DEPT OF ARMY PAMPHLET 27-100-106

MILITARY LAW REVIEW

Volume 106 Fall 1984

MILITARY LAW REVIEW

VOLUME 106

Pamphlet

No. 27-100-106

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., *Fall 1984*

MILITARY LAW REVIEW—VOL. 106

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 and is designed for use by military attorneys in connection with their official duties. 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.

SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. The subscription price is $14.00 a year for domestic mailing, and $17.50 for foreign mailing. A single copy is $5.50 for domestic mailing and $6.90 for foreign mailing.

Publication exchange subscriptions are available to law schools and other organizations which publish legal periodicals. Editors or publishers of such periodicals should address inquiries to the Editor of the *Review*.

Inquiries concerning subscriptions for active Army legal offices, other federal agencies, and JAGC officers in the USAR or ARNGUS not on active duty should be addressed to the Editor of the *Review*. To insure continued distribution, Reserve Component judge advocates should promptly inform the U.S. Army Reserve Personnel Center of address changes. Judge advocates of other military departments should request distribution from their service's publication channels.

CITATION: This issue of the *Review* may be cited as 106 Mil. L. Rev. (number of page) (1984). Each quarterly issue is a complete, separately numbered volume.

The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and are replaced by a cumulative index in volume 96. A cumulative index for volumes 97-101 appears in volume 101. Volumes 101 to 111 will be indexed in volume 111.

Military Law Review articles are also indexed in the *Advanced 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. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche*, by Infordata International Incorporated, Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

MILITARY LAW REVIEW

TABLE OF CONTENTS

MILITARY LAW REVIEW

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

Footnotes should be double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (13th ed. 1981), copyrighted by the *Columbia, Harvard,* and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*. Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of rank or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The Editorial Board of the *Military Law Review* consists of the Deputy Commandant of The Judge Advocate General's School, the Director, Developments, Doctrine, and Literature Department, and the Editor of the *Review*. They are assisted by instructors from the teaching divisions of the School's Academic Department. The Board submits its recommendations to the Commandant, TJAGSA, who has final approval authority for writings published in the *Review*.

The Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. However, minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs or page proofs are provided to authors.

Reprints of published writings are not available. However, authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

BACK ISSUES: Copies of recent back issues are available in limited quantities from the Editor of the *Review*. For individual military personnel on active duty, recent back issues are also available from the U.S. Army AG Publications Center, ATTN: Distribution Management Division, 2800 Eastern Boulevard, Baltimore, Maryland 21220.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

THE ACTIVE GUARD/RESERVE PROGRAM: A NEW MILITARY PERSONNEL STATUS

by Major Thomas Frank England*

This article examines the creation of the Active Guard/Reserve program, a new military personnel status dedicated to the full-time support of the Reserve components of the United States Armed Forces and of the National Guard. The history of the program's creation is reviewed as a predicate to an analysis of military personnel and criminal law concerns for the future. The article concludes that a renewed effort should be made to define the full dimensions of the status of National Guard participants, and that changes should be made to the Manual for Courts-Martial to fully implement the criminal jurisdiction over Reserves afforded by Article 3(a) of the Uniform Code of Military Justice.

PREFACE

This article is a personnel law analysis of a new military status. Such an analysis is the main business of a military personnel law attorney, yet the methods used in such a study are not confined to a particular field of law. At a practical level, a client must be fully informed of all possible ramifications from creating such a new status. At a philosophical level, military personnel law is, by definition, an interdisciplinary profession. The indicia of a particular personnel status are evidenced only in the context of many subcategories of the law. In addition to addressing the many administrative law topics that directly concern the management of a personnel category, such as accession, promotion, and separation, the military personnel law attorney must provide information as to the military status of a personnel classification to other, equally specialized attorneys.

---

*Judge Advocate General's Corps, United States Army. Currently assigned as Officer-in-Charge, Office of the Staff Judge Advocate, VII Corps, Heilbronn Branch Office, Federal Republic of Germany, 1984 to present. Formerly assigned to Administrative Law Division, Office of The Judge Advocate General, U.S. Army, 1980-83; Chief, Magistrate Court Branch, Office of the Staff Judge Advocate, III Corps and Command Judge Advocate, 13th Corps Support Command, Fort Hood, Texas, 1977-80. J.D., University of Pittsburgh, 1976; B.A., University of Tennessee, 1973. Completed 32d Judge Advocate Officer Graduate Course, 1984; 83d Judge Advocate Officer Basic Course, 1977. Author of *DOPMA Correction: Not a Mere Technicality*, The Army Lawyer, Aug. 1981, at 13. Member of the bars of the States of Texas and Pennsylvania. This article is based upon a thesis submitted in partial satisfaction of the requirements of the 32d Judge Advocate Officer Graduate Course. This article is dedicated to the memory of the late Colonel Thomas H. Davis.

A complexity that arises in this synthesis of many disciplines into a single analysis is that the nature of a military status may not be uniform across various fields of law. For example, the fact that a soldier is said to be on "active duty" for the purposes of receiving pay, allowances, and benefits, does not always mean that he is similarly situated for the purpose of criminal law. Therefore, an inductive analytical approach in the practice of military personnel law is doomed to failure; military personnel lawyers must reason deductively.

Finally, the practice of military personnel law requires the epitome of the staffing principle termed "coordination." Because the law is so detailed and specialized, the military personnel lawyer makes his greatest contribution as a general practitioner, recognizing the issues that specialists must resolve.

I. INTRODUCTION: MILITARY PERSONNEL LAW IN THE EARLY 1980s

In the past five years, Congress has rewoven the fabric of military personnel management. A new active-duty management structure for Reserves was created at the same time that the traditional active forces were encouraged to become "all-Regular." Specifically, the "anomaly of the career Reservist," discouraged by the Defense Officer Personnel Management Act (DOPMA),[1] has been resurrected in the Active Guard/Reserve (AGR) program.[2]

The creation of the AGR program is part of an increasing emphasis on the use of Reserves to augment active forces, as was demonstrated in late October and early November 1983. During this period, Philadelphia-area Army Reservists received telephone calls explaining that they were needed to support an Active Army operational mission.[3] These Reserves represented a cross-section of civilian backgrounds: an educational administrator, an airline pilot, the head

---

[1]Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) (prior to 1981 amendment) (codified mainly in numerous provisions of 10 U.S.C. 1982) [hereinafter cited as DOPMA]. *See* H.R. Rep. No. 1462, 96th Cong., 2d Sess. 12-13 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6343-6344 (discussion of purpose of DOPMA to solve the "anomaly of the career Reservist" by encouraging "all-Regular" active-duty career forces).

[2]Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 401(b), 93 Stat. 807 (1979) (first enactment of separate authorization for active-duty personnel dedicated to support Reserve components). *See infra* Section II.D.

[3]Office of the Chief, Army Reserve, Public Affairs Release No. 26-83 (Dec. 14, 1983) (available in the Army Reserve Public Affairs Office, Washington, D.C.).

of a construction firm, a senior official in city government, a vice-president of a water treatment company, and a supervisory iron worker. With only minimal notice, they became active-duty soldiers, participating in operation "Urgent Fury," the deployment of United States combat troops in Grenada.[4]

This article examines military personnel and criminal law concerns within the Active Guard/Reserve program. This requires, first, an introduction to the AGR program for those unfamiliar with its history and purposes. Thereafter, a full spectrum of military personnel law issues is analyzed. Finally, the issue of criminal jurisdiction over AGR personnel is explored in a series of practical scenarios.

II. GENESIS OF THE ACTIVE GUARD/RESERVE PROGRAM

A. INTRODUCTION

Congress is authorized by the Constitution to "raise and support Armies,"[5] to "provide and maintain a Navy,"[6] and to "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces."[7] In addition to creating the full-time armed forces,[8] Congress has also exercised this constitutional authority by creating various part-time military organizations. These organizations are the seven reserve components of the armed forces: The Army National Guard of the United States (ARNGUS); The Army Reserve (USAR); The Naval Reserve (USNR); The Marine Corps Reserve (USMCR); The Air National Guard of the United States (ANGUS); The Air Force Reserve (USAFR); and The Coast Guard Reserve (USCGR).[9]

It is important to not confuse the Army and Air National Guards *of the United States*, ARNGUS and ANGUS, respectively, with the National Guard of the various states. The National Guard, including both the Army National Guard and the Air National Guard, is *not* defined as a reserve component of the armed forces. Rather, it is part of the organized militia[10] of the states, territories, Puerto Rico,

---

[4]*Id.*
[5]U.S. Const. art. I, § 8, cl. 12.
[6]*Id.* at cl. 13.
[7]*Id.* at cl. 14.
[8]10 U.S.C. § 101(4) (1982) (Army, Navy, Air Force, Marine Corp, and Coast Guard).
[9]*Id.* at § 261(a).
[10]*See* U.S. Const. art. 1, § 8, cls. 15, 16. *See also* 10 U.S.C. § 311 (1982) (generally, the militia is all "able-bodied males" between 17 and 45, and is divided into an organized militia and an unorganized militia).

and the District of Columbia.[11] Further, the National Guard does not become part of the Armed Forces of the United States unless it is "called" into federal service for one of three reasons specified in the Constitution: to execute the laws of the United States; to suppress insurrections; and to repel invasions.[12] So that the National Guard may be prepared for such a "call" to federal service, the Constitution authorizes Congress to "provide for organizing, arming, and disciplining" the National Guard.[13] Although the authority to train the National Guard is reserved to the states, Congress is authorized to prescribe the substance of the training.[14]

In 1933, Congress anticipated that these constitutional constraints on the National Guard might hinder the modern use of military force and, therefore, created the concept of a National Guard *of the United States*.[15] Under this concept, two reserve components, the ARNGUS and the ANGUS were formed. Essentially, these organizations permit qualifying members of the National Guard to acquire a second military status as Reserves of the United States Armed Forces. Thus, all members of the ARNGUS and the ANGUS are also members of the National Guard.[16]

Certain distinctions between the National Guard and the National Guard of the United States must be explored. As discussed above, members of the National Guard are "called" into federal service under the Constitution for only three reasons. In contrast, the members of the ARNGUS and ANGUS are "ordered" to active duty for any purpose specified in a statute.[17] While ARNGUS and ANGUS personnel are on active duty, they serve as Reserves of the United States Armed Forces,[18] and are relieved from their duties in the National Guard.[19] While these various organizations are, in common parlance, referred to as "The Guard," the technical distinctions are crucial in analyzing the applicability of laws and regulations to service members.

---

[11]*Id.*, at § 101(9), (10), (12); 32 U.S.C. § 101(3), (4), (6) (1982). The characteristics of the National Guard are: it is a land or air force; it is trained and has its officers appointed under U.S. Constitution, Article I, Section 8, Clause 16; it is organized, armed, and equipped wholly or partly at federal expense; and it is federally recognized. *Id.*

[12]*See* U.S. Const. art. I, § 8, cl. 15. *See also* 10 U.S.C. §§ 3500, 8500 (1982).

[13]U.S. Const. art. I, § 8, cl. 16.

[14]The training of the militia, including the National Guard, must be "according to the discipline prescribed by Congress." *Id.*

[15]Act of 15 June 1933, 48 Stat. 155 (current version codified in various provisions of 10 U.S.C.).

[16]10 U.S.C. § 101(11) and (13) (1982); 32 U.S.C., § 101(5) and (7) (1982).

[17]*Id.* at §§ 3495, 8595.

[18]*Id.* at §§ 3497, 8497.

[19]32 U.S.C. § 325 (1982).

The remainder of this section focuses upon the mission of the modern Reserve components, the reasons propelling creation of the AGR program, and the legislative origins of the program. This synthesis of the historical information available from myriad sources provides a framework for the practical applications in subsequent chapters.

B. THE MISSION OF THE RESERVE COMPONENTS

The mission of the reserve components is described in 10 U.S.C. § 262 as follows:

> The purpose of each reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires, to fill the needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components.[20]

The practical effect of this mission was enhanced in 1973 with the adoption of the "Total Force Policy."[21] This policy requires that all of the active and reserve military organizations of the United States be treated as a single integrated national defense force. The impetus for a "total force" approach was summarized in 1975 by the Secretary of Defense:

> While the United States has been reducing its active manpower levels, the Soviet Union has enlarged its armed forces by more than one million men during the past decade. In Europe the Warsaw Pact forces outnumber NATO in many important categories of military resources. . . . Reserve forces are relied upon to perform important combat and combat support missions which active forces cannot perform at their reduced force levels.[22]

---

[20]10 U.S.C. § 262 (1982).

[21]Secretary of Defense, Memorandum to Secretaries of Military Departments, Subject: Readiness in the Selected Reserve (Aug. 23, 1973) (available in the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, & Logistics)).

[22]Department of Defense, *Annual Report of the Secretary of Defense on Reserve Forces, Fiscal Year 1975* 1 (1976).

Clearly, the nature of the Reserve mission has changed. Instead of depending on a slow-moving general mobilization, modern Reserve forces must be immediately available to augment active-duty personnel in important front-line duty.[23] Moreover, as the actual use of military force to protect the security of the United States does not always rely on a declaration of war or national emergency, the use of certain specialized Reserve forces during "rescue attempts" or "peace-keeping missions" can be foreseen.

Even prior to this increased emphasis on the mission of the Reserves, Congress required that all reserve component members be classified into one of three groups: the Ready Reserve; the Standby Reserve, and the Retired Reserve.[24] As might be expected from their titles, classification into one of these three groups generally relates to the priority in which units or individuals will be involuntarily ordered to active duty in war or national emergency.[25] This distinction in mobilization priority dictates the amount of training needed by members of each group.[26]

In the context of using the Reserves in times other than war or national emergency, it is important to discuss one additional classification of Reserves, the Selected Reserve. Congress has created this elite classification as a subcategory of the Ready Reserve.[27] Members of the Selected Reserve may either belong to specified Selected Reserve units, or be designated by the Secretary of a military service as an individual member of the Selected Reserve.[28] Further, describing the Selected Reserve as an elite group in terms of preparation for combat should not imply that it is small. For fiscal year 1984, Congress authorized an average Selected Reserve strength of over one million soldiers.[29] This is nearly one-half of the authorized end-strength for all active-duty personnel in fiscal year 1984.[30] Moreover, the programmed strengths for the Selected Reserve of the Army Reserve and the Army National Guard of the United States are approximately ninety percent of the size of the active-duty Army.[31]

---

[23] *Id.*

[24] 10 U.S.C. §§ 267(a), 268, 269, 273, 274 (1982).

[25] *Id.* at §§ 672(a), 674, 675.

[26] *Id.* at § 270(a); Department of Defense Dir. No. 1215.6 (1974).

[27] 10 U.S.C. § 268(b) (1982).

[28] *Id.*

[29] Department of Defense Authorization Act, 1984, Publ. L. No. 98-94, § 501(a), 97 Stat. 630 (1983).

[30] *Compare id.* at § 501(a) *with id.* at § 401; 97 Stat. 629-30 (1983) (approximately 1 million Selected Reservists compared to approximately 2.1 million active-duty personnel).

[31] *Id.* (approximately 699,000 USAR and ARNGUS Selected Reserves compared to 780,000 Army active-duty soldiers).

As illustrated by the Reserve participation in Grenada,[32] this large Selected Reserve force provides military manpower ready for immediate worldwide deployment. In addition to statutes that provide for involuntarily ordering reserves to active duty during war or national emergency,[33] Congress has authorized ordering up to 100,000 members of the Selected Reserve to active duty, for not more than 90 days, to augment the active forces during *any* operational mission.[34] This authorization is important not only in the case of short-duration missions; it allows the United States to immediately respond to any military threat to the nation's security while Congress and the President consider a declaration of war or national emergency. Thus, the Reserve components are essential to the national defense. As Congress has commented:

> The integral role of the reserves in our Nation's security is often misunderstood. Under the Total Force Policy, the National Guard and reserve forces will be used as the initial and primary augmentation of the active forces in the event of mobilization. In many instances, the active forces would be unable to deploy and accomplish their mission without reserve augmentation. The Guard and reserve today are expected to provide nearly one-half of the total Army's combat power and two-thirds of its combat support, service structure and wartime medical capability.[35]

C. THE NEED FOR AN AGR FORCE

In this climate of increased reliance on the Reserves, Congress identified four specific areas of concern in the existing Reserve program: recruiting sufficient Reserve manpower; increasing the readiness of the Reserves; solving problems associated with civilian technicians; and insuring proper military personnel classification. Each of these concerns led, ultimately, to the conclusion that a new personnel classification was needed. These will be considered *seriatim*.

1. Recruiting Sufficient Reserve Manpower.

First, the increasing reliance on immediately available Reserve forces demanded fully trained and disciplined Reserves. Yet, contemporaneously, overall Reserve recruiting and retention were declining. Every Annual Report by the Secretary of Defense from 1973

---

[32]*See supra* notes 3 & 4 and accompanying text.
[33]10 U.S.C., §§ 672(a), 673(a) (1982).
[34]*Id.* at § 673b.
[35]H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983).

through 1979 noted a major problem in maintaining a sufficient number of Reserves.[36] Attributed principally to the elimination of a major incentive for joining the Reserves, the draft,[37] this personnel decline[38] required leaders of individual units to recruit members, often through extraordinary efforts.[39] Such recruiting detracted from the efforts of those unit leaders to achieve the required state of readiness for their units. Congress concluded that Reserve recruiting was a full-time job which required full-time workers.

2. Increasing the Readiness of the Reserves.

Recruiting Reserves was only the beginning. Between 1973 and 1975 a "Total Force Study" was conducted to determine what was needed for actual Reserve capabilities to comport with the new theory of their use. The report identified three major areas for improvement: mobilization planning; Reserve unit equipment; and integration of Active and Reserve forces.[40] These recommendations imply a need for training, organizing, and administering the Reserves into a disciplined military force. A nucleus of full-time personnel was needed to insure that these goals were met.[41]

3. Solving Problems Associated with Civilian Technicians.

The recruiting and readiness needs for the AGR program arose as problems with the existing full-time support program surfaced. At the time, full-time support relied mainly on "military technicians."[42]

---

[36]Department of Defense, *Secretary of Defense Elliot L. Richardson's Annual Defense Department Report, FY 1974* 106 (1973); Department of Defense, *Annual Report of the Secretary of Defense on Reserve Forces, Fiscal Year 1975* 8 (1976); Department of Defense, *Annual Report of the Secretary of Defense on Reserve Forces, Fiscal Year 1976 and Transition Quarter* 1, 2, 5, 8-10 (1977); Department of Defense, *Annual Report, Fiscal Year 1979* 332-335 (1978); Department of Defense, *Annual Report, Fiscal Year 1980* 285 (1979).

[37]Department of Defense, *Secretary of Defense Elliot L. Richardson's Annual Defense Department Report, FY 1974* 106 (1973).

[38]*See infra* Appendix 1.

[39]Department of Defense, *Annual Report of the Secretary of Defense on Reserve Forces, Fiscal Year 1976 and Transition Quarter* 8 (1977).

[40]Department of Defense, *Annual Report of the Secretary of Defense on Reserve Forces, Fiscal Year 1975* 10 (1976).

[41]*Department of Defense Authorization for Fiscal Year 1980: Hearings on S. 428 Before the Committee on Armed Services, United States Senate*, 96th Cong., 1st Sess. 2232, 2234 (1979); H.R. Rep. No. 166, 96th Cong., 1st Sess. 122 (1979).

[42]Military technicians are civilian employees of the United States who are responsible for the daily operations of Reserve components and the National Guard. They also hold a military status in the unit, and therefore train and mobilize with the unit. *See* 32 U.S.C. § 709 (1982) (statutory authority for National Guard technicians. *See also* U.S. Dept. of Army, Reg. No. 140-315, Army Reserve-Employment and Utilization of US Army Reserve Technicians (1 Jan. 1982) (regulatory authority for USAR civilian technicians).

In 1977, however, the House Appropriations Committee strongly criticized the technician program and recommended conversion of such full-time support to active-duty military personnel.[43] The committee discussed in detail seven major problems with the technician program.[44] Among these problems was the issue of unions in the armed services. The extent and relevance of unionization in the technician program was described in a National Defense University monograph as follows:

> Prior to 1969 [National Guard Technicians] were unique in that they worked for the states but were paid by congressional appropriation. . . . Congress resolved [a problem with state retirement plans] by declaring the technicians to be federal employees under the National Guard Technicians Act. By declaring the technicians employees they became eligible to become represented by unions under the Executive Order [pertaining to Federal employees]. By 1973, 60 percent of the technicians were represented by labor organizations. One author, in a study of military unionization, describes this act as a "bridge" between the federal civilian and the federal military employment sectors.[45]

Because of general resistance to unionization of military forces,[46] the technician program was in great disfavor at the same time additional full-time manning was demanded by the redefined Reserve mission. This disfavor was so strong that it actually became an independent reason to create a new full-time Reserve program.

4. Insuring Proper Military Classification.

The final reason for creation of the AGR program resulted from the attempts of the services to provide an *ad hoc* program of full-time

---

[43]H.R. Rep. No. 451, 95th Cong., 1st Sess. 98 (1977).

[44]These problems were: costs of the program (estimated $270 million could be saved annually by conversion to active duty military personnel); retirement costs of technicians (technicians could earn up to 4 retirement checks for doing essentially one job); unionization of the military (inherent potential for undue union influence in strictly military functions); lack of statutory authority governing USAR and USAFR technicians (military membership was excused if active Reserve status was lost for reasons outside of technician's control); management problems with technicians (split supervision between civilian and military chain of command); reserve morale problem (part-time Reservists felt technicians were getting unfair advantage in military career); stagnation of military experience (technician stays with single unit for extended periods). *Id.* at 94-97.

[45]Sime, *The Issue of Military Unionism: Genesis, Current Status and Resolution*, National Security Affairs Monograph 77-5, 19 (1977).

[46]*Id.* at ix, 64. *See* 10 U.S.C. § 976 (1982) (subsequently adopted legislation to prohibit unionization of United States Armed Forces).

military personnel to support the reserve components. While the services recognized that full-time support for the Reserve components should be provided by active-duty soldiers, provision in the United States Code for active-duty military personnel to support the Reserve components was limited to certain types of "statutory tours."[47] These tours could not easily be used to build a large-scale support program. Nor could Regulars and Reserves on active duty, other than for training, support the Reserve components without detracting from the accomplishment of the active forces missions. Faced with such choices, the services decided to order Reserves to active duty *for training*, principally to perform Reserve recruiting duties. In order to distinguish these tours from normal training tours, they were termed "special active duty for training (SADT)."[48]

This ingenuity, however, was criticized by Congress on the basis that it misused the classification "active duty *for training.*" In 1978, House and Senate conferees considering the Department of Defense Appropriation Act of 1979, agreed "it is inappropriate to characterize these reservists [recruiters] as on active duty for training when their function is operational in substance."[49] Clearly, Congress desired a program that would accurately classify Reserves ordered to active duty in support of the Reserve components.

D. LEGISLATIVE ORIGINS OF THE AGR PROGRAM

The first congressional step in the creation of the AGR program was the Department of Defense Appropriation Authorization Act of 1979.[50] After acknowledging the need to increase the active-duty manpower strengths to accommodate support of the Reserve components, Congress approved an increase in the authorized active-duty end-strength of the Army that exceeded the Administration's request. The higher authorization included provision for 2,000 of the

---

[47]*E.g.*, 10 U.S.C. § 265 (1982) (Reserve officers authorized to serve on active duty at the seat of government and major headquarters responsible for Reserve affairs); *id.* at § 3033(h) (at least 10 Reserves may serve as additional members of the Army General Staff); *id.* at 3496 (ARNGUS officers may serve on active duty at the National Guard Bureau).

[48]*E.g.*, Department of Defense Dir. No. 1215.6, para. D.2, encl. 2, para. P. (1974).

[49]H.R. Rep. No. 1402, 95th Cong., 2d Sess. 48 (1978) [hereinafter cited as H.R. Rep. No. 1402].

[50]Department of Defense Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611, § 301 (1978).

4,100 Reserve recruiters then serving on special active duty for training. The purpose of this action was described as follows:

> By including half of these people in this year's authorization, the conferees have provided for a transition from this status of "active duty for training" to a new status of *active duty for organizing, administering, recruiting, instructing or training the reserves.* The conferees agree that a legislative proposal will be considered at the earliest possible date to create authority for this new category.[51]

The following year, this new category, the Active Guard/Reserve program, was confirmed in the Department of Defense Authorization Act of 1980:

> (b) Within the average strengths prescribed by subsection (a) [programmed strengths of the Selected Reserve], the reserve components of the Armed Forces are authorized, as of September 30, 1980, the following number of Reserves to be serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the reserve components. . . .[52]

The House Committee on Armed Services described the new provision in the following terms:

> For the first time, and at the direction of the statement of the managers in last year's conference report on the Defense authorization legislation, there is a seperate [*sic*] authorization for reserve component members serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the reserve forces. The category essentially encompasses all full-time support personnel of the reserve components who are paid from reserve appropriations. It does not include civilians providing full-time support.[53]

Thus, a new military status began.

---

[51]H.R. Rep. No. 1402 (emphasis added).

[52]Department of Defense Authorization Act of 1980, Pub. L. No. 96-107, § 401(b), 93 Stat. 807 (1979).

[53]H.R. Rep. No. 166, 96th Cong., 1st Sess. 121 (1979).

III. A MILITARY PERSONNEL LAW OVERVIEW OF AGR STATUS

A. INTRODUCTION

The phenomenal growth of AGR personnel strengths from 1980 to 1984[54] has resulted in personnel strengths equivalent to nearly five light divisions.[55] The current size of the AGR force has already exceeded previous projections of the size of the AGR force for 1987.[56] Moreover, current plans would increase the size of the AGR force to ten percent of the total number of Selected Reservists who are paid for their participation in monthly inactive duty for training.[57]

The regular forces have developed their current active-duty personnel management system over the course of two centuries. With the luxury of a personnel management system in place, modifications to the laws governing the traditional active-duty forces could be fully planned and carefully adopted. For example, consideration of DOPMA took over eight years;[58] nevertheless, numerous technical errors were later discovered.[59]

---

[54]The Department of Defense definition of the AGR program is broad enough to include Reserves ordered to the traditional "statutory tours" discussed *supra* text accompanying note 47. Department of Defense Dir. No. 7730.54, para. D.3.a. (1981); *See* U.S. Dept. of Army, Reg. No. 135-18, Army National Guard and Army Reserve—Active Duty and Full-Time Duty in Support of the Army National Guard, Army National Guard of the United States, and the US Army Reserve, Glossary 1, § 11 (1 Mar. 1984) [hereinafter cited as AR 135-18]. This article, however, focuses on the large new authorizations for full-time personnel to support the Reserves and the National Guard, as illustrated in Appendix 2.

[55]Department of Defense Authorization Act of 1984, Pub. L. No. 98-94, § 502[a], 97 Stat. 631 (1983) (designation of subsection [a] of section 502 is not in original law; however, subsection (b) refers to the end strengths prescribed by subsection (a)) [hereinafter cited as DOD Authorization Act, 1984]. The comparision of the AGR force size to the size of a light division assumes that such a division has approximately 10,000 soldiers. Office of the Deputy Chief of Staff for Operations, Department of the Army, *U.S. Army Light Infantry Division, Improving Strategic and Tactical Flexibility* 11 (Feb. 1984) (available in the Office of the Deputy Chief of Staff for Operations, Department of the Army).

[56]General Accounting Office, Report to Stephen J. Solarz, House of Representatives, *Information on Military Technician Conversions to Full-Time Active Duty Guard and Reserve*, GAO/FPCD-82-57, Appendix I, 6 (Sept. 8, 1982) (citing Armed Services; FY 1980-87 Program Objective Memoranda).

[57]Office of the Deputy Chief of Staff for Personnel, Department of the Army, *Reserve Component Study Group, Full Time Support* 1 (Sept. 30, 1983) (available in the Office of the Deputy Chief of Staff for Personnel, Department of the Army) [hereinafter cited as RC Study Group].

[58]Bent, *DOPMA: An Initial Review*, The Army Lawyer, Apr. 1981, at 1, 2.

[59]England, *DOPMA Correction: Not a Mere Technicality*, The Army Lawyer, Aug. 1981, at 13.

In contrast, the history of AGR personnel management, faced with relatively short planning time, has been decentralized.[60] With the first Army Regulation governing the AGR program being published approximately three years after the creation of the AGR status,[61] policy guidance has relied on electronic messages. Moreover, Department of Defense guidance has generally been limited to establishing reporting systems to be used in accounting for Reserve component personnel.[62]

In 1983, the Deputy Chief of Staff for Personnel (DCSPER) of the Army directed a study group to develop a methodology for assessing the increased need for AGR personnel and develop a "feasible management framework" for the AGR program.[63] Concerning the second objective, the DCSPER directed: "This management framework must include the total life cycle of AGR members from accessioning to separation or retirement."[64] This report has been completed, and its recommendations will soon be implemented in Army Regulations.[65] In addition, the Department of Defense has been staffing a policy directive concerning the AGR program; publication is imminent.

In view of this fluid regulatory environment, a comprehensive description of each military service's current management system for AGR personnel would soon become obsolete. Therefore, this section will examine AGR personnel law issues from the perspective of basic statutory requirements that are expected to persist even after

---

[60]RC Study Group, *supra* note 57, at 3.

[61]U.S. Dep't. of Army, Reg. No. 135-18, Army National Guard and Army Reserve—Active Duty and Full-Time Duty in Support of the Army National Guard, Army National Guard of the United States, and the US Army Reserve (15 May 1983). This regulation was never effective as it was suspended prior to its effective date in order to allow for a legal review, and was superseded by a revision nearly a year later. Headquarters Department of the Army Message 061222Z June 1983; AR 135-18 (effective 1 Apr. 1984).

[62]In addition to establishing a personnel reporting system for all persons providing full-time support to the Reserve components, a 1981 memorandum from the Assistant Secretary of Defense (Reserve Affairs) provided brief guidance concerning the selection and utilization of such personnel. Deputy Assistant Secretary of Defense (Reserve Affairs), Memorandum, *Policy on Selection, Utilization and Reporting Personnel Providing Full-Time Support for Reserve Components* (Apr. 8, 1981). This guidance was superseded, without replacement, by a Department of Defense directive devoted entirely to classifying and reporting Reserve component personnel. Department of Defense Directive No. 7730.54, encl. 1, ref. (m) (26 Oct. 1981).

[63]RC Study Group, *supra* note 57, at A-1.

[64]*Id.*

[65]Director of the Army Staff, Action Memorandum, Subject: Reserve Component (RC) Management (Nov. 18, 1983) (avilable in the Office of the Deputy Chief of Staff, Department of the Army).

new guidance is published. Current Army Regulations will be cited only to illustrate these statutory requirements.[66] The following subsection focuses on the essence of military status, organizational affiliation; the final subsection reviews a number of military personnel law topics, as they relate to the AGR program.

B. AGR: ORGANIZATIONAL AFFILIATION OF AGR PERSONNEL

The initial question in examining the military status of AGR soldiers is: "Who is their employer?" This question is not necessarily the same as, "Who hires and fires them?" or "Who directs their work?" A delegate may be responsible for hiring and supervising, without being the employer.[67] Therefore, the question requires identification of the entity that bears ultimate responsibility for the conduct of the employee within the scope of the employee's duties. In the context of a military employment relationship, this is a question of ultimate command authority.

The following four subsections will examine the evolution of the employment status of AGR personnel during the first five years of the program. Titles 10 (Armed Forces) and 32 (National Guard) of the United States Code contain most of the provisions pertaining to the management of military forces. Nevertheless, the major source of statutory guidance concerning the AGR program is found in uncodified law: the annual authorization and appropriation acts from 1980 to 1984. Hence, the first subsection examines the initial guidance concerning the military status of AGR personnel expressed in these uncodified laws. The remaining subsections review the controversial status of ARNGUS and ANGUS AGR personnel, the new authorization for National Guard AGR personnel, and the anticipated clarification of the implications of being a National Guard AGR soldier.

1. AGR: Reserves Serving in a Federal Status.

The first four Department of Defense Authorization Acts that sanctioned the AGR program (1980-1983) left no doubt as to the military organizations that employed AGR personnel:

---

[66]Even statutes can be quickly changed; Reserve officer management may be completely overhauled by uniform officer management legislation, similar to DOPMA. Therefore, this overview of AGR military personnel law should not be viewed as a substitute for careful research of individual cases, as they arise.

[67]*E.g.*, 10 U.S.C. § 3080 (1982) (ARNGUS officers who are not on active duty may, nevertheless, order other ARNGUS personnel to active duty for training).

> [T]he following number of Reserves are authorized to be serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the reserve components:
>
> (1) The Army National Guard of the United States, [x number].
>
> (2) The Army Reserve, [x number].
>
> (3) The Naval Reserve, [x number].
>
> (4) The Marine Corps Reserve, [x number].
>
> (5) The Air National Guard of the United States, [x number].
>
> (6) The Air Force Reserve, [x number].[68]

Of the seven Reserve components of the United States Armed Forces, only the Coast Guard Reserve was not authorized AGR personnel.[69] Nor was the National Guard authorized AGR personnel.[70]

The four Department of Defense Appropriation Acts that correspond to these authorization acts were also modified to provide for the new program. Specifically, appropriations for Reserve Personnel of the Army, Navy, Marine Corps, and Air Force included this language:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending [specific date], for military functions administered by the Department of Defense, and for other purposes, namely:

---

[68]Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 502[a], 96 Stat. 726 (1982) (amended 1983) (designation of subsection [a] is not in original; however, subsection (b) exists and referes to the end-strengths prescribed by subsection (a)) [hereinafter cited as DOD Authorization Act, 1983]; Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 502(a), 95 Stat. 1107 (1981) [hereinafter cited as DOD Authorization Act 1982]; Department of Defense Authorization Act of 1981, Pub. L. No. 96-342, § 401(b), 94 Stat. 1084 (1980) [hereinafter cited as DOD Authorizaton Act 1981]; Department of Defense Authorization Act of 1980, Pub. L. No. 96-107, § 401(b,) 93 Stat. 807 (1979) [hereinafter cited as DOD Authorization Act 1980].

[69]This continues to be true. DOD Authorization Act, 1984, *supra* note 55.

[70]*Cf. supra* at text accompanying notes 10-19 (discussion of distinction between the National Guard and the National Guard of the United Stafes).

. . . .

> For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the [specify either Army, Navy, Marine Corps, or Air Force Reserve]. . . while serving on active duty in connection with performing duty specified in section 678(a) of title 10, United States Code. . . ; $[specify amount].[71]

The appropriation act format for the Army and Air National Guard was almost identical; it differed only in providing an option for ordering personnel to active duty in the AGR program under either Title 10 or Title 32.[72]

The key description of military status in all of these acts is "active duty." The authorization acts termed the new military status "*Reserves. . .* serving on *full-time active duty* for the purpose of organizing, administering, recruiting, instructing, or training the reserve components."[73] The appropriation acts described this military status as personnel "serving on *active duty* in connection with performing duty specified in section 678(a) of title 10, United States Code."[74] As the duty specified in 10 U.S.C. §678(a) is "organizing, administering, recruiting, instructing, or training the reserve components,"[75] the appropriation acts' label for the program is, in effect, identical to the one used in the authorization acts.

---

[71]Department of Defense Appropriation Act of 1983, Pub. L. No. 97-377, Title I, 96 Stat. 1834-35 (1982) [hereinafter cited as DOD Appropriations Act, 1983]; Department of Defense Appropriation Act of 1982, Pub. L. No. 97-114, Title I, 95 Stat. 1565-66 (1981) [hereinafter cited as DOD Appropriations Act, 1982.]; Department of Defense Appropriation Act of 1981, Pub. L. No. 96-527, Title I, 94 Stat. 3068-69 (1980) [hereinafter cited as DOD Appropriations Act, 1981]; Department of Defense Appropriation act of 1980, Pub. L. No. 96-154, Title I, 93 Stat. 1139-40 (1979) [hereinafter cited as DOD Appropriations Act, 1980]. Although these acts authorize Reservists to serve on active duty, they are actually ordered to such duty under 10 U.S.C. § 672(d) (1982). *See* 10 U.S.C. § 678(a) (1982).

[72]Specifically, the last phrase, in the quotation accompanying *supra* note 71 when used in a National Guard appropriation provided: "[W]hile serving on active duty under section 672(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 678(a) of title 10, United States Code. . . ." DOD Appropriation Act, 1983, 96 Stat. 1835; DOD Appropriation Act, 1982, 95 Stat. 1567; DOD Appropriation Act, 1981, 94 Stat. 3069-70; DOD Appropriation Act, 1980, 93 Stat. 1141.

[73]DOD Authorization Act, 1983; DOD Authorization Act, 1982; DOD Authorization Act, 1981; DOD Authorization Act, 1980 (emphasis added).

[74]DOD Appropriation Act, 1983, 96 Stat. 1834-35; DOD Appropriation Act, 1982, 95 Stat. 1565-67; DOD Appropriation Act, 1981, 94 Stat. 3068-70; DOD Appropriation Act, 1980, 93 Stat. 1139-41 (emphasis added).

[75]10 U.S.C. § 678(a) (1982).

Yet, to understand the military status of AGR personnel, the meaning of the term "active duty" must be reviewed. The term "active duty" is defined in both Titles 10 and 32 as: "[F]ull-time duty in the active military service of the United States."[76] Therefore, as this term was used in the relevant authorization and appropriation acts, all AGR service under these acts is clearly classified as federal service.

2. AGR: Special Problem of ARNGUS and ANGUS Personnel.

As discussed above, the appropriation acts funded personnel ordered to *active duty* under either 10 U.S.C. § 672(d) or 32 U.S.C. § 502(f). Section 672(d) authorizes Reserves to be ordered to active duty, and there has been no dispute as to the federal status of personnel ordered to active duty under its authority. These indisputably federal troops include AGR personnel who are members of the Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and some National Guard of the United States personnel.[77] A question arose, however, concerning the status of National Guard of the United States personnel who were ordered to active duty under 32 U.S.C. § 502(f).

> Section 502 (f) provides:
>
> Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
>
> (1) without his consent, but with the pay and allowances provided by law; or
>
> (2) with his consent, either with or without pay and allowances; be ordered to perform training *or other duty* in addition to that prescribed under subsection (1) [drills, encampment, and other training]. Duty without pay shall be considered for all purposes as if it were duty with pay.[78]

Congress did not express a preference for the use of one authority over the other,[79] but it clearly intended that AGR active duty be

---

[76]10 U.S.C. § 101(22) (1982); 32 U.S.C. § 101(12) (1982).

[77]*E.g.*, personnel ordered to AGR tours under National Guard Reg. No. 600-10 (1983).

[78]32 U.S.C. § 502(f) (1982) (emphasis added).

[79]When the topic was discussed in the context of the DOD Appropriation Act, 1979 (the transition year between SADT and AGR), a conference report acknowledged that the Secretary of Defense should decide whether "reservists are brought on active duty under 10 U.S.C. 678 or 32 U.S.C. 502(f)." H.R. Rep. No. 1764, 95th Cong., 2d Sess. 8 (178); *see supra* text accompanying notes 50 & 51.

operational in nature.[80] Thus, AGR personnel were not ordered to perform "training" under 32 U.S.C. § 502(f); instead they were ordered to "other duty," which was further specified by Congress to be "active duty."[81]

The criticism of classifying ARNGUS or ANGUS AGR personnel serving under 32 U.S.C. § 502(f) as serving in a federal, rather than state, status, centered on two arguments: a contention that such an order is an unconstitutional interference with the states' control of their militias; and that the term "active duty," when used in conjunction with Title 32 does not mean "federal service."[82] The first argument reflects a misunderstanding of the difference between the National Guard and the National Guard *of the United States*. As discussed earlier, Congress created the latter organization as a Reserve component of the United States Armed Forces in order to avoid the constitutional limits on "calling" members of the National Guard into federal service. By creating a federal organization, a National Guard of the United States, members of that organization could be "ordered" to active duty in their status as members of a federal reserve component. The authorization acts for fiscal years 1980-1983 referred only to members of the National Guard *of the United States*; there was no provision for members of the National Guard.[83] Moreover, the duties of ARNGUS and ANGUS AGR personnel were limited by the authorization and appropriation acts to assisting the Reserve Components, *i.e.*, the National Guard of the United States, not the National Guard. Therefore, that National

---

[80]Even though the definition of "active duty" includes "active duty for training," Congress intended the AGR program to be classified as operational active duty (i.e., "active duty other than for training"). *See supra* text accompanying note 49.

[81]While 32 U.S.C. 502 does not state that personnel serving under that statute perform "active duty," and such service may have been originally contemplated, Congress certainly has the authority to expand the scope of that statute to meet the needs of a new program. *Compare* S. Rep. No. 1584, 88th Cong., 2nd Sess. 1, *reprinted in* 1964 U.S. Code Cong. & Admin. News 3800-01 (original purpose of predecessor statute to 32 U.S.C. 502(f) was to provide official duty status for commanders, pilots, vehicle drivers, and other specialists who perform training or other duty at time other than normal unit "drill periods"), *with* H.R. Rep. No. 1764, *supra* note 79. (additional purpose to order Reserves to active duty.)

[82]The National Guard Association of the United States, *Action Gram 83-14*, Subject: State Control (Mar. 3, 1983) [hereinafter cited as The National Guard Association of the United States].

[83]Ordering individual members of the National Guard of the United States to active duty in the AGR program is no different from the long established practice of ordering such persons to active duty to serve in the National Guard Bureau or for other tours with the Army or Air Force. *E.g.*, National Guard Reg. No., Personnel-General, ARNG Tour Program (NGB Controlled Title 10 USS Tours, 600-10, paras. 5-3, 5-5 (24 Feb. 1983).

Guard of the United States AGR personnel were ordered to perform active duty as a particular Reserve unit (ARNGUS or ANGUS)[84] did not constrain the authority of a governor to train or issue orders to the state's militia. The federal government simply provided certain active-duty soldiers to assist specified Reserve units (ARNGUS or ANGUS) located within a state.[85]

The second argument focused on the definition of the term "active duty" in the context of service under Title 32. Specifically, advocates claimed that the term meant "active duty" in a "state status."[86] Yet, the term is clearly defined by both Titles 10 and 32 as "full-time duty in the active military service of the United States."[87] As Congress did not define that term differently in the relevant authorization and appropriation acts, the codified definitions must control. This is especially apparent in the case of the appropriation acts, where sections in both Title 10 and Title 32 are cited as the mechanisms by which AGR soldiers will be ordered to active duty. These acts involve the expenditure of public funds; therefore, the terminology should be presumed to mean precisely what it says.

Further, the provisions of Title 32 that use the term "active duty" clearly mean federal duty. For example, under Title 32, National Guard commissioned officers who are selected to be property and fiscal officers for their state's National Guard, "may be ordered to active duty" by the President while serving in that position.[88] When such officers cease to be property and fiscal officers, they resume their status as officers of the National Guard.[89]

---

[84]Of course, the National Guard of the United States units coexist with National Guard units. *E.g.*, 10 U.S.C. § 3077(1) (1982). The AGR program, as originally enacted, focused only upon aiding the unit in its Reserve of the Army of Air Force status, and not as aid to the organized militia.

