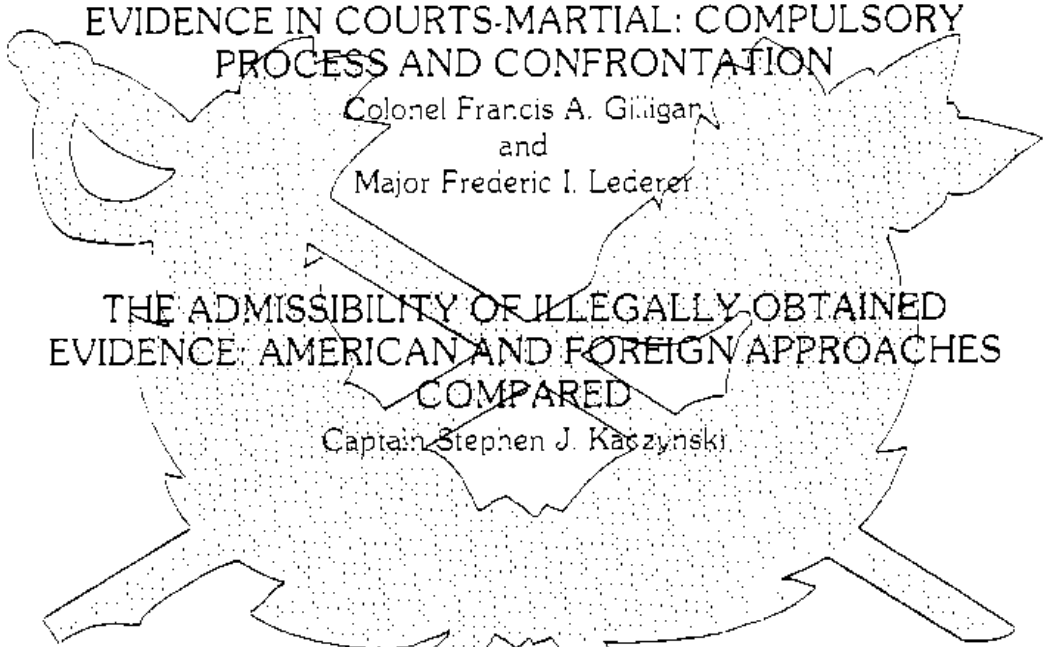
DEPT OF ARMY PAMPHLET 27-100-101 MILITARY LAW REVIEW INDEX 97-101 VOLUME 101

MILITARY LAW REVIEW



THE PROCUREMENT AND PRESENTATION OF EVIDENCE IN COURTS-MARTIAL: COMPULSORY PROCESS AND CONFRONTATION

Colonel Francis A. Gilligan
and
Major Frederic I. Lederer

THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE: AMERICAN AND FOREIGN APPROACHES COMPARED

Captain Stephen J. Kaszynski

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Volume 101 Summer 1983

Pamphlet

No. 27-100-101

HEADQUARTERS,
DEPARTMENT OF THE ARMY
Washington, D.C., *Summer 1983*

MILITARY LAW REVIEW—VOL. 101

(USPS 482-130)

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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CITATION: This issue of the *Review* may be cited as 101 Mil. L. Rev. (number of page) (1983). Each quarter issue is a complete, separately numbered volume.

MILITARY LAW REVIEW

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 covered all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 covers writings in volumes 75 through 90 (excluding Volume 81), and replaces the volume indices in volumes 82 through 90. Individual volume indices appear in volumes 92 through 95, and is replaced by a cumulative index in volume 96. Volume 101 contains an index of of volumes 97 through 101.

Military Law Review articles are also indexed in the *Advance Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.); Index to Legal Periodicals; Monthly Catalog of United States Government Publications; Law Review Digest; Index to U.S. Government Periodicals; Legal Resources Index*; two computerized data bases, the *Public Affairs Information Service* and *The Social Science Citation Index*; and other indexing services.

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THE PROCUREMENT AND PRESENTATION OF EVIDENCE IN COURTS-MARTIAL: COMPULSORY PROCESS AND CONFRONTATION*

by Colonel Francis A. Gilligan** and
Major Frederic I. Lederer***

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 The opinions and conclusions expressed in this article are those of the authors and do not necessarily represent the view of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. This article will form the basis of Chapter 21 of F. Gilligan, F. Lederer & J. Cooke, Military Criminal Procedure, tentatively scheduled for publication by the Michie Company in 1984. The authors gratefully acknowledge the invaluable aid received from Loren C. Meyers, Esquire, during the preparation of the chapter from which this article is taken.

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Although pretrial litigation often seems to render trial on the merits something of an anti-climax, adversarial adjudication is of course the focus of the criminal justice system, military or civilian.[1] Once trial on the merits has begun, trial and defense counsel naturally utilize the rules of evidence in the fashion most likely to make the most of the evidence available to them. Yet, as all lawyers are aware, the period since the enactment of the Uniform Code of Military Justice has brought sweeping changes not only in military criminal law, but also in the "constitutionalization" of the law of evidence. Increasingly, considerations of compulsory process and confrontation play important roles in determining what evidence can be obtained and used at trial. Accordingly, this article undertakes to review the law applicable to the procurement and admission of evidence on the merits[2] in the armed forces in light of the Sixth Amendment rights to compulsory process and confrontation.[3] Such a review necessarily entails a considerations of matters which are generally considered procedural, primarily the law applicable to witness procurement, as well as matters clearly evidentiary in nature.

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[1]Ironically, the large number of guilty pleas in both civilian and military law often renders trial on the merits the rarity rather than the usual rule. Notwithstanding this, the entire criminal justice system is oriented around the contested trial, which thus supplies a normative standard.

[2]Although the rules of evidence do apply to sentencing proceedings in the armed forces, Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 75; Mil. R. Evid. 1101, this article will deal only with trial on the merits.

[3]This article will not, therefore, generally address the innumerable questions inherent in the Military Rules of Evidence.

I. THE BURDENS OF PROOF AND PRODUCTION

Because burdens of proof and production, like presumptions,[4] are substitutes for evidence and dictate which party must address and prove an issue, no discussion of the law relating to the procurement and admission of evidence can be undertaken without consideration of the burdens of proof and production. In *In re Winship*,[5] the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[6] *Winship* left open what facts werre necessary "to constitute the crime". The Court appears to have clarified its intent in *Patterson v. New York*[7] by holding that the legislature may constitutionally define a crime in whatever fashion it deems desirable and may then require a defendant proven to have committed the unlawful conduct to carry the burden of proving the application of any exception to the statute the legislation chooses to recognize.[8] As a result, those matters, such as insanity, which *excuse* the offense but

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[4]Although the Supreme Court has clearly permitted various forms of presumptions in criminal cases, whether statutory or common law, Barnes v. United States, 412 U.S. 837 (1973), it has yet to expressly indicate the necessary relationship between the basic fact and the presumed fact. *See id* (stating that the court need not choose between the different tests of "more likely than not" or beyond a reasonable doubt as possession of stolen property gave rise to the presumed fact of guilty knowledge beyond a reasonable doubt); Turner v. United States, 396 U.S. 398, 416 (1970) (suggesting need for a beyond a reasonable doubt standard); Leary v. United States, 395 U.S. 6, 36 (1969) (statutory presumption must be more likely than not given the underlying fact); Tot v. United States, 319 U.S. 463, 467 (1943) (presumption is invalid if there is no rational connection between the basic and presumed facts). *See generally* E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Criminal Evidence 377-88 (1979). The topic of presumptions is complex. *See generally* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harv. L. Rev. 321 (1980).

[5]397 U.S. 358 (1970).

[6]*Id.* at 364. *See also* Jackson v. Virginia, 443 U.S. 307, 318 (1979) (on appeal the question is whether the evidence of record "could reasonably support a finding of guilt beyond a reasonable doubt".) Although the Court in *Winship* refers to "every fact necessary to constitute the crime," it is clear that that language means that every "element of the offense must be proven beyond a reasonable doubt. *See* Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (use of the word, "element").

[7]432 U.S. 197 (1977). *Compare* Patterson v. New York, *with* Mullaney v. Wilbur, 421 U.S. 684 (1975).

[8]432 U.S. at 210. *Patterson* necessarily limits Mullaney v. Wilbur, 421 U.S. 684 (1974). *Compare Patterson*, 432 U.S. at 210-16, *with Mullaney*, 421 U.S. at 698-99. Although this is a reasonable synthesis of the Court's decision in this area, there may well be limits beyond which neither Congress nor any other legislature may not go. *See, e.g.*, Allen & DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim. L. Rev. 1, 6-7 (1982) (arguing that the Court could tie the reasonable doubt requirement to due process standards created by the common law).

which are not part of the statutory definition, need not constitutionally be proven beyond a reasonable doubt; indeed the burden of proof for these affirmative or special defenses may constitutionally be placed on the defense.[9] Within the armed forces, however, the Manual for Courts-Martial[10] declares:

> The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the Government, both with respect to those elements of the offense which must be established in every case and with respect to issues involving special defenses which are raised by the evidence.[11]

The burden of *proof*, sometimes referred to as the burden of persuasion, must be distinguished from the burden of production, sometimes referred to as the burden of going forward. The party with the burden of production has the burden of producing evidence sufficient to raise the issue. This burden may be distinct from the burden of proof. As already indicated, the Manual for Courts-Martial, for example, places the burden of production for affirmative or special defenses primarily on the defense,[12] but, once such a defense is raised, palces the burden of disproving such a defense on the government beyond a reasonable doubt. Within the military context, the difference between the burdens of proof and production can be of particular importance because the Manual for Courts-Martial appears to restrict the government from placing the burden of *proof* on the defense.[13] No such limitation exists with respect to the burden of production and, consequently, the defense may lawfully be required to assert, for example, exceptions to criminality recognized in punitive regulations. Thus, in *United States v. Cuffee*,[14] the Court of Military Appeals held that, when a regulation prohibited possession of a hypodermic syringe with a hypodermic needle unless pos-

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[9]Leland v. Oregon, 343 U.S. 790 (1952) (defendant could be required to prove insanity beyond a reasonable doubt).

[10]Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM, 1969].

[11]MCM, 1969, para. 214.

[12]*Id.* The Manual actually places the burden of proof to negate the defense on the government whenever the defense is "raised by the evidence". Thus, the government's evidence may itself raise a special defense.

[13]As an executive order, the Manual is, of course, subject to revision. Its primary effect at present, given the nature of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 [hereinafter cited as U.C.M.J.] is to prohibit the armed forces from creating punitive regulations under U.C.M.J., art 92 which place the burden of proof on the defense.

[14]10 M.J. 381 (C.M.A. 1981) (clarifying United States v. Verdi, 5 M.J. 330 (C.M.A. 1980)). *See also* United States v. Lavine, 13 M.J. 150 (C.M.A. 1982).

sessed in the course of "official duty or pursuant to valid prescription", the defense had the burden of production in that it had to raise the exceptions via evidence.[15] Once raised, the burden of proof or persuasion shifts to the government which must disprove the claim to the exception beyond a reasonable doubt. This division of responsibility, which the court explicitly held constitutional,[16] appears clearly appropriate in that it is difficult if not impossible for the government to negate all possibilities of an exception while such information is peculiarly in the possession of the defense. However, once the issue is joined and specific, there is no reason not to put the government to its burden. The result of this allocation of burdens is to require the defense in such a case to obtain and present evidence sufficient to raise the issue.[17]

II. PROCUREMENT OF EVIDENCE

A. IN GENERAL

Congress has declared:

> 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 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....[18]

In response, the President has, through the Manual for Courts-Martial, directed that process be issued by the trial counsel on behalf of both the defense and prosecution[19] and that defense requests for witnesses be submitted to the trial counsel with any disagreements between defense and trial counsel about calling the witnesses to be resolved by the convening authority.[20] The present system necessari-

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[15]10 M.J. at 381.

[16]*Id.* at 383-84 (citing at 384, Sandstrom v. Montana, 442 U.S. 510, 518 (1979)).

[17]This is not, incidentally, the rule for litigating suppression motions. Under Mil. R. Evid. 304 (confessions and admissions), 311 (search and seizure), and 321 (eye-witness identification), the defense is required to raise its issues by an offer of proof rather than the actual presentation of evidence. *See, e.g.*, Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 304(d)(3), *reprinted* at MCM, 1969, A18-22.

[18]U.C.M.J., art. 46. Article 46 implements the accused's Sixth Amendment right to compulsory process. United States v. Davison, 4 M.J. 702, 704 (A.C.M.R. 1977).

[19]MCM, 1969, para. 115.

[20]*Id.* at para. 115*a*.

ly raises two distinct questions: when will the trial counsel attempt to obtain evidence, and what means are available to the trial counsel to do so.

B. THE DECISION TO OBTAIN EVIDENCE

1. In general

a. General procedures

Insofar as witnesses are concerned,[21] the Manual for Court-Martial states:

> 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 the personal appearance of a witness will be submitted in writing, together with a statement, signed by the counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which 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 request

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[21] Documentary and other evidence is not fully dealt with in the Manual for Courts-Martial, MCM, 1969, para. 115*c* deals with documentary and other evidence in control of military authorities and states that:

> If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge, or the president of a special court-martial without a military judge will, upon reasonable request and without the necessity of further process, take necessary action to effect their production for use in evidence and, within any applicable limitations (see. . . (Military Rules of Evidence)), to make them available to the defense to examine or to use, as appropriate under the circumstances.

> for a witness on the merits must be made on an individual basis in each case by weighing the materiality of the testimony and its relevance to the guilt or innocence of the parties concerned, against the equities of the situation.... If the convening authority determines that the witness will not be required to attend the trial, the request may be renewed at the trial for determination by the military judge or the president of a special court-martial without a military judge, as if the question arose for the first time during the trial.
>
> The trial counsel may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest these facts or if they were unimportant....[22]

Under paragraph 115, the individual trial counsel's decision to obtain a witness is not subject to review. In actual practice, the prosecution's decision is subject to the review of the trial counsel's superiors, usually the staff judge advocate and convening authority, who may direct the trial counsel not to subpoena or otherwise obtain a witness for a variety of reasons,[23] including financial ones. The defense attempt to obtain witnesses is, however, subject to definite review. Although, pragmatically, the defense may obtain its own witnesses and call them at trial, it lacks the power to subpoena them or to pay witness fees or travel costs unless it complies with paragraph 115. Consequently, if the defense desires to escape the constraints of paragraph 115, it is in practice limited in most cases to local volunteer witnesses. Even then, a failure to comply with paragraph 115 means that the trial counsel is legally blameless if the witness fails to appear, depriving the defense of a potentially useful weapon at trial.[24]

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[22]*See* text accompanying notes 101-12 *infra*; MCM, 1969, para. 115*a*.

[23]Such reasons could include a desire not to interfere with the activities of the witness, particularly likely when the witness is a highly placed civilian or military officer, a possibility of revealing classified information, or simply a desire to avoid delaying the trial.

[24]In a highly unusual case, the defense might be able to show it that it has a substantial interest outweighing the government's interest in knowing the identity of the defense witnesses. Under these circumstances, the defense should make an *ex parte* application to the military judge with the record of the application remaining sealed until trial.

If the prosecution has failed to obtain a defense witness without cause, the military judge may take corrective action to include granting a continuance or giving special instructions to the members. *Cf.* United States v. Kilby, 3 M.J. 938, 944-45 (N.C.M.R. 1977). Such a result is less likely if the defense fails to comply with paragraph 115.

Subject to the potential availability of extraordinary relief,[25] the decision of the military judge as to the materiality and procurement of a witness is not subject to interlocutory review. The Court of Military Appeals has held that "once materiality has been shown the Government must either produce the witness or abate the proceedings."[26] Thus, military operations, expense, or inconvenience can only delay the trial rather than justifying proceeding without an otherwise material witness.[27] A witness who cannot be located, however, obviously cannot be produced and trial need not be affected. If the witness will be unavailable for an indefinite period, presumably the same result would apply if the absence was not due to action by the government.

b. Expert witnesses

Because many trials are dependent upon the use of expert testimony, procurement of expert witnesses may clearly critical to a case. Consequently, expert witnesses are treated specially in the Manual. Presumably, because of availability and lack of cost,[28] most counsel, defense or prosecution, utilize government-employed experts. The Manual for Courts-Martial does contemplate, however, the possible employment of other experts:

> The provisions of this paragraph are applicable unless otherwise prescribed by regulations of the Secretary of a Department. When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the military judge or the president of a special court-martial without a military judge, request the convening authority to authorize the employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense.

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[25]*Cf.* Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979).

[26]United States v. Carpenter, 1 M.J. 384, 385-86 (C.M.A. 1976). *Accord* United States v. Willis, 3 M.J. 94 (C.M.A. 1977). The quoted language has been disclaimed by Judge Cook as being overbroad. *Id.* at 96-100 (Cook, J., dissenting).

The court has, however, held that there is no right to cumulative evidence. United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977). *See generally* text accompanying notes 59-65 *infra*.

[27]In limited circumstances substitutes for live testimony, such as stipulations, may be acceptable. *See generally* text accompanying notes 66-79 *infra*.

[28]The prosecution will be concerned with expenditure of government funds while the defense will be limited to the funds available to the accused unless the government can be required to pay an expert's fee under MCM, 1969, para. 116.

> When, in advance of trial, the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the convening authority for permission to employ the expert, stating the necessity therefor and the probable cost. In the absence of a previous authorization, only ordinary witness fees may be paid for the employment of a person as an expert witness.[29]

These requirements are in addition to the showing required by paragraph graph 115 of the Manual. Requests for employment of experts under paragraph 116 of the Manual are rarely successful[30] and the denial of any specific request may raise significant questions of the rights to compulsory process and fair trial under the Constitution.[31] It is important to note, however, that nothing in the Uniform Code of Military Justice or the Manual of Courts-Martial requires payment of special fees to obtain the testimony of an expert who happens to be a witness. Thus, a medical doctor who has previously treated the accused could be subpoenaed and paid normal witness fees if he or she were to be questioned about that treatment. The Manual would appear to require some form of expert fee if the expert were to be asked to make special preparations for testimony.[32]

2. Form of the Paragraph 115 request

The Manual for Courts-Martial requires that a request for a defense witness be in writing and contain a synopsis of the expected testimony, justification for the personal appearance of the witness, and any other matter showing that the witness is "necessary to the ends of justice."[33] The request must ordinarily set forth enough information to establish the "materiality"[34] of the expected testimony

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[29]*Id.* The fees authorized are dependent upon service regulations. In the Navy, for example: "The convening authority . . . will fix the limit of compensation . . . on the basis of the normal compensation paid by United States attorneys for attendance of a witness of such standing in the United States courts in the area involved." Navy JAGMAN § 0138k(1).

[30]*See, e.g.*, United States v. Johnson, 22 C.M.A. 424, 47 C.M.R. 402, 404-06 (1973) (holding that the defense failed to demonstrate necessity for employment of a civilian psychiatrist).

[31]*See* text accompanying notes 229-377 *infra*.

[32]MCM, 1969, para. 116 speaks of "employment of an expert". Accordingly, requiring the expert to perform tests in advance of trial or to make substantial pretrial preparation would seem to require an expert fee. Similarly, obtaining an expert's testimony solely to utilize the expert's opinion would seem to constitute "employment".

[33]MCM, 1969, para. 115*a*.

[34]*See, e.g.*, United States v. Wagner, 5 M.J. 461, 469 (C.M.A. 1978); United States v. Lucas, 5 M.J. 167, 172 (C.M.A. 1978).

of the witness.[35] In certain circumstances, however, the government will be held responsible for knowledge within its possession so that an otherwise deficient paragraph 115 request will be held sufficient.[36] Paragraph 115 necessarily presumes that the defense will be able to adequate interview[37] the witness in order to set forth an adequate synopsis and the courts may be expected to be particularly hostile to a witness request made without any contact with the given witness.[38] Chief Judge Everett has recognized that, in some cases, such as those in which the witness is a hostile one, the synopsis requirement cannot be met and "a rigid application of these requirements would produce a conflict with an accused's statutory and constitutional right to compulsory process."[39] Consequently, when defense counsel cannot contact a witness who is believed to have material testimony, that fact should be set forth with an explanation.[40] When a defense request for a witness is heard by the military judge, the judge must determine the issue "on the basis of the

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[35]The procedure is recounted in numerous cases. *E.g.*, United States v. Jovan, 3 M.J. 136 (C.M.A. 1977); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975); United States v. Manos, 17 C.M.A. 10, 16-17, 37 C.M.R. 274, 280-81 (1967) (Quinn, C.J., concurring in part, dissenting part) (request should include synopsis of expected testimony, logical and legal relevance of evidence); United States v. Powell, 4 M.J. 551 (A.F.C.M.R. 1977); United States v. Courts, 4 M.J. 518 (C.G.C.M.R. 1977), *aff'd*, 9 M.J. 285 (C.M.A. 1980); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976); United States v. Corley, 1 M.J. 584 (A.C.M.R. 1975). A diminished standard of materiality appears to apply to experts who have prepared government laboratory reports offered against the accused at trial. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980).

[36]*E.g.*, United States v. Lucas, 5 M.J. 167, 172 (C.M.A. 1978) (staff judge advocate charged with knowledge of the content of a pretrial statement made by the witness at the pretrial investigation).

[37]Chief Judge Everett appears to believe that some form of contact is generally necessary, but that that contact need not be an in person interview. United States v. Vietor, 10 M.J. 69, 78 (C.M.A. 1980) (Evertt, C.J., concurring in the result). The drafters of the Military Rules of Evidence, on the other hand, concluded that the defense counsel must be afforded the right to an in person interview of potential witnesses before counsel could be required to raise a suppression motion with specificity. Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 304(d)(3), *reprinted at* MCM, 1969, A18-21. Inasmuch as the procurement of a witness on the merits may be more essential to due process than the procurement of a witness for a suppression motion, the Military Rules of Evidence necessarily suggest that the defense be afforded the right to an in person interview before a request for a witness under paragraph 115 can be held insufficiently justified.

[38]*See, e.g.*, United States v. Corley, 1 M.J. 584, 586 (A.C.M.R. 1975) (counsel's representations that two witnesses would give alibi testimony held insufficient when "not corroborated or verified in any way"); United States v. Carey, 1 M.J. 761, 766-67 (A.F.C.M.R. 1975).

[39]United States v. Vietor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in the result).

[40]*Cf.* United States v. Carey, 1 M.J. 761, 767 (A.F.C.M.R. 1975).

matters presented to the judge . . . not just that contained in the written request.[41]

3. Timeliness

The Manual for Courts-Martial does not prescribe time requirements for filing a request for witnesses under paragraph 115 and the courts have been surprisingly loathe to hold requests invalid as untimely. Members of the Court of Military Appeals have clearly indicated their willingness to consider the timeliness of a defense request[42] and the Courts of Military Review have utilized untimeliness in holding that the defense lacked a right to witnesses.[43] However, as of yet, the courts have failed to give any significant guidance as to what actually constitutes timeliness. The Courts of Military Appeals has stated in dicta, however, that "while a defense counsel, for tactical reasons, may properly delay a request for witnesses until after the charges are referred to trial, he thereby assumes the risk that . . . in the interval the witness may become unavailable to testify at trial."[44] Thus, by awaiting referral of charges, counsel may not have an untimely submission but may be unable to obtain the requested witness. An unnecessary delay in filing a request risks having the request treated as untimely, especially when the delay results in the transfer of a witness known to the defense to be pending reassignment.[45] In most cases, given the brevity of most courts-martial, a request for the procurement of a witness made at trial,

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[41]United States v. Corley, 1 M.J. 584, 586 (A.C.M.R. 1975) (citing United States v. Jones, 21 C.M.A. 215, 44 C.M.R. 269 (1972)). *See* United States v. Courts, 4 M.J. 518, 525-26 (C.G.C.M.R. 1977) (Lynch, Jr., concurring in part, dissenting in part); United States v. Green, 2 M.J. 823, 826 (A.C.M.R. 1976). *Jones*, however, does not necessarily stand for this proposition since the court in *Jones* determined the propriety of the trial judge's ruling on the basis of all the information given to the judge because he "presumably . . . considered it in his ruling." 21 C.M.A. at 217, 44 C.M.R. at 271.

[42]*See, e.g.*, United States v. Vietor, 10 M.J. 69, 72, 78 (C.M.A. 1980) (Cook, J. and Everett, C.J., individually concurring in the result with separate opinions); United States v. Stocker, 7 M.J. 373, 374 (C.M.A. 1979) (summary disposition) (Cook, J., dissenting on the grounds that defense request for witness was untimely).

[43]*See, e.g.*, United States v. Onstad, 4 M.J. 661, 664 (A.C.M.R. 1977) (dicta). A theory of waiver may be applicable. *Cf.* United States v. Briers, 7 M.J. 776 (A.C.M.R. 1979) (failure to request lab analyst when judge gave defense right to do so constitutes waiver); United States v. Mackey, 7 M.J. 649, 654 (A.C.M.R. 1979) (same).

[44]United States v. Cottle, 14 M.J. 260, 263 (C.M.A. 1982). The lack of a *pretrial* request is not conclusive. *See, e.g.*, United States v. Johnson, 3 M.J. 772, 773 (A.C.M.R. 1977); United States v. Phillippy, 2 M.J. 297, 300 (A.F.C.M.R. 1976).

[45]*E.g.*, United States v. Onstad, 4 M.J. 661, 664 (A.C.M.R. 1977) (dicta) (overseas witness). *See also* United States v. Credit, 2 M.J. 631, 646 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977), *aff'd on remand*, 6 M.J. 719 (A.F.C.M.R. 1978), *aff'd*, 8 M.J. 190 (C.M.A. 1980) (defense request reviewed during trial implicitly held to be untimely when request had been withdrawn and lab technician discharged in interim).

untimely or otherwise, effectively constitutes a motion for a continuance. When the request is untimely, the decision is discretionary with the military judge.[46] Nonetheless, if the defense shows that the witness is material and necessary, the judge should, in the interests of justice, grant the request.[47] To do otherwise would penalize the accused the for counsel's conduct and would raise a strong probability of ultimate reversal for inadequacy of counsel.

4. Materiality

The Manual for Courts-Martial requires that a defense request for a witness give "full reasons which necessitate the personal appearance of the witness, and...any other matter showing that the expected testimony is necessary to the ends of justice."[48] Perhaps, because the prosecution is not to procure a prosecution witness on its own motion unless "satisfied that the testimony of the witness is material and necessary,"[49] the courts have consistently viewed paragraph 115 as requiring that the defense demonstrate the "materiality" of its requested witnesses.[50] The exact meaning of "materiality" has been unclear. In its evidentiary sense, "materiality" requires at least that the evidence involved be relevant.[51] It also may mean in any

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[46]*See, e.g.*, United States v. Stocker, 7 M.J. 373, 374 (C.M.A. 1979) (summary disposition) (Cook, J., dissenting).

[47]*See, e.g.*, United States v. Jovan, 3 M.J. 136, 137 (C.M.A. 1977); United States v. Green, 2 M.J. 823, 826 (A.C.M.R. 1976); United States v. Onstad, 4 M.J. 661, 664 (A.C.M.R. 1977).

[48]MCM, 1969, para. 115*a*.

[49]*Id.*

[50]*See, e.g.*, United States v. Hampton, 7 M.J. 284, 285 (C.M.A. 1979); United States v. Wagner, 5 M.J. 461 (C.M.A. 1978); United States v. Lucas, 5 M.J. 167 (C.M.A. 1978); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975); United States v. Marshall, 3 M.J. 1047 (A.F.C.M.R. 177). *Cf.* United States v. Valenzuela-Bernal, 31 Crim. L. Rep [BNA] 3162 (U.S. July 2, 1982) (noting, however at note 9, that the Court expressed "no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance...of witnesses within the United States.").

[51]*See, e.g.*, United States v. Courts, 4 M.J. 518, 522-23 (C.G.C.M.R. 1977). Mil. R. Evid. 401 defines what is often termed, "logical relevance" or the requirement that the evidence involved have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Phrased differently, in the case of determining witness availability, the evidence must tend to negate the prosecution's case or to support the defense's. United States v. Iturralde-Aponte, 1 M.J. 196, 197-98 (C.M.A. 1975). "Relevance" has additional scope, however, inasmuch as evidentiary rules which exclude evidence because of doubt of its probative value, prejudicial impact on the members, or for other reasons for social policy are often termed rules of "legal relevance". *See, e.g.* I. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Criminal Evidence 62-65 (1979). Mil. R. Evid. 403-05; 407-12 are rules of legal relevance as are the rules of privilege, Mil. R. Evid. 501-09, and testimony which would be inadmissible

given case that, considering all of the factors unique to the case,[52] the evidence is important,[53] a determination which might include the availability of substitute forms of evidence.[54] Recently, the Court of Military Appeals has attempted to clarify the issue:

> The word "material" appears misused. Obviously a witness' testimony must be material to be admissible.... However, the terms may have been confused in earlier cases, 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.[55]

The use of the word, "essential", can hardly be considered as resolving this question for the term is itself subject to ambiguity. What degree of probative value is necessary before a prospective witness' testimony will be "essential"? In past cases, witnesses needed to establish affirmative defenses such as lack of jurisdiction or self-defense have usually been considered to be material witnesses[56] as

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under them should not ordinarily be "material" for purposes of obtaining witnesses. *But see* Chambers v. Mississippi, 410 U.S. 284 (1973); text accompanying notes 341-72, 373-77 *infra*.

[52]United States v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978).

[53]At common law, "materiality" had been given two alternative meanings: that the evidence is of consequence to the case and that the evidence is of particular probative value. The paragraph 115 standard includes this latter meaning. *See* note 55 *infra*.

[54]A true materiality standard should not include this factor. To the extent that it plays a role in the question of making a witness available, *see* text accompanying notes 66-79 *infra*, it is because of the phrasing of paragraph 115*a*, which does not as such specify "materiality" as the prerequisite for obtaining a witness.

[55]United States v. Bennett, 12 M.J. 463, 465 n.4 (C.M.A. 1982). In the past, the court, in determining whether a failure to obtain a requested defense witness necessitated reversal, stated: "materiality . . . must embrace the 'reasonable likelihood' that the vidence could have affected the judgment of the military judge or court members." United States v. Hampton, 7 M.J. 284, 285 (C.M.A. 1979) (citing Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Lucas, 5 M.J. 167, 172-73 (C.M.A. 1978)); United States v. Tippit, 7 M.J. 908 (A.F.C.M.R. 1979). *See Compulsory Process II*, *infra* note 382, at 222-23 & n.108.

[56]*See, e.g.*, United States v. Hampton, 7 M.J. 284 (C.M.A. 1979) (lack of jurisdiction; witness immaterial when defense counsel had not interviewed him); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975) (self-defense); United States v. Dawkins, 10 M.J. 620 (A.F.C.M.R. 1980) (insanity defense: witness immaterial when psychiatric interview with defendant needed and witness does not interview defendant); United States v. Jones, 6 M.J. 770 (A.C.M.R. 1978) (insanity defense; witness immaterial when no indication they would retract earlier sanity board opinions); United States v. Christian, 6 M.J. 624 (A.C.M.R. 1978) (suppression motion; witness immaterial if no adequate showing that witness remembered incident); United States v. Krejce, 5 M.J. 701 (N.C.M.R. 1978) (lack of jurisdiction); United States v. Onstad, 4 M.J. 661 (A.C.M.R. 1977) (informant's perjury at Art. 32 investigation, but inadequate showing of materiality on facts); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976((alibi); United States v. Staton, 48 C.M.R. 250 (A.C.M.R. 1974) (no intent to desert); United States v. Snead, 45 C.M.R. 382 (A.C.M.R. 1972) (entrapment).

have been defense character witnesses[57] when the accused's character has been in issue.[58] While these cases may deal with "essential" evidence, it is unlikely that the defense could or should be restricted to witnesses presenting evidence of such ultimately critical value. Interestingly, in the May, 1983, Proposed Revision of the Manual for Courts-Martial, the Joint Service Committee on Military Justice has, in proposed Rule 703(b)(1), created a potentially more useful standard: "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary." The Discussion to the proposed rule states: "Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." The proposed Rule is qualified in Rule 703(b)(3), which provides that, notwithstanding Rule 703(b)(1), a party is not entitled to production of a witness who would be unavailable under Military Rule of Evidence 804(a) unless the witness' testimony "is of such central importance to an issue that it is essential to a fair trial . . .". The Rule's caveat is not likely to be of importance except insofar as it incorporates, through Military Rule of Evidence 804(a)(6), Article 49(d)(2) of the Uniform Code which, in relevant part, makes a witness unavailable "by reason of . . . military necessity, . . . or other reasonable cause." Unless this exception is utilized in an improbably broad fashion, the proposed Rule appears both more useful and more likely to comply with an accused's constitutional and statutory rights to obtain and present evidence than does the court's "essentiality" standard.

5. Cumulative testimony

Inherent in the right to compulsory process is the limitation of relevancy.[59] Military Rule of Evidence 403 allows evidence to be

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[57]United States v. Williams, 3 M.J. 239 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976); United States v. Giermek, 3 M.J. 1013 (C.G.C.M.R. 1977); United States v. Ambalada, 1 M.J. 1132 (N.C.M.R. 1977). *See generally* Mil. R. Evid. 404(a)(1), 405(a), (b). When the defendant's character for truthfulness is in issue, polygraph evidence may be material. Because such evidence has traditionally been viewed as being logically and legally irrelevant, however, no compulsory process right to introduce such evidence has been recognized. United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1981). A witness who is more credible and articulate is material even though another witness has already testified to the events. United States v. Jovan, 3 M.J. 136 (C.M.A. 1977).

[58]Mil. R. Evid. 404(a) strictly limits use of character evidence restricting it in most cases to "[e]vidence of a pertinent trait of the character of the accused. . . ." Mil. R. Evid. 404(a)(1). The Analysis of Rule 404 declares that the Rule makes evidence of good general character inadmissible although it would allow "evidence of good military character when that specific trait is pertinent . . . for example in a prosecution for disobedience of orders." Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 404(a), *reprinted at* MCM, 1969, A18-61.

[59]*See* note 51 *supra*.

excluded, even if logically relevant,[60] "if its probative value is substantially outweighed...by considerations...of needless presentation of cumulative evidence." If evidence is cumulative under Rule 403, it is "legally irrelevant" and there is no right to introduce it.[61]

The issue of cumulative testimony often arises when character evidence is sought to be introduced.[62] To establish an adequate record for appeal, the defense should furnish to the judge the name and location of each character witness, how long each witness has known the defendant, the capacity in which the witness knew the defendant, and the characteristics to which the witness will testify.[63] The standard used in determining cumulativeness is not merely whether the evidence is repetitive. Instead, the military judge must "in his sound discretion decide whether, under the circumstances of the given case, there is anything to be gained from an additional witness saying the same thing other witnesses have said...".[64] If testimony is declared to be cumulative, the judge should indicate how many of such witnesses will be subpoenaed at government expense. Only the defense, though, can decide *which* witnesses will be called to testify.[65]

6. Alternatives to personal attendance at trial of a witness

The Court of Military Appeals has stated that, even though a witness is material, personal attendance at trial may be obviated by other effective alternatives,[66] including depositions, interrogatories,

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[60]*Id.*

[61]United States v. Williams, 3 M.J. 239, 242 (C.M.A. 1977). *See* United States v. Staton, 48 C.M.R. 251, 254 (A.C.M.R. 1974); Mil. R. Evid. 402. *See* note 51 *supra* for the definition of "legal relevance." Clearly irrelevant evidence cannot be considered "essential" evidence under United States v. Bennett, 112 M.J. 463, 465 n.4 (C.M.A. 1982).

[62]*E.g.*, United States v. Credit, 8 M.J. 190 (C.M.A. 1980); United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978); United States v. Williams, 3 M.J. 239 (C.M.A. 1977); United States v. Courts, 4 M.J. 518 (C.G.C.M.R. 1977), *aff'd*, 9 M.J. 285 (C.M.A. 1980); United States v. Elliott, 3 M.J. 1080 (A.C.M.R. 1977); United States v. Scott, 3 M.J. 1111 (N.C.M.R. 1977). Note that paragraph 115 of the Manual for Courts-Martial was amended in 1981 so as to generally eliminate live witness testimony on sentencing.

[63]*See* United States v. Manos, 17 C.M.A. 10, 16-17, 37 C.M.R. 274, 280-81 (C.M.A. 1967) (Quinn, C.J., concurring in part, dissenting in part); text accompanying notes 18-20 *supra*. Note that the trial counsel need not be concerned with this procedure as the government determines whether to make witnesses available.

[64]United States v. Williams, 3 M.J. 239, 243 n.8 (C.M.A. 1977). *Accord* United States v. Scott, 3 M.J. 1111, 1113 (N.C.M.R. 1977).

[65]United States v. Williams, 3 M.J. 239, 243 n.9 (C.M.A. 1977) (Perry, J., Fletcher, C.J., concurring; Cook, J., dissenting). In an appropriate case, the judge would clearly be able to make that determination. However, in the usual situation, the decision is for the defense.

[66]United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978); United States v. Willis, 3 M.J. 94, 98 (C.M.A. 1977) (Cook, J., dissenting). *See also* United States v. Courts, 9 M.J. 285, 292-93 (C.M.A. 1980).

and stipulations to the expected testimony of the witness.[67] If the government is willing to stipulate to the witness' expected testimony, there may be no need for the witness,[68] especially inasmuch as the defense may have obtained more through the stipulation than it would have through live testimony because the government has lost the chance of rebuttal. The decision to admit alternatives lies in the discretion of the judge.[69] The fundamental issue is whether "the effect of the form of the testimony under the particular facts and circumstances of the case will . . . diminish the fairness of the proceedings."[70] Because the circumstances of each individual case are extremely important, the judge should explicitly state reasons for allowing alternative forms of testimony to insure adequate review of the decision.[71]

Older cases allowed the judge to use a balancing test in deciding whether to allow alternatives to the witness' personal appearance.[72] However, a presumption existed that the defense request was to be granted if it would be "done without manifest injury to the service,"[73] with military necessity or convenience often being cited as reasons for refusing to require the personal appearance of the witness.[74] The Court of Military Appeals, in *United States v. Carpenter*[75] and *United States v. Willis*,[76] has overruled that approach. The current standard requires that the witness' personal appearance turn only on the materiality of the testimony;[77] military necessity only affects *when* the witness can testify.[78] Even though obtaining witnesses for the

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[67]*E.g.*, United States v. Snead, 45 C.M.R. 382, 386 (A.C.M.R. 1972) (listing alternatives). *See also* Proposed Rule of Court-Martial 703(b)(3), Proposed Revision of the Manual for Courts-Martial (Joint Service Comm. on Military Justice, May 1983).

[68]This may be particularly true of some character witnesses. While character evidence given by the defendant's commanding officer "occupies a unique and favored position in military judicial proceedings," United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976), performance ratings, fitness reports, and efficiency reports may be acceptable substitutes. United States v. Tangpuz, 5 M.J. 426, 430 (C.M.A. 1978).

[69]United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). It should be noted that most of the cases in which substitutes for live testimony were urged by the government were cases in which the testimony was offered for sentencing purposes by the defense. With the revision of the Manual for Courts-Martial to generally eliminate live testimony for sentencing, *see* MCM, 1969, para. 75, the number of appellate cases involving a use of substitutes for live testimony should diminish.

[70]United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). Thus, if a witness' credibility is important, live testimony should be required.

[71]United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978).

[72]United States v. Manos, 17 C.M.A. 10, 15, 37 C.M.R. 274, 279 (1967); United States v. Sweeney, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

[73]United States v. Manos, 17 C.M.A. 10, 15, 37 C.M.R. 274, 279 (1967).

[74]*See, e.g.*, United States v. Sweeney, 14 C.M.A. 599, 606, 34 C.M.R. 379, 386 (1964).

[75]1 M.J. 384 (C.M.A. 1976).

[76]3 M.J. 94 (C.M.A. 1977).

[77]United States v. Carpenter, 1 M.J. 384, 386 (C.M.A. 1976).

[78]*Id.*

defense may be inconvenient and costly to the government, the defendant cannot be compelled to accept a substitute for those reasons alone.[79]

7. Defense objections to Paragraph 115

Applying as it does to virtually all defense witnesses, paragraph 115 produces two primary complaints: that the defense must "submit its request to a partisan advocate for a determination,"[80] and that, in doing so, it necessarily reveals defense strategy and testimony to the government.[81] Inasmuch as the trial counsel is exempt from any similar situation, equal protection complaints were also raised.

a. The recipient of the request

As a matter of practice, the prosecution's decision to procure a witness is subject only to the review of those who have endorsed the prosecution of the accused, *i.e.*, the staff judge advocate and convening authority.[82] Although the law requires these officers to be neutral and experience suggests that most make great efforts to carry out their legal duty, both common sense and experience suggest that an inherent conflict of interest exists when the defense requests that a given witness be obtained.[83] Any given witness potentially represents the expenditure of funds[84] for a purpose contrary to what may be viewed as the best interest of the given officer or service. A number of commentators have recognized, for example, that the staff judge advocate is in effect the chief prosecutor for the convening authority[85] and paragraph 115 asks a great deal of such a person. Further-

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[79]United States v. Willis, 3 M.J. 94, 96 (C.M.A. 1977).

[80]United States v. Carpenter, 1 M.J. 384, 386 n.8 (C.M.A. 1976).

[81]Disclosure results not only from notice of *who* the defense wishes to call, but, more importantly, from the requirement that the defense must show materiality in order to obtain the witness, a requirement which necessarily reveals defense strategy. *See* text accompanying notes 89-95 *infra*.

[82]In most of the armed forces, the prosecutor is rated by these officers, or their equivalents, and promotion is thus contingent on the prosecutor's compliance with their wishes.

[83]*See* note 85 *infra*.

[84]Budgeting for courts-martial varies within the armed forces with not all services budgeting specifically for trials. When witness expenses come out of a ship's operating budget, for example, one can expect the ship's captain who is the convening authority to be particularly resistant to any expense.

[85]*See, e.g.*, Hodson, *The Manual for Courts-Martial—1984*, 57 Mil. L. Rev. 1, 15 (1972), in which General Hodson, formerly The Judge Advocate General of the Army and then Chief Judge of the Army Court of Military Review, said: "I would favor recognizing the staff judge advocate and the commander for what they are. They are the Government." Indeed, he proposed reorganizing the military criminal legal system so that the "staff judge advocates . . . would resemble United States Attorneys." *Id.* at 8.

more, as a matter of law, paragraph 115 declares that the trial counsel will take action to provide a witness requested by the defense "except when there is disagreement between the trial counsel and the defense counsel [as to the necessity for the witness]." In effect, the trial counsel has a substantial amount of leverage over the defense.[86] The Court of Military Appeals has noted this objection to paragraph 115 and has stated in dicta that "the requirement appears to be inconsistent with Article 46. . .".[87] More recently, Chief Judge Everett appears to have implicitly rejected this view by stating that "the Government is entitled to prescribe reasonable rules whereunder it will have adequate opportunity either to arrange for the presence of the witness or to explore any legally permissible alternative to the presence of the witness."[88]

The defense may be able to escape the need to advise the prosecution of its requested witnesses by directly requesting the witness from the military judge. Under present law, this solution would appear appropriate only when the defense has a substantial interest in not advising the government of the identify of the witnesses, an interest which clearly outweighs the government's interest in knowing their identity. Inasmuch as this procedure would of necessity require the judge to utilize novel procedures to insure that the necessary witness fees could be paid and the subpoena served in the event of a noncooperative witness, the most probable circumstance justifying this procedure would be a defense showing that a prosecution member would likely tamper with the witness. In such a unique circumstance, the military judge should seal the record of the witness request until the conclusion of the witness's testimony.

b. Defense disclosure of tactics and strategy

The defense objection that paragraph 115 necessarily reveals defense tactics and strategy can be divided into two components: the

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[86]The Court of Military Appeals has said that its application of paragraph 115 leaves "no doubt that an accused's right to secure the attendance of a material witness is free from substantive control by trial counsel." United States v. Arias, 3 M.J. 436, 438 (C.M.A. 1977). *But see* United States v. Cottle, 14 M.J. 260, 261 (C.M.A. 1982) (trial counsel denied the witness request). Trial counsels can and have rejected paragraph 115 requests as being procedurally deficient, however, using the rejection as a tactical ploy to either discourage the defense from requesting the witness or the judge from granting the request due to the lateness of the final request or to encourage the defense counsel to plea bargain.

[87]United States v. Carpenter, 1 M.J. 384, 386 n.8 (C.M.A. 1976). *Accord* United States v. Williams, 3 M.J. 239, 240 n.2 (C.M.A. 1977).

[88]United States v. Vietor, 10 M.J. 69, 77-78 (C.M.A. 1980). Chief Judge Everett concurred in the result of *Vietor* only, while Judge Fletcher, also concurring in the result alone, found Judge Everett's "analysis. . . unacceptable." *Id.* at 78.

disclosure itself and the lack of reciprocity. Proper compliance with paragraph 115 will result in a disclosure to the government of all defense witnesses and a synopsis of their individual testimony. Although counsel may well believe that they are required to disclose more than the law actually requires,[89] there is no doubt but that the quantum actually required, as well as the quantum occassionally demanded by prosecutors, is enough to be very revealing. The prosecution has no equivalent requirement[90] and the broad discovery available to the defense as a matter of practice can hardly be equated with the template of the defense case required under paragraph 115. Any Fifth Amendment objection[91] to paragraph 115 appears to be foreclosed by the Supreme Court's decision in *Williams v. Florida*.[92] In *Williams*, the Court sustained Florida's notice of alibi rule against constitutional self-incrimination objections on the grounds that the defense was only divulging information which it would have to reveal at trial.[93] Although *Williams* appears to require a reciprocal duty on the party of the government,[94] that requirement is met simply by making discovery of the prosecution case available to the defense;[95] response in kind is not apparently required.

c. Lack of reciprocity in general

Defense counsel have contended that paragraph 115 "improperly discriminates against an accused because it imposes burdens in the procurement of a defense witness that are not imposed upon the Government."[96] In effect, this is a claimed violation of Article 46 and a denial of equal protection. Chief Judge Everett may have addressed

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[89]*See, e.g.*, United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980).

[90]Although the charge sheet, MCM, 1969, App. 5, requires the names and addresses of witness for both the defense and prosecution, that requirement is more honored in the breach. Further, a command's information as to possible witnesses is something far different from counsel's actual intent at trial.

[91]Although the Supreme Court's decisions may resolve the Fifth Amendment question, they leave untouched the parallel Article 31, 10 U.S.C. § 831 (1976), the military's statutory right against self-incrimination, question.

[92]399 U.S. 78 (1970).

[93]The view has been, in effect, that the information gained by the prosecution is *de minimis* and serves the interests of justice and judicial efficiency by avoiding surprise. *See generally* Van Kessel, *Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation*, 4 *Hasting Const. L.Q.* 855, 882-89 (1977). Inasmuch as the information obtained from the defense may lead the government to evidence otherwise undiscoverable, at least until the defense portion of the case, it can hardly be said that the defense material is *de minimis*. Rather, it may practically assist the government greatly in making out its case in chief.

[94]Wardius v. Oregon, 412 U.S. 470 (1973).

[95]*Id. See also* United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980) (discovery afforded defense via Article 32 proceedings more than balances government's discovery from paragraph 115).

[96]United States v. Arias, 3 M.J. 436, 438 (C.M.A. 1977).

this when he stated that paragraph 115 not only provides the government with an opportunity to explore any permissible alternative to the witness,[97] but also insures that the defense counsel, who might be spurred as an advocate to request witnesses in the hope that the delay and expense would result in dismissal or an attractive plea bargain, have a good faith belief that the testimony will benefit the accused.[98] The Courts of Military Review have justified paragraph 115 as permitting the trial court to avoid cumulative testimony[99] and insuring "that government funds are not wasted in producing witnesses who are not absolutely necessary and material...."[100] Although these purposes are praiseworthy, the present procedural mechanism is not necessary to insure that they are well served.