[85]In fact, federal funding of ARNGUS personnel to support ARNGUS units would appear to be less of an "interference" with the governors' authority over their militias than Regular soldiers being detailed to serve with National Guard units, which is a common and accepted practice. *See* 32 U.S.C. § 315 (1982). *See also* National Guard Reg. No. 600-7, Personnel-General-Army Full-Time Manning Personnel (15 July 1982). Unless a critic argues that the entire concept of the National Guard of the United States is unconstitutional, it is obvious that Congress may authorize ordering individual members of that federal reserve component to active duty. Therefore, the constitutional argument is fairly characterized as a "red-herring;" it provided a gloss to a desire that the federal government spend its money on personnel serving in a state status rather than in a federal status. There is nothing wrong with making such a policy proposal, but it should not be characterized as constitutionally compelled.

[86]The National Guard Association of the United States, *supra* note 82.

[87]10 U.S.C. § 101(22) (1982); 32 U.S.C. § 101(12) (1982).

[88]32 U.S.C. § 708(a) (1982).

[89]*Id.* at § 708(c). Furthermore, property and fiscal officers are clearly analogous to AGR personnel as their duties (administering United States property in the possession of the National Guard) are similar to the "organizing" and "administering" duties of AGR personnel. *See id.* at § 708(b).

Another example of a federal employment relationship under Title 32 is the civilian technician program of the National Guard. National Guard civilian technicians are federal employees of the Army or of the Air Force.[90] It was not unreasonable for Congress to replace or supplement such employees with other federal employees, including persons serving on active duty in the United States Armed Forces. Indeed, Congress responded to the unionization of civilian technicians by just such replacement.[91]

In summary, from fiscal year 1980 through fiscal year 1983, all AGR personnel served on active duty in the armed forces of the United States.[92] This was true whether that service occurred under the authority of 10 U.S.C. § 672(d) or of 32 U.S.C. § 502(f).[93]

3. AGR: The Hybrid Status of National Guard Personnel.

a. New Authorization for National Guard AGR Personnel.

The situation discussed above prompted the National Guard Association to support legislation to amend the definitions of active duty in Titles 10 and 32 to exclude full-time service under 32 U.S.C. § 502(a).[94] Contemporaneous with this effort, the House of Representatives' Committee on Appropriations announced that Congress had intended that the "National Guard personnel serving. . . in a DOD program called Active Guard and Reserve (AGR) serve under 32 U.S.C. 502(f) in conventional National Guard status, i.e., under State control as opposed to service in the active military service of the United States. . . ."[95] Subsequently, Congress modified the authorization for the AGR program to conform to this intent:

> Within the average strengths prescribed in section 501, the reserve components of the Armed Forces *and the National Guard* are authorized, as of. . . [specify fiscal

---

[90]*Id.* at § 709(d).

[91]*See supra* text accompanying note 43. Further, the law prohibiting unionization of military personnel applies only to members of the United States Armed Forces. 10 U.S.C. § 976 (1982).

[92]As will be discussed in the next section, the DOD Authorization Act, 1983, was amended with 7 days left in the fiscal year. Therefore, the possibility that a state status tour began in the last week of fiscal year 1983 exists.

[93]This does not mean that all "other duty" under 32 U.S.C. § 502(f) is federal duty. However, the status of AGR personnel demonstrates that "Title 32 service" may not automatically be assumed to be service in a state status; the facts of the particular program and the wording of the statutes in question must be carefully examined.

[94]The National Guard Association of the United States, *supra* note 82; H.R. 1494, 98th Cong., 1st Sess. (1983).

[95] H.R. Rep. No. 943, 97th Cong., 2d Sess. 31 (1982).

> year], the following number of Reserves to be serving on full-time active duty, *and members of the National Guard to be serving in a full-time duty status*, for the purpose of organizing, administering, recruiting, instructing, or training the reserve components *or the National Guard*:
>
> (1) *The Army National Guard and* the Army National Guard of the United States, [x number].
>
> . . . .
>
> (5) *The Air National Guard and* the Air National Guard of the United States, [x number].[96]

This language was enacted in the Department of Defense Authorization Act of 1984. The Act also amended the Department of Defense Authorization Act of 1983 by adding the same format.[97] The legislative history of this change describes it as a "clarification" of the status of National Guard personnel, but there is no explanation how the language of previous authorizations should be interpreted.[98] Therefore, there is no evidence that modification of the 1983 and 1984 Authorization Acts changed the federal status of any person ordered to active duty under the authorization acts from 1980 through 1982.[99]

As the new format was enacted with only seven days left in fiscal year 1983, the effect of the amendment on the Department of Defense Authorization Act of 1983 is unclear. The statute does not purport to retroactively change the status of personnel who were previously ordered to active duty. Moreover, the format for the authorization does not require that AGR personnel be ordered to duty in a status other than active duty. The services retain discretion to decide in what status AGR personnel will serve. Therefore, absent some action by a military service changing a fiscal year 1983 AGR tour to a state status, the active-duty status of AGR personnel already serving at the moment of the amendment would not change.

Following the enactment of the new authorization language, the Army chose to release from active duty "all Army National Guard personnel serving in active Guard/Reserve (AGR) status who were

---

[96]DOD Authorization Act, 1984 (emphasis added).
[97]*Id.* at § 504.
[98]H.R. Rep. No. 943, *supra* note 95.
[99]A court might interpret the change to the AGR authorization format as a concession that the previous language could not be interpreted to authorize a "state status." Otherwise, legislation would have been unnecessary.

ordered to active duty under section 502(f) of title 32, United States Code,"[100] but these soldiers were tendered "orders to full time duty (State) in AGR status for the remainder of the period of their original tour."[101] The recently published Army Regulation governing the AGR program defines the AGR program as:

> ARNG, ARNGUS, and USAR military personnel on full-time duty or on AD [active duty] (other than for training or active duty in the AC [Active Component] for 180 days or more in support of a RC [Reserve Component] or the National Guard and paid from National Guard Personnel, Army or Reserve Personnel, Army appropriations. Exceptions are personnel ordered to AD as—
>
> (a) The CAR [Chief, Army Reserve] under 10 USC 3019.
>
> (b) The CNGB [Chief, National Guard Bureau] under 10 USC 3015.
>
> (c) United States Property and Fiscal Officers under 32 USC 708 and 10 USC 673(b).
>
> (d) Members of the Selective Service System serving under the Military Selective Service Act (50 USC app 460(*b*) (2)).
>
> (e) Members of the Reserve Forces Policy Board serving under 10 USC 175.[102]

This definition recognizes the inclusion of National Guard Personnel within the AGR program.[103]

Currently, it is clear that the AGR personnel of the Reserve Components of the Army, Navy, Marine Corps, or Air Force continue to serve on active duty. Furthermore, certain members of the National Guard continue to be ordered to active duty in their status as members of the Army or Air National Guard of the United States. These AGR personnel are on active duty and their status is federal for all purposes. However, certain members of the National Guard

---

[100]Principal Deputy Assistant Secretary of the Army, Memorandum for Chief, National Guard Bureau, Subject: Implementation of Sections 502 and 504, Public Law 98-94 (Nov. 7, 1983) (copy available in the Office of the Assistant Secretary of the Army).

[101]*Id.*

[102]AR 135-18.

[103]It also includes various "statutory tours" that preexisted the recent authorization acts. *See supra* note 54.

are ordered to full-time duty in a "state status." These AGR personnel are actually serving in a hybrid status: federal for some purposes and state for others.

b. Creation of the Hybrid Status.

National Guard AGR personnel, serving under the new authorization discussed above, are on "full-time duty under state control." Yet, a new section was added to Title 32, directing a pretense that National Guard AGR personnel are serving on active duty.

> § 335. Status of certain members performing full-time duty
>
> Members of the National Guard serving in a full-time duty status for the purpose of organizing, administering, recruiting, instructing, or training the National Guard shall be entitled to all rights, privileges, and benefits of members called to active duty under section 265 of title 10 and shall be considered to be serving on active duty for purposes of sections 524(a) and 976 of such title.[104]

This melding is a classic example of the use of legal fiction. The new legislation is clear: National Guard AGR personnel are *really* state employees, who are sometimes afforded the treatment of soldiers on active duty. Still, such ambiguity leaves National Guard AGR soldiers unsure of the full ramifications of their military status.

Hence, the initial concern in implementing 32 U.S.C. § 335 must be to insure that all documents describing the status of National Guard AGR personnel indicate that they are not, in fact, serving on active duty. For instance, what form of identification should such a soldier be issued? All soldiers serving on active duty are identified by a Defense Department Form 2 (Active), *US Armed Forces Identification Card*.[105] The Department of Defense authorizes issue of these "green" identification cards only to military personnel serving on active duty, *i.e.*, federal duty.[106] As National Guard AGR personnel are performing full-time state duties, they may not properly be

---

[104]DOD Authorization Act, 1984, § 504(b)(1). These cards identify military personnel that are truly on active duty; they also serve as Geneva Convention identification cards.

[105]Department of Defense Dir. No. 1000.13, para. D. (1979).

[106]*Id.*

issued these cards. In fact, such a card could be used to mislead innocent third parties to conclude that these personnel are serving in a federal status.[107]

Additionally, consider how a National Guard AGR soldier might be identified for benefits purposes. For the active-duty soldier, the active-duty identification card often serves. Of course, the card does not govern entitlement to benefits.[108] Such entitlement is prescribed in various directives and regulations,[109] and other persons may also be entitled to benefits, upon presentation of evidence of an entitlement. Therefore, a major concern in implementing 32 U.S.C. § 335 is the issue of a form of identification that properly indicates both eligibility for benefits and the soldier's "state status."

Proper identification of the National Guard AGR soldier is relatively simple, however, in comparison with the larger question of what rights, privileges, and benefits such a soldier is entitled to under 32 U.S.C. § 335. While a detailed exploration of this topic is beyond the scope of this article, it is possible to succinctly define the methodology for answering the question: all "rights, privileges, and benefits" of personnel serving on active duty under 10 U.S.C. § 265 should be catalogued and all regulations pertaining to the management of National Guard AGR personnel should then be reviewed to insure that the catalogued "rights, privileges, and benefits" are provided. This plan has three major problems, however: difficulty in defining "rights, privileges, and benefits"; inconsistent regulations and statutes; and the "privilege/entitlement swap" problem. These problems are discussed below.

Congress did not define the "rights, privileges, and benefits" of National Guard AGR personnel in 32 U.S.C. § 335. Instead, it related them to the "rights, privileges, and benefits of members called to active duty under" 10 U.S.C. § 265. As discussed previously, 10 U.S.C. § 265 authorizes ordering reservists to active duty, other than for training, to serve at the seat of government and at the headquarters responsible for Reserve affairs.[110] The importance of the reference

---

[107]For example, the military police might erroneously assume that the "state status" AGR soldier is on active duty for purposes of military justice. Private or governmental benefits that are provided only to soldiers on active duty might be erroneously bestowed on a "state status" soldier. Finally, courts seeking to establish the true status of an AGR "state status" soldier would be confused by the soldier's possession of an active duty identification card. These examples illustrate that a legal fiction, *e.g.*, state status AGR personnel treated as if on active duty for certain purposes, must always be precisely defined as such.

[108]Department of Defense Dir. No. 1000.13, para D.4.b., c. (1979).

[109]*See id.*

[110]*See supra* note 47.

to 10 U.S.C. § 265 is that the benefits are keyed to those received by personnel serving on active duty, *other than for training*.[111] However, the phrase "rights, privileges, and benefits" is not expressly limited to "rights, privileges, and benefits" provided by statute. Thus, any comprehensive survey must encompass regulations, and perhaps even customs of the services. There is little guidance available upon which to rely in compiling the list. The only generalization that can be made about the phrase "a right, privilege, or benefit" is that it relates to outcomes which are viewed as helpful or good by the soldier, rather than to the detriments or penalties of serving on active duty.

The second problem is closely related to the first: problems may arise with the implementation of 32 U.S.C. § 335 due to inconsistent statutes and regulations. For example, 32 U.S.C. § 335 may contradict the treatment of National Guard AGR personnel required by statutes relating to veterans' benefits.[112] Furthermore, as the definition of "rights, privileges, and benefits" may relate to those provided by regulation, the managers of National Guard AGR personnel must be vigilant to insure that National Guard regulations constantly provide exactly the same "rights, privileges, and benefits" afforded by service regulations to personnel serving on active duty, other than training.[113]

The third problem in implementing 32 U.S.C. § 335 is the "privilege/entitlement swap." This describes the scheme whereby 32 U.S.C. § 335 appears to convert the "privileges" of some soldiers

---

[111]10 U.S.C. § 265 (1982) (statute expressly authorizes personnel classified as serving on active duty (other than for training)).

[112]The definitional provisions of another title of the United States Code may contradict 32 U.S.C. § 355. For example, 38 U.S.C. § 101(22)(c) (1982) requires that the Veterans Administration consider AGR personnel to be serving on "active duty for training" rather than "active duty other than for training." *See* General Counsel's Opinion, Veterans Administration-Op. G.C. 3-82 (March 25, 1982). This causes a classic interpretation problem: does the "later adopted" or "subject-matter specific" statute control? Such a contradiction between statutes should be remedied by comprehensive legislation.

[113]*E.g.*, the details of processing an active duty soldier for involuntary release from active duty could be characterized as a "right, privilege, or benefit" to which AGR personnel in a "state status" are "entitled." Variance from active-duty procedures might prove fatal to the legality of the involuntary separation of an AGR soldier from a "state tour." Moreover, the language in 32 U.S.C. § 335 is not referenced to the rights, privileges, and benefits of personnel in the same service. This ambiguity encourages, for example, an Army National Guard AGR soldier to complain that he has not been provided a right, benefit, or entitlement afforded to an Air Force Reserve soldier serving on active duty for purposes stated in 10 U.S.C. § 265. Such a contention may appear blatantly specious, but it is unfortunately encouraged by the language of the statute.

on active duty to an "entitlement" of National Guard AGR personnel. This language could substantially confuse a due process analysis when National Guard AGR personnel are denied a "privilege" to which they are "entitled."[114]

c. Proposed New Legislation.

Implicitly recognizing the problems in 32 U.S.C. § 335, Congress added the following language to the section of the Department of Defense Authorization Act of 1984, that enacted 32 U.S.C. § 335:

> Not later than November 15, 1983, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a draft of legislation to provide on a permanent basis that members of the National Guard described in section 335 of title 32, United States Code, as added by subsection (b), are under State control except when explicitly ordered to Federal service in accordance with law.[115]

Such legislation was forwarded for consideration on February 9, 1984.[116] The proposed legislation's general approach is to exclude

---

[114]*See* U.S. Const. amends. V, XIV § 1. *See also, e.g.*, Goss v. Lopez, 419 U.S. 365 (1975) (discussion of "entitlement" to public education created by state law and analysis of "how much process is due"). The best interpretation is that a National Guard AGR soldier's "entitlement" is to equal treatment with personnel serving on active duty, including the same "due process" if such a "privilege" is to be withdrawn.

[115]DOD Authorization Act, 1984, § 504(c).

[116]Section 1 of the proposed legislation would make amendments to title 10, United States Code as follows:

Subsection (a)(1) would exclude full-time National Guard duty from the definition of "active duty" used in title 10, United States Code, making it clear that, except for benefit purposes as provided in sections 3686 and 8686 of title 10, full-time National Guard duty is not active duty.

Subsection (a)(2) would include full-time National Guard duty in the definition of "active service" used in title 10, United States Code, to make it clear that full-time National Guard duty is included within the meaning of the term "active service" where it is used in title 10 (e.g., sections 3926 and 8926).

Subsection (a)(3) defines full-time National Guard duty to encompass all training and other duty, except inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's capacity as a member of the National Guard of a state, territory, Puerto Rico, or the District of Columbia for which the member is entitled to compensation from the United States. This duty is distinguished from service as a Reserve of the Army of Air Force on active duty or active duty for training.

Subsection (b) would amend section 517 of title 10, United States Code, to provide that National Guard members serving on full-time National Guard duty in connection with organizing, adminstering, recruiting, instructing or training the National Guard will be counted against the strength-in-grade limitations for pay grades E-8 and E-9 currently prescribed. It would not affect the numbers of members in pay grades E-8 or E-9 who would be counted against the limitations of section 617. Members on full-time duty under section 502(f) of title 32, United States Code to provide full-time sup-

port to the National Guard would continue to be counted against these limitations.

Subsection (c) would amend section 523(b)(1) of title 10, United States Code, to (1) delete officers on active duty under sections 502 or 503 of title 32, United States Code, from the categories of officers to be excluded when computing and determining the number of officers who may be serving on active duty in pay grades 0-4, 0-5, and 0-6 in the Army, Navy, Air Force, or Marine Corps, and (2) to add officers on full-time National Guard duty to the list of those excluded from such computations. The former group would be deleted since there would be no officers on active duty under sections 502 or 503 of title 32, United States Code. These officers would be on full-time National Guard duty, hence the inclusion of officers in that status in the list of categories to be excluded when determining the number authorized each Service under the active duty grade tables.

Subsection (d) would amend section 524 of title 10, United States Code to include officers on full-time National Guard duty (other than for training) under section 502(f) of title 32, United States Code in the numbers of officers to be counted when determining the authorized strength of officers in pay grades 0-4, 0-5, and 0-6 who may serve on active duty or on full-time National Guard duty for administration of the Reserves or the National Guard. The changes made would reflect the fact that officers serving on full-time National Guard duty are not on "active duty." It would not affect the numbers of officers who would be counted against the limitations of section 524.

Subsection (e) would amend section 641(1) of title 10, United States Code, to delete officers on active duty under sections 502 or 503 of title 32, United States Code, from the categories of officers not subject to the provisions of Chapter 36 of title 10, United States Code which covers the promotion, separation, and involuntary retirement of officers on the active-duty list. It would add officers on full-time National Guard duty to the categories that are not subject to Chapter 36. The category "officers on active duty under section 502 or 503 of title 32" would be deleted since there would be no officers on active duty under these sections. These officers would be on full-time National Guard duty, hence the inclusion of officers on full-time National Guard duty in the list of categories excluded from the application of Chapter 36.

Subsection (f) would amend section 976(a)(1) of title 10, United States Code to include members on full-time National Guard duty within the definition of "member of the armed forces" with respect to the provision of section 976 dealing with military unions. This inclusion would update the language of the section but would not add or subtract any member currently included in the definition.

Subsections (g) and (h) would amend sections 3686(2) and 8686(2) of title 10, United States Code to indicate that full-time National Guard duty shall be considered active duty, or active duty for training as the case may be, in Federal service as a Reserve of the Army or as a Reserve of the Air Force for the purpose of laws providing benefits for members of the Army National Guard of the United States or Air National Guard of the United States. The categories of members covered by these sections would be unchanged as the term "full-time National Guard duty" would include all, but no other, members now described in these sections.

Section 2 of the bill would make amendments to title 32, United States Code as follows:

Subsection (a) would exclude full-time National Guard duty from the definition of "active duty" used in title 32, United States Code, making it clear that, except for benefit purposes as provided in sections 3686 and 8686 of title 10, full-time National Guard duty is not active duty.

Subsection (b) would define full-time National Guard duty to encompass all training and other duty, except inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's capacity as a member of the National Guard of a State, Territory, Puerto Rico or the District of Columbia for which the member is entitled to compensation from the United States. This duty is distinguished from service as a Reserve of the Army or Air Force on active duty or active duty for training. The definition would parallel the proposed new section 101(42) of title 10, United States Code.

Section 3 of the bill would amend section 101(18) of title 37, United States Code to

National Guard AGR personnel from the definition of personnel serving on active duty, except for the purpose of 10 U.S.C. §§ 3686 and 8686, which relate to benefits.[117]

This permanent legislation provides an excellent opportunity for policymakers to resolve the ambiguity associated with the status of National Guard AGR personnel. The current draft may be a step in the right direction, but substantial additional research should be conducted prior to enactment. For example, the current legislation would not correct the ambiguity in entitlement to Veterans Administration benefits.[118] Moreover, in an era of concentration on effective measures to counter fraud, waste, and abuse, consideration should be given to the applicability of conflicts of interest legislation to National Guard AGR personnel.

In summary, the legislation must be coordinated with a full range of federal policymakers outside of the Department of Defense in order to insure that proper treatment of National Guard AGR personnel is achieved. An interesting starting point for such a policy analysis is the knowledge that the word "active" precedes the word "duty" in the same sentence in 657 provisions of the United States Code.[119] Some of these provisions do not relate to military active duty. Those that do range from crediting military service in determining the amount of a federal judge's survivors' annuity[120] to special rules in the Internal Revenue Code pertaining to members of the Armed Forces of the United States serving on active duty.[121]

---

conform the definition of active duty in title 37 to the changes made in the title 10 and 32 definitions. The title 37 definition applies to pay and allowances only, and for that purpose full-time National Guard duty would be considered to be active duty.

Section 4 of the bill would repeal section 355 of title 32, United States Code. Section 355 was added to title 32 by the Department of Defense Authorization Act, 1984, to make it clear that members of the National Guard serving in a full-time duty status for the purpose of organizing, administering, recruiting, instructing, or training the National Guard serve in their capacity as members of the federally recognized National Guard of the State concerned, rather than as Reserves of the Army or the Air Force. With the enactment of sections 1 through 3 of the bill, the provisions of section 355 are included elsewhere in the United States Code and section 355 may be repealed.

[117]*See* 10 U.S.C. §§ 3686, 8686 (1982).

[118]*See* note 112 *supra*.

[119]A list of these statutes may be obtained by two Westlaw® searches of the United States Code data base using the following search formulas: "active duty % (15,14,13,12,11,10,9);" and "active ~s duty % (8,7,6,5,4,3,2,1)." This procedure reduces the size of the data base to be searched, and, thereby, reduces the amount of material placed in the list buffer. This is necessary because the Westlaw® buffer is limited to 400 citations.

[120]28 U.S.C. § 376 (1982).

[121]*E.g.*, 26 U.S.C. § 1034(h) (1982) (deferral of capital gain for active duty personnel).

Under the proposed legislation, many determinations of a National Guard AGR soldier's status under the United States Code would be left, perforce, to courts and administrative agencies. Such an approach inherently encourages a patchwork of contradictions between various federal statutes and regulations.

C. SPECIFIC MILITARY PERSONNEL LAW TOPICS

The following subsections will focus on military personnel law issues encountered during all phases of managing AGR personnel. The topics follow a general flow from accession to retirement. The specific analyses will focus on the management of AGR personnel serving on active duty. As the previous section indicates, the management of "state status" AGR personnel is too volatile to warrant detailed here.

1. Selection of AGR Personnel.

Although the discretion concerning the selection of the members of the AGR program reposes with the Secretaries of the military services, [122] Congress has stressed that only highly qualified personnel should be selected for service in the AGR program.[123] Examples of the kinds of qualifications and disqualifications that are used in the selection of AGR personnel are provided in the Army's new AGR regulation.[124] Two of the disqualifications are discussed below.

Under the current Army Regulation, individuals who would accrue 18 or more years of active federal service during their initial AGR tour are generally ineligible for the program.[125] This is clearly an attempt to prevent the AGR program from becoming a "last-minute retirement qualification program." Allowing persons initially to join the AGR program near the point of qualification for retirement could increase the "life-cycle" costs attributable to the AGR program, to the extent that such personnel would not otherwise be able to serve on active duty until qualification for military retirement. Moreover, positions that are occupied by persons with a limited future in the AGR program are unavailable to persons who have a greater poten-

---

[122]Both 10 U.S.C. § 672(d) (1982) and 32 U.S.C. § 502(f) (1982) provide the Secretaries with authority to regulate the accession of AGR personnel.

[123]H.R. Rep. No. 166, 96th Cong., 1st Sess. 122-23 (1979).

[124]AR 135-18.

[125]*Id.* at para. 6c(1). *Cf.* 10 U.S.C. § 1163(d) (1982) (retirement "sanctuary" is effective if soldier is within two years of retirement).

tial to use the experience gained in the first AGR tour. Thus, the ineligibility classification is rationally based, especially as the regulation allows consideration of exceptions.

The regulation also disqualifies any officer who was not selected for promotion when last considered by a Headquarters, Department of the Army, promotion board.[126] The wording of this disqualification allows consideration of a person who, although not selected for promotion at one time, has subsequently been selected. Moreover, the disqualification applies only to officers who were not selected for promotion on the basis that they were "not *fully* qualified" for promotion. This is a term of art in promotion management meaning that the officer could have been promoted, *i.e.*, a position was available, but for a finding by the promotion board that the officer did not possess the qualifications to serve in the higher grade.[127] This disqualification should be carefully distinguished from the case of an officer who was not selected for promotion because of a finding that the officer was "not *best* qualified" for promotion. This term refers to a promotion selection process in which there are fewer positions available than officers being considered; that an officer is not selected means only that other officers considered by that board were more qualified.[128] Congress has specifically designed the active-duty list promotion system to operate on this latter basis and has stated that such nonselected officers should not be "stigmatized" by having failed to be selected for promotion.[129] Indeed, it is possible that an officer who is not competitive with other officers on the active-duty list in any given year might be highly competitive with applicants for service in the AGR program.

This Army regulation applies to all Army AGR personnel, including Army National Guard of the United States personnel who serve on active duty, and Army National Guard personnel who serve on full-time state duty.[130] Hence, critical management procedures for the entire AGR program have been standardized. This should forestall any claim that one group of AGR personnel is being unfairly treated in comparison to others. However, it will require vigilance by the

---

[126]AR 135-18, para. 6c(3).

[127]U.S. Dep't of Army, Reg. No. 624-100, Promotions—Promotion of Officers on Active Duty, para. 2-8(a)(3) (1 May 1982).

[128]*Id.*

[129]H.R. Rep. No. 1462, 96th Cong., 2nd Sess. 19-20 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6350-51.

[130]AR 135-18, para. 1. The Secretarial authority to regulate "state status" personnel ordered to AGR duty is expressly authorized by 32 U.S.C. § 502(f) (1982).

drafters of implementing regulations[131] to insure that their regulations do not vary from the standardized requirements; such variance is a breeding ground for litigation. Moreover, the National Guard Bureau should carefully monitor the implementation to ensure that the selection procedures of the state National Guards comply with the standardized criteria.

2. Order of AGR Personnel to Active Duty.

Once selected for an AGR tour, the soldier must receive orders for such a tour. AGR personnel may be ordered to active duty, pursuant to an agreement executed under 10 U.S.C. § 679, for a period of not more than five years.[132] Under the current Army Regulation, AGR personnel are ordered to an intitial tour of three years.[133]

An issue exists, however, concerning the authority to extend such an agreement.[134] Title 10 does not discuss extension of an agreement by amendment,[135] but it would be logical to allow such an extension if the total period of the agreement does not exceed five years.[136] Congress clearly contemplated new agreements overcoming old ones when it provided: "An agreement may not be made under subsection (a) unless the specified period of duty is at least 12 months longer than any period of active duty that the member is otherwise required to perform."[137]

3. Utilization of AGR Personnel.

Generally, the assignment of duties of military members is within the sole discretion of the service Secretary.[138] In the case of AGR personnel, however, Congress has specifically limited duties to

---

[131]The Chief, National Guard Bureau, and Chief, Army Reserve, are responsible for implementing the policies of the regulation. AR 135-18, para. *6d*.

[132]10 U.S.C. § 679 (1982). The language of this statute appears permissive. Nevertheless, any attempt to order a Reservist to active duty without such an agreement may be viewed as a circumvention of the right to "release from active duty pay." *See* 10 U.S.C. § 680(b).

[133]AR 135-18, para. 8*b*. The regulation does not expressly implement the "agreement" provisions of 10 U.S.C. § 679 (1982).

[134]For example, the Army regulation allows the initial tour to be extended for a period of 3 years or less. AR 135-18, para. 8*b*.

[135]The statute only provides: "When such an agreement expires, a new one may be made." 10 U.S.C. § 679(a) (1982).

[136]Suppose the additional period of service exceeds 5 years. If the "extension" or "reorder" occurs at the expiration of a previous agreement, the new period of service should be characterized as pursuant to a new agreement. Suppose the extension or reorder occurs before the end of the current agreement. The parties could simply agree to a novation or an amendment to shorten the original period to the time served. Thus, the new agreement would occur, in all cases, after the expiration of the first.

[137]*Id.* at § 679(b).

[138]*E.g.*, 10 U.S.C. § 3012(e) (1982).

"organizing, administering, recruiting, instructing, or training the reserve components or the National Guard."[139] In authorizing specific positions for AGR personnel, manpower planners must be cognizant of this congressional limitation.[140] Congress has deemed it necessary to establish a separate accounting of AGR personnel and, hence, the labor-hours that they represent.[141] Ordering AGR personnel to perform duties other than those prescribed by law will dilute the number of hours that Congress expects to be devoted to the separate classification.

Notwithstanding the statutory limitations on duties, AGR soldiers cannot avoid performing routine "roster-type duties." Such shared duties, such as duty officer, court-martial panel member, or survivor assistance officer, should be viewed as part of the incidental "overhead" of working in a particular facility, and, therefore, are necessary and proper duties for AGR soldiers in accomplishing their primary missions.

An additional utilization issue concerns the training of AGR personnel. While periodic *refresher* training of active-duty AGR personnel is expressly authorized,[142] training in new skills is not. Recall that one impetus for the AGR program was congressional concern that the services were abusing the classification "active duty for training."[143] Ordering an AGR soldier to training, other than refresher training, would commit the same classification sin in reverse; operational soldiers would be performing duties that should be classified as active duty for training. Therefore, under current law, AGR personnel should be ordered to "active duty for training" for any non-refresher training. This is consistent with the current Army regulation.[144]

4. Promotion of AGR Personnel.

Active duty AGR personnel, enlisted and officer, are ordered to duty in their Reserve grade, and continue to be eligible for promotion as a Reserve member.[145] The promotion of enlisted personnel is

---

[139]DOD Authorization Act, 1984.

[140]For example, it would violate the assignment limitation for an AGR soldier to be assigned as a tank driver in an otherwise totally Active Army unit; such a position would not bear any relationship to the stated purposes of the soldier's tour. *See* AR 135-18, paras. 1, 7.

[141]*See supra* text accompanying notes 47-49.

[142]10 U.S.C. § 678(b) (1982).

[143]*See supra* text accompanying notes 47-49.

[144]AR 135-18, para. 8*d*.

[145]10 U.S.C. § 678(a) (1982).

essentially regulatory in nature.[146] The main statutory concern with enlisted promotions is the limitations on the number of personnel serving in pay-grades E-8 and E-9. The number of persons serving on active duty (other than for training) in pay-grade E-8 is limited to an authorized daily average of two percent of all enlisted personnel; the number serving in pay-grade E-9 is restricted to 1 percent of all enlisted personnel.[147] However, AGR personnel are excluded from the operation of these limitations.[148] Instead, the number of senior active-duty AGR enlisted personnel is specified in numbers, not percentages, for each armed force.[149]

Promotion of active-duty Army AGR commissioned officers has faced a severe statutory problem since the inception of the program. Active-duty AGR commissioned officers are expressly excluded from consideration for active-duty list promotion;[150] they remain eligible for Reserve promotion.[151] Nevertheless, a problem has existed in determining the active-duty grade of AGR commissioned officers who were promoted to a higher Reserve grade during a tour. In this regard, the operation of 10 U.S.C. § 3380 must be understood.

Section 3380 originally addressed the problem caused by conflicts between the timing of Reserve promotions and the number of officers authorized to be serving on active duty in a specified grade.[152] In order to prevent the mandatory release from active duty of an officer who had been promoted to a higher Reserve grade before a vacancy in the active duty authorization was available, the statute provided that the officer would have an option. Those who wished to continue serving on active duty could either decline promotion or accept promotion and be "treated as if" serving on active duty in the grade held prior to accepting the promotion. Both options avoided violation of the active-duty grade limitation.

---

[146]*E.g.*, The new Army AGR regulation authorizes the National Guard Bureau and the Office of the Chief, Army Reserve, to develop and implement enlisted promotion systems. AR 135-18, para. 9*b*(1). Publication of regulatory authority governing such promotions is imminent.

[147]10 U.S.C. § 517(a) (1982).

[148]*Id.*

[149]*Id.* at § 517(b). The important relationship is that of the grade to the duty description of an AGR soldier. Although the specification of numbers will require changes, as needed, to a codified statute, this can easily be accomplished as part of establishing the annual authorization for AGR personnel.

[150]10 U.S.C. §§ 620(a) 641(1)(B), (C).

[151]10 U.S.C. § 678(a) (1982).

[152]10 U.S.C. § 3380 (1982) (amended 1983); S. Rep. No. 2010, 83rd cong., 2nd Sess. 26 (1954), *reprinted in* 1954 U.S. Code Cong. & Ad. News 3929, 3954.

Prior to the creation of the AGR program, this statute did not, generally, pose a problem. Most full-time support personnel were ordered to special active duty for training. Section 3380 applied only to commissioned officers serving on active duty (other than for training).[153] However, with the advent of the AGR program, a substantial and growing number of officers served on active duty (other than for training) without hope of a promotion changing their active-duty grade.[154] This situation has been remedied by an amendment to 10 U.S.C. § 3380. In general, this amendment has completely rewritten 10 U.S.C. §3380 to allow promotions of AGR commissioned officers, as long as the position that the officer occupies authorizes the higher grade and the promotion would not violate the ceiling established for the number of AGR personnel that may serve in that grade.[155] Although this provides a current solution to the problem, the amendment expires on September 30, 1985.[156] A permanent solution to this problem should be provided by the proposed Reserve Officer Personnal Management Act (ROPMA).

5. Separation of AGR Personnel.

All Reserve components have established procedures for elimination of personnel from their organizations; those procedures do not require further elaboration here. Nevertheless, to a Reserve soldier serving on active duty, the focus is on the topic of release from active duty, whether or not such release is accompanied by separation from the military. Therefore, this subsection will examine two types of release from active duty: automatic and involuntary.

Reserves who agree to serve on active duty for a specified period are normally released at the end of that period. A key question is whether such release is automatic, or whether it requires an affirmative act by the service. As an exception to the general rule that a soldier's service does not terminate automatically at the end of a

---

[153]*See supra* text accompanying notes 47-49.

[154]The original need for a statute such as 10 U.S.C. § 3380 persisted in the AGR program. Congress established a ceiling on the number of AGR officers in certain grades. *Id.* at § 524(a) (1982). *Id.* at § 3380 remained the only device by which Reserve promotions could be guaranteed not to exceed the authorized active-duty (AGR) strengths; as a management tool, however, it was overly broad. It prevented service in a higher Reserve grade, without regard to whether the force was managed at the relevant grade ceiling. The version of the statute pertaining to the Air Force, differed in that it authorized Secretarial discretion in its implementation. *Id.* at § 8380 (amended 1983). Therefore, the Air Force did not have the same problem with promotion of AGR commissioned officers.

[155]DOD Authorization Act, 1984, §§ 1015(a)(1). A similar amendment was enacted for the Air Force. *Id.* at § 1015(b)(1).

[156]*Id.* at § 1015(a)(2).

specific tour of active duty, some Reserves have been characterized as serving pursuant to "self-executing" orders, *i.e.* orders that expire automatically.[157] Therefore, unless proper steps are taken before the expiration of those orders to extend the period of service,[158] the soldier is automatically released from active duty.

Personnel managers should avoid drafting regulations and orders which provide for such automatic release from active duty. Such an order might jeopardize UCMJ jurisdiction over the soldier. Moreover, the validity of the concept of "self-executing" orders was seriously questioned by a recent opinion of the Court of Military Appeals.[159] Although the case involved a Regular soldier's claim that his orders were "self-executing," the court extended the reasoning to Reserves. Specifically, 10 U.S.C. § 1168 is traditionally cited to prove that Regular soldiers may not be discharged until the discharge certificate has been delivered.[160] Often overlooked, however, is the statute's prohibition against releasing a member of the Armed Forces until a "certificate of release from active duty" is ready for delivery.[161] Therefore, both Regulars being discharged and Reserves being released from active duty must await the formalities of separation. This issue could be mooted by the following provision in all AGR active duty orders: "You are scheduled to be released from active duty on [*date*]. However, this is not a 'self-executing order'; you will be released when clearance procedures are completed, and if there is no proper reason for your retention on active duty."

The second major separation issue concerns involuntary release from active duty. The principal statute involved is 10 U.S.C. § 681 (a) which provides: "Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."[162] The best way to implement this authority in the context of the AGR program is to simply incorporate the same procedures used for processing the release of any Reservist from active duty.[163] This precludes application of inconsistent procedures between various types of Reserves on active duty.

---

[157]United States v. Hudson, 5 M.J. 413, 419 (C.M.A. 1978).

[158]*E.g.* 10 U.S.C. § 672(d) (1982) requires consent of the governor to order ARNGUS personnel to active duty. This consent may need to be extended. *But see* United States v. Pearson, 13 M.J. 140 (C.M.A. 1982) (consent of governor for travel time to and from active duty location is implied).

[159]United States v. Meadows, 13 M.J. 165, 168 (C.M.A. 1982).

[160]10 U.S.C. § 1168(a) (1982).

[161]*See id.*

[162]*Id.* at § 681(a).

[163]*E.g.* AR 135-18, paras, 11*b*, *c*. All such regulations should implement the requirement of 10 U.S.C. § 680(a)(2) (1982) (Reserve who is to be released prior to expiration of a § 679(a) agreement must be provided an opportunity to be heard by a board of officers).

A Reservist who is involuntarily released from active duty may be entitled to a special payment because of such release. The primary statute controlling these payments is 10 U.S.C. § 1174, which deals with separation pay.[164] At the outset, it is important to note the conditions that trigger an entitlement to separation pay under this statute. As mentioned, an involuntary release is one event that may create an entitlement to such pay.[165] But what happens if an AGR tour expires and a soldier desires to continue in the program? Although the release on a previously agreed date cannot be characterized as involuntary, the soldier may trigger the entitlement by requesting an additional tour of duty. The denial of that request is a first step in supporting a claim for separation pay.[166]

Assuming that the statute is properly invoked, additional qualifications must be satisfied. The first of these is the "five-year rule." Section 1174 was enacted by DOPMA at the same time that 10 U.S.C. § 687 (readjustment pay) was repealed.[167] Both statutes authorized pay if a Reserve with at least five years of previous active service was involuntarily released from active duty. The provisions of 10 U.S.C. § 1174, however, differed in an important way; the five years need not be continuous.[168] A recent amendment to 10 U.S.C. § 1174, however, returns to the former rule that the five years of service must be continuous.[169] Unlike the original five-year continuous service requirement, the new rule only applies to Reservists not on the active-duty list.[170] As previously discussed, AGR personnel are expressly excluded from the active-duty list. Therefore, an AGR soldier may receive separation pay only if the soldier's five qualifying years are continuous. The amended statute defines continuous service as

---

[164]10 U.S.C. § 1174 (1982) (*amended by* DOD Authorization Act, 1984, §§ 911(a)).
[165]*Id.* at § 1174(c)(1)(A).

[166]*Id.* at § 1174(c) (1) (B).
[167]DOPMA, §§ 109(a), (c), 94 Stat. 2870 (1980).
[168]This entitled a Reservist to separation pay, if otherwise qualified, without having five years of continuous service. The absence of a continuity requirement is not apparent on the face of the statute, as it describes the five qualifying years of service as occurring "immediately before" a release or discharge. 10 U.S.C. § 1174(c) (1982) (amended 1983). The words "immediately before" might imply a continuity requirement, but for the sectional analysis that accompanied its passage. It states: "Although the last phase of the term of five years. . . must reach a terminous immediately preceding the relevant discharge, there is no requirement that the qualifying years be continuous." H.R. Rep. No. 1462, 96th Cong., 2d. Sess. 83 (1980). Such generosity was adopted in the context of the anticipated implementation of an all-Regular force, causing a possible increase in the number of Reserves released from active duty. H.R. Rep. No. 1462, 96th Cong., 2d Sess. 30-31 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6361-62.
[169]DOD Authorization Act, 1984, § 911(a) (to be codified at 10 U.S.C. §§ 1174(c)(3)).
[170]*Id. See* 10 U.S.C. §§ 620, 641 (1982).

tolerating a break in service of not more than 30 days. Thus, if an AGR soldier is ordered to a new tour more than 30 days after the expiration of the last one, the soldier may not receive separation pay at the end of the new tour, even if five years of service have been amassed. In contrast, a Reservist on the active-duty list under these facts would receive separation pay if otherwise qualified.

Moreover, the term "active-duty list" applies only to commissioned officers;[171] any active-duty Reserve warrant officer or enlisted member would also be required to satisfy the continuity requirement. It is not clear why, among Reserves, only commissioned officers on the active-duty list are not required to satisfy the continuous service rule. Perhaps different wording would more precisely achieve the unstated policy objective.[172]

In addition to the five-year continuity requirement, 10 U.S.C. § 1174 imposes the following restrictions: the release from active duty must not have been at the soldier's request; the release must not have been from the status "active duty for training"; the member must not be immediately eligible for retired or retainer pay, based on military service.[173] Further, the service Secretary may determine that the conditions under which a member is separated do not warrant separation pay. Such a determination defeats the entitlement to the pay.[174] If appropriate, separation pay is calculated by a formula specified in 10 U.S.C. § 1174; the maximum pay is $30,000.

Another form of release from active duty pay is found in 10 U.S.C. § 680(b).[175] That section authorizes payment when a Reservist is released from active duty prior to the end of a tour specified in a agreement executed under 10 U.S.C. § 679(a).[176] The amount is relatively small: one month's basic pay multiplied by the number of years and fraction of a year by which the tour has been curtailed. The relationship between the two types of separation pay is explained in 10

---

[171]*See id.* at § 641.

[172]Perhaps the amendment to 10 U.S.C. § 1174 was designed to prevent a soldier from claiming separation pay following release from a very short tour of active duty (other than for training). If this is the policy concern, a more precise solution would establish a uniform minimum continuous service period for all Reserves, whether or not on the active-duty list. This period could operate independently from the five-year active service rule. For example, an eighteen month continuous service requirement would preclude personnel from becoming entitled to separation pay based upon a release from a period of active duty of less than eighteen months.

[173]10 U.S.C. §§ 1174(e) (1)-(3) (1982).

[174]DOD Authorization Act, 1984, §§ 911(a) (to be codified at 10 U.S.C. § 1174(C((2)); 10 U.S.C. § 680(b) (1982).

[175]10 U.S.C. § 608(b) (1982).

[176]*Id.* at § 679(a).

U.S.C. § 1174. Essentially, periods used in qualifying for other types of separation pay are not counted for purposes of 10 U.S.C. § 1174.[177] As the amount involved in 10 U.S.C. § 1174 is far greater, it should always be requested, if possible. If 10 U.S.C. § 680 is applicable, it would allow compensation without regard to the five-year continuous service rule.

6. Retirement of AGR Personnel.

In general, AGR personnel may qualify for active-duty retirement just as Reservists who serve with the active components of the service. Nevertheless, two specific problems should be noted: the time-in-grade problem for certain commissioned officers and the 30-year problem for Reserve enlisted personnel of the Army.

Section 1370 of Title 10 establishes uniform rules for determining the retired grade of commissioned officers.[178] One of these rules requires that officers serve for three years on active duty in certain grades before they may voluntarily retire in that grade. The affected grades are those grades above major or lieutenant commander and below lieutenant general or vice admiral.[179] This rule would not prevent retirement; the retired grade would simply be based on the next lower grade in which the officer had satisfactorily served on active duty for not less than six months.[180] Because AGR officers serve from tour to tour, it is possible for a tour to expire before an officer has qualified for retirement in a particular grade. Officers and their personnel managers must be cognizant of this time-in-grade requirement.

Sections 3914 and 3917 of Title 10 govern Army enlisted retirements.[181] Reserve enlisted personnel of the Army are authorized to retire if they have completed at least 20, but less than 30 years of qualifying service.[182] Interestingly, in the unlikely event that a Reserve enlisted person of the Army attains 30 or more years of qualifying service, that soldier would be ineligible to retire.[183]

---

[177] *Id.* at § 1174(g)(1).
[178] *Id.* at § 1370.
[179] *Id.* at § 1370(a)(2).
[180] *Id.* at § 1370(b).
[181] *Id.* at §§ 3914, 3917.
[182] *Id.* at § 3914. *See* 10 U.S.C. § 3925 (1982) for computation of qualifying service.
[183] When 10 U.S.C. § 3914 was amended to allow retirement of Reserves, a similar amendment was not made to 10 U.S.C. § 3917 (retirement of Regular enlisted personnel with 30 or more years of qualifying service). *See* Act of Sept. 8, 1980, Pub. L. 96-343, § 9(a)(1), 94 Stat. 1128 (codified as 10 U.S.C. § 3914).

IV. THE AGR CRIMINAL

A. INTRODUCTION

One of the pervasive questions in criminal law centers on the authority of courts to try certain persons and offenses. Consider the following: a person commits an act clearly in violation of the criminal laws, but is not subject to the jurisdiction of the courts. Has this person committed a crime?[184]

This question illustrates that the initial point in analyzing any case is the court's jurisdiction over the *person*. Often, such jurisdiction is indisputable, but arguments about jurisdiction over the person abound, especially in a system such as military justice. Clearly, the creation of a new personnel classification, such as the AGR program, raises new jurisdictional questions. Hence, the managers of the criminal justice system must decide if and how such individuals will be assimilated into that system.[185]

This section examines key criminal law jurisdiction questions about AGR personnel. The format, a progression of scenarios and solutions, allows for variations and changes within the laws and regulations governing the program. As the details of AGR personnel management vary between the different Reserve components and may rapidly change within each component, the scenarios are written without direct reference to current personnel management techniques.[186] The scenario format allows an attorney to select the situation that most closely relates to the facts of a given case and its governing regulations. Actual substantive and procedural criminal law are discussed in the solutions only if they relate to the determination of jurisdiction.

---

[184]A variation on the question: If a tree falls in the forest, and no one is present, is there a sound? The original question is based on two different definitions of sound: (1) the sensation perceived by the sense of hearing; versus (2) energy transmitted by waves of air pressure. Therefore, the original question turned on the proper definition of an act. Instead of focusing on the definition of an act, the question posed in the text focuses on the authority of a person to apply the definition to a given act. It is only through the use of certain criminal adjudication procedures that a person may be found to have committed a crime. If a person may never be subjected to such procedures, then he may not be officially declared to have committed a crime.

[185]*See, e.g. Ex parte* Quirin, 317 U.S. 1 (1942) (Supreme Court grapples with jurisdictional status of Nazi Saboteurs); Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59 (1980). *Cf.* Reid v. Covert, 354 U.S. 1 (1957) (Supreme Court refuses, in time of peace, to extend court-martial jurisdiction to civilian family members of military personnel stationed in foreign countries).

[186]*E.g.*, AR 135-18, para. 11*(d)(2)* authorizes a personnel manager to continue a soldier on an AGR touf by extension or reorder. Thus, it is unclear whether the tour termination will amount to a release from active duty.

Finally, most scenarios rest upon the assumption that an AGR soldier has committed an offense which may be characterized as "any UCMJ offense."[187] For any act to be so characterized, three further determinations are required. First, criminal prosecution for the act must be warranted. Second, the elements of a punitive Article of the UCMJ must be present. Third, there must be sufficient "service-connection" to warrant UCMJ jurisdiction over the crime.[188]

B. COURT-MARTIAL DURING AN ACTIVE-DUTY TOUR (USAR OR ARNGUS STATUS)

SCENARIO 1: A USAR AGR soldier commits any UCMJ offense. The case is tried during the same active-duty tour in which it is committed.

This scenario presents a straightforward application of UCMJ jurisdiction. Article 2(a), UCMJ, lists twelve categories of persons subject to court-martial jurisdiction.[189] The most frequently-used category, found in Article 2(a)(1) is a complex description of all persons serving on active duty:

> Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.[190]

This case involves a Reservist, not a Regular or a volunteer, who is ordered, not mustered, accepted, or called, to duty (not training) in the armed forces.[191] As the Reserve soldier already has a federal

---

[187]"UCMJ" is the abbreviation for the Uniform Code of Military Justice, 10 U.S.C. § 801-940 (1982) [hereinafter cited as UCMJ].

[188]*See, e.g.*, Relford v. Commandant, 401 U.S. 335 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969).

[189]10 U.S.C. § 802(a) (1982).

[190]*Id.* at § 802(a)(1) (emphasis added).

[191]The phrase "duty in. . . the armed forces" means active duty. Rule 202(a), Rules for Courts-Martial (Jan. 1984) [hereinafter cited as R.C.M.], states: "Courts-martial may try any person when authorized to do so under the code." The discussion of the phrase "authority under the code" states: "Article 2 lists classes of persons who are subject to the code. These include active duty personnel (Article 2(a)(1). . . ." Therefore, the set of persons serving on active duty is coterminous with the set of persons described by Article 2(a)(1), UCMJ, 10 U.S.C. §§ 802(a)(1) (1982).

military status, the soldier is not "ordered into" the armed service; the soldier's duty status is merely changed from inactive to active. That USAR AGR soldiers are accounted for in a separate authorization,[192] does not alter that an individual is serving on active duty.[193] Such soldiers are subject to UCMJ jurisdiction.

> SCENARIO 2: An ARNGUS AGR soldier commits any UCMJ offense. The case is tried during the same active-duty tour in which it is committed.

This scenario illustrates the importance of the *US* in ARNG*US*. All members of the National Guard *of the United States* have federal military status. Thus, all ARNGUS AGR personnel are serving on active duty.[194] Assuming that an ARNGUS soldier was properly ordered to active duty, such as with the consent of the soldier's state governor, as required by 10 U.S.C. § 672(d), the ARNGUS soldier's active-duty status and amenability to court-martial, are identical to that of the USAR AGR soldier in Scenario 1.

C. COURT-MARTIAL DURING AN EXTENSION OF AN ACTIVE DUTY TOUR

> SCENARIO 3: During an active-duty AGR tour, a USAR or an ARNGUS soldier commits any UCMJ offense, but the crime is not discovered until near the end of the tour. The tour is extended by proper authority and a court-martial is convened during the extension period.

The first determination to be made under this scenario is that the extension of the original order was proper. Such a determination requires a working knowledge of the procedures for ordering an AGR soldier to active duty and the methods for extending the period of service specified in the order. Once it is determined that the crime and trial will both occur within the period defined by the current tour's order, as amended to extend the period of service, the UCMJ jurisdictional issue is resolved.

The Court of Military Appeals has provided a general rule of personal jurisdiction: "[A]n active duty serviceperson is subject to the

---

[192] *See supra* text accompanying note 55.

[193] As discussed in *supra* note 71, USAR soldiers in the AGR program are ordered to active duty under 10 U.S.C. § 672(d) (1982).

[194] *See supra* text accompanying notes 77-93.

Uniform Code of Military Justice while retained on active duty."[195] As the soldier remains on active duty during the extension just as if the period had been originally ordered, UCMJ jurisdiction continues.

> SCENARIO 4: During an active-duty AGR tour, a USAR or ARNGUS soldier commits any UCMJ offense. Before the active-duty tour expires, the soldier receives a new order amending the previous one. It orders the soldier to a new duty station for an extended tour and states that the AGR soldier is *not* released from active duty. (Note: the crime is committed before the first order was amended, but is discovered and tried after service begins under the new order.)

In this scenario, the new tour is accomplished by the ultimate in order-amendment "technology;" the first order is actually amended in its entirety. A new description of the tour is substituted for the old one. As the soldier is not released from active duty, he or she remains continuously susceptible to UCMJ jurisdiction, just as in the previous scenario. Theoretically, an AGR soldier could have an entire active-duty career based on such amendments. Throughout such a career, the soldier would never be released from active duty or UCMJ jurisdiction.[196]

Applications of this scenario extend to any situation in which a personnel manager purports to transfer an active-duty AGR soldier to a new duty station for a new period of service without releasing the soldier from active duty. Ideally, such orders should state that the soldier is transferred without release from active duty, to avoid contentions that a release occurred *sub silentio*. The language of the order and other relevant facts may indicate, however, that no release from active duty occurred, even if such statements are absent.

D. COURT-MARTIAL AFTER RELEASE FROM AN ACTIVE-DUTY TOUR

> SCENARIO 5: During an active-duty AGR tour, a USAR or an ARNGUS soldier commits any UCMJ offense. The soldier is released from active duty early for the sole purpose

---

[195]United States v. Fitzpatrick, 14 M.J. 394, 397 (C.M.A. 1983).

[196]Each amendment to the original order could be based on a new service agreement executed under 10 U.S.C. 679(a) (1982); *see supra* text accompanying notes 132-40. There is no requirement that a soldier be released from active duty in order to execute a new agreement.

> of being simultaneously ordered to another AGR tour. The crime is discovered and the trial is conducted during the new tour.

This scenario posits an early release from active duty and, at the same moment, an order to a new active-duty tour. Such a determination requires factual distinction from a personnel action that amends the soldier's orders to change the duty location and/or expiration date of the order, as in Scenarios 3 and 4. Making this distinction in an individual case requires knowledge of the applicable regulations governing release from active duty and a careful review of the orders involved.[197] This scenario assumes that a proper release from active duty has occurred. Therefore, UCMJ jurisdiction may not automatically be based on the logic in Scenarios 3 and 4. Instead, the recent decision of the Court of Military Appeals in *United States v. Clardy*[198] becomes relevant. Therein, the court authorized continuing jurisdiction in cases involving "short-term discharges."

---

[197]Personnel managers are sometimes good sources of expert testimony as to the nature of administrative actions, but their conclusions must be carefully evaluated. In particular, actions are sometimes inconsistent with an individual's asserted status. This does not suggest that personnel managers provide result-oriented advice, but merely recognizes that different officials of any large organization may treat a soldier in inconsistent ways, without knowledge of other individual's actions. Furthermore, a determination of the facts in a case may be complicated by administrative error. For example, the personnel manager may have erroneously amended the original order without releasing the soldier from active duty, as required by applicable regulations, or *vice versa*. In the event of erroneous amendment, the relevant fact for the purposes of UCMJ jurisdiction is that active duty service was not interrupted. This situation is similar to the erroneous retention of a regular enlisted soldier beyond an anticipated discharge date, discussed in the solution to Scenario 8. Moreover, a soldier does not have a right to be released from active duty prior to the expiration of the tour. Although the case may turn on the wording of the regulation in question, the choice of method for early termination of an AGR tour for the purpose of ordering the soldier to a new tour would seem to be an administrative matter for the sole benefit of the military service. *See* Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972) (soldier had no right to be considered for elimination under Army regulation designed to eliminate undesirable soldiers). Therefore, erroneous retention on active duty in the process of ordering an AGR soldier to a new tour should not defeat criminal jurisdiction. In the opposite situation (erroneous release from active duty) the wording of the relevant regulation may allow a determination that the person who ordered the release from active duty was unauthorized to do so, in which case the release might be declared void, *ab initio*.

[198]13 M.J. 308 (C.M.A. 1982), *overruling* United States v. Ginyard, 16 C.M.A. 512, 37 C.M.R. 132 (1967). *Ginyard* held that any termination of jurisdiction, however brief, would generally defeat UCMJ jurisdiction for crimes committed during a period of service. The *Ginyard* rule did not preclude post-discharge prosecution of UCMJ offenses, punishable by confinement for five or more years, if the requirements of Article 3(a) were otherwise satisfied. UCMJ art. 3(a), 10 U.S.C. § 803(a) (1982).

Such discharges are defined as those occurring before the end of an obligated period of service for the purpose of immediate reenlistment.[199]

In applying the *Clardy* cases to this scenario, it is essential to examine the basic rationale of the case. In an earlier case, *United States ex rel. Hirshberg v. Cooke*,[200] the Supreme Court held that, in the absence of congressional authority, a sailor who had been discharged at the expiration of his enlistment could not be court-martialed for crimes committed during that enlistment, even though he had immediately reenlisted. The Court of Military Appeals was careful to distinguish *Clardy* from *Hirshberg*. Considering that Congress had enacted Article 3(a), UCMJ in direct response to *Hirshberg*,[201] the majority concluded that persons remain subject to court-martial under Article 2 until a change in status relieves them from UCMJ jurisdiction. In particular, the court noted that a soldier who is discharged early for the purpose of reenlistment does not receive the same discharge certificate as does a soldier completing a tour. Further, the soldier receives the certificate only after the new enlistment period begins.[202] The court found that a "short-term" discharge was not a termination of a status subject to the UCMJ: "He has remained continuously in 'active service' at all times, despite his receipt of a discharge from the prior enlistment."[203]

In the present scenario, the argument for continuous UCMJ jurisdiction rests on this reasoning. Indeed, because the AGR soldier retains a Reserve military status upon release from active duty, it is even stronger. If UCMJ jurisdiction can survive a short-term *discharge*, as in *Clardy*, it should certainly survive a short-term *release*

---

[199]In United States v. Horton, 14 M.J. 96 (C.M.A. 1982), the Court of Military Appeals held that the *Clardy* rule is prospective only, *i.e.* it does not provide additional UCMJ jurisdiction in cases involving "short-term discharges" issued on or before July 12, 1982.

[200]336 U.S. 210 (1948).

[201]*Clardy*, 13 M.J. at 316.

[202]*Id.* at 317 n.12.

[203]*Id.*

from active duty.[204] Initiation of the second tour clearly causes the release from the active duty of the first tour without even a momentary termination of status susceptible to UCMJ jurisdiction. This argument would be enhanced by language in the remarks section of the second order such as: "Upon acceptance of this tour of active duty, you are released from active duty for the period to which you were ordered by [*specify order*]."

> SCENARIO 6: A USAR or an ARNGUS soldier commits any UCMJ offense near the end of an active-duty AGR tour. The tour expires, the soldier is released from active duty and, on the next day, the soldier is ordered to another active-duty AGR tour. A court-martial is convened during the second tour.

While this scenario may seem a minor extension of the "short-term discharge" principle, the Court of Military Appeals specifically warned against extending the rationale of the *Clardy* opinion:

> We do not question that under *Hirshberg* military jurisdiction is terminated by a discharge at the *end* of an enlistment or period of obligated term of service even though the servicemember immediately reenters the service. [footnote omitted] This break in "status," irrespective of the length of time between discharge and reenlistment, is sufficient to terminate jurisdiction.[205]

---

[204]The recently-effective Rules for Courts-Martial implement the *Clardy* rule as follows:

> There are several exceptions to the general principle that court-martial jurisdiction terminates on discharge *or its equivalent*.
>
> . . . .
>
> A person who was subject to the code at the time the offense was committed is subject to trial by court-martial despite a later discharge if—
>
> (1) the discharge was issued before the end of the accused's term of enlistment for the purpose of reenlisting;
>
> (2) the person remains, at the time of the court-martial, subject to the code; and
>
> (3) [t]he reenlistment occurred after 26 July 1982.

R.C.M. 202(a) (2) (B) (iii) *(b)* (emphasis added). (It is unclear why the rule cites July 26, 1982, as the pivotal date for application of the *Clardy* rule; the *Horton* case uses July 12, 1982. *Horton*, 14 M.J. at 96.). The "equivalent" of a discharge from the service, in this context, is any action that removes a soldier from a category of persons subject to the UCMJ. Therefore, a release from active duty should be viewed as equivalent to discharge for the purpose of this rule. *See, e.g.*, Article 3(a) (speaks broadly of termination of any status that subjects a soldier to UCMJ jurisdiction.) UCMJ, art. 3(a), 10 U.S.C. § 803(a) (1982).

[205]*Clardy*, 13 M.J. at 316.

Therefore, the general rule governing this scenario is that UCMJ jurisdiction is terminated by discharge at the end of a tour, with respect to offenses committed during that tour.

There are several possible exceptions to application of this rule, however. These exceptions require answers to two additional questions: what UCMJ action was taken before the moment that the soldier was released from active duty and what offense is charged?

The answer to the first question determines whether trial can proceed on the theory of continuing court-martial jurisdiction. The Manual for Courts-Martial describes this theory as follows:

> Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing charges—continues for all purposes of trial, sentence, and punishment. If action is initiated with a view to trial because of an offense committed by an individual before his official discharge he may be retained in the service for trial to be held after his period of service would otherwise have expired. Similarly, if jurisdiction has attached by the commencement of action before the effective terminal date of self-executing orders, a person may be held for trial by court-martial beyond that terminal date.[206]

The new Rules for Courts-Martial describe the continuation of court-martial jurisdiction as an "attachment".

> Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial.[207]

The discussion following this Rule adds: "If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date."[208]

---

[206]Manual for Courts-Martial, United States, 1969 (Rev. ed., para. 11*d)* [hereinafter cited as MCM, 1969].

[207]R.C.M. 202(c).

[208]*Id.* at discussion of R.C.M. 202(c).

The determination of whether jurisdiction has attached in a particular case requires close scrutiny of the prosecutorial conduct that occurred prior to the release from active duty. First, a determination must be made of the moment of release from active duty. Next, a list of acts that demonstrate attachment of UCMJ jurisdiction should be compiled. Recent opinions of the Court of Military Appeals provide guidance concerning acts that are sufficient to demonstrate such attachment. In *United States v. Smith*,[209] the drafting of charges, without more, was held insufficient to attach UCMJ jurisdiction. But, in *United States v. Self*,[210] a criminal investigator's interview of a suspect was sufficient to sustain attachment of UCMJ jurisdiction. Warning that initiation of an investigation, taken alone, might not evidence attachment of jurisdiction, the court described the persuasive facts in *Self*:

> [W]hen a criminal investigation reaches the point where the guilt of a particular suspect seems particularly clear and it is highly likely that he will be prosecuted, we believe that the investigative actions can fulfill the requirements of paragraph 11(*d*) of the Manual even though no formal charges have been preferred.
>
> . . . .
>
> Under these circumstances requiring Self to report to the CID office was very similar to an "apprehension," which is specifically designated by the Manual as an "action with a view to trial." Since appellant was informed of the offenses for which he was suspected and then interviewed and since immediately after the interview he felt sure that he would be court-martialed and even anticipated spending 6 months in jail, we are convinced that at this point the investigation was being conducted with a view to his trial by court-martial.[211]

Although notice to the accused of an intent to prosecute is not the *sine qua non* of proving attachment of UCMJ jurisdiction,[212] it was persuasive in the *Self* case. Perhaps *Smith* and *Self* can be summarized in the following rule: a government official must take a formal

---

[209]4 M.J. 265 (C.M.A. 1978).
[210]13 M.J. 132, (C.M.A. 1982).
[211]*Id.* at 137-38.
[212]For example, it is generally accepted that preferral of charges is sufficient to attach jurisdiction. MCM, 1969, para. 11*(d)*. Notice of the charges is not an element of preferral; it need only occur as soon as practical. Article 30, UCMJ.

UCMJ action against the accused *or* notify the accused that the government has focused an investigation on the accused with the intent to imminently take some formal UCMJ action. If either of these acts had occurred in the present scenario, UCMJ jurisdiction had attached and no further inquiry is necessary.

If continuing jurisdiction does not exist, the second question must be considered: what offense is charged? Article 3, UCMJ, authorizes UCMJ jurisdiction over three types of offenses: serious offenses not amenable to civilian prosecution, Article 3(a), UCMJ; fraudulent discharges, Article 3(b), UCMJ; and crimes committed by deserters, Article 3(c), UCMJ.[213]

Only the serious offense exception is relevant to this scenario. Article 3(a), UCMJ provides:

> Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.[214]

This jurisdictional grant is easily applied in this case; the AGR soldier was subject to the UCMJ when he committed the crime and is back on active duty at the time of the trial. The Court of Military Appeals, in warning that the *Clardy* decision would not authorize continuous UCMJ jurisdiction in a case where a tour expired and a new tour began, noted: "Of course, if jurisdiction over the offense is saved by Article 3(a), a different result would obtain."[215] Furthermore, in his concurring opinion in *Clardy*, Judge Fletcher discussed the purpose of Art 3(a) by quoting from a letter from the Chairman of the Senate Armed Services Committee at the time Article 3 was drafted, Senator Millard E. Tydings, to Senator McCarran:

> [T]he problem encountered in connection with this article, and particularly subdivision (a) of it, concerns those types of situations where persons have committed offenses while serving on active duty in the armed services and

---

[213] 10 U.S.C. § 803 (1982).
[214] *Id.* at § 803(a)
[215] *Clardy*, 13 M.J. at 316 n.13.

> who, thereafter, by virtue of some artificial situation, are unable to be tried either by courts martial or the Federal courts.[216]

Among the classes of cases listed by Senator Tydings as illustrating this problem are "persons who, although once discharged, reenter the service."[217] Just as in the reenlistments of Regular Army soldiers, Article 3(a) applies to an AGR soldier who completes one tour and begins another.

> SCENARIO 7: A USAR or an ARNGUS soldier commits any UCMJ offense near the end of an AGR tour. Charges are preferred and served on the accused prior to the expiration of the tour. However, the tour expires and the soldier is released from active duty. Subsequently, a court-martial is convened, and the military judge rules that the actions taken by the government prior to the accused's release from active duty have attached UCMJ jurisdiction for trial of the charged offenses. During the trial, the accused commits another UCMJ offense. Charges are preferred and served on the accused for the new offense, prior to completion of the first court-martial. A second court-martial convenes.[218]

Under the continuing jurisdiction theory discussed in the previous scenario, the accused may clearly be tried for the UCMJ offense charged before release from active duty. It is equally clear, however, that the accused may not be subjected to court-martial for the offense committed after the termination of the accused's status as a person subject to UCMJ jurisdiction.[219]

This scenario should not be confused with cases involving the exercise of jurisdiction over Regular enlisted personnel after the expiration of an enlistment period. In *United States v. Douse*,[220] two members of the Court of Military Appeals confirmed that a soldier

---

[216]*Id.* at 318.

[217]*Id.*

[218]This scenario illustrates the advantage of conducting courts-martial only against persons serving in a status that subjects them to UCMJ jurisdiction. The preferable administration approach in this case would have been to extend the accused's active-duty tour. Failing that, consideration should be given to some method of ordering the accused back to active duty. This scenario supposes that neither of these administrative techniques is used.

[219]United States v. Hamm, 36 C.M.R. 656 (A.B.R.), *petition denied*, 16 C.M.A. 655, 36 C.M.R. 541 (1966); United States v. Mansbarger, 20 C.M.R. 449 (A.B.R. 1955). Although these cases dealt with self-executing orders, the outcome should be the same any time an actual release from active duty occurs.

[220]12 M.J. 473 (C.M.A. 1982).

remains subject to the UCMJ even after his regular enlistment expires, if no official action to discharge the soldier has occurred. However, this AGR soldier may not be characterized as subject to UCMJ jurisdiction while "awaiting *discharge* after expiration of. . . [an] enlistment;"[221] the accused has been *released from active duty* at the expiration of an AGR tour.[222] Thus, the soldier in this scenario is not subject to UCMJ jurisdiction at the time of the second offense and may not be court-martialed for its commission.

> SCENARIO 8: A USAR or an ARNGUS soldier is erroneously retained on active duty beyond the expiration of an AGR tour. The soldier protests his continued service on active duty. Thereafter, the soldier commits any UCMJ offense. Charges are preferred and served on the soldier. A court-martial is convened.

This "erroneous retention" scenario has plagued military appellate courts in cases involving both Regulars and Reservists. There may be many valid reasons for retaining a person beyond the expiration of a period of service.[223] This scenario assumes, however, that the soldier is retained for no good reason *i.e.*, personnel managers made a mistake.

In cases involving Regulars, no single theory of jurisdiction has prevailed. In *United States v. Simpson*,[224] the Army Court of Military Review considered a case of erroneous retention where the accused had not consented to retention and had refused to accept the benefits of continued service. The court "estopped" the government from arguing that the accused remained subject to the UCMJ, saying:

> In so concluding, we have not overlooked Article 2(1) of the Code, which provides pertinently that persons "awaiting discharge after expiration of their terms of enlistment" remain subject to the Code. That provision is designed to permit the Government to accomplish an orderly separation or discharge and not to relieve it from the consequences of its own negligence.[225]

---

[221] UCMJ art. 2(a)(1), 10 U.S.C. § 802(a)(1) (1982).

[222] This release from active duty could have occurred because the orders were determined to be "self-executing" or because the military service consciously chose to release him from active duty.

[223] *E.g.*, U.S. Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel, sec. IV (1 Oct. 1982).

[224] 1 M.J. 608 (A.C.M.R. 1975).

[225] *Id.*

The idea that UCMJ jurisdiction cannot sruvive a negligent retention on active duty was adopted by Judge Cook in *Douse*.[226] In one of three separate opinions in that case, Judge Cook imposed a "reasonableness" requirement on the government in a slightly different way. In asserting that a soldier may be retained beyond expiration of a term of service for only a reasonable time, he established the principle that even a proper retention can become improper if the government is negligent in prosecuting the case.[227]

In contrast, Judge Everett advocated retention of jurisdiction until actual separation, without regard to the government's negligence.[228] He described his position as follows:

> I do not condone failure of the Armed Services to discharge servicemembers promptly at the end of an enlistment—even without any specific demand for such a discharge. However, neither the Constitution nor the Congress has prescribed that military jurisdiction is lost under such circumstances. Indeed, in cases arising overseas such a rule might preclude trial of some heinous crimes by the only American forum possessing subject-matter jurisdiction.[229]

In addition to stating a pragmatic concern that heinous criminals might avoid prosecution, this approach is logical under the traditional view that, once a person changes status from civilian to soldier, the latter status continues until it is in fact terminated.[230] A soldier may have many administrative[231] and legal[232] remedies to obtain release from active duty, but, until such release is obtained, the soldier remains subject to the UCMJ. However, in view of Judge Fletcher's dissent in *Douse*, Judge Everett's theory would not command a majority of the court.

The above discussion relates to the present scenario only if the AGR order is not viewed as "self-executing."[233] Absent an automatic release from active duty, the soldier is subject to UCMJ jurisdiction while awaiting discharge. However, under *Simpson*, the govern-

---

[226]*Douse*, 12 M.J. at 473.
[227]*Id.* at 477.
[228]*Id.* at 481. *See Fitzpatrick*, 14 M.J. at 397 n.z. (Chief Judge Everett noted that his view has not captured a majority of the court).
[229]*Douse*, 12 M.J. at 481.
[230]*In re* Grimley, 137 U.S. 147 (1890).
[231]*E.g.*, UCMJ art. 138, 10 U.S.C. § 938 (1982); 10 U.S.C. § 1552 (1882).
[232]*See, e.g.*, Pence v. Brown, 627 F. 2d 872 (8th Cir. 1980).
[233]*See supra* text accompanying notes 157-62.

ment might be estopped from prosecution because of its error in failing to properly release the soldier. If not estopped from prosecution, the soldier may be retained on active duty for court-martial. Such prosecution should be conducted within a reasonable time.

If the AGR order is "self-executing," jurisdiction clearly ceased on the expiration date of the order. In *United States v. Peel*,[234] an ARNGUS soldier was erroneously retained on active duty beyond the expiration of active duty for training orders and was transferred to another military installation. The court held that the soldier was not subject to court-martial for crimes committed at the second installation.[235] The key fact was that the offenses were committed after the expiration of the tour of duty.[236]

> SCENARIO 9: A USAR or an ARNGUS soldier commits a serious UCMJ offense, *i.e.*, one punishable by confinement for five or more years, near the end of an active-duty AGR tour. The soldier has refused to consent to an order to return to active duty. The offense cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia. The court-martial convenes after the soldier is released from active duty and returns to inactive duty. There is no evidence that UCMJ jurisdiction attached, by virtue of government action, prior to the soldier's release from active duty.

This scenario tests the full extension of UCMJ jurisdiction allowed by the Constitution. The facts exclude the possibility of continuing UCMJ jurisdiction, thus forcing the issue of the application of Article 3(a) as the only possible means to bring an alleged serious criminal to justice. The importance of resolving the scope of Article 3(a) jurisdiction is greatly increased by the existence of the AGR program. As discussed previously, the number of soldiers involved in the AGR program and their importance in the United States military structure is significant and increasing. Therefore, the incidence of releasing Reservists from active to inactive duty is likely to increase. Even assuming that the number of soldiers in the AGR program who will commit serious offenses is significantly lower than the general population, it only takes one highly publicized case to ridicule, and hence undermine, the effectiveness of military discipline. The solution to

---

[234]4 M.J. 28 (C.M.A. 1977).

[235]*Id.*

[236]*See* United States v. Gonzalez, 5 M.J. 770 (A.C.M.R. 1978) (court distinguishes *Peel* from case where crime and action to attach jurisdiction occurred before the erroneous retention).

this scenario proceeds on the assumption that the full burden of military discipline in an era of instantly mobilized selected Reserve forces should not fall on administrative sanctions, however useful such sanctions may be in most cases. A policy determination that UCMJ prosecution would not generally be necessary should not be the basis for its unavailability in egregious cases.

The solution to this scenario must begin with the apparent limitation placed upon the exercise of UCMJ jurisdiction by the Manual for Courts-Martial, which provides:

> Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia is not terminated by discharge or other termination of status (Art. 3(a)). *Courts-martial may not try such offenses if, at the time of trial, the accused has severed all connection with the military and is in civilian status, but may do so if he has subsequently become subject to the code by reentry into the armed forces or otherwise.*[237]

The present scenario falls in the gap in the emphasized language. The hypothetical AGR soldier has not "severed all connection with the military" by returning to "civilian status", therefore, the language would not appear to prohibit trial. Yet, the soldier has not "subsequently become subject to the code by reentry into the armed forces or otherwise"; therefore, trial by court-martial does not appear to be authorized. The current Rules for Courts-Martial also fail to authorize UCMJ jurisdiction in this case.

> A person who was subject to the code at the time an offense was committed may be tried by court-martial for that offense despite a later discharge or other termination of that status if:
>
> (*1*) The offense is one for which a court-martial may adjudge confinement for 5 or more years;
>
> (*2*) The person cannot be tried in the courts of the United States or of a State, Territory, or the District of Columbia; and

---

[237]MCM, 1969, para. 11*(b)* (emphasis added).

> (3) *The person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise.* See Article 3(a).[238]

The Rule was drafted with the purpose of fully stating the extent of UCMJ jurisdiction under Article 3(a).[239] Any attempt to prosecute the former AGR soldier in this scenario is contrary to the stated jurisdictional policies of the non-binding discussion of the Rule.[240] In summary, UCMJ jurisdiction in cases paralleling this scenario is authorized only if the soldier again acquires a status subject to UCMJ jurisdiction under Article 2.[241]

Ignoring for the moment the provisions of the Manual for Courts-Martial and the Rules for Courts-Martial, a strong argument can be made to support UCMJ jurisdiction in this scenario. The analysis of this argument must begin with the landmark case of *United States ex rel. Toth v. Quarles*.[242] While serving on active duty in Korea, Toth allegedly committed murder, but was not identified as a suspect. He was subsequently discharged from the Army and returned to civilian life. When Toth's involvement in the offense was discovered, he was apprehended and returned to Korea for court-martial. His petition for *habeus corpus* was considered by the Supreme Court, which held: "Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article 3 of the Constitution."[243] Without intimating that court-martial procedures violate the Constitution, the Court discussed, at length, the differences between civilian and military prosecutions. The point of the case, however, is not that the systems are different,

---

[238]Discussion of R.C.M. 202(a) (2) (B) (iii) (a) (emphasis added).

[239]*Id.* at Drafter's Comments pertaining to Discussion of R.C.M. 202(a) (2) (B) (ii).

[240]This scenario would place the prosecutor in the awkward position of arguing that the current MCM provision, promulgated by the President under Article 36, UCMJ, is improper on the grounds that it is "contrary to or inconsistent with [the UCMJ]." UCMJ art. 36(a), 10 U.S.C. § 836(a) (1982). Under the R.C.M., a trial counsel would argue that the only limitation is in the non-binding discussion. This is still a poor rhetorical position.

[241]This could be accomplished by implementation of Article 2(a) (3) (jurisdiction over reserves during inactive duty training). UCMJ art. 2(a) (3), 10 U.S.C. § 802(a) (3) (1982). The government could wait until a soldier is serving on inactive duty training, and then initiate the court-martial. However, this provision has not been implemented in the Army. Baldwin & McMenis, *Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates*, The Army Lawyer, Mar. 1984, at 10, 22. Another option is simply to wait until the soldier serves his next period of active duty for training or annual training.

[242]350 U.S. 11 (1955).

[243]*Id.* at 23.

but that Congress is without authority to include civilians who have absolutely no military connection in the military criminal system Even if military and civilian trial procedures were identical, the authority to try Toth by court-martial would still be absent. Congress is authorized by the Constitution to "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces."[244] As Toth was not in the military at the time of his trial, he was not subject to these "rules," *i.e.*, the UCMJ. Therefore, the only possible justification for his trial was that it was necessary and proper to maintain order and discipline in the military.[245] The following language demonstrates that the Court was not persuaded by that argument:

> Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades.[246]

The Court did not, at any time, suggest that a "necessary and proper" showing is required when the accused has a military status and is therefore within the plenary power of Congress to regulate the military.[247] Moreover, the Court has recognized that the definition of persons with sufficient military status to be subject to UCMJ jurisdiction included a dishonorably discharged soldier who is a military prisoner serving a sentence imposed by a prior court-martial.[248]

After *Toth*, the Supreme Court considered UCMJ jurisdiction over civilians in *Reid v. Covert*[249] and *Kinsella v. Krueger*.[250] Both cases involved civilian wives who were charged with killing their service member husbands while stationed overseas. Unpersuaded that such an exercise of jurisdiction was necessary and proper in peacetime, the Court declared the courts-martial unconstitutional. *Toth, Reid,*

---

[244]U.S. Const. art. 1, § 8, cl. 14.

[245]*Id.* at cl. 18.

[246]*Toth*, 350 U.S. at 22.

[247]Plenary jurisdiction over the soldier's "person" must be clearly distinguished from an analysis of jurisdiction over the "crime." Courts may protect against overly broad application of the UCMJ against service members by the "service-connection" doctrine established in *Relford*, 401 U.S. at 355, and *O'Callahan*, 395 U.S. at 258. But this doctrine should never be used as a basis to deny personal jurisdiction over any service member.

[248]*Toth*, 350 U.S. at 14 (citing Kahn v. Anderson, 255 U.S. 1 (1920)).

[249]354 U.S. 1 (1957).

[250]*Id.*

and *Kinsella* were well summarized by the Ninth Circuit in the following languages: "The common denominator of all three decisions, as well as the basis for them, is that the defendant in each case was a civilian with absolutely no present relationship to the military. They were all full-fledged civilians when they were tried."[251]

In discussing the possible constitutionality of court-martial of civilians during war, Justice Black's opinion in *Reid* stated:

> There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during *time of war. To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces*, they must rest on the Government's "war powers."[252]

This language implied that UCMJ jurisdiction over the person need not be justified as necessary and proper if members of the armed forces are involved.

In contrast to the civilian involved in *Toth*, the soldiers in the current scenario represent a vital part of the military forces that defend this country. The earlier discussion of the Reserve mission and the need for the AGR force demonstrates that the Reserve organizations are not social clubs or honorary societies that only march in parades. Perhaps the best evidence of the importance of the Reserves is the fact that Congress has relied on them to limit the size and funding of the active duty forces.[253] Therefore, Congress expects them to be as professional and as well-disciplined as active-duty forces.

Unlike the scrutiny applied in the *Toth* case, the Supreme Court has demonstrated its deference to congressional judgments concerning the discipline of members of the service. In refusing to enjoin the court-martial of a service member, the Supreme Court in *Schlesinger v. Councilman*[254] specifically distinguished the *Toth* case. The court described its reliance on congressional judgments regarding the UCMJ as follows:

> [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is

---

[251]Lee v. Madigan, 248 F.2d 783, 786 (9th Cir. 1957).
[252]*Reid*, 354 U.S. at 33 (emphasis added).
[253]S. Rep. No. 580, 97th Cong., 2d Sess. 18 (1982).
[254]420 U.S. 738, 759 (1974).

> adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.[255]

The deference afforded Congress in matters involving the discipline of military members was further demonstrated by the Supreme Court in *Middendorf v. Henry*.[256] In sustaining the procedures for summary courts-martial, the Court said: "In making such an analysis we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, §8, that counsel should not be provided in summary courts-martial."[257] This deference to Congress was summarized well by the District of Columbia Circuit in words relevant to this scenario:

> Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.[258]

Articles 2 and 3(a), UCMJ[259] demonstrate that Congress carefully considered the need for discipline in the context of the part-time duty which Reservists perform. Article 2(a) (3) subjects Reservists to UCMJ jurisdiction "while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter."[260] Furthermore, in Article 3(a), Congress limited the application of UCMJ jurisdiction over crimes committed during former periods of service under UCMJ jurisdiction to only serious offenses.[261] Senator Tydings' letter explaining the purpose of Article 3(a)[262] also listed "Reservists who go on inactive duty" among the categories of cases that Article 3(a) was designed to address.[263] If Congress felt that such

---

[255]*Id.* at 758.
[256]425 U.S. 25 (1975).
[257]*Id.* at 43.
[258]Curry v. Secretary of the Army, 595 F.2d 873, 877 (D.C. Cir. 1979).
[259]UCMJ arts. 2, 3(a), 10 U.S.C. §§ 802, 803(a) (1982).
[260]10 U.S.C. § 802(a) (3) (1982). That the Army has not implemented this provision does not detract from the judgment of Congress that the option to use such jurisdiction should be provided to the services.
[261]10 U.S.C. § 803(a) (1982).
[262]*See supra* text accompanying notes 214-16.
[263]*Clardy*, 13 M.J. at 318.

a need to provide for discipline of Reserve members existed when Article 3(a) was enacted, it is even more apparent in the context of the "total force" arrangement of the present defense structure. Courts properly defer to this careful congressional consideration of the proper discipline of the members of the military services.[264]

The view that Article 3(a) may constitutionally allow the court-martial in this scenario has been supported by opinions in several cases. In *United States v. Wheeler*,[265] the accused was court-martialed for murdering a German woman. The murder occurred near the end of the accused's active duty tour in Germany, but his involvement was not discovered until after he returned to the United States, was released from active duty, and was transferred to the Air Force Reserve. Approximately five months later, the accused confessed to the murder and consented to be returned to active duty. The accused, on appeal, challenged the validity of his reorder to active duty. Two judges of the Court of Military Appeals found that the accused had consented to the reorder to active duty and concluded that UCMJ jurisdiction to try the offense resulted from the facts that the accused was subject to the UCMJ at the time of the trial and that the offense qualified for prosecution under Article 3(a).[266]

Apparently uncomfortable with the determination that the order to active duty was valid, Judge Latimer used different reasoning from the other judges to arrive at the same result. Judge Latimer determined that Article 3(a) allowed the prosecution of the accused even if he was not on active duty at the time of the trial.[267] Essential to this opinion was the distinction between the accused's status and the civilian in *Toth*:

> No doubt the accused is one step removed from the man on active duty, but he has not become a full-fledged civilian and his military status is such that he is in fact part and parcel of the armed services. He was trained by the Air Force to be an airman, and Congress has said he must be

---

[264]Courts must not confuse jurisdiction over the person with jurisdiction over the offense. To say that the courts should defer to congressional judgment concerning the extent to which service members will be subjected to UCMJ jurisdiction in no way detracts from the principle that all offenses charged must be "service-connected." Articles 2(a) (3) and 3(a), UCMJ, actually encourage trial of service-connected offenses by focusing on offenses committed during actual periods of inactive duty service or during previous active-duty tours.

[265]10 C.M.A. 646, 28 C.M.R. 212 (1949).

[266]*Wheeler*, 28 C.M.R. at 223, 225.

[267]*Id.* at 223.

> available for immediate recall to active duty during his obligated duty period. He is part of that body of men who is characterized as ready reserves, and he is subject to serve on active duty almost at the scratch of the Presidential pen, 10 U.S.C. § 673. It must be realized that under existing conditions a reservoir of trained individuals who are minutemen must be maintained to augment those on full-time employment.[268]

While persuasively advocating application of Article 3(a) jurisdiction to Reservists not on active duty, a weakness in Judge Latimer's opinion is his implicit concession that the standards used by the Supreme Court to determine whether the exercise of jurisdiction over civilians is necessary and proper to accomplishing an enumerated power of Congress also applies in the case of a Reservist.[269]

Another minor weakness in Judge Latimer's opinion was his limitation of the exercise of Article 3(a) to Reservists whose inactive duty was required by a statutory military service obligation.[270] That limitation was consistent with the facts in *Wheeler*, but does not seem compelled by any of its reasoning, except for a general desire to limit the number of soldiers that might be subject to UCMJ jurisdiction. Yet, there is no logical basis to distinguish between Reservists performing inactive duty pursuant to a statutory military service obligation rather than some other form of service agreement.

Aside from the minor problems discussed above, Judge Latimer's opinion should be viewed as a cornerstone in the doctrine of UCMJ jurisdiction over Reservists. The opinion was consistent with the disposition of Wheeler's *habeus corpus* petition by the United States District Court for the Northern District of Florida,[271] which was recently cited with approval by the Court of Appeals for the Fifth Circuit as an alternate basis for disposing of *Wickham v. Hall*:[272]

---

[268]*Id.* at 221.

[269]This is best illustrated in the opinion's defense to a charge that it would open a "Pandora's Box." The judge predicts that the exercise of UCMJ jurisdiction over Reserves would be infrequent. *Id.* at 223. Frankly, this is irrelevant to the determination of jurisdiction over military members. The fact that frequency was an issue in *Toth* relates to the unique determination that the exercise of UCMJ jurisdiction over persons who were not military members was necessary and proper. The frequency of UCMJ prosecution has never been important in determining UCMJ jurisdiction over Regular service members; it should be no different for Reserves.

[270]*Id. See* 10 U.S.C. § 651 (1982).

[271]Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958).

[272]706 F.2d 713, *reh'g denied*, 712 F.2d 1416 (5th Cir. 1983).

> In closing, we also note that *Toth* speaks to one whose offense was not connected with the severance of his ties with the military. Wickham, upon obtaining her discharge, was not totally released but instead was transferred from Active Duty to a Reserve component. All military ties were not severed. She did not become a "full-fledged" civilian. *Wheeler v. Reynolds*. . . . Since, even if her discharge from active duty was valid, Wickham remained in a Ready Reserve duty status for the remainder of her contract enlistment period, her status would not equate with that of civilian. If it should be determined that the fraud-in-discharge issue is one that must constitutionally go to a civil court, we would nevertheless hold that Article 3(b) of the UCMJ, is valid as applied to Wickham in this case since she remained a member of an armed forces reserve component.[273]

Why, then, does the Manual for Courts-Martial fail to expressly authorize the exercise of UCMJ jurisdiction in the present scenario? A clue to the source of the restrictive provisions in the Manual is found in a note following the reprint of Article 3(a) in Appendix 2 of the Manual for Courts-Martial:

> *NOTE:* This article has been held to be unconstitutional to the extent that it purports to extend court-martial jurisdiction over persons who, although subject to the code at the time of the commission of the offense, later ceased to occupy that status. *(Toth v. Quarles,* [citation omitted]. This article is still applicable to such persons, however, if they subsequently return to the status of a person subject to the code. *(United States v. Winston,* [citation omitted]; *United States v. Gallagher*, [citation omitted]. See *United States v. Wheeler,* [citation omitted].[274]

This language was added to the Manual during the 1969 revision[275] and implies a broader interpretation of *Toth* than discussed previously. Certainly, the note is accurate if it is interpreted as a way, although not the only way, that Article 3(a) may be used after *Toth*. This interpretation is consistent with the fact that *Wheeler* is cited therein. Furthermore, the drafters' comments indicate that a narrower interpretation of *Toth* was actually intended: "The require-

---

[273]706 F.2d at 718.