8. Revision of Paragraph 115.

The primary defense objections to paragraph 115 could be met by requiring counsel to submit requests to the military judge for resolution. Although this could be done in an ex parte fashion, thus shielding the defense case from the government, the interests of justice would best be served by requiring service of witness requests on the opposing party with adversarial litigation before the trial judge. This would permit the stipulations and concessions that may hasten the process. Further, it would equalize the parties' information and permit either side to argue against a given witness request. Such a system would moot virtually all of the present objections to paragraph 115. Opponents would most likely urge that it would remove fiscal control from the convening authority and further extend the power and number of military judges. As to the former, a revised paragraph 115 could leave the government with the option of funding the witness or dismissing charges, a reasonable, although unpalatable, choice. As to the latter point, a fundamental issue is involved the resolution of which is dependent on far more than this issue.

C. THE POWER TO OBTAIN EVIDENCE

1. Evidence in the custody or control of military authorities

Although the Proposed Revision of the Manual for Courts-Martial provides a comprehensive body of discovery rules,[101] modeled in part

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[97]United States v. Vietor, 10 M.J. 69, 77-78 (C.M.A. 1980).

[98]*Id.* at 78. *See also* United States v. Kilby, 3 M.J. 938, 944-45 (N.C.M.R. 1977).

[99]United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980).

[100]United States v. Christian, 6 M.J. 624, 627 (A.C.M.R. 1978) (DeFord J., concurring). *Accord* United States v. Williams, 3 M.J. 239 (C.M.A. 1977).

[101]Proposed Rule of Courts-Martial 701, Proposed Revision of the Manual for Courts-Martial (Joint Service Comm. on Military Justice, Department of Defense, May 1983) [hereinafter cited as Proposed Rules of Courts-Martial].

on the Federal Rules of Criminal Procedure, the present Manual for Courts-Martial provides little in the way of procedure for obtaining evidence in military control, other than the testimony of witnesses, when it declares:

> If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge . . . will, upon reasonable request and "without the necessity of further process, take necessary action to effect their production for use in evidence and . . . to make them available to the defense to examine or to use, as appropriate under the circumstances.[102]

The Manual clearly contemplates the voluntary cooperation of others when a proper officer requests evidentiary materials. It does not expressly provide a remedy when efforts at voluntary cooperation fail.[103] However, given the defense's constitutional right to compul-

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[102]MCM, 1969, para. 115*c*.

[103]The situation should be analyzed from the perspective of the two parties. The government is usually viewed in a unitary fashion and, if prosecution cannot obtain needed evidence, it may be reasonable to expect it to get its house in order or suffer the consequences. Unfortunately, this does place enforcement of the criminal law potentially in the hands of those who may have contrary motives. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974). While great deference should be paid to the government, especially within the military with its chain of command, given the potential for obstruction, and the occasional bureaucratic obstacles present when evidence must be obtained from an unrelated command, the prosecution should not be penalized as a general rule for an inability to obtain voluntary cooperation in evidence production. When the defense is unable to obtain needed evidence, a different situation results because of the accused's constitutional rights to confrontation, compulsory process, and fair trial. The question then becomes one of remedy. The law does not guarantee an accused the right to a trial to clear his or her name, *but see* U.C.M.J. art. 4 (dismissed officer's right to trial by court-martial), and the accused can be protected by dismissal of charges or abatement of trial rather than by an order to obtain needed evidence.

This omission is rectified by Proposed Rule of Court-Martial 701(g)(3), which provides that:

> [T]he Military judge may take one or more of the following actions:
> (A) Order the party to permit discovery;
> (B) Grant a continuance;
> (C) Prohibit the party from introducing evidence or raising a defense not disclosed; and
> (D) Enter such order as is just under the circumstances.

Although the Rule further provides that it "shall not limit the right of the accused to testify in the accused's behalf," its provision permitting the judge to prohibit the defense from raising an undisclosed defense raises troubling constitutional questions which the Supreme Court expressly chose not to explore in Williams v. Florida, 399 U.S. 78, 83 n.14 (1970). Although the Court declared in Wardius v. Oregon, 412 U.S. 470, 472 (1973) that "the Due Process Clause . . . forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants", it did not reach

sory process, the power to obtain evidence granted by the Uniform Code of Military Justice,[104] and the express powers granted by the Manual to the military judge to call witnesses[105] and require additional evidence,[106] it seems apparent that the power exists in at least the military judge[107] to order the production of evidence in military custody. In the event of noncompliance with such an order, however, the only meaningful sanctions may be to abate the proceedings[108] and perhaps prefer criminal charges against those refusing to comply.[109] When witnesses are involved, the Manual states that, customarily, the attendance of a witness stationed near enough to trial so "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 . . . . 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."[110] The Manual continues by stating that if formal notice is required, "the trial

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the question of how, if at all, Oregon's notice of alibi rule could be enforced. 412 U.S. at 472, n.4.

[104]U.C.M.J. art. 46.

[105]Mil. R. Evid. 614(a).

[106]MCM, 1969, para. 54*b*. Paragraph 54*b* declares in relevant part that:

> The court is not obliged to content itself with the evidence adduced by the parties. When that evidence appears to be insufficient for a proper determination of the matter before it or when not satisfied that it has received all available admissible evidence on an issue before it, the court may take appropriate action with a view to obtaining available additional evidence.

Paragraph 54*b* does not explicitly address how the evidence shall be obtained and continues to illustrate its point by stating: "The court may, for instance, require the trial counsel . . . to summon new witnesses. . . ." Given the express power to call witnesses granted by Mil. R. Evid. 614(a), however, it is clear that the Manual is not relying solely on the voluntary cooperation of military personnel.

[107]MCM, 1969, para. 115*d*(1) authorizes the trial counsel to subpoena civilian witnesses. Although the provision could be read as limiting the trial counsel's power to subpoena to civilians, it seems more likely that the Manual's drafters took for granted government compliance with paragraph 115*c* and simply granted express power to deal with the case of civilians. However, to the extent that the Manual fails to grant subpoena power to compel military production of evidence, it seems clear that the Manual necessarily grants such power to the military judge. In United States v. Toledo, 15 M.J. 255, 256 (C.M.A. 1983), the court held that the trial judge erred by refusing to order the prosecution to obtain a transcript of a prosecution witness' prior federal district court testimony for impeachment use.

[108]United States v. Willis, 3 M.J. 94 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976). *See also* n.26 *supra*.

[109]A refusal to supply evidence pursuant to either paragraph 115*c* or a court order may constitute a violation of Articles 98 or 134. *Cf.* United States v. Perry, 2 M.J. 113, 116 (C.M.A. 1977) (Fletcher, C.J., concurring) (violation of speedy trial right); United State v. Powell, 2 M.J. 6, 8 (C.M.A. 1976) (unnecessary delay in completing Article 32 proceedings). Refusal to obey a court order may also constitute a disobedience under Articles 90 and 92.

[110]MCM, 1969, para. 115*b*.

counsel will, through regular channels, request the proper commanding officer to order the witness to attend.[111] Notwithstanding its phrasing, the Manual does not appear to intend that the commanding officer of the accused has any discretion to reject the request in general. The decisions of the Court of Military Appeals treat the government in a unitary fashion and when a material defense witness is not made available, trial must be abated until the witness is available.[112] The court has implicitly recognized that witnesses may not be instantly available and that, in normal practice, reasonable needs of the individual or the service are accommodated.

2. Evidence not in military control

Although most civilian evidence is obtained through the voluntary cooperation of the appropriate individuals, recourse to process is occasionally necessary, and Congress has provided that:

> 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.[113]

At the outset, it is apparent that process is unavailable if it would reach abroad, except for the "territories, Commonwealths, and possessions,"[114] and the Manual states: "In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence thereof, within the principles of international laws."[115] Further, courts-martial lack the power to compel the attendance abroad of witnesses who could be compelled to attend courts-martial tried within the United States.[116]

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[111] *Id.*

[112] *See* note 108 *supra*. In an appropriate case, dismissal of charges may be necessary.

[113] U.C.M.J., art. 46.

[114] Presumably, a court-martal could constitutionally be given the power to subpoena United States citizens outside the United States to trials taking place within the United States. Civilian federal courts have such power. 28 U.S.C. § 1783 (1976); Fed. R. Crim. P. 17(e)(2).

[115] MCM, 1969, para. 115*d*(1). The Manual also states that "In occupied enemy territory, the appropriate commander is empowered to compel the attendance of a civilian witness in response to a subpoena issued by the trial counsel." *Id.*

[116] United States v. Bennett, 12 M.J. 463, 471 (C.M.A. 1982) (courts-martial lack the statutory power to require a United States citizen to testify *abroad* before a court-martial); United States v. Daniels, 23 C.M.A. 94, 96-97, 48 C.M.R. 655, 657-58 (1974) (courts-martial lack power to compel testimony of U.S. citizen military dependent residing in the same nation in which the court-martial takes place); United States v. Potter, 1 M.J. 897, 899 (A.F.C.M.R. 1976) (court-martial could not compel American witness to testify in Germany); United States v. Boone, 49 C.M.R. 709, 711 (A.C.M.R. 1975) (American witness could not be compelled to testify in Germany).

Compulsory process is available in two forms: subpoena and warrant of attachment. The subpoena compels the attendance of a witness by the coercion of law while a warrant of attachment results in the apprehension of the witness and his or her coerced physical transportation to trial.

a. Subpoenas

Pursuant to Article 46 of the Uniform Code of Military Justice, the Manual for Courts-Martial provides for the issuance of subpoenas by the trial counsel to compel the attendance of civilian witnesses.[117] The Manual provides a model subpoena form[118] and states that service should generally be made by mail.[119] The trial counsel is required to "take appropriate action with a view to timely and economical service when formal service is necessary.[120] According to the Manual, personal service "ordinarily will be made by persons subject to military law, but may legally be made by others."[121] Service by United States marshals has occasionally been used in lieu of service by military personnel. In the event of noncompliance with the subpoena, the witness is subject to criminal prosecution in a United States district court under the provisions of Article 47 of the Uniform Code of Military Justice.[122] Such a sanction is not particularly useful insofar as obtaining the testimony of the witness is concerned. Given a witness who refuses to comply, the trial counsel may request a United States district court to direct the attendance of the witness or, more directly, may issue a warrant of attachment.

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[117]MCM, 1969, para. 115*d*(1). Insofar as summary courts-martial are concerned, paragraph 79*b* states that a summary court has the same power as a trial counsel to obtain evidence. *See also* Proposed Rule of Court-Martial 703(e)(2).

[118]MCM, 1969, A17-1.

[119]The Manual also states that the witness should ordinarily be advised that voluntary compliance with the subpoena will not prejudice the rights of a witness to fees and mileage and that a voucher for such fees will be paid after completion of testimony. MCM, 1969, para. 115*d*(1).

[120]*Id.*

[121]*Id.*

[122]Article 47 penalizes an individual, not subject to court-martial jurisdiction, who having been properly subpoenaed "willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to product," U.C.M.J., art. 47(a)(3), and provides a maximum punishment of "a fine of not more than $500, or imprisonment for not more than six months, or both." *Id.* at art. 47(b). A prerequisite condition for an Article 47 prosecution is that the witness 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." *Id.* at art. 47(a)(2). *See also* MCM, 1969, para. 115*d*(2). Interestingly, the Code appears to deprive the civilian prosecutor of any prosecutorial discretion as Article 47(c) states: "The United States attorney . . . shall, upon the certification of the facts to him by the military court . . . file an information against and prosecute any person violating this article." This is not to say that the prosecution would necessarily comply with article 47. *See, e.g.*, C. Lederer, The Military Warrant of Attachment 1 n.6 (1982).

b. The warrant of attachment[123]

1. In general

The warrant of attachment, usually known as a bench warrant in civilian practice, directs the seizure of a witness who has refused to appear before a court-martial and orders the production of the witness before the tribunal the process of which has been disobeyed. The attachment prerogative has existed almost as long as the power of compulsory process[124] and may be regarded as inherent to compulsory process.[125] The express authority of courts-martial to attach civilian witnesses first appeared in Army general orders in 1868[126] and, virtually unchanged since that date, was incorporated into the modern Manual for Courts-Martial.[127] The power to attach is not found expressly in the Uniform Code of Military Justice, but attachment is authorized by 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.[128]

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[123]Much of the following text and accompanying footnotes are taken from Lederer, *Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses*, 98 Mil. L. Rev. (1983), written by Major Calvin M. Lederer, Instructor, The Judge Advocate General's School, U.S. Army. The authors gratefully acknowledge Major Lederer's permission to utilize his outstanding article so extensively. Those interested in this general topic are urged to read his comprehensive treatment of the topic.

[124]*See, e.g.*, 12 Op. Atty. Gen. 501 (1868).

[125]*See, e.g.*, Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929); United States v. Caldwell, 2 U.S. (2 Dall.) 333 (1795). *See also* 9 Op. Atty. Gen. 266 (1859).

[126]General Orders No. 93, Headquarters of the Army (Nov. 9, 1868). *See also* J. Winthrop, Military Law and Precedents 202 n.46 (1886, 1920 reprint); Digest of Opinions, The Judge Advocate General 490 (1880).

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

[128]*Id.*

The Manual for Courts-Martial places the full discretion and responsibility for issuance of the warrant in the trial counsel, subject only to the requirement for *consultation* with, rather than approved by, the appropriate officer. By placing authority in the trial counsel to issue the warrant, the Manual obviously contemplates that the warrant can only issue after referral of charges.[129] The Manual authorizes issuance any time thereafter, even before the court actually convenes.

The Manual does not state when a warrant of attachment may issue. Instead, it provides only that it is to be used in an appropriate case.[130] In context, it is clear that a warrant of attachment should be used only to obtain a material[131] witness who will not comply with a subpoena. Although the better practice is to attempt service of a subpoena first and to resort to a warrant of attachment only after the witness refuses to comply, nothing in the Manual for Courts-Martial necessarily suggests that the issuance of a subpoena or an actual refusal to appear is a prerequisite to issuance of a warrant. The Manual's criterion appears to primarily be one of necessity.[132] This raises an interesting policy question. In civilian practice, bench warrants are generally issued after witnesses fail to appear. Yet, civilian courts also utilize material witness statutes to order the arrest of witnesses likely to attempt to evade testifying. Although bench warrants are utilized for those witnesses who have *not* appeared, while material witness provisions are used for those who *may* not appear, the two procedures are obviously related in that they both provide for the procurement and preservation of witness testimony. At present, the armed forces have a bench warrant procedure which might theoretically be utilized as a material witness provision. Proposed Rule for Courts-Martial[133] 703(e)(2)(G) and its Discussion will condition issuance of the warrant of attachment to

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[129]A court-martial is convened by the officer designated as a convening authority who details the trial counsel (prosecutor) to the court-martial pursuant to U.C.M.J. art. 27. The term "convened" in MCM, 1969, para. 115*d*(3), is somewhat inartful because it obviously does not refer to the action of the convening authority in creating the court but rather to the point at which the court is called into session as there is no power to subpoena, much less attach, until there is a court-martial in being for which process can issue, it is not until after the court is "convened" and charges in a specific case are referred to it that process can issue.

[130]*Id.*,

[131]*See* note 55 and accompanying text *supra*.

[132]MCM, 1969, para. 115*d*(3), speaks of: "When it becomes necessary to issue a warrant of attachment." The civilian case law relating to arrest of material witnesses makes it clear that non-compliance with a subpoena is not a condition prerequisite to issuance of an arrest warrant. *See, e.g.*, Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).

[133]*See* note 101 *supra*.

cases in which the witness neglects or refuses to appear. Although this may well be desirable both for reasons of policy related to military-civilian relations and to forestall raising serious constitutional questions, it should be clear that the proposed revision will foreclose a possible avenue for obtaining evidence before courts-martial.

Procedurally, the Manual does not prescribe the form of the warrant[134] and, although the Manual directs the trial counsel to accompany the warrant with supporting documents,[135] that requirement is intended to support the government's position in the event of a habeas corpus petition[136] and does not appear to be a formal condition to be met before the warrant may issue.

2. Execution of the warrant

Execution of the warant is to be effective "when practicable... through a civil officer of the United States."[137] The civil officer contemplated by the Manual is United States marshal.[138] 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 command, or other appropriate command."[139] The Manual contemplates that force may be necessary for the successful execution of the warrant,[140] although no statute or other executive order expressly allows the use of force on or permits the deprivation

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[134]The Manual prescribes no specific form for the warrant although earlier Manuals did so. *See, e.g.*, MCM, 1921 at 655; MCM, 1928 at 88. The present form, DD Form 454, is prescribed by the Department of Defense.

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> [T]he warrant of attachment will be accompanied by the orders convening the court-martial, or copies thereof; a copy of the charges in the case, including the order referring the charges for trial, each copy certified by the trial counsel to be a full and true copy of the original; 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. MCM, 1969 para. 115*d*(3).

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

[137]*Id.*

[138]U.S. Dep't of Army, Pamphlet No. 27-2, Analysis of Contents Manual for Courts-Martial, United States 1969. Revised Edition 23-2 (1970). In 1980, the Director of the Federal Marshal Service was directed by the Department of Justice to assist the armed forces with the execution of warrants of attachment.

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

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> 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

of liberty of a civilian by military authority.[141]

3. Constitutionality of the military warrant of attachment

Clearly, the apprehension by military authorities of a civilian witness who is not the subject of criminal charges is troubling and raises a number of constitutional questions, among the most important of which are the following:

(1) Whether any innocent citizen may be arrested to obtain testimony?
(2) Whether military authorities may apprehend a civilian to obtain testimony at a court-martial?
(3) What quantum of proof is necessary before a warrant of attachment may issue?
(4) Who may issue a warrant of attachment?

The first of these questions must be considered resolved; twenty-seven states expressly utilize variations of the warrant of attachment[142] and all states subscribe to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[143] The fundamental concept of the arrest of material witnesses is also accepted throughout the American judicial system.[144] Although it could be said that warrants of attachment directing the attachment of civilians might better be placed in the hands of civilian judicial authorities, the only court which has considered the issue to date[145] has clearly rejected that position.[146] The last two questions, however, raise issues of substantially greater legal import.

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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. MCM, 1969 para. 115*d*(3).

[141]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 by statute. The most recent bill of this kind was S. 727, 97th Cong., 1st Sess. (1981) which would have authorized the Secretary of Defense "to invest officers . . . of the Department of Defense . . . with the power to arrest individuals on military facilities and installations."

[142]Lederer, *supra* note 123, at 12-13, n.49.

[143]The Act provides that a host state must honor an order from another state directing that a given witness be taken into custody.

[144]*See* note 125 *supra*. *See also* Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).

[145]United States v. Shibley, 112 F. Supp. 734 (S.D. Cal. 1953).

[146]The court in *Shibley* addressed the issue of whether a Marine Court of Inquiry had the same power to compel attendance as did a court-martial. In resolving that issue, it also addressed the issue of the warrant of attachment as Shibley had been apprehended and brought before the court of inquiry. The court stated:

> If the only method of making this provision (authorizing the summoning of witnesses) effective were resort to prosecution under (Article 47), the result would be ineffective and illusory. Punishment as an offense cannot

Although the Supreme Court has held that "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense,"[147] it is apparent that the actual apprehension of an individual and his or her involuntary physical removal to testify[148] at a court-martial necessarily constitutes such a seizure.[149] Except for a limited number of exceptions, the Fourth Amendment commands that seizures be based upon probable cause and at least one court has held that a seizure of a material witness must be based upon probable cause.[150] This conclusion seems correct and fully applicable to the military warrant of attachment. What is less clear, however, is *what* probable cause must establish. In the normal attachment case, the absence of the subpoenaed witness at trial is apparent and is more than enough to support the issuance of a warrant insofar as it is necessary to procure that person's attendance.[151] Yet, the Manual for Courts-Martial contemplates only the attachment of a witness who will give "material" testimony.[152] Accordingly, it would seem reasonable to require that the materiality of the witness be demonstrated prior to the issuance of the warrant, although it might be argued that a *subpoena* need not be based on probable cause[153] and will be considered valid until properly voided by the court.[154] Accordingly, lack of

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> compel disclosure to make an inquiry effective. And if boards of inquiry are to perform their functions . . . , they can do so if only if means exist to bring summarily recalcitrant witnesses before them. And the warrant of attachment traditionally provides such means. 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.

United States v. Shibley, 112 F. Supp. 734, 743 n.19 (S.D. Cal. 1953).

[147]United States v. Dionisio, 410 U.S. 1, 9 (1973).

[148]In order to secure the necessary testimony, the witness may be required to travel and may necessarily be held in custody for at least a few days.

[149]*See, e.g.*, United States v. Dionisio, 410 U.S. 1, 8-12 (1973) (distinguishing the subpoena situation, in which the coercion is the force of law, from detentions of the individual affected by the police); Bacon v. United States, 449 F.2d 933, 942 (9th Cir. 1971).

[150]*Id.* at 943.

[151]*See, e.g.*, United States v. Evans, 574 F.2d 352, 355 (6th Cir. 1978).

[152]*See* note 131 *supra*.

[153]United States v. Dionisio, 410 U.S. 1 (1973).

[154]*Cf.* Dolman v. United States, 439 U.S. 1395, 1395 (1978) (Rehnquist, Circuit Justice) ("invalidity of an injunction may not ordinarily be raised as a defense in contempt proceedings for its volation"); Walker v. City of Birmingham, 388 U.S. 305, 315-20 (1967); United States v. United Mine Workers, 330 U.S. 258, 293-94 (1947).

materiality may only be raised by the prospective witness via a motion to quash the subpoena. Although the issue is a close one, as a matter of policy, the better course is to demonstrate materiality of the witness on a preponderance basis when seeking a warrant of attachment. It should be simple for counsel to demonstrate materiality in view of the fact that the Manual presently requires the defense to demonstrate materiality and the government to only call material witnesses[155] and because of both the dislocation to the witness and the nature of the military intrusion into civil matters caused by the warrant. Proof of materiality should clearly be required when a warrant is to be issued for an individual who has not been subpoenaed. In such a case, the prosecution should demonstrate not only materiality but also that the witness is not likely to comply with the subpoena.[156]

The last matter to be resolved is the question of *who* should grant the warrant of attachment. At present, the Manual specifies that the warrant should be issued by the trial counsel.[157] The Supreme Court has, however, declared search warrants issued by prosecutors[158] to be unconstitutional and declared that issuing officers must be neutral and detached. "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement."[159] As warrants of attachment result in the seizure of *civilians*, there is no justification for application of the argument of military necessity to their seizure. Although placing the warrant of attachment power in the hands of the trial counsel is historically understandable in view of the fairly recent advent of the military judiciary,[160] there is no justification at present for issuing a warrant of attachment by a prosecutor.

In summary, the present procedure for the issuance of a military warrant of attachment provides an unusual tool to secure the testimony of unwilling civilian witnesses. In its present form, however, it must be viewed as flawed and almost certainly unconstitutional. Given this result, a trial counsel could likely moot any constitutional complaints by applying to a military judge for permission to issue a

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[155]*See* text accompanying notes 22-27, 48-58 *supra*.

[156]*See* Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

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

[158]Coolidge v. New Hampshire, 403 U.S. 443 (1971) (state attorney general could not issue search warrant notwithstanding state statute authorizing him to issue warrants as a justice of the peace).

[159]Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

[160]Military judges were not required at special courts-martial, for example, until 1969.

warrant of attachment, proving in the process on a preponderance basis that the desired witness is a material witness and, when appropriate, that it is more probable than not that the witness will not comply with a subpoena.

3. Immunity

a. In general

The Supreme Court has long recognized that a valid claim to the privilege against self-incrimination may be overcome by a grant of immunity.[161] Accordingly, when the prosecution[162] seeks the testimony of a witness who will claim the constitutional or statutory[163] privilege, it may compel the individual's testimony through a grant of immunity. Although the armed forces have claimed the power to grant immunity since at least 1917,[164] no statute presently exists[165] or has ever existed that authorizes the armed forces to grant immunity. Dealing with this issue in 1964 in *United States v. Kirsch*[166] the Court of Military Appeals held that it perceived "a Congressional grant of power to provide immunity from prosecution in the provisions of the Uniform Code; and a valid delineation of a method by which to exercise the power in the Manual for Courts-Martial..." [167] In *Kirsch*, the court reasoned that, inasmuch as the Uniform Code provides the convening authority the power to overturn a conviction,[168] and thus through the right against double jeopardy the power to absolutely protect an accused from criminal sanction, a convening authority need not actually try an accused and overturn a conviction to grant immunity to a service member.[169] The court also noted that Congress was well aware of the various Manuals for Courts-Martial and regulations providing for immunity and had failed to object to

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[161]*See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Brown v. Walker, 161 U.S. 591 (1896). *See generally*, Green, *Grants of Immunity of Military Law*, 53 Mil. L. Rev. 1, 3-16 (1971) [hereinafter cited as Green]. *See also* Green, *Grants of Immunity and Military Law 1971-1976*, 73 Mil. L. Rev. 1 (1976).

[162]Insofar as the ability of the defense to obtain immunity for defense witnesses is concerned, *see* text accompanying notes 392-99 *infra*.

[163]U.C.M.J. art. 31. *See generally*, Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1 (1976). *See also* Mil. R. Evid. 301-05.

[164]Green, *supra* note 161, at 17 (citing MCM, 1917); Proposed Rule for Courts-Martial 907(d)(2)(D)(ii).

[165]Green, *supra* note 161, at 17. *But see* the Organized Crime Control Act of 1970, *discussed* at note 173 and accompanying text, which has limited application.

[166]15 C.M.A. 84, 35 C.M.R. 56 (1964).

[167]*Id.* at 90-91, 35 C.M.R. at 62-63.

[168]*See* U.C.M.J. art. 64 ("convening authority may approve only such findings of guilty, and the sentence . . . as he finds correct in law and fact and as he in his discretion determines should be approved.")

[169]15 C.M.A. at 92, 35 C.M.R. at 64.

the military's interpretation of the law.[170] Although expressly recognizing the power of a convening authority to grant immunity, the court made it clear that immunity could not be granted for offenses over which military courts lack jurisdiction[171] and thus, implicitly, a convening authority cannot grant immunity to persons not subject to trial by court-martial.[172] Although *Kirsch* remains the dispositive case in this area, enactment of the Organized Crime Control Act of 1970[173] complicated matters substantially. The Act centralized in the Attorney General the federal government's power to grant immunity and could be read to have deprived the armed forces of any general power to grant immunity due to the absence of express reference to courts-martial. Although the military departments may, as federal agencies, obtain the Attorney General's permission to grant immunity to a witness,[174] one commentator, after a thorough examination of the legislative history of the Act, can find no reason to believe that the Act was intended to affect the armed forces in any other fashion.[175] Notwithstanding this, Justice Rehnquist, then Assistant Attorney General, Office of Legal Counsel, having opined that courts-martial constitute "proceedings before an agency" within the meaning of the Act but that Act had not repealed the armed forces powers to grant immunity under *Kirsch*, stated that immunity could not be granted without the consent of the Attorney General in any case in which the Department of Justice might have an interest.[176] Such a result, although in accord with the Act's spirit, hardly seems possible in view of the finding that the Act did not repeal the military's power to grant immunity and the absence in the legislative history of any intent to affect the armed forces.

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[170]*Id.* at 94, 35 C.M.R. at 66. The present Manual provisions referring to immunity are MCM, 1969, para. 68*h* and Mil. R. Evid. 301(c)(1). Only a general court-martial convening authority may grant immunity within the armed forces. MCM 1969, para. 68*h*; United States v. Villines, 13 M.J. 46, 53 (C.M.A. 1982); United States v. Joseph, 11 M.J. 333, 334 (C.M.A. 1981). *But see* United States v. Villines, 13 M.J. 46, 61-62 (C.M.A. 1982) (Everett, C.J. dissenting). Immunity may be granted, of course, by the Attorney General pursuant to statute.

[171]15 C.M.A. at 96, 35 C.M.R. at 68.

[172]Immunity may be granted to such persons pursuant to the Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-05 (1976). *See, e.g.*, United States v. Andreas, 14 M.J. 483, 485-86 (C.M.A. 1983).

[173]18 U.S.C §§ 6001-05 (1976).

[174]*Id.* at 6001, 6004.

[175]Green, *supra* note 161, at 29-31.

[176]Coast Guard Law Bulletin No. 413 setting forth the 22 September 1971 memorandum of the Assistant Attorney General, Office of Legal Counsel (William H. Rehnquist), *reprinted in part in* VI Criminal Law Materials 32-50 (The Judge Advocate General's School, U.S. Army 1981). For the procedure to obtain such a grant, *see* note 217 *infra*.

At present, the assumption is that Congress has implicitly granted the armed forces the power to grant immunity to any service member who may be tried by court-martial for the offense about which the member will testify, but that the immunity must be obtained under the Organized Crime Control Act of 1970 whenever the case has Department of Justice interest. Given Justice Rehnquist's findings, the latter requirement albeit an excellent policy decision, appears a legal nullity. The real question is whether the armed forces in fact have power to grant immunity.[177] Assuming that federal statute has not deprived the military of that power, one must reexamine *Kirsch*. Concededly, the court's holding in *Kirsch* is unusual and somewhat tortured and the court need not have concluded as it did. The court could easily have held that, although a convening authority could *in effect* grant immunity, the Code did not authorize the issuance of such a grant absent trial.[178] The weight of legal history does support *Kirsch*, however, and, as the armed forces are part of the federal government, it would also appear reasonable to conclude that a grant of transactional immunity[179] properly issued by the armed forces is binding on the remainder of the federal government and the states.[180] Any future revision of the Uniform Code of Military Justice should resolve this matter, however, by creating express statutory authority for the armed forces to grant immunity. At present, the military system is clearly vulnerable to challenge in the federal district courts.

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[177] *But see* United States v. Villines, 13 M.J. 46, 61 (C.M.A. 1982) (Everett, C.J., dissenting) (noting that the assumption that the 18 U.S.C. §§ 6001-05 (1976) did not preempt the military's power to grant immunity "is not indisputable.").

[178] *See* Green, *supra* note 161, at 26-27.

[179] *Kirsch* dealt with a grant of transactional immunity. Although not fully resolved, it appears that the armed forces may use grants of testimonial immunity as well as grants of transactional immunity. *See* text accompanying notes 18-136 *infra*.

[180] U.C.M.J. art. 76. In relevant part, Article 76 declares that "the proceedings . . . of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive." This interpretation of Article 76 may be erroneous in that the Article clearly is intended to deal with the finality and effects of convictions. Given that immunity in the armed forces is ultimately based upon the effects of Articles 64, 76, and the constitutional prohibition against double jeopardy, however, Article 76 might reasonably be interpreted to reach this far. If not, a grant of immunity in the armed forces should act to bar the use of testimony, and the product thereof, by a state or the federal government. New Jersey v. Portash, 440 U.S. 450 (1979) (grand jury testimony given pursuant to a grant of immunity was involuntary and could not be used for impeachment of the declarant at his later trial); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

b. The nature of the immunity required

(1). In general

Following civilian precedent, military grants of immunity extended transactional immunity[181] until the Supreme Court's decision in 1972 in *Kastigar v. United States* that only testimonial immunity[182] was necessary to overcome the Fifth Amendment privilege. The ability of the armed forces to grant testimonial immunity since *Kastigar* has been unclear. The promulgation of the Military Rules of Evidence expressly authorized the granting of use immunity,[183] but the President's rule making power under Article 36 of the Code[184] does not extend to violating congressional statute; members of the armed forces have been granted a statutory right against self-incrimination which has frequently been held to be broader than the Fifth Amendment privilege.[185] The legislative history of the statutory privilege suggests that, in relevant part, it was indeed intended to merely echo the Fifth Amendment privilege,[186] in which case the Court's holding in *Kastigar* would clearly apply to the armed forces. However, the holdings of the Court of Military Appeals create some uncertainty. Until fairly recently, the court repeatedly held that the statutory right was more protective than the constitutional one. Although the court has since either rejected or modified this position,[187] enough doubt exists that a reasonable argument can be mounted to the effect that the statutory right requires transactional immunity, especially since the present statutory right and all of its

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[181]Under transactional immunity, a witness is granted immunity from prosecution for any transaction or offense concerning which the witness testified.

[182]406 U.S. 441 (1972).

[183]Mil. R. Evid. 301(c)(1). *See also* United States v. Villines, 13 M.J. 46, 60 (C.M.A. 1982) (Everett C.J., dissenting).

[184]"Pretrial, trial, and post-trial procedures. . . may be prescribed by the President by regulations which shall. . . not be contrary to or inconsistent with this chapter." U.C.M.J. art. 36(a).

[185]*See generally*, Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1, 2-9 (1976). *But see* United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980), in which Chief Judge Everett rejected earlier holdings, while Judges Cook and Fletcher stated that nothing in the case required the court to reexamine the "settled construction of Article 31" that the Article " 'has a broader sweep than the Fifth Amendment.' " 9 M.J. at 384 (quoting United States v. Ruiz, 23 C.M.A. 181, 182, 48 C.M.R. 797, 798 (1974)). The court has clearly narrowed the scope of Article 31, however. United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980); United States v. Lloyd, 10 M.J. 172 (C.M.A. 1982).

[186]Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. v. 1, 6-9 (1976). *See also* United States v. Lloyd, 10 M.J. 172 (C.M.A. .1981); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

[187]*See* United States v. Lloyd, 10 M.J. 172 (C.M.A. 1981); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

predecessors were enacted during the period in which transactional immunity was viewed as constitutionally necessary to overcome the Fifth Amendment privilege.[188] The issue seems to have been resolved in *United States v. Villines*,[189] in which a fragmented Court of Military Appeals appears to have accepted the granting of testimonial immunity by a general court-martial convening authority.[190] Proposed Rule for Court-Martial 704(a) express accepts testimonial immunity.

(2). Threat of prosecution in a foreign jurisdiction

For immunity to overcome the right against self-incrimination, it must at minimum successfully protect the witness against any use of the testimony given pursuant to the grant including any derivative use thereof.[191] Even if a military grant of immunity is not binding on the states, through either Article 76 or the Supremacy Clause, the Supreme Court's decision in *Murphy v. Waterfront*[192] would protect the witness from use of the immunized testimony in a state court. The same result will follow, however, if the witness is potentially subject to prosecution in a foreign nation.

The Supreme Court has yet to determine whether a witness who is faced with a realistic threat of foreign prosecution may refuse to testify in a court in the United States notwithstanding a grant of immunity fully effective in the United States.[193] A number of federal district courts have considered the topic, nearly all in the context of witnesses granted immunity to testify before grand juries, and have, with little exception, held that the witness must testify.[194] The holdings have relied on two rationales; first, that grand jury testimony is secret and not likely to come to the attention of a foreign power and,

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[188]*See generally* E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Criminal Evidence 304-05 (1979).

[189]13 M.J. 46 (C.M.A. 1982). *See also* United States v. Newman, 14 M.J. 474, 481 (C.M.A. 1983) ("our Court has clearly authorized such immunity.")

[190]*Id.* at 52-54 (Fletcher, J.); *id.* at 57 (Cook J., concurring in the result); *id.* (Everett, C.J., dissenting). *See also* United States v. Rivera, 1 M.J. 107 (C.M.A. 1975) (failing to raise the testimonial immunity issue), *reversing on other grounds*, 49 C.M.R. 259 (A.C.M.R. 1979) (holding testimonial immunity lawful).

[191]Kastigar v. United States, 406 U.S. 441 (1972).

[192]378 U.S. 52 (1964).

[193]Zicarelli v. Commission of Investigation, 406 U.S. 472 (1974) (intentionally not deciding the issue).

[194]*See generally* E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer Criminal Evidence 300-02 (1979); VI Criminal Law Materials 32-11 (The Judge Advocate General's School, U.S. Army 1981). *But see In re* Grand Jury Subpoena of Martin Flanagan, 81 C.V. 3978 Nat. L. J., March 8, 1982, at 2, col. 3 (E.D. N.Y. 1982).

second, that absent extradition,[195] the witness may avoid foreign prosecution simply by not traveling to the foreign nation. To the extent that these holdings are correct as they relate to civilian life,[196] they hardly seem applicable to the armed forces. Testimony before military proceedings, including the functional equivalent of the grand jury, the Article 32 proceeding,[197] is almost never secret. Furthermore, service members are subject to involuntary transfer to virtually any nation in the world. Indeed, trial may be taking place in a country with an interest in trying the accused.[198] Consequently, the civilian law seems inapposite. The Court of Military Appeals was faced with a case involving a threat of foreign prosecution in 1956,[199] when an accused complained that a Korean civilian witness was erroneously forced to testify at his court-martial despite his reliance on the right against self-incrimination because of possible trial in Japan. In dicta, not joined by any other member of the court, Judge Latimer stated that both the constitutional and statutory[200] rights against self-incrimination extended only to " 'a reasonable fear or prosecution' under the Law of the United States."[201]

The right against self-incrimination is a favored right under American law. Although the government does have a right to "every man's evidence", that right is contingent on the right to remain silent. Where potential foreign prosecution is possible, at least when that prosecution is a consequence of military service, the privileges against self-incrimination should apply absent immunity which is effective to prevent the use or derivative use of immunized testimony

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[195]The possibility of extradition does not appear to have been taken seriously in many of the cases.

[196]At the heart of the question is the probability of successful overseas prosecution. This necessarily requires one to determine not only foreign law but also the probability of overseas interest in prosecution and the probability that the jurisdiction can reach the American accused. In *Flanagan*, the witness held joint U.S. and Irish citizenship and was an unindicted co-conspirator in a plan to ship weapons to Ireland and Great Britain. The trial judge held that both Ireland and Northern Ireland enforced their laws implicitly making prosecution likely.

[197]U.C.M.J. art. 32.

[198]A foreign host nation clearly has an interest in trying an American service member who has violated its laws or injured its people. The United States has negotiated Status of Forces Agreements or concluded executive agreements with many host nations which generally result in court-martial of nearly all such offenders. However, foreign trial is a clear possibility and in some countries for some types of offenses a probability.

[199]United States v. Murphy, 7 C.M.A. 32, 21 C.M.R. 158 (1956).

[200]U.C.M.J. art. 31.

[201]7 C.M.A. at 37, 21 C.M.R. at 163, (citing Slochower v. Board of Education, 350 U.S. (1956)). Judge Latimer's reliance on *Slochower* was misplaced. *See, e.g.*, note 193 *supra*.

in a prosecution in any jurisdiction, domestic or foreign.

c. Consequences of granting immunity

(1). At trial

Pursuant to the Military Rules of Evidence:

> When a prosecution witness...has been granted immunity or leniency in exchange for tsetimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.[202]

The Rule thus insures the defense a meaningful opportunity to cross-examine the immunized prosecution witness. The Rule is taken from the decision of the Court of Military Appeals in *United States v. Webster*[203] and its analysis states that disclosure should be made prior to arraignment.[204]

(2). To the immunized witness

When the witness has been granted transactional immunity,[205] the witness may not be later prosecuted by the armed forces[206] for any offense included within the grant.[207] When the witness has been given testimonial immunity,[208] the witness may later be prosecuted, but only if the prosecution can adequately show in court, by evidence,[209] that the government has not relied on the immunized tes-

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[202]Mil. R. Evid. 301(c)(2).

[203]1 M.J. 216 (C.M.A. 1975).

[204]Analysis of the 1980 Amendments to the Manual for Courts-Martial, 1969, Analysis of Rule 301(c)(2), *reprinted at* MCM, 1969, A18-11.

[205]*See generally* text accompanying notes 181-90 *supra*.

[206]It is unclear whether the accused could be prosecuted lawfully by a civilian jurisdiction. *See* accompanying notes 161-80 *supra*.

[207]The accused may be prosecuted for committing perjury while testifying pursuant to the immunity grant.

[208]Testimonial immunity protects the witness against subsequent use of the testimony and any product derivative of it with the possible exception of the discovery of a live witness as a result. *Cf.* United States v. Ceccolini, 435 U.S. 268 (1978). Testimonial immunity is sometimes known as "use plus fruits" immunity.

[209]The rules of evidence may not apply to this showing. Mil. R. Evid. 104(a). It is unclear, however, whether either Federal or Military Rule of Evidence 104(a) applies in determinations involving constitutional rights.

timony or any product thereof.[210] It appears from the decision of the Court of Military Appeals in *United States v. Rivera*[211] that the Court of Military Appeals will strictly hold the government to this requirement and it is probable that the government cannot prosecute a previously immunized witness without being able to prove that the case preparation was complete prior to the witness' testimoney pursuant to the grant,[212] and even then only if the trial counsel can be shown to be unaware of the nature of the testimony given under the grant.[213] A subsequently prosecuted witness may raise a prior immunity grant on a motion to dismiss.[214] A previously immunized accused may not be impeached at trial with testimony given pursuant to the grant as such testimony is deemed coerced and involuntary.[215]

(3). Post-trial

Within the armed forces, immunity may only be granted by the convening authority[216] or by the action of a convening authority.[217] From 1958 until 1983, the Court of Military Appeals reasoned that it was unlikely that a convening authority would grant or obtain immunity for a witness who was not expected to testify truthfully. Consequently, it has consistently held that, by granting immunity, the convening authority[218] and staff judge advocate[219] involved in the

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[210]Mil. R. Evid. 301(c)(1). *See also* United States v. Rivera, 1 M.J. 107 (C.M.A. 1975).

[211]1 M.J. 107 (C.M.A. 1975). *See also* United States v. Whitehead, 5 M.J. 294 (C.M.A. 1978).

[212]This rule may not extend so far as to prevent use of a new witness discovered via the immunized testimony, *see* United States v. Ceccolini, 435 U.S. 268 (1978), although any logical analysis of the right against self-incrimination would result in exclusion of such evidence.

[213]Knowledge of the probable nature of a witness' response which permits highly useful trial preparation should be considered improper fruit of the immunized testimony. *See* United States v. Rivera, 1 M.J. 107 (C.M.A. 1975).

[214]MCM, 1969, para. 68*h*.

[215]New Jersey v. Portash, 440 U.S. 450 (1979).

[216]The convening authority may grant immunity to any service member subject to referral of charges and trial by that convening authority. *See* text accompanying notes 161-80 *supra*.

[217]When a convening authority lacks the power to immunize a witness because that person is not subject to court-martial, immunity may be obtained from the Department of Justice based upon the Organized Crime Control Act of 1970, 18 U.S.C. 6001-05 (1976). *See* Criminal Law Items, *Grants of Immunity*, The Army Lawyer, Dec. 1973, at 22-25; Criminal Law Items, *Addendum*, The Army Lawyer, Feb. 1974, at 14.

[218]*See, e.g.*, United States v. Espiet-Betrancourt, 1 M.J. 91 (C.M.A. 1975); United States v. Williams, 21 C.M.A. 292, 45 C.M.R. 66 (1972). *But see* United States v. Griffin, 8 M.J. 66 (C.M.A. 1979) (disqualification is not required when a defense witness is immunized).

[219]*See, e.g.*, United States v. Johnson, 4 M.J. 8 (C.M.A. 1977); United States v. Diaz, 22 C.M.A. 52, 46 C.M.R. 52 (1972).

grant were disqualified from taking post-trial actions. The Court repudiated this doctrine in its entirety in *United States v. Newman*,[220] reasoning that the advent of testimonial immunity coupled with the adoption of Military Rule of Evidence 607, which provides that a party may impeach his or her own witnesses, had eliminated any possibility that a convening authority or staff judge advocate could be viewed as having vouched for a witness' credibility by issuing a grant of immunity. The court did not, however, determine the effect of a grant of transactional immunity declaring, however, that the "key inquiry is whether [the convening authority's] actions before or during the trial create, or appear to create, a risk that he will be unable to evaluate objectively and impartially all the evidence in the record of trial. . . ."[221]

III. CONFRONTATION AND COMPULSORY PROCESS

A. IN GENERAL

From the perspective of an accused, perhaps the most important constitutional protections are the Sixth Amendment rights to confrontation and compulsory process, the rights which, with the right against self-incrimination, epitomize the adversary system.[222] Viewed in general terms, the right to confrontation gives the accused the right to be present at trial[223] and to confront the evidence offered by the prosecution, and the right to compulsory process gives the defense the right to obtain and present evidence in its behalf. Clearly, the two rights are interdependent and must be viewed together, although Professor Westen has correctly suggested that, of the two, compulsory process is probably more important; the right to present defense evidence is likely more valuable than the ability to contest prosecution evidence inasmuch as the former may correct for mistakes in the latter.[224] Were the Sixth Amendment rights to confrontation and compulsory process, both applicable to courts-martial,[225]

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[220]14 M.J. 474 (C.M.A. 1983).

[221]*Id.* at 482.

[222]A careful analysis will indicate that the privilege against self-incrimination is the foundation stone of the adversary system as, without it, the burden of proof could be effectively placed on the defendant. The confrontation and compulsory process rights supply the tools necessary to make the adversary system function.

[223]*See* note 229 *infra*. *See also Confrontation and Compulsory Process*, *infra* note 232, at 569.

[224]Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 183 (1974).

[225]The Court of Military Appeals has held that the Bill of Rights applies to members of the armed forces unless expressly or implicitly excepted. *See, e.g.*, United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). In addition, Article 46 of the Uniform Code of Military Justice provides for equal access to witnesses for the prosecution, defense, and court-martial while providing for compulsory process.

to be interpreted in a literal and expansive fashion, it is apparent that present evidentiary and procedural standards would be greatly affected. At the every least, the confrontation right would constitutionalize the hearsay rule and render all hearsay inadmissible. Consequently, it is not surprising that most commentators have rejected such interpretation.[226] The Supreme Court, while also rejecting such literal interpretation,[227] has refused to fully acknowledge the dimensions of the two rights, preferring to deal with confrontation and compulsory process issues on a case by case basis. The pragmatic utility of the rights to the defense primarily stems from their unsettled nature. The adversary system that they protect has been incorporated into military criminal law by the Uniform Code of Military Justice[228] and case law. It is in the question of how they affect specific areas of the law, areas which are still unresolved, that they are pragmatically important and present the able defense counsel with significant opportunities. Accordingly, having examined the present procedural mechanisms for procuring evidence, it is appropriate to turn to an examination of the effects of the Sixth Amendment on that procurement and on the admissibility of evidence. Given that this entire area is a developing one, the focus of this examination is necessarily on the decisions of the Supreme Court rather than the Court of Military Appeals.

B. THE RIGHT OF CONFRONTATION

1. In general

The Sixth Amendment declares: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...." At a minimum, the right to confrontation gives the accused the right to be present at trial[229] to confront the evidence

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[226] *See, e.g.*, Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99 (1972); note 224 *supra*.

[227] *E.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); Dutton v. Evans, 400 U.S. 74 (1970).

[228] *See, e.g.*, U.C.M.J. art 46. Most of the usual features of the adversary system are arguably inherent in the Uniform Code's provisions for counsel, U.C.M.J. arts. 27, 38, and the right against self-incrimination found in Article 31.

[229] The confrontation rights does not extend to the accusation stage of proceedings, *see* Gerstein v. Pugh, 420 U.S. 103, 119-25 (1975) (implied); McCray v. Illinois, 386 U.S. 300 (1967); Cooper v. California, 386 U.S. 58, 62 n.2 (1967); *but see* Roviaro v. United States, 353 U.S. 53 (1957), or to the type of sentencing proceedings usually followed by civilian jurisdictions. *See* Williams v. New York, 337 U.S. 241 (1949). *But cf.* Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion) (in cases in which death penalty might be imposed, due process requires that defendant be allowed to inspect evidence used in sentencing); Specht v. Patterson, 386 U.S. 605 (1967) (when special sentencing procedures for specific crimes, *e.g.*, sex offenses, exist, due process requires, *inter alia*, confrontation of witnesses). *See also* Fed. R. Crim. P. 32(c). The peculiar nature of

offered by the government on the issue of guilt or innocence[230] unless the accused has waived that right in some fashion.[231] Presumably, the framers intended the confrontation right to have some greater import. The question then is how far, if at all, the Sixth Amendment protects the accused against admission of various forms of evidence.[232]

2. The Right to Compel the Government to Produce Witnesses Whose Statements are Used at Trial

a. In general

Construed narrowly, the right to be present at trial is of use to the defendant only because the accused is thus aware of the government's evidence; the accused is thereby enabled to prepare and present a defense. If this were the limits of the Sixth Amendment, however, the government could subject the defendant to "trial by affidavit" as long as the defendant was faced with the evidence in court. Yet it has been obvious since the earliest confrontation cases that the prohibition of trials by affidavit is a basic concept of confrontation.[233] Consequently the Sixth Amendment must limit the government's ability to present its case in hearsay form to some degree.

b. Available witnesses

Notwithstanding the large number of hearsay exceptions which do not require unavailable declarants,[234] the Supreme Court has not as

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military sentencing, *e.g.*, adversarial and an independent part of trial, may require application of the right. The confrontation clause also protects the accused against *ex parte* proceedings which are unauthorized under the jurisdiction's law. *E.g.*, Parker v. Gladden, 385 U.S. 363 (1966); Lewis v. United States, 146 U.S. 370 (1892); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973) (harmless error on facts). However, the right to be present at trial does not merely incorporate the jurisdiction's law by reference, but stands as an independent standard of the validity of local statutes that allow trial in absentia. *See In re* Oliver, 333 U.S. 257 (1948).

[230]*See* Snyder v. Massachusetts, 291 U.S. 97 (1934); Dowdell v. United States, 221 U.S. 325 (1911) (interpretation of Phillipines Bill of Rights).

[231]Voluntary absence from trial after arraignment permits trial *in absentia*. Taylor v. United States, 414 U.S. 17 (1973) (per curiam); United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972). *Compare* United States v. Peebles, 3 M.J. 177 (C.M.A. 1977) (absence held to be involuntary) *with* United States v. Condon, 3 M.J. 782 (A.C.M.R. 1977) (voluntary absence). If there is trial *in absentia*, the judge might instruct the court members that they can draw no inference of guilt from the defendant's absence. The conduct of the accused may also constitute an implicit waiver of the right to present. Illinois v. Allen, 397 U.S. 337 (1970); United States v. Cook, 20 C.M.A. 504, 43 C.M.R. 344 (1971).

[232]For an outstanding analysis of this matter in conjunction with the compulsory process clauses, *see* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 570 (1978) [hereinafter cited as *Confrontation and Compulsory Process*].

[233]*See* Mattox v. United States, 156 U.S. 237, 242 (1895).

[234]*See, e.g.*, Fed. R. Evid. 803 (twenty-three enumerated exceptions and a residual general exception).

yet expressly held constitutional hearsay evidence against an accused who could not cross-examine the declarant[235] when that confrontation might have been useful to the accused.[236] Instead, although there are clear indications that the Court will recognize exceptions to this general rule, present case law appears to bar admission of hearsay evidence against the accused when the hearsay declarant is available for cross-examination.[237] The government thus must produce the declarant in person before introducing an out-of-court statement against the accused.[238] In determining when a witness is available,[239] the Court has rejected the argument that the government has no obligation to produce witnesses from beyond its territorial boundaries.[240] Similarly, the government cannot rely merely on its regular procedures for producing witnesses and must make a good faith effort to use all practical methods to produce the witness in person.[241] The government is not required to attempt to produce a witness in person if it can show the likely failure of its efforts.[242] The question of whether the government has met its obligation to produced a witness is a constitutional one, however, and the standard is strict.[243]

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[235]Given the general definition of hearsay, *see, e.g.*, Mil. R. Evid. 801(c), a statement made out of court offered for its truth remains hearsay notwithstanding the fact that its declarant is present in court subject to cross-examination. When the declarant is so available, both the Federal and Military Rules of Evidence define as nonhearsay three types of statements, Fed. R. Evid. 801(d)(1); Mil. R. Evid. 801(d)(1), but the general rule is far more expansive than the exceptions.

[236]Ohio v. Roberts, 448 U.S. 56, 65 n.7 (1980) stated: "A demonstration of unavailability, however is not always required. In Dutton v. Evans, 400 U.S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness."

[237]*Id.* at 65. The Court did, however, suggest that there may well be exceptions as it declared: "In the *usual case*. . .the prosecution must either produce, or demonstrate the unavailability of the declarant. . . ." *Id.* (emphasis added). *See also* note 236 *supra* as to one such "exception". It seems quite probable that the Court will accept the clearly established hearsay exceptions—particularly the business record exception. *See* note 260 and text accompanying notes 248-326 *infra*.

[238]Motes v. United States, 178 U.S. 458 (1900).

[239]*See e.g.*, Mil. R. Evid. 804(a).

[240]Pointer v. Texas, 380 U.S. 400 (1965).

[241]Barber v. Page, 390 U.S. 719 (1968) (recognizing increased cooperation among prison officials in temporarily transferring inmates needed as witnesses). *See* United States v. Davis, 19 C.M.A. 217,, 221, 41 C.M.R. 217, 221 (1970); United States v. Obligacion, 17 C.M.A. 36, 37, 37 C.M.R. 300, 301 (1967); United States v. Valli, 7 C.M.A. 60, 21 C.M.R. 186 (1956); United States v. Troutman, 42 C.M.R. 419 (A.C.M.R. 1970); United States v. Chatmon, 41 C.M.R. 807 (N.C.M.R. 1970). *See also* United States v. Gaines, 20 C.M.A. 557, 43 C.M.R. 397 (1971); United States v. Hodge, 20 C.M.A. 412, 415, 43 C.M.R. 252, 255 (1971) (Ferguson, J., concurring); United States v. Miller, 7 C.M.A. 23, 30, 21 C.M.R. 149, 156 (1956).

[242]*Compare* Mancusi v. Stubbs, 408 U.S. 204 (1972) *and* United States v. Daniels, 23 C.M.A. 94, 48 C.M.R. 655 (C.M.A. 1974) *with* Barber v. Page, 390 U.S. 719 (1968).

[243]*See* United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974).

Although it could be argued that the confrontation clause would allow the government to try a defendant by affidavit as long as the witness was present at trial for defense cross-examination, the Court has repeatedly implied that, before the government will be permitted to use out-of-court statements of an available witness, the government must first call the witness[244] during its case-in-chief and attempt to obtain the testimony directly from the witness under oath and in the presence of the jury.[245] Though reliability would exist if the government presented its case in hearsay form while allowing the defendant to call the declarant as witness, there are sound reasons for requiring the government to present its evidence via direct examination. If hearsay were used as part of the government's presentation, for example, the jury could be left with an initial impression not easily erasable by defense examination of the declarant after the prosecution rested.[246] In addition, the defendant would be placed in the difficult position of having to call us a defense witness a person whose testimony is likely to be adverse.[247]

c. Unavailable witnesses

(1). In general

The confrontation right necessarily asks whether the government is estopped from introducing out-of-court statements by witnesses who are *unavailable* for courtroom examination. If confrontation includes such a rule, it would presuppose "that evidence in any form other than direct testimony is too unreliable ever to be used against the accused in a criminal proceeding."[248] Not only would confrontation contain procedural guarantees, but the concept would imply that a substantive constitutional standard governs admissibility of evidence. Rejecting this approach, the Supreme Court has suggested that the state may use out-of-courts statements as long as the prosecution cannot produce the evidence in a more reliable form. In *Mattox v. United States*,[249] the Court allowed various statements, prior

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[244]*See* Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan J., concurring in result); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99, 108, 143 (1972).

[245]Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Mattox v. United States, 156 U.S. 237 (1895).

[246]*See* United States v. Oates, 560 F.2d 45, 82 n.39 (2d Cir. 1977); Westen, *supra* note 232, at 578-79.

[247]The problem is mitigated in part by allowing the witness' credibility to be impeached by any party, including the party calling him. Mil. R. Evid. 607. *See* Fed. R. Evid. 607, Adv. Comm. Notes, 56 F.R.D. 183, 266-67 (1972).

[248]*Confrontation and Compulsory Process*, *supra* note 232, at 583.

[249]159 U.S. 237 (1895).

recorded testimony and a dying declaration, to be used against the defendant after the prosecution showed that the declarant was dead and that the evidence was unavailable in a more reliable form.[250] Similarly, in *California v. Green*,[251] the Court held that the state could use testimony given at a preliminary hearing once the prosecution had attempted and failed to obtain the testimony from the witness on direct examination. In *Ohio v. Roberts*,[252] testimony given by the witness at a preliminary hearing was held admissible after the state had shown that the witness was unavailable. When the evidence in the out-of-court statement has been available and producible in the more reliable form of in-court testimony, the confrontation clause has barred use of the out-of-court statement.[253] One series of cases precludes use of an out-of-court statement when the declarant could not be cross-examined because of physical absence from the courtroom. However, examination of these cases reveal that prosecutorial neglect or misconduct caused the witness' unavailability,[254] suggesting an underlying due process violation. In a second series of decisions, out-of-court statements have been excluded when the declarant, though physically present, asserted the right against

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[250]*See* Kirby v. United States, 174 U.S. 47, 61 (1899).

[251]399 U.S. 149 (1970).

[252]448 U.S. 56 (1980).

[253]The standard to be applied in determining availability is unclear. In Ohio v. Roberts, 448 U.S. 56, 74 (1980), the Court quoted Barber v. Page, 390 U.S. 719, 724, 725 (1968), for the proposition that a "witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." (emphasis added in Ohio v. Roberts). Having declared that no effort to obtain a witness need be made when there is clearly no possibility of doing so successfully, such as in the event of death of the witness, the Court stated:

> But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." California v. Green 299 U.S. at 189, n. 22 (concurring opinion citing Barber v. Page, *supra*).

448 U.S. at 74 (emphasis in the original). Given that Justice Brennan dissented in *Ohio v. Roberts* on the ground that the government failed to make a bona fide search to find the missing hearsay declarant, 448 U.S. at 79-82, it is apparent that the mere *possibility* of obtaining the declarant is not enough to prevent use of the hearsay declaration authored by the missing witness. On the other hand, the dissent seems to necessarily conclude that the government did not in fact make a good faith effort to find the witness. Given this view of the facts, the proper interpretation of the majority's opinion is at best uncertain.

[254]*See, e.g.*, Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); Pointer v. Texas, 380 U.S. 400 (1965); Motes v. United States, 178 U.S. 458 (1900); Kirby v. United States, 174 U.S. 47 (1899). For the analysis of these cases, *see Confrontation and Compulsory Process*, *supra* note 232, at 584 n.43.

self-incrimination.[255] Again, these cases suggest that prosecutorial conduct played a role and that the prosecution could have made the declarant available. When the challenged statements were made by co-defendants on trial with the accused, for example, severance of the trials might have obviated the self-incrimination issue.[256] Alternatively, the government could have tried the declarants before trying the defendant against whom the statements were to be used.[257] Finally, if the declarants continued to claim their self-incrimination privilege, they could have been made available by a grant of testimonial immunity.[258]

The Court has, however, never declared that the confrontation clause is satisfied merely by offering evidence in its best available form. Instead, the clause contains a two-part standard controlling admissibility, regardless of whether the evidence exists in a better form. Initially, the confrontation clause establishes a rule of necessity: "in the usual case...the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[259] Once the declarant is shown to be unavailable, the out-of-court statement is admissible only if it bears adequate "indicia of reliability"[260] which "serve as adequate substitutes for the right of cross-examination."[261]

(2). Unavailability

A declarant can be unavailable because of death, disappearance, illness, amnesia, or insanity,[262] exercise of a testimonial privilege,[263] or because of "imprisonment, military necessity, nonamenability to

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[255]*See* Roberts v. Russell, 392 U.S. 293 (1968); Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965). *But see* Parker v. Randolph, 442 U.S. 62 (1979).

[256]*Confrontation and Compulsory Process*, *supra* note 232, at 585 n.43. *See generally* text accompanying notes 400-10 *infra*.

[257]*Confrontation and Compulsory Process*, *supra* note 232, at 585 n.43.

[258]*Id.* at 581-82 n.38.

[259]Ohio v. Roberts, 448 U.S. 56, 65 (1980). *See* notes 236-37, 253 *supra*. An alternative statement defines necessity as "the State's 'need' to introduce relevant evidence that through no fault of its own cannot be introduced in any other way." California v. Green, 399 U.S. 149, 167 n.16 (1970).

[260]Dutton v. Evans, 400 U.S. 74, 89 (1970). *See also* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). The trier of fact must have "a satisfactory basis for evaluating the truth of the prior statement." California v. Green, 399 U.S. at 161.

[261]Hoover v. Beto, 467 F.2d 516, 533 (5th Cir. 1972).

[262]Mil. R. Evid. 804(a)(3), (4). *See also* Ohio v. Roberts, 448 U.S. 56, 74 (1980).

[263]Mil. R. Evid. 804(a)(1), (2).

process, or other reasonable cause."[264]

As the Supreme Court has stated, "a witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."[265] While the prosecution is not required to perform "a futile act" to locate the witness,[266] the good faith standard *might* be met even if the prosecution fails to take steps that offer a remote possibility of producing the witness.[267] The essential standard is one of reasonableness.[268] Thus, a witness is unavailable when for some reason, the witness is beyond the reach of the court-martial.[269] However, actual unavailability must be established and the prosecution must produce independent evidence of the witness' actual departure.[270] Unless the prosecution has made a good faith effort to secure the witness, imprisonment does not make the witness unavailable.[271]

When a witness with relevant information properly invokes a

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[264]U.C.M.J. art. 49(d)(2), *incorporated in* Mil. R. Evid. 804(d)(6). *See* Mil. R. Evid. 804(d)(5). It is unclear as to what would constitute adequate "military necessity." When the provision was included in the Military Rules of Evidence, its general utility was considered questionable in view of the procedents dealing with depositions. *See, e.g.*, United States v. Davis, 19 C.M.A. 217, 223-24, 41 C.M.R. 217, 223-24 (1970).

[265]Barber v. Page, 390 U.S. 719, 724-25 (1968).

[266]Ohio v. Roberts, 448 U.S. at 74.

[267]*See* note 253 *supra*. *See* United States v. Bright, 9 M.J. 789 (A.C.M.R. 1980). *But see* Mancusi v. Stubbs, 408 U.S. 204 (1972).

[268]Ohio v. Roberts, 448 U.S. at 74. *Compare* Mancusi v. Stubbs, 408 U.S. 204 (1972), *with* Barber v. Page, 390 U.S. 719 (1968).

[269]Although U.C.M.J. art. 49(d)(1), permits the use of depositions when the witness is outside the civil jurisdiction in which trial takes place or is more than one hundred miles from the location of trial, the Court of Military Appeals has limited the Article to civilian witnesses. United States v. Davis, 19 C.M.A. 217, 41 C.M.R. 217 (1970); United States v. Ciarletta, 7 C.M.A. 606, 614, 23 C.M.R. 70, 78 (1957). The court's reasoning in *Davis*, to the extent that the jury must weigh the demeanor of the witness, 19 C.M.A. 220, 41 C.M.R. at 220 (quoting Barber v. Page, 390 U.S. 719, 725 (1968)), suggests that the Article may be invalid as to civilians as well. *See also* United States v. Chatmon, 41 C.M.R. 807 (N.C.M.R. 1970).

[270]United States v. Davis, 19 C.M.A. at 224, 41 C.M.R. at 224; United States v. Troutman, 42 C.M.R. 419 (A.C.M.R. 1970). *See* United States v. Johnson, 44 C.M.R. 414 (A.C.M.R. 1971). The same analysis applies when the witness is allegedly unwilling to appear. United States v. Obligacion, 17 C.M.A. 36, 37 C.M.R. 300 (1967); United States v. Stringer, 5 C.M.A. 122, 17 C.M.R. 122 (1954). *See* United States v. Daniels, 23 C.M.A. 94, 48 C.M.R. 655 (1974). *Compare* United States v. Gaines, 20 C.M.A. 557, 43 C.M.R. 397 (1971) and United States v. Hodge, 20 C.M.A. 412, 43 C.M.R. 252 (1971) (dictum) (unavailability caused by the discharge of witness at government's convenience), *with* United States v. Dempsey, 2 M.J. 242 (A.F.C.M.R. 1976) (witness was expected to appear at trial; government did not cause unavailability).

[271]Barber v. Page, 390 U.S. 719 (1968).

privilege against testifying,[272] the witness is unavailable. Such a situation can present either a confrontation or compulsory process issue. If the government can remedy the reason for the exericse of the privilege, as by granting immunity to a defense witness who has exercised the right against self-incrimination, a compulsory process is presented. When the government offers the hearsay statement of a witness who will not be subject to cross-examination, a confrontation issue is posed. It is, however, almost always the exercise of a witness' privilege against self-incrimination which results in litigation. The conflict could be obviated by giving the witness testimonial immunity.[273] However, the courts have been extremely reluctant to compel the government to provide use immunity to a witness not yet tried. The grant of immunity has been required only when the prosecution intentionally disrupts the fact-finding process, when there is a violation of due process, when the prosecution acts on the basis of religion, race, or other discriminatory criteria, or when the potential testimony is clearly necessary and exculpatory.[274] In some situations, though, the government's interest in withholding immunity is minimal compared to the defendant's interest in obtaining the testimony. If the prosecution has already prepared its case against the witness, there is, at most, a slight burden on the prosecution of having to trace its evidence to independent sources. Thus, the prosecution cannot claim that its ability to prosecute would be hindered by granting immunity, and the prosecution should be forced to choose between granting immunity or striking the witness' testimony.[275]

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[272]The usual situation involves the privilege against self-incrimination, though assertion of any testimonial privilege makes the witness unavailable, *see* Mil. R. Evid. 804(a)(1), and may require any direct testimony to be struck should the privilege be exercised on cross. *See* note 333 *infra*. A persistent wrongful refusal to testify on the grounds of privilege will also make the declarant unavailable. Mil. R. Evid. 804(a)(2). *See Confrontation and Compulsory Process*, *supra* note 232, at 584 n.43. If joinder is the problem, severance can be ordered. *See* MCM, 1969, para. 26*d*.

[273]*See* text accompanying notes 181-201 *infra*.

[274]United States v. Villines, 13 M.J. 46 (C.M.A. 1982); United States v. Barham, 625 F.2d 1221 (5th Cir. 1980); Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976); United States v. Lowell, 490 F. Supp. 897 (D.N.J. 1980); United States v. De Palma, 476 F. Supp. 775 (S.D.N.Y. 1979).

[275]Even if there is no violation of the defendant's confrontation rights, his or her rights under Article 47 may be violated.

(3). Indicia of reliability

Before the prosecution may offer a hearsay statement made by an unavailable declarant against the accused at trial on the merits, it must demonstrate that the statement has sufficient "indicia of reliability"[276] to effectively substitute for defense cross-examination of the witness.[277] Although the Supreme Court has failed to delineate with great precision what constitutes adequate indicia of reliability, it has stated: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[278] The Court has failed to indicate which of the numerous hearsay exceptions are "firmly rooted" in its judgment except to note with approval dying declarations, former testimony which was subject to cross-examination, and business and public records.[279] Because of their potential importance to military practice, closer examination of a number of hearsay exceptions are appropriate.

(a). Former testimony

Under Military Rule of Evidence 804(b)(1), former or prior recorded testimony is admissible as an exception to the hearsay rule. The basic prerequisite for this exception is that the party against whom the testimony is offered has "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[280] This requirement is the "indicia of reliability" that satisfies the confrontation clause. In *California v. Green*,[281] the declarant's

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[276]Dutton v. Evans, 400 U.S. 74, 89 (1970).

[277]*See* Ohio v. Roberts, 448 U.S. 56, 70-71 (1980).

[278]*Id.* at 66 (footnote omitted). The utility of the "residual" hearsay exceptions, Mil. R. Evid. 803(24) and 804(b)(5), is unclear under this test. Neither exception is a "firmly rooted exception," yet both are contingent upon the proffered hearsay being material, probative and "having equivalent circumstantial guarantees of trustworthiness" as the enumerated exceptions. *See* United States v. Ruffin, 12 M.J. 952 (A.F.C.M.R. 1982) (hearsay statements by minors held admissible under Mil. R. Evid. 804(b)(5)).

[279]*Id.* at n.8.

[280]Mil. R. Evid. 804(b)(1). The record of the previous proceeding or hearing must be verbatim. *Id. See also* United States v. Norris, 16 C.M.A. 574, 37 C.M.R. 194 (1967). When the former testimony is offered against the defendant, the adequacy of the accused's representation by counsel should be considered as an element of the "opportunity and similar motive" requirement. Analysis of the 1980 Amendment to the Manual for Courts-Martial Analysis of Mil. R. Evid. 804, *reprinted at* MCM, 1969, A18-109. Direct and redirect examination of one's own witness may very often be equivalent to cross-examination. *See* Ohio v. Roberts, 448 U.S. at 70-71 & n.11; Mil. R. Evid. 607; Fed. R. Evid. 804(b)(1); Adv. Comm. Notes, 56 F.R.D. 183, 324.

[281]399 U.S. 149 (1970).

statement had been made at a preliminary hearing "under circumstances closely approximating those that surround the typical trial,"[282] and the Supreme Court suggested that an opportunity to cross-examine would have been sufficient under the circumstances.[283] The Court expanded this into a functional analysis in *Ohio v. Roberts*.[284] The declarant in *Roberts* had testified as a defense witness at the preliminary hearing and then disappeared. At the preliminary hearing, defense counsel had questioned the declarant in a fashion very similar to that of cross-examination.[285] Because the questioning "comported with the principal *purpose* of the cross-examination"[286] by challenging the declarant's veracity, the testimony was held sufficiently reliable for confrontation purposes.[287]

As the drafters of the Military Rules of Evidence noted, the unique nature of Artice 32 investigations[288] raises the question of how this hearsay exception applies to Article 32 hearings.[289] Article 32 hearings are designed "to function as discovery devices for the defense as well to recommend an appropriate disposition of charges. . . ."[290] Merely having an opportunity to develop the witness' testimony is not enough; there must be a similar motive in each proceeding to do so.[291] Thus, if a defense counsel only uses the Article 32 hearing for discovery purposes, the Rule prohibits use of Article 32 testimony under this exception unless the requisite similar motive existed.[292] While defense counsel's expression of intent during the Article 32 hearing is not subsequently binding on the military judge at trial,[293] the prosecution has the burden of establishing admissibility and the

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[282]*Id.* at 165. *See* United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Eggers, 3 C.M.A. 191, 11 C.M.R. 191 (1953); United States v. Chestnut, 4 M.J. 642 (A.F.C.M.R. 1977).

[283]California v. Green, 399 U.S. at 165-66. *See* R. Lempert & S. Saltzburg, A Modern Approach to Evidence 474-75 (2d ed. 1983).

[284]448 U.S. 56 (1980).

[285]*Id.* at 70 n.11. Reliability depends on the particular facts of each case instead of whether the witness was technically on cross-examination. *See id.* at 7.

[286]*Id.* at 71 (emphasis in original).

[287]*Id.* at 71, 78.

[288]U.C.M.J. art. 32.

[289]Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 804, *reprinted at* MCM, 1969, A18-109.

[290]*Id.* (citing Hutson v. United States, 19 C.M.A. 437, 42 C.M.R. 39 (1970); United States v. Samuels, 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959)). *See* United States v. Obligacion, 17 C.M.A. 36, 38, 37 C.M.R. 300, 302 (1967).

[291]Mil. R. Evid. 804(b)(1). The similar motive requirement exists to insure sufficient identify of issues, thus creating an adequate interest in examining the witness. S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 652 (3d ed. 1982) [hereinafter cited as Saltzburg & Redden].

[292]*See* note 289 *supra*.

[293]Analysis of Rule 804, *reprinted at* MCM, 1969, A18-110.

burden may be impossible to meet if defense counsel adequately raises the issue at trial.[294] To obviate this problem, the better practice is for a defense counsel who is using the Artice 32 hearing primarily for discovery purposes to announce that strategy during the hearing.[295]

While the typical scenario involves an attempt by the prosecution to introduce prior recorded testimony against the defendant, the reverse is also possible. Assuming the prior record is verbatim and properly authenticated,[296] the accused may want to use favorable testimony given at the earlier Article 32 hearing. If the government had an opportunity and similar motive to develop the witness' testimony at the Article 32 hearing, the testimony should be admitted.[297] It should be noted that these requirements are inapplicable if counsel merely wishes to do is to impeach the in-court testimony of a witness with testimony given at the Article 32 hearing. In such a case, the evidence is not being offered for its truth and no hearsay objection applies.[298]

(b). Business and public records"

Under Military Rules of Evidence 803(6) and (8), records of regularly conducted activity and public records and reports are admissible as exceptions to the hearsay rule. The essential requirement for the "business records" exception is that the record be made and kept "in the course of a regularly conducted business activity."[299] Justifi-

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[294] *Id.*

[295] *Id.*

[296] Mil. R. Evid. 804(b)(1), 902(4).

[297] United States v. Henry, 448 F. Supp. 819, 821 (D.N.J. 1978); United States v. Driscoll, 445 F. Supp. 864, 866 (D.N.J. 1978). *See* United States v. Klauber, 611 F.2d 512, 516-17 (4th Cir. 1979). *Contra* Saltzburg & Redden, *supra* note 291, at 657. *See* United States v. Atkins, 618 F.2d 366, 373 (5th Cir. 1980). The analysis is more complicated if the government is not represented by counsel at the Article 32 investigation. *See* MCM, 1969, para. 34*c*. Adopting the functional analysis of Ohio v. Roberts, 448 U.S. 56 (1980), the relevant inquiry should be the effect of the investigating officer's examination of the declarant and the qualifications of the investigating officer. *See also* MCM, 1969, para. 34*a*; Mil. R. Evid. 804(b)(1); note 218 *supra*.

[298] Mil. R. Evid. 801(c).

[299] Mil. R. Evid. 804(6). *See* Fed. R. Evid. 803(6), Adv. Comm. Notes, 56 F.R.D. 183, 308 (basis of exception). The specific list of records given in the rule are normally records of regularly conducted activity in the armed forces. Analysis of the 1980 Amendments to the Manual for Courts-Martial Analysis of Mil. R. Evid. 803(6), *reprinted at* MCM, 1969, A18-104. *See* United States v. Evans, 21 C.M.A. 579, 580, 45 C.M.R. 353, 354 (1972). If the circumstances surrounding the making of the report indicate a lack of trustworthiness, the report can be excluded. Mil. R. Evid. 803(6). *See* Palmer v. Hoffman, 318 U.S. 109 (1943). *But cf.* United States v. Evans, 21 C.M.A. at 582, 45 C.M.R. at 356 (when analyst is called to testify, issue is weight to be given to lab report, not initial admissibility).

cation for the public records exception lies in "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record."[300] These assumptions constitute the "indicia of reliability" satisfying the confrontation clause in this instance.[301] It is primarily the application of these exceptions to laboratory reports and the effect of the confrontation clause which has plagued the military courts;[302] the Court of Military Appeals has held that such reports are properly admitted under the business record exception.[303] In the view of the court, a chemical analysis is inherently neutral; the chemist's job is to analyze the substance, not exercise prosecutorial discretion,[304] and there is no reason to suspect the chemist of bias. The court's conclusions are subject to dispute, particularly where, as is the usual case in the Army, the laboratory report is the product of a forensic laboratory operated by a law enforcement agency. Recognizing that such reports are subject to attack on an individual basis, the court has allowed the defendant to attack the report's accuracy,[305] both in terms of the analyst's competence and the regularity of the test procedures.[306] Later cases have accepted this doctrine[307] and the Military Rules of Evidence expressly declare laboratory reports to be a hearsay exception.[308] A question not yet addressed, however, is

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[300]Fed. R. Evid. 803(8), Adv. Comm. Notes, 56 F.R.D. 183, 311 (citations omitted). The assumption, though, does not extend to the person who makes a report to the official or agency. *See* Saltzburg & Redden, *supra* note 291, at 579.

[301]*See* Comment, 30 La. L. Rev. 651, 668 (1970).

[302]*E.g.*, United States v. Vietor, 10 M.J. 69 (C.M.A. 1980); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979); United States v. Miller, 23 C.M.A. 247, 49 C.M.R. 380 (C.M.A. 1974); United States v. Evans, 21 C.M.A. 579, 45 C.M.R. 353 (C.M.A. 1972).

[303]*Id. Contra* United States v. Oates, 560 F.2d 45 (2d Cir. 1977). *See* United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978); State v. Henderson, 554 S.W. 2d 117 (Tenn. 1977).

[304]United States v. Evans, 21 C.M.A at 582, 45 C.M.R. at 356. *See* United States v. Hernadez-Rojas, 617 F.2d 533 (9th Cir. 1980); United States v. Orozco, 590 F.2d 789 (9th Cir. 1979); United States v. Grady, 544 F.2d 598 (2d Cir. 1978); Saltzburg & Redden, *supra* note 291, at 612; English, *Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?*, The Army Lawyer, May 1978, at 25, 30.

[305]United States v. Miller, 23 C.M.A. 247, 49 C.M.R. 380 (1974); United States v. Evans, 21 C.M.A. 579, 45 C.M.R. 353 (1972).

[306]As one writer has noted, the analyst's testimony will be of little use in most instances. English, *supra* note 304, at 31. *See* Dutton v. Evans, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring).

[307]*See, e.g.*, United States v. Vietor, 10 M.J. 69 (C.M.A. 1980); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979). The prosecution can avoid the laboratory report issue by stipulating to the identity of the substance tested or to the analyst's testimony or by deposing the chemist. In addition, the prosecution should inform the defense as soon as possible that the lab report will be offered into evidence and inquire if the defense desires the analyst's presence at trial. English, *supra* note 304, at 33.

[308]Mil. R. Evid. 803(6), (8)(c).

the degree to which a laboratory report may be used to present in summary form an expert opinion susceptible to disagreement. Although Military Rule of Evidence 803(6) expressly permits "business records" to contain "opinions", it is by no means clear that the Rule is intended to permit circumvention of the expert testimony rules, liberal though they are. Although current civilian law is sparse and confused, there may be a trend to admit records of regularly conducted activity containing expert opinion and to leave to the trial judge the discretion to rule the evidence inadmissible when, pursuant to Rule 803(6), "the course of information or the method or circumstances of preparation indicate lack of trustworthiness."[309] Inasmuch as Rule 803(6) states tha laboratory reports are "normally" admissible under the Rule, this approach, for example, would clearly permit the military judge to exclude a report which utilized a controversial scientific test.

Assuming that the laboratory exception is sufficiently "reliable" to satisfy the confrontation clause, the remaining problem is what showing must be made to obtain the testimony of the chemist.[310]

(c). Statements against interest

Statements against interest, notably confessions in criminal cases, are admissible as an exception to the hearsay rule.[311] Admissibility is premised on the fact that the statement would tend "to subject [the declarant] to civil or criminal liability" in such a fashion that a reasonable person would not make the statement unless he or she thought it to be true.[312] The assumption that people do not make disserving statements unless they are true underlies the exception[313] and this assumption appears to ordinarily establish "indicia of reliability" for confrontation purposes.[314] Particular concern for reliability accompanies the offer of a third party's confession to exculpate the defendant. To obviate the danger of fabrication, the Federal and

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[309]*See, e.g.*, United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979); United States v. Oates, 562 F.2d 45 (2d Cir. 1977); *but see* Clark v. City of Los Angeles, 650 F.2d 1033 (9th Cir. 1981). Some courts have required expert opinions expressed in business records to conform to the expert testimony rules generally, *see, e.g., id.*, while others do not address this issue. *See, e.g.*, Gardner v. Chevron U.S.A. Inc., 675 F.2d 658 (5th Cir. 1982).

[310]*See* text accompanying notes 469-92 *infra*.

[311]Mil. R. Evid. 804(b)(3). This assumes that Military Rules of Evidence 306 is not applicable.

[312]Mil. R. Evid. 804(b)(3).

[313]Fed. R. Evid. 804(b)(3), Adv. Comm. Notes, 56 F.R.D. 183, 327.

[314]*See also* United States v. Alvarez, 584 F.2d (5th Cir. 1978).

Military Rules of Evidence require corroborating evidence to "clearly indicate the trustworthiness of the statement."[315] If the confession includes statements implicating the accused, under general principles, the statements may be admissible as contextual statements.[316] Yet, there is some uneasiness in "identifying all third-party confessions implicating a defendant as legitimate declarations against penal interest."[317] A declarant's inculpatory statement made to the authorities which implicates the accused may be the result of a desire to improve the declarant's position in plea bargaining or a similar motive.[318] While the statement implicating the accused would then be self-serving and should be excluded as not against the declarant's interest,[319] a similar statement made to an accomplice could easily qualify as one falling under the hearsay exception.[320] Thus, any confrontation issue depends directly on the circumstances surrounding the declarant's confession.[321]

Arguably, the use of a co-defendant's confession violates the rationale of *Bruton v. United States*,[322] which held that use at a joint trial of co-defendant A's confession which implicates co-defendant B,

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[315]Fed. R. Evid. 804(b)(3); Mil. R. Evid. 804(b)(3). *See* McCormick, Evidence § 278, at 84 (2d ed. Supp. 1978).

[316]*Id.* at § 279, at 675-76 (2d ed. 1972). *See also* United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) (contextual statements admissible if neutral in interest and giving meaning to statement).

[317]United States v. McConnico, 7 M.J. 302, 308 (C.M.A. 1979) (citing Fed. R. Evid. 804(b), Adv. Comm. Notes, 56 F.R.D. 183, 328). *Accord* United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981); United States v. White, 553 F.2d 310 (2d Cir. 1977).

[318]United States v. McConnico, 7 M.J. at 308. *See Confrontation and Compulsory Process*, *supra* note 232, at 600 n.98.

[319]Fed. R. Evid. 804(b)(3), Adv. Comm. Notes, 56 F.R.D. at 328. *See* Parker v. Randolph, 442 U.S. 62, 85-86 (1979) (Stevens, J., dissenting); Bruton v. United States 391 U.S. 123, 141-42 (1968) (White, J., dissenting); United States v. Oliver, 626 F.2d 254 (2d Cir. 1980); United States v. Love, 592 F.2d 1022 (8th Cir. 1979); United States v. Lilley, 581 F.2d 182 (8th Cir. 1978). *But see* United State v. McConnico, 7 M.J. 302, 308 (C.M.A. 1979) (no reason to exclude when confession offered solely to establish commission of crime by principal, confession was voluntary, and declarant refused to testify because of privilege against self-incrimination).

[320]*See* McCormick, *supra* note 315, at § 278, at 83-84; Fed. R. Evid. 804(b), Adv. Comm. Notes, 56 F.R.D. at 328. *Cf.* Dutton v. Evans, 400 U.S. 74 (1970) (co-conspirator exception). *But see, e.g.*, United States v. Pena, 527 F.2d 1356 (5th Cir. 1976) (no declaration when declarant may not have believed he was confessing to crime).

[321]*See* United States v. McConnico, 7 M.J. 302, 309 (C.M.A. 1979). Obviously, if the co-defendant takes the stand, no problem exists inasmuch as the exception is premised on the declarant's unavailability. *See* Nelson v. O'Neil, 402 U.S. 622 (1971); Mil. R. Evid. 306; 76 Dick L. Rev. 354 (1972). *See also* United States v. Perner, 14 M.J. 181 (C.M.A. 1982).

[322]391 U.S. 123 (1968).

but which is not admissible against B, violates B's confrontation right and that limiting instructions are inadequate to protect B.[323] The confession strengthens the government's case by evidence that the co-defendant B cannot test by cross-examination, and the evidence is equally damaging whether it proves the fact of the commission of the crime or the identity of the defendant as perpetrator.[324] The declarant's confession will often be as inconsistent with the defense, even if it does not explicitly refer to the defendant or of anyone else, as if it clearly named the defendant; the confession can factually contradict the defense's theory, or the facts can be such that both the declarant and the defendant are probably guilty if either is.[325] The Court of Military Appeals has avoided the issue in light of the differing opinions of the Supreme Court, preferring to decide the question by assuming a violation of the confrontation clause and then deciding the error war harmless.[326]

3. The Right to Cross-Examine the Government's Witnesses at Trial

a. In General

While the Sixth Amendment constitutionalizes the state's duty to disclose its evidence to the accused at trial and, to some degree, a duty to present its evidence in the best available form,[327] it also protects the accused's interest in cross-examining opposing witnesses. In *Smith v. Illinois*,[328] the defendant was prevented from cross-examining a prosecution witness about his real name and address, apparently because the information was deemed irrelevant and thus beyond the scope of cross-examination. Reversing the conviction, the Supreme Court held that the permissible scope of defense cross-examination of a prosecution witness is measured by independent constitutional standards.[329] *Smith* reflects the concept that, when applicable, the right to confrontation pre-empts the normal rules of evidence.[330]

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[323]*But see* Parker v. Randolph, 442 U.S. 62(1979) (*Bruton* not applicable to interlocking confessions of multiple defendants with proper limiting instructions).

[324]*See* United States v. McConnico, 7 M.J. 302, 315-16 (C.M.A. 1979) (Perry, J., dissenting). *But see id.* at 309-10. *Cf.* Parker v. Randolph, 442 U.S. at 72-73 (co-defendant confession less prejudicial when defendant has confessed also).

[325]A. Amsterdam, Trial Manual for the Defense of Criminal Cases 1-273, -359 to -360 (3d ed. 1975).

[326]United States v. McConnico, 7 M.J. at 309-10.

[327]*See* text accompanying notes 248-326 *supra*.

[328]390 U.S. 129 (1968).

[329]*Id.* at 132-33.

[330]*See* Alford v. United States, 282 U.S. 687 (1931); United States v. Jacoby, 11 C.M.A. 428, 432, 29 C.M.R. 244, 248 (1960); United States v. Speer, 2 M.J. 1244 (A.F.C.M.R. 1976).

The Court has demonstrated that the constitutional standard in this context is strict. In *Davis v. Alaska*,[331] an important state witness was a juvenile on juvenile court probation. Relying on a state law designed to protect the confidentiality of juvenile court records, the trial judge precluded defense cross-examination relating to the witness' juvenile record and his possible bias. Even though the state had an "important interest" in creating a privilege for juvenile records,[332] the Court held that the defendant's right of confrontation outweighed the state's interest. *Davis* suggests that the defendant's right of cross-examination can be defeated, if at all, only for the most compelling reasons.[333] Although the Court's opinions in this area, strictly construed, indicate only that the defense must be permitted to show the bias of a hostile witness,[334] it is apparent that they stand for the proposition that the accused must be permitted a meaningful cross-examination of a witness despite local rules of evidence.[335]

Cross-examination serves three main functions: it sheds light on the credibility of the direct testimony; it brings out additional facts related to those elicited on direct examination; and in jurisdictions allowing "wide open" cross-examination,[336] it brings out any additional facts tending to elucidate any issue in the case.[337] While the standard of relevancy applied to direct testimony can be logically

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[331]415 U.S. 308 (1974).

[332]*Id.* at 319.

[333]*Confrontation and Compulsory Process*, *supra* note 232, at 581. *Davis* also implies that cross-examination for impeachment purposes is more favored in confrontation analysis. *See* United States v. Saylor, 6 M.J. 647 (N.C.M.R. 1978); United States v. Streeter, 22 C.M.R. 363 (A.B.R. 1956); Fed. R. Evid. 611(b); Mil. R. Evid. 611(b); McCormick, *supra* note 315, at § 29, at 58 (2d ed. 1972). When the witness refuses to answer on cross-examination, then "the accused's usual remedy for this denial of his right to confront an adverse witness is to have that witness' direct testimony stricken from the record." United States v. Rivas, 3 M.J. 282, 285 (C.M.A. 1977) (footnote omitted). *See also* Mil. R. Evid. 301(f)(2); United States v. Demchak, 545 F.2d 1029 (5th Cir. 1977); United States v. Vandermark, 14 M.J. 690 (N.M.C.M.R. 1982). The remedy must be requested by the defense and is invariably granted unless the refusal applies only to "collateral" matters. United States v. Hornbrook, 14 M.J. 663 (A.C.M.R. 1982); United States v. Lawless, 13 M.J. 943 (A.F.C.M.R. 1982). However, the military judge has no duty to strike, *sua sponte*, the direct testimony in order to insure the basic fairness of the court-martial when the direct testimony is not *per se* inadmissible. *Rivas*, 3 M.J. at 286.

[334]Davis v. Alaska, 415 U.S. 308 (1974); Alford v. United States, 282 U.S. 687 (1931).

[335]*See, e.g.*, Davis v. Alaska, 415 U.S. at 320, in which the Court states that the state's policy in protecting juvenile offenders' records "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."

[336]McCormick, *supra* note 315, at § 21, at 47 (2d ed. 1972).

[337]*Id.* at § 29, at 57. *See also* E. Imwinkelreid, P. Giannelli, F. Gilligan & F. Lederer, Criminal Evidence 11-12 (1979). The armed forces is not a "wide open" jurisdiction, as cross-examination is restricted to the scope of the direct. Mil. R. Evid. 611(b).

applied to facts elicited on cross-examination for use on the merits,[338] the standard is markedly different for facts obtained to evaluate the credibility of evidence given during direct examination. In that instance, the test is "whether it will to a useful extent aid the court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony."[339] Questioning for this purpose takes various forms, and the criteria of relevancy are vague. Close adherence to a fixed standard may limit the usefulness of the cross-examination, but the dangers of undue prejudice and excessive consumption of time clearly lurk in the background.[340] Clearly, evidence which is irrelevant cannot invoke the confrontation clause. However, it is probable that evidence which is technically relevant to impeachment might not have the degree of probative value of importance necessary to make the clause applicable.

b. The rape shield rule

(1). In general

In one situation in particular, that of sexual assault cases, potentially relevant cross-examination has been restricted by the Military Rules of Evidence. When the issue of consent is raised in a forcible rape case, evidence of the character trait of the victim has generally been considered relevant.[341] In reaction to political pressure from women's rights organizations and law enforcement agencies,[342] however, the overwhelming majority of jurisdictions now limit the relevance of the past sexual behavior of a victim of a forcible sexual offense.[343] The military approach, codified in Military Rule of Evidence 412, substantially follows Federal Rule of Evidence 412.[344] Subdivision (a) expressly declares that, in any case in which the defendant is charged with a "nonconsensual sexual offense,"[345] the court-martial cannot admit into evidence reputation or opinion evi-

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[338]McCormick, *supra* note 315, at § 29, at 58.

[339]*Id.*

[340]Thus, the trial judge has the power to control the extent of cross-examination. Fed. R. Evid. 611(a); Mil. R. Evid. 611(a).

[341]McCormick, *supra* note 315, at § 193, at 59.

[342]23 C. Wright & K. Graham, Federal Practice & Procedure: Evidence § 5382, at 492-531 (1980) [hereinafter cited as Wright & Graham].

[343]"[A]lmost every jurisdiction in this country has enacted some sort of rape shield law." R. Lempert & S. Saltzburg, A Modern Approach to Evidence 636 (2d. ed. 1983).

[344]Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Mil. R. Evid. 412, *reprinted at* MCM, 1969 A18-65. The military rule is somewhat broader than the civilian rule in that it applies to any "nonconsensual sexual offense." Mil. R. Evid. 412(a).

[345]Illustrations of included offenses are listed in Mil. R. Evid. 412(e).

dence concerning the past sexual behavior[346] of an alleged victim.[347] Subdivision (b) precludes admission of the victim's past sexual behavior unless the evidence is constitutionally required or offered to show:

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the course of semen or injury; or
(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.[348]

Noteably, Rule 412(a), unlike Rule 412(b), does not provide in its text for admission of evidence that is constitutionally required by otherwise prohibited by the Rule. The drafters of the Rule, however, declared in their Analysis that "evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a)."[349]

(2). Potential confrontation problems

Rape shield laws, including Military Rule of Evidence 412, have generally been upheld against claims that they violate the right of confrontation.[350] Nevertheless, the rule's application in a particular case may violate the defendant's right to cross-examine a prosecution witness.[351]

Rule 412(a)'s seemingly absolute prohibition on reputation or opinion evidence may run afoul of the confrontation clause in a number of circumstances. The accused might, for example, wish to offer evidence of the victim's reputation for certain sexual practices in order

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[346]"Past sexual behavior" is defined in Mil. R. Evid. 412(d). *See* Wright & Graham, *supra* note 342, at § 5384, at 538-48.

[347]Mil. R. Evid. 412(a). Compare Mil. R. Evid. 405(a) (when character evidence is used circumstantially, only reputation or opinion evidence is admissible). Rule 412 takes the opposite view, admitting *only* specific acts and limiting the circumstances in which that evidence is admissible. *See* Saltzburg & Redden, *supra* note 291, at 222.

[348]*See* note 344, *supra*.

[349]Mil. R. Evid. 412(b).

[350]United States v. Hollimon, 12 M.J. 791, 793 (A.C.M.R. 1982); United States v. Mahone, 14 M.J. 521, 526 n.4 (A.F.C.M.R. 1982) (dicta). *See generally* cases cited in Annot., 1 A.L.R. 4th 283, 292-300 (1980); Wright & Graham, *supra* note 342, at § 5387, at 571 n.53.

[351]Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973).

to show that he acted in good faith and in accord with that reputation and thus did not intentionally use force or acted under a reasonable mistake of fact.[352] Professors Saltzburg and Redden suggest that the peculiar transient status of the armed forces[353] presents another problem as defense witnesses may be unavailable and opinion or reputation evidence may be the only form of evidence available.[354]

The remainder of subdivision (b) of Rule 412 expressly provides that evidence constitutionally requires to be admitted shall be admitted despite the general prohibition on evidence of the sexual history of the victim. The problem is in determining when the confrontation clause will require such evidence. One possible situation may occur when the victim's sexual history is proffered to show a motive for fabricating a rape charge;[355] the rape charge might be used by the victim to explain her pregnancy[356] or, in the case of a minor, her all-night absence from home.[357] Applying the Rule becomes more problematic in other contexts, such as impeachment by showing bias or specific contradiction. In a group rape case, the accused might claim, for example, that the victim's testimony has been influenced because she had previously had sexual relations with one of the rapists. Conversely, a witness who corroborates part of the victim's story might be biased because he or she is her lover or, at the least, has previously had sexual relations with the victim.[358] *Davis v. Alaska*[359] may be little help in such a case as *Davis* could be read as allowing cross-examination to establish that the witness has a reason to accuse someone, but without showing that the witness has a particular bais for accusing the defendant.[360]

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[352]*See* Saltzburg & Redden, *supra* note 291, at 222.

[353]Saltzburg & Redden, *supra* note 291, at 103 (2d ed. Supp. 1981).

[354]Saltzburg & Redden, *supra* note 291, at 222. *See also* United States v. Elvine, 16 M.J. 14, 18 (C.M.A. 1983).

[355]United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983); United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983); United States v. Ferguson, 14 M.J. 840 (A.C.M.R. 1982); State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975); State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976). In *Ferguson*, the Court of Review held that evidenceof the victim's past sexual history, coupled with the testimony of a psychiatrist, should have been admitted to establish a motive for a false accusation of rape. The court's opinion reviews a number of cases dealing with the effect of the confrontation clause on rape shield rules and represents a useful resource to counsel faced with this issue. *See also* United States v. Elvine, 16 M.J. 14 (C.M.A. 1983) (inadequate offer of proof).

[356]State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975).

[357]Wright & Graham, *supra* note 342, at § 5387, at 574 n.73.

[358]*Id.* at 576.

[359]415 U.S. 308 (1974).

[360]Wright & Graham, *supra* note 342, at § 5387, at 577.