[274]MCM, 1969, at A2-3.

[275]U.S. Dep't of Army, Pamphlet No. 272-2, Analysis of Contents Manual For Courts-Martial. United States 1969, Revised Edition, at A2-1 (1970).

ment for Secretarial consent [before prosecution under Article 3(a)] was deleted as *civilians* cannot be tried under Article 3(a). . . The new sentence recognizes that Article 3(a) retains vitality in certain cases, *for example*, where the accused has reenlisted."[276]

Therefore, the apparent limitation in the current Manual, which has been reproduced in the Rules for Courts-Martial, may have resulted from slightly imprecise language in the Manual. Yet, the prevailing attitude is based on a broad interpretation of *Toth*. The following discussion in a Department of the Army pamphlet provides insight:

> [T]he presence of continuing inactive reserve status may be sufficient to permit the military to exercise jurisdiction over an accused through the provisions of Article 3(a). The continuing validity of such rationale is questionable, however, since its only proponent, Judge Latimer, is no longer a member of the Court of Military Appeals. Further, to reach this position requires a tortuous reading of the Supreme Court's holding in *Toth*, overlooking the essential nature of an inactive reservist's status—that he is a citizen rather than a soldier.[277]

Aside from the practical concerns about how the Court of Military Appeals would rule on the application of Article 3(a) to Reservists on inactive duty, the assertion that a Reservist is essentially a civilian for the purposes of *Toth* seems unfounded. This argument was anticipated by the district court in the *Wheeler* case and addressed in the following manner:

> [W]hile the different categories of the Air Force Reserve are charged with varying requirements as to active duty and inactive duty training, and vary as to eligibility for pay, promotion, and other military desirable advantages accruing to reservists, such differences do not affect the basic status of all reservists as constituting continuing members of the reserve component of the Air Force and, hence of the Air Force, and their continuing military obligation to respond to active duty orders when war or national emergency or other lawful contingency may require. It is true that for non-military purposes and for purposes of receiving various veteran's benefits, petitioner

---

[276] *Id.* at 4-1 (emphasis added).

[277] U.S. Dep't of Army, Pamphlet No. 27-174, Military Justice-Jurisdiction of Courts-Martial, at 4-27 (1980).

> occupies the same relationship to the government respectively, as do other citizens who have had no military connection or as to discharged veterans who have had such relations but who have no further statutory military obligations, present or prospective. Nonetheless, by reason of his military obligation and reserve status, however inactive or limited it may be, for the military purposes intended by Congress to be served by the creation and maintenance of the present reserve components of the armed forces, petitioner, when released from active duty, was not a full-fledged civilian, nor in the same status as a discharged veteran, but as an Airman Third Class of the Air Force Reserve.[278]

The district court properly focused on the need for military discipline of the Reserves, even prior to the development of the "total force" defense philosophy. The pamphlet, therefore, may demonstrate an out-dated view of the importance of the Reserve forces.[279]

Whether the Court of Military Appeals, as currently constituted, would sustain UCMJ jurisdiction in this scenario is not clear. The uncertainty of the court is demonstrated in *Wickham v. Hall*.[280] This case involved a petition for extraordinary relief in the same case in which the Fifth Circuit relied on *Wheeler v. Reynolds* as an alternate basis of decision.[281] The central issue in the case involved the constitutionality of Article 3(b).[272] The accused had allegedly fabricated a pregnancy test in order to qualify for release from active duty. The court issued three separate opinions. Judge Cook reviewed the holding in *Wheeler* and then discussed *United States v. Brown*:[283]

> Chief Judge Quinn concluded, as Judge Latimer had in *Wheeler*, that accused's separation from active duty did not relieve him from amenability to trial by court-martial for an offense of the kind specified in Article 3(a), committed before his separation. However, the majority in

---

[278] *Wheeler v. Reynolds*, 164 F. Supp. at 955.

[279] Moreover, it seems inappropriate for an Army pamphlet to appear, to any extent, to concede that the application of Article 3(a), UCMJ to Reservists performing inactive duty would be unconstitutional. Until such a decision is rendered by the Supreme Court, the executive branch should presume the constitutionality of an act of Congress.

[280] 12 M.J. 145 (C.M.A. 1981).

[281] 706 F.2d at 718.

[282] 10 U.S.C. § 803(b) (1982).

[283] 12 C.M.A. 693, 91 C.M.R. 279 (1962).

> *Brown* affirmed the decision of the United States Navy Board of Review (now Court of Military Review), which held that, notwithstanding the reserve obligation, a sufficient basis for continued military jurisdiction over Brown was lacking.[284]

Without discussing these cases further, Judge Cook remarked:

> *Wheeler* and *Brown* may merit reexamination. For purposes of this proceeding, I assume, but do not decide, that petitioner's return to active duty was not voluntary, and her obligation to perform reserve duty, even with tours of active duty, is insufficient connection with the military to make her, constitutionally, amenable to trial by court-martial under Article 3(b) of the Code.[285]

Judge Cook then found that the accused had never validly been released from active duty, fraud vitiates all. Therefore, her amenability to UCMJ jurisdiction had never been terminated.

In a classic example of entropy, this language was cited by a dissenting opinion in the Fifth Circuit as evidence that both Articles 3(a) and (b) could not constitutionally subject a Reserve to prosecution unless he or she was otherwise amenable to UCMJ jurisdiction.[286] This dissent interpreted *Brown* as holding "that a continuing reserve obligation constituted an insufficient basis for the exercise of court-martial jurisdiction under Article 3(a)."[287] Perhaps this interpretation was based on Judge Cook's juxtaposition of *Wheeler* and *Brown*. However, Judge Cook said only that a reserve obligation was insufficient to *continue* military jurisdiction; he did not mention Article 3(a) in discussing *Brown*. Moreover, the *Brown* decision did not cite Article 3(a); the punishment for the offenses did not quality for jurisdiction under that Article.[288] Instead, *Brown* focused on the issue of whether the accused was subject to jurisdiction under Article 2. The opinion held that the delivery of an order releasing the accused from active duty terminated his amenability to court-martial.

---

[284] *Wickham*, 12 M.J. at 149.

[285] *Id.*

[286] *Wickham v. Hall*, 706 F.2d at 718.

[287] *Id.*

[288] *Brown*, 91 C.M.R. at 279. Brown was charged with conspiracy, Art. 81, UCMJ, and various offenses relating to the administration of service-wide competitive examinations. Art. 134, UCMJ. The court did not mention the maximum permissible punishment under each offense, and the Navy Board of Review opinion in the case was unreported. However, surely the court would have mentioned the fact, if true, that one of the "various offenses" qualified for jurisdiction under Article 3(a).

It is no surprise that Reservists, after release from active duty, are not subject to UCMJ jurisdiction under Article 2, unless the requirements of Article 2(a) (3) (Reserves performing inactive duty training) are satisfied. Therefore, *Brown* should not be cited as authority for extending the *Toth* rationale to Reservists.

The judicial confusion is compounded when the continuing jurisdiction theory of Article 2(a) (3) is applied to this scenario. Specifically, this continuing jurisdiction theory holds that, if a Reserve member subject to the UCMJ under Article 2(a) (3), commits an offense during one period of inactive duty training, *i.e.*, a "weekend drill", the soldier may be prosecuted by a court-martial convened during a subsequent inactive duty training period, without a showing that jurisdiction attached at the first inactive duty training period. Article 3(a) does not operate to limit the crimes that can be prosecuted at a court-martial convened during a subsequent inactive duty training period because Congress did not intend Article 3(a) to restrict jurisdiction under Article 2(a) (3).[289]

The Navy-Marine Corps Court of Military Review has extended this inactive duty training rationale to allow UCMJ jurisdiction over Reservists on active duty for training. In *United States v. Harris*,[290] that court allowed the court-martial of a Marine Corps Reserve major for charges arising from fraudulent travel claims relating to a period of active duty for training. The offense was committed two days before the accused's release from active duty; the government did not discover the crime until after the officer had been released from active duty for training. The court examined the reasoning of *Schuering* and could "find no reasonable basis for differentiating that situation from the extended periods of active duty for training performed by Major Harris in determining court-martial jurisdiction."[291] This approach turns on the fact that the accused was performing active duty for *training*, which may provide a sufficient connection to justify the analogy to *Schuering*. However, it may not be further extended to solve the present scenario. As previously discussed, reservists on active duty for operational purposes rather than training are certainly within the contemplation of Article 3(a).

To summarize the analysis of this scenario, the current and proposed language in the Manual for Courts-Martial limits the exercise of UCMJ jurisdiction against this soldier. However, a substantial argument can be made that the soldier may constitutionally be tried

---

[289]United States v. Schuering, 16 C.M.A. 324, 36 C.M.R. 480 (1966).
[290]11 M.J. 690 (N.M.C.M.R. 1981).
[291]*Id.* at 693.

by court-martial. In order to clarify that such a trial is authorized, the discussion of the Rules for Courts-Martial pertaining to Article 3(a) should be changed to implement the full scope of that article. The discussion of Rule for Courts-Martial 202(a) (2) (B) (iii) (a) (3) should be changed to read as follows: "The person is at the time of the court-martial either: (a) subject to the code by reentry into the armed forces or otherwise; or (b) is a member of the Reserve component of the armed forces." All other rules, discussion, drafters' comments, regulations, pamphlets, or other documents should be revised, as necessary, to be consistent with this change.

> SCENARIO 10: An ARNG AGR soldier, serving on full-time duty under 32 U.S.C. § 502(f), is ordered to active duty in a foreign country under 10 U.S.C. § 673b (90 days active duty to support an operational mission). During the mission, he rapes and kills a local civilian woman. The crime is not discovered until after the soldier is released from active duty and returned to a state AGR status. The soldier refuses to consent to an order to return to active duty. The offense cannot be tried in the courts of the United States or of a state, a territory, or the District of Columbia. There is no evidence that UCMJ jurisdiction attached by virtue of government action prior to the soldier's release from active duty. A court-martial convenes after the soldier's release from active duty and return to state status.

This scenario presents an identical problem to that faced in Scenario 9, except that the AGR soldier is an ARNG AGR soldier. While serving on full-time duty in a state status, the ARNG AGR soldier is not subject to the UCMJ.[292] He was ordered to active duty, however, in his ARNGUS status and was therefore subject to the UCMJ during the tour.[293] After release from active duty, the ARNG AGR soldier is not subject to court-martial under Article 2. However, as a member of the ARNGUS, he is still a Reserve of the Army. Therefore, as discussed in Scenario 9, this soldier should be, but is not, subject to court-martial under Article 3(a) for the rape-murder.[294]

---

[292] *E.g.*, AR 135-18, para 12.

[293] *Id. See supra* text accompanying notes 15-31 (discussion of reason for creation of ARNGUS as a Reserve component and authority to order members of a Reserve component to active duty for 90 days to support operational missions).

[294] In fact, the absence of court-martial jurisdiction is even more egregious in this case. The ARNG AGR soldier is performing full-time military duty, albeit in a state status, and is receiving many benefits as if on active duty. It is small recompense for this heinous offense that the AGR soldier may be administratively sanctioned.

E. PROSECUTION OF CRIMES COMMITTED DURING "STATE STATUS"

SCENARIO 11: An ARNG AGR soldier serving on full-time duty under 32 U.S.C. § 502(f) commits larceny, bribery, and various conflict of interest offenses.

This scenario illustrates the absence of federal military jurisdiction over ARNG AGR personnel. They are not subject to the UCMJ[295] and, while it may be possible to prosecute the ARNG soldier in a federal district court under federal bribery or conflict of interest statutes, the applicability of these federal statutes is not clear.[296] Such soldiers are subject to a "state UCMJ,"[297] but punishment options thereunder are severely limited.[298] Therefore, prosecution in many

---

[295]*E.g.*, AR 138-18, para. 12.

[296]18 U.S.C. § 201 (1982) established bribery of public officials as a federal crime. The term "public official" is defined, in part, as "an officer or employee or person acting for or on behalf of the United States. . . ." Although ARNG AGR soldiers are clearly state employees, the question remains whether they are "person[s] acting for or on behalf of the United States." *See* Maryland v. United States, 381 U.S. 41, 48 (1965) (National Guardsmen, when not in federal service, are state employees); *cf.* Dixson v. United States, 52 U.S.L.W. 4262, 4264-66 (U.S. 1984) (person acting for or on behalf of the United States need not be in a formal federal employment relationship; only a degree of responsibility in administering a federal program or policy is required). Moreover, 18 U.S.C. § 202 (1982) defines "special Government employee" and "officer of the United States" for the purpose of various conflicts of interest crimes. Although the definition expressly addresses the status of Reservists (including members of the National Guard of the United States), it is silent as to full-time National Guard personnel.

[297]*See* 32 U.S.C. §§ 326-322 (1982).

[298]*E.g.*, *id.* at § 327(b) provides:

> (b) A general court-martial [of the National Guard not in Federal service] may sentence to—
>
> (1) a fine of not more than $200;
>
> (2) forfeiture of pay and allowances;
>
> (3) a reprimand;
>
> (4) dismissal or dishonorable discharge;
>
> (5) reduction of a noncommissioned officer to the ranks; or
>
> (6) any combination of these punishments.

Id. at § 330 authorizes the substitution of one day of confinement for each dollar of authorized fine. These punishments are substantially less severe than an ARNGUS AGR soldier faces under the UCMJ. Various papers have been written concerning the "state UCMJs." The following unpublished manuscripts are available in the Library of The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia: Dietz, *Military Justice Provisions for the National Guard Not in Federal Service* (undated); Martin, *The National Guardsman in State Active Duty: A Federal Puppet or State Employee* (1975); Winkler, *The New York Code of Military Justice* (1975); York, *State Codes of Military Justice* (1958). The new authorizations for National Guard (state status) AGR personnel should add impetus to the needed reform of this system of justice.

cases may fall totally to state criminal statutes.

In conducting a review of the pending legislation that defines the status of ARNG AGR personnel,[299] the suitability and consistency of "state UCMJs" and other state laws should be reviewed. Moreover, clarification of the applicability of the various conflict of interest crimes in Title 18 to ARNG AGR personnel is needed. Absent these actions, ARNG AGR personnel who commit abuse of position offenses may be treated much more leniently than would those similarly situated ARNGUS AGR personnel.

V. CONCLUSION: AGR—KEY TO A TOTAL FORCE

This article has examined the creation and early years of the AGR program. The analysis demonstrates that "AGR" is truly a new military personnel status with its own set of challenges. Comprehensive legislation is recommended to clarify the status of ARNG AGR members and amendments to the Rules for Courts-Martial are encouraged to fully implement Article 3(a), UCMJ. Various other recommendations are made concerning military personnel law and criminal law issues encountered in the administration of the new program.

As some of these details are resolved, the services will become more comfortable with the existence of the AGR program and commanders, Active and Reserve alike, will increasingly find imaginative ways for AGR soldiers to aid the national defense. The Total Force Policy makes sense; A substantial Reserve force should be easily integrated into operational missions of the United States Armed Forces.

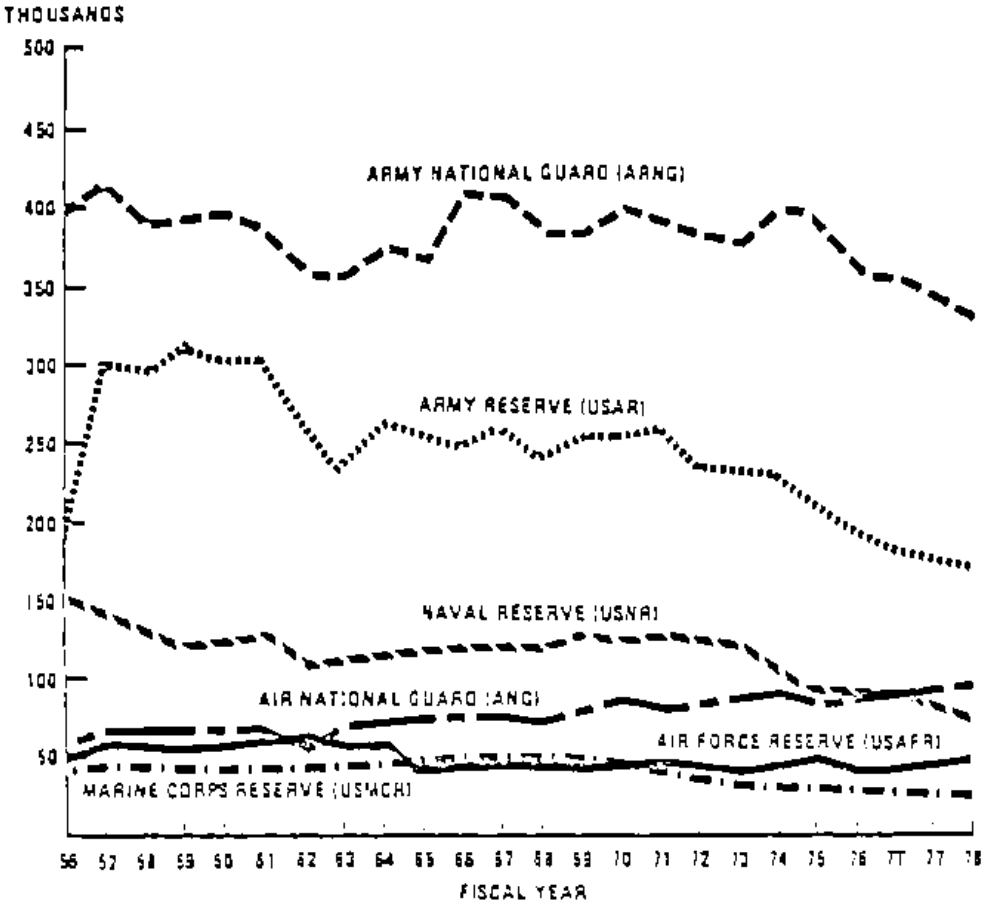
In conclusion, recall the example of the Total Force Policy provided in section I. The special talents and skills of Reservists were crucial in accomplishing the military mission in Grenada. Yet the credit for this successful integration of Reserve and Regular forces rests largely with one individual: an Army Reserve major who made an advance trip to Grenada to determine exactly which Reserve personnel would be needed.[300] This major was an AGR officer, an indispensible link between the vast Reserve potential of the United States Armed Forces and the missions of its Regular Forces.

---

[299] *See supra* text accompanying notes 114-20.
[300] *See supra* note 3.

APPENDIX 1

STRENGTH OF SELECTED RESERVE (TOTAL PAID DRILL)

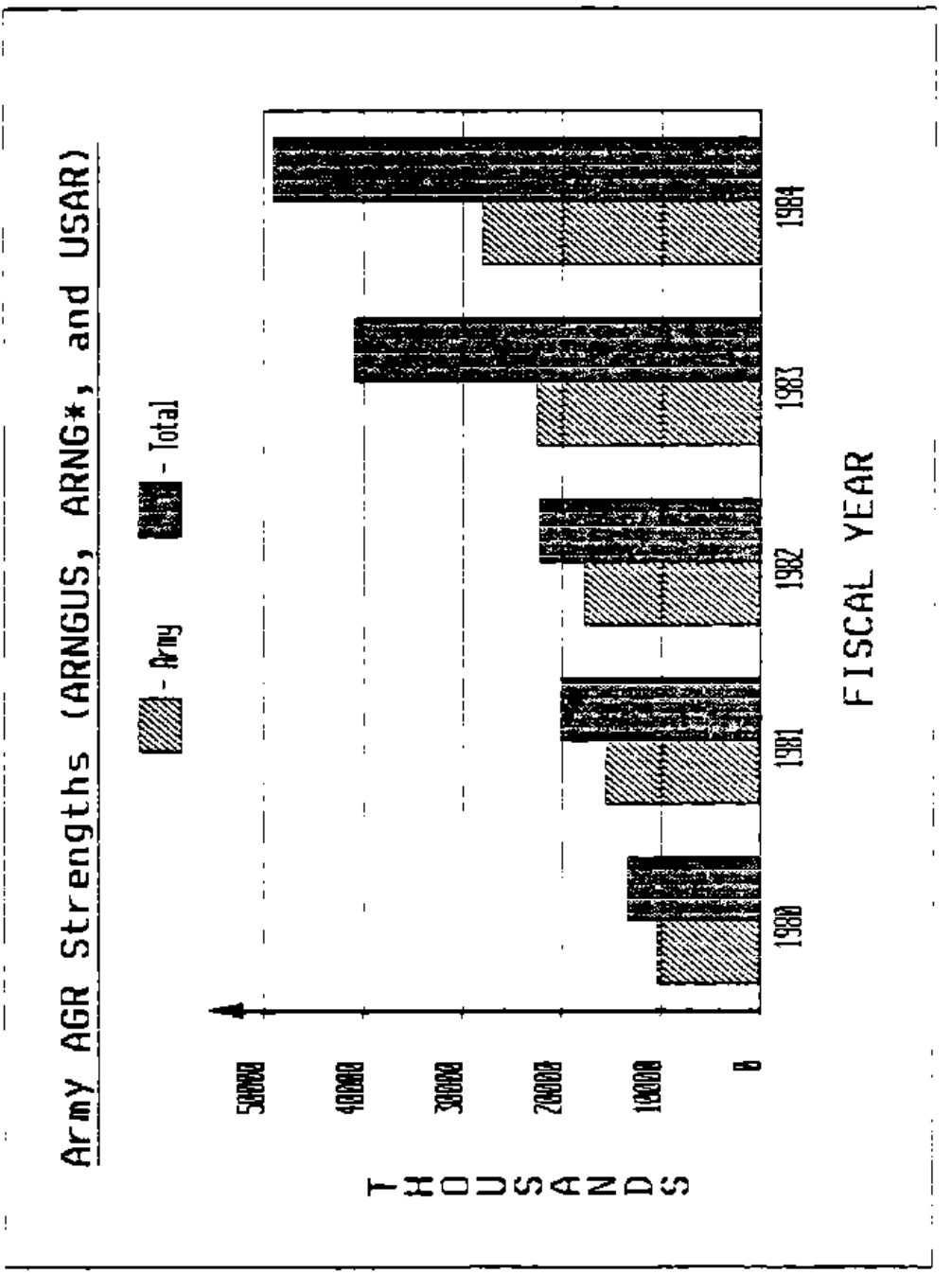


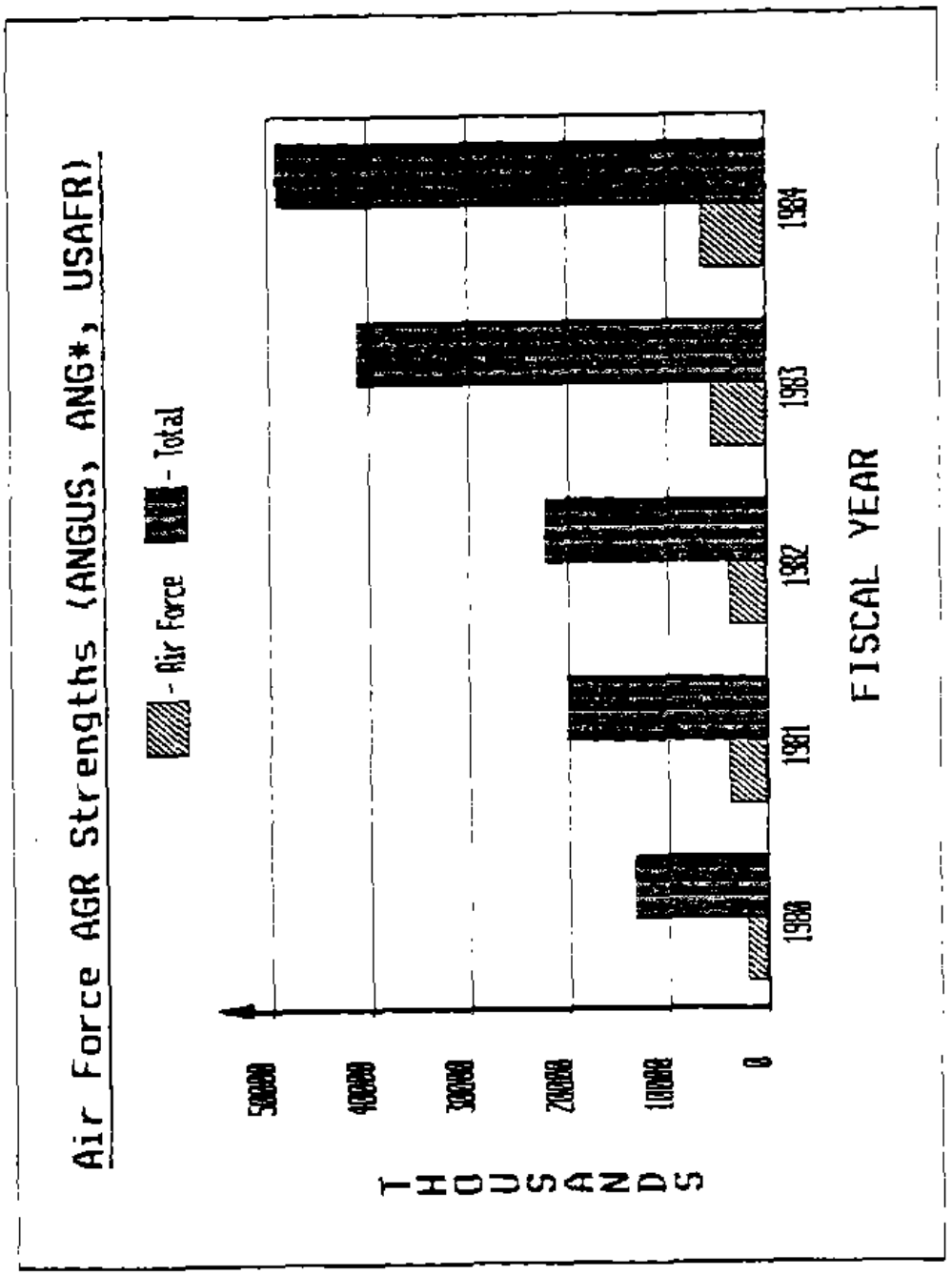
Source: Department of Defense, Annual Report, Fiscal Year 1980, at 285 (1979).

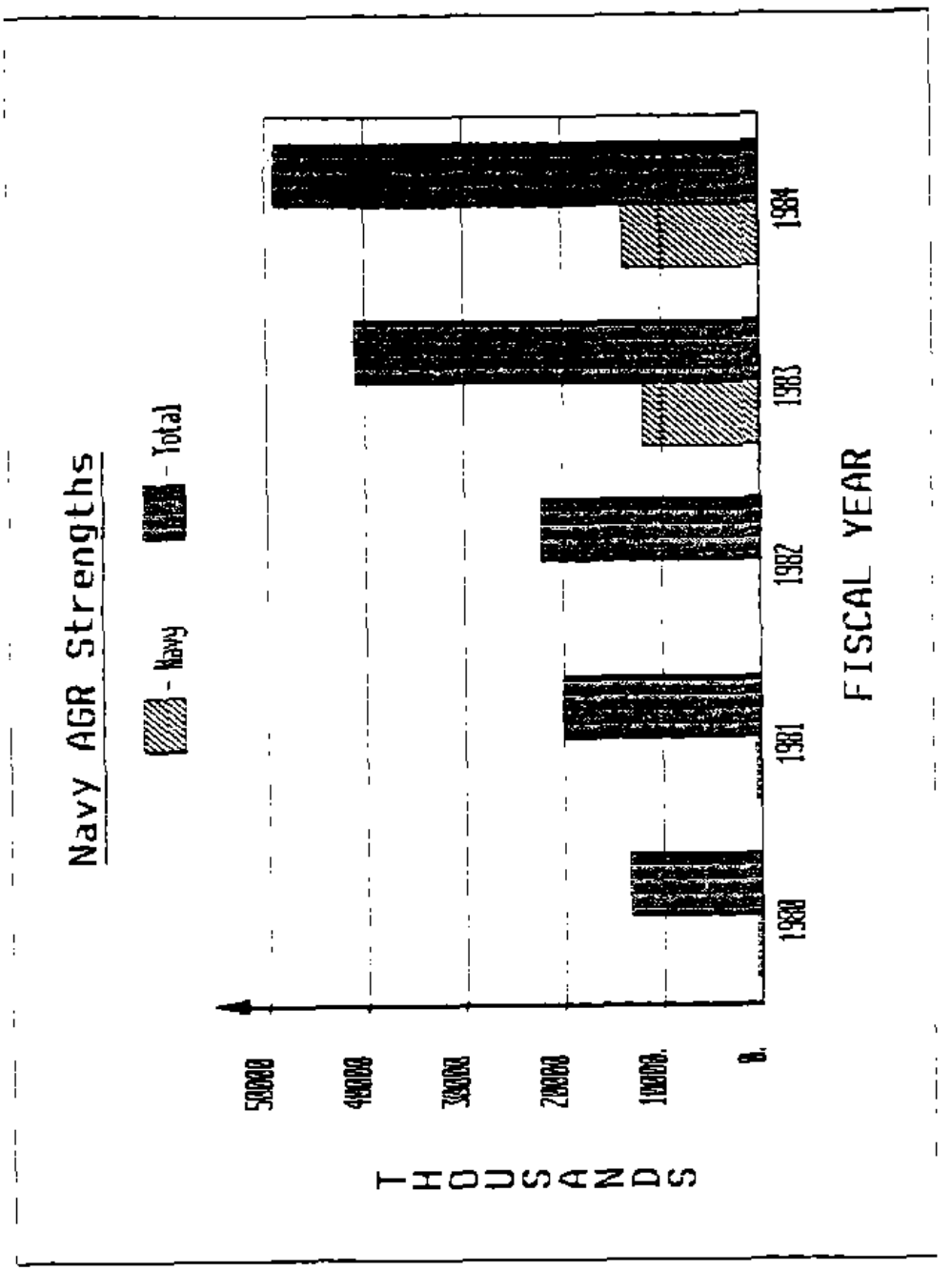
APPENDIX 2

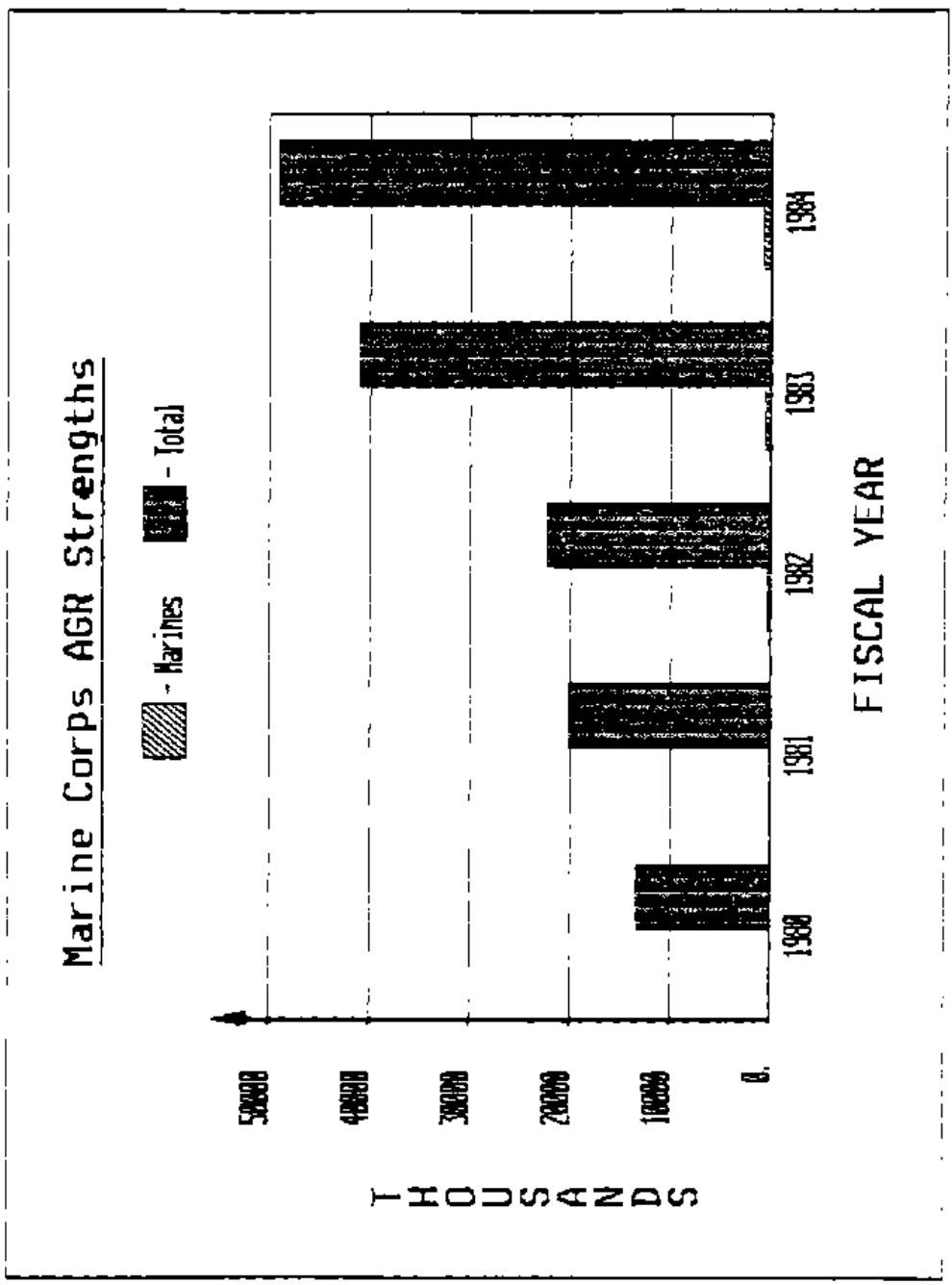
AGR STRENGTHS

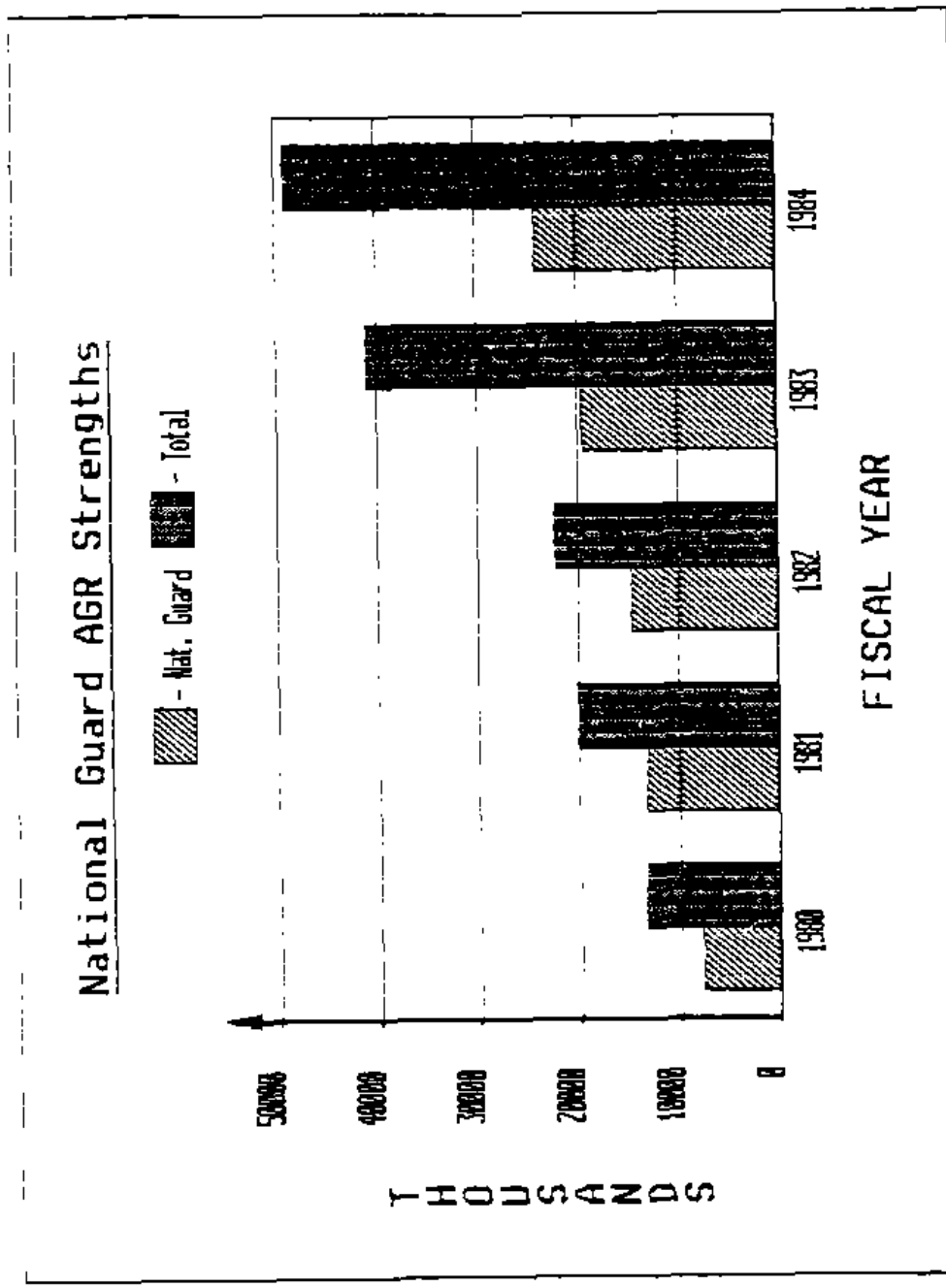
Source: The following graphs compile data from the Department of Defense Authorization Acts, FY 1980 through FY 1984 (acts cited in full in notes 55 and 68).

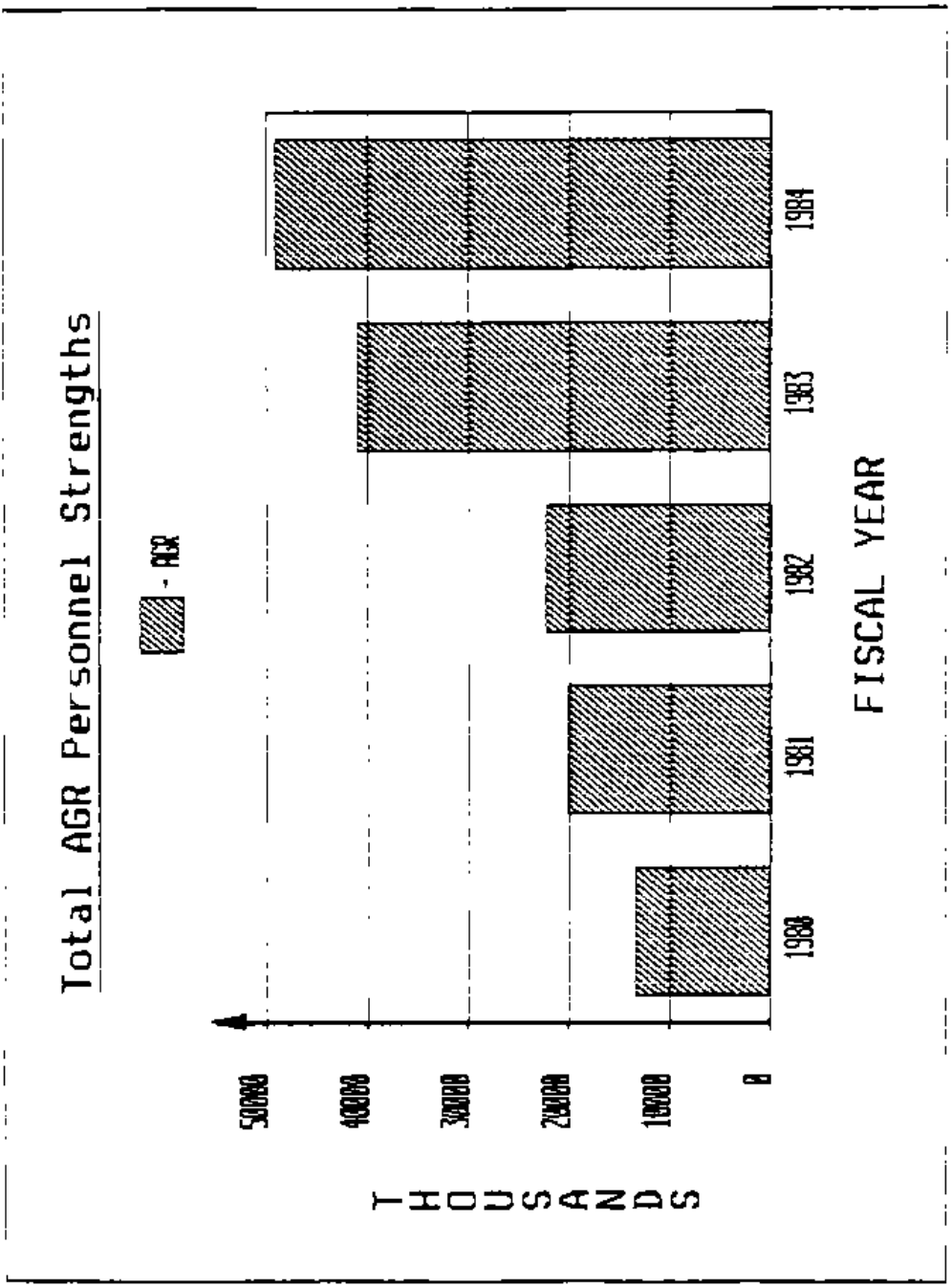

Army AGR Strengths (ARNGUS, ARNG*, and USAR)
- Army
- Total
THOUSANDS
500000
400000
300000
200000
100000
0
1980
1981
1982
1983
1984
FISCAL YEAR


Air Force AGR Strengths (ANGUS, ANG*, USAFR)
- Air Force
- Total
THOUSANDS
500000
400000
300000
200000
100000
0
1980
1981
1982
1983
1984
FISCAL YEAR


Navy AGR Strengths
- Navy
- Total
THOUSANDS
FISCAL YEAR
1980
1981
1982
1983
1984


Marine Corps AGR Strengths
- Marines
- Total
THOUSANDS
FISCAL YEAR
1980
1981
1982
1983
1984


National Guard AGR Strengths
- Nat. Guard
- Total
THOUSANDS
FISCAL YEAR
1980
1981
1982
1983
1984


Total AGR Personnel Strengths
- AGR
THOUSANDS
500000
400000
300000
200000
100000
0
1980
1981
1982
1983
1984
FISCAL YEAR

VOLUNTARY AND INVOLUNTARY EXPERT TESTIMONY IN COURTS-MARTIAL

By Major Alan K. Hahn*

I. INTRODUCTION: THE EXPANSION OF EXPERT TESTIMONY

Expert testimony occupies an important place in military criminal law. Expert testimony has been allowed in such traditional areas as blood grouping,[1] time of death,[2] and voice identification[3] and also in more unusual areas such as security classification of information[4] and blackmarket value of stolen goods.[5] While expert testimony has been disallowed in such areas as the polygraph,[6] use of body language to determine truthfulness,[7] or truthfulness of homosexuals,[8] developments in the social and physical sciences have led to a relentless expansion of subjects appropriate for expert testimony. In recent years, bite-mark identification evidence[9] has been allowed, while expert testimony concerning battered child syndrome,[10] rape

---

*Judge Advocate General's Corps, United States Army. Currently assigned as an Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army, 1982 to present. Formerly Trial Counsel, 8th Infantry Division (Mechanized), Baumholder, Federal Republic of Germany, 1978-81; G-2 Plans Officer, 1st Armored Division, Ansbach, Federal Republic of Germany, 1973-75; Tank Platoon Leader, 1st Armored Division, Illesheim, Federal Republic of Germany, 1971-73. J.D., *cum laude*, University of Wisconsin, 1978; B.A., *cum laude*, Marquette University, 1971. Completed 30th Judge Advocate Graduate Course, 1981-82; 87th Judge Advocate Officer Basic Course, 1978; Armor Officer Basic Course, 1971. Author of *Previous Acquittals, Res Judicata, and Other Crimes Evidence Under Military Rule of Evidence 404(b)*, The Army Lawyer, May 1983, at 1; *Preparing Witnesses For Trial—A Methodology for New Judge Advocates*, The Army Lawyer, July 1982, at 1. Member of the bars of the States of Maine and Wisconsin.

[1]United States v. Russell, 15 C.M.A. 76, 35 C.M.R. 48 (1964).
[2]United States v. Hurt, 9 C.M.A. 735, 27 C.M.R. 3 (1958).
[3]United States v. Wright, 17 C.M.A. 183, 37 C.M.R. 447 (1967).
[4]United States v. Grow, 3 C.M.A. 77, 11 C.M.R. 77 (1953).
[5]United States v. Hood, 12 M.J. 890 (A.C.M.R. 1982).
[6]United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1981).
[7]United States v. Clark, 12 M.J. 978 (A.F.C.M.R. 1982).
[8]United States v. Adkin, 5 C.M.A. 492, 18 C.M.R. 116 (1954); United States v. O'Connell, 18 C.M.R. 881 (A.F.B.R. 1955).
[9]United States v. Martin, 13 M.J. 66 (C.M.A. 1982).
[10]United States v. Irvin, 13 M.J. 749 (A.F.C.M.R.), granted, 14 M.J. 438 (C.M.A. 1982). *Cf.* United States v. Snipes, 18 M.J. 172 (C.M.A. 1984) (no abuse of discretion for military judge, absent defense objection and in a bench trial, to allow expert testimony on behavior patterns of sexually abused children and their families.

trauma syndrome,[11] and the unreliability of eyewitness identification evidence[12] has yet to be permitted.

In addition to general developments in the social and physical sciences, recent specific developments in urinalysis and in rape cases will further expand the use of experts in military courts. In 1981, the Department of Defense generally eased regulatory restrictions on the use of urinalysis tests.[13] This move was largely precipitated by the decision of the Court of Military Appeals in *United States v. Armstrong*,[14] which apparently removed the self-incrimination obstacles of the Fifth Amendment of the U.S. Constitution[15] and Article 31 of the Uniform Code of Military Justice[16] and paved the way for the admission into evidence of urinalysis results. Other remaining obstacles to the admission of urinalysis test results were dislodged by the court in *Murray v. Haldeman*.[17] Issues remaining after *Murray*, such as passive inhalation,[18] existence of physiological or psychological effects from the presence of drug metabolites in the urine,[19] and sufficiency of the tests to prove guilt beyond a reasonable doubt[20] are scientific and their resolution will require expert testimony.

In *United States v. Moore*,[21] the court allowed two psychologists and a psychiatrist to testify that the rape victim could unknowingly place herself in a sexually compromising situation, that she would be

---

[11]United States v. Hammond, 17 M.J. 218, 219 n. 1 (C.M.A. 1984) (allowed in principle rape trauma evidence in sentencing, but reserved issue of admissibility on the merits). *See generally* Portley, *Rape Trauma Syndrome: Modifying the Rules in Rape Prosecution Cases*, The Army Lawyer, Nov. 1983, at 1.

[12]United States v. Hulen, 3 M.J. 275 (C.M.A. 1977) (interracial identification not a demonstrable scientific principle); United States v. Dodson, 16 M.J. 921 (N.M.C.M.R. 1983) (psychological testimony on memory and perception not generally accepted in scientific community); United States v. Hicks, 7 M.J. 561 (A.C.M.R. 1979) (adopts four-part test to admit testimony on eyewitness unreliability. *See infra* note 24.

[13]Deputy Secretary of Defense Memorandum, Alcohol and Drug Abuse, Dec. 28, 1981 (popularly known as the "Carlucci memorandum").

[14]9 M.J. 374 (C.M.A. 1980).

[15]U.S. Const. amend. V.

[16]Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1976) [hereinafter cited as U.C.M.J.].

[17]16 M.J. 74 (C.M.A. 1983). The court found compulsory urinalysis to be a reasonable Fourth Amendment seizure not prohibited under the Fifth Amendment or Article 31 self-incrimination privileges, not prohibited by the Military Rules of Evidence, and, on these facts, not prohibited by due process.

[18]*Id.* at 76 n.1. *See also infra* note 186.

[19]*Id.* at 80. The court stated that for subject-matter jurisdiction to exist for a use offense that occurred while the member was on extended leave the government must show the member is subject to physiological or psychological effects from the presence of the drug metabolite in the urine upon return to duty. It is unclear if the effects must be actual or potential.

[20]*Id.* at 83 (Fletcher, J., concurring in the result).

[21]15 M.J. 354 (C.M.A. 1983).

likely to consent to intercourse upon a demonstration of force by a male, and that she was unlikely to falsely claim rape.[22] With the door opened by *Moore* to expert testimony on a rape victim's personality traits and with testimony on rape trauma syndrome on the merits waiting in the wings,[23] expert testimony may well see increased use in this area.

If the test of *Frye v. United States*,[24] which requires that scientific evidence be generally accepted in its relevant scientific community, continues to apply in military law, it may slow down the expanded use of experts. Even if the *Frye* test survives, however, counsel still must litigate its application to a given theory or technique. Further,

---

[22]Additionally, Judge Cook found admission of expert testimony on rape psychology and rape classifications to be error, but harmless. 15 M.J. at 364. Judge Fletcher found this evidence to be relevant background to the expert's opinion on the absence of trauma in rapes. 15 M.J. at 366, 367 (Fletcher, J., concurring in the result).

[23]*See supra* note 11. *See also* United States v. Elvine, 16 M.J. 143 (C.M.A. 1983) (admission of post-offense sexual conduct of rape victim may be constitutionally required to show absence of emotional trauma). *See generally* Ross, *The Overlooked Expert in Rape Prosecution*, 14 U. Toldeo L. Rev. 707 (1983).

[24]293 F. 1013 (D.C. Cir. 1923). The test was adopted in military law in United States v. Ford, 4 C.M.A. 611, 16 C.M.R. 185 (1954). The test has been much criticized as difficult to apply and as inconsistently applied. *See e.g.*, United States v. Moore, 15 M.J. 354, 373 (C.M.A. 1983) (Everett, C.J., dissenting) (some evidence allowed by majority on traits of rape victim did not meet the *Frye* test and should have been excluded). *See generally* Gianelli, *The Admissibility of Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197 (1980). It has also been suggested that *Frye* is not needed because jurors may be capable of understanding scientific evidence. *See generally* Imwinkelreid, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 100 Mil. L. Rev. 99 (1983). The applicability of *Frye* after adoption of Mil. R. Evid. 702 (scientific evidence admissible if will assist the trier of fact) is an open question. While the courts of military review continue to apply *Frye*, *see, e.g.*, United States v. Dodson, 16 M.J. 921 (N.M.C.M.R. 1983) (psychological testimony on memory and perception not generally accepted); United States v. Bothwell, 17 M.J. 684 (A.C.M.R. 1983) (psychological stress evaluation not generally accepted), the Court of Military Appeals has merely recognized the issue. United States v. Hammond, 17 M.J. 218, 220 n.4 (C.M.A. 1984); United States v. Martin, 13 M.J. 66, 68 n.4 (C.M.A. 1982). In United States v. Snipes, 18 M.J. 172 (C.M.A. 1984), Judge Cook, writing for a majority, stated, without mentioning *Frye*, that Mil. R. Evid. 702-705 broaden the admissibility of expert testimony. The value of *Snipes* as authority for the demise of *Frye* is limited, however, because *Frye* was not an issue in *Snipes* because the defense in *Snipes* did not object to the testimony, and because of Judge Cook's impending departure from the bench. Chief Judge Everett is apparently not ready to abandon *Frye*. *Moore*, 15 M.J. at 373. The constitutional right to present a defense may overcome the *Frye* test if it prohibits reliable and probative evidence, however. *See generally* Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial. Compulsory Process and Confrontation*, 101 Mil. L. Rev 1, 73-74 (1983) [hereinafter cited as Gilligan & Lederer]; Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 196-98 (1983).

objections based upon *Frye* are waivable[25] and *Frye* may be inapplicable under the relaxed rules of evidence at sentencing.[26]

Despite the frequent use of experts in military trials, the refinement of military law on experts has been spotty. Developed to some extent are such areas as qualifications of experts,[27] subjects of expert testimony,[28] standards for admissibility,[29] weight of expert testimony,[30] instructions on expert testimony,[31] use of hypotheticals, and the basis of an expert's opinion.[32] Far less developed is an area of increasing importance—how to procure the voluntary and involuntary testimony of experts.

The purpose of this article is to review existing military law on securing the voluntary and involuntary services of service member, government employee, and civilian experts. The Manual for Courts-Martial[33] and case law provide insufficient guidance on procuring the range of expert testimony and investigative services that are

---

[25]United States v. Rojas, 15 M.J. 902, 923 (N.M.C.J.R. 1983). *See* United States v. Snipes, 18 M.J. 172 (C.M.A. 1984).

[26]*See* United States v. Hammond, 17 M.J. 218, 219 n.1 (C.M.A. 1984); United States v. Breuer, 14 M.J. 723 (A.F.C.M.R. 1982).

[27]*See, e.g.*, United States v. Moore, 15 M.J. 354 (C.M.A. 1983) (psychologist qualified to evaluate personality traits); United States v. Fields, 3 M.J. 27 (C.M.A. 1977) (psychologist not qualified by training or experience to recognize or diagnose specific mental diseases or defects); United States v. Richards, 47 C.M.R. 544 (A.F.C.M.R. 1973) (security policeman qualified to opine on accused's recent amphetamine use); United States v. Maher, 46 C.M.R. 535 (N.C.M.R. 1972) (Army specialist four qualified as chemist); United States v. Oakley, 28 C.M.R. 451 (A.B.R. 1959) (military medical officer qualified to render opinion on accused's mental responsibility even though he had insufficient qualifications to become a psychiatrist in civilian life). The qualification rule of Mil. R. Evid. 702 does not differ significantly from the former para. 138e, Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM]. *Moore*, 15 M.J. at 361.

[28]*See supra* notes 1-12 and accompanying text.

[29]*See supra* note 24.

[30]United States v. Williams, 14 C.M.R. 242 (A.B.R. 1953) (court could disregard four experts and find the accused sane based upon lay testimony); United States v. Hofues, 4 C.M.R. 356 (A.B.R. 1952) (court could reject testimony of psychiatrist who said accused had a conditioned reflex to draw and shoot when someone said "draw"). *Cf.* United States v. Michaud, 2 M.J. 428 (A.C.M.R. 1975) (government expert's opinion based on a cursory custodial interview insufficient to overcome accused's four psychiatrists and other lay witnesses).

[31]*See, e.g.*, United States v. Wynn, 11 C.M.A. 195, 29 C.M.R. 11 (1960) (error to imply in instructions that opinion of expert is binding on court-members); United States v. Fountain, 2 M.J. 1202 (N.M.C.M.R. 1976) (military judge not required to instruct that lay testimony can overcome expert psychiatric testimony).

[32]*See infra* notes 188, 189 and accompanying text.

[33]On 13 April 1984, President Reagan signed Executive Order No. 12473, 79 Fed. Reg. 17152 (23 Apr. 1984), which promulgated the Manual for Courts-Martial, 1984. The Manual took effect on 1 August 1984 for all courts-martial initiated after that date. The Rules for Courts-Martial in the 1984 Manual will be cited as R.C.M.

necessary for modern criminal trials and to insure a fair trial for the accused. This article will propose a Manual provision following federal law and standards to meet these needs.

II. SECURING VOLUNTARY EXPERT TESTIMONY

A. SERVICE MEMBER- AND GOVERNMENT EMPLOYEE-EXPERTS

Securing the voluntary testimony of the service member-expert normally presents few problems. Whether drawn into the case in the normal course of duty (forensic chemists) or specifically drawn in by the court-martial process (psychiatrists in sanity boards),[34] attendance of the military expert can be secured by notice to the member or his or her commander[35] and by compliance with applicable service regulations.[36] If materiality and necessity[37] are shown in a timely manner,[38] the military expert should be produced regardless of the situs of the court-martial or the duty station of the expert.[39]

As with service member-experts, government employee-experts normally present few problems. Because most scientific analysis is

---

[34]R.C.M. 706, Inquiry into the mental capacity or mental responsibility of an accused; MCM, 1969, para. 121. *See also* Mil. R. Evid. 706, Court appointed experts.

[35]R.C.M. 703(e)(1); MCM, 1969, para. 115b.

[36]*See e.g.*, U.S. Dep't of Army, Reg. No. 195-2, Criminal Investigation—Criminal Investigation Activities, para. 6.4 (C.2, 15 Jan. 1980) [hereinafter cited as AR 195-2] (court appearance of U.S. Army Criminal Investigation Laboratory experts).

[37]*See infra* notes 45-61 and accompanying text.

[38]Untimeliness *per se* does not justify refusing a witness request. The request must be so untimely as to interfere with the orderly prosecution of the case. *Compare* United States v. Hawkins, 6 C.M.A. 135, 19 C.M.R. 261 (1955) (error to refuse production of witness where request was made the day before trial and witness was available in post stockade) *with* United States v. Mitchell, 14 M.J. 260 (A.C.M.R. 1981) (no error to refuse production at court-martial in Korea of witness on leave in the United States where defense knew of witness well before trial and waited until defense case in chief to request witness' presence). *See* United States v. Vietor, 10 M.J. 69, 78 (C.M.A. 1980) (Everett, C.J., concurring) (defense counsel remiss in making a last-minute request for expert without communicating with expert). *See also* R.C.M. 703(c)(2)(C), Time of request [for witnesses].

[39]*See* United States v. Davis, 19 C.M.A. 217, 41 C.M.R. 217 (1970). In *Davis*, the court held that a service member must be actually unavailable before a deposition may be substituted for live testimony despite language in Article 49 allowing depositions to be used if a witness is more than 100 miles from the trial situs. U.C.M.J. art. 49.

done in military facilities,[40] government employees are frequent witnesses. The current Manual for Courts-Martial specifically addresses government employees,[41] and compliance with the normal requirements of materiality, necessity, timeliness, and with regulations will secure attendance.[42] Expert fees are not required.[43]

Two areas of potential controversy exist in military law: first, what showing is required to obtain the presence of a service member or government employee expert; and, second, what is the remedy if the appropriate commander or other authority should refuse to make the expert available?[44]

Because Rule for Courts-Martial 703(d) and its predecessor, paragraph 116 of the 1969 Manual only govern the contractual employment of civilian experts,[45] the provisions of R.C.M. 703(b)(1) and paragraph 115 must govern the procurement of expert service member and government testimony.[46] The standard of materiality for production of witnesses is currently in flux. Paragraph 115 required that material and necessary witnesses be produced. In interpreting paragraph 115, the Court of Military Appeals may have created a strict definition of materiality. In *United States v. Bennett*,[47] the court stated that the true test of materiality is "es-

---

[40]In the Army, all forensic laboratory examinations must be conducted in an Army Criminal Investigation Laboratory which is under the control of the U.S. Army Criminal Investigation Command. *See* AR 195-2, para. 6-3. Urine testing is conducted at drug testing laboratories under control of The Surgeon General. *See* U.S. Dep't of Army, Reg. No. 600-85, Personnel—General, Alcohol and Drug Abuse Prevention and Control Program, para. 1-17b (I05, 11 Aug. 1983).

[41]The 1969 Manual merely stated that the attandance of service members not on active duty should be obtained "in the same manner as the attendance of civilian witnesses not in government employ." MCM, 1969, para. 115*b*. Past Manuals have specifically addressed government employees. *See, e.g.*, Manual for Courts-Martial, U.S. Army, 1908, 43 (Rev. ed.). In the new Manual, the Discussion to R.C.M. 703(e) states: "Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose." The Analysis to R.C.M. 703(d) states that the Rule "does not apply to persons who are government employees. . . ."

[42]*See, e.g.*, AR 195-2, para. 6-4.

[43]*See* supra note 41.

[44]Presumably the service member or government employee expert would "willingly" attend if so directed by competent authority. The service member who refused to go would be subject to criminal penalties for failing to obey a lawful order, U.C.M.J. arts. 90, 91, and 92, or wrongful refusal to testify, art. 134. The government employee could be dismissed. After discharge or dismissal, a former service member or government employee could nonetheless be compelled to testity. *See infra* notes 154-75 and accompanying text.

[45]*See infra* notes 64-72 and accompanying text.

[46]*See* United States v. Vietor, 10 M.J. 698 (C.M.A. 1980).

[47]12 M.J. 463 (C.M.A. 1982).

sentiality": "If a witness is essential for the prosecution's case, he will be present or the case will fail. The defense has a similar right."[48] This language was a significant departure from existing law that apparently required a witness to be produced merely if the witness would help the defense or hurt the government.[49] While a trial level standard as to *how much* a witness must hurt the government or help the defense was never clearly articulated, the appellate standard was whether there was a reasonable likelihood that the evidence would have affected the judgment of the trier of fact.[50] The "essentiality" standard not only appears more rigorous than the reasonable likelihood standard, but arguably is also to be applied at the trial level to determine whether the process (travel order or subpoena) should issue.[51] It may be, however, that Bennett's "essentiality" was only meant as a test for prejudice to be applied to a witness for whom process should have issued, but who was unavailable, for example, because of nonamenability to process.[52]

In any event, despite the confusion engendered by *Bennett*,[53] the new Manual in R.C.M. 703(b)(1) omits the word "material" and states that the standard for witness production is "relevant and necessary." The non-binding Discussion to the rule explains that to be necessary, the testimony should merely contribute "in some positive way" on a matter in issue. Whether this becomes the standard is ultimately a matter for judicial determination.

The courts have developed a separate materiality standard for expert witnesses who produce laboratory or other admissible reports.[54]

---

[48]*Id.* at 465 n.4.

[49]United States v. Lucas, 5 M.J. 167 (C.M.A. 1978); United States v. Ituralde-Aponte, 1 M.J. 196 (C.M.A. 1975).

[50]United States v. Hampton, 7 M.J. 284 (C.M.A. 1979). *Cf.* United States v. Dorsey, 16 M.J. 1, 6 (C.M.A. 1983) (materiality for purposes of determining if evidence of sexual conduct of rape victim is constitutionally required is to be analyzed in terms of importance of issue for which evidence offered, extent to which issue in dispute, and nature of other evidence on issue).

[51]*See generally* Gilligan & Lederer, *supra* note 24, at 13-16. United States v. Phillips, 15 M.J. 671 (A.F.C.M.R. 1983) (military judge to apply essentiality test). Courts of review have split, however, on which standard to apply. *Compare id.* (applies "essentiality") *with* United States v. Palmer, 16 M.J. 501, 502 (A.F.C.M.R. 1983) (applies reasonable likelihood standard). For further discussion of Bennett, *see infra* notes 107-10 and accompanying text.

[52]*Cf.* R.C.M. 703(b)(3) which requires abatement of the proceedings if a witness is unavailable within the meaning of Mil. R. Evid. 804(a) and is of such central importance to an issue that the witness' presence is essential to a fair trial. The Analysis to this Rule indicates that the Drafters relied in part on *Bennett*.

[53]The language of *Bennett* was characterized as an unhelpful exercise in semantics. *Bennett*, 12 M.J. at 472 (Fletcher, J., concurring in the result).

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

In *United States v. Vietor*,[55] the Court of Military Appeals held that the admission of a laboratory report does not give the accused an automatic right to production of the person who performed the test. While the three judges differed in their views of what showing of materiality must be made,[56] the decision is being interpreted as requiring only "some plausible showing" of materiality before the person who performed the test must be produced.[57]

If the required showing for production is met, substitutes or alternatives to live testimony are deemed inadequate,[58] and the appropriate authority does not allow the service member or government employee expert to testify, the military judge should abate the proceedings until the expert is produced or an adequate substitute expert is provided. This is not only the remedy developed in case law under paragraph 115 for material witnesses,[59] but also is explicitly stated in the new Manual as the remedy for failure to produce an unavailable witness[60] or to employ a civilian expert.[61]

B. CIVILIAN EXPERTS

Voluntary or non-compelled civilian expert services may be obtained either through a general contract by the government with a firm[62] or, more commonly, by an individual contract with an expert on a case-by-case basis. Individual contracts in the new Manual are governed by R.C.M. 703(d) which provides:

---

[55]10 M.J. 69 (C.M.A. 1980).

[56]Judge Cook, writing for the court, apparently upheld the materiality requirements of para. 115. Judge Everett, concurring in the result, stated that strict compliance with para. 115 is not required and that materiality need not be demonstrated in detail. Judge Fletcher, concurring in the result, would require the chemist to be made available unless the chemist was actually unavailable or the utility of confrontation was remote. *See generally* Gilligan & Lederer, *supra* note 24, at 76-79.

[57]United States v. Davis, 14 M.J. 847 (A.C.M.R. 1982) (reversible error to fail to produce chemist who did not do the best test and did not authenticate the standard).

[58]United States v. Bennett, 12 M.J. 463 (C.M.A. 1982). Alternatives to live testimony are permissible provided that they do not diminish the fairness of the proceedings. United States v. Scott, 5 M.J. 431 (C.M.A. 1978). *See also* United States v. Meadow, 14 M.J. 1002 (A.C.M.R. 1982) (reversible error to fail to produce witness to accused's character for trustworthiness).

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

[60]R.C.M. 703(b)(3), Unavailable witness.

[61]R.C.M. 703(d).

[62]Within the Department of Defense, urine testing must be done in service laboratories. Contracting out to civilian drug testing laboratories is permitted if they are certified by DOD, incorporated into the DOD quality program, and maintain DOD chain of custody requirements. Dep't. of Defense Directive No. 1010.1, Drug Abuse Testing Program, para. 7 (16 Mar. 1983). The Department of the Navy has contracted with Mead Compuchem to perform gas chromatography/mass spectroscopy confirming tests of urine specimens. A contract provision states that Mead Compuchem will provide expert testimony at courts-martial regarding tests performed under the contract.

> *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated costs of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

R.C.M. 703(d) is very similar to paragraph 116[63] of the 1969 Manual. It retains the same provisions regarding a showing of necessity and the need for prior approval by the convening authority. It merely clarifies what the military judge is to do, *i.e.*, abate the proceedings, if the military judge disagrees with the convening authority as to the necessity of employing an expert. Surprisingly little case law on paragraph 116 and its precedessors has been generated and many issues regarding its scope, adequacy, and fee arrangements have not been fully addressed.

---

[63]Para. 116, MCM, 1969 provided:

> 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. 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.

1. The Scope of R.C.M. 703(d)

Understanding the scope of R.C.M. 703(d) is essential to a clear resolution of later issues in this article. Specifically, it is important to establish whether or not these provisions are limited to voluntary contractual arrangements or whether they also apply to compelled testimony by an expert.[64]

The history, older interpretations, and language of these paragraphs indicate that they apply *only* to voluntary, contractual relationships. The Manual language on experts has been remarkably unchanged for the almost one-hundred years of the provision. The provision originally appeared[65] in the 1893 Manual in a footnote which stated:

> The Secretary of War has the authority to order the employment of experts in a trial before a court-martial, and to determine the rate of compensation to be paid them; and he is not limited to the rate prescribed by the Army Regulation for civilian witnesses, who can be compelled to testify.[66]

The original provision on its face distinguished between experts who must be employed at special fees and ordinary civilian witnesses who can be compelled. Although the footnote explained that the authority for employment was the Army authorization act for fiscal year 1892,[67] the Court of Claims in *Smith v. United States*[68] had previously held that the Secretary of War had the authority to order such employment. The *Smith* court made clear that, unless the expert was a witness to the facts of the case,[69] the government could only acquire the expert's services by consent, that is, by contract.[70] The 1893 Manual provision implemented this view.

The "employment" language of the 1893 Manual remains to this day. Not only does "employment" in its usual sense imply a contractual relationship,[71] but, consistent with its history, it apparently has

---

[64]*See supra* notes 152-209 and accompanying text.

[65]The earlier Manual, A. Murray, Instructions for Court-Martial, (2d ed. 1891), was silent on expert witnesses.

[66]A. Murray, A Manual for Courts-Martial, 50 n.2 (3d ed. 1893).

[67]*Id.*

[68]24 Ct. Cl. 209 (1889). *See also* W. Winthrop, Military Law and Precedents 339 n.69 (1920 reprint ed.).

[69]*Smith*, 24 Ct. Cl. at 216.

[70]*Id.* This view is no longer generally held, however. *See supra* note 154.

[71]Black's Law Dictionary 471 (5th ed. 1979). The Analysis to R.C.M. 703(d) provides further support, stating that the Rule "does not apply to persons who are. . . *under contract* to the *Government to provide services which would otherwise fall within* this section" (emphasis added).

never been judicially interpreted to mean anything but a *voluntary*, contractual relationship.[72]

2. The Meaning of "Necessity"

The standard for employment of experts is "necessity." The term first appeared in the 1898 Manual[73] and remains the standard in R.C.M. 703(d).[74] While paragraph 116 was itself silent on the issue, Military Rule of Evidence 706[75] (Court appointed experts), case law,[76] and commentators[77] have stated that paragraph 116 was to be read with paragraph 115's test of materiality and necessity. The new Manual continues this analytic method in R.C.M. 703(d) by explicitly stating the witness production test of relevance and necessity in the employment of experts rule.[78] While *how* to read the tests for production of witnesses and employment of experts together has not been directly discussed by the authorities, it is clear that "necessity" in the employment of experts has come to mean necessity because government expert services are inadequate or unavailable.

Relatively few military cases interpret paragraph 116 and only one interprets necessity, partly because government expert services are normally available and adequate[79] or because the issue is sometimes resolved as a failure to produce a material and necessary witness when the desired expert is already identified.[80] Also, the appellate courts have apparently adopted the view that the expert's testimony must be admissible before an expert must be employed.[81]

---

[72]Courts have, however, misapprehended the need to employ experts who could otherwise be compelled, *see infra* text accompanying notes 161-64.

[73]Manual for Courts-Martial, U.S. Army, 1898, 36 n.3 provided: "When the employment of experts is necessary in a trial by court-martial, the judge advocate will apply to the Secretary of War for authority to employ them and for a decision as to compensation to be paid them."

[74]R.C.M. 703(d) states: "The request shall include a complete statement of reasons why employment of the expert is necessary. ..."

[75]Mil. R. Evid. 706(a) states that "the employment and compensation of expert witnesses is governed by paragraphs 115 and 116 of this Manual." In the new Manual, Mil. R. Evid. 706(a) simply states: "The employment and compensation of expert witnesses will be governed by R.C.M. 703."

[76]United States v. Shelby, 29 C.M.R. 823 (A.F.B.R. 1960). *See* United States v. Salisbury, 7 M.J. 425 (C.M.A. 1979).

[77]*See generally* Gilligan & Lederer, *supra* note 24, at 10.

[78]R.C.M. 703(d) states: "A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary. ..."

[79]*See generally* United States v. Johnson, 22 C.M.A. 424, 47 C.M.R. 402 (1973).

[80]*See supra* note 76.

[81]*See supra* note 12 and cases cited therein. Some federal courts have adopted a more lenient view. *See, e.g.*, United States v. Sims, 617 F.2d 1371 (9th Cir. 1980) (admissibility of testimony only a factor to consider in necessity of appointing expert as expert can also render pretrial and trial assistance). For further discussion, *see infra* notes 117-33 and accompanying text.

The leading necessity case is *United States v. Johnson.*[82] Johnson requested employment of a civilian psychiatrist after refusing to cooperate with a military sanity board. Johnson's claim of necessity did not relate specifically to his mental condition, but rather on the absence of a physician-patient privilege in military law, an alleged partiality of government psychiatrists, and a fear that his admissions would be used against him.[83] The Court of Military Appeals found that necessity had not been shown. The court noted that the military judge had previously ruled that statements made during the sanity board could not be disclosed to the trial counsel[84] and, although there was no physician-patient privilege, that fact alone did not constitute necessity. Finally, the court found a bald assertion of partiality without supporting evidence as to the partiality of *these* sanity board members insufficient. The court further stated:

> In a different setting an accused may be entitled to relief of the kind sought here. A history of disturbances, former diagnoses, conflicts in military psychiatric opinions, or other circumstances may justify a defense need for the services of its own expert to examine the accused and to present testimony in his behalf at the trial. We say no more here than that this is not such a case.[85]

While *Johnson*'s necessity test has been applied in subsequent decisions,[86] its necessity language has not been further discussed. While the test was not explicitly adopted in R.C.M. 703(d), the drafters' analysis demonstrates that the Rule clearly intended to implement the *Johnson* view.[87]

---

[82]22 C.M.A. 424, 47 C.M.R. 402 (1973).

[83]*Id.* at 428, 47 C.M.R. at 406.

[84]*Id.* at 426, 47 C.M.R. at 404. *See also* Mil. R. Evid. 302, Privilege Concerning Mental Examination of an Accused.

[85]*Johnson* 22 C.M.A. at 428, 47 C.M.R. at 406.

[86]*E.g.*, United States v. Vaden, 1 M.J. 879 (A.F.C.M.R. 1976); United States v. Hines, 2 M.J. 1148 (N.C.M.R. 1975).

[87]The drafters' Analysis of R.C.M. 703(d) states in part:

> This subsection is based on para. 116 of MDM, 1960 (Rev.). *See also United States v. Johnson*, 22 U.S.C.M.A. 424, 47 C.M.R. 402 (1973); Hutson v. United States, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970). Because funding for such employment is the responsibility of the command, not for the court-martial, application to the convening authority is appropriate. In most cases, the military's investigative, medical, or other agencies can provide the necessary service. Therefore, the convening authority should have an opportunity to make available such services as an alternative. *Cf. United States v. Johnson, supra; United States v. Simmons*, 44 C.M.R. 804 (A.C.M.R. 1971), *pet. denied*, 21 U.S.C.M.A. 628, 44 C.M.R. 940 (1972).

3. The Adequacy of the Necessity Test

The paucity of authority on paragraph 116 and how to read paragraphs 115 and 116 together leads to analytical confusion because *both* paragraphs required necessity. "Material and necessary" witnesses must be produced under paragraph 115 and "necessary" experts must be employed under paragraph 116. The analytical confusion of two necessity tests continues in the new Manual which requires "relevant and necessary" witnesses to be produced under R.C.M. 703(b)(1) and "necessary" experts to be employed under R.C.M. 703(d). Further, since the adequacy of these Manual provisions generally or as tested against constitutional, ethical, and military due process constraints has yet to be addressed, these provisions should have been more carefully articulated to insure that these potential tests are met.

The existence of a constitutional standard for providing expert and investigative assistance is problematic because of the lack of clear Supreme Court precedent. In 1953, in *United States ex rel. Smith v. Baldi*,[88] the Court held that a state does not have a constitutional duty to appoint a psychiatric expert to aid an indigent defendant in an insanity defense.[89] The accused had contended that such appointment was necessary to provide adequate counsel. The validity of this pre-Warren Court decision has been questioned because of later Warren-era decisions such as *Griffin v. Illinois*[90] which explanded the rights of indigent defendants on equal protection grounds. Further, the reach of *Griffin* and its progeny for indigent accused's rights[91] has been clouded by *Ross v. Moffit*,[92] which focuses on minimum due process (adequate opportunity) for indigents rather than equal protection.[93] Not only is Supreme Court precedent clouded, but, because it is largely based upon indigency and focused on the appellate process, it is of little value to military law where indigency is irrelevant[94] and post-trial rights are fully protected.[95]

---

[88]344 U.S. 560.

[89]*Id.* at 568.

[90]351 U.S. 353 (1963) (right to trial transcript to perfect appeal).

[91]*E.g.*, Roberts v. LaVellee, 390 U.S. 40 (1967) (right to preliminary hearing transcript for habeas corpus proceeding); Long v. District Court, 385 U.S. 192 (1966) (per curiam) (right to free trial transcript for habeas corpus proceeding); Douglas v. California, 372 U.S. 353 (1963) (right to appointed counsel to perfect first appeal of right).

[92]417 U.S. 600 (1974) (no right to counsel for discretionary state appeals or certiorari petitions to United States Supreme Court).

[93]*See generally* Note, *Constitutional Law*, 49 Geo. Wash. L. Rev. 191 (1980).

[94]United States v. Toledo, 15 M.J. 255, 258 (C.M.A. 1983) (Everett, C.J., concurring).

[95]*See* U.C.M.J. arts. 63-76.

Challenges are possible under other constitutional theories, however, such as due process,[96] effective assistance of counsel,[97] compulsory process,[98] and confrontation.[99] Additionally, military due process[100] and ethical considerations[101] may provide a basis for attack.

For analytical clarity and to satisfy potential constitutional[102] and other challenges, the following steps should be adopted. This analysis combines the requirements for production of witnesses and employment of experts and eliminates the confusion of the two "necessary" tests that were in paragraphs 115 and 116[103] and that are now in R.C.M. 703(d). Generally, the analytical steps are drawn from compulsory process jurisprudence as adopted in military law.[104]

A written request for employment of experts should address the following:

a. *Is expert testimony relevant?* A determination that expert testimony is admissible,[105] otherwise relevant, and not cumulative from a

---

[96]*See, e.g.*, United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975); United States v. Simmons, 44 C.M.R. 804 (A.C.M.R. 1971). *See generally* Ross v. Moffit, 417 U.S. 600 (1970); Note, *The Indigents Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 50 Cornell L. Rev. 632, 637-39 (1970) [hereinafter cited as Note]. *See also* Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 Crim. L. Rev. 574, 581-86 (1982) [hereinafter cited as Decker].

[97]*See, e.g.*, Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980); Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967). *See generally* Decker, *supra* note 96, at 593-99; Note, *supra* note 96, at 640, 641; Annot., 34 A.L.R. 3d 1257, 1263-66 (1970).

[98]*See* United States v. Shelby, 29 C.M.R. 823 (A.F.B.R. 1960) (military's codification of compulsory process clause, U.C.M.J. art. 46, includes experts). *See generally* Decker, *supra* note 96, 16 590-93; Gilligan & Lederer, *supra* note 24, at 10.

[99]Expert assistance may be necessary to insure adequate cross-examination. United States v. Durant, 545 F.2d 823 (2d Cir. 1976). *See generally* Note, *supra* note 96, at 642, 643.

[100]*See* United States v. Toledo, 15 M.J. 255 (C.M.A. 1983) (military due process required government to provide transcript of key government witness' testimony in two prior federal trials against accused). Military due process, while originally intended to apply violations of the U.C.M.J., United States v. Clay, 1 C.M.A. 74, C.M.R. 74 (1951); United States v. Gibbs, 8 C.M.R. 379 (N.B.R. 1954), has apparently been expanded to include a right for which there is no direct statutory authority that the court does not wish to elevate to a constitutionally derived right. *See Toledo,* 15 M.J. at 256. *See also* United States v. Matfield, 4 M.J. 843 (A.C.M.R. 1978) (transcript of government witness' testimony at witness' own prior court-martial).

[101]*See infra* note 120.

[102]*See generally* Gilligan & Lederer, *supra* note 24, at 10 (denial of requests for expert employment may violate accused's right to a fair trial and compulsory process).

[103]While United States v. Shelby, 29 C.M.R. 823 (A.F.B.R. 1960), sets forth a five part test for combining paras. 115 and 116, it does not adequately differentiate the two "necessity" tests.

[104]*See generally* United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983); Gilligan & Lederer, *supra* note 24.

[105]*See supra* notes 24-26 and accompanying text.

strictly evidentiary standpoint is a necessary starting point. Such a determination clarifies but does not finally resolve the problem.

b. *Is the issue upon which expert testimony or assistance is desired material?* While the admissibility of government evidence is limited by the rules governing evidence, cross-examination, and rebuttal, the accused's evidence may transcend these rules and be constitutionally required under the Fifth and Sixth Amendments if it is reliable and probative.[106] Further, even when *testimony* is not admissible or constitutionally required, expert *assistance* may be.[107] This analysis is best done using the materiality factors elaborated in *United States v. Dorsey*,[108] including importance of the issue in relationship to other issues in the case, the extent to which the issue is in dispute, and the nature of other evidence in the case. The materiality test of *Bennett*[109] (essentiality—the case will fail without it) should not be used as a pretrial or trial-level standard for the production of experts because it is too strict and too difficult to apply at this stage. It is difficult to apply particularly at the pretrial stage when defense theories may not be fully developed and where experts may be needed to prepare the defense as well as to testify. On the other hand, it is practical at the pretrial stage to determine merely if an issue is important and in dispute and to examine the nature of any other evidence on the issue.

R.C.M. 703(b)(3) supports this view as it allows the military judge to abate the proceedings when, "a witness who is unavailable is of such central importance to an issue that [he or she] is essential to a fair trial." Appellate review can then, with the benefit of a record, focus on whether, even though important evidence was excluded, there was a reasonably likelihood that the excluded testimony would have impacted on the verdict.[110] The issue must, of course, be capable of being resolved favorably to the accused[111] for there to be any right to compulsory process[112] or for there be prejudicial error.

---

[106]Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Johnson, 3 M.J. 143 (C.M.A. 1977). *See generally* Churchwell, *The Constitutional Right to Present Evidence*, 19 Crim. L. Bull. 131 (1983); Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L.J. 711 (1976); Gilligan & Lederer, *supra* note 24, at 68-74; Imwinkelreid, Chambers v. Mississippi, 410 U.S. 284 (1973): *The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973); Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 196-98 (1983).

[107] *See infra* 117-33 and accompanying text.

[108]United States v. Dorsey, 16 M.J. 1, 6 (C.M.A. 1983).

[109]*See supra* notes 47-51 and accompanying text.

[110]United States v. Hampton, 7 M.J. 284 (C.M.A. 1979); U.C.M.J. art. 59.

[111]*Dorsey*, 16 M.J. at 7.

[112]The compulsory process clause only guarantees the accused witnesses in his or her favor. U.S. Const. amend. VI.

The test of R.C.M. 703(b)(1) and (d) that relevant and necessary witnesses should be produced is too lenient a standard to apply to employment of experts, especially if the drafters' suggestion[113] that the witness help merely "in some positive way" is implemented. The standard does not evaluate the importance of the issue upon which expert assistance or testimony is desired in the case. Practically, even if government assistance or substitutes are not available, the convening authority is not going to hire civilian experts to help the defense if the issue is merely relevant and the expert would merely contribute to the resolution of a relevant issue.

c. *Is a civilian expert required?* Because the purpose of R.C.M. 703(d) is to provide only necessary civilian expert services,[114] the availability and adequacy[115] of government experts must be examined. Read as a whole, R.C.M. 703(d) already requires such analysis. If the civilian expert has already been identified, a synopsis of expected testimony should be required as it is for any other known witness that the defense requests.[116] A synopsis of a prospective expert's testimony might be available from testimony in other cases or from the expert's writings.[117]

The three-step approach advocated above sets out the analysis required to determine if a civilian must be employed. Adoption will not only lead to clarity of analysis but will adequately protect the accused's rights.

4. Assistance Other Than Testimony

R.C.M. 703(d) does not clearly address the issues of investigative assistance or expert assistance other than testimony.

While there has been non-military judicial,[118] legislative,[119] and

---

[113]R.C.M. 703(b) (Discussion).

[114]*See supra* notes 82-87 and accompanying text.

[115]*See* United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983) (Navy psychiatrists qualified even though not possessing specific expertise in "coercive persuasion"). *See also* United States v. McGhee, 36 C.M.R. 785 (N.B.R. 1966).

[116]*See* R.C.M. 703(c)(2)(B); MCM, 1969, para. 115a.

[117]Such an expert might, under some circumstances, be compelled to testify without a consent or expert free. *See infra* 152-211 and accompanying text.

[118]*See generally* Annot., 6 A.L.R. Fed. 1007 (1971); Annot., 34 A.L.R. 3d 1256 (1970).

[119]18 U.S.C. § 3006A(e) (1976) expressly provides for investigative services. This statute has been held not to apply to the military. United States v. Johnson, 22 C.M.A. 424, 47 C.M.R. 402 1973); Hutson v. United States, 19 C.M.A. 437, 42 C.M.R. 39 (1970). *But see* United States v. Pearson, 13 M.J. 922, 927 (N.M.C.M.R. 1982) (Malone, J., dissenting). Many states have provided for investigative services. *See generally* Note, 59 Wash. U.L.Q. 317, 321 (1981) (collects state statutes). Of course, the adequacy of state schemes is tested in federal courts. *E.g.*, Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975).

ethical[120] recognition that notions of due process and effective assistance of counsel require such assistance, the need for investigative assistance for the military accused has not been recognized. Further, pretrial, post-trial, and trial expert assistance other than testimony or investigative assistance has not clearly been addressed.

R.C.M. 703(d) and paragraph 116 are silent concerning investigative assistance. This silence in paragraph 116 has apparently been interpreted by military courts to mean that the provision does not apply to investigators since the few cases discussing investigators do not mention paragraph 116. The sole authority for investigative assistance being covered by these provisions is the non-binding Drafters' Analysis to R.C.M. 703(d). The Analysis states:

> Because funding for such employment is the responsibility of the command, not the court-martial, application to the convening authority is appropriate. In most cases, the military's investigative, medical, or other agencies can provide the necessary service. Therefore, the convening authority should have the opportunity to make available such services as an alternative.

The inference that the convening authority can provide investigative services is ultimately illusory because not all military investigators are under the convening authority's control.[121] The few cases on investigative services illustrate the problems arising when the in-

---

[120]ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 (2d ed. 1982) provides: "The (legal representation) plan should provide for investigatory, expert and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process." While the specific applicability of this provision to the Army is questionable, it is nonetheless an important policy statement. *See* U.S. Dep't of Army, Reg. No. 27-1, Legal Services—Judge Advocate Legal Service, para. 5-8 (1 Sep. 1982) (ABA Standards apply unless clearly inconsistent with the U.C.M.J., the MCM, or departmental regulations).