It has been assumed that the accused has the right to contradict evidence of sexual behavior elicited by the prosecution, such as evidence that, prior to the incident, the victim was a virgin.[361] This view assumes too much; Rule 412 bars such evidence whoever introduces it and ordinarily the accused has no right to compound the error.[362] On the other hand, evidence of prior sexual behavior may be relevant to rebut testimony not inadmissible itself under Rule 412.[363]

The victim's credibility is also challengeable by showing some defect in her ability to perceive, recall, or narrate.[364] Such defects may implicitly involve proof of prior sexual behavior, such as mental defects caused by tertiary syphilis.[365] In some cases, admission of the evidence may be required under the confrontation clause.[366]

Impeaching the victim by introducing evidence by false accusations has not received much attention. Under the terms of Rule 412, this is not "past sexual behavior."[367] Admission would seem to be limited by Military Rule of Evidence 608, which limits impeachment by specific acts to inquiry on cross-examination and subjects it to the court's discretion.[368] Notwithstanding the strictures of Rule 608, an accused's constitutional right to cross-examine in this instance includes the right to introduce evidence of previous false accusations.[369]

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[361]Wright & Graham, *supra* note 342, at § 5387, at 577.

[362]*Id.* at 581. The commentators contradict themselves at this point, saying first that admission of impeachment or rebuttal evidence may be constitutionally required, and then that impeachment by specific contradiction need not be permitted under Rule 412(b)(1). *Compare* Wright & Graham, *supra* note 342, at § 5386, at 562-63 *with id.* at § 5387, at 576-77. Impeachment through bias appears to be allowed, however. Waiver may be inapplicable here because the Rule is intended in part to protect the *victim* who is not a party to the case. Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981).

[363]For example, to counter a claim that the rape has left the victim debilitated, evidence that she later engaged in strenuous sexual activity might be profferred. When the victim denies a bias against the accused, episodes of lesbian activities might be submitted as contradiction. Wright & Graham, *supra* note 342, at § 5387, at 577 n.90. *See id.* at 581. Clearly, the exception suggestion here should be narrowly construed to prevent the exception from overwhelming the rule.

[364]McCormick, *supra* note 315, at § 45, at 93.

[365]Evidence of disease or physical condition, *per se*, are not rendered inadmissible by Mil. R. Evid. 412.

[366]Wright & Graham, *supra* note 342, at § 5387, at 577. *But see* People v. Nemie, 87 Cal. App. 3d 926, 151 Cal. Rptr. 32 (1978) (evidence of victim's prior sexual history excluded on issue of her ability to perceive penetration).

[367]Mil. R. Evid. 412(d). *See also* Wright & Graham, *supra* note 342, at § 5384, at 546-47.

[368]Mil. R. Evid. 608(b).

[369]Wright & Graham, *supra* note 342, at § 5387, at 580. A distinction should be made between accusations which are factually unfounded and cases which are dismissed.

Finally, the accused might wish to impeach the victim with evidence of past convictions. While Rule 609 would appear to control the situation, admitting the conviction into evidence,[370] the harder case arises when the impeachment is by convictions for past sex-related crimes, such as prostitution or obscenity. Rule 412 does not by its express language exclude such evidence for it is the fact of criminal conduct, the conviction, which is important. However, such evidence indirectly includes evidence of past sexual conduct. Though *Davis v. Alaska*[371] may appear to require admission of the convictions, it may not be controlling; some courts have concluded that *Davis* only allows use of juvenile convictions for bias rather than for general impeachment.[372] Thus, a prostitution conviction might be used to show that the victim had a reason to accuse the defendant of rape, but not to merely impeach the victim's veracity. This issue is not likely to arise as these sexually related convictions are not likely to be probative of untruthfulness and thus neither admissible under Military Rules of Evidence 609(a) or 608(b) or *Davis*.

c. Cross-examination during suppression hearings

Though the accused's right to cross-examine is generally protected and can be abridged only for compelling reasons,[373] a less stringent standard is used in suppression hearings, as suggested by *McCray v. Illinois*.[374] The Supreme Court in *McCray* held that the confrontation clause was not violated when the judge hearing the suppression motion refused to allow defense cross-examination directed toward obtaining the name and address of the informant alleged to have provided probable cause for the arrest. Lower courts have extended *McCray* to situations in which valid security interests necessitate receiving *in camera* government evidence proffered at the suppression hearing.[375] In such instances, however, a "least restrictive alternative" approach is used; confrontation is limited only to the extent

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[370]Mil. R. Evid. 609(a). The military judge's discretion to exclude the evidence is not applicable since exclusion is warranted only if the probative value of the conviction is less than "its prejudicial effect to the accused." Mil. R. Evid. 609(a)(1). Such evidence is hardly prejudicial to the accused but is only of concern to the victim.

[371]415 U.S. 308 (1974).

[372]*E.g.*, People v. Conyers, 86 Misc. 2d 754, 382 N.Y.S. 2d 437 (Sup. Ct. N.Y. County 1976); State v. Barr, 18 Or. App. 494, 525 P.2d 1067 (1974). *Contra* State v. Cox, 42 Ohio St. 2d 200, 327 N.E. 2d 639 (1975).

[373]*See* text accompanying notes 18-340 *supra*.

[374]386 U.S. 300 (1967).

[375]*E.g.*, United States v. Bell, 464 F.2d 667 (2d Cir. 1972) (when government introduced hijacker detection profile, the defendant was excluded, but defense counsel was allowed to cross-examine). *Cf.* Gannett Co. v. DePasquale, 443 U.S. 368, 439 (1979)

necessary to protect the valid government interest.[876] While the court may restrict cross-examination to avoid "backdoor" discovery by the defense, it may not limit questioning that is clearly relevant to the defense claim.[877]

C. THE RIGHT OF COMPULSORY PROCESS

1. The right to compel the attendance of available witnesses at trial

a. In general

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Under the Uniform Code of Military Justice, the accused has the same ability as the prosecution to secure "witnesses and other evidence."[878] The statutory provision implements the defendant's right of compulsory process under the Sixth Amendment.[879] Compulsory process, at the least, means that the defendant is entitled to use the government's subpoena power in order to compel the attendance of witnesses on behalf of the defense. In addition, the clause stands as an independent standard, doing more than incorporating by reference whatever subpoena rights the defendant has under statute.[350] As such, the defendant's right of compulsory process goes beyond the subpoena power and includes not only writs of attachment and writs of habeas corpus *ad testificandum*,[881] but noncoercive devices for requesting and inducing the appearance of witnesses, such as the good faith power of the prosecution and the convening authority to

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(Blackmun, J., concurring in part, dissenting in part) (exclusion of public); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977) (same); United States v. Arroyo-Angulo, 580 F.2d 1137 (2d Cir. 1978) (some defendants and counsel excluded from selected pretrial proceedings upon request of other defendants who were informants). These incidents can also be analyzed in terms of the government's privilege to withhold classified or sensitive information or the identity of an informant. *See* Mil. R. Evid. 505(i), 506(i), 507(d) (*in camera* hearings to determine extent of disclosure). *See also* Wellington, *In Camera Hearings and the Informant Identity Privilege Under Military Rule of Evidence 507*, The Army Lawyer, Feb. 1983, at 9.

[876]United States v. Clark, 475 F.2d 240 (2d Cir. 1973).

[877]Hill v. United States, 418 F.2d 449 (D.C. Cir. 1968).

[878]U.C.M.J. art. 46.

[879]United States v. Davison, 4 M.J. 702, 704 (A.C.M.R. 1977).

[350]Wigmore believed otherwise, 8 J. Wigmore, Evidence § 2191 (rev. ed. J. McNaughton 1961), but the courts have been reluctant to construe the clause so narrowly. *See* State *ex rel.* Rudolph v. Ryan, 327 Mo. 728, 38 S.W. 2d 717 (1931); State *ex rel.* Gladden v. Lonergan, 201 Or. 163, 269 P.2d 491 (1954).

[881]*See, e.g.*, Barber v. Page, 390 U.S. 719, 724 (1968) (dictum); Johnson v. Johnson, 375 F. Supp. 872 (W.D. Mich. 1974); Curran v. United States, 332 F. Supp. 259 (D. Del. 1971) (denying petition on facts). *See also* 28 U.S.C. § 2241(c)(5) (1976) (authorizing writs of habeas corpus *ad testificandum* and *ad prosequendum*). For the nature of military compulsory process, *see* text accompanying notes 18-20 *supra*.

ask a person to return as a witness.[382] Witnesses within and outside the jurisdiction are encompassed by the right.[383]

Though the compulsory process right is extensive, it is not absolute. The government has no duty to search for witnesses whom it has no reasonable probability of discovering or producing.[384] Instead, as with the government's obligation to confront the accused with witnesses against him,[385] the government need only make a good faith effort to locate and product defense witnesses.[386] The similarity should not be surprising in light of the common purpose of the confrontation clause and the compulsory process clause to secure "the attendance of witnesses in order to enhance the ability of a defendant to elicit and present testimony in his defense."[387] The defense's right to witnesses extend only to "material witnesses".[388] Within the armed forces, the determination of materiality "is not susceptible to gradation. The testimony of a given witness either is or is not material to the proceeding at hand,"[389] and "once materiality has been shown the Government must either produce the witness or abate the proceedings."[390] Given the state of military criminal law,

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[382]*Compare* Barber v. Page, 390 U.S. 719 (1968), *with* Mancusi v. Stubbs, 408 U.S. 204 (1972). The results of the two cases can be seen as requiring the prosecution to use established procedures making it reasonably likely that the witness would be produced, but not requiring use of futile or improbable procedures. Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 286-88 (1975) [hereinafter cited as *Compulsory Process II*]. *See also* United States v. Davison, 4 M.J. 702, 705 (A.C.M.R. 1977) (Jones, S.J., concurring).

[383]*Compulsory Process II*, *supra* note 382, at 281-98. This is not to say, however, that a court will necessarily have the statutory or inherent power to compel the attendance of a witness. *See* note 116 for the limitations on court-martial subpoena power when trial takes place in a foreign nation.

[384]Mancusi v. Stubbs, 408 U.S. 204 (1972). *Cf.* Ohio v. Roberts, 448 U.S. 56, 74 (1980); United States v. Killebrew, 9 M.J. 154, 161 (C.M.A. 1980).

[385]*See* text accompanying notes 324-37.

[386]Mancusi v. Stubbs, 408 U.S. 204 (1972); United States v. Vietor, 10 M.J. 69, 72 (C.M.A. 1980) (Cook, J.); United States v. Davison, 4 M.J. 702, 705 (A.C.M.R. 1977) (Jones, S.J., concurring); United States v. Kilby, 3 M.J. 938, 944 (N.C.M.R. 1977). Once the witness is found, the government cannot lose him. *See* United States v. Potter, 1 M.J. 897 (A.F.C.M.R. 1976). Conversely, the defense must use reasonable diligence in obtaining evidence. *E.g.*, United States v. Jones, 6 M.J. 770 (A.C.M.R. 1978); United States v. Onstad, 4 M.J. 661 (A.C.M.R. 1977); United States v. Marshall, 3 M.J. 1047, 1049 n.2 (A.F.C.M.R. 1977); United States v. Carey, 1 M.J. 761 (A.F.C.M.R. 1975); United States v. Corley, 1 M.J. 584 (A.C.M.R. 1975); United States v. Young, 49 C.M.R. 133 (A.F.C.M.R. 1974).

[387]*Confrontation and Compulsory Process*, *supra* note 232, at 589.

[388]*Cf.* United States v. Valenzuela-Bernal, 74 L.Ed.2d 1193 (1982). *See generally* text accompanying notes 48-58 *supra*.

[389]United States v. Willis, 3 M.J. 94, 95 (C.M.A. 1977).

[390]United States v. Carpenter, 1 M.J. 384, 385-86 (C.M.A. 1976). *Accord* United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977). There is no constitutional right to introduce irrelevant or immaterial evidence. Washington v. Texas, 388 U.S. 14, 23 (1967); *Williams*, 3 M.J. at 242.

the only significant compulsory process problem is the requirement found in paragraph 115 of the Manual for Courts-Manual that a request for defense witnesses be submitted to the trial counsel with adequate justification previously discussed. The compulsory process clause, has, however, importance beyond its basic ambit for it would appear to not only provide the defense with its fundamental right to obtain defense witnesses but also to provide the defense with the authority to obtain and present important defense evidence notwithstanding usual procedural and evidentiary rules.[391]

b. Requiring the government to grant immunity to prospective defense witnesses

Under current law, the defense has a constitutional right to obtain available material defense witnesses. A particular problem is posed when the only reason that a witness will be unavailable is because the testimony of the witness would be self-incriminatory. Most such witnesses would refuse to testify against their interests voluntarily, of course, and the Fifth Amendment and Article 31 privileges against self-incrimination would prohibit the defense from calling them involuntarily. When the prosecution has a similar problem, it has the power to grant immunity to the witness[392] which grant deprives the witness of any valid constitutional objection to testifying.[393] Although the prosecution could grant immunity to defense witnesses in order to enable them to testify, it almost without fail will refuse to do so voluntarily. Prosecutors will point out that bestowal of immunity complicates or makes impossible subsequent prosecution of the witness,[394] that there is no way in which to adequately insure in advance that the witness's testimony is material, and that immunizing defense witnesses would interfere with prosecutorial discretion and run the risk of immunizing large "fish" in order to prosecute "small fry". All of these concerns are valid. It may be, however, that the defense may be able to make an adequate offer of proof as to the

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[391]Insorfar as the potential conflict between the defense's need for evidence and the shielding effect of evidentiary privileges, *see* Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 159-77 (1974). *See also* text accompanying notes 161-221 *supra*.

[392]Kastigar v. United States, 406 U.S. 441, 453 (1972).

[394]The prosecution could grant the accused use immunity, Kastigar v. United States, 406 U.S. 441 (1972); Mil. R. Evid. 301(c)(1), under which nothing the witness said, or any product thereof, could later be used against the witness. However, military law takes an unusually expansive view of the derivative evidence rule and it would be very difficult for the prosecution to adequately prove in court that a case against an immunized witness was actually prepared and tried without use of the immunized testimony. United States v. Rivera, 23 C.M.A. 430, 50 C.M.R. 389, 1 M.J. 50 (1975).

anticipated testimony of the witness.[395] Further, prosecutorial discretion is in the control of the government. If the prospective defense witness is a more culpable offender than the accused, the government should not be heard to complain that its own election of how to proceed has caused it eventual difficulties. In short, in an appropriate case, the defense's right to the testimony of a material witness should outweigh the government's interest in not bestowing use immunity on the witness.[396] Thus far, however, the courts have been extremely reluctant to compel the government to grant immunity to defense witnesses.[397] Within the armed forces, the ultimate resolution of this issue is unclear. With a majority of the three member

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[395]A procedure may exist, at least in civilian life, to cope with the situation in which the defense may demonstrate a reasonable belief that the witness has material testimony but is unable to actually demonstrate the existence of the testimony. Arguably

> a judge can grant the witness use immunity for purposes of an in camera hearing out of the presence of the prosecutor, in order to determine whether the witness possesse exculpatory evidence. If the testimony is material, the court can then force the prosecution to choose between allowing the witness to testify in open court under a grant of use immunity or withholding immunity and thus foregoing prosecution. If the witness' evidence is immaterial, the judge can then seal the in camera testimony, thereby protecting the witness from self-incrimination while sparing the prosecution the burden of attempting to trace any further evidence against the witness to independent sources.

Confrontation and Compulsory Process, *supra* note 232, at 581-82 n.38 (citing United States v. Melchor Moreno, 536 F.2d 1042, 1047 n.7 (5th Cir. 1976)). Professor Westen questions the ability of the court to prevent disclosure to the prosecution. *Id*, but if evidence allegedly privileged against disclosure to the defense can be protected, *see* Mil. R. Evid. 505-07, the legality of which may be suspect insofar as *ex parte* in camera proceedings are concerned, there seems to be no reason why disclosure to the prosecution is any more probable. The issue is further complicated by the fact that, usually, immunity is granted by the convening authority rather than the military judge in the armed forces. Thus, the intermediate use of immunity would normally need command cooperation and it is not likely that a trial judge would threaten dismissal of charges if the convening authority failed to grant such immunity with the potential evidence being so speculative.

[396]*See* Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); State v. Broady, 41 Ohio App. 2d 17, 321 N.E. 2d 890 (1974). But the government's interest is established if the witness is a potential target of prosecution. United States v. Turkish, 623 F.2d 769 (2d Cir. 1980). The granting of immunity to the witness need not be the only possible remedy, however. In an appropriate case, the case might be continued until the witness's status is clarified, such as by conviction. *But see* United States v. Villines, 13 M.J. 46 (C.M.A. 1982) (right against self-incrimination in contested case persists pending appeal).

[397]*See, e.g.*, United States v. Jones, 13 M.J. 407 (C.M.A. 1982); United States v. Herman, 589 F.2d 1191 (3d Cir. 1978); United States v. Carmen, 577 F.2d 556 (9th Cir. 1978). For cases discussing an asserted duty to grant defense witnesses immunity, *see* United States v. Villines, 13 M.J. 46 (C.M.A. 1982); United States v. Barham, 625 F.2d 1221 (5th Cir. 1980); Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); United States v. Alessio,

court sustaining a conviction in which a defense request that a defense witness be granted immunity was denied, the Court of Military Appeals was badly divided on this issue in *United States v. Villines*,[398] a decision consisting of an opinion by Judge Fletcher, with Judge Cook concurring in the result, and Chief Judge Everett dissenting. A synthesis of the three opinion suggests that a majority of the present court believes that immunity can be granted to enable defense witnesses to testify "when clearly exculpatory evidence is involved". Furthermore, the decision on such a defense request must be made without utilizing "an unjustifiable standard [or improper consideration] such as race, religion, or other arbitary classification. . ." and without the intent of making such a decision "with the deliberate intention of distorting the judicial fact finding process."[399] Rejecting the view of Chief Judge Everett that both the general court-martial convening authority and the military judge may grant immunity, Judges Fletcher and Cook appear to hold that only the convening authority has that power. Given the divided nature of the court in *Villines*, further litigation can be expected in this area.

c. Improper joinder

Joinder of accuseds is allowed under paragraph 26*d* and 33*l* of the Manual for Courts-Martial. The procedure creates several savings, notably time, expense, and prosecutorial effort.[400] The Manual counsels, however, that if "the testimony of an accomplice is necessary, he should not be tried jointly with those against whom he is expected to testify."[401] From the accused's perspective, joinder may deny the defense the benefit of favorable testimony from a co-accused, either because the testimony would improperly prejudice the co-accused[402]

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528 F.2d 1079 (9th Cir. 1976); United States v. Lowell, 490 F. Supp. 897 (D.N.J. 1980); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979). *See generally* Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983). Though there may be no constitutional obligation on the prosecution to grant immunity to defense witnesses, *but see Confrontation and Compulsory Process*, *supra* note 232, at 581 n.38, arguably, an obligation under Article 46 exists in order to effectuate the article's mandate of equal access to witnesses. *But cf.* United States v. Davison, 4 M.J. 702, (A.C.M.R. 1977) (Art. 46 only implements Sixth Amendment rights).

[398]13 M.J. 46 (C.M.A. 1982).

[399]*Id.* at 55. In United States v. Jones, 13 M.J. 407 (C.M.A. 1982), the court rejected a defense claim that it was entitled to have a defense witness immunized, stating that there was no "reasonably foreseeable testimony" beneficial to the defense.

[400]MCM, 1969, para. 26*d*; Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 141 (1974) [hereinafter cited as *Compulsory Process*].

[401]MCM, 1969, para. 26*d*.

[402]*E.g.*, Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

or because the co-accused refuses to testify.[403] The principal problem in such a case is determining if joinder is the real cause of the co-accused's silence.[404] Such claims for severance are usually treated with skepticism, especially in civilian courts.[405] The Manual for Courts-Martial, however, declares: "In a common trial, a motion to sever will be liberally considered"[406] and states that one of the "more common grounds for this motion are that the mover desires to use at his trial the testimony of one or more of his co-accused . . . ."[407] In light of the prosecution's obligation to avoid harassing or discouraging defense witnesses from testifying[408] and the Manual's liberal standard, the accused should not be required to show to a certainty that joinder silenced the co-accused and, for example, if the accused shows that the co-accused has already given exculpatory testimony out-of-court and that joinder could silence the witness, the government should be required to show that joinder would have no such effect.[409] Severance should certainly be ordered whenever it is more probable than not that the co-accused will testify for the accused at a separate trial.[410]

2. The Right to be Present for the Testimony of Defense Witnesses at Trial

There is little, if any, discussion in the case law on the extent of the accused's constitutional right to be present when defense witnesses testify as the government is "not in the habit of requiring defense witnesses to testify outside the defendant's presence."[411] The issue

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[403]*E.g.*, United States v. Shuford, 454 F.2d 772 (4th Cir. 1971).

[404]*Compulsory Process*, *supra* note 400, at 142-43.

[405]*See* United States v. Boscia, 573 F.2d 827 (3d Cir. 1978); United States v. Bumatay, 480 F.2d 1012 (9th Cir. 1973); United States v. Pellon, 475 F. Supp. 467 (S.D.N.Y. 1976), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980); United States v. Stitt, 380 F. Supp. 1172 (W.D. Pa. 1974), *aff'd mem.*, 510 F.2d 971 (3d Cir. 1975); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y. 1970). *But see* MCM, 1969, para. 69*d* (military practice).

[406]*Id.*

[407]*Id.*

[408]*See* text accompanying notes 460-68 *infra*.

[409]*Compulsory Process*, supra note 400, at 143. *See* United States v. Duzac, 622 F.2d 911 (5th Cir. 1980); United States v. Starr, 584 F.2d 235 (8th Cir. 1978); United States v. Smolar, 557 F.2d 13 (1st Cir. 1977); United States v. Anthony, 565 F.2d 533 (8th Cir. 1977); United States v. Kozell, 468 F. Supp. 746 (E.D. Pa. 1979); United States v. Aloi, 449 F. Supp. 698 (E.D.N.Y. 1977); United States v. Iezzi, 451 F. Supp. 1027 (W.D. Pa. 1976), *aff'd. sub nom.* United States v. Boscia, 573 F.2d 827 (3d Cir. 1978); United States v. Buschmann, 386 F. Supp. 822 (E.D. Wis. 1975), *aff'd on other grounds*, 527 F.2d 1082 (7th Cir. 1976).

[410]*See* United States v. Duzac, 622 F.2d 911 (5th Cir. 1980); United States v. Boscai, 573 F.2d 827 (3d Cir. 1978); United States v. Wofford, 562 F.2d 582 (8th Cir. 1977); United States v. Bumatay, 480 F.2d 1012 (9th Cir. 1973); MCM, 1969, para. 69*d* (citing this as one of the "more common grounds" for severance).

[411]*Confrontation and Compulsory Process*, *supra* note 232, at 589.

could arise nonetheless in the context of the presentation of classified information. In this instance, the accused's analogous right under the confrontation clause is relevant. The accused has the right to be present when government witnesses testify and the right can be defeated only when the accused voluntarily leaves the jurisdiction after arraignment or disrupts trial.[412] The principle established under the confrontation clause applies with equal force in the context of the compulsory process clause. In each case, the accused's interests in being present are the same. During the prosecution's case-in-chief, the accused needs to know exactly what the government witnesses are saying in order to prepare the defense. When presenting the defense, the accused needs to know exactly what the defense witnesses are saying so that he or she can better elicit testimony. As a result, the accused's interests should be infringed only when the accused forfeits the right[413] or for a compelling government interest.[414]

It is not immediately apparent why the accused should be present to hear his or her own witnesses; preparation for trial should show in advance what defense witnesses will say. But preparation does not eliminate the possibility of surprise testimony; at best, preparation only gives an approximation of what a witness will say and turncoat witnesses are not unknown. To evaluate the impact of a witness, the accused needs to the exact substance of each witness' testimony.[415] Furthermore, though counsel is usually appointed now so as to have enough time to prepare, preparation assumes that a witness is friendly and can be located. Instead, not all witnesses are on friendly terms with the accused—the accomplice who turns state's evidence is the common example—and not all witness can be located in advance of trial. Defense witnesses then could be hostile in whole or part and might need to be impeached.[416]

3. The Right to Examine Defense Witnesses at Trial and to Present Defense Evidence

a. General constitutional standards

The "most important question"[417] under the compulsory process

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[412]*See* note 231 *supra*.

[413]*See Confrontation and Compulsory Process*, *supra*, note 232, at 573-75 n.18.

[414]*Id.* at 589.

[415]The cynic would ask then if the defendant will tell counsel. *Cf.* Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 1618-19 (5th ed. 1980) (unrealistic to expect attorney to consult with defendant on every trial decision).

[416]Mil. R. Evid. 607.

[417]*Confrontation and Compulsory Process*, *supra* note 232, at 590.

clause is whether the defendant's right to compel attendance of witnesses at trial includes the right to introduce their testimony into evidence.[418] Two theoretical possibilities exist: the Sixth Amendment merely incorporates by reference the government's definition of "witness" as contained in rules on competency, relevancy, materiality, and privilege or the Sixth Amendment establishes an independent definition of "witness" based on its own standards on admission of defensive evidence. Obviously, arguments for both approaches exist and there is always a risk of making every evidence question in criminal cases a constitutional question. Wigmore's view was that the constitutional rule overrode state law only to guarantee the right to compel attendance of witnesses, but that the states could establish rules to govern admissibility of the evidence.[419] On the other hand, if the government is free to determine who is a witness in the context of compulsory process, the purpose of the clause could be easily and completely frustrated.[420] In *Washington v. Texas*,[421] the Supreme Court resolved the fundamental question by holding that compulsory process includes both the right to compel attendance of defense witnesses and the right to introduce their testimony into evidence. The Court's decision consisted of two parts. First, the witnesses the defendant may subpoena must be congruent with those allowed to testify for the defendant. Otherwise, the defendant would only have the right to subpoena witnesses who could not be put on the stand or the right to call witnesses whom could not be subpoenaed; either right alone would be an empty one.[422] Second, and of more significance, it is constitutional law alone that ultimately determines whether testimony is admissible on behalf of the defendant. The framers were not content to rely on rules of evidence governing admissibility but intended to create a constitutional standard with which to judge those rules.[423] *Washington* also established the content of the constitutional standard. The state rule of evidence at issue[424] was invalid, not because it was discriminatory or irrational,[425] but because the government interest was inadequate to justify restricting the defendant's right to present evidence in his defense.[426] Admit-

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[418] *See generally* Imwinkelried, *Recent Developments: Chambers v. Mississippi—The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973).

[419] 8 J. Wigmore, Evidence § 2191, at 68-69 (rev. ed. J. McNaugton 1961).

[420] *Confrontation and Compulsory Process*, *supra* note 232, at 591.

[421] 388 U.S. 14 (1967).

[422] *Id.* at 23.

[423] *Id.* at 20, 22.

[424] *Id.* at 16, 17 n.4. (Texas law made accomplices incompetent to testify for one another.)

[425] *But cf. id.* at 22-23 (rule disqualifying alleged accomplice from testifying for defendant is absurd in light of exceptions to rule and sheer common sense).

[426] *See also* Chambers v. Mississippi, 410 U.S. 284 (1973).

tedly, the state had an interest in excluding evidence which probably was false and self-serving. The Court instead weighed the relative interests of the state and the defendant and determined that, since the trier of fact could be trusted to adequately consider the evidence, the only course was to admit the evidence.

There is some congruence between the Court's view of compulsory process expressed in *Washington* and its view of confrontation, as stated in *Smith v. Illinois*[427] and *Davis v. Alaska*.[428] In both *Washington* and *Smith*, the defendant was prevented by a state rule of evidence from obtaining testimony from a witness who was present and ready to testify. Holding that the Sixth Amendment requires the trier of fact be allowed to give the evidence whatever weight and credibility may be appropriate, the Court in both instances overturned the evidentiary rule. Similarly, the presence of a legitimate state interest was raised to justify exclusion of evidence in *Washington* and *Davis*. Neither denying the importance of the asserted state interests nor challenging the value of the rules used to further those interests, the Court held in both cases that the defendant had a superior interest in presenting defense evidence. Implicit in *Washington* and *Davis* is that the defendant's rights under the Sixth Amendment are not absolute, but that questions of admissibility due to competence, materiality, or privilege concerns ultimately constitute a federal question determined by strict constitutional standards.[429]

b. Competency of witnesses

As both *Washington v. Texas*[430] and *Chambers v. Mississippi*[431] indicate, rules on competency of evidence may raise constitutional issues. Generally, though, the constitutional questions about competency have been reduced by the broad competency standard contained in Military Rule of Evidence 601; unless provided otherwise, any person is competent to testify.[432] The only restrictions on competency are those prohibiting the military judge and court members

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[427]390 U.S. 129 (1968).

[428]415 U.S. 308 (1974).

[429]*See Compulsory Process*, *supra* note 400, at 159-77; *Compulsory Process II*, *supra* note 382, at 194-231.

[430]388 U.S. 14 (1967).

[431]410 U.S. 284 (1973).

[432]The Analysis of the Rule states that its plain meaning would eliminate any judicial discretion in the area of competence. Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 601, *reprinted at* MCM, 1969, A18-85 to -86. Other traditional competency questions were also rendered obsolete by the Manual revision. Hearsay, for example, is no longer incompetent. Mil. R. Evid. 801.

from testifying as witnesses.[433]

Under the military rule, a court member "may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence."[434] The Rule does not draw the line at the jury room door but between the mental processes of court members and the presence of conditions or events designed to improperly influence court members in or out of the jury room. The Rule thus distinguishes between subjective and objective events and prohibits testimony about conduct which has no verifiable objective manifestations.[435] While the Rule correctly states existing law,[436] there is some suggestion that actual practice need not be so rigid.[437] Going beyond the Rule requires consideration of the interests protected by the Rule, when and how the issue is raised, and the type of impropriety involved. There are two basic interests being furthered by the Rule. One is the protection of court members from probing by the defense to see if there was misconduct or improper procedure.[438] The other interest involved is the need for finality in criminal convictions. If this type of inquiry were allowed, the verdict would be subject to constant attack.

The issue of impropriety can be raised by "affidavit or evidence or any statement by the member" when the member could testify to the same effect.[439] The issue of impropriety should be raised before the court adjourns, if possible, and will usually be suggested in this situation by a member's statement to the judge, counsel, or bailiff.[440] In addition, the problems that the Rule is designed to prevent "disappear in large part if such investigation . . . is made by the judge and takes place before the juror's discharge and separation."[441]

The type of impropriety and its effect will also be important. A

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[433]Mil. R. Evid. 605(a), 606(a).

[434]Mil. R. Evid. 606(a).

[435]*See* Mil. R. Evid. 606(b).

[436]United States v. West, 23 C.M.A. 77, 48 C.M.R. 548 (1974); Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 606, *reprinted at* MCM, 1969, A18-87.

[437]United States v. West, 23 C.M.A. at 81, 48 C.M.R. at 552 (Quinn, J., concurring).

[438]*See* Parker v. Gladden, 385 U.S. 363, 369 (1966) (Harlan, J., dissenting); United States v. Miller, 403 F.2d 77, 82 (2d Cir. 1968). Given the usual complexity of instructions, it would be easy to establish that the court members misunderstood or misapplied an instruction.

[439]Mil. R. Evid. 606(b).

[440]*Compare* Parker v. Gladden, 385 U.S. at 366-67 (Harlan, J., dissenting) (petitioner's wife asked individual jurors a series of questions sent to her by petitioner).

[441]8 J. Wigmore, Evidence § 2350, at 691 (rev. ed. J. McNaughton 1961).

juror cannot testify about improper quotient verdicts[442] or about compromise verdicts.[443] Court members may testify about prejudicial information brought to their attention[444] or outside influence on the family,[445] or to irregularities as intoxication, bribery, and possession of information not obtained through trial.[446]

c. Admissibility of evidence

(1). In general

Even though a witness is competent to testify, his or her testimony may be excluded on evidentiary grounds. *Chambers v. Mississippi*,[447] a case susceptible to multiple interpretations, suggests that evidence rules cannot be applied to infringe the defendant's right to present a defense. In *Chambers*, the Supreme Court overturned a conviction because the defendant was not permitted to solicit declarations against penal interest—confessions to the crime made by a third party—because of state evidentiary law. The import of *Chambers* was, and remains, unclear. Some commentators have interpreted it as a unique case growing out of unusual facts and an unusual combination of state evidentiary principles. Others have interpreted it as a major, if not seminal, case providing the defense with a constitutional right to present important probative evidence notwithstanding normal evidentiary rules. Under this latter view, *Chambers* is both a confrontation and compulsory process case and thus one of great potential value. Although the Court of Military Appeals has followed *Chambers*,[448] it has not clearly indicated which interpretation of *Chambers* it has accepted. Recently, however, the court has emphasized the need for the proffered evidence to at least be "reliable" for *Chambers* to apply.[449] Furthermore, the court appears to have placed some emphasis on the fact that the hearsay declarant in

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[442]McDonald v. Pless, 238 U.S. 264 (1915).

[443]Hyde v. United States, 225 U.S. 347 (1912).

[444]Mattox v. United States, 146 U.S. 140 (1892); Bulger v. McCray, 575 F.2d 407 (2d Cir. 1978).

[445]Krause v. Roberts, 570 F.2d 563 (6th Cir. 1977).

[446]3 J. Weinstein v. M. Berger, Evidence para. 606 [or], at 609-29 to -32 nn.25-37 (1981) (citing cases).

[447]410 U.S. 284 (1973). *Chambers* is an unusual case. Justice Powell, its author, expressly limited its holding to "the facts and circumstances of this case. . . ." *Id.* at 303. However, it is impossible to ignore the broader import of the case which seems clearly to be that the defense may present relevant and critical defense evidence notwithstanding state evidentiary rules to the contrary. *See* Imwinkelried, *supra* note 418, for an outstanding examination of the case. Insofar as the effect of evidentiary privileges are concerned, *see* note 391 *supra*.

[448]United States v. Johnson, 3 M.J. 143 (C.M.A. 1977).

[449]United States v. Perner, 14 M.J. 181, 184 (C.M.A. 1982).

Chambers was available at trial,[450] suggesting that the court will limit *Chambers* to circumstances in which the declarant is present at trial although not subject to full cross-examination.

(2). Scientific evidence

Although *Chambers* has great potential scope, mainly in the hearsay area, it may have particular value in the area of scientific evidence, particularly in circumstances in which the defense desires to offer evidence of an exculpatory polygraph examination. Before scientific evidence is admitted, it must be shown to be relevant, *i.e.*, to make the existence of any fact "more probable or less probable than it would be without the evidence."[451] Traditionally, this meant for scientific evidence that the proponent had to establish that:

(1) the underlying scientific principle is valid;
(2) the technique properly applies the principle;
(3) the instruments used were in proper working order;
(4) proper procedures were used; and
(5) the people conducting the test and interpreting the results were qualified.[452]

This foundation met the authentication and relevancy requirements and was known as the *Frye* test.[453] Pursuant to this test, if the idea behind a scientific technique is invalid, evidence obtained through that technique is irrelevant.[454] It is unclear, however, whether the *Frye* test was adopted by either the Federal or Military Rules of Evidence.[455] The expansive nature of the expert witness rules found in the Federal and Military Rules of Evidence,[456] coupled with the simple definition of relevancy in Rule 401 and the lack of any reference to the *Frye* test suggest strongly that the test has been aban-

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[450]*Id.* at 184 n.3. *See also* United States v. Johnson, 3 M.J. 143, 147-48 (C.M.A. 1977) (declarant, who had refused to testify pursuant to the right against self-incrimination was in the courtroom).

[451]Mil. R. Evid. 401.

[452]*See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); United States v. Ford, 4 C.M.A. 611, 16 C.M.R. 185 (1954).

[453]*See* note 451 *supra*.

[454]United States v. Hulen, 3 M.J. 275, 277 (C.M.A. 1977) (Perry, J., concurring); United States v. Helton, 10 M.J. 820, 823 (A.F.C.M.R. 1981); United States v. DeBentham, 348 F. Supp. 1377 (S.D. Cal. 1972), *aff'd*, 470 F.2d 1367 (9th Cir. 1973).

[455]Saltzburg & Redden, *supra* note 291, at 457; Analysis of Mil. R. 702. *See generally* Imwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 Wm. & Mary L. Rev. 261, 265-67 (1981) (collecting cases).

[456]*See generally* Analysis of the 1980 Amendments to the Manual for Courts-Martial; Analysis of Rule 702, *reprinted at* MCM, 1969, A18-95-96.

doned. Yet, the test has had such wide currency over the years, albeit often not followed, that absence of mention in the Rules may not equate to its abandonment. If the *Frye* test has not been abandoned, *Chambers* could be argued in any given case to prohibit its application to prohibit defense evidence if it could be shown to be too rigorous and to prohibit relevant and *probative* defense evidence. For the argument to succeed, the evidence must also be "legally relevant;" it must not be unfairly prejudicial, confusing, or unduly delaying.[457] Because the compulsory process right to prevent evidence extends only to relevant evidence,[458] there is no violation of the defendant's constitutional or statutory[459] rights when necessary foundation requirements are not met and the evidence is not admitted as a result.

d. Preventing defense witnesses from testifying

The defendant's right to present evidence may be frustrated not only by evidentiary rules, but also by the actions of the prosecutor or the judge. The effect on the accused is the same whether a witness is prevented from testifying because of evidentiary rules or because of coercion. The compulsory process clause prohibits the government from deliberately harassing or removing witnesses. Legitimate procedures may be employed, *e.g.*, advising a witness of the penalty for perjury or of the privilege against self-incrimination,[460] thus suggesting that there is a fine line between proper and improper conduct. Some conduct, though, may be so flagrant as to violate the compulsory process clause.[461]

The constitutional principle was recognized by the Supreme Court in a due process decision *Webb v. Texas*.[462] While acknowledging the state's interest in preventing perjury, the Court overturned the conviction on due process grounds because the trial judge had used "unnecessarily strong terms" to warn the only defense witness about perjury and "effectively drove that witness off the stand."[463] *Webb* thus establishes that a practice that effectively deters a material defense witness from testifying is invalid unless necessary to

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[457]Mil. R. Evid. 403. *See* United States v. Hulen, 3 M.J. 275, 277 (C.M.A. 1977) (Cook, J.). *See also* United States v. Helton, 10 M.J. 820, 824 (A.F.C.M.R. 1981); United States v. Hicks, 7 M.J. 561, 563, 566 (A.C.M.R. 1979) (adopting opinion of Cook, J. in *Hulen*).

[458]United States v. Williams, 3 M.J. 239, 242 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384, 385 (C.M.A. 1976).

[459]U.C.M.J., art. 46.

[460]Mil. R. Evid. 301(b)(2).

[461]*See, e.g.*, United States v. Giermek, 3 M.J. 1013, 1016 (C.G.C.M.R. 1977).

[462]409 U.S. 95 (1972) (though relying on a compulsory process case, Washington v. Texas, 388 U.S. 14 (1967)).

[463]409 U.S. at 98.

accomplish a legitimate state interest. *Webb* only addressed the situation of judicial interference with the defendant's right to present evidence.[464] Other cases hold that harassment or other efforts designed to discourage defense witnesses also violate the defendant's rights. Such efforts have included perjury warnings and threats of prosecution or arrest.[465] Although military cases support the proposition that negligent discharge of a defense witness violates the government's duty to insure the attendance of the witness at trial,[466] the Supreme Court's 1982 decision in *United States v. Valenzuela*[467] places that general statement in doubt. Concerned with the deportation of a potential witness, the Court held in *Valenzuela* that the statutory policy of rapid deportation of illegal aliens requires that the defendant make "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."[468] Although the Court expressly stated, in what may soon be an oft-quoted footnote 9, that it expressed no opinion "on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance...of witnesses within the United States" and the holding may be limited to cases in which the desired witness has been deported, the case may be persuasive when the armed forces have properly discharged a service member, albeit with negligent timing. One can reasonably argue that the elimination of unfit members of the armed forces is necessary to an effective armed force and that Congress has clearly recognized this via its knowledge and recognition of the discharge system. If this should prove accurate, no sanction would be assessed against the government unless the lost testimony fit the test pronounced in *Valenzuela*.

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[464]Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 848 (1976). *See* United States v. Cool, 409 U.S. 100 (1972); United States v. Sears, 20 C.M.A. 380, 384, 43 C.M.R. 220, 224 (1971); United States v. Giermek, 3 M.J. 1013, 1016 (C.G.C.M.R. 1977); United States v. Staton, 48 C.M.R. 250, 254 (A.C.M.R. 1974); United States v. Snead, 45 C.M.R. 382, 385 (A.C.M.R. 1972). *See also* United States v. Phaneuf, 10 M.J. 831 (A.C.M.R. 1981).

[465]*See, e.g.*, United States v. Thomas, 488 F.2d 334 (6th Cir. 1973).

[466]*See* United States v. Potter, 1 M.J. 897 (A.F.C.M.R. 1976) (negligent discharge of defense witness violates government's duty to insure witness' pressure at trial). *See also* Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1978). The defendant must show that the alleged conduct did in fact cause the witness not to testify or to change his or her testimony. Once the defendant has made a prima facie case of harassment, the prosecution has the burden of demonstrating the contrary. United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); United States v. Thompson, 5 M.J. 28 (C.M.A. 1978); United States v. Kennedy, 8 C.M.A. 251, 24 C.M.R. 61 (C.M.A. 1957).

[467]73 L.Ed.2d 1193 (1982).

[468]*Id.* at 1206.

e. Laboratory reports

In the military, one of the most troublesome issues raised in a compulsory process analysis is the right to challenge admission of laboratory reports. The reports are clearly admissible under the hearsay exception for records of regularly conducted activity,[469] but, assuming the report is admitted under a hearsay exception, the question then becomes whether the defense can present evidence to impeach the report. Commonly, this impeachment is directed toward the competency of the analyst involved and the procedures used in the test.[470] The Court of Military Appeals has concluded that the defendant has the right "to call the analyst under appropriate circumstances" for this purpose.[471] While the right is uncontroverted, the mechanics involved cause considerable problems.

Generally, a defense request for the analyst must comply with the procedures established under paragraph 115*a* of the Manual, including the implied prerequisites of timeliness and materiality.[472] There is no consensus, however, on the exact standards required in this situation. The problem stems from the peculiar nature of the testimony involved. The analyst's statements are used against the defendant at trial and the analyst actually is a witness for the government even if he or she does not personally appear.[473] Thus, when the defense calls the analyst, defense counsel may have difficulties interviewing this witness.[474] If a pretrial interview cannot be

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[469]*United States v. Vietor, 10 M.J. 69, 70 (C.M.A. 1980)* (Cook, J.); United States v. Strangstalien, 7 M.J. 225, 229 (C.M.A. 1979); United States v. Evans, 21 C.M.A. 579, 45 C.M.R. 353, 355-56 (1972); Mil. R. Evid. 803(6), (8)(B); Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 803(6), *reprinted at* MCM, 1969, A18-104. *See* United States v. Licavoli, 604 F.2d 613, 622 (9th Cir. 1979) (Fed. R. Evid. 803(6)). *See also* United States v. Coleman, 631 F.2d 908, 910 (D.C. Cir. 1980); United States v. Hernandez-Rojas, 617 F.2d 533, 534 (9th Cir. 1980); United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979); United States v. Orozco, 590 F.2d 789, 793 (9th Cir. 1979); Saltzburg & Redden, *supra* note 291, at 570. *Contra* United States v. Oates, 560 F.2d 45, 66-68 (2d Cir. 1977). *See* Imwinkelreid, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 Hastings L.J. 621 (1979).

[470]*See* Imwinkelreid, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 Wm. & Mary L. Rev. 261 (1981) (arguing that increasing rejection of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), necessitates attacking the weight of scientific evidence of its admissibility).

[471]United States v. Vietor, 10 M.J. 69, 72 (C.M.A. 1980) (Cook, J.); United States v. Strangstalien, 7 M.J. 225, 229 (C.M.A. 1979) (Fletcher, C.J.).

[472]*See* text accompanying notes 42-47, 48-58 *supra*.

[473]United States v. Vietor, 10 M.J. 69, 80-81 (C.M.A. 1980) (Fletcher, J., concurring in result) (citing *Confrontation and Compulsory Process*, *supra* note 282, at 604 & n. 105).

[474]*See* United States v. Vietor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in result) (implied in analysis of MCM, 1969, para. 115*a*); Mil. R. Evid. 806.

accomplished, the defense may not have enough information with which to establish the materiality and necessity of the analyst's personal testimony.[475] At this point, the judges on the Court of Military Appeals apply different standards of materiality, and implicitly, standards of compliance with paragraph 115. Judge Fletcher ance.[476] Apparently, no formal request would be needed, and the defense would not be required to expressly show materiality or necessity.[477] This view assumes that cross-examination of the analyst is always material and necessary because it detracts from the weight given to the evidence of the laboratory report.[478] Judge Cook, on the other hand, believes that compliance with the usual standards is appropriate. The government must produce a witness only upon the defendant's showing of materiality and necessity[479] and this standard is no different for laboratory reports.[480] To hold that a mere unsupported request triggers the obligation to obtain the witness would nullify the purpose of the hearsay exception.[481] The accused's right to call the chemist is thus qualified by the normal standards of materiality and it would appear that, in Judge Cook's view, the defense counsel must attempt to contact the analyst before trial and submit a request as for any other witness.[482] Chief Judge Everett appears to take the middle ground. Recognizing that paragraph 115*a* serves legitimate government interests, he would require the defense to follow the paragraph's procedure,[483] but "rigid application

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[475]United States v. Vietor, 10 M.J. 69, 77-78 (C.M.A. 1980) (Everett, C.J., concurring in result).

[476]United States v. Strangstalien, 7 M.J. 225, 229 (C.M.A. 1980). *See* United States v. Vietor, 10 M.J. 69, 81 (C.M.A. 1980) (Fletcher, J., concurring in result).

[477]*Id.* at 80.

[478]*See id.* at 82. (C.M.A. 1980) (citing *Confrontation and Compulsory Process*, *supra* note 232, at 619 n.143); Imwinkelreid, *supra* note 470.

[479]*E.g.*, United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384, 385-86 (C.M.A. 1976). In *United States v. Davis*, 14 M.J. 847 (A.C.M.R. 1982), the court held that failure to order a chemist produced was reversible error. In *Davis*, the court interpreted *Vietor* as requiring the defense "to make some plausible showing of how the requested witness would be material and favorable to the defense." 14 M.J. at 847 (footnote omitted).

[480]*See* United States v. Strangstalien, 7 M.J. 225, 230 (C.M.A. 1979) (Cook, J., concurring in part, dissenting in part); United States v. Johnson, 3 M.J. 772, 775 (A.C.M.R. 1977) (DeFord, J., dissenting).

[481]United States v. Strangstalien, 7 M.J. 225, 230 (C.M.A. 1979) (Cook, J., concurring in part, dissenting in part); United States v. Watkins, 5 M.J. 612, 614 (A.C.M.R. 1978); United States v. Credit, 2 M.J. 631, 647 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977), *aff'd on remand*, 6 M.J. 719 (A.F.C.M.R. 1978), *aff'd*, 8 M.J. 190 (C.M.A. 1980).

[482]*See* United States v. Vietor, 10 M.J. 69, 71-72 (C.M.A. 1980) (Cook, J.) (counsel was "remiss" in not contacting the witness); United States v. Strangstalien, 7 M.J. 225, 230 (C.M.A. 1979) (Cook, J., concurring in part, dissenting in part).