[121]Criminal Investigation Division (CID) investigators, for example, are in a separate organization. *See generally* U.S. Dep't of Army, Reg. No. 195-1, Criminal Investigation—Army Criminal Investigation Program (12 Aug. 1974); U.S. Dep't of Army, Reg. No. 195-2, Criminal Investigation—Criminal Investigation Activities (C.2, 15 Jan. 1980). Military Police Investigators and Military Police, however, are not in a separate organization and normally are controlled by the installation or activity provost marshal, normally a subordinate of the convening authority. *See* U.S. Dep't of Army, Reg. No. 190-30, Military Police—Military Police Investigation, para. 1-4b, (1 June 1978). Military Police Investigators have authority to investigate only certain offenses, however. *Id.* at Appendix B. *See* AR 195-2, Appendix A (offenses investigated by CID). *See also* United States v. Simmons, 44 C.M.R. 804, 811 (A.C.M.R. 1971) (CID has no obligation to investigate for defense).

vestigation resources required are not under the convening authority's control. In *Hutson v. United States*,[122] the accused was charged with murder, rape, and assault with intent to commit murder arising out of the infamous My Lai massacre. He petitioned the Court of Military Appeals for a writ of mandamus to have the convening authority appoint qualified military criminal investigators or to hire private investigators under the authority of section 3006A(e) of Title 18, U.S. Code[123] or to arrange for FBI investigators. The court, while sympathetic, held that the All Writs Act[124] did not allow such relief and that section 3006A did not apply to the military. The court further noted that Congress provided the accused with only the Article 32 investigation for discovery. Because of the posture of the case, however, the court did not have to rule on whether Hutson received a fair trial despite the lack of investigative assistance. In *United States v. Simmons*[125] and *United States v. Pearson*,[126] the courts were faced with completed trials where requests for investigative assistance had been denied. Both courts ultimately found that due process, *i.e.*, a fair trial, had not been denied on the facts of the cases.[127]

---

[122]19 C.M.A. 437, 42 C.M.R. 39 (1970).

[123]18 U.S.C. 3006A (1976) provides:

> (e) **Services other than counsel.—**
>
> (1) **Upon request.**—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.
>
> (2) **Without prior request.**—Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.
>
> (3) **Maximum amounts.**—Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

[124]28 U.S.C. § 1651 (1976).

[125]44 C.M.R. 804 (A.C.M.R. 1971).

[126]13 M.J. 92 (N.M.C.M.R. 1982), *rev'd on other grounds*, 17 M.J. 149 (C.M.A. 1984).

[127]*Simmons*, 44 C.M.R. at 812; *Pearson*, 13 M.J. at 924.

Although cases requiring outside investigative assistance will be rare, explicit provisions for such funding for an accused should be made in the Manual to prevent confusion, to help guarantee fair trials, and to avoid conflicts of interest by investigative agencies.[128] Similarly, the Manual should make explicit provision for expert services other than testimony for an accused. While the necessity of expert assistance in preparation of a case and aiding counsel in cross-examining witnesses has been recognized in cases predating the Manual provisions on employment of experts,[129] this necessity has not been clearly recognized as being covered by the Manual provisions on employment of experts. There is likewise no authority to provide post-trial expert assistance.[130] Military cases do not directly address these issues. A few cases suggest that assistance to the defense in preparation is authorized only if incidental to preparation of the expert to testify.[131] Federal cases have recognized a statutory and constitutional right to such assistance other than testimony, however.[132] To avoid confusion, to insure payment,[133] and to insure a fair trial, explicit provision for assistance other than testimony should be made.

5. Payment of Fees Under R.C.M. 703(d)

Payment of expert fees is strictly governed under R.C.M. 703(d).[134] Authority construing fees under predecessors to R.C.M. 703(d), however, consists mostly of published and unpublished Comptroller General decisions.

Few changes regarding fees have occurred over the ninety years during which the Manual has authorized payments. From the 1880s to 1928, approval of the Secretary of War was required for the payment of expert fees. In 1928, however, the convening authority was

---

[128]Marshall v. United States, 423 F.2d 135 (10th Cir. 1970) (plain error to appoint FBI as defense investigative aid under 18 U.S.C. § 3006A(e) because of FBI conflict of interest in the case). *See generally* Decker, *supra* note 96, at 605-08.

[129]*See* Smith v. United States, 24 Ct. Cl. 209, 216 (1899). *Smith* did not interpret a Manual provision, however. *See supra* notes 67-70 and accompanying text.

[130]*See, e.g.*, United States v. Jones, 320 F. Supp. 901 (E.D. Tenn. 1971) (post-trial request for investigator to research newspaper for pretrial publicity).

[131]*See* United States v. Doyle, 17 C.M.R. 615, 642 (A.F.B.R. 1954); Ms. Comp. Gen. B-128136 (20 June 1956) (proper to pay expert under para. 116 for preparation even though expert did not testify because preparatory work was a necessary preliminary to testifying).

[132]United States v. Durant, 545 F.2d 823 (2d Cir. 1976); United States v. Sims, 617 F.2d 1371 (9th Cir. 1971).

[133]*See infra* notes 134-44 and accompanying text.

[134]*See also* U.S. Dep't of Army, Reg. No. 37-106, Financial Administration—Finance and Accounting for Installations, Travel and Transportation Allowances, para. 13-38 (C.72, 15 Jan. 1982).

given the authority to authorize the employment of experts.[135] In 1945, an unpublished Comptroller General decision in dicta[136] stated that an expert who was not employed with the prior approval of the convening authority as the Manual required[137] could be paid no more than ordinary witness fees. The opinion also stated that ratification by the convening authority would be ineffective. The "no ratification" rule was expressly adopted in the 1949 Manual[138] and continues in R.C.M. 703(d).[139] While the Analysis to the 1969 Manual states that publication of the Manual in the Federal Register provides notice to experts that prior authorization by the convening authority[140] is required, such constructive notice is ineffective and causes harsh results. For example, a recent Comptroller General decision[141] held that three experts called at the direction of the *military judge* (and not the convening authority) upon application of the defense counsel were not properly employed under the Manual and implementing Army regulation[142] and could not be paid expert fees. The opinion also refused to report the matter to Congress under the Meritorious Claims Act[143] because the situation was neither unusual or of a non-recurring nature.

Despite the existence of ratification procedures in federal law,[144] the "no ratification" rule of R.C.M. 703(d) is justified because it serves the purpose of giving the government an initial opportunity to provide government expert services or substitutes. The new Manual should help reduce inequities to experts by clarifying the military judge's role in instances in which he or she may disagree with the convening authority's determination. R.C.M. 703(d) provides that the convening authority shall employ the expert or provide a substitute or the proceedings will be abated.

---

[135]Manual for Courts-Martial, U.S. Army, 1928, para. 99.

[136]Ms. Comp. Gen. B-49109, slip op. at 5 (22 June 1945). The opinion held that fees were not required for a doctor who had assisted in an autopsy. Because the doctor was testifying as to facts (cause of death), he was only entitled to ordinary witness fees.

[137]*See supra* note 135.

[138]Manual for Courts-Martial, U.S. Army, 1949, para. 107.

[139]The analysis to R.C.M. 703(d) states: This subsection has no reference to ratification of employment of an expert unlike 18 U.S.C. § 3006A(e) (1976). *See also* Ms. Comp. Gen. B-49109 (June 25, 1945).

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

[141]Ms. Comp. Gen. B-210831 (2 Aug. 1983).

[142]*See supra* note 134.

[143]31 U.S.C. § 3702(D) (1976).

[144]18 U.S.C. § 3006A(e)(2) (1976) provides for ratification. *See supra* note 123.

Another troublesome area is the expert who demands an excessive fee. Because R.C.M. 703(d) deals with contractual employment, there must be an agreement on the fee or no contract exists. Since neither the Manual nor Army regulations[145] place limits on the amount, any fee, even an excessive or unreasonable one, could be set.[146] In such a situation, expert substitutes, either military or civilian, could be sought to avoid payment of excessive fees. While it has generally been held that there is no right to a specific expert,[147] in some situations an expert may be so unique because of qualifications or because of expected testimony that due process may require that this particular expert be employed regardless of the amount of the fee.[148]

In addition to the negotiation problems that can arise from the absence of a limit on the amount that can be paid an expert, ethical problems may also develop. Ethical standards prohibit payment of excessive fees to experts.[149] The evil to be avoided is the appearance of influencing the expert's testimony by paying an excessive fee. While an expert may demand an excessive fee, counsel may be ethically prohibited from recommending that the convening authority pay it.

To remedy these problems, the Manual should at least expressly limit expert fees to reasonable fees. A better solution would be to follow the Navy's example[150] and fix the limits of expert fees for preparation and testimony to those paid by U.S. Attorneys. Such guidelines are published from time to time by the Department of Justice.[151] Department of Justice practices also allow for local rates, *i.e.*, as provided for by a local professional society, to be used if the expert is not of a classification listed in the guidelines. Convening authorities overseas should use prevailing local rates if foreign experts are used. The convening authority should be allowed to exceed

---

[145]*Cf.* JAGMAN 0138K which apparently requires experts testifying in the United States to be paid the same rates as utilized by U.S. Attorneys in their area.

[146]*Compare* compensation limits in 18 U.S.C. § 3006A(e)(3) (1976). *See supra* note 123.

[147]*See generally* Annot., 40 A.L.R. Fed. 707, 717-720 (1978); Annot., 6 A.L.R. Fed. 1007, 1019 (1971).

[148]*See infra* notes 184-200 & accompanying text.

[149]ABA Code of Professional Responsibility, Disciplinary Rule 7-109(c); ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-3.3(b), The Defense Function, Standard 4-4.4(b) (2d ed. 1980).

[150]*See supra* note 145.

[151]Current Department of Justice guidelines are found in Department of Justice Order, OBD 2110.13A, Subject: Approval Of, And Rates For, Expert Witness Expenses (26 Oct. 1982) (reproduced at Appendix A).

the Department of Justice or local rates, however, in exceptional situations such as where a particular expert may be required for a fair trial. Such a Manual provision using Department of Justice guidelines would generally, however, clarify the negotiations process and avoid potential ethical problems.

III. PROCURING TESTIMONY OF THE UNWILLING EXPERT

Compelling the attendance of experts,[152] whether on behalf of the defense, the government, the military judge, or the court-members, is an area not addressed by the Manual[153] and not developed in military case law. Scant military authority exists in Comptroller General decisions. In this section of the article, two types of experts will be examined: the expert with a previous connection to the case either as a witness to the facts of the case or by having a previously formed opinion, and the expert with no previous connection to the case.

A. THE EXPERT WITH A PREVIOUS CONNECTION TO THE CASE

One type of expert with a previous connection to the case is the witness to a fact or occurrence. The fact expert is one who has personally observed conditions or events. A common example is the doctor who performed an autopsy[154] or who previously examined a patient.[155] The overwhelming weight of nonmilitary authority is that such an expert may be compelled like an ordinary witness to attend and be paid ordinary witness fees, even though his or her

---

[152]The phrase "compelling the attendance of experts" is used instead of "compulsory process" because the latter term is more precisely applied to an accused's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor." The former term is broader and would include instances where the *government, military judge, or court members*, wanted to compel an expert's attendance. *See generally* Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974); Westen, *Compulsory Process II*, 74 Mich. L. Rev. 192 (1975); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978). The codification of the Sixth Amendment right in military law is broader on its face than the Sixth Amendment in that it provides the government, defense, military judge, and court-members with equal opportunity to obtain witnesses and evidence. U.C.M.J., art. 46. It is clear, however, that an accused's constitutional rights to a fair trial and to present a defense may give the accused the opportunity to actually present more evidence than the government. *See supra* note 106.

[153]*See supra* notes 64-72 and accompanying text.

[154]Ms. Comp. Gen. B-49109 (25 June 1945).

[155]*See* Gilligan and Lederer, *supra* note 24, at 10.

knowledge of "facts" may have been aided by special study, training, or experience.[156] While there is no modern military criminal case law, an older decision of the Comptroller General[157] and opinions of military commentators[158] reach the same result.

While less overwhelming, the weight of authority from the state courts is that an expert who has previously formed an opinion regarding a case may also be compelled to testify.[159] The federal trend, though authority is scarce, is to the same effect.[160] There is no direct military authority.

To examine the problem more closely, a look at a military case which raised the issue would be helpful. In *United States v. Shelby*,[161] the accused was charged with one absence without leave and seventeen larcenies by check. Two service member psychiatrists and a service member psychologist examined Shelby and found him not to have been mentally responsible at the time of the offenses or at the time of the examination and the charges were dismissed.[162] Later, a new sanity board found Shelby responsible and the charges were reinstated. By the time of trial, the two psychiatrists and the psychologist had left the service. Being no longer on active duty nor employed by the government, they were in the same position regarding compulsory process as ordinary civilians.[163] The court resolved the issue as a failure to produce a material witness[164] and never addressed the issue of whether contractual employment under paragraph 116 was required or whether the witnesses could merely be subpoenaed and tendered ordinary fees.

Former service member or government employee experts are not the only experts with previously formed opinions about the case at hand. Further examples would include an expert hired by the

---

[156]*See generally* M. Graham, Handbook on Federal Evidence 620 (1981); 8 J. Wigmore, Evidence § 2203(2) (McNaughton rev. ed. 1961); Note, *Compelling Experts to Testify*, 50 Colo. L. Rev. 49, 50 (1978) [hereinafter cited as Note]; Annot., 77 A.L.R. 2d 1182, 1187, 1188 (1961); 31 Am. Jur. 2d *Expert and Opinion Evidence* § 10 (1967).

[157]Ms. Comp. Gen. B-49109 (25 June 1945) (doctor who performed autopsy not entitled to expert fees when testifying about cause of death).

[158]*See* Gilligan & Lederer, *supra* note 24, at 10.

[159]*See supra* note 156. *See also* Comment, *Compelling Witnesses to Testify: A Proposal*, 44 U. Chi. L. Rev. 851, 854, 855 (1977) [hereinafter cited as Comment].

[160]*See* Graham, *supra* note 156, at 620, n.55. *See also* Kaufman v. Edelstein, 539 F.2d 811 (2nd Cir. 1976); Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2nd Cir.) *cert. denied* 412 U.S. 929 (1972). *See generally* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 489 (3d ed. 1982).

[161]29 C.M.R. 823 (A.F.B.R. 1960).

[162]*Id.* at 825.

[163]R.C.M. 703(e)(2)(A); MCM, 1969, para. 115*b*.

[164]*Id* at 829.

defense to do an urinalysis retest.[165] If the results of the test are unfavorable to the accused, the government may wish to call the expert. Similarly, an unfavorable sanity evaluation done by a civilian expert at the accused's expense may be uncovered by the government, which would then attempt to use the expert. Because the expert's opinion is already formed and no further preparation is required, these experts could be compelled to testify without expert fees.[166]

The rationale for compelling the expert who has previously formed an opinion about a case to testify is best stated by Wigmore who says that such an expert, "is asked merely, as other witnesses are, to testify what he knows or believes."[167] An expert is entitled to special compensation only where special preparation is required.[168] Under these circumstances, an expert cannot, therefore, be compelled to make an examination, do a study, or listen to testimony to prepare to testify. Consent of the expert, special fees, and, in the military, compliance with R.C.M. 703(d) are required if the expert must prepare.

Experts have sought protection from compelled testimony under property, contract, and privilege theories. The property argument states that experts have property rights in their knowledge because of their investment in their training. Accordingly, this property cannot be taken without just compensation. This theory has been generally rejected largely on *Wigmore's* grounds that the expert is not being asked to render professional services but to testify as to what the expert already knows.[169] There also is a fear that, if a property right were acknowledged, too much essential expert testimony would become unavailable.[170] Contract theories have been advanced

---

[165]Requests for retests at the accused's expense at non-DOD laboratories is governed by service regulations. *See e.g.*, Dep't of Army Letter, DASG-PSC-L, 25 May 1983, subject: Standard Operating Procedure: Chain of Custody Procedures for Collection, Handling, and Testing of Urine Specimens. Efforts to utilize defense experts may be frustrated, however, by the attorney-client or the work-product privilege. *See generally* United States v. Dupas, 14 M.J. 28 (C.M.A. 1982); Mil. R. Evid. 502; R.C.M. 701(f); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan. L. Rev. 455-478 (1962). *See also* Comment, *supra* note 159, at 853 n.9.

[166]While such an evaluation might be protected by an attorney-client or work-product privilege, it is not protected by Mil. R. Evid. 302 because it is not ordered under R.C.M. 706. While R.C.M. 701(b)(2) and (4) require disclosure of expert reports if an accused is raising a mental responsibility defense, the section does not require disclosure of the expert's identity.

[167]*See* 8 Wigmore, *supra* note 156.

[168]*See generally* Gilligan & Lederer, *supra* note 24, at 10 n.32. *See also supra* note 156.

[169]*See generally* Comment, supra note 157, at 852 n.8. *See also supra* note 156.

[170]*See* Kaufman v. Edelstein, 539 F.2d 811, 820-21 (2d Cir. 1976).

less often. It has been suggested, however, that a contract merely to testify without previous preparation would lack consideration.[171] In a much discussed case, *Kaufman v. Edelstein*,[172] claims of constitutional and statutory privilege were rejected. Similarly, federal courts have rejected a general common law "expert's privilege."[173] Further, it has been recognized that "the public. . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege."[174] Finally, the need to obtain all relevant evidence has long been recognized to be greater in criminal proceedings and to be constitutionally required under the Sixth Amendment rights to confrontation and of compulsory process and the Fifth Amendment right to due process.[175]

Some states have sought to lessen the seeming unfairness of compelled expert testimony by paying expert fees.[176] Federal authority on fees for compelled experts is unclear. In *Kaufman v. Edelstein*, for example, the issue was mooted when the party offered to pay.[177] In *Fitzpatrick v. Holiday Inns*, the trial judge ordered fees "in the interests of fairness."[178] While such payments may be desirable, the lack of military authority makes the possibility of such expert fees highly questionable. Even if the convening authority approved such a payment, the Comptroller General could adopt the majority view that such testimony on previously formed opinion was compellable for ordinary fees and disapprove the expert fee.[179]

The foregoing indicates the need for the Manual to explicitly address the problem. An explicit Manual provision is required not only to clarify when expert fees are due or desirable, but also to make clear when compulsory process is available.[180] The provision should adopt the majority view that an expert who has previously formed an opinion regarding a particular case may be compelled to testify in that case without special compensation.

---

[171]*See Graham, supra* note 156, at 620, 621.

[172]539 F.2d 811 (2d Cir. 1976). *See also infra* note 204.

[173]*E.g.*, Wright v. Jeep Corp., 547 F. Supp. 871, 874-75 (E.D. Mich. 1982).

[174]United States v. Nixon, 418 U.S. 683, 709 (1973) (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

[175]United States v. Nixon, 418 U.S. 683, 711 (1973); Philadelphia Co. v. Philadelphia, 262 Pa. 439, 105 A.630 (1919); Annot., 2 A.L.R. 1573 (1919).

[176]*See* Comment, *supra* note 159, at 856 n.18.

[177]*Kaufman*, 539 F.2d at 820 n.15.

[178]507 F. Supp. 979 (E.D. Pa. 1981).

[179]10 Comp. Gen. 111, 112 (1930) (dicta that only experts who need to prepare are entitled to special compensation).

[180]*See infra* text accompanying notes 209, 212.

While, at first blush, expert fees may seem desirable, they are unnecessary and create problems. Expert fees in this situation are not only unnecessary as a matter of law,[181] but also unnecessary as a matter of fairness in military courts. Situations as in *Shelby*, where former military or government employee experts have previously formed an opinion in a military case, are relatively rare. Similarly, instances of civilians who have previously formed an opinion in a military case will also be rare. Even when testimony is required, it is only for a single case. Testimony in multiple cases will be infrequent. The burden on the expert in this situation will be slight and compelling such an expert to testify should normally be no more burdensome to the expert than to the ordinary person who happens to become a material witness in a given case.[182] Similarly, the civilian expert who was previously hired by the defense should have been previously paid by the defense. Even if not paid, the expert would only be compelled to testify in that case. Little hardship exists, therefore, in requiring such experts to testify for ordinary witness fees.

The problem created by allowing payment to an expert with a previously formed opinion but not to a "fact" expert is that it would become necessary to differentiate between facts and opinions.[183] While the doctor who testifies that the victim was dead and had five stab wounds in his chest is clearly testifying to facts, the doctor's statement that the stab wounds caused the death seems to be opinion, particularly if the cause of death is controverted. Such mental gymnastics are unnecessary. A Manual provision that simply compelled the testimony of the expert with a previous connection to the case at hand and for which no preparation was required would be mechanical to apply. If the facts or opinions were previously within the expert's knowledge, the expert could simply be subpoenaed and tendered ordinary witness fees.

B. THE EXPERT WITH NO PREVIOUS CONNECTION WITH THE CASE

The expert who has had no previous connection to the case and who has knowledge of no facts or has not previously formed an opinion regarding the facts of *that case*, is more troublesome. Even without particular knowledge of the case at hand, the expert may have

---

[181] *See supra* note 156 and accompanying text.
[182] *See generally*, 8 Wigmore, *supra* note 156.
[183] *See generally* Friedenthal, *supra* note 165, at 481.

general knowledge that is relevant to the case. For example, in *Wright v. Jeep Corp*,[184] a products liability case, an academic researcher had already done an unique study which had concluded that the Jeep CJ-5 experienced a disproportionately high roll over rate in accidents.

Examples of potential use of experts who are not familiar with the facts of the case at hand can be found in current military law problems. For example, as noted earlier, several scientific issues remain in the area of urinalysis.[185] Only a relatively few experts have completed studies of the issue of passive inhalation.[186] Issues also abound as to the sufficiency of the tests and the ability of the Department of Defense Drug Testing Laboratories to accurately perform the tests. A handful of experts have spoken out on the inadequacy of DOD procedures.[187]

Such experts could testify not only about general knowledge of the issues, but also could answer questions about the facts of the case at hand. The evidentiary vehicle for such testimony is Military Rule of Evidence 703[188] which allows an expert to base an opinion not only on the expert's specialized knowledge and training, but on hypothetical questions and facts, data, and opinions presented to the expert at trial while on the witness stand.[189] Such experts, therefore, could testify about relevant matters within their expertise and offer opinions about the case *at hand* through facts contained in hypo-

---

[184]540 F. Supp. 871 (E.D. Mich. 1982).

[185]*See supra* notes 18-20 and accompanying text.

[186]Johnson, Yaeger, Jasinski, Cone, & Gorodetsky, *Detention of Cannabinoid Metabolites in Human Urine Following Passive Inhalation of Marijuana* (abstract of pilot study submitted to American Society of Pharmacology and Experimental Therapeutics); Perez-Reyes & Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, Clinical Pharmacology and Therapeutics (July 1983); Wethe, Bugge, Bones, Morland, Skuterud, & Stein (National Institute of Forensic Toxicology, Oslo, Norway), *Passive Smoking of Cannabis*, 51 ACTA Pharmacologica and Toxicologica (Supp. 1, Abstract 21, 1982); Zeidenberg, Bowdon, & Nahas, *Marijuana Intoxication by Passive Inhalation: Documentation by Detection of Urinary Metabolites*, 134 Am. J. Psychiatry 76 (1977).

[187]*See e.g.*, Letter from McBay, Dubowski, and Finkle to editor, Journal of the American Medical Association, 249 J.A.M.A. 881 (February 18, 1983); N.Y. Times, Dec. 21, 1983, § 1, at 24, col. 1.

[188]Mil R. Evid. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[189]Graham, *supra* note 51, at 626; J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703[02] (1982). *See also* United States v. Allen, 7 M.J. 345 (C.M.A. 1979); United States v. Breuer, 14 M.J. 723 (A.F.C.M.R. 1982).

theticals presented while the expert was testifying. While having an expert attend the trial to listen to testimony is permissible, [190] it is deemed preparation to testify for which consent of the expert and special compensation are required.[191] The expert, however, who testifies as to knowledge already possessed, who answers hypothetical questions, and for whom special preparation is not required stands in the same position as the fact expert and the expert with a previously formed opinion. None require special preparation and all can be compelled to testify.[192]

Such experts have sought and been denied relief on the same property, contract, and privilege grounds as experts with previously formed opinions.[193] Other arguments, such as a First Amendment right and an academic privilege because of the chilling effect on a researcher who may be called repeatedly into court, have similarly been rejected.[194]

Some protection, however, has been afforded such experts. If their expertise is not relevant to issues in the case,[195] if their research is incomplete[196] or if their data is confidential[197] or privileged,[198] there may be protection. Further, if the expert is not unique[199] or if testifying would be burdensome,[200] the courts have been reluctant to compel testimony.

Clearly, the expert who is a stranger to the case is subject to greater burdens and abuse than the expert who has a previous con-

---

[190]*See supra* note 156.

[191]*See generally* 31 Am. Jur. 2d *Expert and Opinion Testimony* § 11 (1967); Annot., 77 A.L.R. 2d 1189 (1961).

[192]*See generally* Annot., 77 A.L.R. 2d 1182, 1188 (1962).

[193]*See supra* text accompanying notes 167-75.

[194]*Wright*, 540 F. Supp. at 875, 876.

[195]Karp v. Cooley, 493 F.2d 408, 425 (5th Cir.), *cert. denied*, 419 U.S. 845 (1974) (link not established between mechanical heart and experiments done by expert and the mechanical heart used on plaintiff); Baskett v. United States, 2 Cl. Ct. 356, 371 (1983) (not experts in soil erosion matters in issue in case).

[196]Andrews v. Eli Lilly and Co., Inc., 97 F.R.D. 494 (N.D. Del. 1983) (analysis of medical data incomplete).

[197]*Id.*

[198]Privilege, however, is determined by the law of the forum in which the witness testifies. United States v. Johnson, 22 C.M.A. 431, 435, 47 C.M.R. 402, 406 (1973). *See generally* Mil. R. Evid. 501-512; E. Imwinkelreid, The Methods of Attacking Scientific Evidence 53-59 (1982).

[199]*Kaufman*, 539 F.2d at 822 (uniqueness of expert a factor to consider in compelling an unwilling expert). *See generally* Buchanan v. American Motors, 697 F.2d 151 (6th Cir. 1983).

[200]*Buchanan*, 697 F.2d at 151 (testimony itself would require much time explaining raw data); *Kaufman*, 539 F.2d at 822 (oppressiveness a factor to consider in compelling an unwilling witness to testify).

nection to the case. Because no previous connection with a case is required, the expert is subject to being called in a potentially unlimited number of cases. Protection is needed.

Because military law is silent on the issue, an explicit Manual provision should address compelling the attendance of such experts. The provision should set standards to guide when such experts could be compelled and, in the interests of fairness and to decrease expert resistance, authorize the convening authority to pay reasonable expert fees.

Because of the general congressional preference that military law conform to federal law,[201] because of a specific preference that military subpoena power be similar to that of federal courts,[202] and because the issue may ultimately be resolved in federal courts,[203] the Manual provision should adopt the considerations set out in the leading federal case, *Kaufman V. Edelstein.*[204] *Kaufman*, while expressly not giving an exhaustive list, stated that considerations in compelling an expert to testify include the uniqueness of the expert, the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify, and the degree to which the expert can show he or she has been oppressed by continually having to testify.[205] The burden should be on the party desiring the witness to show that the witness is unique or that comparable willing witnesses are unavailable.[206] The expert should be allowed to demonstrate to the convening authority that compelled testimony would be burdensome and oppressive through any reliable means of evidence, including letters.[207] The determination of whether such an expert would be compelled and of what fee to pay would be discretionary with the convening authority with *de novo* review by the military judge and the same "produce or abate" judicial remedy.

Procedurally, the party desiring the witness should apply through the trial counsel to the convening authority for permission to voluntarily employ the expert, utilizing normal employment of expert pro-

---

[201]U.C.M.J. art 36.

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

[203]*See infra* notes 211, 212.

[204]539 F.2d 811 (2nd Cir. 1976). *See generally* Graham, *supra*, note 156; Younger, *Expert Witnesses*, 48 Ins. Counsel J. 267, 273 (1981); Comment, *supra* note 159.

[205]*Kaufman*, 539 F.2d at 822. This article does not attempt to define uniqueness or oppression. These issues are best resolved on a case by case basis. *See* Note, *supra* note 156, at 56.

[206]*See genrally* Note, *supra* note 156, at 56; Comment, *supra* note 159. *See* Mil. R. Evid. 804(a); R.C.M. 703(b)(3).

[207]*See* Mil. R. Evid. 104(a).

cedures. Seeking voluntary employment first may resolve many problems without further litigation. If the convening authority approves and the expert agrees to voluntary employment, the matter is ended. If the expert agrees but the convening authority does not, the matter should be reviewed *de novo* by the military judge as with normal employment of expert procedures. If the convening authority agrees but the expert is unwilling, the burden then shifts to the party desiring the witness to make an additional showing that the witness is unique or that comparable willing witnesses are unavailable. This solution would provide such expert testimony as may be needed for a fair trial but minimizes oppression by payment of fees and by placing a burden on the party seeking the evidence to show true need.

To eliminate the bargaining and ethical[208] problems arising from an expert who is willing to testify but only for a certain fee, or who, although willing, feels preparation is necessary,[209] all fees of experts not previously acquainted with the case should be governed by the same federal standards as voluntarily contract experts.[210]

IV. PROPOSAL FOR A COMPREHENSIVE MANUAL PROVISION

The proposed solution builds on R.C.M. 703(3) but clarifies it in that "employment" only applies to experts who must prepare to testify and establishes the Department of Justice guidelines as a ceiling on fee amounts in all but exceptional circumstances. The rule would establish that an expert with a previous connection with the case can be compelled at no expert fee and that a unique expert with no previous connection with the case may be compelled under some circumstances to testify, but is entitled to expert fees in any event. Finally, the rule provides the accused with a procedure to request investigative assistance and expert assistance other than testimony.

---

[208] *See also supra* notes 145-51 and accompanying text.

[209] *See* Friedenthal, *supra* note 105, at 481 (experts would want to prepare so not to appear foolish or unable to respond).

[210] *See* Appendix A.

PROPOSED RULE 703(d). PRODUCTION OF EXPERT WITNESSES

(1) *Experts who may be compelled to testify.*

(A) Experts possessing factual knowledge regarding the court-martial or who have previously formed an expert opinion regarding the particular matters in issue in the court-martial may be compelled to testify upon compliance with procedures governing production of nonexpert witnesses (R.C.M. 703(b)(1)). Expert fees shall not be paid.

(B) Experts who have no factual knowledge regarding the case or who have not previously formed an opinion regarding particular matters in issue in the court-martial may be compelled to testify only after voluntary employment has been attempted under R.C.M. 703(d)(2). If an attempt at voluntary employment fails, the party desiring the compelled attendance shall, upon notice to the other party, apply to the convening authority to approve the issuance of a subpoena by the trial counsel for the production of the expert and the approval for payment of expert fees. The expert fee shall not exceed those paid by the Department of Justice. The convening authority may authorize fees exceeding those paid by the Department of Justice in exceptional circumstances in the interests of justice. If the expert will not voluntarily attend, the party desiring the expert shall have the burden to show that the expert is unique or that comparable willing experts are not available. The expert shall be given an opportunity to show the convening authority that compelling the expert's testimony would be burdensome or oppressive. A request denied by the convening authority may be renewed before the military judge who shall review the request in the same manner as a denial of a request for voluntary employment of an expert who must prepare specially.

(2) *Employment of experts who must prepare specially.*

When the employment at Government expense of an expert who must prepare specially is considered necessary by a party at any stage of the proceedings, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the com-

pensation for the expert. The request shall include a complete statement of reasons why expert testimony is relevant and material and why Government resources are unavailable or inadequate. The request should also include a statement of estimated costs. The request shall include a synopsis of the expert's testimony, if available. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and material, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule. Expert fees shall not exceed those paid by the Department of Justice. Fees for local foreign experts paid overseas should not exceed prevailing local rates. The convening authority may authorize fees exceeding those paid by the Department of Justice or prevailing local rates in exceptional circumstances in the interests of justice.

(3) *Investigative Services and Expert Services Other Than Testimony.* An accused may apply at any stage of the proceedings to the general court-martial convening authority to authorize investigative services and expert services other than providing testimony. Requests shall use procedures in Rule 703(d)(2).

V. CONCLUSION

Many reasons why provision for the voluntary and involuntary procurement of expert testimony should be contained in the Manual have already been discussed. To summarize, a Manual provision will clarify the law and thereby give clear guidance to the counsel, military judges, and convening authorities who must implement it. Further, to not address the issue in the Manual may lead in part to the law being established by the Comptroller General when ruling on the appropriateness of individual expenditures.

Clarification of the law in a Manual provision will have three other salutary effects. First, with the clear and lawful authority of an Executive Order, experts may be more willing to submit to compulsory

process. Second, with a clear Manual provision using federal law and standards, the likelihood of effective enforcement in federal courts is enhanced. Refusals to appear or testify are prosecuted in federal courts under Article 47, UCMJ. Even warrants of attachment which could be executed by military authorities[211] will ultimately be tested *in federal courts by habeas corpus.*[212] With clear authority, the cooperation of U.S. Attorneys, U.S. Marshals, and federal judges should be more easily attained. Finally, the adoption of an explicit Manual provision covering the entire range of procurement of expert testimony will enable military justice to more effectively cope with the increasing scope and use of expert testimony in courts-martial.

---

[211]MCM, 1969, para. 115d; R.C.M. 703(e)(2)(G). *See generally* Lederer, *Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses*, 98 Mil. L. Rev. 1 (1982).

[212]MCM, 1969, para. 115d.

Appendix A

Oct. 26, 1982

Department of Justice Order, OBD 2110.13A (Oct. 26, 1982)

Subject: APPROVAL OF, AND RATES FOR, EXPERT WITNESS EXPENSES

---

1. *PURPOSE.* This order establishes a new schedule of rates to be used as a basis for negotiating compensation payable to expert witnesses. Also, this order serves to reemphasize the need to have prior approval before incurring expenses for expert witnesses.

2. *SCOPE.* This order is applicable to all U.S. Attorneys' Offices and the legal divisions.

3. *CANCELLATION.* Order OBD 2110.13, dated September 28, 1978, is cancelled.

4. *PRIOR APPROVAL.* The Assistant Attorney General for Administration (AAG/Administration) is responsible for the control of Appropriation 15-0311, Fees and Expenses of Witnesses.

   a. In order for the control to be maintained, all expert witness expenses must have the PRIOR approval of the AAG/Administration, the Deputy AAG/Administration, or one of the following officials to whom authority is hereby delegated:

      (1) Authority to approve or disapprove requests within or exceeding the established rates, or not covered by the rate schedule, is delegated to the Deputy Assistant Attorney General, Office of Personnel and Administration (OPA), Justice Management Division (JMD); the Director, Procurement and Contracts Staff (PCS), OPA; and the Assistant Director, Contract Administration Service, PCS.

      (2) Authority to approve or disapprove requests within the established rates is delegated to the Senior Special Authorizations Technician, Contract Administration Service.

   b. All requests must be submitted to the:

      Department of Justice
      JMD/OPA/PCS/CAS
      ATTN: Special Authorizations
      Washington, D.C. 20530

The teletype routing indicator for Special Authorizations on the Departmental teletype network (JUST SYSTEM) is JACCT. Procedures covering the preparation of the request forms are contained in the JUST System directive.

5. *SCHEDULE OF RATES.*

a. The rates listed below are the rates normally paid to expert witnesses for services most commonly required. The higher rates are applicable to those metropolitan areas having generally higher costs. Attorneys shall negotiate with EACH expert witness to insure that his services are obtained at the lowest possible rate.

b. A daily rate should be negotiated when the witness will be performing a full day's service or, if less than a full day's service, when an hourly rate would exceed the maximum daily rate.

c. For experts in categories other than those listed, attorneys should use prevailing rates in their local area as guidelines for negotiations. When local prevailing rates are used as a guideline instead of those listed in the Department's rate schedule, a copy of the source for these rates shall be submitted with the request to support the rates. Rates for these experts should not exceed $400 per day.

d. In addition to the fees listed below, REASONABLE travel and other miscellaneous expenses necessary to the case may be allowed. Travel expenses should be limited to the same expenses allowed for government employee travel. Travel expenses requested in excess of the applicable Standard Government Travel Regulations shall be supported by a complete justification. Other miscellaneous expenses will be limited to actual costs.

NOTE: The expert fee will not be paid for travel time.

An estimate of these expenses should be submitted with the request for authorization of fees.

TYPE OF EXPERT	HOURLY RATE (3 HOURS MAXIMUM)	DAILY RATE
Accountants and Auditors		
Preparation	$25 to $ 75	$ 75 to $300
Testimony	$25 to $100	$100 to $350
Appraisers (Real Estate)		
Preparation	$50 to $100	$100 to $300
Testimony	$50 to $100	$100 to $400
Appraisers (Stock, jewelry, coins, etc.)		
Preparation	$25 to $ 60	$100 to $200
Testimony	$25 to $ 75	$100 to $400
Chemists		
Analysis	$25 to $ 50	$ 50 to $200
Testimony	$25 to $ 75	$ 75 to $250
Economists		
Preparation	$35 to $ 90	$150 to $350
Testimony	$40 to $100	$150 to $400
Engineers		
Preparation	$25 to $ 90	$100 to $300
Testimony	$25 to $100	$100 to $350
Engineers (Petroleum)		
Preparation	$50 to $125	$100 to $400
Testimony	$50 to $125	$100 to $400
Geologists and Mining Experts		
Preparation	$25 to $ 75	$100 to $400
Testimony	$25 to $100	$100 to $400

OBD 2110.13A
Oct. 26, 1982

TYPE OF EXPERT	HOURLY RATE (3 HOURS MAXIMUM)	DAILY RATE
Handwriting Experts (Voice print, polygraph, etc.)		
Examinations	$25 to $ 50	$ 50 to $200
Testimony	$35 to $ 75	$ 50 to $250
Obscenity Experts		
Preparation	$35 to $ 50	$ 75 to $175
Testimony	$35 to $ 50	$ 75 to $200
Physicians (Nonspecialists)		
Examinations	$40 to $ 75	$ 75 to $300
Testimony	$45 to $125	$100 to $500
Physicians (Specialists other than psychiatrists)		
Examinations	$75 to $200	$250 to $500
Testimony	$75 to $200	$250 to $750
Pilot Expert		
Preparation	$25 to $ 80	$100 to $300
Testimony	$25 to $ 90	$100 to $400
Psychiatrists		
Examinations	$40 to $100	$ 75 to $300
Testimony	$45 to $100	$100 to $350
Psychologists		
Examinations	$25 to $ 50	$ 50 to $200
Testimony	$25 to $ 50	$ 75 to $300

/s/KEVIN D. ROONEY
Assistant Attorney General
for Administration

MULTIPLICITY: A FUNCTIONAL ANALYSIS

by Major James A. McAtamney*

This article examines the historical development of the issue of multiplicity of criminal charges in both civilian and military practice. The courts in both systems have devised numerous, sometimes conflicting tests for identifying whether offenses are the same for purposes of findings or sentence. This article concludes that because no one test will suffice to resolve post-trial attacks on multiplicious charges, a new approach to drafting charges and a new emphasis on motion practice should be developed.

I. INTRODUCTION

> One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person.[1]

For over fifty years, this standard has applied to the preparation of court-martial charges against an Army accused.[2] At the same time, law officers, military judges, and appellate authorities have struggled to define the meaning of the standard, how to implement it, and the effect, if any, of a variance from it. In the last two years, the Court of Military Appeals has launched itself into the debate with a view toward solving the riddle once and for all.

---

*Judge Advocate General's Corps, United States Army. Currently assigned as an Instructor, International Law Division, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 1984 to date. Formerly assigned as a Branch Chief and Appellate Defense Counsel, Defense Appellate Division, Falls Church, Virginia, 1980-83; Chief Defense Counsel, Chief Trial Counsel, Chief of Legal Assistance, Office of the Staff Judge Advocate, 21st Support Command, Mannheim Branch Office, 1977-80. J.D., Marshall-Wythe School of Law, College of William and Mary, 1976; S.B., S.M., Massachusetts Institute of Technology, 1973. Completed 32d Judge Advocate Officer Graduate Course, 1984; 82d Judge Advocate Officer Basic Course, 1976. Member of the bars of the United States Supreme Court, the United States Court of Military Appeals, the United States Army Court of Military Review, and the Commonwealth of Virginia. This article was originally submitted as a thesis in partial satisfaction of the requirements of the 32d Judge Advocate Officer Graduate Course.

[1]Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 26*b* [hereinafter cited as MCM, 1969].

[2]*Compare* Naval Courts and Boards, 1937, ch. II, § 19.

This article will address the historical development of the concept of multiplicity in both civilian and military practice. It will analyze the types of multiplicity which may exist, the various tests which have been proposed to determine if offenses are multiplicious, and the policy considerations underlying the tests. Finally, it will suggest a practical approach to charging offenses which, although not one which will address every contingency, will satisfy the competing interests of the government and the accused. This approach will also simplify the preparation of charges and reduce the number of time-consuming appeals.

II. MULTIPLICITY FOR FINDINGS

Historically, the question of whether one could be convicted of more than one offense based on a single episode of criminal conduct has been analyzed within the context of the protection against double jeopardy.[3] The evaluation of the concept, however, began with a concern over the procedural method of pleading criminal cases and later addressed the "true" application of the Double Jeopardy Clause as it arose in the context of separate trials. During this period of evolution, however, the definition of what constituted an offense was elusive.

A. EARLY CASES—FOCUS ON METHODS OF PLEADING

Many of the early cases arose in the context of whether it was permissible to charge a person in a single count of an indictment with conduct which purported to describe more than one criminal offense. In *Commonwealth v. Hope*,[4] the defendant was charged with four counts of a single indictment, each alleging a breaking and entering with the intent to commit larceny, *and* larceny. The trial court held that the indictment alleged larceny offenses rather than breaking and entry since the consummated offense of larcey was alleged in each count of the indictment. Hope was sentenced as a "common thief" based on a repeat offender statute and appealed on the basis that the court erroneously applied the repeat offender provision. In the alternative, Hope complained that the inclusion of the larceny allegation in the housebreaking indictment was improper.

---

[3]U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

[4]39 Mass (21 Pick.) 1 (1839).

The Supreme Judicial Court of Massachusetts held that the method of pleading employed by the prosecution was permissible; in fact, it was the historically preferred method of pleading such cases. Chief Justice Shaw rendered that opinion notwithstanding his acknowledgment that the language in each count described different statutory offenses:

> It is very manifest, that breaking and entering a dwelling-house in the daytime with an intent to steal, and stealing in a dwellinghouse, whether by means of breaking and entering or otherwise, are two distinct statute offenses, each subjecting the party to a liability to five years' imprisonment. It is also obvious, that the one fact of breaking, entering and stealing necessarily constitutes both of these offenses. We are not aware of any instance, in which two several indictments have been brought in such a case, and probably the reason may be, because it has been usual to charge the whole as one compound offense, as in the present case, and then the larceny being embraced, it may not seem properly to be subject of a separate indictment. Whether in a case where the felonious intent, and not the fact of stealing, is charged, a separate indictment would lie for the larceny, we give no opinion.[5]

The court's implicit holding, that when an allegation contains elements of both a breaking and entering with the intent to commit a specific offense and the intended offense, a separate indictment for the intended offense would not lie, was an extension of the opinion of the same court in *Commonwealth v. Tuck*.[6] In that case, the defendant was also charged in a single count with breaking and entering with the intent to commit larceny and the completed larceny. Tuck challenged the conviction on the ground that the indictment was impermissibly duplicitous, but the court disagreed.