[483]United States v. Vietor, 10 M.J. 69, 77-78 (C.M.A. 1980). Judge Everett's conclusion finds support in other cases. *See* United States v. Williams, 3 M.J. 239 (C.M.A. 1977); United States v. Dixon, 8 M.J. 858 (N.C.M.R. 1980); United States v. Christian,

of these requirements would produce a conflict with an accused's strategy and constitutional right to compulsory process" in some cases.[484] Interviewing the analyst may be impossible in some instances and strict compliance with paragraph 115 should not be required. As under Judge Fletcher's approach, this assumes that the analyst's personal testimony is inherently material on the weight given to the laboratory report.[485]

While the views of each judge have merit, there is another approach that better reflects the issues involved. Instead of combining the questions of the analyst's qualifications and the test procedures actually used, the two questions should be considered separately. In the abstract, the analyst's qualifications should seldom be at issue initially when the test involved is simple, as in the cases of counting sperm cells, blood typing, or drug analysis.[486] If the test is complicated, such as neutron activation analysis or human leukocyte antigen testing, then the analyst's ability to perform the test and interpret the results becomes important.[487] Depending on the complexity of the test, the requisite showing of materiality and necessity in support of a defense request for the analyst should vary. If the test is a simple one, the defense should be required to interview the analyst before trial about his or qualifications and to show that the analyst's qualifications are inadequate to perform the test. The underlying presumption is that any analyst is capable of performing simple tests.[488] When the test is more complex, the analyst's ability becomes more important; not everyone can do neutron activation analysis. Because the test results then depend more on the analyst's ability to do the test and read the results, the presumption of competency is weaker and the court should recognize that the analyst's qualifications are inherently material. As a result, though the defense request for the analyst should be as detailed as possible, the standard used in determining compliance with paragraph 115*a* should be lower.

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6 M.J. 624, 627 (A.C.M.R. 1978) (DeFord, J., concurring); United States v. Kilby, 3 M.J. 938, 944-45 (N.C.M.R. 1977).

[484]United States v. Vietor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in result).

[485]*Id.* at 76-77 (Everett, C.J., concurring in result), 82 (Fletcher, J., concurring in result) (citing *Confrontation and Compulsory Process*, supra note 232, at 619 n.143).

[486]Qualification as an expert requires only that his or her testimony will help "the trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid. 702. The witness need not be the most expert or proficient in his field. United States v. Barker, 553 F.2d 1013, 1024 (6th Cir. 1977) (Fed. R. Evid. 702). Competency in this situation only involves the ability to perform the test.

[487]*See* Imwinkelreid, *supra* note 470, at 278-83.

[488]*See* Mil. R. Evid. 702.

A different standard should be applied when the defense wants to examine the analyst about the test procedures actually used. Because the test procedures can affect the test results,[489] the defense should only have to meet a standard similar to that applied when the analyst's competency to perform or interpret a complex test is involved. Obviously, the defense should always try to determine before trial what the proper procedures are and whether they were used on that particular sample. But, in light of increasing evidence that forensic laboratories are incapable of accurately performing any but the simplest tests,[490] a court should not be too eager to presume the test procedures are proper *per se* or that the proper procedures were actually used. If in the paragraph 115*a* request, the defense offers any evidence that the actual procedures were improper, the analyst should be required to testify.[491]

Like many rules of evidence, this approach is based on assumptions about how various scientific tests are performed and who performs them. The armed forces utilize "on the job training" to prepare many personnel to function within the armed forces. If a significant expansion in personnel forced hasty training of otherwise unqualified personnel, it would be appropriate for military judges to assume that the qualifications of a forensic chemist, for example, should be in doubt until shown otherwise by the government. In effect, this would nullify the "presumption" that any normal analyst is capable of performing routine tests.[492]

IV. DEPOSITIONS AND INTERROGATORIES[493]

Article 49 of the Uniform Code of Military Justice expressly authorizes any party to take "oral or written depositions" unless prohi-

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[489]This includes careless handling, storage, and preparation of the evidence; improper procedures actually used; and improper procedures in theory.

[490]*See* Imwinkelreid, *supra* note 470, at 267-69 (citing four surveys). The court of Military Appeals has presumed a regularity of handling and storage procedures in the chain of custody. United States v. Strangstalien, 7 M.J. 225, 229 (C.M.A. 1979). (Fletcher, C.J.).

[491]While it may be reasonable to be concerned about the degree of faith to be placed in an advocate's assertion, professional ethics limit counsel from calling witnesses who will give irrelevant or superfluous evidence. Courts should be reluctant to assume that a defense counsel's assertion of relevance and probative value is erroneous.

[492]*See* note 488 *supra*.

[493]U.C.M.J. art. 49 uses the expression "written deposition" to refer to what MCM, 1969, para. 117*a* and customary civilian practice refer to as written interrogatories. Interrogatories are covered by MCM, 1969, para. 117*c*.

bited from doing so by the military judge or other proper officer[494] and Military Rule of Evidence 804 permits the use in evidence of depositions under certain conditions. It is apparent that the intent of Article 49 was to utilize depositions in lieu of live testimony.[495] According to the terms of Article 49(d) a deposition may be used only when "the witness resides or is beyond the State, Territory Commonwealth, or District of Columbia in which the court . . . is ordered to sit, or beyond 100 miles from the place of trial or hearing"[496] or when the witness is actually unavailable or[497] cannot be located.[498]

The Court of Military Appeals has held that the geographic justifications for depositions are invalid insofar as they relate to service members[499] and has strongly suggested that constitutional standards dictate the same result insofar as civilians are concerned.[500] Thus, actual unavailability is necessary. Whatever the Article's original intent, the primary use of depositions is now clearly limited to pres-

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[494]U.C.M.J. art. 49(a). *See generally* McGovern, *The Military Oral Deposition and Modern Communications*, 45 Mil. L. Rev. 43 (1969); Everett, *The Role of the Deposition in Military Justice*. 7 Mil. L. Rev. 131 (1960). The codal provision permits the taking of depositions unless the proper officer "forbids it for good cause". U.C.M.J. art. 49(a). MCM, 1969, para. 117*b*(1) requires that "any party may request permission to take oral depositions or, with the approval of the other party, written depositions", and that normally a request for permission will be submitted to the convening authority or other proper office in advance. Although MCM, 1969, para. 117*b*(3) echoes U.C.M.J. art. 49(a) in that a request may be denied for good cause, paragraph 117*b* as a whole appears to place the onus on the requestor, a result seemingly in violation of U.C.M.J. art. 49(a).

If the case is being tried as a capital case, only the defense may utilize depositions, U.C.M.J. arts. 4(d)-(f).

[495]It is probable that depositions were intially used to obtain the testimony of military witnesses stationed far from the situs of trial, *see, e.g.*, J. Winthrop Military Law and Precedents 352-53 (2d ed. 1896, 1920 reprint), and to obtain the testimony of civilians who were not subject to compulsory process as no general statute providing for such process existed. *Id.* at 352 n.55, 353 n.58. The accused apparently had not right to attend the deposition, at least not at government expense. *Id.* at 355-57.

[496]U.C.M.J. art. 49(d)(1). *See* note 502 *supra*.

[497]U.C.M.J. art. 49(d)(2) (permits depositions when the witness "by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamendability to process, or other reasonable cause is unable or refuses to appear . . ."). The current approach of the Court of Military Appeals to "military necessity" in the general area of witness procurement suggests that, absent declared war, it is improbable that depositions will be justified by military necessity.

[498]U.C.M.J. art. 46(d)(3).

[499]*See* note 269 *supra*.

[500]*Id.* Although Mil. R. Evid. 804(a) is illustrative rather than limiting, its express enumeration of U.C.M.J. art. 49(d)(2) and silence as to Article 49(d)(2), suggests that a deposition obtained under Article 49(d)(1) may be inadmissible under the Military Rules of Evidence.

ervation of testimony.[501] It was the intent of Congress that no deposition take place unless the accused is given the opportunity to attend[502] and military law gives the accused the right to attend the deposition with counsel.[503] Under these circumstances, the accused's confrontation right is protected as the accused is both present at a prosecution deposition and has the right through counsel to cross-examine the witness to be deposed. What the accused loses is the ability to conduct the cross-examination before the court-members. In a particular case, this loss of demeanor evidence may be harmful, but if the witness is actually unavailable for trial, the accused would seem to have no cognizable constitutional complaint. A similar result follows from a compulsory process examination. Of course, should the witness not be actually unavailable, as when the witness has been rendered unavailable due to reassignment to a military duty that another service member could perform as well, substantial confrontation and compulsory process problems may result. These matters should not arise under present law if only because the government pays an economic penalty for any attempt to use depositions in lieu of live testimony even if such use were acceptable under the confrontation and compulsory process clauses. Acute problems may result in wartime, however, given the need for rapid mobility.

Procedurally, the Code requires that reasonable written notice of the time and place of the deposition be given to those parties who have not requested the deposition[504] and that "depositions may be taken before and authenticated by any military or civil officer authorized...to administer oaths."[505] The Manual for Courts-Martial requires that oral depositions be recorded verbatim and normally be certified by the officer taking the deposition.[506] Appropriate objections should be made during the deposition, but the deposing officer is not to rule upon them; they are merely to be recorded for later resolution.[507] Although, absent actual unavailability, the defense

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[501]*See, e.g.*, MCM, 1969, para. 117*a* ("Depositions normally are taken to preserve testimony of witnesses whose availability at the time of trial appears uncertain.") It is possible to use the coercive nature of depositions as a discovery device except that it is not likely that such a deposition would be approved.

[502]*Uniform Code of Military Justice, Hearings Before a Subcomm. of the House Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 696 (1949) (statement of Rep. Elston).

[503]United States v. Jacoby, 11 C.M.A. 248, 253, 29 C.M.R. 244, 249 (1960). *Jacoby* has been codified in MCM, 1969, para. 117*b*(2), which declares that the right to counsel held by an accused at a deposition is the same as that prescribed for trial by the type of court-martial before which the deposition is to be used.

[504]U.C.M.J. art. 49(b); MCM, 1969, para. 117*b*(4) permits service of notice on counsel.

[505]U.C.M.J. art. 49(c); MCM, 1969, para. 117*b*(8).

[506]*Id.* at para. 117*d*.

[507]*Id.* at para. 117*b*(7).

generally has the right to prohibit the receipt into evidence of a deposition, trial tactics are often such that the defense has no particular reason to object to the use of depositions provided that the testimony of the witness can carry sufficient persuasive effect. Given the widespread availability of videotape recorders in the modern society and the armed forces, both trial and defense counsel should make increasing use of videotaped depositions.[508] Such depositions can save substantial amounts of trial time, may be edited following the military judge's ruling on objections, and will convey the demeanor of the witness to the fact finder. Indeed, given mutual consent, whole portions of trial can be presented in this fashion.[509]

V. CONCLUSION

Like the civilian legal system, the military criminal legal system is a complex amalgam of statute, executive order, rule, and custom. Descended from a disciplinary system perhaps more concerned with certainty and rapid disposition than due process, contemporary military justice provides the accused with protections equal to or superior to that afforded by civilian justice. Yet, like the civilian legal system, further constitutional change is in the wind as the confrontation and compulsory process clauses of the Constitution not only weigh in the balance the military's unique procedures for obtaining defense evidence, but also delimit what the ordinary rules of evidence may prescribe.

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[508] *See* McGovern, *The Military Oral Deposition and Modern Communications*, 45 Mil. L. Rev. 43, 59-75 (1969).

[509] One entire civilian criminal trial has been conducted in this fashion by Judge McCrystal in Ohio. Numerous civil cases have also been so conducted. Because of the ability to present edited videotapes to juries, substantial amounts of juror and trial time have been saved.

THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE: AMERICAN AND FOREIGN APPROACHES COMPARED*

by Captain Stephen J. Kaczynski**

I. INTRODUCTION

The American exclusionary rule is nearly a septugenarian. Born in 1914,[1] the rule that excludes illegally obtained, yet relevant and probative, evidence from admission at a criminal trial has been much criticized and occasionally limited, yet it remains today the law of the land. An attempt to judicially modify the exclusionary rule was recently avoided by the United States Supreme Court,[2] but may

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. This article is based upon a paper submitted in partial satisfaction of the requirements of the LL.M. program of the University of Virginia and will form the basis for a chapter in K. Redden (ed.), Modern Legal Systems (1983).

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[1]Weeks v. United States, 232 U.S. 383 (1914).

[2]In United States v. Williams, 622 F.2d 830 (5th Cir. 1983) (en banc), *cert. denied*, 449 U.S. 1127 (1981), the United States Court of Appeals for the Fifth Circuit adopted a "good faith" exception to the exclusionary rule. In Illinois v. Gates, a case recently before the Supreme Court, the Court had heard reargument on March 1, 1983 on the issue of whether

> the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified, so as, for example, not to require the exclusion of evidnece obtained in the

well yet receive the Court's approval.[3] Pending such modification, both federal and state courts are bound to refuse to admit into evidence any items or information discovered as a direct result of a violation of the constitutional rights of an accused. This article will study the American exclusionary rule as it relates to evidence obtained in violation of various constitutional provisions and compare the rule to the manner in which the legal systems of other nations, both of common and civil law foundations, deal with illegally obtained evidence.

II. THE AMERICAN RULE: THE FOURTH AMENDMENT

Among the fundamental guarantees the violation of which may cause relevant and probative evidence to be excluded from a criminal trial is the Fourth Amendment to the U.S. Constitution. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, 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 place to be searched and the person or things to be seized.[4]

This provision was designed to give the populace of the new American nation a constitutional bulwark against arbitrary governmental intrusion such as was prevalent under the pre-revolutionary writs of assistance.[5] Modern Fourth Amendment litigation, however, has produced such concepts unknown to the Founding Fathers as "fruit of the poisonous tree,"[6] inevitable discovery,[7] and the "automobile exception."[8] This section will briefly outline the contours of the Fourth Amendment, the American exclusionary rule, the Fourth Amendment situations in which the rule may come into play, and conclude with some proposed modifications of the exclusionary rule.

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reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

51 U.S.L.W. 3415 (U.S. Nov. 30, 1983) (citing Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914)). *But see* test accompanying notes 91-95 *infra* for the Court's decision in *Gates*.

[3]*See* text accompanying notes 198-277 *infra* for a discussion of the good faith exception's prospects for judicial approval.

[4]U.S. Const. amend. IV.

[5]*See generally* 1 W. Ringel, *Searches & Seizures, Arrest and Confessions* § 5.2, at 5-2 (2d ed. 1981).

[6]*See* text accompanying notes 26-27 *infra*.

[7]*See* text accompanying notes 56-64 *infra*.

[8]*See* text accompanying notes 123-26 *infra*.

A. GENERAL APPLICABILITY

The zone of interests protected against governmental intrusion by the Fourth Amendment was originally defined by the Supreme Court in property law concepts. Under this view, absent a transgression of some property right of the citizen, no constitutional violation would have occurred.[9] It was not until 1967, in *Katz v. United States*,[10] a case involving a wiretap of a public phone booth, that the Supreme Court eschewed property law as the touchstone for the invocation of the coverage of the Fourth Amendment. In *Katz*, the Court held that the Fourth Amendment "protects people, not places" and that a search or seizure occurs whenever the government intrudes upon a person's reasonable expectation of privacy.[11] Under the facts of *Katz*, "[t]he Government's activities in electronically listening to and recording the [accused]'s words violated the privacy upon which he had justifiably relied while using the telphone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[12] Since the search and seizure was conducted without benefit of prior judicial authorization,[13] it was deemed unreasonable and its fruits were suppressed.

Not all violations of a person's reasonable expectation of privacy will be subject to Fourth Amendment scrutiny. The Fourth Amendment shields the citizen only from unreasonable searches and seizures conducted by government officials.[14] Searches or seizures conducted by a private citizen not acting as an agent of government authorities will not draw judicial examination.[15] Further, the Fourth Amendment is inapplicable to civil proceedings; only crimi-

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[9]For a full discussion of how property law concepts were imposed upon the Fourth Amendment, *see* Lee v. United States, 343 U.S. 747 (1927). *See also* Goldman v. United States, 316 U.S. 129 (1942); Hester v. United States, 265 U.S. 57 (1924); Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616 (1866). *See generally* Wilson, *Origin and Development of the Federal Rule of Exclusion*, 18 Wake Forest L. Rev. 1073 (1982).

[10]389 U.S. 347 (1967).

[11]*Id.* at 351.

[12]*Id.* at 353.

[13]For the current requirements concerning judicial authorization of interception of oral or wire communications, *see* text accompanying notes 337-50 *infra*.

[14]*See* Burdeau v. McDowell, 256 U.S. 465 (1921) (the "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authorities and was not intended to be a limitation upon other than governmental agencies.").

[15]*See* United States v. Harless, 464 F.2d 953 (9th Cir. 1972) (hotel security guard); United States v. Winbush, 428 F.2d 357 (6th Cir.), *cert. denied*, 400 U.S. 918 (1970) (hospital employee); Wolf v. States, 281 So.2d 445 (Miss. 1973) (trespasser). *See also* United States v. Pansoy, 11 M.J. 811 (A.F.C.M.R. 1981) (military exchange store detective).

nal trials require a study of the legality of the manner in which evidence was obtained.[16] Finally, without such involvement of American authorities as to make the activity a joint venture with foreign officials, the Fourth Amendment provides no protections against searches or seizures conducted by foreign officials, even if in violation of American constitutional standards.[17]

The scope of items subject to seizure under the Fourth Amendment has undergone a constitutional redefinition. Based upon property law restrictions, the Supreme Court had limited seizures to contraband or instrumentalities of a crime. "Mere evidence" was deemed exempt from seizure.[18] In 1976, however, in *Warden v. Hayden*,[19] the Court abandoned these distinctions and held that any article for which a nexus to criminal activity can be established is subject to seizure under the Fourth Amendment.[20]

People are also subject to seizure. An arrest has been equated with a seizure of the person for purposes of the Fourth Amendment.[21] From this notion flows the consequences that an arrest should be effected pursuant to an arrest warrant and that evidence obtained as a result of an unlawful arrest will be excluded from admission in court.[22]

B. THE EXCLUSIONARY RULE

Once a Fourth Amendment violation has been established, what should the consequences be? The American response has been to exclude the fruits of the illegality from evidence in criminal trials. As will be discussed later in this article, this response in virtually unique among the legal systems of the world and is considered an oddity by foreign observers of American constitutional jurisprudence. This phenomenon was born only in the twentieth century and is still a vital element of American law.

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[16]*See* United States v. Janis, 428 U.S. 433 (1976).

[17]*See* Burlay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965); United States v. Morrison, 12 M.J. 272 (C.M.A. 1982) (overruling United States v. Jordan, 1 M.J. 334 (C.M.A. 1976)).

[18]Gouled v. United States, 255 U.S. 298 (1921).

[19]387 U.S. 294 (1976).

[20]*Id.* at 310.

[21]Terry v. Ohio, 392 U.S. 1 (1968); Draper v. United States, 358 U.S. 307 (1959); United States v. Paige, 7 M.J. 480 (C.M.A. 1979).

[22]Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints); United States v. Harris, 453 F.2d 1317 (8th Cir. 1972), *cert. denied*, 409 U.S. 927 (1973) (handwriting exemplars).

1. Origin and Development

The notion that evidence discovered or seized in violation of Fourth Amendment protections ought to be excluded in a criminal proceeding found its origin in 1914 in *Weeks v. United States*.[23] In *Weeks*, the accused was arrested without a warrant while the police gained entry to his home. Thereupon, a search was conducted. Evidence was discovered which led to the accused's conviction for use of the mails to promote a lottery. In finding that the evidence so seized should not have been used against the accused, the Court held:

> To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[24]

To the *Weeks* Court, there was no doubt that the exclusionary rule was constitutionally mandated and that to admit evidence seized in violation of the Constitution would compromise the integrity of the federal judiciary.[25]

Six years later, in *Silverthorn Lumber Co., Inc. v. United States*,[26] the Court enlarged the rule to exclude from evidence any information gained by the government as a consequence of illegal action. Thus, where the knowledge acquired by virtue of an illegal search or seizure was exploited to uncover other evidence, not only would the original information be excluded, but the subsequent discoveries would be rejected as well as "fruit of the poisonous tree."[27] In sum, "knowledge gained by the government's own wrong cannot be used by it."[28]

It was not until 1949 that the Supreme Court seriously considered applying the exclusionary rule to the states through the Fourteenth Amendment.[29] In *Wolf v. Colorado*,[30] the Court, while conceding that the substantive protections of the Fourth Amendment are binding on the states, declined to impose the exclusionary remedy on them as

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[23]232 U.S. 383 (1914).
[24]*Id.* at 394.
[25]*Id.* at 394-95.
[26]251 U.S. 385 (1920).
[27]The term "fruit of the poisonous tree" was coined in Nardone v. United States, 308 U.S. 338, 341 (1939).
[28]251 U.S. at 391.
[29]Wolf v. Colorado, 338 U.S. 298 (1949).
[30]*Id.*

well.[31] This course, however, was abruptly changed twelve years later when, in *Mapp v. Ohio*,[32] the Court not only vigorously reaffirmed the "constitutionally required" basis of the exclusionary rule, but also extended the rule to the states.[33] The Court noted the twin purposes of the rule: to deter illegal police conduct and to protect the imperative of judicial integrity by the exclusion of evidence seized in violation of the highest law of the land.[34]

Mapp may have been the zenith of the exclusionary rule in constitutional jurisprudence. Within the past decade, a majority of the Supreme Court has consistently renounced the constitutional basis of the rule. In *United States v. Calandra*,[35] the Court described the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[36] Further, in *United States v. Janis*,[37] the Court determined that the "'primary purpose' of the rule, if not the sole one, 'is to deter future unlawful police misconduct.'"[38] Finally, in *Stone v. Powell*,[39] the Court studied the history of Fourth Amendment litigation and found that the concern for the preservation of judicial integrity "has limited force as a justification for the exclusion of highly probative evidence."[40]

The shift of judicial emphasis concerning the origin and purpose of the exclusionary rule is significant. Were the rule a matter of judicial implication drawn from the requirements of the Constitution, only amendment of the Constitution, pursuant to the onerous proces promulgated by the framers,[41] could modify the rule's effect.[42] If, however, the rule is a judicial creation, it could be judicially or legislatively modified or abolished.[43] Further, if the primary, if not

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[31]*Id.* at 33. The Court relegated the aggrieved accused to state tort remedies and internal police disciplinary procedures. *Id.* at 31-33.

[32]367 U.S. 643 (1961).

[33]*Id.* at 654-55.

[34]*Id.* at 659.

[35]414 U.S. 338 (1974).

[36]*Id.* at 348.

[37]428 U.S. 433 (1976).

[38]*Id.* at 446 (citing Calandra v. United States, 414 U.S. 338, 347 (1974)).

[39]428 U.S. 465 (1976).

[40]*Id.* at 485.

[41]The Constitution provides that proposed amendments must be approved by a two-thirds vote of both houses of Congress and ratified by three-fourts of the states. U.S. Const. art. V.

[42]*See generally* Hanscom, *Admissibility of Illegally Seized Evidence: Could This be the Path Out of the Labyrinth of the Exclusionary Rule?*, 9 Pepperdine L. Rev. 799, 804 (1982).

[43]*See* text accompanying notes 160-63, 211-12 *infra*.

sole, purpose of the rule is to deter illegal police activity, then the reasonableness of judicial or legislative action would have to be measured against the rule's success or failure in having achieved this purpose. As the available information concerning the success of the rule is, at best, mixed,[44] the defenders of the rule would have a difficult task in marshalling evidence to persuade the courts or the legislature. With the apparent departure of a foundation of constitutional origin and a purpose of safeguarding judicial integrity, the path to modification of the exclusionary rule has been made clear.

2. Limitations

Even as the exclusionary rule was being engrafted onto the body of American constitutional law, the Supreme Court began to circumscribe its use. The Court has recognized that, notwithstanding the illegal conduct of police officials, certain evidence may yet be admitted at trial if the government can establish that the evidence was in fact discovered through means independent of the illegality or by a chain of causation such that the connection to the illegal conduct had been attenuated. Although not explicitly embraced by the Supreme Court, a doctrine of "inevitable discovery" has been increasingly adopted by state and lower federal courts as a hypothetical independent source exception to the exclusionary rule. Finally, the Supreme Court has ruled that only a person whose reasonable expectation of privacy has been invaded may invoke the protections of the Fourth Amendment. Thus, evidence obtained as a direct result of an unlawful search or seizure may be admitted at trial provided that the wrong person is objecting to its use.

a. Independent Source

The independent source doctrine is almost as old as the exclusionary rule itself. In 1920, in *Silverthorn Lumber Co., Inc. v. United States*,[45] the Court noted that facts obtained by reason of illegal police conduct do not "become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others."[46] Thus, if police obtain information during the course of an illegal search which in turn uncovers other evidence, the new

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[44]*See generally* empirical studies reported in Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243 (1973).

[45]251 U.S. 385 (1920).

[46]*Id.* at 392.

evidence may nonetheless be admitted in court if the police *in fact* were led to that evidence by another source independent of the illegal conduct.[47]

b. Attenuation

A more difficult case is encountered when the evidence is discovered as an indirect result of illegal police activity. In such cases, the inquiry will focus on the degree of attenuation of the connection between the illegal conduct and the discovery. In announcing the rule of attenuation, the Court explained that, although "a sophisticated argument may prove a casual connection" between the illegality and the proferred evidence, common sense would in some cases be offended by judicial recognition of the connection. Accordingly, "such connection may [have] become so attenuated as to dissipate the taint."[48] Among the factors later expounded as bearing on the issue of attenuation were the temporal proximity between the illegality and the challenged evidence, the presence of intervening circumstances, and the purpose and flagrancy of official misconduct.[49]

Wong Sun v. United States[50] is instructive. In *Wong Sun*, based upon information not amounting to probable cause, the police proceded to a laundry, rang the bell, and observed the owner flee upon seeing them. The police then entered the laundry and arrested the owner, who then provided them with information which led the authorities to the accused.[51] The Supreme Court refused to allow the government to utilize the link to the accused provided by the laundry owner. Several days after his arrest, however, the accused had voluntarily returned to the police and produced incriminating information. This act proved to be such an intervening circumstance between the initial illegality and the newly discovered evidence as to purge the latter evidence of the taint of the initial illegality.[52]

An attenuation will more readily be found when a live witness has been discovered as a result of unlawful conduct. The Supreme Court has noted that

> the exclusionary rule should be invoked with much

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[47]*See* United States v. Holsey, 437 F.2d 250 (10th Cir. 1970), in which, despite knowledge of the identity of witnesses gained by means of an unlawful search, the police demonstrated that they *already* possessed knowledge of the witness from an independent source. The evidence was therefore not suppressed.

[48]Nardone v. United States, 308 U.S. 338 (1939).

[49]Brown v. Illinois, 422 U.S. 590 (1975).

[50]371 U.S. 471 (1963).

[51]*Id.* at 473-76.

[52]*Id.* at 476.

> greater reluctance where the claim is based on a causal connection between a constitutional violation and the discovery of a live witness than when a similar claim is advance to support suppression of an inanimate object.[53]

The court has reasoned that it would be unreasonable to permanently silence by operation of the exclusionary rule a witness who, by virtue of his or her free will, may, as an intervening cause, agree to testify.[54] Conversely, where the illegally discovered witness had to be threatened with contempt of court in order to secure cooperation, a sufficient attenuation has not been found and the testimony of the witness was excluded.[55]

c. Inevitable Discovery

In cases where the items offered into evidence were *in fact* found as the result of unlawful police activity - the opposite situation from that involving an independent source - the items may nonetheless be received in court under the emerging doctrine of inevitable discovery. Inevitable discovery provides that, notwithstanding the police illegality, the items may be received in evidence if the government establishes that the same evidence would have been found in the course of the ongoing police investigation and that the police did not act in bad faith to accelerate the discovery. To date, however, acceptance of inevitable discovery as constitutional doctrine has only been hinted at by the Supreme Court.[56]

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[53]United States v. Ceccolini, 435 U.S. 268, 280 (1978).

[54]*Id.* at 279. *See also* United States v. Leonardi, 623 F.2d 746 (2d Cir. 1980); United States v. Stevens, 612 F.2d 1226 (19th Cir. 1979); United States v. Carsello, 578 F.2d 199 (7th Cir. 1978).

[55]United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978). *See also* United States v. Cruz, 581 F.2d 535 (5th Cir. 1978) (en banc).

[56]In Brewer v. Williams, 430 U.S. 387 (1977), the Supreme Court reversed a conviction which was based in part upon statements obtained from a suspect in violation of his right to counsel and the discovery of the body of the murder victim which resulted from the illegally obtained information. *Id.* at 392-93. The Court, however, speculated:

> While neither Williams' incriminatory statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had the incriminatory statements not been elicited from Williams.

Id. at 407 n.12. *See generally* Kaczynski, *Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery*, The Army Lawyer, Aug. 1982, at 1; Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rule*, 74 Colum. L. Rev. 88 (1974).

People v. Fitzpatrick[57] illustrates the doctrine. In *Fitzpatrick*, the accused was suspected of murder and arrested in a closet in his home. After removing the accused from the closet but before advising him of his rights, the police asked the accused about the location of the murder weapon. Fitzpatrick then led the police to a shelf in the closet on which the weapon and other incriminating evidence were located. At trial, the evidence was admitted and the accused was convicted.[58]

On review, the New York Court of Appeals upheld the conviction. The court instructed that

> evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent of illegal conduct, have inevitably led to such evidence.[59]

In *Fitzpatrick*, the court found that the police would have inevitably and legally searched the closet incident to the accused's apprehension.[60] Accordingly, the evidence was deemed properly admitted.

Other cases and commentators have placed a "good faith" safeguard on the doctrine.[61] In cases in which the police deliberately engaged in improper conduct to accelerate the discovery of evidence, the resulting evidence has been excluded. *United States v. Griffin*[62] is instructive. In *Griffin*, while awaiting the arrival of a search warrant, the police entered and searched the home of the accused. The evidence so discovered was admitted at trial. On appeal, the resulting conviction was reversed. The court rejected the government's argument that a *Fitzpatrick* rationale of inevitable discovery - that the items would have been discovered anyway upon the obtaining of the lawfully-issued warrant - should be applied to the case. The court found a much greater degree of flagrant official illegality in *Griffin*

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[57]32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139, *cert. denied*, 414 U.S. 1033 (1973).

[58]*Id.* at 505, 346 N.Y.S.2d at 795, 300 N.E. 2d at 140-41. Fitzpatrick wsa sentenced to death.

[59]Id. at 506, 346 N.Y.S.2d at 796, 300 N.E.2d at 141.

[60]That the accused had been handcuffed and removed from the closet were not deemed fatal to the search incident to apprehension. *See id.* at 508, 346 N.Y.S.2d at 798-99, 300 N.E. 2d at 143. *See also* United States v. Kozak, 12 M.J. 389 (C.M.A. 1982) (citing *Fitzpatrick* and adopting inevitable discovery in the military).

[61]*See* Williams v. Nix, No. 82-1140 (8th Cir. Jan. 19, 1983), *discussed in* Kaczynski, *Inevitable Discovery - Reprise*, The Army Lawyer, Mar. 1983, at 21; 3 W. LaFave, *Search & Seizure* § 11.4, at 620-21 (1978).

[62]502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974).

than in *Fitzpatrick* and suppressed the fruits of the warrantless entry. "Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."[63]

The government bears the dual burden of establishing that the evidence in question would have been discovered in the course of normal police investigation and that there was a lack of bad faith on the part of government officials. Recent developments have indicated that appellate courts will not indulge in speculation on either count to assist the government in meeting its burden.[64] Affirmative evidence must be introduced to prove the inevitability of the discovery and the lack of bad faith by the police. Failure to do so may result in adverse action on appeal.

d. The Standing Requirement

Constitutional rights are personal to the individual. A violation of the rights of citizen A creates no right to redress that violation in citizen B. This is the essence of the standing requirement; assuming that a constitutional violation has occurred, only the party whose rights were impaired may raise the issue. In the Fourth Amendment arena, only a party upon whose reasonable expectation of privacy the government has unlawfully imposed may be granted exclusionary relief.[65]

In recent years, the standing rule has undergone a constitutional sea change toward a more restrictive view of who may successfully seek the application of the exclusionary rule. Prior to 1978, standing to challenge an illegal search or seizure would be conferred upon any party who could establish a possessory or proprietary interest in the item or place searched, was legitimately on the premises at the time of the search, or was charged with a crime, an element of which was possession of the seized physical evidence.[66] Once the threshold question of standing had been resolved, the substantive issue of the legality of the search or seizure would be addressed.[67]

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[63]*Id.* at 961.

[64]In Williams v. Nix, No. 82-1140 (8th Cir. Jan. 10, 1983), the Eighth Circuit, on review of a denial of an application for habeas corpus relief, reversed the conviction on retrial, 285 N.W.2d 248 (Iowa, 1979), *cert. denied*, 446 U.S. 921 (1980), of the accused in Brewer v. Williams, 430 U.S. 387 (1977), *see* text accompanying note 56 *supra*. The court found that the government had not met its burden of establishing a lack of bad faith on the part of the police authorities.

[65]*See* Rakas v. Illinois, 439 U.S. 128 (1978); Jones v. United States, 362 U.S. 257 (1960); United States v. Sanford, 12 M.J. 170 (C.M.A. 1981); United States v. Harris, 5 M.J. 44 (C.M.A. 1978). *See also* Mil. R. Evid. 311.

[66]*See* Jones v. United States, 362 U.S. 257 (1960).

[67]*See* Ringel, *supra* note 5, at § 20.3, at 20-6.

In 1978, in *Rakas v. Illinois*,[68] the Supreme Court reversed the order of inquiry and decided that the Fourth Amendment issue - whether an unreasonable search or seizure had taken place - should be resolved first. If that issue were decided adversely to the government, the trial court would then inquire as to whose rights were violated. In resolving the latter issue, the court must determine whether the moving party had a reasonable expectation of privacy in the place or thing searched or seized. In making this decision, the court should weigh as factors the proprietary interest, if any, of the accused, as well as the degree to which the accused was legitimately at the place searched. No single factor is determinative.[69] In *Rakas*, evidence was discovered by an illegal search of a vehicle. The accused, however, as a "mere passenger," lacked "a proprietary or other similar interest" in the vehicle as would confer standing to challenge the search.[70] Exclusionary relief was accordingly denied.

Two years later, in *United States v. Salvucci*,[71] the Court eliminated "automatic standing" for an accused charged with a crime, an element of which was possession of the seized evidence. The *Salvucci* Court found that the underlying reason for automatic standing - to spare the accused the delimma of waiving the suppression motion or taking the witness stand to admit an interest in the evidence to establish standing - was undercut over a decade earlier in *Simmons v. United States*.[72] In *Simmons*, the Court had held that the accused's testimony at a suppression hearing could not, over objection, be used against the accused at tria.[73] With the conundrum of waiver or incrimination thereby removed, the *Salvucci* Court saw no reason for the continued existence of automatic standing.[74]

Salvucci was promptly invoked as precedent in *Rawlings v. Kentucky*.[75] In *Rawlings*, drugs were discovered during an illegal search of the purse of the accused's female companion. The accused admitted that the drugs were his and that he had placed them there only moments earlier. At trial, the evidence was admitted and the accused was convicted of possession of a controlled substance with intent to sell.[76]

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[68]439 U.S. 128 (1978).
[69]*Id.* at 141-49.
[70]*Id.* at 131 (citation omitted).
[71]448 U.S. 83 (1980).
[72]390 U.S. 377 (1968).
[73]*Id.* at 391-94.
[74]448 U.S. at 85.
[75]448 U.S. 98 (1980).
[76]*Id.* at 102.

Based on *Rakas* and *Salvucci*, the Court initially found that an unreasonable search had occurred, but held that the accused lacked standing to contest it. He had no reasonable expectation of privacy in the article searched, the purse, and the admitted ownership of the drugs and charge with a possessory element were insufficient to confer standing.[77]

The states remain free to provide an accused with greater rights to raise search and seizure issues under state law.[78] At present, however, the federal judiciary is clearly on a course to restrict standing to raise constitutional violations.

3. Procedure

Given a potential question of an illegal search or seizure, how does the accused raise the issue?

In American practice, the issue is usually[79] raised by pretrial motion directed to the trial judge.[80] In the motion, the accused requests that the judge suppress evidence uncovered by reason of an illegal search or seizure. In a hearing before the judge on the motion, the government will bear the burden of proof, typically by a preponderance of the evidence,[81] to establish the admissibility of the evidence. To carry this burden, the government must demonstrate either that the evidence was not illegally discovered or, notwithstanding illegal activity, the evidence is nonetheless admissible under a theory of independent source, attenuation, or inevitable discovery.[82] The accused may testify at the hearing - and may have to in order to establish standing, but the testimony cannot be used against the accused before the jury on the government's direct case.[83]

Should an accused fail to raise a search or seizure at trial or, having unsuccessfully raised it, chooses to plead guilty, he or she will

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[77]*Id.* at 111.

[78]*See, e.g.*, State v. Culotta, 343 So.2d 977 (La. 1976); Caplan v. Superior Court, 98 Cal., Rptr. 649, 491 P.2d 1 (1971); People v. Martin, 290 P.2d 855 (Cal. 1955).

[79]If the trial is held before the judge alone, the court may choose to hear the issue as an objection to the evidence on the merits, rather than by pretrial motion, to avoid duplication of evidence. *See, e.g.*, the discretion granted the military judge in Mil. R. Evid. 311(d)(4).

[80]*See, e.g.*, Fed. R. Crim. P. 12(b); Cal. Penal Code § 1538.3 (West 1982); Fla. R. Crim. P. 3.190(h)(4); N.Y. Crim. Proc. L. § 710.40(3) (McKinney 1982).

[81]*See* Alderman v. United States, 394 U.S. 165 (1968); Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939).

[82]*See* text accompanying notes 45-64 *supra*.

[83]Simmons v. United States, 390 U.S. 377 (1968).

generally be deemed to have waived the Fourth Amendment issue for appellate purposes.[84]

C. REASONABLE SEARCHES AND SEIZURES

In order to understand the full applicability of the exclusionary rule, it is necessary to briefly survey the doctrines under which evidence derived from a search and seizure will be admissible in court. If the challenged evidence does not fully fit within one of the categories described below, it is likely that the exclusionary rule will require its suppression.

1. The Warrant Requirement

The language of the Fourth Amendment itself indicates a constitutional preference that searches and seizures be conducted pursuant to a search warrant issued upon a finding of probably cause.[85] Probable cause exists when the available information renders it more likely than not that the particularly described fruits, instrumentalities, or evidence of a crime will be found in the particularly described location.[86] This information must be presented, under oath or affirmation, to a neutral and detached magistrate, who will make the determination whether a warrant will issue.

The information presented to the magistrate may arise from the first hand observations of the affiant or through reliance in the hearsay declarations of others. In the latter case, the Supreme Court had held that the official must establish before the magistrate the basis of knowledge of the declarant - How does he know? - and the declarant's reliability - Why should I believe him?[87] The basis of knowledge would usually be demonstrated by the declarant's claim of personal observation of the items or activity in question.[88] Reliability could be proven by relating for the magistrate the past track record of a declarant-informer,[89] by corroboration of the information

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[84]*See* Hoffman v. United States, 327 F.2d 489 (9th Cir. 1974); United States v. Cox, 464 F.2d 937 (6th Cir. 1972); Simmons v. United States, 354 F. Supp. 1383 (N.D.N.Y. 1973), *aff'd*, 491 F.2d 758 (2d Cir. 1974). The accused would have also foreclosed examination of the issue in federal habeas corpus review of a state conviction. *See* Stone v. Powell, 428 U.S. 465 (1976).

[85]*See* text accompanying note 4 *supra*.

[86]Draper v. United States, 358 U.S. 307 (1959).

[87]Spinelli v. United States, 393 U.S. 410, 415-16 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[88]*See, e.g.*, United States, 393 U.S. 410, 415-16 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[89]*See, e.g.*, United States v. Pond, 523 F.2d 210 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976).

[90]*See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967).

by other information from an independent source,[90] or simply by the absence on the part of the declarant to falsify the information.[91]

In *Illinois v. Gates*,[92] the Supreme Court relaxed these strictures. In *Gates*, a judicially issued warrant had been obtained by police based largely upon an anonymous tip.[93] The resulting search and seizure revealed evidence that the accuseds had been traffiking in narcotics. As the tip had been anonymous, the police, although able to verify some information contained in it,[94] had been unable to determine the basis of knowledge of the informant. The Court held that this requirement was not inelastic and that the magistrate should instead use "common sense" in determining "whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[95] Reasonableness, not rigidity, was to be the key.

Once issued, the manner and time of execution of the warrant are generally governed by statute.[96] To insure that the fruits of the search will be admissible in court, the official executing the warrant must comply with such rules. Restrictions on the execution of the warrant may include a time duration on the warrant's validity[97] or a limitation on nighttime or unannounced entry.[98] Absent unforeseen and unforeseeable exigency at the time of execution, these limitations must be observed.[99]

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[90]*See, e.g.*, United States v. Dennis, 625 F.2d 782, 791 (8th Cir. 1980).

[91]United States v. Harris, 403 U.S. 573 (1971) (declaration against penal interest); United States v. McCrea, 583 F.2d 1083 (9th Cir. 1978) (the good citizen); Cundiff v. United States, 501 F.2d 188 (8th Cir. 1974) (the innocent bystander). *See generally* Green, *The Citizen Informant*, The Army Lawyer, Jan. 1982, at 1.

[92]___U.S.___ (Mar. 9, 1983).

[93]The facts of *Gates* are reported in the opinion of the Supreme Court of Illinois, 423 N.E. 2d 887 (Ill. 1981).

[94]The information had been contained in an anonymous letter. It essentially had related that the accuseds, husband and wife, had been dealing in drugs and would be travelling to Florida and returning with their automobile trunk filled with drugs. The police verified that the couple lived where indicated and had been planning a trip to Florida. The accuseds were placed under surveillance while in Florida as well. *See id.* at 887-88.

[95]___U.S.___. *See Supreme Court Eases Criteria For Approval of Search Warrants*, Washington Post, Mar. 9, 1983, at A1, A16.

[96]*See, e.g.*, Fed. R. Crim. P. 41(c), (d). *See also* 18 U.S.C. § 3109 (1976) (knock and announce requirements).

[97]*See* Fed. R. Crim. P. 41(c) ([The warrant] shall command the officer to search, within a specified period of time not to exceed 10 days . . .").

[98]*See id.* ("The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.").

[99]*See, e.g.*, United States v. Searp, 586 F.2d 1117 (6th Cir. 1978) (nighttime execution of federal warrant without special provision; fruits of search suppressed); United States v. Burke, 517 F.2d 377 (2d Cir. 1975) (execution of federal warrant after ten day period; fruits of search suppressed).

As an arrest is a seizure of the person, the courts have indicated a strong preference that arrests be conducted pursuant to a judicially issued warrant.[100] The warrant must issue upon probable cause to believe that a crime has been committed and the accused had committed it.[101] If the arrest is to take place in the accused's home, absent exigency, the courts will require that a warrant be issued prior to police entry into the home.[102]

The exclusionary rule may come into play in a variety of settings. The police may not have sought a warrant when one was required or may have obtained one based on less than probable cause.[103] The warrant itself may have been defective by failing to describe the place to be searched or the items to be seized with sufficient particularity.[104] The execution of the warrant may have taken place at an unauthorized time or in an unauthorized manner.[105] Finally, the executing official might have strayed beyond the terms of the warrant itself and searched places not described in it.[106] In such cases, it is likely that the fruits of the unlawful government conduct will be excluded from evidence in a criminal trial.

2. Reasonable Warrantless Searches and Seizures

The Supreme Court has stated that, except in a few narrowly defined cases, searches and seizures should be carried out pursuant to a warrant. In this section, those exceptions to the warrant requirement are outlined, together with the instances in which the exclusionary rule may be invoked.

a. Search Incident to Apprehension

Recognizing the need of the police to protect themselves upon making an arrest and to prevent the destruction of physical evidence at the scene of the arrest, the courts have granted law enforcement authorities the right to search the suspect and the "grab area" sur-

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[100]*See* Payton v. New York, 445 U.S. 573 (1980).

[101]Brinegar v. United States, 338 U.S. 160 (1949). *See also* Fed. R. Crim. P. 4(a).

[102]*Compare* Payton v. New York, 445 U.S. 573 (1980) (arrest warrant required for non-exigent arrest in home) *with* United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest in public place permissible, even if no exigent circumstances).

[103]*See* Payton v. New York, 445 U.S. 573 (1980); United States v. Ventresca, 380 U.S. 102 (1965).

[104]*See* Steele v. United States, 267 U.S. 498 (1925); United States v. Higgins, 428 F.2d 232 (7th Cir. 1970).

[105]*See* cases cited in note 99 *supra*.

[106]*See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). *But see* discussion of plain view in text accompanying notes 113-17 *infra*.

rounding him or her incident to the apprehension.[107] Interestingly, some courts have afforded the police this right notwithstanding that the suspect had already been handcuffed and/or removed from the scene of the arrest.[108] Under this theory, the right to search attached at the time and place of the arrest and was not vitiated by the subsequent removal of the suspect from that location.[109] Similarly, the search of the accused's person may occur at some time after the arrest.[110]

Under the rationale detailed above, it is apparent that the locus of the apprehension controls the area lawfully subject to search. Thus, if the accused had been apprehended outside his or her home and then escorted inside the home, the house would not become subject to search.[111] Additionally, if the suspect were arrested in one room of the home, the other rooms would not thereby become fair game for search except, in some circumstances, for a walk-through by the police to insure their own safety.[112] An exceeding of the legitimate scope of this right would render the fruits inadmissible in evidence.

As the predicate for this brand of warrantless search is a lawful arrest, a search incident to an unlawful arrest would itself be illegal. Thus, if the arrest had required a warrant and none had been obtained, or if, with or without a warrant, the arrest had been predicated upon less than probable cause, then the fruits acquired during the resulting search will be inadmissible in court.[113]

b. Plain View

Once a law enforcement officer is properly located at a particular place, any contraband, evidence, or fruits of a crime observed in "plain view" are subject to seizure by the officer[114] and will be admitted into evidence at a criminal trial.

In *Coolidge v. New Hampshire*,[115] the Supreme Court laid down the

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[107]Chimel v. California, 395 U.S. 752 (1969); United States v. Acosta, 11 M.J. 307 (C.M.A. 1981).

[108]People v. Fitzpatrick, 32 N.Y. 2d 499, 508, 346 N.Y.S.2d 793, 798-99, 300 N.E.2d 139, 143, *cert. denied*, 414 U.S. 1033 (1973).

[109]United States v. Wright, 577 F.2d 378 (6th Cir. 1978).

[110]United States v. Edwards, 415 U.S. 800 (1974).

[111]Vale v. Louisiana, 399 U.S. 30 (1970).

[112]*See* United States v. Phillips, 593 F.2d 553 (4th Cir. 1978); United States v. Bowdach, 561 F.2d 1160 (1973); United States v. Christophe, 470 F.2d 865 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

[113]*See* Amador-Gonzalas v. United States, 391 F.2d 308 (5th Cir. 1976); United States v. Paige, 7 M.J. 480 (C.M.A. 1979).

[114]Note that the "plain view" doctrine deals with the "seizure" aspect of the Fourth Amendment. *See* Mil. R. Evid. 316 (d)(4)(c).

[115]403 U.S. 443 (1971).

four elements of a plain view seizure. First, the police must have legitimately been in a position to observe the item. This is mose frequently accomplished pursuant to a lawful search warrant issued for the search for other evidence, by reason of a permissible warrantless entry, or by observance of the item from a public place.[116] Secondly, the item must in fact be in "plain view." No amount of searching except that already authorized by a lawful search warrant is permitted. Thirdly, the incriminating nature of the observed item must be immediately apparent. Finally, and most controversially, the Supreme Court has required that the discovery of the item have been inadvertent.[117] Simply stated, police authorities must not have known that the item discovered would be located in the place in which it was found. If they did, they should have obtained a search warrant. Lower courts have interpreted this restriction narrowly; a suspicion not amounting to probable cause that the evidence was present will not defeat its seizure providing that the other elements of plain view are met.[118] In those cases, however, in which any of the first three *Coolidge* elements are lacking, plain view will not be available as a basis for admission of evidence in a criminal trial.

c. Consent

The fruits of a search may be admissible in evidence if they had been discovered pursuant to the freely given consent of a party with dominion and control over the area to be searched.[119] In offering the fruits of a purportedly consensual search, the prosecution bears the burden of proving to the satisfaction of the trial judge that the waiver by the accused of his or her Fourth Amendment rights was voluntary.[120] The court will make this determination based upon the totality of the circumstances surrounding the giving of the consent.[120] The fruits of a voluntarily given consent will be admissible in court;

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[116]If, however, the police observe, from a *public* place, contraband or evidence of a crime which is located in a *private* place, then, absent exigency, the police must obtain a search warrant before the item may be seized. *See* discussion in Ringel, *supra* note 5, at § 8-2(a), at 8-8 to 8-9.

[117]403 U.S. at 466-67.

[118]*See, e.g.*, United States v. Sanders, 631 F.2d 1309 (8th Cir. 1980); United States v. Antill, 615 F.2d 648 (5th Cir. 1980) (per curiam); United States v. Paolli, 470 F.2d 67 (2d Cir. 1972).

[119] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[120]*Id.* at 242; United States v. Wallace, 11 M.J. 445 (C.M.A. 1981); Mil. R. Evid. 314(e).

[121]*Schneckloth*, 412 U.S. at 242.

evidence obtained through coercion will be excluded.[122]

d. Exigent Circumstances

When the pressures of time, danger, or the need to preserve evanescent evidence arise, the police may be excused from the need to obtain judicial authorization prior to conducting a search or seizure.

Among the doctrines spurred by this theory of exigency was the "automobile exception" to the search warrant requirement. Under this theory, the police may search a vehicle on the highway, pursuant to probable cause, without a search warrant, due to the inherent mobility of the automobile.[123] As in the case of the search incident to apprehension, the right to search arises at the time of interdiction of the automobile; actual search at a later time when the vehicle is immobilized is permitted.[124] In such cases, the Supreme Court has noted the diminished expectation of privacy which one enjoys in an automobile as justification for the search later in time.[125] It should also be noted that, like the search incident to apprehension, the lawfulness of the automobile search depends upon the lawfulness of the original stop. An automobile search based upon probable cause developed only after an illegal stop of the vehicle by the police will be inadmissible in court.[126]

In other situations, where evidence may easily by destroyed, a warrantless seizure has been permitted. In *Cupp v. Murphy*,[127] the police were questioning the accused concerning the strangulation death of his wife. An officer noticed dark stains under the accused's fingernails. After refusing the police permission to scrape his nails and appearing to try to remove the substance from under his nails, the accused was physically restrained while the police seized the substance, which was subsequently identified as matching the blood type of the victim.[128] The Supreme Court upheld the accused's conviction. The Court found that the "evanescent" nature of the evidence

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[122]Examples of coerced consent may result from the use of force, *id.* at 233, or threats against the person or property of the suspect, United States v. Kampbell, 574 F.2d 962 (8th Cir. 1978), or of an acquaintance of the suspect. United States v. Bolin, 514 F.2d 554 (1975). An important factor in a court's determination of the voluntariness of the consent is whether the suspect was informed or his or her right to refuse to consent to the search. United States v. Mendenhall, 446 U.S. 544 (1980).

[123]Carroll v. United States, 267 U.S. 132 (1925); Mil. R. Evid. 315(g)(3).

[124]Chambers v. Moroney, 399 U.S. 42 (1970).

[125]*Id.* at 51-52.

[126]*See* Delaware v. Prouse, 440 U.S. 648 (1979).

[127]412 U.S. 291 (1973).

[128]*Id.* at 292.

and its ease of destruction justified the warrantless action by the police.[129]

Warrantless entries to a particular place have been permitted when there was cause to believe that a crime was in progress at that location,[130] when the police were in "hot pursuit" of a suspect,[131] and in emergency situations.[132]

In those cases, however, where the warrantless search or seizure had been conducted for convenience rather than exigency, the fruits of the search or seizure may be excluded from evidence. Thus, where an item of personal property,[133] a secured location,[134] or an accused[135] is in the exclusive control of the police and there is no danger that evidence would disapear, a warrant must be sought prior to a search being conducted. Absent the warrant, the results of the search will likely be ruled inadmissible at trial.

e. Administrative Inspections and Searches

The twentieth century has witnessed a proliferation of governmental regulations and a superabundance of oversight responsibilities. The execution of the resulting duties of the government has necessitated occasional examination of the regulated activities in order to insure compliance with mandated standards. As an inspection brings a government official onto the premises and into the inner workings of the business of a perhaps reluctant citizen, there exists an invasion of privacy which raises Fourth Amendment issues.[136]

The Supreme Court recognized such issues in 1967 in *Camera v. Municipal Court*[137] and *See v. City of Seattle*.[138] In those cases, the Court held that an administrative warrant, based upon the public need to guarantee healthful and safe conditions in the regulated occupation, must issue prior to an administrative search.[139] The

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[129]*Id.* at 296. *See also* Schmerber v. California, 384 U.S. 757 (1966) (extraction of blood alcohol test permissible because of "highly evanscent" nature of evidence.)

[130]United States v. Jones, 635 F.2d 1357 (8th Cir. 1980); Thompson v. McNamus, 512 F.2d 769 (8th Cir. 1975).

[131]Warden v. Hayden, 387 U.S. 294 (1967).

[132]*See, e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978) (fire); Vauss v. United States, 370 F.2d 250 (D.C. Cir. 1966) (person unconscious).

[133]United States v. Chadwick, 433 U.S. 1 (1977).

[134]United States v. Griffin, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974). *See also* Mincey v. Arizona, 437 U.S. 385 (1978).

[135]*But see* United States v. Edwards, 415 U.S. 800 (1974) (search of an accused on the day following his arrest permissible as incident to the arrest).

[136]Camera v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

[137]387 U.S. 523 (1967).

[138]387 U.S. 541 (1967).

[139]*Camera*, 387 U.S. at 534; *See*, 387 U.S. at 546.

warrant requirement may be excused in cases of emergency, consent, open view observation of a violation, or in a pervasively regulated industry, such as firearms.[140] When evidence of a crime is discovered during a warrantless inspection when an administrative warrant was required, the evidence will be inadmissible at trial.

Inspections in the armed forces are governed by Military Rule of Evidence 313.[141] This Rule provides that a commander may direct an inspection of his or her unit, or a portion thereof, the fruits of which will be admissible at a criminal trial, provided that the commander is not acting primarily to obtain evidence for prosecutorial purposes, but rather is conducting the inspection "to ensure the security, military fitness, or good order and discipline" of the unit.[142] An inspection may be conducted to locate and confiscate contraband or unlawful weapons provided that the commander had made a threshold determination that such contraband or illegal weapons would adversely affect the security or discipline of the command and either the inspection has been previously scheduled or there is a reasonable suspicion that such contraband or illegal weapons are present in the command.[143] Inspections may utilize reasonable natural or technological aids, such as metal detectors or drug detection dogs, to enhance the commander's senses.[144] Evidence discovered during an inspection under this Rule will be admitted in court unless the inspection is shown to have been the subterfuge for a search for which probable cause was lacking.[145]

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[140]*See* Compagnie Francaise v. Borad of Health, 186 U.S. 380 (1902). *See also* Marshall v. Barlow's Inc., 436 U.S. 307 (1978); Davis v. United States, 328 U.S. 582 (1946); United States v. Thriftmart, Inc., 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970); United States v. Golden, 413 F.2d 1010 (4th Cir. 1969).

[141]Mil. R. Evid. 313. The Military Rules of Evidence, patterned generally on the Federal Rules of Evidence, became effective on September 1, 1980. *See generally, Symposium: The Military Rules of Evidence*, The Army Lawyer, May 1980, at 1.

[142]Mil. R. Evid. 313(b).

[143]*Id.*

[144]*Id. See generally* Analysis to Mil. R. Evid 313, *reprinted in* Manual for Courts-Martial, United States (1969 rev. ed.), App. 18, at A18-36 to A18-42.

[145]Mil. R. Evid. 313(b). Prior editions of the Manual for Courts-Martial had been silent as to the commander's power to inspect. Consequently, the drafters of the Military Rules of Evidence were explicit about it:

> Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they must be considered as a condition precedent to the existence of any effective armed force and inherent in the concept of a military unit. Inspections as a general legal concept have their constitutional origins in the very provisions of the Constitution which authorize the armed forces of the United States.

Analysis to Mil. R. Evid. 313, *reprinted in* Manual for Courts-Martial, United States (1969 rev. ed.), App. 18, at A18-37. *See* United States v. Brown, 12 M.J. 420 (C.M.A. 1982); United States v. Middleton, 10 M.J. 123 (C.M.A. 1981).

f. Abandoned Property

The touchstone of the Fourth Amendment is whether a reasonable expectation of privacy existed in the place or property searched.[146] It logically follows that no search or seizure within the meaning of the Fourth Amendment has occurred when there is a search or seizure of a place or property in which the accused has relinquished all interest. This is the doctrine of abandoned property.[147]

Whether the accused has abandoned the subject matter of the search or seizure is a question of the accused's intent and will be resolved by the trial judge in light of all the relevant circumstances in the case. Relinquish of property in advance of a lawful arrest or search will be deemed an abandonment and the property will be admissible at trial.[148] An abandonment prompted by illegal police activity, however, will be found involuntary and evidence of the discarded property will be excluded by the trial judge.[149]

D. SUGGESTED MODIFICATIONS OF THE EXCLUSIONARY RULE

In the last decade, there has been no shortage of suggested modifications of the exclusionary rule. From practitioners to professors to Supreme Court justices, the issue has been a timely and thought-provoking one and provided grist for many a law review article.

At the heart of the debate over whether and how the exclusionary rule ought to be changed are the primary issues discussed earlier in this article: Is the rule constitutionally required or a creature of judicial creation?[150] Is the primary purpose of the rule deterrence of police misconduct or the maintenance of judicial integrity?[151] The answers to these questions largely dictate the position on the issue of modification which any given party will adopt.

1. Revision Within Constitutional Guarantees

At least one view which accepts the constitutional mandate of the exclusionary rule would nonetheless modify its application in those

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[146]Katz v. United States, 389 U.S. 347 (1967).

[147]Abel v. United States, 362 U.S. 217 (1960). *See* Mil. R. Evid. 316(d)(1).

[148]Hester v. United States, 265 U.S. 27 (1924); United States v. Hollman, 541 F.2d 196 (8th Cir. 1976).

[149]United States v. Maryland, 479 F.2d 566 (5th Cir. 1973); Massachusets v. Painten, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed*, 389 U.S. 560 (1968).

[150]*See* text accompanying notes 25, 33 *supra*.

[151]*See* text accompanying notes 24, 34, 35-40 *supra*.

situations where the Fourth Amendment violation is not flagrant.[152] Under this theory, it has been noted that "the only condition under which one may be deprived of life, liberty or property is if that deprivation be in accordance with due process of law."[153] As the Constitution is the primary source of the definition of due process, it then logically follows that violation of the commands of the Fourth Amendment would equally violate the due process clause of the Fifth Amendment.[154] Accordingly, the introduction of illegally seized evidence would violate the Constitution and a conviction based upon such evidence would cause a deprivation of liberty in violation of the due process clause. The exclusionary rule, which bars such evidence at the threshold of the trial, is thus more than a prudential rule of judicial housekeeping; rather, the rule guarantees an accused the minimum requirements of due process under the Constitution.

The inquiry, however, does not end there. After studying the history behind the concept of due process in English and American law, the proponent concluded that due process was conceived as a protection against flagrant and arbitrary abuses by government authority.[155] Similarly, the facts of the American case law which has given rise to and confirmed the current vitality of the exclusionary rule have involved not "technical" or "good faith" violations of the law of search and seizure, but rather wilful and gross abuses of the fundamental rights of the citizen.[156] Consequently, while exclusion of relevant, but illegally seized, evidence has come to be the practice in all cases of Fourth Amendment violations, it may be argued that both history and the facts of landmark exclusionary rule cases fail to dictate so doctrinaire a result. Given this background, it has been contended that "[e]xclusion as a requirement of due process of law need not be extended to insubstantial violations which do not offend those great purposes which give the concept of due process its fundamental justification."[157] Under this analysis, the violation of the constitutional right is conceded; the remedy of exclusion, however, is reserved for those cases in which the violation was intentional, flagrant, or substantial. The constitutional basis of the rule is left intact, yet the practical effect of the rule is curtailed.

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[152]Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. Crim. L. & Criminology 141, 155 (1978).

[153]*Id.* at 149.

[154]*Id.* at 150.

[155]*See* discussion in *id.* at 156-58.

[156]*See* Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 165 (1952), *discussed in* Sunderland, *supra* note 152, at 152-53.

[157]*Id.* at 175.

The American Law Institute, in its Model Code of Pre-arraignment Procedure, has proposed a scheme not unlike the foregoing. Under the ALI proposal, the court would first determine if the violation of the Constitution was "substantial." A violation is substantial and warrants exclusion of the evidence thereby procured, "if it was gross, wilful and prejudicial to the accused. A violation shall be deemed wilful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a higher authority in it."[158] If the violation is not found to be substantial under this single criterion, the court must determine whether "all the circumstances" dictate a substantial violation. Among the factors which the court must consider are:

(a) the extent of the deviation from lawful conduct;
(b) the extent to which the violation was wilful;
(c) the extent to which the violation was likely to have led the defendant to misunderstand his position or legal rights;
(d) the extent to which exclusion will tend to prevent violations of the ALI code;
(e) whether there is a generally effective system of administrative or other sanctions which makes it less important that exclusion be used to deter such a violation.[159]

While the ALI proposal was in its preliminary stages, it was substantially adopted as the basis for a bill introduced in the Senate by Senator Lloyd Bentsen. In addition to the substantiality test, the bill included a tort remedy for an aggrieved party.[160] Although the Bentsen bill received support from various academics and former government officials,[161] it was opposed by the American Bar Association.[162] The bill never reached a floor vote.[163]

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[158]*See* American Law Institute, Model Code of Pre-Arraignment Procedure §§ 150.3 (confessions), SS 290.2 (search and seizure) (1975), *discussed in* Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Rule*, 10 Ga. L. Rev. 1 (1975).

[159]American Law Institute, Model Code of Pre-Arraignment Procedure § SS 290.2 (1975).

[160]S. 2657, 92d Cong., 2d Sess. (1972).

[161]The bill was supported by Professor Charles Alan Wright and the former United States Solicitor General Erwin N. Griswold. *See generally* Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736 (1972).

[162]Professor Samuel Dash of Georgetown University led the opposition. *See ABA Votes to Keep Exclusionary Rule*, 12 Crim. L. Rep. [BNA] 2429, 2429-31 (1973).

[163]Despite the demise of the Bentsen bill in the 92d Congress, bills have been introduced in the 97th, *see* S. 2903, 97th Cong., 2d Sess. (1982); President's Message to Congress Transmitting the Criminal Justice Reform Act of 1982 (Sept. 13, 1982), and 98th Congresses. *See* S. 101, 98th Cong., 1st Sess. (1983); President's Message to Congress Transmitting the Comprehensive Crime Control Act of 1983 (Mar. 16, 1983).

While the ALI test skillfully implements the constitutional theory noted at the beginning of this section, it anticipates, as one of the substantiality factors, that some alternative "effective system" of deterrence be in place prior to its adoption. Such systems are discussed in the following sections.

2. Bivens v. Six Unknown Agents

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,[164] the Chief Justice of the United States had occasion to outline his requirements for an alternative scheme to the exclusionary rule.[165] In *Bivens*, six agents of the Federal Bureau of Narcotics had entered the plaintiff's apartment without a search or arrest warrant, arrested and handcuffed him, and threatened his family with arrest. The home was thereafter searched "from stem to stern" and the plaintiff was taken to the local federal courthouse and strip searched. Asserting an implied right of action under the Fourth Amendment, the plaintiff sued the six agents for damages. The district court dismissed the suit[166] and the Second Circuit affirmed the dismissal.[167] A majority of the Supreme Court reversed those decisions and held that the plaintiff was entitled to a cause of action which was implied under the Constitution.[168]

Chief Justice Burger dissented, reasoning that the majority had usurped the prerogatives of the legislature in creating this new cause of action.[169] Additionally and at length, however, the Chief Justice commented upon the type of statutory structure which he would require to be in place[170] prior to the elimination of the exclusionary rule, a rule he deemed "conceptually sterile and practically ineffective" in deterring police misconduct.[171]

The Chief Justice acknowledged that private actions were ineffectual in remedying alleged constitutional violations.[172] Moreover, the "remedy" of the exclusionary rule is entirely unavailable to innocent persons who are never subjected to trial.[173] To resolve these prob-

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[164]403 U.S. 388 (1971).
[165]*Id.* at 411 (Burger, C.J., dissenting).
[166]276 F. Supp. 12 (E.D.N.Y. 1967).
[167]409 F.2d 718 (2d Cir. 1969).
[168]403 U.S. at 396-99.
[169]*Id.* at 411-12 (Burger, C.J., dissenting).
[170]*Id.* at 415.
[171]*Id.* The Chief Justice noted: "Freeing either a tiger or a mouse in a school room is an illegal act, but no rational person would suggest that these two acts should be punished in the same way." *Id.* at 419.
[172]*Id.* at 421.
[173]*Id.* at 420.

lems, the Chief Justice proposed that Congress enact:

> (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under this statute;
>
> (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
>
> (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of a violation of the Fourth Amendment.[174]

The Chief Justice envisioned that the scheme would serve to identify problem police officers for internal discipline[175] and serve as a model for the states.[176] In the following section, both state and federal implementations of the Chief Justice's plan are discussed.

3. Administrative Remedies

Given the twin realities that one aggrieved by unlawful police conduct is unlikely to sue the official in tort and that, if brought, the suit would yield minimal, if any, damages, various systems have been proposed to establish administrative procedures for claiming damages. Each system is advanced as an alternative method of deterring police misconduct and would thus largely obviate the need for an exclusionary rule of evidence.

a. Administrative Board Remedy

Judge Richard J. Hanscom of the San Diego Municipal Court has suggested a scheme oriented primarily to the states, but potentially applicable to the federal government. He has proposed that the legislature concurrently enact two provisions into law. The first would direct the courts to admit at trial evidence seized illegally, but in "good faith," by the police officials involved. Exclusion of evidence

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[174] *Id.* at 422-23.
[175] *Id.* at 423.
[176] *Id.* at 423-24.

would still be available where the conduct of the police was found not to be in good faith or where the activity "shocks the conscience" of the court.[177]

At the same time, an administrative forum, akin to a workmen's compensation board, would be established. A party aggrieved by illegal police conduct would be given the option of appearing before the board or being relegated to civil remedies.[178] There would be no right to a jury trial before the board. As with workmen's compensation, the board would have the power to make fixed monetary awards to the plaintiff. Those damages would in turn be charged to the governmental agency whose officials engaged in the unlawful activity. This assessment is designed to prompt internal disciplinary procedures and thereby promote a true deterrence.[179]

Judge Hanscom's proposal has its merits. A fixed adminsitrative award schedule would guarantee recompense to the plaintiff whose injury is not measurable in dollars, such as an invasion of the privacy of the home. The assessment procedure should quell the objections of those who fear that any modification of the exclusionary rule would lead to a decreased police training emphasis on constitutional rights. On the other hand, awards of assessable damages for "good faith" violations of the law could impact adversely on zealous law enforcement and encourage the officer to "safe-side it" in the pressurized judgment calls of everyday police work. If the exclusionary rule has proven to be an ineffective deterrent, this proposal may deter too well. Yet, the scheme is worthy of study in devising an alternative to the current exclusion of relevant evidence.

b. The Federal Tort Claims Act

The Federal Tort Claims Act[180] was originally enacted by Congress in 1946 to waive the sovereign immunity of the federal government in certain categories of cases and to provide a forum for the adjudication of claims against the United States.[181] In the wake of *Bivens v. Six Unknown Agents*,[182] the Act was amended to allow

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[177]Hanscom, *Admissibility of Illegally Seized Evidence: Could This Be the Path Out of the Labyrinth of the Exclusionary Rule:*, 9 Pepperdine L. Rev. 799, 801, 817-18 (1982).

[178]*Id.* at 801, 818. The establishment of a board recognizes that parties will not generally succeed before juries which will be reluctant to award damages to a lawbreaker. *Id.* at 816 (citing Bivens v. Six Unknown Agents, 403 U.S. 388, 522 (1971) (Burger, C.J., dissenting)).

[179]Hanscom, *supra* note 177, at 817.

[180]28 U.S.C. §§ 1346, 2671-80 (1976).

[181]*See* Gilligan, *The Federal Tort Claims Act - An Alternative to the Exclusionary Rule*, 66 J. Crim. L. & Criminology 1, 9 (1975).

[182]403 U.S. 388 (1971). *See* text accompanying notes 164-75 *supra*.

recompense for the victims of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by investigative or law enforcement personnel of the federal government.[183] Colonel Francis A. Gilligan of the U.S. Army Judge Advocate General's Corps has proposed that the Act, with minor adjustment, could prove to be the much sought alternative to the exclusionary rule.[184]

Under the Federal Tort Claims Act, a party injured by an official of the federal government must file a claim against the agency whose employee caused the harm.[185] The claims must be based upon one of the enumerated categories of injury and state a sum certain sought as recovery.[186] Upon denial of the claim or after six months of inaction by the agency, the aggrieved party may file suit in federal court.[187] The determination of liability, if any, will be made in accordance with the law of the place where the injury occurred.[188] The monetary amount demanded in the claim will, absent exceptional circumstances, be the upper limit of recovery allowed in court.[189] Colonel Gilligan has noted that "[t]he Act is an efficient vehicle for processing claims and is procedurally so simple as to encourage aggrieved parties to file claims."[190] Presumably, were parties injured by the unlawful searches and seizures committed by federal officials to file such claims and were recovery afforded them, then the Act could provide the measure of deterrence, at least in the federal sphere, currently sought by the exclusionary rule.

As presently constituted, however, the Act is unable to perform such a function. The requirement that the claim be filed only for personal injury or property damage would serve little purpose in the context of an illegal search or seizure. The injuries incurred in such cases are usually intangible, such as the loss of privacy or a new feeling of insecurity in one's own home.[191] Further, as liability is determined under state law, a great potential exists for a diversity of decisional law as the claims reach the courts. Additionally, the post-*Bivens* amendment fails to make the Act an exclusive remedy for the aggrieved plaintiff; suit against the individual officer in his or her

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[183]Pub. L. No. 93-253, § 2 (Mar. 16, 1974), *codified at* 28 U.S.C. § 2680(h) (1976).
[184]Gilligan, *supra* note 181, at 9.
[185]28 U.S.C. § 2675 (1976).
[186]28 C.F.R. § 14.2a (1982).
[187]28 U.S.C. § 2675 (1976).
[188]*Id.* at §§ 1346, 2672.
[189]*Id.* at § 2675(b).
[190]Gilligan, *supra* note 181, at 9.
[191]*Id.* at 10.

private capacity is permitted.[192] Finally, the Act prohibits the award of either punitive damages or attorney's fees and limits the percentage of administrative or judicial recovery which can be paid to the attorney of a successful claimant.[193]

Colonel Gilligan has proposed legislation designed to remedy these shortcomings. He has recommended that the application of the Act to "abuse of process" be amended to read "illegal search and seizure," thereby clarifying the scope of the Act and more acurately reflecting the congressional intent behind it.[194] The Act should provide for liquidated damages and expand the potential recovery beyond claims for personal injury and property damage.[195] Action against the individual officer should be barred. Rather than mechanically applying the law of the state in which the injury occurred, the courts should be required to view the law of the state in light of congressional intent behind the Act. Thus, in situations in which the law of the state might deny recovery but Congress clearly intended to grant it, redress would be given to effectuate the purposes of the Act.[196] Finally, even after amendment of the Act, evidence obtained by a "patently outrageous" violation of the Constitution would be barred from court.[197]

Colonel Gilligan's proposal is essentially a federal version of Judge Hanscom's administrative board, but built upon an existing foundation. Its benefits and drawbacks are analagous. The scheme nonetheless provides a potential substitute for the exclusionary rule and perhaps is one which ought to be explored.

4. The "Good Faith Exception"

If, as recent Supreme Court decisions have indicated, the primary purpose of the judicially-created exclusionary rule is to deter police misconduct,[198] does the rule have any cause for existence in cases where police activity seemed objectively and subjectively lawful at

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[192] *Id.* at 18.

[193] 28 U.S.C. §2674 (1976). Colonel Gilligan has noted that this provision of the Act compares unfavorably with that section of the Omnibus Crime Control and Safe Streets Act which provides for liquidated damages and punitive damages as well as attorney's fees in cases of illegal wiretapping. *See* 18 U.S.C. § 2520 (1976), *discussed in* Gilligan, *supra* note 181, at 18. *See also* text accompanying notes 337-50 *infra*.

[194] Gilligan, *supra* note 181, at 21.

[195] *Id.*

[196] *Id.* at 16.

[197] *Id.* at 22.

[198] *See* text accompanying notes 37-40 *supra*.

the time it occurred? In *United States v. Williams*,[199] the Fifth Circuit thought not and, sitting en banc, became the first federal court to adopt a "good faith exception" to the exclusionary rule.

In *Williams*, the accused had been apprehended by a federal drug enforcement agent for violation of the terms of a court order releasing her pending the appeal of another conviction. In a search incident to that apprehension and at a subsequent search authorized by a judicially issued search warrant, a large amout of heroin was found on the accused's person and in the accused's luggage, respectively.[200] The trial court granted the accused's motion to suppress the heroin, finding that the agent was without authority to arrest the accused such that the discovery of the heroin flowed from an unlawful arrest. Initially, a panel of the Fifth Circuit affirmed the suppression,[201] but, at a rehearing en banc, the full court reversed that determination and found the heroin to be admissible at trial.[202]

Among the theories of admissibility which commanded a majority of the Fifth Circuit judges[208] was

> that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized.[204]

The panel noted two situations in which good faith might be present. In the first, an officer might have made a judgmental error concerning whether facts sufficient to constitute probable cause to arrest or search existed; this was called a "good faith mistake."[205] In the second situation, the officer may have acted in reliance upon a statute or search or arrest warrant later ruled invalid; this was

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[199]622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), *discussed in* Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal, 1981-82*, 71 Geo. L.J. 339, 437 (1982); Recent Developments, *Criminal Procedure - Exclusionary Rule - "Good Faith" Exception - The Exclusionary Rule Will Not Operate in Circumstances Where the Officer's Violation Was Committed in the Reasonable Good Faith Belief That His Actions Were Legal*, 27 Vill. L. Rev. 211 (1981-82).

[200]622 F.2d at 834-35.

[201]594 F.2d 86 (5th Cir. 1980).

[202]622 F.2d 830 (5th Cir. 1980).

[203]Twenty-four judges sat en banc to hear the case. Sixteen concurred in an opinion which found that the federal narcotics agent had possessed the requisite authority to arrest the accused. Under this theory, the searches incident to the apprehension and pursuant to the warrant were lawful. *Id.* at 839. Thirteen judges joined in the opinion which recognized the good faith exception. *Id.* at 840.

[204]*Id.*

[205]*Id.* at 841 (quoting Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim L. & Criminology 635, 638-39 (1974)).

denominated a "technical violation.[206] In either case, exclusion of the evidence so discovered would have no deterrent effect on police behavior as the police had subjectively and reasonably believed their conduct to have been lawful when they had acted. Under the facts of *Williams*, the arresting agent had acted on a good faith and reasonable belief that the accused had committed a crime and that authority existed to apprehend her for it. According the evidence discovered as the fruits of the arrest was deemed admissible at trial.[207]

The Supreme Court denied review of *Williams*.[208] The Court was, however, presented with an opportunity to adopt the doctrine in *Illinois v. Gates*.[209] In *Gates*, the police had obtained a judicially issued search warrant and discovered incriminating evidence while executing it. At trial, the court found that the warrant had been issued upon less than probable cause and suppressed the fruits of the search.[210] Before the Supreme Court, the issue had initially been couched as a review of the finding of lack of probable cause. The Court, however, ordered reargument and directed the parties to address whether a good faith exception to the exclusionary rule should be recognized.[211] In its decision, the Court avoided the good

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[206] *Id.*

[207] 622 F.2d at 846. *Williams* has been favorably noted, if not adopted, by several federal and state courts. *See, e.g.*, United States v. Cady, 651 F.2d 290 (5th Cir. 1981); United States v. Hill, 626 F.2d 1301 (5th Cir. 1980); United States v. Wilson, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982); United States v. Nolan, 530 F. Supp. 386, 399 (W.D. Pa. 1981); United States v. Pills, 522 F. Supp. 855, 867 (M.D. Pa. 1981); United States v. Lawson, 502 F. Supp. 158, 166 (D. Md. 1980); People v. Hogan, 649 P.2d 326, 334 (Colo. 1982) (en banc) (dissent); State v. Settle, 447 A.2d 1284, 1288-89 (N.H. 1982) (Douglas, J., concurring); Jessie v. State, 640 P.2d 56, 67 (Wyo. 1982); State v. Lehnen, 403 So.2d 688, 686 (La. 1981); People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980); People v. Arnow, 108 Misc. 2d 128, 436 N.Y.S.2d 950 (Sup. Ct. Spec. Narcotics N.Y. County 1981); People v. Pierce, 44 Ill. Dec. 326, 411 N.E. 2d 295 (Ill. App. 1980).

[208] 449 U.S. 1129 (1981).

[209] 423 N.E.2d 887 (Ill. 1981).

[210] *Id.* at 888-89.

[211] 51 U.S.L.W. 3415 (U.S. Nov. 30, 1982). *See* note 2 *supra*. Excerpts from oral argument are reported at 51 U.S.L.W. 3643-45 (U.S. Mar. 8, 1983). The confluence of the Fifth Circuit's decision in *Williams* and the Court's reargument order in *Gates* prompted a deluge of material concerning the desirability of a "good faith" exception. *See e.g.*, Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 So. Tex. L.J. 654 (1982); Burkoff, *Bad Faith Searches*, 57 N.Y.U.L. Rev. 70 (1982); Crump, *The "Tained Evidence" Rationale: Does It Really Support the Exclusionary Rule?*, 23 So. Tex. L.J. 687 (1982); Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L.J. 1065 (1982); Hanscom, *Admissibility of Illegally Seized Evidence: Could This Be the Path Out of the Labyrinth of the Exclusionary Rule*, 9 Pepperdine L. Rev. 799 (1982); Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. Crim. L. & Criminology 916 (1982); Leonard, *Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice*, 4 Whittier L. Rev. 33 (1982); McC. Mathias, *The Exclusionary Rule Revisited*, 28 Loy. L. Rev. 1 (1982); Rader, *Legislating a Remedy for the Fourth Amendment*, 23 So. Tex. L.J. 584 (1982); Teague, *Applications of the Exclusionary Rule*, 23 So. Tex. L.J. 632 (1982); Wilkey, *Constitu-*

faith issue, as it had not been raised in the state courts.[212]

The search in *Gates* might have been termed a "technical violation" under the language of *Williams*. When the factually and procedurally proper case is presented to the Supreme Court, however, it seems clear that a modification of the exclusionary rule is imminent. Four Justices - Chief Justice Burger and Justices White, Powell, and Rehnquist - have gone on record urging adoption of variations of a good faith exception to the rule.[213] Justice O'Connor, in her confirmation hearings, also expressed reservations about the exclusionary rule.[214] Whatever the views of the four other Justices,[215] a majority for modification appears to exist on the present Court.

If judicial revision is not forthcoming, legislative actions is possible, but not likely. In the Criminal Justice Reform Act of 1982, President Reagan has proposed that a good faith exception to the exclusionary rule be legislatively created. The resulting bill, S. 2903, was not acted upon by the 97th Congress, but was reintroduced in the 98th Congress.[216] Prospects of passage are dim; the American Bar Association opposes the measure.[217]

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tional Alternatives to the Exclusionary Rule, 23 So. Tex. L.J. 530 (1982); Comment, *The Exclusionary Rule Revisited: Good Faith in Fourth Amendment Search and Seizure*, 70 Ky. L.J. 879 (1981-82); Comment, *Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule*, 23 So. Tex. L.J. 693 (1982); Note, *The Fourth Amendment and the Exclusionary Rule: The Desirability of a Good Faith Exception*, 32 Case W. Res. L. Rev. 443 (1982). *See also* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229 (1983); White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 Mich. L. Rev. 1273 (1983).

[212]The Court instead opted to revise the standard by which information obtained through an informant would be evaluated in a magistrate's probable cause determination. *See* text accompanying notes 91-95 *supra*.

[213]*See* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting); Peltier v. United States, 422 U.S. 531 (1975) (Rehnquist, J.); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring); Michigan v. Tucker, 417 U.S. 433 (1974) (Rehnquist, J.); Bivens v. Six Unknown Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting). *See also* Burger, *Who Will Watch the Watchman?*, 14 Am. U.L. Rev. 1, 23 (1964).

[214]*See* LawScope, *The Exclusionary Rule*, 69 A.B.A.J. 137, 139 (1983).

[215]The views of Justices Brennan and Marshall are well known. In their dissent in United States v. Calandra, 414 U.S. 338, 355 (1974), the two Justices argued that the exclusionary rule is an integral part of the Fourth Amendment and that it serves an important function in preserving judicial integrity. With this view, it is unlikely that those Justices would favor a "good faith" restriction on the exclusionary rule.

[216]*See* S. 2903, 97th Cong., 2d Sess. (1982). *See also* President's Message to Congress Transmitting the Criminal Justice Reform Act of 1982 (Sept. 13, 1982). Such a provision has been introduced in the 9th Congress. *See* S. 101, 98th Cong., 1st Sess. (1983); President's Message to Congress Transmitting the Comprehensive Crime Control Act of 1983 (Mar. 16, 1983).

[217]*See CongresScan*, 69 A.B.A.J. 153 (1983).

Various criticisms have been leveled at the good faith exception. Some who believe that the exclusionary rule is a requirement of the Fourth Amendment itself and that the rule serves other important purposes than deterrence question the Court's ability to create the exception.[218] As noted above, however, the current view of the Supreme Court has rejected both these premises.[219]

Additionally, it has been argued that a good faith exception would reward the "dumb cop": "Constitutional values would be ill-served by an extension of such a rule to officers with pure hearts but empty heads."[220] Adoption of the *Williams* court's requirement that the good faith belief be both subjectively held *and* objectively reasonable, however, would withhold the benefit from the "dumb" or poorly trained officer and discourage the well-trained professional from feigning ignorance.[221]

It has also been asserted that the exclusionary rule has created an increase in the situations in which the police have taken the time to obtain judicially authorized warrants.[222] As noted above, the Supreme Court itself has indicated a preference for searches conducted pursuant to warrants.[223] This objection to a good faith rule is easily silenced. In formulating the exception, the Court could restate its preference by creating a less probing standard of review for "technical violations," *i.e.* a search or arrest conducted pursuant to a warrant later ruled invalid,[224] than for a "good faith violation," *i.e.* a search or arrest based upon a misjudgment by the officer as to the

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[218]*See, e.g.*, United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting); Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L. Bull. 5 (1979).

[219]*See* text accompanying notes 35-40 *supra*.

[220]United States v. Nolan, 530 F. Supp. 386, 399 (W.D. Pa. 1981).

[221]In *Williams*, the panel noted:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded on an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable - no matter how pure in heart - who had never heard of the fourth amendment could never qualify.

622 F.2d at 841 n.4a. Indeed, the First Circuit has refused to adopt the exception when presented with a case in which the police conduct was not objectively reasonable. United States v. Downing, 665 F.2d 404, 408 n.2 (1st Cir. 1981). *Accord* People v. Jones, 110 Misc. 2d 885, 443 N.Y.S.2d 298 (Crim. Ct. N.Y. County 1981). *See also* United States v. Santucci, 509 F. Supp. 177, 183 n.8 (N.D. Ill. 1981) (exception inapplicable where unconstitutional standard police operating procedures).

[222]*See* Ball, *supra* note 205, at 647048.

[223]*See* text accompanying note 85 *supra*.

[224]*See* text accompanying note 206 *supra*.

existence of probable cause.[225] In the former case, the Fourth Amendment preference for the interposition of a neutral and detached magistrate will have been realized; in the latter, it was not.

Finally, the argument has been advanced that the existence of an exclusionary rule has resulted in an increased emphasis in police training on constitutional protections.[226] The statistics in this regard are inconclusive.[227] Additionally, the objective prong of the good faith test should prove a sufficient deterrent to shoddy police training procedures.

Under these circumstances, it may be desirable that a good faith exception to the exclusionary rule be tested. If the consequences were adverse, the option of the return to the exclusionary rule is available. Thus, a present modification of the rule would not be the equivalent to its abrogation. If a need is empirically proven, the exclusionary rule might well be only temporarily absent from the scene of constitutional jurisprudence.

III. THE AMERICAN RULE: THE FIFTH AMENDMENT

A. GENERAL APPLICABILITY

The Fifth Amendment to the U.S. Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." As the Fourth Amendment, the Fifth Amendment is a limitation on governmental action; interrogations by a private party are beyond the scope of the Amendment's protections.[228] Two distinct protections are embodied in the Amendment. The due process clause protect the individual from violations of "fundamental fairness" by police authorities. Under the due process clause, confessions which are obtained involuntarily from a

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[225] *See* text accompanying note 205 *supra*.

[226] See Kamisar, *supra* note 213, at 39; LaFave, *Improving Police Performance Through the Exclusionary Rule (pt. 1)*, 30 Mo. L. Rev. 391, 395-96 (1965); *Id. (pt. 2)*, 30 Mo. L. Rev. 566 (1965).

[227] *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973). The latter study revealed that the hours of training which police received in search and seizure issues varied from six in Denver and Baltimore to thirty in Phoenix, thirty-three in Washington, D.C., and forty in Houston. *Id.* at 275.

[228] *See, e.g.*, United States v. Wilkinson, 460 F.2d 725 (5th Cir. 1972); United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970); United States v. Thomas, 396 F.2d 310 (2d Cir. 1968). United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

suspect or an accused may be excluded from evidence.[229] The self-incrimination clause of the Amendment has, at least since 1966,[230] caused the exclusion from evidence of statements obtained from a suspect during certain custodian interrogations.[231] These clauses, together with the consequences of their violation, will be studied in this section.

B. THE CONCEPT OF VOLUNTARINESS

A confession will not be admitted into evidence, regardless of the presence of other procedural safeguards,[232] if it has been shown to have been obtained involuntarily from the accused. This involuntariness may arise in a number of ways. The police may have used brutality,[233] or truth serum,[234] to extract the confession from the accused or may have engaged in an extended period of incommunicado interrogation.[235] Police threats concerning the members of the accused's family could also render a confession involuntary.[236] The bases for exclusion of such confessions are dual: that such oppressive police conduct is violative of the "fundamental fairness' guaranteed by the due process clauses of the Fifth and Fourteenth Amendments[237] and that statements so obtained are inherently unreliable.[238] Whatever the constitutional basis, it has long been clear that, "technicalities" aside, confessions obtained involuntarily, measured under the totality of the circumstances surrounding the confession,[239] will be excluded at trial. As will be noted later in this article, this ground of exclusion is common to many legal systems around the world.[240]

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[229]Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Brown v. Mississippi, 297 U.S. 278 (1936).

[230]Miranda v. Arizona, 384 U.S. 436 (1966).

[231]*See* text accompanying notes 243-52 *infra*.

[232]*See id.*

[233]Brown v. Mississippi, 297 U.S. 278 (1936); United States v. Brown, 557 F.2d 541 (6th Cir. 1977).

[234]Townsend v. Sain, 372 U.S. 293 (1963).

[235]Davis v. North Carolina, 384 U.S. 737 (1966); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ziang Sung Wan v. United States, 266 U.S. 1 (1924). *See* Mil. R. Evid. 304 (c)(3).

[236]*See* Lynumm v. Illinois, 372 U.S. 528 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

[237]Spano v. New York, 360 U.S. 315 (1959).

[238]Ward v. Texas, 316 U.S. 547, 555 n.2 (1942); Brown v. Mississippi, 297 U.S. 278 (1936).

[239]*See* Mincey v. Arizona, 437 U.S. 385, 401 (1978); Davis v. North Carolina, 384 U.S. 737, 741-42 (1966); Haynes v. Washington, 373 U.S. 503, 513 (1963).

[240]*See* text accompanying notes 359.77 (England), 427-41 (Canada) 457-64 (Australia), 483-86 (Zambia), 495-97 (Israel), 521-23 (South Africa), 543 (Japan), 548-56 (Federal Republic of Germany), *infra*.

C. THE RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment grants to a suspect a right against self-incrimination.[241] Prior to 1966, however, the Supreme Court had measured confessions on a case-by-case basis and only under the standard of voluntariness.[242] Whether the suspect had been informed of this right was only a factor in the overall balance of whether the confession was voluntarily rendered.

The law was abruptly changed in 1966. In *Miranda v. Arizona*,[243] the accused had been interrogated without benefit of counsel and without having been warned of his right to remain silent.[244] Statements made during this interrogation were used against Miranda at trial and he was convicted of kidnapping and rape.[245] On review, the Supreme Court reversed the conviction. Noting the inherently coercive atmosphere of custodial interrogation, the Court held that the Fifth Amendment required that statements made under such circumstances be excluded at trial upon objection of the accused unless the government could establish that the police had advised the accused of his or her right against self-incrimination and had obtained a valid waiver of it.[246]

The Court was quite specific about the rights warning envisioned; "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed."[247] Statements rendered during a custodial interrogation[248] without prior warnings having been given, would be *per se* excluded at trial.[249] Whether the suspect in fact was aware of those rights is immaterial; the rule is a prophylactic one.[250]

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[241]U.S. Const. amend. V. *See also* Art. 31, Uniform Code of Military Justice, 10 U.S.C. §831 (1976).

[242]*See* Ringel, supra note 5, at § 26.1, at 26-1.

[243]384 U.S. 436 (1966).

[244]*Id.* at 491-92.

[245]*Id.* at 492.

[246]*Id.* at 475.

[247]*Id.* at 444.

[248]"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. In Rhode Island v. Innis, 446 U.S. 291, 301 (1980), the Court defined interrogation as "words or actions . . . that police should know are reasonably likely to elicit an incriminating response."

[249]384 U.S. at 468-69.

[250]*Miranda* warnings have been required prior to qestioning of *inter alia*, attorneys. *See* State v. Stein, 360 A.2d 347 (N.J. 1976).

After proving that warnings were given, the government bears a heavy burden to further establish a knowing and intelligent waiver of those rights.[251] The waiver may be either oral or written.[252]

When the right to remain silent is invoked, whether at the conclusion of the warnings or at some point following a waiver, all questioning must cease.[253] Questioning may resume at a later time if the government had "scrupulously honored" the original assertion of the right.[254] The courts will make a case-by-case determination of whether the renewal of questioning was proper. Among the factors which will be weighed are the time lapse between the original assertion of the rights and the renewal of quesitoning, whether a new set of rights warnings were given, whether the questioner had changed, whether the new questioning concerned the same or a different offense, how many prior attempts had been made to resume questioning, and by whom the re-interview had been initiated.[255]

The right against self-incrimination extends beyond the initial encounter between the suspect and the police to the trial itself. An accused has the right to remain silent and decline to testify at a criminal trial and the prosecutor may not call the attention of the jury to such silence.[256] Nor may a prior invocation by the accused of the right to remain silent be introduced at trial as evidence of guilt.[257] The accused may, on the other hand, be required to perform certain acts such as speaking certain words,[258] exhibiting a part of the body,[259] wearing certain clothing,[260] or providing a handwriting exemplar.[261] It has been held that the Fifth Amendment protects the accused against giving compelled testimony. As the acts described above lack testimonial characteristics, they may be required of an accused.[262]

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[251]384 U.S. at 475. *See also* Tague v. Louisiana, 444 U.S. 469 (1980).
[252]North Carolina v. Butler, 441 U.S. 369, 373 (1979).
[253]384 U.S. at 444-45.
[254]Michigan v. Mosely, 423 U.S. 96 (1975).
[255]*Id.* at 104, *discussed in* Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99 (1978).
[256]Griffen v. California, 308 U.S. 609 (1965).
[257]Doyle v. Ohio, 426 U.S. 610 (1976).
[258]United States v. Dionisio, 410 U.S. 1 (1973).
[259]Schmerber v. California, 384 U.S. 757, 764 (1966).,
[260]Holt v. United States, 218 U.S. 245 (1910).
[261]United States v. Mara, 410 U.S. 19 (1973).
[262]Schmerber v. California, 384 U.S. 757, 760-65 (1966). *See also* United States v. Lloyd, 10 M.J. 172 (C.M.A., 1981); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1979). *But see* Howell, *Article 31, UCMJ and Compelled Handwriting and Voice Exemplars*, The Army Lawyer, Nov. 1982, at 1.

D. THE EXCLUSIONARY RULE

There are essentially two exclusionary rules which mirror the two grounds upon which a confession may be challenged. A different rule pertains to cases involving an allegedly involuntary confession than to *Miranda* violations. Each is noted below.

1. Exclusion of Involuntarily Obtained Evidence

The scope of the modern exclusionary rule for confessions obtained by use of force, threats, or other coercion dates from *Brown v. Mississippi*.[263] In *Brown*, the accused had been hung from a tree and then whipped. He was threatened with future whipping unless he confessed.[264] The resultant confession was found by the Supreme Court to have been obtained in violation of the due process clauses of the Fifth[265] and Fourteenth Amendments.[266] This prohibition was promptly applied to the states as well.[267]

The fruit of the poisonous tree doctrine[268] applies to evidence discovered as a consequence of the illegal activity. As in the rules for determining the admissibility of evidence in Fourth Amendment cases, the doctrines of independent source,[269] attenuation,[270] inevitable discovery, [271] and standing[272] are viable grounds for asserting that evidence may be used at trial notwithstanding the existence of illegal police activity.

2. Exclusion of Evidence Obtained in Violation of the Right Against Self-Incrimination

As noted earlier, a *per se* rule of exclusion obtains where statements have been exacted from a suspect during a custodial interrogation without a prior rendition of rights warnings and the acquisition of a valid waiver.[273] In *Michigan v. Tucker*,[274] however, the Supreme Court has modified the fruit of the poisonous tree

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[263]297 U.S. 278 (1936).

[264]*Id.* at 281-83.

[265]*See* text of U.S. Const. amend. V.

[266]297 U.S. at 286-87.

[267]*Id.* at 285. The Court found that the privilege against self-incrimination was "fundamental" to the concept of ordered liberty such than it ought to be applied to the states via the Fourteenth Amendment. *Id.*

[268]*See* text accompanying notes 26-28 *supra*.

[269]*See* text accompanying notes 40-47 *supra*.

[270]*See* text accompanying notes 48-55 *supra*.

[271]*See* text accompanying notes 56-64 *supra*.

[272]*See* text accompanying notes 65-78 *supra*. *See generally* United States v. Fisher, No. 82-1217, slip op. at 1617-18 (2d Cir. Feb. 1, 1983).

[273]*See* text accompanying notes 243-55 *supra*. *See also* Mil. R. Evid. 305(a).

[274]417 U.S. 433 (1974).

doctrine in cases where only a technical violation of *Miranda* has occurred.

In *Tucker*, the accused, while in custody but prior to interrogation, had been advised of his rights to remain silent and to counsel, but had not been informed that counsel would be appointed for him were he indigent.[276] During the resulting interrogation, the accused revealed to the police the name of an alleged alibi witness. When the police located the witness, he provided information incriminatory to the accused.[276] At trial, the accused moved to suppress the testimony of the witness as the fruit of the incomplete *Miranda* warnings. The trial court denied the motion and the accused was convicted of rape. On review,[277] the Supreme Court upheld the conviction.[278]

The Court initially noted that the accused had advanced no argument that his right to counsel had been violated, [279] nor that his confession was otherwise involuntary; only a violation of *Miranda* was alleged.[280] Finding that the holding of the *Miranda* case was not necessarily constitutionally required[281] and that exclusion of evidence obtained in violation of *Miranda* was designed to deter future police misconduct,[282] the Court determined that exclusion of evidence was not necessary in cases of "good faith" violations of *Miranda*.[283] In *Tucker*, the police error was found to have been inadvertent. Consequently, "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence,"[284] dictated that the testimony of the alibi witness should have been admissible at trial.