The court recognized the general rule that only one crime may be charged in a single court of an indictment. It pointed out, however, that there was an exception to the rule:

> When two crimes are of the same nature and necessarily so connected that they *may*, and when both are committed *must* constitute but one legal offense, they should be included in one charge. Familiar examples of these are, *assault and battery*, and *burglary*. . . . An *assault* and

---

[5]*Id.* at 5.
[6]37 Mass (20 Pick.) 356 (1838).

> *battery* is really but one crime. The latter includes the former. A person may be convicted of the former but acquitted of the latter, but not *vice versa*. They must therefore be charged as one offense. . . . So in burglary, where the indictment charges a breaking and entry with an intent to steal and an actual *stealing*, (which is the common form,) the jury may acquit of the burglary and convict of the larceny, but cannot convict of the *burglary* and *larceny* as two distinct offenses. The latter is merged in the former, and they constitute but one offense.[7]

Both *Hope* and *Tuck* resolved the question of separateness of offenses on the basis of time-honored methods of pleading criminal offenses. In addition, each relied generally on the theory of compound offenses in which several criminal acts followed in succession to constitute a single criminal episode. The results in these cases were the products, however, of the method used by the prosecution to allege the offenses and were not grounded on any detailed analysis of the offenses from the standpoint of differing elements or statutory preferences. It was not long before this approach was to lose favor with the Massachusetts court.

In *Josslyn v. Commonwealth*,[8] the court confronted the situation in which the defendant was charged in one count of an indictment with breaking and entering with the intent to commit larceny and in another count with the larceny. Josslyn challenged his conviction, asserting that the indictment was irregular because it charged two distinct offenses. The court rejected the contention and distinguished the case from *Hope*:

> [*Hope*] was decided on the ground, that where breaking and entering are averred, and an actual stealing at the same time, all charged in one count, the charge of stealing is substituted for an averment of an intent to steal; a mode of charging which is warranted by the precedents there cited. We think the distinction to be this; that where the breaking and entering, and actual stealing, are charged in one count, there is but one offense charged, and there can be but one penalty adjudged. But where they are averred in distinct counts, as distinct substantive offenses not alleged to have been committed at the same time and as one continued act; if in other respects, they are such of-

---

[7] *Id.* at 361 (citations omitted).
[8] 44 Mass. (6 Met.) 236 (1843).

> fenses as may be joined in the same indictment, the defendant may be convicted on both, and a judgment rendered, founded on both.[9]

The stage had been set for separating offenses committed during a continuous course of conduct and thus departing from traditional methods of pleading. The *Josslyn* court, though, did not engage in a detailed analysis of the elements of crime. In essence, it left the decision on how offenses would be charged to the prosecutor, and the only guidance appeared to be one of the temporal proximity between the offenses. Otherwise, the approach taken fell short of delineating whether offenses were indeed separate for purposes of pleading and proof. The traditional analysis was dependent instead on defining offenses in terms of the act or acts alleged to have constituted the offenses, and the discretion of prosecutors in formulating such definitions was to a great extent unfettered.

B. REFINING THE DEFINITION OF "OFFENSE"

As has been seen, the early cases dealing with the propriety of charging several offenses in a single count of an indictment or in a single indictment focused primarily on a superficial analysis of whether the method of pleading was permissible under traditional rules. As the cases evolved, however, the definition of offenses assumed a greater role in court's consideration of the separateness of offenses, and the courts looked to traditional double jeopardy notions to resolve the dilemma.

1. Offenses Defined in Terms of Law and Fact.

Commonwealth v. Roby[10] was a case which directly implicated the Double Jeopardy Clause. The defendant had been convicted of a misdemeanor, assault with intent to commit murder. After the victim's death, he was indicted for her murder. At the second trial, Roby interposed a plea in bar of trial, arguing that the same act underlay both the assault and the murder and that for purposes of double jeopardy the offenses were the same.

The focus of the court's inquiry was to determine whether the offenses were indeed separate. It defined an offense in terms of both the act underlying it and the crime resulting from the act:

---

[9] *Id.* at 239-40.
[10] 29 Mass. (12 Pick.) 496 (1832).

> In considering the identity of the offense, it must appear by the plea, that the offense charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.[11]

To determine whether Roby's first conviction precluded the murder prosecution, the court examined whether the facts of one indictment would have warranted conviction under the other. Although the same act formed the basis of both indictments, the legal and factual nature of the crimes was different and Roby's plea in bar of trial was denied:

> The indictment for murder necessarily charges the fact of killing, as the essential and most material fact, which gives its legal character to the offense. If the party assaulted, after a felonious assault, dies within the year and day, the same act, which till the death was an assault and misdemeanor only, though aggravated, is by that event shown to have been a mortal wound. The event, strictly speaking, does not change the character of the act, but it relates back to the time of the assault, and the same act, which might be a felonious assault only had the party not died, is in truth shown by that event to have been a mortal wound; and the crime, which would otherwise have been an aggravated misdemeanor, is thus shown to be a capital felony. The facts are essentially different, and the legal character of the crime essentially different.[12]

2. Same Facts Test.

A similar line of reasoning was applied in *Wilson v. State*,[13] but the court went further and attempted to inject policy considerations into its analysis. Wilson had been convicted of larceny and pleaded that conviction in bar of a later trial for breaking and entering with the intent to commit larceny. The court, although recognizing that the larceny of which he had been convicted was the intended offense of the breaking and entering, denied the plea in bar of trial.

---

[11] *Id.* at 503.

[12] *Id.* at 504-05. The definition of offenses was treated as a matter separate from the question whether one could be convicted for a misdemeanor upon an indictment for a felony. *Id.* at 506.

[13] 24 Conn. 56 (1855).

In an exhaustive analysis of the rule against double jeopardy, the court not only defined the identity of offenses to be considered in applying the rule, but it sought to define and to justify the limits of the rule's application:

> [The rule against double jeopardy] we do not mean to impair. But it is our manifest duty to so apply it, as not to create an immunity in cases of crime, which do not constitute, either in whole or in part, the offenses for which the criminal has once been exposed to punishment. Such a defense should never be available, unless it appears from the averments in the plea, that the offenses for which the accused has been tried and that for which he is afterward prosecuted, are really the same.[14]

Applying the approach followed by the court in *Roby*, the court concluded that the facts alleged in the second indictment, breaking and entering with the intent to commit larceny, could not have established proof of Wilson's commission of the larceny of which he had earlier been convicted. The first conviction, then, was not a bar to the second trial.[15]

While it relied primarily on a test centering on the identity of the facts alleged in each indictment, the court also discussed the essential differences between the offenses under consideration. Breaking and entering, a creature of statute, did not require proof that the intended offense was actually completed. Likewise, larceny, a common law offense, was in no sense dependent for its commission on the showing of any unlawful entry. Although the actual theft constituted the strongest proof of the intent attending the breaking and entering, it was not a necessary element of the statutory offense.[16]

The dissent in *Wilson* was critical of the majority's analysis of the offenses in terms of the abstract facts and elements of the two offenses. Instead, Chief Justice Waite considered the question of intent to be the paramount consideration in resolving the issue. "Whenever, in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent,

---

[14] *Id.* at 62.

[15] *Id.* at 63.

[16] *Id.* at 65. The court recognized that a different result might have been reached had the second indictment charged a breaking and entering and a theft in the same count. The court doubted whether the statute under consideration would have authorized such a charge. *Id.* at 67.

cannot be maintained."[17] Since the larcenous intent was the same for both offenses, the larceny conviction should have been a bar to the second trial.

The dissent was also critical of the departure from traditional methods of charging offenses such as those in *Hope*, for Chief Justice Waite believed that the prosecutor was being given greater powers than the law should allow and that some check should be placed on prosecutorial discretion. "[T]he law gives him no power to make two crimes, or one, out of the same transaction, at his pleasure. The law, and not the attorney, must determine that matter."[18]

C. DOUBLE JEOPARDY AND INDICTMENTS—A SYNTHESIS

For the most part, the early definition of offenses followed the approaches outlined above. If there were several offenses alleged in a single count of an indictment, the traditional rules of pleading were followed, and the prosecutor was afforded substantial leeway in drafting charges. If the question of double jeopardy arose by a plea in bar of trial, a more concerted effort was made to define offenses in terms of their elements, regardless of the discretion exercised by the prosecutor. These two tracks finally merged, however, in *Morey v. Commonwealth*[19] and *State v. Ridley*.[20]

In *Morey*, the defendant was charged with both adultery and wrongful cohabitation. He contended that since the time period during which he was alleged to have cohabited encompassed the periods during which the adultery was committed, and since the same woman was involved in the offenses, the offenses were the same and he could not be convicted of and punished for each. The court rejected his contention, formulating a test to determine if offenses are the same for purposes of the protection against double jeopardy:

> A conviction of acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether

---

[17] *Id.* at 71 (Waite, C.J., dissenting).
[18] *Id.* at 72.
[19] 108 Mass. 433 (1871).
[20] 48 Iowa 370 (1878).

> he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.[21]

The court's approach was a combination of the "same evidence" test early announced in cases such as *Roby* and *Josslyn* and an "elements" test which took into consideration the prerogative of the legislature to define crimes. With regard to the case before it, the court explained that regardless of the facts actually adduced as to each of the indictments, the charge of cohabitation did not require proof that either party was married. Likewise, a conviction upon the adultery indictment did not require proof of cohabitation, but it did require proof of Morey's being married to another. Despite the fact that both offenses required proof of unlawful sexual intercourse, and that evidence at trial of the same acts of intercourse formed the basis for both convictions, the offenses were held to be separate.[22]

The departure from traditional notions of pleading and defining offenses in terms of the facts necessary to support them was even more pronounced in *State v. Ridley*. The court, not content merely to state rules and formulate definitions, engaged in a detailed critique of the older cases and refined the quest for a definition of offenses to one involving statutory construction.

In *Ridley*, the indictment alleged, in a single count, that the defendant had broken and entered a store in the nighttime with the intent to commit larceny and that he had in fact stolen certain goods. The judge instructed the jury that it could return a conviction on any one of the three different offenses. The greatest offense would be larceny from the store in the nighttime, followed, in order of severity, by breaking and entering with the intent to commit larceny, and by simple larceny.[23] After his conviction of the greatest offense, Ridley appealed on the ground that the indictment was improperly drafted and at most he should have been convicted of breaking and entering with the intent to commit larceny. The prosecution's position was that the indictment was proper because it charged a compound offense and each aspect of the compound offense was a permissible part of the indictment.

---

[21] *Morey*, 108 Mass. at 434.
[22] *Id.*
[23] *Ridley*, 48 Iowa at 371-72.

The court, while recognizing that there existed a statutory basis for charging several offenses in the same indictment in cases involving compound offenses,[24] proceeded to analyze the applicability of the rule to Ridley's situation. In its initial opinion, the court pursued a narrow definition of what constituted a compound offense. "It must, we think, refer to a case where a particular transaction constitutes in itself two or more offenses."[25] The example used by the court was a man's having forcible sexual intercourse with a woman not his wife. That "transaction" would permit charging adultery and rape in the same indictment, and, depending on the "degree of consanguinity," a further allegation of incest might be included. "In such cases, all the offenses are committed by the same act or transaction at the same point of time, and all may be charged in the same indictment."[26] Because Ridley's offense did not arise from the same act—the breaking and entering was completed prior to the larceny—the compound offense exception did not apply, and the court held the combination of offenses in a single indictment to be improper.[27]

The state requested a rehearing, citing the past practice of charging burglary and larceny in the same indictment in cases in which the larceny is the culmination of the burglary. The court eased its position concerning the identity of time as the touchstone for defining compound offenses, for it recognized that "there may be successive offenses which constitute a single offense," such as robbery, consisting of an assault followed by a larceny.[28] In that situation, however, both offenses had to be committed in order to constitute the "compound offense" of robbery. Burglary, on the other hand, did not by definition require that the intended offense be committed.

Expanding on the difference between offenses such as burglary and robbery, the court chose to restrict the meaning of the term "transaction" for purposes of defining compound offenses. It rejected the reasoning of *Commonwealth v. Hope*, which was decided on traditional rules of pleading, and engaged in a logical analysis of

---

[24]The court believed it difficult to define a compound offense. "It must, we think refer to a case where a particular transaction constitutes in itself two or more offenses." *Id.* at 372. The example given was a married man's having forcible sexual intercourse with a woman not his wife. The same act would constitute rape and adultery. *Id.* at 372-73.

[25]*Id.* at 372.

[26]*Id.* at 373.

[27]*Id.* at 373.

[28]State v. Ridley, 48 Iowa 374, 375 (1878) (rehearing).

the anomalous results which would arise if the traditional rules were followed in every case. Specifically, the court examined the various types of burglary which could be committed depending on the offense intended at the time of the breaking and entering. If a defendant intended to commit the offense of murder or rape, the court was sure that a civilized society would not countenance charging burglary alone and subjecting the defendant to the maximum sentence for that offense. Although the practice of charging burglary committed with the intent to commit larceny had traditionally been sanctioned, the court could find no basis in logic to distinguish that offense from the more serious varieties of burglary.[29]

The decisions in *Morey* and *Ridley*, therefore, established a break in the analysis of pleading so-called compound offenses. By narrow construction of the concept of criminal transactions, the court in each case in effect divorced the factual basis of the offenses being considered from the abstract definition of offenses based purely on the elements thereof. This approach lent itself to an economical resolution of the double jeopardy component of the multiplicity analysis and was to be adopted later by the Supreme Court, but not before the Court was to engage in several attempts to untangle the double jeopardy web of confusion.

D. THE SUPREME COURT CONSIDERS THE ISSUE

In its attempt to resolve disputes concerning application of the Double Jeopardy Clause, the Supreme Court considered essentially two questions. The first was the scope of its applicability to offenses; the second was whether the Clause set any limits on a legislature's power to define offenses. For purposes of this analysis, the first consideration will be treated in greater detail.

1. Continuing Offenses.

A variation of the compound offense concept presented itself in *Ex parte Snow*.[30] In that case the defendant was charged in three indictments with separate instances of cohabitation in violation of federal statute.[31] The first indictment alleged the period of cohabitation to be from January 1, 1883, to December 31, 1883, the second from January 1, 1885, to December 31, 1885, and the third from

---

[29]*Id.* at 377.
[30]120 U.S. 274 (1887).
[31]Ch. 47, § 3, 22 Stat. 30, 31 (1882).

January 1, 1884, to December 31, 1884. Each indictment alleged that Snow had cohabited with the same woman; the only distinction among the indictments was the alleged duration.

After his conviction upon all three indictments and his service of the first of three six-month terms of imprisonment adjudged, Snow sought his release by writ of habeas corpus on the ground that the offense of cohabitation was a continuous offense and therefore he could be subjected only to a maximum imprisonment of six months even if the indictments were separate.[32]

The Supreme Court examined the statutory basis for the indictments against Snow and concluded that the intent of Congress was to define the offense of cohabitation as a continuing offense: "The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offense, having duration, and not an offense consisting of an isolated act."[33]

The Court compared the offense to the offense of working on the Sabbath considered in *Crepps v. Durden*.[34] In that case, Lord Mansfield had held that Crepps could not be sentenced for each instance of selling bread on a single Sunday. On the contrary, "repeated offenses are not the object which the Legislature had in view in making the statute; but singly, to punish a man for exercising his ordinary trade and calling on Sunday."[35] Likewise, the Supreme Court concluded that the Congress sought not to punish each act which evidenced cohabitation, but the practice of living together over a period of time, no matter how long that period lasted.[36]

The Court's approach in *Snow* differed from that taken by the earlier state court analyses. While it examined traditional procedural rules governing pleading and drafting of criminal charges and a factual analysis of interplay among the several indictments, the Court in *Snow* looked first to the nature of the offense as defined by Congress. Implicitly, it established the rule that a double jeopardy

---

[32]120 U.S. at 280.

[33]*Id.* at 281.

[34]98 Eng. Rep. 1283 (1777).

[35]*Id.* at 1287, *quoted in Snow*, 120 U.S. at 284. *See* United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981) ("Lord Mansfield held that a statute prohibiting working on Sunday allowed the Crown to convict a baker only once for baking four loaves of bread on one Sunday; it could seek only one penalty of five shillings; it could not convict him four times, once for each loaf, and fine him one pound").

[36]*See* Commonwealth v. Robinson, 16 Mass. 259 (1879), *cited in Snow*, 120 U.S. at 286 (the offense of keeping a tenement for the sale of liquor was a continuous offense even if it covered a period of several days).

analysis is first and foremost a question of statutory construction. This rule would continue as the Court grappled with more "classic" double jeopardy questions.

2. Same Transaction Theory.

Although various courts, most notably those in *Ridley* and *Morey*, grappled with the concept whether offenses could or should be defined in terms of transactions, the Supreme Court's concern with criminal transactions did not arise in the same context. In *Grafton v. United States,*[37] the defendant had been acquitted by a general court-martial of two specifications of murder. Thereafter, he was charged with assassination in a Philippine civilian court. The offense of assassination was defined as murder accompanied by one of an enumerated list of aggravating factors.[38]

Among other grounds on which he challenged the jurisdiction of the Philippines court to try him for assassination, Grafton maintained that his acquittal by general court-martial barred his second trial. The court overruled the plea in bar of trial on the ground that the court-martial could not have tried him for assassination as defined by Philippine law. Grafton was convicted of homicide, a killing in the absence of any of the enumerated aggravating factors.[39]

On appeal to the Supreme Court, Grafton prevailed in his assertion that the general court-martial acquittal barred his trial by the Philippine civil courts.[40] Although it specifically declined to formulate a comprehensive test "by which every conceivable case must be solved,"[41] the Court held that the offenses were the same regardless of the names given to them. In so doing, it fleetingly referred to criminal transaction but did not define the limits of the definition of the term transaction. The Court stated: "If the transaction is the same, or if each [offense] rests upon the same facts between the same parties, it is sufficient to make good the defense."[42]

The Court decided *Grafton* on its facts without aspiring to formulation of a strict rule for universal application. The offense of which

---

[37]206 U.S. 333 (1907).

[38]*Id.* at 343 (quoting Philippines Penal Code art. 403).

[39]206 U.S. at 343 (quoting Philippines Penal Code art. 404).

[40]The Court in *Grafton*, drew no distinction between the constitutional protection against double jeopardy, *supra* note 3, and the statutory protection extended to the Territory of the Philippines, ch. 1369, § 5, 32 Stat. 691, 692 (1902). *Grafton*, 206 U.S. at 345-46.

[41]206 U.S. at 355.

[42]*Id.* at 351 (quoting J. Bishop, Treatise on Criminal Law § 1050 (7th ed. 1882)).

Grafton had been convicted, homicide, was identical to that of which he had been acquitted by the court-martial. Nevertheless, *Grafton* lay the groundwork for later treatment of the issue.

3. Scope of the Double Jeopardy Clause—Offenses, not Acts.

If, despite *Grafton*, any questions existed concerning the traditional or transactional approach to double jeopardy analysis, they were resolved by a consistent string of decisions. In *Carter v. McClaughry*,[43] decided five years before but not noted in *Grafton*, the Court dealt with a collateral attack on a general court-martial conviction for conspiracy to file false claims, causing false claims to be filed, and conduct unbecoming an officer, in violation of Articles of War 60 and 61.[44] The accused claimed that the conspiracy and false claims offenses were the same offense for purposes of double jeopardy and that they were the same as the conduct unbecoming an officer offense.

With regard to the first prong of Carter's contentions, the Court, citing *Morey v. Commonwealth*, held they were separate offenses "if the test of the identity of offenses, that the same evidence is required to sustain them, be applied."[45] The Court held further that "[t]he fact that both charges related to and grew out of the same transaction made no difference."[46] The Court reached the same result with regard to the second prong of Carter's attack.

With only minor variation the Court applied the "same evidence" test in subsequent cases. The offense of agreeing to receive a bribe and actually receiving the same bribe were held to be separate in *Burton v. United States*.[47] In *Gavieres v. United States*,[48] the defendant was convicted, based on the same words and conduct, of the offenses of insulting a public official and drunk and boisterious behavior in public. The Court adopted the reasoning of *Morey v. Commonwealth* and held that, although the acts underlying the offenses were the same, the elements of the offenses were different. Therefore, Gavieres was properly convicted of separate offenses arising from the same conduct.

---

[43]183 U.S. 365 (1902).

[44]American Articles of War, arts. 60, 61 (1874), *reprinted in* Winthrop, *infra* note 72, at 991.

[45]183 U.S. at 394.

[46]*Id.* at 394-95.

[47]202 U.S. 344 (1906). The Court cited both *Roby* and *Wilson* in reaching this result.

[48]220 U.S. 338 (1911).

One of the most far-reaching cases decided in the area was *Morgan v. Devine*.[49] The Court held that breaking into a post office with the intent to commit larceny and the completed larceny were separate offenses, based on the Court's interpretation of the legislative prerogative to define the crime:

> It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections [of the statute] to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon the subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself.[50]

In referring to the "difference in adjudicated cases," the Court, though not explicitly overruling it, discussed *Munson v. McClaughry*,[51] in which offenses similar to those in *Devine* were held to be the same. The court's theory in *Munson* was that the focus of the double jeopardy inquiry must be the criminal intent of the perpetrator:

> A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuous criminal act.[52]

In *Devine*, however, the Court discredited the "underlying intent test" and reinforced its view that offenses are defined by Congress and the congressional intent would govern.

4. Double Jeopardy Clause Not a Limit on the Legislature.

During the evolution of the various tests to determine whether offenses are the same for purposes of double jeopardy, a question arose as to the limits, if any, that the Double Jeopardy Clause placed on a legislature in defining crime. On the one hand there was the school which looked to the reasonableness of dissecting criminal

---

[49]237 U.S. 632 (1915).
[50]*Id.* at 369.
[51]193 F. 72 (8th Cir. 1912).
[52]*Id.* at 74 (citing Halligan v. Wayne, 179 F. 112 (9th Cir. 1910)).

transactions—however they might be defined—and punishing each step thereof. Among these were *Munson* and *Halligan v. Wayne*[53] which saw no limit to such dissection and believed the practice itself to be inhumane and unreasonable.[54] Even the Supreme Court in *Snow* could not countenance subdividing what it held to be a continuous offense into its component parts.

The contrary view was that the legislature was endowed with the power to define offenses and there was no constitutional or other rein on the exercise of that power. This is the position adopted by the Supreme Court in *Albrecht v. United States*.[55] Albrecht was convicted of possessing illegal liquor and of selling the same liquor. He contended that the possession and sale offenses arising out of the same transaction were single offenses under the Double Jeopardy Clause. Citing *Burton*, *Devine*, and *Gavieres*, the Court held that the offenses were indeed separate. In so doing, it looked not to the factual basis of each offense but rather to the offenses in the abstract of the context of Congress' power to define offenses:

> [P]ossessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.[56]

The Court's quest for a definitive rule governing the application of the Double Jeopardy Clause while respecting the power of the legislature culminated in its decision in *Blockburger v. United States*.[57] Blockburger had sold morphine to another person on two days. He

---

[53] 179 F. 112 (9th Cir. 1910).

[54] It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction. . . . And there is evidently no limit to the number of offenses into which a single criminal intent may be divided, if this rule of division and punishment is once firmly established.

Munson, 198 F. at 74.

[55] 273 U.S. 1 (1927).

[56] *Id.* at 11.

[57] 284 U.S. 299 (1931).

maintained that the drug transaction was a continuing offense and that his conviction of three separate offenses arising from that transaction violated the Double Jeopardy Clause.[58]

In deciding *Blockburger*, the Court was faced with resolving both a "criminal transaction—continuing offense" issue and an issue of the permissibility of double punishment for the same criminal act. Both inquiries were resolved on the basis of statutory construction.

Regarding the issue of a continuing offense, the Court distinguished the drug sales in *Blockburger* from the cohabitation in *Snow*. In the latter, the offense was by definition a continuous offense, while in the former, Congress sought not to "create the offense of engaging in the business of selling forbidden drugs, but [to penalize] any sale made in the absence of either of the qualifying requirements set forth [in the statute]."[59]

Regarding the second issue, whether the same sale could be punished as two distinct offenses, the Court refined the definition of the identity of offenses and promulgated the so-called *Blockburger* Rule:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.[60]

Because one provision of the statute required proof that the sale was not from the original package and another required proof that a written order had not accompanied the sale, the same sale was found to violate separate statutory provisions and thus constitute two separately punishable offenses. That it was within the power of Congress to decide whether offenses were to be separately punishable was clearly stated by the Court; "[E]ach offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by Congress, not by judicial legislation in the guise of construction."[61]

---

[58]Blockburger was convicted of selling morphine hydrochloride not in or from the original stamped package, in violation of the Harrison Narcotics Act, ch. 1, § 1, 38 Stat. 785 (1914) *as amended by* ch. 18, § 1006, 40 Stat. 1130, 1131 (1919). The second transaction was charged as the sale of the same drug, in violation of the same statute, and as a sale made without a written order by the purchaser in violation of the Harrison Narcotics Act, ch. 1, § 2, 38 Stat. 785, 786 (1914). *Blockburger*, 284 U.S. at 300.

[59]*Id.* at 302.

[60]*Id.* at 304 (citing *Gavieres*).

[61]284 U.S. at 305.

E. EVOLUTION IN MILITARY PRACTICE—A RULE OF PROCEDURE

The question of the permissibility of separate punishment for different aspects of a single criminal transaction was analyzed differently in military practice from the approach taken by the civilian courts. Just as early cases such as *Commonwealth v. Hope* grounded their approaches in traditional methods of drafting criminal charges, military practitioners treated the concept of multiplicity as a procedural rule affecting how specifications were to be drafted. The interplay between multiplicity and the Double Jeopardy Clause did not become manifest as quickly as it had in the civil courts.

1. Unnecessary Multiplication to be Avoided.

The early approach was explained by Colonel Winthrop as a method of pleading:

> In military cases where the offense falls apparently equally within the purview of two or more articles of war, or where the legal character of the act of the accused cannot be precisely known or defined till developed by the proof, it is not infrequent in cases of importance to state the accusation under two or more charges. . . . If the two articles impose different penalties, it may, for this additional reason, be desirable to prefer separate charges, since the court will thus be vested with a wider discretion as to the punishment. Where, however, the case falls quite clearly within the definition of a certain specific article, to resort to plural charges is neither good pleading nor just to the accused. . . . An unnecessary multiplication of forms of charges for the same offense is always to be avoided.[62]

He also pointed out that, since military courts were different from civilian juries because of their ability to enter findings by excepting portions of a specification and substituting other language, the need for multiple descriptions of the same criminal conduct was not as great in military practice as it was in civilian practice.[63]

---

[62]W. Winthrop, Military Law and Precedents 143 (2d ed. 1920 reprint) [hereinafter cited as Winthrop]. In discussing the permissive forms of pleading in military practice, Colonel Winthrop quoted Wharton: "Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law allows." F. Wharton, Criminal Pleading and Practice § 297 (8th ed. 1880), *quoted in* Winthrop, *supra*, at 143. As will be discussed, contingencies in the evidence need not be guarded against solely by resort to multiple specifications. The forms of individual specifications may accomplish the same result.

[63]Winthrop, *supra* note 62, at 143.

Two difficulties arose from Colonel Winthrop's approach. First, there was no clear-cut method for determining what constituted "unnecessary" multiplication of charges. More significantly, though, was the inconsistency between his approach and the early precedents of The Judge Advocate General. That this inconsistency should arise was in no small measure a function of the less than consistent treatment of the concept in those precedents. For example, in a single page of the 1880 Digest of the Opinions of The Judge Advocate General of the Army, several conflicting rules were announced. One could not be charged with a lesser offense in lieu of a greater offense, but one could be arraigned on separate charges alleging distinct offenses which arose from the same act, but the prosecution was apparently limited to charging a single act under several forms only if there was doubt as to what the evidence would show.[64] Apparently, the approach taken by Colonel Winthrop was an attempt to simplify the procedure without specifying a definitive rule.

2. Practice Established by the Manual for Courts-Martial.

The early editions of the Manual for Courts-Martial adopted Colonel Winthrop's approach. The 1921 edition allowed duplicate charges for the same act or omission in cases of uncertainty as to the proof which would be adduced at trial.[65] The 1928 Manual charged the language from "act or omission" to "transaction or what is substantially one transaction," but retained the standard of uncertainty of the evidence as justifying multiplication of charges.[66] The 1949 Manual was identical to the 1928 Manual.[67]

In each case, however, the problem of multiple charges was treated as a function of the punishment which could be imposed rather than as a question of the lawfulness of multiple convictions based on the same conduct. Thus, each of the three cited versions of the Manual provided that, if the same act or omission gave rise to two or more offenses, the court "should impose punishment only with respect to the act or omission in its most important aspect."[68]

---

[64]Dig. Ops. JAG 1901 *Charge*, para. 702, at 197 (Aug. 1872).

[65]Manual for Courts-Martial, United States, 1921, para. 66 [hereinafter cited as MCM, 1921].

[66]Manual for Courts-Martial, United States, 1928, para. 27 [hereinafter cited as MCM, 1928].

[67]Manual for Courts-Martial, United States, 1949, para. 27.

[68]*Compare* MCM, 1949, para. 80*a*, *with* MCM, 1928, para. 80, *and* MCM, 1921, para. 66.

3. Application of the Manual Guidance.

The interpretation of the Manual guidance by the Army Board of Review treated the rule against multiplication of charges as a procedural rather than a substantive rule.[69] In addition, in determining how the rule was to be applied, various approaches were taken. Some cases compared offenses to determine if they were in law the same offense for purposes of punishment. For example, in *United States v. Johnson*,[70] the board held that involuntary manslaughter, in violation of the 93d Article of War, and drunk and reckless driving resulting in a death, in violation of the 96th Article of War, were not the same offense. The distinction between the two was that the latter offense required proof that the accused's conduct was to the prejudice of good order and discipline or was service-discrediting, while the former offense required no such proof. "The necessity of thus proving a fact under one charge which was not required under the other, alone marks the two offenses as distinct in law. Conviction of both specifications would not have placed the accused twice in jeopardy for the same offense."[71]

Most cases decided by the Board of Review did not engage in a literal double jeopardy analysis. This resulted from the treatment of the terms "unreasonable multiplication of charges" as "unreasonableness from the viewpoint of both the legality and the appropriateness of the punishment involved."[72] Thus, even though the board held that specifications alleging assault against the victim constituted the force and violence elements of a robbery specification, no specification was dismissed; the sentence was reduced.[73] Similarly, where the board held that charging the assaults which constituted the disorderly aspects of a separate specification of drunk and disorderly conduct was an unreasonable multiplication of charges, the board held that the offenses should have been charged differently, but it afforded the accused no sentence relief.[74] Where the accused's loud, boisterous, and threatening language was simul-

---

[69]United States v. Reed, 2 B.R. 109 (A.B.R. 1931).

[70]1 B.R. 273 (A.B.R. 1930).

[71]*Id.* at 289.

[72]United States v. Goyette, 3 B.R. 27, 33 (A.B.R. 1931).

[73]*Id.* at 34.

[74]United States v. Lynch, 4 B.R. 1, 21-22 (A.B.R. 1932). *See* United States v. Loyd, 52 B.R. 255, 261 (1945) ("[Accused] was prejudiced to the extent that anyone who is convicted of two offenses when he should have been convicted of only one is prejudiced." The board affirmed a finding of guilty of the specification, but changed the article violated).

taneous with and part of an assault upon a noncommissioned officer, the board held that charges had been unreasonably multiplied and reduced the sentence.[75]

In none of these cases did the board discuss or attempt to define any test for the identity of offenses. With few exceptions, the treatment of multiplicity by Army Boards of Review was not framed in terms of a constitutional double jeopardy issue as to conviction of identical offenses. On the contrary, the double jeopardy protection, if it be denominated as such, concerned itself only with the sentencing aspect of the proceedings.

III. MULTIPLICITY FOR SENTENCING

The evolution of the double jeopardy analysis in the civil courts, though to a certain extent couched in terms of a protection against multiple punishments, was centered on a quest for a method of determining whether offenses were indeed separate for purposes of conviction. In general, no matter what approach was used, if the offenses were found to be different, then they were held to be separately punishable.

A. APPLYING BLOCKBURGER*—THE CIVILIAN PRACTICE*

The approach after the *Blockburger* test was developed was to further refine the inquiry to determine not only whether the legislature had defined separate offenses but also whether there was evident an intent that the offenses were to be punished separately. Thus, in *Prince v. United States*,[76] the Court held that, although Congress had defined both the offenses of bank robbery and entering a bank with the intent to commit a robbery, there was no clear indication of an intent that they be punished separately. On the contrary, the Court held that the entry offense merged with the robbery offense when the latter was consummated, and only one sentence could be adjudged.[77] In *Albernaz v. United States*,[78] on the other hand, the

[75]United States v. Jordan, 12 B.R. 1, 6 (A.B.R. 1941). *See* United States v. Martinez, 75 B.R. 75 (A.B.R. 1947) (separate specifications of robberies of several victims during one holdup should have been consolidated; no prejudice as to sentence found); United States v. Blossomgame, 73 B.R. 133 (A.B.R. 1947) (specification alleging carrying pistol in violation of standing order held unreasonably multiplicious with robbery specification, but no relief given on findings or sentence).

[76]352 U.S. 322 (1957).

[77]*Id.* at 328.

[78]450 U.S. 333 (1980).

Court held that an agreement to import marijuana into the United States and then to distribute it could be charged as separate conspiracies to import and to distribute. Further, since the two conspiracies were in violation of separate statutes, they could be separately punished.[79]

The most recent interpretations of the *Blockburger* rule came in *Whalen v. United States*[80] and *Missouri v. Hunter*.[81] In *Whalen*, the defendant was convicted of both rape and felony murder—murder during the perpetration of the rape—and given consecutive sentences. The Court held that Congress intended the *Blockburger* test for separate offenses to govern the imposition of sentences. Since proof of the rape was a necessary prerequisite to proof of the felony murder, the offenses were not separately punishable. In *Hunter*, a contrary intent on the part of the Missouri legislature was found. The offenses of robbery and armed criminal action were defined in separate statutes. The Court held that the legislature's intent that the offenses be separately punished was "crystal clear" and noted that "[t]he rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent."[82]

B. THE MILITARY APPROACH

The concept of multiplicity for sentencing in the civil courts is thus an exercise in determining legislative intent regarding how offenses are to be punished. The practice in courts-martial, on the other hand, has not been so formalistic. As evidenced in the cases applying the 1921, 1928, and 1949 Manuals, the approach was one of applying the directive that one transaction not be made the basis for many offenses. In essence, although some cases utilized a *Blockburger*-type analysis, the test was not whether separate offenses could be charged in theory, but rather whether too many were charged for no justifiable reason. If several means of charging the same transaction were utilized, the findings of guilty were upheld, but the sentence was examined to determine whether it was in any way enhanced by the presence of multiple offenses.

---

[79]*Compare* Braverman v. United States, 317 U.S. 49 (1942) (seven separate counts of conspiracy based on different object offenses not separately punishable since conspiracy violated single statute).

[80]445 U.S. 684 (1980).

[81]103 S. Ct. 673 (1983).

[82]*Id.* at 692.

IV. THE QUAGMIRE—ATTEMPTS TO APPLY *BLOCKBURGER* TO MILITARY PRACTICE

The enactment of the Uniform Code of Military Justice[83] and the promulgation of the 1951 Manual for Courts-Martial drastically changed the military approach to the issue of multiplicity. For the first time, the *Blockburger* rule was officially adopted as the test for separate offenses.[84] The adoption of the rule, however, was intended as a means of limiting the sentence which could be adjudged rather than for determining the number of offenses which could be charged. The previous rule, that one transaction should not be the basis of an unreasonable multiplication of charges, remained.[85]

The military rule governing the permissible limits for charging multiple offenses arising from the same transaction was acknowledged as being more liberal than the rule applicable in federal courts. "What is desired in court-martial practice is the application of a reasonable rule. . . . Although an accused may be found guilty of any number of specifications, even though they allege offenses arising out of a single act or omission and do not allege separate offenses, . . . he may be punished only for separate offenses. . . ."[86] The benefits to be derived from adoption of the *Blockburger* rule for separateness of offenses were that military practice could then rely on federal precedent in the area and it would "also eliminate the need for unnecessary corrective action by reviewing authorities in that, if the sentence is supported by a good specification, it will be unnecessary to determine whether the offenses are separate."[87]

A. ATTEMPTS TO APPLY THE MANUAL TEST

Despite the clear language of the drafters which accompanied publication of the 1951 Manual, the task of defining the permissible limits of charging and sentencing in courts-martial soon became anything but simplified. The early cases decided by the Court of Military Appeals determined that a pure *Blockburger* analysis would

---

[83]Uniform Code of Military Justice, arts. 1-140, ch. 169, § 1, 64 Stat. 108 (1950) (codified as amended at 10 U.S.C. §§ 801-840 (1958)) [hereinafter cited as U.C.M.J., 1950].

[84]Manual for Courts-Martial, United States, 1951, para. 76*a*(3) [hereinafter cited as MCM, 1951].

[85]MCM, 1951, para. 26*b*.

[86]Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, paras. 26*b*,*c*, at 40-1 (1958 reprint).

[87]*Id.*, para. 76*a*(8) at 78.

not work in military practice, and the stage was set for the attempt to devise a method of analysis which would.

In *United States v. Florence*,[88] the court held that the determination of the separateness of offenses was a question of "law and fact to be determined from the evidence in the record."[89] Thereafter, in *United States v. Yarborough*,[90] the court utilized the test "whether each offense requires proof of an element not required to prove the other."[91] in determining that conspiracy to malinger and malingering were separate offenses. It was not long, however, before the court began to depart from the Manual—*Blockburger* analysis.

In *United States v. Soukup*,[92] the court signaled an erosion of the applicability of *Blockburger* when, while conceding it applied to the facts of that case, it stated that "this standard may not serve accurately and safely in all situations."[93] The court supplied another test for separateness when it determined that the offenses of misbehavior before the enemy by failing to remain with his unit at the front lines and disobedience of an officer's order to return to his unit not only contained separate elements, but the offenses violated separate duties.[94]

The trend away from *Blockburger* continued in *United States v. Davis*,[95] in which the court was called upon to determine whether unpremeditated murder is a lesser included offense of felony murder. The court stated: "[Federal cases] make it abundantly clear that, whether a lesser degree of homicide is necessarily included within that charged, depends almost exclusively on *the facts stated and proved in support of the offense alleged*."[96] The court went on to state that "no definitive rule applicable to all cases can be devised" to define lesser included offenses.[97]

---

[88]1 C.M.A. 620, 5 C.M.R. 48 (1952).
[89]*Id.* at 627, 5 C.M.R. at 55.
[90]1 C.M.A. 678, 5 C.M.R. 107 (1952).
[91]*Id.* at 686, 5 C.M.R. at 115 (citing *Morgan v. Devine; Gavieres v. United States*).
[92]2 C.M.A. 141, 7 C.M.R. 17 (1953).
[93]*Id.* at 145, 7 C.M.R. at 21.
[94]*Id. See* United States v. McCormick, 3 C.M.A. 361, 12 C.M.R. 117 (1953) (in case involving same offenses as in *Soukup*, the court held multiplicity affects only the sentence).
[95]2 C.M.A. 505, 10 C.M.R. 3 (1953).
[96]*Id.* at 508, 10 C.M.R. at 6 (citations omitted).
[97]*Id.*

B. APRIL 16, 1954—THREE APPROACHES TO INTERPRETING BLOCKBURGER

Davis was described as having rejected the view that *Blockburger* was an "*in vacuo* approach to multiplicity."[98] In *United States v. Beene*,[99] the court contended with the accused's assertion that the offenses of drunk and reckless driving resulted in bodily injury and involuntary manslaughter by striking the same victim were the same offense. The government argued that *Blockburger* required only an examination of the elements of the two offenses—without examining the facts of the case—to determine separateness. "Under this interpretation, if offenses alleged may—*theoretically and conceivably*—be established by evidence not the same, cumulative sentences are sustainable."[100]

The court rejected the government's position, citing its own opinion in *Davis*, and declared that it was "sure that. . . *Blockburger*, or other Supreme Court cases, do not compel adoption of the Government's position."[101] The court then examined in detail "the core of the idea expressed in the phrase: one crime, one punishment," and "scrutinize[d] the subject through the spectacles of legal *norms* or *standards*."[102]

The *Beene* opinion was an attempt to develop a method by which *Blockburger* might be applied to the facts of any given case:

> [N]orms or standards—whether of legislative or judicial origin—are designed to facilitate societal living; and their binding power stems in large part from the premise that, apart from a regulated society, man is helpless to survive. . . .It follows logically that punishment will be ascribed in accordance with the number and value of the norms transgressed.
>
> . . . .
>
> . . . Blockburger indicates that each count of an indictment must require proof of a distinct and additional fact in order that it may constitute the basis for separate punishment. Our point is simply that this *fact*, of which proof is demanded, must be significant in that it involves the in-

---

[98]United States v. Beene, 4 C.M.A. 177, 178, 15 C.M.R. 177, 178 (1954).
[99]*Id.*
[100]*Id.* at 178, 15 C.M.R. at 178.
[101]*Id.*
[102]*Id.* at 179, 15 C.M.R. at 179.

> fringement by the accused of a distinct norm established by society through its lawmaking agencies. In short, this separate *fact* must constitute the open sesame to a separate norm. To require less would be to permit the multiplication of punishments through artful, but meaningless, rephrasings of the prosecutor.[103]

Using this "societal norms" approach, the court held that the accused had violated separate norms. The offenses were charged under two different sections of the Code,[104] suggesting a legislative intent that separate norms be created. The gravamens of the offenses were different—violation of a regulatory scheme designed to make the roadways safe, in the case of the reckless driving charge; unlawful killing, in the case of the manslaughter charge. The allegation of injury resulting from the drunk and reckless driving was not an element of the offense, rather it was an aggravating factor. Taking all these factors into consideration, the court determined that the offenses were indeed separate.

The same day that *Beene* was decided, the court issued opinions in two other cases which had implications on testing for multiplicity of offenses. In *United States v. McVey*,[105] the accused was charged with both robbery and assault with a dangerous weapon. After an extensive survey of the federal precedents governing multiplicity, the court held that the aggravated assault was a lesser included offense of the robbery and, although the accused was properly convicted of both offenses,[106] they were not separate for purposes of punishment.[107] In reaching this determination, the court examined not only the elements of each offense but the wording of each specification to determine whether the allegation of force and violence in the robbery specification was broad enough to cover the aggravated nature of the assault. "Stated succinctly, the fact that the victim was struck with a club and strangled with a belt lay at the core of the offense of robbery here and they were the only means which would sustain the allegation and proof of force and violence."[108] Again, the court departed from the "*in vacuo*" approach of *Blockburger*.

The third case decided along with *Beene* and *McVey* was *United States v. Redenius*.[109] The accused was convicted of both desertion

---

[103]*Id.* at 179, 180, 15 C.M.R. at 179, 180.
[104]U.C.M.J., 1950, arts. 111, 119.
[105]4 C.M.A. 167, 15 C.M.R. 167 (1954).
[106]*Id.* at 169, 15 C.M.R. at 169.
[107]*Id.* at 174, 15 C.M.R. at 174.
[108]*Id.* at 173, 15 C.M.R. at 173.
[109]4 C.M.A. 161, 15 C.M.R. 161 (1954).

with intent to remain away permanently and desertion with the intent to shirk important service; both offenses were based on the same absence. As in *McVey*, the court held that conviction of both offenses was proper because the Manual allowed for multiple specifications based on the same transaction where there is "substantial doubt. . . as to the facts or law."[110] The offenses were not separate for punishment purposes, however.