3. "Cat Out of the Bag"

A special problem is encountered when an accused not only has rendered a confession later ruled inadmissible, but also has made subsequent incriminatory statements which, standing alone, would appear admissible under either a voluntariness or self-incrimination standard. The Supreme Court once termed this situation "cat out of

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[275] *Id.* at 436.
[276] *Id.* at 436-37.
[277] The case had entered the federal system by writ of habeas corpus. *Id.* at 435.
[278] 417 U.S. 433 (1974).
[279] *Id.* at 438.
[280] *Id.* at 438-39.
[281] *Id.* at 444. *Cf.* United States v. Calandra, 414 U.S. 338 (1974) (exclusion of illegally seized evidence not constitutionally required).
[282] 417 U.S. at 446-47.
[283] *Id.* at 447.
[284] *Id.* at 450.

the bag" in that, having revealed the information in the earlier statement, the later statements only confirm a secret out for good.[285]

There is no *per se* rule of exclusion.[286] In evaluating the facts of each case, the court will look at a variety of factors to determine whether the second confession flowed inevitably as a product of the first. Among these factors are the degree of police misconduct involved in obtaining the original confession,[287] the time interval between the confessions,[288] whether the unlawful conduct was a technical violation of *Miranda* or a more serious use of coercion,[289] whether the questioning continued between the confessions,[290] whether additional *Miranda* warnings were given,[291] and any other circumstances bearing upon the issue of whether the taint of the original police ctions had been so dissipated as to render the later confession independently admissible. The government bears the burden of proof on the issue.[292] Failure to convince the court of the independent admissibility of the later confession will result in its exclusion at trial.

4. Procedure

The issue of an unlawfully obtained confession is raised by a pretrial motion addressed to the trial judge.[293] The court must hold an evidentiary hearing[294] at which the government bears the burden of proof of the admissibility of the confession. The Supreme Court has held that, at constitutional minimum, this burden must be carried by a preponderance of the evidence.[295] Some states have elected to

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[285]United States v. Bayer, 331 U.S. 532, 540 (1947).

[286]In Lyons v. Oklahoma, 322 U.S. 596, 603 (1944), the Court explained:

> The Fourteenth Amendment does not protect one who has admitted guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depend upon the same test - is it voluntary.

[287]*Id.*; Harney v. United States, 407 F.2d 586 (5th Cir. 1969).

[288]United States v. Bayer, 331 U.S. 532 (1947).

[289]Tanner v. Vincent, 541 F.2d 932 (2d Cir. 1976), *cert. denied*, 429 U.S. 1065 (1977); United States v. Toral, 536 F.2d 893 (9th Cir. 1976); United States v. Jobin, 535 F.2d 154 (1st Cir. 1976).

[290]State v. Allies, 621 P.2d 1080 (Mont. 1980).

[291]Harney v. United States, 407 F.2d 586 (5th Cir. 1969); State v. Edwards, 199 S.E.2d 459 (N.C. 1973). *See generally* United States v. Seay, 1 M.J. 201 (C.M.A. 1975); United Stats v. Hundley, 21 C.M.A. 320, 45 C.M.R. 94 (1972).

[292]Brown v. Illinois, 422 U.S. 590 (1975).

[293]*See e.g.*, Fed. R. Crim. P. 4; Mil. R. Evid. 302(e).

[294]Jackson v. Denno, 378 U.S. 368 (1964).

[295]Lego v. Twomey, 404 U.S. 477 (1972).

increase the burden on the government to proof beyond a reasonable doubt.[296] Whatever the burden, the decision of the trial judge is conclusive as to the admissibility of the confession; this issue is never left to the jury.[297]

In cases involving purportedly involuntary confessions, some stats have adopted the "Massachusets rule."[298] Under this rule, if the court should rule in favor of the admissibility of the confession, the accused is still permitted to present to the jury evidence concerning the circumstances surrounding the rendering of the confession. The jury is then instructed that they are to reach their own conclusion on the issue of voluntariness. If the jury should determine that the confession was involuntarily obtained, they are free to disregard it.[299]

IV. THE AMERICAN RULE: THE SIXTH AMENDMENT

The Sixth Amendment to the U.S. Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[300] Once this right has attached, limits are placed upon the cope of permissible police activity regarding the suspect or accused in the particular case. Given the importance of this right, the Supreme Court has jealously safeguarded it and several states have enacted protections greater than those deemed constitutionally required.

A. GENERAL APPLICATION

The right to counsel in criminal proceedings extends both to federally[301] and state[302] initiated prosecutions. Although once thought applicable in state prosecutions only to felony defendants, it is now clear that an accused canot be sentenced to imprisonment, regardless of the characterization of the offense for which the sentence was imposed, without having received the assistance of counsel at trial.[303]

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[296]*See, e.g.*, Grey v. State, 404 N.E. 2d 1348 (Ind. 1980); People v. Jiminez, 147 Cal. Rptr. 172, 580 P.2d 672 (1978); State v. Johnson, 363 So.2d 684 (La. 1978); State v. Lyons, 269 N.W.2d 124 (S.D. 1978); State v. Phinney, 370 A.2d 1153 (N.H. 1977); State v. Miller, 388 A.2d 218 (N.H. 1972).

[297]*Jackson v. Denno, 378 U.S. 368 (1964).*

[298]*See e.g.*, State v. Arpin, 410 A.2d 1340 (R.I. 1980); Commonwealth v. Johnston, 364 N.E. 2d 1211 (Mass. 1977); Witt v. Commonwealth, 212 S.E. 2d 293 (Va. 1975).

[299]*See generally* Ringel, *supra* note 5, at § 30.2(c), at 30-7.

[300]U.S. Const. amend. VI.

[301]Johnson v. Zerbst, 304 U.S. 458 (1938). *See also* Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827 (1976).

[302]Gideon v. Wainwright, 372 U.S. 335 (1963); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

[303]Argersinger v. Hamlin, 407 U.S. 25 (1972).

If the accused is indigent, the federal or state government must appoint counsel for the accused.[304]

B. ATTACHMENT OF THE RIGHT

The Supreme Court has held that the right to counsel attaches at any "critical state" or a criminal proceeding.[305] Two elements are thus required to activate the Sixth Amendment right; a criminal proceeding must have been commenced against the accused and the activity in question must be considered a "critical stage."

A criminal proceeding is normally deemed to have been commenced by the arraignment or indictment of the accused.[306] *Prior* to that time, the accused may be interrogated or placed in a lineup by the police without regard for the Sixth Amendment.[307] *Subsequent* to arraignment or indictment, however, the police may engage in such activity only with the presence of counsel or after having obtained a valid waiver of the right from the accused;[308] post-arraignment interrogations and lineups have been identified as "critical stages" by the Supreme Court.[309]

C. WAIVER OF THE RIGHT

Waiver of the right to counsel will not be easily found. The government bears a heavy burden to establish that a waiver by the accused was knowing and intelligent.[310] In determining whether this burden has been met, the court will examine the circumstances surorunding the purported waiver, as well as the education, mental capacity, and experiences of the individual accused.[311] The asserted waiver must be affirmative; mere response to police questioning after the right had attached is itself insufficient evidence of waiver.[312]

Generally, if valid in other respects, a waiver will not be questioned because counsel had actually been retained or contacted prior to

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[304]Gideon v. Wainwright, 372 U.S. 335 (1963) (state proceedings); Johnson v. Zerbst, 304 U.S. 458 (1938) (federal proceedings). *See also* 18 U.S.C. § 3006A (1976); Fed. R. Crim. P. 44(a).

[305]Kirby v. Illinois, 406 U.S. 682 (1972).

[306]Massiah v. United States, 377 U.S. 682 (1972) (indictment); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment).

[307]Kirby v. Illinois, 406 U.S. 682 (1972).

[308]United States v. Wade, 388 US. 218 (1967); United States v. Peyton, 10 M.J. 387 (C.M.A. 1981).

[309]Kirby v. Illinois, 406 U.S. 682 (1972) (lineup); Brewer v. Williams, 430 U.S. 387 (1977) (interrogation).

[310]Johnson v. Zerbst, 304 U.S. 458 (1938).

[311]*See* Wade v. Mayo, 334 U.S. 672 (1948); Tucker v. Anderson, 483 F.2d 423 (10th Cir. 1973).

[312]*See* Brewer v. Williams, 430 U.S. 387 (1977).

the waiver.[313] The courts of a few states, notably New York, have adopted a stricter standard. Under the so-called "New York rule," once a suspect in custody has asserted a right to counsel, even if in response to *Miranda* warnings,[314] the suspect may not be questioned or placed in a lineup until an attorney arrives on the scene.[315] Further, following the acquisition of counsel by or the commencement of a criminal proceeding against an accused, the right to counsel may not be waived except in the presence of counsel.[316]

D. THE EXCLUSIONARY RULE

Evidence obtained in contravention of an accused's right to counsel will be excluded at a criminal trial. Evidence of lineup procedures conducted after arraignment or indictment will be suppressed[317] as will the fruits of police questioning of an accused, whether custodial[318] or noncustodial,[319] following commencement of a criminal proceeding.

Massiah v. United States[320] is illustrative. In *Massiah*, the accused had been indicted on drug charges but was not in custody. The police wired for sound a cooperative coconspirator of the accused who thereafter spoke with the accused an elicited incriminating statements from him.[321] The conversation was recorded. On review of the ensuing conviction on drug charges, the Supreme Court reversed.[322] The conduct of the police, through their recruited agent, the coconspirator, was found to have impermissibly interfered with the accused's post-indictment right to counsel, warranting suppression of the statements so obtained.[323]

The continuing vitality of this rule was affirmed in *Brewer v. Williams*.[324] In *Williams*, the accused had been arrested for the murder of a young girl and had been arraigned. While in police custody, he spoke with one attorney by phone and with another in person. The latter attorney had notified the police that they were not

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[313]*Id.* at 404-06.
[314]People v. Hobson, 39 N.Y.2d 893, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976).
[315]People v. Cunningham, 49 N.Y.2d 360, 424 N.Y.S. 2d 421, 400 N.E.2d 360 (1980).
[316]People v. Arthur, 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 536 (1968); People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963).
[317]United States v. Wade, 388 U.S. 218 (1967).
[318]Brewer v. Williams, 430 U.S. 287 (1977).
[319]Massiah v. United States, 377 U.S. 201 (1964).
[320]*Id.*
[321]*Id.* at 202-03.
[322]377 U.S. 201 (1964).
[323]*Id.* at 204-07.
[324]430 U.S. 387 (1977).

to question the accused until the two attorneys had conferred. The accused himself had informed the police that he would talk to them after he had spoken in person with the attorney whom he had phoned.[325] Nonetheless, while the accused was being transferred to the appropriate jurisdiction by the police, one detective, knowing of the accused's professed deep religious beliefs and addressing him as "Reverend," told the accused of his hopes that the victim's body could be found before it was covered with snow because "the parents of the little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered."[326] A discussion concerning the search for the body ensued and the accused eventually led police to it.[327] The discussions with the police were admitted at trial and Williams was convicted of murder.[328]

On review,[329] the Supreme Court reversed the conviction.[330] The "'Christian burial speech' had been tantamount to interrogation" at a point after which the right to counsel had attached.[331] Further, a waiver of this right would not be implied from the acts of the accused in responding to this surriptitious interrogation.[332] Consequently, a violation of the Sixth and Fourteenth Amendments had occurred and the statements ought to have been suppressed.[333]

V. THE AMERICAN RULE: OTHER EXCLUSIONS

In addition to exclusions for violations of constitutional protections, both the legislatures and the courts have variously fashioned rules for the suppression of evidence discovered in violation of certain statutory norms. Two of these rules are discussed in this section. The first, the federal wiretapping statute,[334] is an example of a legislatively created exclusionary rule. The second concerns the suppression of evidence obtained in violation of the Posse Comitatus Act.[335] This latter case will highlight a judicially established rule of

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[325]*Id.* at 390-92.
[326]*Id.* at 392-93.
[327]*Id.* at 393-94.
[328]*Id.* at 389.
[329]Williams reached the Supreme Court by filing a petition for a writ of habeas corpus in the federal district court and appealing its denial through the federal system. *Id.* at 389-90.
[330]430 U.S. 387 (1977).
[331]*Id.* at 400.
[332]*Id.* at 402-06.
[333]*Id.* at 407.
[334]18 U.S.C. §§ 2510-20 (1976).
[335]18 U.S.C. § 1385 (1976).

exclusion created at a time when other trends appear to favor restrictions, rather than expansion, of the exclusion of relevant and reliable evidence.[336]

A. WIRETAPPING

In 1968, recognizing the pervasive invasions of privacy made possible by advances in communications technology, Congress enacted the Omnibus Crime Control and Safe Streets Act.[337] Among its provisions, the Act specifically defined the conditions under which wire interceptions and the interception of oral communications could take place. The statute further directed exclusion of evidence discovered in contravention of the Act[338] and established criminal[339] and civil penalties for its violation.[340] Several states have enacted similar provisions.[341]

Under the Act, the Attorney General of the United Stats or any Assistant Attorney General specifically authorized to do so may request a federal judge of competent jurisdiction to issue an order authorizing or approving the interception of wire or oral communication in cases involving at least one of a scheduled list of offenses.[342] The government must show and the judge find that there is probable cause to believe that an individual has committed or is about to commit one of the enumerated offenses, that there is probable cause to believe that a communication concerning the offense will be detected through the requested interception, that normal investigative procedures have been tried and have failed to yield such evidence or that such procedures would unlikely to succeed or would be too dangerous to attempt, and that there is probable cause to believe that the instrumentality through which the interceptions would occur would be used by the an individual connected with the commission of the alleged crime.[343] If the foregoing are found, the judge must

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[336] *See* text accompanying notes 355-57 *infra*.

[337] Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 212 (1968).

[338] 18 U.S.C. § 2515 (1976).

[339] *Id.* at § 2511(1).

[340] *Id.* at § 2520. A person guilty of wrongful interception or disclosure or use of any intercepted communication may be civilly liable for actual damages, but not less than liquidated damages at a rate of $100 per day of violation, or $1000 , whichever is higher, punitive damages, attorney's fees, and court costs. Good faith reliance on a court order or legislative action is a complete defense to both criminal and civil proceedings.

[341] *See, e.g.*, Cal. Penal Code §§ 630-37.2 (1981-82 Cum. Supp.); Mass. Gen. Laws Ann. ch. 272, § 99 (1982-83 Cum. Supp.); N.Y. Crim. Proc. Law §§ 700.50-70 (McKinney 1982-83 Cum. Supp.).

[342] 18 U.S.C. § 2516(a) (1976).

[343] *Id.* at § 2518(1).

issue an order specifying the identify of the person whose communication is sought to be intercepted, the nature and location of the facility concerning which the interception will occur, the duration of such order, a description of the communication sought and the crime to which it pertains, and the identity of the person or persons who may conduct the interception.[344] In emergency conditions, an interception may be authorized by the Attonrey General providing that application to a court for approval of the interception is made within forty-eight hours.[345]

Additionally, the Act provides for reporting requirements of intercepted communications,[346] for procedures for the custody of recorded interceptions,[347] and for disclosure to the party whose communication was intercepted the general contents of the order authorizing interception and an opportunity to discover the contents of the intercepted communication itself.[348] The Act does not purport to limit the interceptions of communications in cases where on party to the communication has given prior consent to the communication.[349]

As noted above, violation of the provisions of the statute not only will result in the exclusion of evidence concerning the communications so intercepted, but result in the criminal and civil liability of the violator.[350]

B. THE POSSE COMITATUS ACT

The Posse Comitatus Act[351] prohibits the use of military personnel in the active enforcement of federal or state law. Enacted over a century ago, the Act provides:

> Whosoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.[352]

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[344] *Id.* at §§ 2518(2), (4).
[345] *Id.* at § 2518(7).
[346] *Id.* at § 2519.
[347] *Id.* at § 2518(8).
[348] *Id.* at § 2518(9).
[349] *Id.* at §§ 2511(2)(c), (d).
[350] *See* text accompanying notes 339-40 *supra*.
[351] 18 U.S.C. § 1385 (1976).
[352] *Id.* For a historical survey of the background of the Act, *see* Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 7 Mil. L. Rev. 85 (1960). Although not by its terms applicable to the Navy or Marine Corps, the spirit of the Act has provided guidance for those armed services. *See* SECNAV INSTR. 5820.7 (May 15, 1974).

Although recent congressional action has broadened the permissible uses of the armed services to combat the importation of illegal drugs into the United States,[353] the Act remains a substantial barrier to widescale military assistance to civilian authorities.

In instances in which the letter or spirit of the Act have been violated, the issue concerning the disposition of the evidence developed as a consequence of the unlawful, indeed criminal, conduct has arisen. Until recently, both federal and state courts have refused to fashion an exclusionary rule for such evidence, although occasionally threatening to do so. A typical warning was sounded by the Fourth Circuit: "Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether application of an exclusionary rule is required as a future deterrent."[354]

Having issued similar admonitions in the past,[355] the Oklahoma Court of Criminal Appeals became the first court to create an exclusionary rule for evidence uncovered by a violation of the Posse Comitatus Act. In *Taylor v. State*,[356] a military service member acting as an undercover agent with civilian police authorities significantly involved himself in the controlled purchase of narcotics and actively participated in the ensuing arrest and search of the accused. The accused was later convicted based in part upon these activities of the military policeman. On appeal, the Oklahoma appellate court found the conduct in question to have "intolerably surpassed" the variety of activity which had not warranted the imposition of an exclusionary rule in the past. Ruling that the evidence uncovered by the service member should have been suppressed, the court reversed the conviction.[357]

Whether this case signals a new trend or stands as an aberration awaits further judicial development. Posse Comitatus violations are rare and the *Taylor* court appeared particularly troubled by the nature of the government conduct in the particular case, rather than

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[353] *See* 18 U.S.C.A. §§ 87175 (West Supp. 1981); H.R. Rep. No. 97-71, Pt. II, 97th Cong., 1st Sess, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1781, 1785, *discussed in* Hilton, *Recent Developments Relating to the Posse Comitatus Act*, The Army Lawyer, Jan. 1983, at 1.

[354] United States v. Walden, 490 F.2d 372, 377 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974). *Accord* United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979).

[355] *See* Lee v. State, 513 P.2d 125 (Okla. Crim. App. 1973); Hildebrandt v. State, 507 P.2d 1323 (Okla. Crim. App. 1973); Hubert v. State, 504 P.2d 1245 (Okla. Crim. App. 1972).

[356] 645 P.2d 522 (Okla. Crim. App. 1982).

[357] *Id.* at 525.

by evidence of repeated violation. Nonetheless, the *Taylor* case has added a new exclusionary rule to American jurisprudence at a time when other courts are restricting the use of the rule.[358]

VI. ILLEGALLY OBTAINED EVIDENCE ABROAD

INTRODUCTION

With the background of the American exclusionary rule now outlined, it is appropriate to study the methodology which other nations apply in determining the disposition and uses of illegally obtained evidence. This section will examine common and civil law countries alike and also note the procedures employed in the world's most populous nation.

VII. COMMON LAW SYSTEMS

A threat tracible through the American system and the other English-speaking nations of the world is their universal common law heritage. This birthright, of course, arises from their colonization, settlement, and government by Great Britain. Notwithstanding this common heritage, however, there are vast differences not only between the various ways which the other common law systems of the world deal with illegally seized evidence and the American exclusionary rule, but also differences among the other common law systems themselves. This section will study a number of such systems and note the subtle distinctions among them in this area of the law.

A. GREAT BRITAIN

As the mother country and tongue of the former colonies upon which the sun never sets, Britain and its legal system have had a profound effect upon the development of the law in several countries in the modern world. From Canada to Zambia to Australia, independent nations have and do look to decisions of the courts of England for guidance in interpretation of their own laws, including the law governing illegally obtained evidence. While the individual nations frequently put their own judicial gloss on the meaning of British precedents, the law of Great Britain nonetheless remains the fundamental foundation for legal systems throughout the world.

1. Confessions

The rule for the admission of confessions in England is one of

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[358] *See* text accompanying notes 199-212 *supra*.

reliability. Confessioned deemed reliable by the court will be allowed into evidence; unreliable confession will be excluded.[359] A confession will be found unreliable and inadmissible if it is shown to have been involuntarily obtained from the accused. Involuntariness will be found where the confession was "forced from the mind [of the accused] by the flattery of hope, or by the torture of fear."[360] Simply stated, confessions procured through threat or violence, or by a promise or inducement held out by a person in authority, are involuntary.[361] The burden of proof is upon the prosecution to establish the voluntariness of a proffered confession;[362] several cases have hinted that this burden is proof beyond a reasonable doubt.[363]

In 1912, at the request of the English Home Secretary, the Judges of the King's Bench division promulgated a set of guidelines for the police to follow in interrogating a suspect. These "Judges' Rules," as subsequently modified and expanded,[364] currently provide that, during an investigation, the police may question anyone concerning an offense. Warnings against self-incrimination and a caution that statements made may be used in court, however, must be given whenever the police have reasonable grounds to suspect a person of an offense or if that person has been or may be charged with an offense.[365] Statements are to be taken in writing and the suspect is to have an opportunity to make corrections or alterations to the written statement.[366]

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[359]Regina v. Warickshall, [1783] 168 E.R. 234. *See e.g.*, Regina v. Powell, [1980] Crim. L. Rev. 39 (statement rendered during hypoglycaemic reaction excluded as unreliable); Regina v. Davis, [1979] Crim L. Rev. 167 (statement made under influence of drug excluded as unreliable); Regina v. Kilner, [1976] Crim. L. Rev. 740 (statement made by accused of subnormal intelligence who became hysterical under stress excluded).

[360]Regina v. Warickshall, [1783] 168 E.R. 234.

[361]*See generally* F. Kaufman, The Admissibility of Confessions in Criminal Matters 107-70 (2d ed. 1974); Note, *Excluding Evidence to Protect Rights: Principles Underlying the Exclusionary Rule in England and the United States*, 6 B.C. Int'l & Comp. L. Rev. 133 (1983).

[362]Regina v. Sartori, [1961] Crim L.R. 397.

[363]*See, e.g., id.*; Regina v. McLintock, [1962] Crim L.R. 549.

[364]The original Judges' Rules were four in number and were generally made known to the public in Regina v. Voisin, [1918] 13 Crim. App. R. 89, 90. Through time, five additional Rules were promulgated, prompting explanation and clarification by the Home Office. *See* Home Office Circular Nos. 536053/1929; 238/1947. Finally, in 1964, the new Rules were repromulgated as a whole. *See* Baker, *Confessions and Improperly Obtained Evidence*, 30 Austl. L.J. 59, 60 (1956); Smith, *The New Judges' Rules - A Lawyer's View*, [1964] Crim. L.R. 176.

[365]The Rules direct the form of the warning: "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

[366]If the suspect declines this opportunity to review the statement or refuses to sign it, the senior police officer is to duly note these choices on the face of the statement.

The Rules do not, however, carry the force of law.[367] Statements obtained in violation of the Judges' Rules may be admitted into evidence if found, under all the surrounding circumstances, to have been voluntarily rendered.[368] While a trial judge is possessed of a discretion to exclude confessions obtained in violation of the Rules, this discretion is rarely exercised and only in cases of gross police misconduct.[369]

Even when a confession is ruled involuntary, at least portions of it may be salvagable under the doctrine of "confirmation by subsequent facts."[370] As noted, the basis for the admission of a confession is its reliability; voluntary confessions are thought reliable, involuntary confessions are not. An otherwise inadmissible confession might become admissible, however, if reliability could be otherwise established. Consequently, in instances where the police use the information garnered in an involuntary confession to locate physical evidence of the crime in question, it may be said that the finding of the physical evidence confirmed the reliability of the confession.[371] In the United States, of course, such direct use of information contained in a tainted confession would render inadmissible the physical evidence so discovered as "fruit of the poisonous tree."[372] In England, however, as will be discussed below,[373] physical evidence, howsoever obtained, is admissible in court. Further, as the reliability of at least a portion of the confession has been established, there is some authority that the corroborated section of the confession is admissible as well.[374] While this proposition is well-settled in Canada,[375] the admissibility of the confession may still be fairly debated in England, with substantial authority on both sides of the question.[376] Indeed, a Scottish court had held that, at least where the accused is taken to the location described in the involuntary confession to "facilitate any search," the search for and discovery of physical evidence would be

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[367]Regina v. Voisin, [1918] 13 Crim. App. R. 89, 96. In *Voisin*, the court strongly suggested that the police adhere to the Rules as "statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial."

[368]Regina v. Smith, [1961] 46 Crim. App. R. 51; Regina v. May, [1952] 36 Crim. App. R. 91; Regina v. Straffen, [1952] 36 Crim. App. R. 132.

[369]*See* Heydon, *Confessions and Silence*, 7 Sydney L. Rev. 375, 377, 383 (1976).

[370]The doctrine originated in Regina v. Warickshall, [1783] 168 E.R. 234.

[371]*Id.*

[372]*See* text accompanying notes 27-28, *supra*.

[373]*See* text accompanying notes 404-21 *infra*.

[374]*See* discussion in Kaufman, *supra* note 361, at 181-89.

[375]*See* text accompanying notes 439-41 *infra*.

[376]*Compare* Regina v. Gould, [1840] 9 Car. & P. 364; Regina v. Leatham, [1861] 8 Cox C.C. 498 (corroborated portion admissible) *with* Regina v. Berriman, [1854] 6 Cox C.C. 388 (confession totally inadmissible).

viewed "as part and parcel of the same transaction as the interrogation."[377] Consequently, rather than both the confession and physical evidence being admitted, both were excluded.

In recent years, a major effort was made to reform the British criminal procedure law. In 1980, the Royal Commission on Criminal Procedure issued twelve separate research reports; no fewer than one third of them concerned police interrogations. The Commission recommended that the voluntariness test of admissibility be abandoned and, in its place, a simple rule that only confessions obtained through violence, threat of violence, or inhuman or degrading treatment be excluded be used in the courts of England.[378] Other forms of impropriety would not render the confession inadmissible. The Judges' Rules would be replaced by a comprehensive code detailing the procedures to be followed in interrogating a suspect.[379] The American exclusionary rule was considered and soundly rejected "on the double ground that there was little evidence that it inhibited malpractice by the police and at the same time it resulted in the loss of relevant evidence."[380] Regulation of police conduct was to be left to internal police discipline, tort suits, or, where appropriate, criminal prosecutions.[381]

2. The Northern Ireland (Emergency Provisions) Act

In response to the recommendations of a blue ribbon commission which studied the available legal procedures to deal with terrorism in Northern Ireland, the British Parliament, in 1973, enacted the Northern Ireland (Emergency Provisions) Act.[382] With minor modifications,[383] the Act remains in effect today. Section 6 of the Act sets forth the standards under which the confession of one suspected of having engaged in terrorist activities would be admissible in court. To the extent that the Act departs from traditional English common law, it is worthy of independent evaluation.

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[377]Chalmers v. Regina, [1954] S.L.T. 177, 183.

[378]The Commission's report is fully discussed in Zander, *Police Powers in England: Report of the Royal Commission on Criminal Procedure*, 67 A.B.A.J. 732 (1981).

[379]*Id.* at 734-35. *See also* Mirfield, The Draft Code of Police Questioning - A Comment, 1982 Crim. L. Rev. 659.

[380]Zander, *supra* note 378, at 733.

[381]*Id.*

[382]For a background of the Act, *see generally* Greer, *The Admissibility of Confessions Under the Northern Ireland (Emergency Provisions) Act*, 31 N. Ire. Legal Q. 205 (1980). Degrading or inhuman treatment was defined as acts "done with the intention of causing either physical or mental suffering and with the intention of inducing a statement. Suffering inflicted by reason of negligence or through a lack of judgment or sensitivity do not amount to torture or inhuman or degrading treatment." Regina v. McGrath, Unreported, Court of Appeal (13 June 1980), *digested in* 31 N. Ire. Legal Q. 288 (1980).

[383]The Act was amended in 1978.

Section 6 provides that:

> (1) In any criminal proceeding for a [terrorist offense], a statement made by the accused may be given in evidence by the prosecution in so far as -
> *(a)* it is relevant to any matter in issue in the proceedings; and
> *(b)* it is not excluded by the court in pursuance of subsection (2) below.
> (2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, *prima facie* evidence is adduced that the accused was subject to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained -
> *(a)* exclude the statement, or
> *(b)* if the statement as been received in evidence, either -
> (i) continue the trial disregarding the statement; or
> (ii) direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible).[384]

This provision of the Act refocuses the rationale for the exclusion from evidence of certain confessions. As noted above, involuntary confessions are excluded in the English common law because of the belief that they are inherently unreliable.[385] The admissibility of confessions under Section 6, however, does not turn on the evidentiary value of the confession, but rather requires a study of the means through which it was obtained. Thus, if, in a confession given under torture, a suspect would have related the location of a murder weaopn and, upon police investigation, the weapon were to be found in that place - thereby confirming the reliability of the confession - the confession would nonetheless remain inadmissible because of the manner of its procurement.[386] This is a complete rejection of the doctrine of "confirmation by subsequent facts."[387]

Even in those instances in which improper conduct on the part of police authorities has been shown, the accused's Section 6 *prima facie* showing must further establish a casual connection between the

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[384]Greer, *supra* note 382, at 209-10.
[385]*See* text accompanying note 359 *supra*.
[386]*See* Greer, *supra* note 382, at 217.
[387]*See* text accompanying notes 371-77 *supra*.

impropriety and the confession.[388] In this regard, the courts of Northern Ireland have adopted a doctrine not unlike the American principle of attenuation[389] to justify the admission of certain extrajudicial confessions. In *Regina v. McKearney*,[390] the accused had been subjected to thirty-three separate interrogations. The fruits of the first were excluded because the government had not met its burden to show that the statements had not been obtained as a result of physical abuse. The confessions made during the next three interviews, however, were admitted:

> Even if the conduct on the part of the detectives at any of the earlier interviews had created in the mind of the accused a fear or a sense of oppression, the time that had passed since those interviews and the proper form and tone of the interviews . . . had completely dissipated any such fear or sense of oppression.[391]

Conversely, in cases where a continuation of prior misconduct was presented, subsequent confessions have been excluded.[392]

As in England, Irish courts have possessed a traditional power to exclude relevant and voluntary confessions if the probative value of the confession is far outweighed by the prejudicial effect which its admission would have upon the accused.[393] The study commission which proposed the Act had recommended that "the current . . . judicial discretions as to the admissibility of confessions ought to be suspended . . . [and] should be replaced by a simple legislative provision [Section 6]."[394] As enacted by Parliament, however, Section 6 apparently left open this window of discretion. While the Act dictated that confessions obtained as a result of torture or degrading treatment *must* be excluded from evidence, it also stated that relevant statements of an accused *may* be given in evidence.[395] The absence of a corresponding "must" in the second clause of that provision was almost immediately seized upon by the judiciary to reconfirm its continued power of discretion in cases of contested confessions.[396]

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[388]Regina v. Milne, [1978] N.I. 110, 117.
[389]*See* text accompanying notes 48-55, *supra*.
[390]Unreported, Belfast City Comm'n (11 Dec. 1978).
[391]*Id.*
[392]*See* cases cited in Greer, *supra* note 382, at 216, 216 n.51.
[393]*Id.* at 217-18.
[394]*Report of the Commission to consider procedures to deal with terrorist activities in Northern Ireland*, para. 89 (1972) [hereinafter cited as Commission Report].
[395]See text accompanying note 384 *supra*.
[396]Regina v. Corey, [1979] N.I. 49 (1973).

Once the accused has produced *prima facie* evidence of torture or inhuman or degrading treatment, usually through the introduction of medical evidence,[397] the burden falls upon the prosecution to "eliminate from the mind of the court . . . the reasonable possibility that the statements were so obtained."[399] As the Act has eliminated the jury trial in terrorist cases, ostensibly to guarantee the accused a fair trial by a tribunal not inflamed by public passion,[400] a decision of the court to admit a contested confession is *de facto* final. There is no opportunity to relitigate the issue or deny that the statements were ever made.[401] Since the Act makes no provision for the continuation of the trial before a different judge,[402] the same entity which ruled on the admissibility of the confession will later decide the weight to be afforded to it. It is therefore conceivable that a court might find that a given confession was not procured by torture or inhuman or degrading treatment and is admissible under the statute and yet acquit the accused because, taken in light of other evidence in the case, the confession was offered little probative weight by the judicial factfinder.

The future of the Emergency Provisions Act is as uncertain as the future of the land whose procedures it governs. Proposals to close or adopt various loopholes in the law have met with Parliamentary inaction.[403] It is thus left to the common law to effectuate the desired statutory balance between the rights of the accused to a fair trial and the rights of society to live in tranquility.

3. Search and Seizure

The English rule regarding the admissibility of the fruits of a search or seizure is found in the 1955 Privy Council decision in *Kuruma v. Regina*.[404] In *Kuruma*, two rounds of ammunition were found on the accused's person during a search conducted by two policemen who were below the rank authorized to perform such a

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[397]*See* Regina v. Page, Unreported, Belfast Crown Court (8 Oct. 1979), *discussed in* Greer, *supra* note 24, at 230-31, 230 n.12.

[398]Regina v. Hetherington, [1975] N.I. 164, 166.

[399]Greer, *supra* note 382, at 230.

[400]Commission Report, *supra* note 394, at paras. 35-41.

[401]*See also* Regina v. Brophy, [1980] 4 N.I.J.B. (Belfast Crown Court), wherein the judge ruled the confession inadmissible, yet convicted the accused based upon the judicial admissions made during the suppression hearing.

[402]The Act only provides that, if the confession is excluded and there is other evidence against the accused, the court may direct that the trial be restarted before another judge. There is no corresponding provision governing cases in which the confession has been admitted.

[403]*See* Greer, *supra* note 382, at 221-22.

[404][1955] A.C. 197 (P.C.) (Kenya).

search. At trial, the evidence was admitted and the accused was convicted and sentenced to death.

On appeal, the conviction was affirmed. The Privy Council instructed that "the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."[405]

In perhaps fearing the harsh outcomes in individual cases which might result from the mechanical application of this inclusionary rule of evidence, the Council allowed that "in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."[406] The Council suggested that evidence obtained by police trickery might fall within this category.[407]

Lower courts have offered criteria to guide the trial court in the exercise of this discretion:

> Was the illegal action intentional or unintentional, and if intentional, was it the result of an *ad hoc* decision or does it represent a settled or deliverate policy? Was the illegality one of a trivial and technical nature or was it a serious invasion of important rights the recurrence of which would involve a real danger to necessary freedoms? Were there circumstances of urgency or emergency which provide some excuse for the action?[408]

To these factors has been added the consideration of the seriousness of the offense.[409]

The Scottish courts, in cases predating *Kuruma*, had fashioned a balancing test, weighing the interest of the citizen to protection from illegal invasion of privacy by the authorities against the interest of the state that evidence of a crime not be withheld from the factfinder on purely technical grounds.[410] The courts of Scotland and Northern Ireland have been readier to exercise this discretion to exclude evidence than have their English counterparts.[411]

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[405]*Id.* at 203.
[406]*Id.* at 204.
[407]*Id.* (citing H.M. Advocate v. Turnbull, [1951] Sess. Cas. 96).
[408]People v. O'Brien, [1965] Ir. R. 144, 160 (C.C.A. 1961).
[409]Regina v. Murphy, [1965] N. Ir. L.R. 138, 149 (C.M.A.C.).
[410]*See* Lawrie v. Muir, [1950] Sess. Cas. 19, 26-27 (Scot. 1949).
[411]*Compare* cases cited in notes 407-09 *supra with* Regina v. Sang, [1979] 2 All E.R. 1222, *discussed in* Allen, *Judicial Discretion and the Exclusion of Evidence in Entrap-*

It has been noted that, outside of Scotland, this residual discretion of the court to exclude evidence has been exercised in the accused's favor in only four cases.[412] Those cases involved circumstances of deliverate and substantial police misrepresentation, such as where an accused is told by police that he must submit to a medical examination which, in fact, he had a right to refuse.[413] Additionally, where police entrapment, not a defense in England,[414] has been shown, the court may disregard the evidence uncovered as a result of oppressive entrapment.[415]

As recently as 1979, however, the House of Lords significantly muddied the waters of this discretion. In *Regina v. Sang*,[416] the accused was charged with comspiring with another to utter and of possession of forged United States bank notes. At a pretrial hearing, the defense counsel offered to prove that the accused had been entrapped and argued that the court should exercise its discretion to exclude this evidence at trial and enter a verdict of not guilty for the accused.[417] The judge declined to do so. Thereupon, the accused changed his plea to guilty.

The House of Lords sustained the actions of the trial judge. It was initially recognized that, in this case, the defense had essentially attempted to assert a defense not recognized in British law, entrapment, by asking the judge to suppress the prosecution's case-in-chief.[418] Lord Diplock, however, wrote beyond the facts of the case:

> (i) A trial judge in a criminal trial always has a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
> (ii) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence he has no discretion to refuse to admit relevant evidence on the ground

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ment Situations in Light of the House of Lords Decision in R. v. Sang, 33 N. Ire. Legal q. 105 (1982), *and* Jeffrey v. Black, [1978] 1 All E.R. 555, *discussed in* Recent Cases, *Evidence - Admissibility - Evidence Obtained as the Consequence of an Illegal Search*, 52 Austl. L.J. 215 (1978).

[412]*See* Heydon, *Illegally Obtained Evidence (I)*, 1973 Crim. L. Rev. 603.

[413]Regina v. Ireland, [1970] S.A.S.R. 416. *See also* Regina v. Court, [1962] Crim. L.R. 697.

[414]Regina v. Sang, [1979] 2 All E.R. 1222.

[415]Regina v. Mealy & Sheridan, [1974] 60 Crim. App. R. 59, 62, 64 *discussed in* Peiris, *The Admissibility of Evidence Obtained Illegally: A Comparitive Analysis*, 13 Ottawa L. Rev. 309, 333-34 (1981).

[416][1979] 2 All E.R. 1222.

[417]*Id.* at 1226-27.

[418]*Id.* at 1238.

> that it was obtained by improper or unfair means. The court is not concerned with how it was obtained....[419]

If this language were adopted as a general proposition of law, *Sang* would virtually limit a judge's discretion to exclude evidence to the single example listed by the Privy Council in *Kuruma*, police trickery, but only in self-incrimination situations. It has been noted that this interpretation would exclude evidence obtained by unlawful, but deceitful, investigative techniques, yet admit evidence obtained by the most flagrantly illegal search or seizure.[420]

The exact scope of *Sang* is as yet unclear. Canada, in 1970, greatly contracted the discretion of the trial court.[421] It may be that, in 1979, the English courts followed suit.

4. Recommendations for Reform

As noted above, the Royal Commission on Criminal Procedure has made a recommendation that the British law of confessions be reformed to abolish the voluntariness test and adopt a rule of admission of evidence except in very limited circumstances.[422] Conversely, in the law of search and seizure, little dissatisfaction with the present rules has been voiced. Generally, police misconduct plays a very small role in British law enforcement.[423] Alternative means of redress, such as tort suits, internal police discipline, and criminal prosecution of the offender, are available to the aggrieved. Practical problems with the utilization of those avenues, however, abound. The victimized party may be unwilling or unable to sue at tort and, if suit is brought, may recover a nominal judgment, if any at all[424] Police cohesion is thought by many to inhibit internal discipline and criminal prosecution of the errant officer, except in the most extreme cases, is unlikely.[425] Indeed, in *Sang*, the House of Lords may have contracted judicial discretion to exclude evidence of entrapment, thereby removing this potential exclusionary deterrent to police misconduct and bringing the British rule closer to the Canadian all-inclusionary rule of evidence.[426] In short, the climate in the British bar does not portend a great change in the law of search and seizure.

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[419] *Id.* at 1231.

[420] *See* Heydon, *Current Trends in the Law of Evidence*, 8 Sydney L. Rev. 305, 324 (1977); Heydon, *Illegally Obtained Evidence (2)*, 1973 Crim. L. Rev. 690, 696.

[421] *See* text accompanying notes 444-47 *infra*.

[422] *See* text accompanying notes 378-81 *supra*.

[423] *See* Peiris, *supra* note 415, at 342.

[424] *Id.* at 342-43.

[425] *Id.* at 343.

[426] *See* text accompanying notes 444-47 *infra*.

B. CANADA

The geographical proximity of Canada to the United States has not translated into a Canadian acceptance of the American exclusionary rule. Rather, Canadian courts have generally adhered to the principles dictated by the courts of the former mother country, England. In certain respects, however, a distinct Canadian judicial imprint can be detected in the current state of the law.

1. Confessions

As in England, a confession will be admitted into evidence in Canada if it is proven by the prosecution to have been the free and voluntary statement of the accused.[427] A confession is not voluntary and therefore inadmissible if it was inspired by fear or by a hope of advantage held out by a person in authority.[428] This view reflects the belief that confessions so obtained are likely to be unreliable and thus unworthy of admission into evidence as positive proof of guilt.[429] Additionally, although the British Judges' Rules have not been formally adopted in Canada,[430] the principle that a suspect in custody ought to be warned that he or she may remain silent is a firm fixture of Canadian law.[431] The presence or absence of such a warning, however, is not determinative on the issue of admissibility:

> The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.[432]

The Canadian Bill of Rights affords a person "arrested or detained . . . the right to retain and instruct counsel without delay."[433] Unlike the American rule,[434] however, statements obtained in violation of

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[427]Prosko v. Regina, [1922] 37 C.C.C. 199.
[428]Gach v. Regina, [1943] 79 C.C.C. 221, 225.
[429]*See* Regina v. St. Lawrence, [1949] 7 C.R. 464 (Ont.).
[430]Regina v. Vaupotic, [1969] 70 W.W.R. 129, 131 (B.C.) (the Rules "receive respectful consideration as being a useful guide").
[431]*See* Bach v. Regina, [1943] 79 C.C.C. 221, 225.
[432]Boudreau v. Regina, [1949] 7 C.R. 427, 433.
[433]Can. Bill of Rights, c. 44, § 2 (1960).
[434]*See* text accompanying notes 371-43 *supra*.

this right are not necessarily inadmissible. Rather, a Canadian court will view police compliance or noncompliance with the provision to be but one factor in determing voluntariness.[435]

Where a series of statements have been made by the accused and certain of these have been ruled involuntary by the court, it is incumbent upon the prosecution to establish that the original acts which rendered the initial statement involuntary did not affect later statements.[436] This is not unlike the American "cat out of the bag" rule.[437] In Canada, the original statement may have been obtained by violence, threat, or promise. It has been noted that the most difficult taint to purge is in cases in which there is a promise involved. In those cases, notwithstanding other intervening circumstances, the benefit held out remains in the future and the accused will likely always hope of attaining it.[438]

It is now clear that Canada subscribes to the doctrine of "confirmation by subsequent facts." In *Regina v. St. Lawrence*,[439] the accused rendered an involuntary confession which led the police to the discovery of the alleged murder weapon and other incriminatory evidence. The court held that both the physical evidence and that part of the involuntary confession which was confirmed by the subsequent discovery of the physical evidence were admissible:

> It is therefore permissible to prove in this case the facts discovered as a result of the inadmissible confession, but not any accompanying statements which the discovery of the facts does not confirm. Anything done by the accused which indicates that he knew where the articles in question were is admissible . . . when that fact is confirmed by the finding of the articles . . . On the other hand, it is not admissible to show that the accused said he put the articles where they were found, as the finding of them does not confirm his statement. The finding of them is equally consistent with the accused's knowledge that some other person may have put them in the place where they were found.[440]

It should be remembered that the basis for the exclusion of a

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[435]*See* Regina v. Emele, [1940] 74 C.C.C. 76, 81 (Sask.).
[436]*See* Regina v. Logue, [1969] 2 C.C.C. 346, 351 (Ont.).
[437]*See* text accompanying notes 285-91 *supra*.
[438]*See* Regina v. Williams, [1968] 52 Crim. App. R. 439; Kaufman, *supra* note 3, at 95.
[439][1949] 7 C.R. 464 (Ont.).
[440]*Id.* at 478.

confession in Canada is unreliability. To the extent that an otherwise inadmissible confession is confirmed by physical evidence, the confession will be deemed reliable as to that portion which led the police to the evidence. The confession will be redacted and the reliable portions will be received in evidence.[441]

2. Search and Seizure

As noted earlier,[442] the British Privy Council in *Kuruma v. Regina* established a general rule for the admissibility of physical evidence without regard for how the evidence was obtained. The Council, however, reserved to the trial judge the discretion to exclude otherwise admissible evidence if "the strict rules of admissibility would operate unfairly against an accused."[443] Although rarely invoked in favor of an accused, this residual discretion lies in the British courts as a potential weapon with which, if necessary, to combat widespread police illegality. The Canadian Supreme Court has significantly restricted even this small measure of discretion in *Regina v. Wray.*[444] In *Wray,* the accused was charged with murder. Based upon information learned during a nine-hour interrogation from which the accused's counsel was deliverately excluded, the police were led to the murder weapon. Noting that the murder weapon and the corroborated portion of the accused's statement were probably admissible under the "subsequent fact" doctrine,[445] the trial court nonetheless exercised its *Kuruma* discretion, excluded the evidence, and acquitted the accused. The court of appeals upheld the decision.

The Canadian Supreme Court reversed. According to the court, the trial judge had no authority to exclude the evidence under *Kuruma:*

> The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for an accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[446]

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[441] *See also* Kaufman, *supra* note 361, at 193-94, which details the redaction which was performed on the confession in *St. Lawrence.*

[442] *See* text accompanying notes 404-15 *supra.*

[443] [1955] A.C. 197, 204 (P.C.) (Kenya). The Canadian Supreme Court adopted *Kuruma* in Attorney General v. Begin, [1955] 5 D.L.R. 394.

[444] [1970] 11 D.L.R.3d 673.

[445] [1970] 2 Ont. 3, 4 (C.A.).

[446] [1970] 11 D.L.R.3d at 689-90.

The *Wray* decision has been widely interpreted to have completely closed the inquiry into the methods by which physical evidence was obtained.[447] Canadian courts thus operate under a more inclusionary rule of evidence than the courts of the country under whose precedents the Canadian rule was purportedly derived.

Absent an exclusionary rule, police conduct in Canada is regulated through the common law tort system, criminal prosecution of the offender, or internal police discipline. Of these, the tort suit has produced favorable comment,[448] but can offer little evidence of success.[449] Although it has been said that Canadian juries are more sensitive to abuses by the police than their American counterparts,[450] this alleged sentiment has not translated into a widespread use of the tort system.

Criminal prosecutions of the police are rare. Besides the obvious unwillingness to treat criminally an officer who had been, albeit overzealously, trying to enforce the law, Canadian prosecutors are unlikely to routinely become aware of police illegality. In light of *Wray*, the prosecutors, as the courts, are unconcerned with the manner in which evidence is procured.[451]

Internal police discipline is also, at present, ineffective. While a civilian may file a grievance with the particular department's complaint bureau, experience has shown that the bureaus are reluctant to rule against a police officer.[452] This is particularly true where the sole evidence presented to the bureau consists of the inevitably conflicting testimony of the complainant and the police officer.[453]

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[447] *See* Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 Tex. L. Rev. 1325, 1359 (1973); Katz, *Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the Untied States*, 3 Can.-U.S. L.J. 103, 124 (1980). A narrow exception to *Wray* was legislatively created in cases involving eavesdropping. *See* Right of Privacy Act, Can. Rev. Stat. C-34, §§ 178.1-.23 (1976). Evidence obtained by easvesdropping without prior judicial authorization will be excluded unless the defect was technical or if exclusion "may result in justice not being done." *Id.* at § 178.16(2)(b). *See generally* Delisle, *Evidentiary Implications of Bill C-176*, 16 Crim. L.Q. 260 (1973-74).

[448] *See* Martin, *The Exclusionary Rule Under Foreign Law: Canada*, 52 J. Crim. L., Criminology & Police Sci. 271, 272 (1961); Spiotto, *The Search and Seizure Problem - Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. Police Sci. & Ad. 36, 49 (1973).

[449] Katz, *supra* note 89, at 129.

[450] *Id.*

[451] *Id.* ("[P]olice illegality is simply not relevant to the criminal case.").

[452] *See* R. Morand, The Royal Commission Into Metropolican Toronto Police Practices 137 (1976).

[453] Katz, *supra* note 447, at 130.

3. The Future

Just as many in the American legal profession as dissatisfied with the exclusionary rule, so, too, are many Canadian lawyers unhappy with their inclusionary rule of evidence. The Canadian Bar Association has gone on record favoring exclusion of evidence "obtained unlawfully, contrary to due process of law, or under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute."[454] The Canadian Law Reform Commission has suggeted that *Wray* be reversed and that the trial judge be returned the discretion to exclude evidence, guided by certain enumerated factors.[455] The trend thus appears that, while the courts of the United States are fashioning means to present evidence to the factfinder,[456] Canadian jurists may be granted the authority to exclude such evidence.

C. AUSTRALIA

Like Canada, Australia has accepted the basic English rules concerning the admissibility of illegally obtained evidence. Also like their Canadian counterparts, the Australian courts have put a distinguishable national impression upon their interpretations of English law.

1. Confessions

As in England, the key to the admissibility of a confession in Australia is the demonstration by the prosecution that the confession was voluntarily given.[457] The Australian courts have adopted the British Judges' Rules for the governance of police conduct.[458] A confession obtained either in nonflagrant violation of the Judges' Rules or otherwise unlawfully, however, it is not subject to automatic

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[454]Can. Bar Ass'n Res. No. 2 (Aug. 1978). The provision endorsed by the Bar was section 15(1) of the 1975 *Report on Evidence* of the Law Reform Commission of Canada. *See* discussion in Yeo, *The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches*, 13 Melbourne U.L. Rev. 31, 34 (1981).

[455]Law Reform Comm'n of Canada, *Report on Evidence* § 15(2) (1975). Among the enumerated factors are the seriousness of the offense, whether circumstances of exigency existed, the difficulty of detecting the crime, whether the improper act was accidental or deliberate, whether the violation has been otherwise remedied, the reliability of the evidence, whether compliance would have been simple or difficult, and whether the violation was trivial or fundamental. *See* Katz, *supra* note 447, at 131; Yeo, *supra* note 454, at 46-51.

[456]*See* text accompanying notes 198-227 *supra*.

[457]*See Ex Parte* Dansie, [1981] Qd. R. 1.

[458]*Id.* at 6.

exclusion. The trial court will instead study all of the surrounding circumstances to adjudge the admissibility of the confession.[459]

The 1981 case of *Ex Parte Dansie*[460] illustrates this rule. In *Dansie*, the accused confessed to the constable in the absence of a prior caution concerning his right to remain silent as required by the Judges' Rules.[461] The trial magistrate, "in the exercise of [his] discretion," refused to admit the statement.[462] The Supreme Court of Queensland reversed this determination. The court noted that the Judges' Rules did not carry the force of law and that violation of them does not require exclusion of the resulting statement. Looking to the totality of the circumstances surrounding the giving of the statement to the police, the court found no evidence that the accused was not "on his guard." Thus, it was held that the confession was voluntary[463] and a *Miranda*-like rule was rejected in Australia.[464]

2. Search and Seizure

The Australian law of search and seizure finds its starting point in *Kuruma v. Regina*.[465] The courts of Australia are accordingly not concerned with the manner in which physical evidence was obtained; if relevant, it will be admitted.[466] The trial court does, however, retain a residual discretion to exclude otherwise admissible evidence if to admit it would operate unfairly against an accused.[462] Like Canada, Australia has put its own judicial gloss on the meaning of this discretion. Unlike the Canadian Supreme Court, however, the High Court of Australia has chosen to inquire into the manner in which evidence was procured when determining whether this discretion should be exercised.

In *Regina v. Ireland*,[468] the accused was told by the police that he would have to submit to a medical examination and have his photograph taken for identification purposes under conditions which in fact gave him the right to refuse.[469] His conviction based upon the

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[459]Wendo v. Regina, [1963] 37 A.L.J.R. 77, *discussed in* Recent Cases, *Criminal Law Evidence - Confessional Statements Illegally Obtained - Whether Admissible*, 37 Austl. L.J. 197 (1963).
[460][1981] Qd. R. 1.
[461]*Id.* at 2-3.
[462]*Id.*
[463]*Id.* at 8.
[464]*See* text accompanying notes 241-62 *supra*.
[465]*See* text accompanying notes 404-07 *supra*.
[466]Regina v. Ireland, [1970] S.A.S.R. 416.
[467]*Id.*
[468]*Id.*
[469]*Id.* at 447-48.

evidence thereby obtained by the deliberate misrepresentations was reversed by the High Court. In reaching this decision, the court made note of the factors which could bear on its exercise of discretion:

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requriements must be considered and weighed against one another. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.[470]

In *Ireland*, the court found that the deliberate acts of the police were so misleading to the accused that "the court should discourage such conduct in the most effective way, namely, by rejecting the evidence."[471]

Eight years later, in *Bunning v. Cross*,[472] and with benefit of the Canadian Supreme Court's *Wray* opinion,[473] the High Court reaffirmed *Ireland's* vitality and listed five factors to be considered by the trial judge in each case:

> (1) had there been any deliberate disregard of the law by the police, or had they merely been mistaken as to the proper extent of the law;
> (2) did the nature of the illegality affect the cogency of the evidence;
> (3) how easily could the law have been complied with by the police - was there a delibertae "cutting of corners;"
> (4) what was the nature of the offence charged; and
> (5) did the relevant legislation give any hints as to how strictly police powers were to be controlled?[474]

It has been suggested that this discretionary rule of exclusion evidences a difference in judicial philosophy between the courts of England and Canada and those of Australia.[475] The English and

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[470] *Id.* at 430.
[471] *Id.* at 423.
[472] [1978] 52 A.L.J.R. 561.
[473] *See* text accompanying notes 447-50 *supra*.
[474] 52 A.L.J.R. at 568.
[475] *See* Brown, *Illegally Obtained Evidence Under Military Law*, Justitia in Armis, Nov. 1982, at 17, 18.

Canadian courts, in criminal trials, are concerned only with the issue of guilt or innocence. In Australia, and, to some degree in Scotland and Northern Ireland,[476] the courts are more concerned with the public interest in controlling illegal activities of the police when the fruits of those activities are offered before a judicial tribunal.[477] As noted in *Bunning*, the Australian courts are reluctant to give "curial approval, or even encouragement, . . . to the unlawful conduct of those whose task it is to enforce the law."[478]

3. The Australian Law Reform Commission

The Australian Law Reform Commission has proposed the adoption of a "reverse onus exclusionary rule." Under this rule

> evidence obtained in contravention of any statutory or common law rule . . . should not be admissible in any criminal proceeding for any purpose *unless* the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. The burden of satisfying the court that any illegally obtained evidence should be admitted should rest with the party seeking to have it admitted, i.e. normally the prosecution.[479]

Among the factors to be considered by the judge in weighing whether to admit or exclude the proffered evidence are the seriousness of the offense, the urgency with which the offender must have been detected and arrested, the urgency of obtaining and preserving the evidence, the seriousness of the violation committed by those seizing the evidence, and whether and how easily the same evidence could have been uncovered by lawful means.[480]

The effect of the adoption of this rule would be to legislatively enshrine both the Judges' Rules [481] and the factors of *Bunning*.[482] It would also set Australian law on a course away from its British heritage and towrd a rule of exclusion more moderate than, but comparable to, that found in the United States.

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[476]*See* cases cited in notes 408-10 *supra;* Peiris, *supra* note 415, at 326-29.

[477]*Id.* at 322-23.

[478]Bunning v. Cross, [1978] 52 A.L.J.R. at 581.

[479]Report of the Australian Law Reform Comm'n #2, *Criminal Investigations*, para 298 (1975).

[480]*Id.*, *discussed in* Heydon, *supra* note 420, at 328; Recent Cases, *supra* note 459, at 218.

[481]*See* text accompanying notes 364-69 *supra.*

[482]*See* text accompanying note 474 *supra.*

D. ZAMBIA

As a common law country and former British colony, Zambia practices a law of confessions which parallels the English rule. Voluntary confessions are admitted; involuntary confessions are excluded. the Zambian rule has been summarized as follows:

> (i) a confession made in a criminal case as a result of an unlawful threat or inducement of a temporal nature (in case of a threat) or held out (in case of an inducement) by a person in authority [is] inadmissible. (ii) confessions obtained in contravention of judges rules by means of other improper questions may be excluded by the judge within his discretion although and even if the conditions in (i) above are complied with.[483]

In this regard, the British Judges' Rules have been adopted by the Zambian courts.[484] It has been held that the discretion noted above should be exercised only when the probative value of the confession being offered against the accused is out of all proportion to its prejudicial effect against the accused.[485]

In cases of multiple statements by the accused where one has been held involuntary, the subsequent statements will be found inadmissible as well, absent a showing that the original threat or inducement had ceased to be of concern to the accused.[486]

Proposals have been made in Zambia to afford the Judges' Rules the force of law.[487] Violation of the Rules would mandate exclusion of the resulting statements. Adoption of such a rule would create the functional equivalent of the American exclusionary rule established in *Miranda v. Arizona*.[488] Statements obtained in the presence of a prior rights warning would generally be admitted; statements in the absence of the Zambian *Miranda* warning would be excluded. Given that such a development would set Zambia at odds with its former mother country and Commonwealth partners, its adoption is unlikely.

E. ISRAEL

Like their counterparts in Great Britain and Canada, the courts of

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[483]Ndulo, *Confessions - Tainted Evidence?*, 5 Zambia L.J. 101, 104 (1973).
[484]Chileshe v. The People, 1972 Z.R. 48.
[485]Mutambo v. The People, 1965 Z.R. 15.
[486]Nalishwa v. The People, 1972 Z.R. 26.
[487]Ndulo, *supra* note 483, at 108-09.
[488]384 U.S. 436 (1966). *See* text accompanying notes 241-63 *supra*.

Israel apply different criteria to determine the admissibility of confessions and physical evidence. Israel adheres to the English rule regarding the admission of physical evidence; all relevant evidence, however obtained, is admissible.[489] Unlike the recent and sound British rejection of the American exclusionary rule,[490] however, the Israeli Supreme Court has expressed a subtle but determined willingness to entertain consideration of an exclusionary rule of evidence if warnings to the police concerning violations of the rules for obtaining confessions should go unheeded.[491]

1. Confessions

In Israel, as in the United States, a person suspected of a crime is afforded several rights and protections under the law. The Ordinance of Evidence provides that a suspect has the right to remain silent and against self-incrimination.[492] Additionally, prior to being questioned or making a statement, the suspect must be warned of the foregoing rights.[493] The suspect is entitled to an attorney and must be brought before a judicial officer within forty-eight hours of apprehension.[494]

When offering into evidence a confession made by the accused, the prosecution must present to the court the circumstances surrounding the taking of the confession and convince the court that the confession was "free and voluntary."[495] In determining the voluntariness of the proffered confession, the court will inquire into the conduct of the police at the time at which the confession was rendered. Special attention will be paid to the degree to which the authorities afforded the suspect the rights guaranteed by law.[496] Failure of the police to comply with one or more of these fundamental rights, however, will not work a *per se* exclusion of the resultant confession.[497] Rather, the court will weigh the denial of or respect for those rights in deciding whether the confession was voluntary.

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[489]Straschnow, *The Exclusionary Rule: Comparison of Israeli and United States Approaches*, 93 Mil. L. Rev. 57, 68-69 (1981).

[490]*See* text accompanying ntoes 378-81 *supra*.

[491]*See* text accompanying notes 503-12 *infra*.

[492]Ordinance of Evid., art. 12 (1979).

[493]*Id.*

[494]*Id.*

[495]Straschnow, *supra* note 489, at 69. *See generally* Cohn, *The Privilege Against Self-Incrimination Under Foreign Law: Israel*, 51 J. Crim. L., Criminology & Police Sci. 175 (1960). The rationale for excluding involuntary confessions is that they are probably false. *See* Cohn, *The Exclusionary Rule Under Foreign Law: Israel*, 52 J. Crim. L., Criminology & Police Sci. 282, 283 (1961).

[496]Straschnow, *supra* note 489, at 69.

[497]*Id.*

Involuntary confessions may arise in a number of situations. In one case, a confession was given following four hours of questioning after the accused had asserted his right to remain silent; the confession was found to be involuntary.[498] In another case, a statement rendered after the accused had been abruptly awakened was also found to be inadmissible.[499] In order to avoid the possibility of obtaining a confession which will later be excluded in court, Israeli authorities have routinely attempted to adhere to the British Judges' Rules[500] when questioning suspects. As in England, the Rules have not attained the force of law.[501] Further, again as in England, a confession may be admitted into evidence as voluntary notwithstanding a violation of the Rules or excluded from evidence despite adherence to the Rules.[502] Compliance with the Rules, however, has served to minimize the cases in which the accused is afforded the benefit of the doubt and had a confession excluded from evidence.[503]

Within the past six years, however, the Israeli Supreme Court has, on occasion, flirted with the notion that an exclusionary rule of evidence might be a necessary tool with which to combat police misconduct. In *Meiry v. State of Israel*,[504] the police refused to permit the accused's defense counsel to attend a photographic identification concerning the accused in apparent violation of a judicially-created right to counsel at such procedures. Following the admission at trial of the fruits of the identification procedure, the accused was convicted. On appeal, the Supreme Court reversed the conviction and cautioned:

> Maybe the police investigators will learn in this way . . . to perform their duties according to the court's direction . . . [w]e are concerned with preserving human rights and encouraging the individual's liberties, as they should be preserved in a democratic society where the law dominates. If the policemen, who are in charge of enforcing the law cannot or will not perform their duties according to this court's directive, they have no right to complain against criminals themselves for breaking the law . . . we are not willing to give any probative value to the photogra-

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[498]Attorney General v. Aharonovitz, 10 P.D. 599, 604 (1956).
[499]Goldstein v. Attorney General, 10 P.D. 505, 515 (1956).
[500]*See* Cohn, *Police Interrogations, Privileges, and Limitations Under Foreign Law: Israel*, 52 J. Crim. L., Criminology & Police Sci. 63, 63 (1961).
[501]*Id.*
[502]*Id.*
[503]*Id.* at 64.
[504]32 P.D., Pt.2, 180 (1977).

> phic [identification], in which the accused was identified in the absence of defense counsel.[505]

At least on commentator on Israeli law has observed that the *Meiry* decision was reminiscent of the American exclusionary rule and supposed that the court, in a proper case, might explicitly adopt the rule.[506] Indeed, the language in the quotation noted above hearkens back to *Weeks v. United States*,[507] *i.e.* that those who enforce the law ought not be able to present in court evidence discovered by breaking the law.[508] The *Meiry* court, however, did not mention the exclusionary rule in its decision and opted instead to base its ruling upon a perceived lack of probative value of the evidence of identification. Rather than focusing directly upon the conduct of the police in deciding whether to admit or exclude the evidence, the court studied the nature of the evidence itself, albeit in light of the police misconduct, and found the evidence inherently unworthy of belief. In so ruling, the court remained faithful to, rather than departing from, the traditional English common law standard that reliability is the key to admission of such evidence.[509]

After *Meiry*, the Supreme Court again had an opportunity to examine the desirability of an exclusionary rule in *Abu-Madigam v. State of Israel*.[510] In *Abu-Madigam*, the evidence presented to the court had indicated another case of investigative overreaching. In this case, the American exclusionary rule was discussed at length - and rejected:

> [I]n the current situation of overwhelming crime, we cannot afford the luxury of rejecting valid evidence only because of the illegal way in which [it] was obtained. The legislator - in the same way as the judiciary - must increase the effectiveness of punishing the violent policeman and order him to pay damages. The simple lesson to be learned from the negative experience of excluding such evidence is that this is not the right way - neither to prevent police brutality, nor to cause deterrence of violent policemen or to fight against crime.[511]

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[505] *See* Straschnow, *supra* note 489, at 74 n.53.
[506] *See* Ben-Ze'ev, *Evidence Illegally Obtained - Is the Road Open for the Exclusionary Rule?*, 32 Hapraklit [Israeli National Bar Review] 466 (1979).
[507] 232 U.S. 383 (1914). *See* text accompanying notes 23-24 *supra*.
[508] 232 U.S. at 394.
[509] *See* Cohn, *supra* note 500, at 65.
[510] 33 P.D., Pt. 3, 376 (1978).
[511] *Id.* at 383.

In a third case, although the question had seemingly been laid to rest in *Abu-Madigam*, the Supreme Court, through Chief Justice Aharon Barrack, again warned the police:

> It is important to emphasize that our current sytem - based on the English law - is not the only system to be applied, and the power to change it lies in our hands. It is well known that the attitude of the courts in the United States is different and they frequently order exclusion of confessions obtained in violation of the law. In creating this rule, the courts of the United States were of the opinion that that is the only way to "educate" the police, urging them to act lawfully.[512]

In that case, however, the admonition was deemed sufficient and resort to the exclusionary rule was again avoided.[513]

While the exclusionary rule contains to remain alien to the Israeli law of confessions, it is clear that, even while the American courts may be on the verge of lessening the strictures of the rule,[514] the Israeli courts have repeatedly indicated that, given continued police abuse of the rules for obtaining confessions, the adoption of a rule of exclusion similar to the American rule is not unthinkable.

2. Search and Seizure

As noted above, the Israeli rule concerning the admission of physical evidence mirrors the English system; the rule is one of relevancy.[515] Notwithstanding that a search may have been conducted in violation of the law or applicable police regulations, the fruits of the search will nonetheless be admitted into evidence if the item offered bears upon an issue in the case. Once admitted, all other factors concerning the evidence will be considered by the factfinder in determining the weight to be afforded it.

While there has been some criticism of the inclusionary effect of this rule, there has historically been little enthusiasm about adopting the American exclusionary rule.[516] Rather, the focus of debate has been upon how remedies, whether in tort or otherwise, for the party aggrieved may be established and how best to deal with the offending

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[512]33 P.D., Pt. 2, at 204, 207 (1978).
[513]*Id.*
[514]*See* text accompanying notes 198-227, *supra*.
[515]Straschnow, *supra* note 489, at 68-69.
[516]*See generally* Cohn, *The Exclusionary Rule Under Foreign Law: Israel*, 52 J. Crim. L., Criminology & Police Sci. 282, 283-84 (1961).

public servant.[517] Accordingly, the Israeli rule seems unlikely to be revised.

F. SOUTH AFRICA

The courts of South Africa find their treatment of illegally seized evidence closest to the liberal attitude of the courts of Australia.[518] In search and seizure cases, the judge's discretion is broad; in confession cases, the authority to exclude evidence may extend beyond ruling on involuntary statements alone.

1. Confessions

The South African law of confessions grants to a suspect the right against self-incrimination.[519] In determining whether a violation of that right has occurred, the courts will give deference to the Judges' Rules as guidelines for police conduct.[520] The proffered confession will not be admitted into evidence unless the prosecution satisfies the court beyond a reasonable doubt that the confession was voluntary.[521] A confession is not voluntary if induced by violence or prospect for advantage or disadvantage held out by a person in authority.[522] Even in the event that the confession is ruled involuntary, any portion of the confession in which the accused had pointed out the location of an object or place will be admitted into evidence.[523]

There is some judicial authority in South Africa upon which to argue for the exclusion of compelled incriminatory acts by an accused. In one case, the accused was required to compare his footprints with those found at the scene of the crime. The evidence was excluded at trial.[524] In another case, the very act of fingerprinting the accused was ruled inadmissible.[525] On the other hand, courts have indicated a willingness to admit evidence obtained "passively" from an accused, such as when a photograph was taken, a lineup was conducted, or a part of the accused's body was exposed to the court.[526]

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[517] *Id.* at 284.
[518] *See* text accompanying notes 465-78 *supra.*
[519] *See* A. Dowd, The Law of Evidence in South Africa 94 (1963); Peiris, *supra* note 415, at 320.
[520] *See* V A. Lansdown & J. Campbell, South African Criminal Law and Procedure 854-55 (1982).
[521] *Id.* at 851.
[522] *Id.*
[523] S. Afr. Crim. Code § 218.
[524] Rex v. Maleleke, [1925] S.A.L.R. 491 (Transvaal S.C.).
[525] Coleman v. Rex, [1907] T.S. 535 (Transvaal S.C.).
[526] *In Re* Rex v. Matemba, [1941] S.A.L.R. 75 (App. Div. 1940).

2. Search and Seizure

South African courts adhere to the proposition that the physical fruits of unlawful searches and seizures are admissible against an accused.[527] As in Britain, the trial judge retains a discretion to exclude otherwise relevant evidence if its admission would be unfair to the accused.[528] In South Africa, however, courts are empowered to consider the manner in which the evidence was procured in determing whether to exercise this discretion.[529] The American rule of exclusion has been noted and rejected by the courts as "peculiar to American law" an perhaps tracable to "the sanctity which Americans attach to their Constitution."[530]

Criticism of the use of illegally seized evidence has periodically been voiced in South African courts for some time.[531] Exclusion of evidence as a remedy, however, has proven unnecessary to deter police misconduct. By statute, those who engage in unlawful police conduct are subject to find and imprisonment for up to six months.[532] With this system of direct and immediate punishment of the offender, the absence of an exclusionary rule is perhaps understandable.

G. SRI LANKA

In Sri Lanka and other South Asian nations which were former British colonies,[533] the rules of evidence have been comprehensively codified in a statute which purported to repeal all other existing rules of evidence.[534] Although the Code allows for the exclusion of other categories of evidence,[535] there exist no provisions in these codes for the exclusion of relevant, but illegally obtianed, evidence. Sri Lankan courts have deferred to this apparent legislative intention to permit the admission of such evidence:

> There is no provision in the Evidence Ordinance which

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[527]Lansdown & Campbell, *supra* note 520, at 152.

[528]*Id.* at 727.

[529]*Id.*

[530]Rex v. Mabuya, [1927] S.A.L.R. 181, 182 (S.C.).

[531]In Rex v. Maleleke, [1925] S.A.L.R. 491, 536 (Transvaal S.C.), the court noted that the admission of illegally seized evidence "would be tantamount to adopting the obnoxious principle that the means justify the end, and that the Crown could avail itself of and connive at the commission of one crime to prove another."

[532]*See* Lansdown & Campbell, *supra* note 520, at 151.

[533]The following discussion applies as well in India, Burma, Malaysia, and Singapore. *See* Peiris, *supra* note 415, at 314-315.

[534]*Id.* at 314. "[I]t is for the legislature alone to decide whether in the interests of the community the admissibility of evidence improperly obtained should be curtailed." Karalina v. Excise Inspector, 52 C.L.R. 89, 91 (Ceylon S.C. 1950).

[535]Peiris, *supra* note 415, at 314.

> renders a relevant fact (such as evidence of an offense) inadmissible merely because the fact has been discovered in the course of an illegal search . . . . [I]n the present state of the law, relevant evidence can[not] be ruled out *ab initio* on the ground that it was obtained by improper means.[536]

Another court has stated the principle in terms of competency to testify: "Disregard of the provisions of law by a police constable may amount to an offence but cannot possibly affect the competency of the officer in question as a witness."[537]

Consequently, absent a legislative enactment, pleas to the courts of Sri Lanka for the adoption of an exclusionary rule for illegally seized evidence are likely to fall on deaf ears.

H. JAPAN

Modern Japanese criminal procedure stems largely from the post-World War II Constitution and statutes drafted by the Allied occupiers of Japan. The subsequent development of the law, however, has not paralleled American jurisprudence. Generally speaking, while the right against self-incrimination is jealously guarded, physical evidence will be deemed admissible regardless of the manner of its procurement.

1. Confessions

Article 38 of the Japanese Constitution of 1947 provides that "[n]o person shall be compelled to testify against himself."[538] Confessions made under compulsion, torture, or threat, or after prolonged arrest or detention shall not be admitted into evidence.[539] The Code of Criminal Procedure requires that a suspect be notified in advance of an interrogation that he or she cannot be required "to make a statement against his will,"[540] Unlike the development of the law in other jurisdictions, the Code expressly permits the obtaining of quasi-self-incriminatory physical evidence, such as fingerprints, footprints, or

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[536]Karalina v. Excise Inspector, 52 C.L.R. 89, 90 (Ceylon S.C. 1940).

[537]Ekanayaka v. Deen, 18 C.L.W. 60 (Ceylon S.C. 1940).

[538]Japan Const. art. 38 provides:

> No person shall be compelled to testify against himself. Confessions made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.
> No person shall be convicted or punished in cases where the only evidence against him is his own confession.

Article 36 prohibits "the infliction of torture by . . . public officers."

[539]*Id. See* discussion in Abe, *Self-Incrimination - Japan and the United States*, 46 J. Crim. L., Criminology & Police Sci. 613, 621 (1956).

[540]Code Crim. P. art. 198, para. 2 (1949).

photographs, from the accused.[541] These compulsory "seizures," however, are to occur only pursuant to a judicially issued warrant or order.[542]

Allegation of irregularities other than a violation of Article 38 in the interrogation process will require the court to determine the voluntariness of the statement rendered.[543] The manner in which the statement was obtained bears heavily upon the issue. It has been noted that Article 38 and the voluntariness inquiry have had a significant effect upon the conduct of ordinary police investigative procedures. Rather than concentrating exclusively upon the need for a confession, the police will more likely channel their energies toward developing circumstantial and scientific evidence in support of their case. The modernization of police investigative techniques was thus prompted.[544]

2. Search and Seizure

In the search and seizure arena, Japanese courts will admit any relevant physical item into evidence: "The illegality of search and seizrue procedure does not change the nature, condition, or shape, and therefore the evidentiary value, of the thing which has been illegally seized."[545] It has been suggested that, even if the fruits of a given search or seizure were to be excluded, the police could easily circumvent the exclusion by repeating the search or seizure in compliance with the law and thereby secure the later admission of the challeneged items.[546] There has been no significant movement in Japan to alter these rules of evidence.[547]

VIII. CIVIL LAW SYSTEMS

We have thus far examined common law systems and their method

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[541] *Id.* at arts. 128, 167, 218, para. 2.

[542] Abe, *The Privilege Against Self-Incrimination Under Foreign Law: Japan*, 51 J. Crim. L., Criminology & Police Sci. 170, 185 n.33 (1960).

[543] Abe, *Police Interrogations, Privileges and Limitations Under Foreign Law: Japan*, 52 J. Crim. L., Criminology & Police Sci. 67, 72 (1961). In Abe v. Japan, 20 Keishn 537 (S. Ct. 1966), the accused had confessed in reliance on the promise of the public prosecutor, who had the power to dismiss the case, that his case would be dismissed if he confessed. The resulting confession was suppressed. *See* H. Tanaka, The Japanese Legal System 820-22 (1976). Confessions made during an "unreasonably prolonged" detention are presumed involuntary. Japan Const. art. 38, para. 2; Code Crim. P. art. 319, para. 1 (1949).

[544] Abe, *supra* note 539, at 624-25.

[545] Decision of the Sup. Ct. (3d Petty Branch, 31 Dec. 1949) (unpublished), *discussed in* Abe, *The Exclusionary Rule Under Foreign Law: Japan*, 52 J. Crim. L., Criminology & Police Sci. 284, 285 (1961).

[546] *Id.*

[547] *Id.* at 286-87.

for dealing with the issue of illegally seized evidence. To obtain some perspective on the attitude of different systems in the modern world, this article will now examine the civil law systems of the Federal Republic of Germany and France. It will be noted that the different system of investigation and trial in these countries impacts heavily upon the admissibility of evidence obtained in violation of the law.

A. THE FEDERAL REPUBLIC OF GERMANY

As a civil law system, West Germany employs an inquisitorial system of trial. An immediate consequence of this arrangement is that the police and prosecutorial activities are far more integrated than in common law systems. The prosecutorial and judicial control over the police is believed to be a sufficiently effective deterrent to illegal police activity that an exclusionary rule of evidence is generally unnecessary.

1. Confessions

Section 136a of the German Code of Criminal Procedure guarantees to an accused a right to be free from coerced confession:

> (i) The freedom of determination and manifestation of the defendant's will shall not be impaired through ill-treatment, fatigue, subjegating to bodily trespass, application of drugs, through torturing, deceiving or hypnosis .... Threats with any measure outlawed ... and the promise of any advantage not provided for by the law is prohibited.
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> ...
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> (ii) ... Statements obtained in violation of this prohibition must not be used in evidence, not even with the consent of the defendant.[548]

The limited exclusionary rule has been noted to be a reaction to the excesses of the Nazi era.[549] Wilful violation of the provisions are themselves criminally punishable.[550]

The Code also affords any witnes a privilege to "refuse information

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[548]Code Crim. P. § 136(a), *discussed in* Bradley, *The Exclusionary Rule in Germany*, 96 Harv. L. Rev. 1032, 1049-50 (1983); Clemens, *Police Interrogations, Privileges and Limitations Under Foreign Law: Germany*, 52 J. Crim. L. Criminology & Police Sci. 59, 59 (1961); Pieck, *The Accused's Privilege Against Self-Incrimination in Civil Law*, 11 Am. J. Comp. L. 585, 590 (1962).

[549]*Id.* at 589.

[550]Penal Code § 343.

as to all questions the answer to which might incur prosecution for himself. . . . The witness shall be advised on his privilege to decline to answer questions."[551] The latter warning applies only to witness; the accused is not so advised.[552]

The accused must tolerate "passive" incriminatory activity, such bodily examination, blood tests, being photographed, and being fingerprinted.[553]

Statements made by an accused during a period of illegal detention may, but need not be, excluded. If excluded, the statement will have been deemed coerced, and therefore unreliable. No automatic rule of exclusion applies.[554]

As in France,[555] the decision of the examining judge is based upon his or her "free evaluation of the evidence."[556] As such, the judge may choose to credit or discredit the evidence presented. The evaluation may be made, *inter alia*, based upon the method by which it was obtained. Thus, it might be said that the German rule is that the obtaining of a confession in situations where the accused had not been warned of the right to remain silent is only a factor for the court to resolve in the course of weighing the evidence of guilt.

2. Search and Seizure

Evidence which had been illegally seized is admissible at trial, subject only to the free evaluation of the evidence by the factfinder.

The obligation felt by the police to adhere to the established rules of search and seizure, however, is more than a moral or professional imperative. In Germany, the police forces are organized on state level. Promotions are awarded on a merit system and under the auspices of the state's parliamentary minister of the interior. Upon a citizen complaint of improper police activity, an investigation is

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[551]*See generally* Pieck, *Witness Privilege Against Self-Incrimination in the Civil Law*, 5 Vill. L. Rev. 375, 378 (1960).

[552]Code Crim. P. § 55; Pieck, *supra* note 548, at 596. *But see* Code Crim. P. § 136(1): "At the beginning of the first [judicial] interrogation, the accused must be informed with which punishable act he is charged. The accused must be asked, whether he wants to say something in response to the accusation." This provision has been interpreted as creating a right against self-incrimination. *See* Pieck, *supra* note 548, at 586, 586 n.6. *See also* Clemens, *The Privilege Against Self-Incrimination Under Foreign Law: Germany*, 51 J. Crim. L., Criminology & Police Sci. 172, 172 (1960).

[553]Pieck, *supra* note 548, at 588.

[554]Clemens, *supra* note 548, at 62.

[555]*See* text accompanying note 578 *infra*.

[556]Code Crim. P. § 261. *See* Clemens, *supra* note 548, at 62.

required to be conducted by a designated police superior.[557] In the resulting report, the investigator must state the reasons for his or her conclusions concerning the merits of the complaint. If not satified, the complainant may renew the complainant before the next higher superior, who must similarly state the reasons for the disposition of the complainant may review the complaint before the next higher officer's personnel file and may affect promotions within the merit system.[558] Other sanctions include warning the officer, official censure, a fine, a reduction in salary or rank, and dismissal with or without an accompanying loss of pension rights.[559]

If the actions of the police officer also violated the criminal law, prosecution of the offender is available. A citizen may present a complaint to the prosecutor, who, in cases of serious crimes, must by law pursue the case to trial.[560] In less serious infractions, the prosecutor retains a discretion to prosecute or not, but a decision against prosecution is reviewable by the state prosecutor-general upon a citizen-initiated complaint.[561] If the decision against prosecution is sustained, the prosecutor-general must state in writing the rationale supporting the decision. Like the police, German prosecutors are members of a career civil service and citizen complaints are retained in their personnel files.[562]

The German system of admitting illegally seized evidence, subject to the judge's "free evaluation of the evidence," and of a hierarchical structure of police discipline has been termed a "compromise."[563] Taken together, these provisions appear to have obtained official compliance with the law and obviated the need for an exclusionary rule as a deterrent for unlawful police misconduct. Even today, there is little support in Germany for the general adoption of such a rule.

3. Wiretapping

In 1968, the same year that the United States enacted the Omnibus

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[557]Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549, 1560 (1978).

[558]*Id.*

[559]*Id.* at n.38.

[560]Code Crim. P. § 152(II). This is known as the "Legalitatsprinzip." *See* Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 Yale L.J. 240, 243 (1977); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468, 481-95 (1974); Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Am. J. Comp. L. 508, 509 (1970).

[561]Langbein & Weinreb, *supra* note 557, at 1563.

[562]*Id.*

[563]Clemens, *The Exclusionary Rule Under Foreign Law: Germany*, 52 J. Crim L., Criminology & Police Sci. 277, 282 (1961)

Crime Control and Safe Streets Act,[564] the Federal Republic of Germany also acquired a wiretapping statute.[565] Remarkably, notwithstanding the differences between American and German treatments of the search and seizure issue and especially considering the German aversion to a general exclusionary rule of evidence, the two wiretap statutes are very similar in both content and consequence.

As in the United States, interception of wire or oral communications in Germany requires prior judicial authorization, except in emergency situations. Wiretapping will be permitted only in cases involving at least one of a schedule of serious offenses and only where a high degree of necessity and likelihood of success are shown.[566] The application for judicial authorization must further state facts which form the basis for a suspicion that someone has committed one of the scheduled offenses. Finally, a statement must be included, which details the method, scope, and duration of the wrietap.[567] Unlike the American statute, however, the German law does not require specification of the type of communication to be intercepted. It has been noted that the American requirement arises from the language of the Fourth Amendment which mandates that the thing to be seized be described with particularity.[568] As German jurisprudence does not view wiretapping as a conventional search and seizure,[569] the particularity requirement is seen as unnecessary and impractical.[570]

Once issued, the order is executed by the Federal Postal Ministry, the state monopoly which operates the phone system. Unlike the American requirement of "minimization,"[571] conversations intercepted by wireptap in Germany are recorded in their entirety. "Windfall", or unsought and unanticipated, evidence obtained during a wiretap may be used for prosecution provided that the offense to which it pertains is a scheduled one such that would independently justify a wiretap.[572] As soon as feasible after the wiretap has been terminated, all "participants" in the recorded conversations are to be given notice of the wiretap.[573]

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[564] *See* text accompanying notes 337-50 *supra*.

[565] Code Crim. P. §§ 100a-101.

[566] *See* discussion in Carr, *Wiretapping in West Germany*, 29 Am. J. Comp. L. 607, 610-11 (1981). *See also* Bradley, *supra* note 189, at 1054-59.

[567] Carr, *supra* note 566, at 616, 622-23, 627-30.

[568] U.S. Const. amend IV.

[569] Carr, *supra* note 566, at 610.

[570] *Id.* at 643.

[571] *See* 18 U.S.C. § 2518(5) (1976), which requires police authorities to avoid unnecessary recording of conversations of no potential evidentiary value.

[572] Carr, *supra* note 566, at 641-42.

[573] *Id.* at 633-35.

Despite the notable lack of a general exclusionary rule in other areas of the law, there is such a rule in the field of wiretap evidence and the rule roughly parallels the American norm. In Germany, evidence obtained pursuant to an invalid court order or in absence of such an order will not be admitted in court.[514] Additionally, derivative physical evidence discovered in consequence of an unlawful wiretap will be excluded. In direct opposition to the American rule, recordings made with the consent of a party to the conversation are absolutely inadmissible in German proceedings as violative of the individual's "right of personality."[575] Recordings of privileged communications will be suppressed as well.[576] Surprisingly, this judicially-imposed exclusionary rule, a remedy noted to be "at least unconventional" in the Federal Republic,[577] has occasioned little controversy. That the legislature has not sought to change this judicial rule is a particularly significant indication of German society's satisfaction with the balance of public interest and individual rights thus struck.

B. FRANCE

As in the courts of its civil law neighbor, the French courts empower the examining judge to determine in his or her "free evaluation of the evidence,"[578] which evidence should be considered and the weight to be afforded it. Subject only to this limitation and the privilege of the accused against self-incrimination, relevant evidence is generally admissible in court.[579]

1. Confessions

Article 114 of the Code of Criminal Procedure grants an accused a right against self-incrimination.[580] Although the privilege applies expressly only to questioning by an examing judge,[581] it is generally agreed that the police are without authority to compel a suspect to answer questions beyond the determination of his or her identity.[582] Additionally, confessions rendered as a consequence of threats or use

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[574]*Id.* at 639.
[575]*Id.* at 640.
[576]*Id.* at 641.
[577]*Id.* at 643.
[578]*See* text accompanying note 556 *supra*.
[579]*See generally* Vouin, *The Exclusionary Rule Under Foreign Law: France*, 52 J. Crim. L., Criminology & Police Sci. 275, 275 (1961).
[580]Code Crim. P. § 114.
[581]*See* Pieck, *supra* note 548, at 585-86.
[582]*Id.* at 586; Vouin, *Police Detention and Arrest Privileges Under Foreign Law: France*, 51 J. Crim. L., Criminology & Police Sci. 419, 419-20 (1960).

of force are excludable as lacking in trustworthiness.[583] It has been noted that this policy is designed to "prevent the accused from being subjected to undue psychological pressure or to physical abuse."[584]

Unlike the American rule,[585] the prosecution may comment upon the pretrial and courtroom invocation of the right to remain silent as a tacit admission of guilt.[586] Moreover, in the free evaluation of the evidence, the court may draw an adverse inference to the accused from such silence.[587]

It has been noted that this scheme affords little practical protection to the accused. As the only required notification of the accused of the privilege against self-incrimination must take place only after formal charges have been filed,[588] this charging is often delayed for the purpose of avoiding the warning.[589] Additionally, invocation of the right by the knowledgable suspect will likely result in prejudice at trial.[590] Thus, the anomoly is created whereby the untruthful or recidivist accused is better positioned to harmlessly assert the right than the cooperative one with little or no prior experience with criminal proceedings. In this respect, the privilege against self-incrimination may seem a hollow one indeed.

2. Search and Seizure

As in Germany,[591] the French police are a part of an integrated civil service with the prosecutors and judiciary. The magistracy makes regular evaluations of police conduct and the results of such examinations become a part of the police officer's record.[592] Accordingly, police excesses in the search and seizure arena which command judicial attention will be duly noted and perhaps adversely affect the officer's career.

The attention of the court is directed to the police investigation

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[583]Pieck, *supra* note 548, at 589. *See also* Vouin, *The Privilege Against Self-Incrimination Under Foreign Law: France*, 51 J. Crim. L., Criminology & Police Sci. 169, 169-70 (1960) (confessions obtained by surprise or trickery excludable).

[584]Pieck, *supra* note 548, at 589. In this vein, an accused must be brought before a magistrate within forty-eight hours of arrest and must, upon request, be afforded a medical examination if held beyond twenty-four hours. *See id.* at 591. *See also* Patey, *Recent Reforms in French Criminal Law and Procedure*, 9 Int'l & Comp. L.Q. 383, 390-91 (1960).

[585]*See* text accompanying notes 256-57 *supra*.

[586]Pieck, *supra* note 548, at 598.

[587]*Id.*

[588]Pieck, *supra* note 548, at 601.

[589]*See* text accompanying notes 586-87 *supra*.

[590]*See* text accompanying notes 557-59 *supra*.

[591]Langbein & Weinreb, *supra* note 557, at 1555.

upon examination of the dossier of the case at the earliest stages of the formal proceedings.[593] It is at this point that the discretion of the judge may be exercised to exclude relevant, but illegally obtained, evidence. The examing judge possesses a power of "nullification", pursuant to which the judge may strike from the dossier the illegal investigatory acts of the police.[594] In practice, however, it has been noted that this limitation is frequently circumvented. If the police characterize the offense as "flagrant," the law excuses them from the requirement of prior judicial authorization to search or seize; hence, no violation will appear to have occurred.[595] Consent to search in France is routinely given, often in the absence of knowledge of the right to refuse it.[596] Finally, "[t]he French *judge d'instruction* and the courts rarely inquire into the illegality of police conduct; although they have authority to 'nullify' an illegal act, they rarely do so in the manner of [the United States] by excluding illegally obtained evidence."[597] Whatever evidence is presented to the court, however, a conviction may not be had based solely upon illegally seized evidence.[598] The extent to which the illegal conduct has influenced the court's "free evaluation of the evidence," however, is a matter difficult of objective determination on review and will seldom nullify a conviction.

IX. THE PEOPLES REPUBLIC OF CHINA

The admissibility of confessional and physical evidence in the People's Republic of China is governed by the Criminal Procedure Law as adopted by the Fifth Session of the National People's Congress in 1979.[599] There are limited rules for exclusion of evidence.

Article 31 of the Code provides: "All facts that prove the true circumstances of a case are evidence."[600] Listed among the categories of evidence are "material and documentary evidence" and "state-

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[593]Goldstein & Marcus, *supra* note 560, at 253.

[594]French Code Crim. P. arts. 114-36.

[595]Goldstein & Marcus, *supra* note 560, at 253.

[596]*Compare* text accompanying notes 119-22 *supra* (knowing and intelligent waiver under American rule).

[597]Langbein & Weinreb, *supra* note 557, at 1554.

[598]Vouin, *supra* note 579, at 275.

[599]The Criminal Procedure Law of the People's Republic of China [hereinafter cited as PRC Crim. P. Law], *reprinted in* 73 J. Crim. L. & Criminology 171 (1982). A comparison of Chinese and Soviet criminal law and procedures is provided in Berman, Cohen, & Russell, *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. Crim. L. & Criminology 238 (1982). *See also* Osakwe, *Modern Soviet Criminal Procedure: A Critical Analysis*, 57 Tul. L. Rev. 439 (1983).

[600]PRC Crim. P. Law art. 31(4) (1979).

ments and explanations of defendants."[601] Perhaps mindful of past abuses,[602] the Code prohibits the "use of torture to coerce statements and the gathering of evidence by threat, enticement, deceit, or other unlawful methods."[603] Notably, the context of this provision indicates its intention to protect all potential witnesses in a case, rather than affording a special protection to the suspect or accused.[604]

Interrogation of an accused must be conducted in the presence of no fewer than two investigative personnel.[605] Article 64 directs that the accused first be asked "whether or not he has engaged in a criminal act and [that he be] let ... state the circumstances of his guilt or explain his innocence."[606] The accused has no right to refuse to answer questions other than those that have no relation to the case.[607] The transcript of the interrogation is to be shown to the accused for correction or alteration. At his or her own request, the accused is to be permitted to make a written statement. The investigators may also request, but not require, a written statement from the accused as well.[608] The interrogation, however, is only one evidentiary element of the case. An accused cannot be convicted based upon an uncorroborated confession.[609]

Article 34 gives to the people's courts the power to "gather and obtain evidence" from the Chinese citizenry, subject only to the limitation that state secrets be excluded.[610] Investigators are expressly authorized to examine any evidence bearing a relationship to the offense and may "conduct searches of the person, articles, residences and other relevant places of defendants and persons who might conceal criminals or criminal evidence."[611] Although searches are to be carried out pursuant to a warrant, warrantless searches are permitted in emergency situations.[612] Bodily examination of the accused is authorized and, if necessary, force may be used to effect the examination.[613] During a search or examination, any article or

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[601] *Id.*
[602] *See* Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. Crim. L. & Criminology 204, 215 (1982).
[603] PRC Crim. P. Law art 32 (1979).
[604] *Id.*
[605] *Id.* at art. 62.
[606] *Id.* at art. 64.
[607] *Id.*
[608] *Id.* at art 66.
[609] *Id.* at art 35.
[610] *Id.* at art 34.
[611] *Id.* at art 79.
[612] *Id.* at art 81.
[613] *Id.* at art 71.

document "that may be used to prove the guilt or innocence or a defendant shall be seized."[614]

The People's Republic has exerted a great deal of effort to upgrade police professionalism. Educational programs and newspaper articles have explained the need to ban unlawful interrogation practices. Reported statistics indicate that, from January 1979 to June 1980, over 10,000 cases of alleged police abuses were heard. Over 9000 such persons have been found guilty.[615] With such statistics, it is little wonder that a rule of exclusion of evidence has not entered that country's socialist jurisprudence.

X. LESSONS FOR THE AMERICAN SYSTEM

There is little happiness in the American legal and law enforcement communities with the current exclusionary rule of evidence. As the courts and legislatures grapple with such alternatives as a "good faith exception," a substantiality test, or a revised tort law remedy for ths aggrieved, it is perhaps useful to look at the systems of other nations in attempting to divine a solution to the American dilemma.

Whatever scheme is devised, it will surely be a compromise. Those favoring zealous, and sometimes overzealous, law enforcement will have to recognize that a suitable rein on police misconduct must be constructed to replace the exclusionary rule. Whether that replacement be a tighter supervision of the police, such as exists in the civil law countries, or the creation of a tort or administrative remedy with greater efficacy than the present situation, it is clear that a deterrent perceived to be as effective as the exclusionary rule must be created.

Those covetous of protecting civil liberties from official encroachment must understand, as do common and civil law countries throughout the world, that the exculsion of evidence, except in cases of the most flagrant police misconduct, is too high a societal price to pay for the uncertain deterrent effect alleged to result from such exclusion. If reliable, the evidence will have to be admitted in court. The tradeoff is that the offending officer will be disciplined, civilly or professionally, and swiftly.

Perhaps the best solution would be the judicial or legislative adoption of a *Williams*-like exclusionary rule exception together with a civil law reporting system to document for the officer's personnel file those flagrant abuses of the law. Where personal injury or property

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[614] *Id.* at art 80.

[615] Leng, *supra* note 602, at 216-17.

damage results, a claims procedure against the government could be established to recompense the innocent victim. Egregious cases might warrant criminal prosecution themselves.

Whatever the ultimate solution, those studying the problem would be well served by looking at the experiences of other nations around the globe. The lessons learned might prove valuable in reforming the American system.

CUMULATIVE INDEX, VOLS. 97-101

I. INTRODUCTION

This index includes entries for articles published in the *Military Law Review* from volume 97 (summer 1982) to 101 (summer 1983), inclusive. This index, like those contained in volumes 81, 91, and 96, consists of an author index, a title index, and a subject index. Unlike previous indices, however, the book review indices have been discontinued.

Beginning with this index, and as may have been suggested by the inclusion of cumulative indices in volumes 81 and 91, the *Review* will provide cumulative indices in every tenth issue. The next cumulative issue, covering volumes 102 to 111 will thus appear in volume 111. It is hoped that this systemization of the indexing of the *Military Law Review* will assist the reader in researching articles contained therein.

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