The court purportedly applied *Blockburger* in holding that the specifications alleged but one offense. However, it went further than merely examining the elements of each offense in the abstract, and examined the duties which may have been breached by the accused or a result of his absence. Applying *Soukup*, the court held that Redenius had only one duty—to remain with his organization until reassigned—and that the different intents alleged in the two specifications were not elements of the offenses for purposes of applying *Blockburger*.[111]

C. OTHER TESTS DEVISED FOR DETERMINING MULTIPLICITY

Following *Beene, McVey*, and *Redenius*, the court devised other tests for determining multiplicity of charges. Thus, in *United States v. Posnick*,[112] the court held that be definition lesser included offenses were not separate from greater offenses for purposes of sentencing. In *United States v. Swigert*,[113] the court held that, although the accused twice entered the victim's room and removed money, the thefts were motivated by a single impulse and constituted a single integrated transaction. The accused was therefore properly charged with a single specification of larceny which served as the basis for a greater maximum sentence than would have been possible if the transaction were charged as two larcenies.[114]

A similar line of reasoning was employed to develop another test for multiplicity in *United States v. Kleinhans*.[115] The accused was convicted of both unlawfully opening mail matter and larceny of the contents thereof. Comparing its decisions in *United States v. Real*[116]

---

[110]*Id.* at 164, 15 C.M.R. at 164.
[111]*Id.* at 166-67, 15 C.M.R. at 166-67. *Compare* Braverman v. United States, 317 U.S. 49 (1942).
[112]8 C.M.A. 201, 24 C.M.R. 17 (1957).
[113]8 C.M.A. 468, 24 C.M.R. 278 (1957).
[114]*Id.* at 471-72, 24 C.M.R. at 281-82.
[115]14 C.M.A. 496, 34 C.M.R. 276 (1964).
[116]8 C.M.A. 644, 25 C.M.R. 148 (1958).

and *United States v. Dicario*,[117] the court held that the proof required to show both the opening of the letters and the larceny of the contents was similar and the act underlying the two offenses was essentially the same. In such circumstances, the offenses are not separately punishable.[118]

D. MULTIPLICITY AS AFFECTING MORE THAN THE SENTENCE

In each of these cases, regardless of which test for identity of offenses was applied, the court remained of the view that multiplicity of offenses only affects the sentence. Thus, if error in the determination of multiplicity were found on appeal, reassessment of the sentence was deemed the appropriate remedy, while findings of guilty were not affected.

This approach began to change with the court's opinion in *United States v. Drexler*.[119] Relying on *United States v. Strand*,[120] which upheld the accused's right to seek dismissal of multiplicious offenses at trial, the court affirmed the action of the Navy Board of Review in setting aside the findings of guilty of a missing movement specification as being multiplicious with an unauthorized absence offense.[121]

This reasoning was later refined in *United States v. Williams*.[122] In dismissing a missing movement offense as multiplicious with a charge of willful disobedience of a superior officer's order, the court stated:

> [P]rocedurally, a multiplicious charge is allowed to be separately charged only to enable the government to meet the exigencies of proof. . . . When the necessity is not present, a multiplicious offense may be dismissed on motion before plea, or the findings of guilty may be disapproved before sentence, so as to guarantee that the offense is not reflected in the final punishment imposed upon the accused.[123]

---

[117] 8 C.M.A. 353, 24 C.M.R. (1957).
[118] 14 C.M.A. at 498, 34 C.M.R. at 278.
[119] 9 C.M.A. 405, 26 C.M.R. 185 (1958).
[120] 6 C.M.A. 297, 20 C.M.R. 13 (1955).
[121] *See* United States v. Peak, 44 C.M.R. 658 (C.G.C.M.R. 1971) (offense of provoking words dismissed as multiplicious for findings with disrespect to officer and communication of threat); United States v. Adams, 42 C.M.R. 911 (N.C.M.R. 1970) (willful damage of government property and arson dismissed as multiplicious for findings with hazarding a vessel); United States v. Davis, 40 C.M.R. 470 (A.B.R. 1969) (missing movement dismissed as multiplicious for findings with unauthorized absence).
[122] 18 C.M.A. 78, 39 C.M.R. 78 (1968).
[123] *Id.* at 81, 39 C.M.R. at 81.

The Army Court of Military Review later amplified *Williams* and reasoned that, on appeal, multiplicious specifications should be dismissed "so that they will not be upon appellant's record of convictions nor be matters for which appellant might be called to account or explain in the future."[124]

E. THE MANUAL ADOPTS SEVERAL TESTS FOR MULTIPLICITY

The various tests formulated by the Court of Military Appeals were, to a greater or lesser degree, adopted by Presidential directive when the 1969 Manual for Courts-Martial was promulgated.[125] While the "general rule" of *Blockburger* was to be applied, the analysis of the separateness of offenses under that rule was to be tempered by application of other tests devised in *Beene, Kleinhans, Soukup*, and *Redenius*.[126]

That this approach would lead to confusion was presaged in *United States v. Lewis*,[127] decided by the Air Force Board of Review in 1961. Lewis was charged, *inter alia*, with forging a check and uttering the same check. The board applied the various tests and found that, despite the fact that each offense contained different elements, violated separate duties, were not included offenses within each other, required different proof as well as a different overt act, the offenses were not separately punishable because they were separate steps in the same transaction.[128] Similar confusion was bound to arise in other analyses, depending on the relative weights to be given to the various tests.[129]

Attempts to untangle the web of uncertainty led to the development of still more tests for multiplicity. Thus, in *United States v. Harrison*,[130] the court held that the offenses of signing false official

---

[124]United States v. Walters, 47 C.M.R. 93, 94 (A.C.M.R. 1973).

[125]*Compare* MCM, 1969, para. 76*a*(5), *with* MCM, 1951, para. 75*a*(8); *see* U.S. Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Rev. Ed.), at 13-8—13-9 (1970) [hereinafter cited as Analysis].

[126]Analysis, at 13-9.

[127]31 C.M.R. 575 (A.F.B.R. 1961).

[128]*Id.* at 578.

[129]*Compare* United States v. Allen, 16 M.J. 395 (C.M.A. 1983) (making of worthless checks constituted false pretense underlying larceny; worthless check offenses dismissed) *with* United States v. Smith, 14 M.J. 430 (C.M.A. 1983) (use and sale of same drug separately punishable as violating separate social norms and containing different elements), *and* United States v. Shealy, 9 M.J. 842 (A.F.C.M.R. 1980) (transfer and use of heroin multiplicious for sentencing because they constituted single integrated transaction marked by unity of time and insistent flow of events).

[130]4 M.J. 332 (C.M.A. 1978).

records were separately punishable from an offense of wrongful appropriation. The records were submitted to conceal the appropriation of government funds. Noting that "no one test can be applied to the exclusion of all others,"[131] the court held the offenses to be separate because there was not a unity of time between them and they were motivated by different impulses or intents.[132]

F. IMPATIENCE WITH MANUAL TESTS

The *Lewis* case and othe cases signalled the courts' impatience with the practice of multiplicious charging and with the necessity for appellate courts to continually address the issue. The court found itself at the same time attempting to provide guidance on how the issue was to be addressed, while not formulating yet additional tests to generate more confusion. In *United States v. Hughes*,[133] Chief Judge Fletcher noted the court's frustration with the continuing practice of multiplying an accused's conduct into many seemingly separate offenses:

> Due consideration of this Court's approach to multiplicity questions should alleviate the need to formulate specific rules for the myriad of multiplicity combinations. Stated more succinctly, sound legal judgment coupled with a measure of common sense often will eliminate the needless and costly judicial process of factually resolving matters of such questionable legal worth.[134]

That combination of legal judgment and common sense was reflected in ensuing Court of Military Review decisions. For example, in *United States v. Arrington*,[135] the court dismissed two specifications of possession of marijuana as multiplicious with two specifications of transfer of the same substance based on the dissipation of any exigencies of proof necessitating the multiple charges.[136] Likewise, in *United States v. Haywood*,[137] the court determined that no question remained as to whether the accused had sold marijuana or merely transferred it and dismissed the transfer specification. The

---

[131] *Id.* at 334.

[132] *Id.* at 334 (citing United States v. Irving, 3 M.J. 6 (C.M.A. 1977); United States v. Smith, 1 M.J. 160 (C.M.A. 1976); United States v. Rosen, 9 C.M.A. 175, 25 C.M.R. 437 (1958)).

[133] 1 M.J. 346 (C.M.A. 1976).

[134] *Id.* at 348-49 n.3.

[135] 5 M.J. 756 (A.C.M.R. 1978).

[136] *Id.* at 758 (citing *United States v. Williams*).

[137] United States v. Haywood, 6 M.J. 604 (A.C.M.R. 1978).

fact that cases such as these continued and appellate courts were called upon to resolve multiplicity questions at all reflected that the matters were not being properly addressed at trial or upon the initial review by the convening authority.[138]

G. IMPATIENCE TURNS TO WRATH— MULTIPLICITY AS A COMPONENT OF DUE PROCESS

If the court's impatience was signalled in *United States v. Hughes*, its temper flared in *United States v. Sturdivant*.[139] Based on a single conversation which the unit first sergeant overheard between Sturdivant and another solider and upon the other soldier's apprehension while in possession of 18 half-ounce bags of marijuana, the accused was charged with ten separate offenses.[140] At trial, the military judge forced the government to elect among certain of the offenses and dismissed three specifications. Sturdivant was convicted of seven specifications and sentenced to a dishonorable discharge, confinement at hard labor for three years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[141]

During its review of the case, the Army Court of Military Review dismissed certain of the offenses due to insufficient evidence.[142] Thereafter, the court held that the "proliferation of charges" against the accused was a violation of the rule that "one transaction. . . should not be made the basis of an unreasonable multiplication of charges," and dismissed two more specifications.[143]

---

[138]Uniform Code of Military Justice, arts. 60, 64, 10 U.S.C. §§ 860, 864 (1976) [hereinafter cited as U.C.M.J.].

[139]13 M.J. 323 (C.M.A. 1982).

[140]The offenses charged were conspiracy to possess marijuana, in violation of U.C.M.J. art. 81; solicitation to possess marijuana, solicitation to introduce marijuana into a military installation for the purpose of transfer, solicitation to introduce marijuana into a military installation for the purpose of sale, introduction of marijuana onto a military installation for purpose of transfer, introduction of marijuana onto a military installation for the purpose of sale, and possession of marijuana, in violation of U.C.M.J. art. 134; and attempted possession of marijuana, in violation of U.C.M.J. art. 80.

[141]The offenses dismissed at trial were the possession and introduction offenses. At the time of the offenses, Sturdivant was a staff sergeant.

[142]9 M.J. 923 (A.C.M.R. 1980). The court set aside findings of guilty of conspiracy to possess marijuana, solicitation to possess marijuana, and attempted possession of marijuana. *Id.* at 927, 928.

[143]*Id.* at 927-28 (citing M.C.M., 1969, para. 26*b*). The court dismissed the offenses of solicitation to introduce for the purpose of transfer and conspiracy to transfer).

The relief afforded by the court was to reduce the sentence to confinement at hard labor for six months and forfeiture of $299.00 pay per month for six months.[144]

The Court of Military Appeals granted Sturdivant's petition for grant of review[145] and requested briefs on the issue "[w]hether the unreasonable multiplication of charges precluded the accused from receiving a fair trial."[146] In resolving that issue, the court recalled the possibility to which it had adverted in *United States v. Middleton*,[147] where the accused had been charged with four separate offenses on the basis of his submitting a single false document. Although the court there held that the multiplication of charges affected only the sentence, it warned:

> This is not to say that unreasonable multiplication may never affect the findings. The exaggeration of a single offense into many seemingly separate crimes may, in a particular case, create the impression that the accused is a "bad character" and thereby lead the court-martial to resolve against him doubt created by the evidence.[148]

In *Sturdivant*, the Court of Military Appeals, citing the Army court's opinion that certain offenses were not sufficiently proven at trial, held that the multiplication of charges had indeed affected the court-martial's deliberations on findings. Despite the substantial reduction in sentence afforded by the Army Court of Military Review, the court concluded that relief other than sentence relief was mandated. "If there is ever to be a case in which we set aside findings of guilt because of 'unreasonable multiplication of charges,' this is it."[149]

H. THE EVERETT COURT—TRYING TO PROVIDE A DEFINITIVE RULE

The magnitude of the multiplicity problem evidenced by the proliferation of charges in *Sturdivant* and the drastic remedial action necessitated in that case led the court to devise its latest test for multiplicity in *United States v. Baker*.[150] In that case, the accused

---

[144]9 M.J. at 928.
[145]10 M.J 244 (C.M.A. 1980).
[146]*Id.* at 245.
[147]12 C.M.A. 54, 30 C.M.R. 54 (1960).
[148]*Id.* at 58-59, 30 C.M.R. at 58-59.
[149]*Sturdivant*, 13 M.J. at 330.
[150]14 M.J. 361 (C.M.A. 1982).

was convicted of assault and battery of one woman and of aggravated assault upon and communication of a threat to kill a second woman. On appeal, Baker argued that the latter two offenses were multiplicious.

In an exhaustive analysis in the lead opinion, Judge Fletcher discussed paragraph 26*b* of the Manual as it operates as a curb on "certain abuses of prosecutorial power," particularly that situation which occurred in *Sturdivant* where the fact-finding process was perverted by the multitude of charges before the court-martial.[151] He then devised a step-by-step analysis to determine whether a violation of the policy enunciated in paragraph 26*b* of the Manual has occurred:

> [1]. [I]t should first be determined whether the charged offenses are based on "[o]ne transaction or what is substantially one transaction."
>
> [2]. The second step. . . is to determine whether alleging both. . . charges on the basis of one transaction constitutes a "multiplication of charges."
>
> [3]. The third step [arises] if some doubt exist[s] on this question [of multiplication] as a matter of law or the Government justified this charging decision on the basis of a realistic contingency in proof.[152]

In applying this analysis, each prong of the test would in turn be governed by further rules. To determine whether a number of offenses arose from the same transaction, a "transaction" was defined as "a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct."[153] Whether the allegation of several charges arising from such a transaction constituted "multiplication" was to be determined from guidance contained in the examples provided in paragraph 26*b* of the Manual. Thus, if the offenses stand in the relationship of greater and lesser offenses, if they are parts of an indivisible crime as a matter of law, or if they are different aspects of a continuous course of conduct prohibited by a single statutory provision, the offenses "are duplicative as a matter of law."[154]

---

[151] *Id.* at 365 (citing Pointer v. United States, 151 U.S. 396 (1894); *United States v. Middleton*).

[152] 14 M.J. at 366-67.

[153] *Id.* at 366 (citations omitted).

[154] *Id.* at 366.

Applying the analysis to Baker's offenses, the court held that the communication of the threat and the aggravated assault did not stand in the relationship of greater and lesser offenses since the elements of the offenses were different and the different elements were not "fairly embraced in the factual allegations of the other offense and the evidence introduced at trial."[155] Although the offenses arose from a single transaction, there was no multiplication of charges and Baker could properly be convicted of both offenses.

The court's inquiry did not end with the determination of the separateness of the offenses for the purpose of conviction. On the contrary, the court immersed itself into the inquiry whether the offenses were "the result of a single impulse or intent" or whether they "involve violations of different social standards."[156] At the conclusion of the analysis, the court held that the accused's intent and the underlying societal standard—protection of life and limb—were the same for each offense. Though separate offenses for purposes of conviction, the assault and communication of a threat were held to be the same for sentencing purposes.[157]

1. Interpreting Baker*—Problem Areas.*

The *Baker* test for multiplicity for findings is on first glance attractive for its apparent simplicity. The difficulties in the test, though, are readily apparent upon further scrutiny. The most obvious deficiency lies in the third prong—whether there is a realistic contingency in proof. The determination of such "realism" lends itself to subjective rather than objective analysis. It is based on the "exigency of proof" concept that the prosecutor may not know how a witness will testify at trial or what evidence will be admitted by the judge.[158] The situations in which the conscientious prosecutor will truly be confronted with such uncertainties are few. The investigations preceding preferral and referral of charges and the trial itself should resolve any questions concerning exigencies of proof in all but the most extraordinary cases.[159] In some cases, of course, exigencies may still remain, and the trial counsel must be prepared to articulate the basis for concern that exigencies still exist. If such a basis cannot be articulated, the legal and ethical efficacy of proceeding to trial at all must be questioned.

---

[155]*Id.* at 368.
[156]*Id.* at 370 (citing M.C.M., 1969, paras. 76*a*(5)(a) and (b)).
[157]*Id.* at 370.
[158]United States v. Doss, 15 M.J. 409, 412 (C.M.A. 1983).
[159]*See Haywood*, 6 M.J. at 606.

Difficulties with the other prongs of the *Baker* analysis have been demonstrated in subsequent cases. These center principally on the second prong, whether multiplication has occurred.

2. Applications of Baker*—Defining Multiplication.*

In *United States v. Doss*,[160] the accused was convicted of two specifications each of unauthorized absence and breach of restriction. The duration of each of the absences was less than an hour, and the inception of each absence coincided with each breach of restriction. The court specifically questioned whether there were any uncertainties as to the facts or law justifying the multiple charges and held that, the same evidence being necessary to support both offenses, the offenses were duplicative of each other.[161] The absences were treated as lesser included offenses of the breaches of restriction and they were dismissed.[162]

In arriving at its result in *Doss*, the court utilized that portion of the *Baker* analysis which tests the factual allegations of specifications to determine whether they "[allege] fairly and the proof raises reasonably, all elements of both crimes."[163] The court concluded that the factual allegations of the breaches of restriction fairly embraced the elements of the absence offenses when it determined they were multiplicious.[164]

A contrary result was reached in *United States v. DiBello*.[165] In that case, the unauthorized absence commenced simultaneously with the breach of restriction, but the absence lasted 17 days. Since the maximum permissible punishment for the absence was greater than that for the breach of restriction, the court was faced with a situation different from that in *Doss*. It was anomalous that an apparently lesser included offense, the absence, would authorize a greater punishment; if the lesser offense were dismissed, the possible sentence would be reduced.

The court analyzed the elements of each offense and held the offenses to be separate for findings purposes. In so deciding, it reaffirmed the rule that the duration of an unauthorized absence is not

---

[160]15 M.J. 409 (C.M.A. 1983).
[161]*Id.* at 413.
[162]*Id.* at 413-14 (citing United States v. Modesett, 9 C.M.A. 152, 25 C.M.R. 414 (1958)).
[163]*Baker*, 14 M.J. at 367-68 (quoting United States v. Duggan, 4 C.M.A. 396, 399-400, 15 C.M.R. 396, 399-400 (1954)).
[164]14 M.J. at 368 n.7.
[165]17 M.J. 77 (C.M.A. 1983).

an element of the offense but pointed out that the aggravating factor of the duration provides the basis for determining the sentence which may be imposed.[166] In order to carve an exception to the elements test of the *Baker* analysis, the court devised yet another test for lesser included offenses: "[W]e conclude that, in testing for multipliciousness of findings, charge A is not included within charge B if A contains allegations of an 'aggravating circumstance' which is not a necessary element of B and which is not specifically alleged in B."[167] In *DiBello*, then, in order to provide a means for imposing the greatest amount of punishment and to reflect the nature of his offense, the court let stand his conviction of both absence without leave and breach of restriction.[168]

V. TOWARD UNRAVELING THE CONFUSION—A BALANCE OF INTERESTS

The historic underpinnings of the multiplicity analysis have consistently addressed two prongs: the interest of society at large in punishing offenders and the protection of the accused against double jeopardy. The former has been reflected in the *Blockburger* test to determine the intent of the people as expressed through the legislature, as to whether offenses are to be separately punished. The protection of the accused has been reflected in the proliferation of other tests as to whether double jeopardy is implicated, whether a fair trial is possible in view of the number of offenses alleged, and whether the intent of the legislature has been clearly expressed.[169]

A. COMPETING INTERESTS AS REFLECTED IN CONVICTIONS

Each of the countervailing interests no doubt is a valid basis on which any multiplicity analysis may be formulated. As demonstrated by the myriad cases on the issue, the balancing of the interests is a difficult exercise. On the one hand, there is a valid societal interest in having an individual's record of convictions accurately reflect the

---

[166] *Id.* at 79.

[167] *Id.* at 80 (footnote omitted). *Accord* United States v. Murray, 17 M.J. 81 (C.M.A. 1983) (unauthorized absence and missing movement through design not multiplicious for findings).

[168] 17 M.J. at 80.

[169] If the intent of the legislature is not clearly expressed concerning the scope of criminal statutes, a rule of lenity is to be applied. *Whalen*, 450 U.S. at 695 n.10, and cases cited therein.

criminal conduct which has breached the norms demanded by the public. This is true no matter what sentence is adjudged. On the other hand, an accused has a valid interest in a conviction based on evidence which proves his or her guilt beyond a reasonable doubt unencumbered by inference operating on the subconscious or conscious mind of the trier of fact that, because of the number of allegations against the accused, there must be some basis to the government's charges.

B. COMPETING INTERESTS IN SENTENCING

In the sentencing arena as well, the society at large has an interest in vindication of breaches against the social order. This interest in turn requires that the sentencing body be provided the greatest possible basis on which to insure that "the punishment fits the crime," and can only be addressed if the aggravated nature of the accused's conduct is fully demonstrated.

The accused, on the other hand, is entitled to a punishment based on an accurate depiction of his or her conduct as opposed to a perversion of that conduct which is calculated to result in a sentence which is disproportionate to the societal interest.

C. BLOCKBURGER, *THE CIVILIAN APPROACH TO A BALANCE*

In the civil sector, the balancing of these interests has resulted in an abstract approach to the analysis in which the offenses are viewed independently from the evidence underlying them.[170] Though this approach has been well-established, it is not without its critics. The criticism essentially derives from a fear that a single criminal episode will give rise to a myriad of conceivable offenses and that prosecutorial discretion will be perverted so as to deny the accused a fair trial. For example, in his concurring opinion in *Ashe v. Swenson*,[171] Justice Brennan expressed his criticism of the "elements" test by citing examples of how it operates:

> [W]here a single criminal episode involves several victims, under the "same evidence" test a separate prosecution

---

[170]*Compare Albernaz with Beene* (whether *Blockburger* is an *in vacuo* approach to defining offenses).

[171]397 U.S. 436 (1970).

> may be brought as to each. *E.g.*, *State v. Hoag*, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958). The "same evidence" test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. *E.g.*, *Johnson v. Commonwealth*, 201 Ky. 314, 256. S.W. 388 (1928) (each of 75 poker hands a separate "offense"). Even a single criminal act may lead to multiple prosecutions if it is viewed from the perspectives of different statutes. *E.g.*, *State v. Elder*, 65 Ind. 282 (1879). Given the tendency of modern criminal litigation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of criminal prosecution, the potentialities for abuse inherent in the "same evidence" test are simply intolerable.[172]

Justice Brennan's fears are embodied in the case of *Illinois v. Vitale*.[173] Vitale was convicted of failure to slow his car to avoid an accident after he was involved in an accident which caused the deaths of two children. The day after that conviction, the state initiated proceedings to prosecute him for manslaughter.

Vitale protested that the earlier conviction barred the manslaughter prosecution and was successful. The state appealed, met with no success in the state courts, and ultimately received review by the Supreme Court.[174]

Analyzing the case through a *Blockburger* inquiry, the Court reversed and remanded to the Illinois Supreme Court. The Court's difficulty consisted in its inability to determine if the traffic offense and the manslaughter offenses were the same offense under *Blockburger*. "[I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test."[175] Further, the state had not made

---

[172]*Id.* at 451-52 (Brennan, J., concurring) (footnotes omitted). *See* Irby v. United States, 390 F.2d 432, 438 (D.C. Cir. 1967) (Leventhal, J., concurring) ("My difficulty with general references to disincentives and multiple societal interests is that they may tend to revive the discarded 'same evidence' rule formerly used for this problem, and to focus on broad and perhaps abstract considerations rather than the purpose that animated the particular defendant and helps define his criminality").

[173]447 U.S. 410 (1980).

[174]The record of the state and Supreme Court proceedings is outlined in detail in *Vitale*, 447 U.S. at 411-15.

[175]*Id.* at 419.

clear what acts it would attempt to prove as constituting the recklessness underlying the manslaughter offense. The Court was therefore unable to say that the offenses were the same.

Justice Stevens, in his dissent, criticized the state for its approach to the case and in effect held it responsible for the Court's failure to arrive at a resolution of the issue of the identity of offenses. In fact, he was of the opinion that the fact that the state had not disclosed its theory of the manslaughter case during the five years the case was pending should alone bar the trial.[176]

Vitale epitomizes the needless litigation that can result when an abstract rule is utilized by a prosecutor to seek multiple convictions on the basis of a single criminal episode. If the logic and common sense approach suggested by Judge Fletcher in *Hughes* were applicable, the confusion in *Vitale* could have been avoided. In military practice, such confusion should never arise.

D. BLOCKBURGER *AND THE PECULIARITIES OF MILITARY CRIMINAL LAW*

Courts-martial are different from their civilian counterparts. Before a case reaches trial, a comprehensive investigation of the accused's conduct affords all parties the opportunity to examine the available evidence in detail. Because the accused is given greater access to the prosecution's evidence than in civilian proceedings, there is a lesser risk that the defense will be surprised or misled by the government's case.[177] More important, though, is the government's opportunity to examine the evidence, discover how witnesses will testify, and develop its theory of the case. This process, if properly utilized, would result in the trial of an accused on charges which accurately reflect the seriousness of the accused's conduct but which do not of necessity have to conform to abstract rules of statutory construction.

1. Restricting the Scope of Courts-martial.

Courts-martial have been described as tools for discipline such that their jurisdiction must be limited to "the least possible power ade-

---

[176]*Id.* at 423, 426 (Stevens, J., dissenting).

[177]U.C.M.J. art. 32; M.C.M. 1969, para. 34 (accused has right to be present at investigation by impartial officer which is condition precedent to referral of charges to general court-martial).

quate to the end proposed."[178] This "least possible power" of courts-martial has expanded over the years in terms of the scope of jurisdiction,[179] but it can serve as a guide in the formulation of the charges upon which an accused is tried and define the disciplinary goal to be achieved.

Civil courts have been guided in the treatment of questions of joinder of offenses and pleading by procedural rules which are different from those that obtain in military practice.[180] The practice in military courts is not so strictly circumscribed. In addition, courts-martial, through the tool of findings by exceptions and substitutions,[181] can deliberate and determine the factual basis of the verdict with a greater degree of accuracy. If these variables were inserted into the "common sense" equation suggested by Judge Fletcher in *Hughes*, and if the guidance in *Baker* concerning the inferences to be drawn from the factual allegations of specifications were followed, discipline could be maintained while insuring that the accused receives a fair trial.

An example can be taken from the treatment of drug offenses by the Court of Military Appeals. In *United States v. Maginley*,[182] the accused was convicted, in part, of sale of marijuana. After the Air Force Board of Review concluded that the evidence was insufficient to support Maginley's conviction of the sale, the charge was dismissed.[183] The board based its action on its opinion that the bare allegation of sale did not give rise to any lesser included offenses which could be affirmed on appeal.[184]

Upon certification of the correctness of that result by The Judge Advocate General of the Air Force, the Court of Military Appeals affirmed. The court explained that "the averment of sale alone does not fairly inform the accused that he is also expected to defend against" the offenses of possession and sale of marijuana.[185] The basis of the court's reasoning was that one can sell an item without possessing it, possess it and later sell it, or possess it without selling it.[186] The problem lies not in the logical appeal of such reasoning, but

---

[178]United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

[179]*E.g.*, United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983).

[180]*See* Wilson v. State, 24 Conn. 56 (1855).

[181]MCM, 1969, para. 74*b*(2).

[182]13 C.M.A. 445, 32 C.M.R. 445 (1963).

[183]32 C.M.R. 842, 847-51 (A.F.B.R. 1962).

[184]*Id.* at 850.

[185]*Maginley*, 13 C.M.A. at 448, 32 C.M.R. at 448.

[186]*Id.* at 447, 32 C.M.R. at 447 (quoting *Albrecht v. United States*).

in the practical effect of it. Any investigation into the case would have indicated whether the accused possessed and sold the drug, transferred it, or merely possessed it. In a typical drug case, the offense is discovered through the participation of an informant or law enforcement personnel. Such being the case, it is logically difficult to conceive of a defense counsel being unprepared to defend against lesser drug offenses than sale. At the same time, one must ask why the government did not describe the offense in the specification in greater detail.

The *Maginley* approach, though, highlights the harsh results which arise from strict adherence to abstract rules. While relying on legal accuracy, the court reached a logically untenable result. Worse still, *Maginley* has been applied as a *per se* rule that sale offenses have no lesser included offenses.[187] It is fair to say that the approach has contributed greatly to the countless cases which have involved separate specifications of sale, transfer, and possession of contraband drugs and which are among those pending resolution of multiplicity issues.[188]

It has been suggested that a blanket adoption of the *Blockburger* rule would eliminate the litigation on the issue of multiplicity.[189] Though the simplicity of that approach is appealing, its applicability to military practice is fraught with the potential for abuse. *Blockburger* cannot always be applied in its literal sense—as a means of determining legislative intent concerning the separateness of offenses.

2. The General Article—Potential for Abuse.

The most obvious problem arises in the case of the general article.[190] Because it proscribes conduct prejudicial to good order and discipline or service-discrediting conduct, the elements of an offense

---

[187]*E.g.*, United States v. Smith, 45 C.M.R. 619 (A.C.M.R. 1972).

[188]*E.g.*, United States v. Deland, 16 M.J. 889 (A.C.M.R. 1983), *petition granted*, 17 M.J. 313 (C.M.A. 1984) (whether specifications of conduct unbecoming an officer are multiplicious with specifications alleging rape and sodomy); United States v. Kauble, 15 M.J. 591 (A.C.M.R.), *petition granted*, 16 M.J. 176 (C.M.A. 1983) (whether conspiracy and wrongful communication of request to commit a crime are multiplicious); United States v. Zickefoose, CM 442196 (A.C.M.R. 1975) (unpublished), *petition granted*, 15 M.J. 177 (C.M.A. 1983) (whether possession and transfer of methamphetamines are multiplicious with sale of methamphetamines; whether possession and attempted transfer of methamphetamines are multiplicious with attempted sale of methamphetamines).

[189]*Baker*, 14 M.J. at 371-76 (Cook, J., dissenting).

[190]U.C.M.J. art. 134.

alleged under that article are not established by the legislature.[191] Rather, they are the product of, and limited only by the imagination of, the person drafting the specification. An inquiry into legislative intent in such a case is therefore impossible if a literal application of *Blockburger* were attempted.

3. The President Determines Sentences.

Allied to that difficulty is the position of the Congress relative to that of the President in establishing the sentences which might be imposed for violations of the Code. Whereas most criminal statutes define offenses in terms of both the proscribed conduct and the possible sentence, the Code, with few exceptions,[192] defines only the offenses and delegates the decision as to the maximum penalty to the President.[193] Although it might be argued that in practice the President has established limitations on sentences based on similar offenses defined by Congress,[194] a pure application of the search for legislative intent according to the *Blockburger* rationale is not possible. The President is not required to implement a sentencing scheme based on analogous offenses, and thus the relative weights of offenses, their penalties, are, in fact, set by the President.

E. MUST BLOCKBURGER *BE THE RULE?*

To be sure, *Blockburger* is part of the Manual rules governing multiplicity. One must question its utility in military practice from a practical point of view. Standing alone, it would provide a seemingly simple escape from the confusion existing in the appellate court opinions today. There are factors, however, which militate against its application across the board.

A basic problem with *Blockburger* is the potential for abuse with the attendant risk of a denial of a fair trial. That this problem should surface is in large measure a result of the view that the permissive language of the rule should be applied to the fullest extent—to cover every legal base in every criminal prosecution. The Court in *Block-*

---

[191] Indeed, Judge Cook has indicated that, for purposes of a multiplicity analysis, the portion of the general article proscribing service-discrediting conduct should not be considered an element of the offense. United States v. Doss, 15 M.J. 409, 414-15 (C.M.A. 1983) (Cook, J., concurring in the result).

[192] U.C.M.J. arts. 85(c), 90, 94, 100, 101, 102, 104, 106, 113, 118(1), 118(4) (specifically providing for death as a possible punishment; most involve offenses in time of war).

[193] U.C.M.J. art. 56.

[194] MCM, 1969, para. 127*c*(1).

burger did not mandate that separately punishable offenses always be charged. It merely provided a means to determine whether, if such offenses were charged, they could in fact be punished separately. In practice, were trial counsel to repeat the technique utilized in *Sturdivant*, the literal application of *Blockburger* would be little more than an abandonment of prosecutorial discretion.

Another fundamental difficulty with the *Blockburger* analysis is its underlying assumption that, because the legislature enacts separate statutes, there is an intent that violation of the statutes be separately punished. An alternative to that approach is that, in defining crime, a legislature recognizes the many ways by which one might violate the standards by which civilized people wish to be governed. By formulating criminal statutes comprising numerous provisions, the legislature does not necessarily express an intent that each provision be utilized as a vehicle for punishment. Rather, the legislature merely provides a legal statement of possible contingencies which might arise in the criminal mind and thereby a basis for punishment.

In practice, particularly in the military context, *Blockburger* should be limited to an appellate test to be applied in questionable cases. Those questionable cases, in turn, should only arise when extraordinary facts are present. The vast majority of cases need not look to *Blockburger* as the justification for preferring multiple charges.

Even before *Blockburger*, the historical aversion to "unnecessary multiplication of charges" guided court-martial practice. The key to resolution of the current controversy lies in focusing on the question of necessity. In the average case, it is simply not necessary to conjure up several ways by which to charge an accused with criminal offenses. The added measure of complexity introduced into courts-martial by multiple charges seldom serves to better the disciplinary process. On the other hand, it may detract from the primary military mission by diverting personnel and other resources to the court-martial arena.[195]

[195] *Toth v. Quarles*, 350 U.S. at 17.

VI. PROPOSED SOLUTION: EXPANSIVE PLEADING AND MOTION PRACTICE

An alternative to the approaches still exists and it has been suggested time and again in the cases which have sought to devise yet another test for multiplicity. The key lies in the form of the specifications, their factual allegations.[196] As the courts have so often stated, in order to evaluate the issue of multiplicity, they must look to the allegations of purportedly multiplicious specifications to determine whether the elements of one offense are fairly embraced in another. That this analysis should take place on appeal is manifestly absurd. Instead, this technique should be used as a tool from the outset.

A. EXPAND THE SCOPE OF FACTUAL ALLEGATIONS IN SPECIFICATIONS

To a great extent, semantic and legalistic arguments whether offenses are unduly multiplied, are part of the same transaction, or arise from the same impulse or intent can be obviated by expanding the scope of the allegations in the specifications. Instead of alleging the distinct phases of criminal misconduct as separate, and possibly multiplicious, offenses, the specifications should describe the criminal conduct in greater detail. For example, had the government charged Maginley with unlawful sale of marijuana by transferring possession of the drug, the theory of the case would have been clear and the defense could hardly claim it was misled. In *DiBello*, the accused could have been charged with absenting himself without authority, thereby breaching the restriction lawfully imposed upon him. In each case, the court would have had the capability of deciding whether the government had proved its allegation or only a part thereof, and the defense could not complain that it was not prepared to address the issues raised by the allegations. At the same time, the true nature of the offenses would have been before the sentencing body so that the aggravating factors could be reflected in the sentence.[197]

---

[196]*Baker*, 14 M.J. at 368.

[197]*See* United States v. Glover, 16 M.J. 397 (C.M.A. 1983) (aggravated assault not separately punishable from sexual offenses because it constituted force necessary to effectuate them and was the result of the same intent); United States v. Allen, 16 M.J. 395 (C.M.A. 1983) (making worthless checks was means of larceny through false pretenses).

The benefits to be derived from such an approach are manifest. It would, in a great majority of cases, eliminate the need for the "costly judicial process of factually resolving matters of. . . questionable legal worth."[198] In addition, it would reduce the need to rely on the numerous tests already devised and the need to formulate new rules for special cases as was the situation in *DiBello*.

B. DUPLICITOUS PLEADING AS NO OBSTACLE

One criticism of this approach is that it raises the spectre of duplicitous pleading. Truly duplicitous pleading, however, is that which charges alternative theories of the offense in the same specification.[199] In that situation, assuming that the need for alternative pleading is based on a genuine uncertainty as to what the evidence will show, multiplicious pleading may be necessary, but only at the outset of the proceedings. In the vast majority of cases in which the issue of multiplicity arises, though, consolidation of criminal allegations into a single specification should meet no legal objection since the rule against such a practice "does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially complete a single occasion of offense."[200]

C. EFFECTS ON SENTENCING

Another criticism of this approach is that the combination of several allegations into a single specification may reduce the maximum penalty which might be adjudged.[201] While this may be a real concern in the most serious of cases, it should not arise in the majority of cases.[202] In most cases, the sentence actually adjudged hardly approaches the maximum. This is particularly true if the case is based on a negotiated guilty plea. The broad description of criminal conduct in "traditional" terms in those cases should have little if any deleterious effect on society's interests in an appropriate sentence. Further, it is anticipated that, in drafting charges, the focus will be on the most serious aspect of the accused's criminal conduct, and therefore the greatest punishment will be implicated.

---

[198]*Hughes*, 1 M.J. at 348-49 n.3.

[199]*E.g.* United States v. Boswell, 32 C.M.R. 726 (C.G.B.R. 1963) (willful and negligent loss of government property).

[200]Winthrop, *supra* note 72, at 144. *Accord* United States v. Voudren, 33 C.M.R. 722 (A.F.B.R), *petition denied* 14 C.M.A. 669, 33 C.M.R. 436 (1963).

[201]*See e.g.*, *Ridley*, 48 Iowa at 377.

[202]*Doss*, 15 M.J. at 414 n.8.

D. ALLOCATING THE BURDENS UNDER THE PROPOSED PRACTICE

The benefits to be derived from expansive pleading in the average case should outweigh the potential pitfalls. By placing the burden on the government to allege the accused's conduct with greater specificity, it will insure that the gravity of that conduct is fully described in the context in which it arose. Both the findings of guilty and the sentence would accurately reflect the magnitude of the transgressions.

Coupled with the government's burden would be an equally onerous burden on the defense to challenge any uncertainties arising from the specifications. In a great number of cases, it was not until the appeal that the multiplicity issue has been raised. This has resulted in the courts' being deprived of a complete record of the parties' positions on which to base resolution of the issue. In addition, that shortcoming has given rise to the ancillary issue of whether questions of multiplicity are waived if not raised at trial.[203]

With the adoption of a system of expanded pleadings, the defense must be called upon to protect the interests of the accused by challenging the government's method of pleading at trial. A motion in the nature of a bill of particulars[204] should clarify the government's position at trial. Failure to assert such a motion should serve as a waiver of all but the most extraordinary challenges thereafter.

Aside from simplifying the inquiry into multiplicious offenses both at trial and on appeal, the proposed system of expansive pleading could benefit the military accused in real terms. The sheer numbers of cases pending review by military appellate courts of necessity delays consideration of appeals. As a result, by the time a court-martial case has been finally reviewed, many years may have elapsed since the commencement of confinement or other components of

---

[203]*Compare Allen*, 16 M.J. at 396 (failure to set aside findings of guilty of multiplicious specifications is plain error) *with* United States v. Huggins, 12 M.J. 657 (A.C.M.R. 1981) (failure of defense to object to multiplicious specifications constitutes waiver).

[204]United States v. Alef, 3 M.J. 414, 419 n.13 (C.M.A. 1977) ("[d]efense counsel may, of course, always as a preliminary matter challenge the indictment as being too uncertain or vague utilizing a motion for a Bill of Particulars"). *See* Gates & Casida, *Report to The Judge Advocate General by the Wartime Legislation Team*, 104 Mil. L. Rev. 139, 153 (1984), in which it is suggested that motion practice "would increase, rather than decrease, the volume of paperwork." This criticism is based on a motion practice fostered by shortening, rather than expanding, the wording of specifications.

the sentence. If an error is finally found during the appeal process, the chances of an accused's receiving meaningful amelioration of the sentence are severely reduced with the passage of time. Renewed emphasis on motion practice by the defense would have the salutary effect of injecting a greater degree of "certainty" into the finality of court-martial judgments, thus minimizing the number of cases in which error is found but it constitutes but a Pyrrhic victory.

VII. CONCLUSION

The problem of determining whether offenses are separate for purposes of conviction or punishment has troubled jurists for over one hundred fifty years. Both the civil and military courts have attempted to fashion tests to determine the identity of offenses which will at the same time protect the interests of society and the accused.

As the volume and complexity of criminal statutes increase, the number of offenses which a person's acts may constitute will increase. Necessarily, if current practice continues, the multiplicity arguments will intensify and generate greater confusion than already exists.

The solution to the problem lies in tempering a legalistic approach to enforcing criminal statutes with a common sense approach. By shifting the focus from time-consuming attacks on appeal to expansive draftsmanship of specifications and professional motion practice at trial, the interests of discipline will be achieved through sentences based on offenses described in the context in which they occurred. At the same time, the military accused will benefit from reducing the risk that unbridled prosecutions will result in a denial of a fair trial or in sentences based on extraneous influences rather than on the nature of the crime.

THE PREVIOUSLY HYPNOTIZED WITNESS: IS HIS TESTIMONY ADMISSIBLE?

by Captain John L. Plotkin*

This article examines the admissibility at a court-martial of the testimony of a witness hypnotized in the course of the pretrial investigation. It discusses the relationship of hypnosis and human memory, the potential impact of hypnosis on a witness, and the conflicting judicial approaches to the testimony of a previously hypnotized witness. The article concludes that, although the use of hypnosis involves risks of memory distortion, the witness may testify if the probative value of his testimony is not substantially outweighed by its prejudicial impact on the finder of fact.

I. INTRODUCTION

In the last fifteen years, the use of hypnosis as an adjunct to criminal investigations has increased, and the admissibility of the testimony of witnesses who have previously undergone hypnosis has occasioned considerable debate in medical, legal, and law enforcement circles.[1] The parties to the debate run the gamut from the unrelenting foe of investigative hypnosis to the enthusiastic proponent.[2] They have conducted the debate in the pages of scientific

---

*Judge Advocate General's Corps, United States Army. Currently assigned as Senior Defense Counsel, U.S. Army Trial Defense Service, Butzbach Field Office, 1984 to date. Formerly assigned as Appellate Attorney, Government Appellate Division, U.S. Army Legal Services Agency, 1980-83; Trial Counsel, Assistant Administrative Law Officer, Chief of Military Justice, Office of the Staff Judge Advocate, U.S. Army Aviation Center, Fort Rucker, Alabama, 1978-80. J.D., Rutgers University, 1977; B.A., Gettysburg College, 1974. Completed 32d Judge Advocate Officer Graduate Course, 1984; 86th Judge Advocate Officer Basic Course, 1978. Admitted to practice before the bars of the United States Supreme Court, the United States Court of Military Appeals, the U.S. Army Court of Military Review, and the State of New Jersey. This article was originally submitted as a thesis in partial satisfaction of the requirements of the 32d Judge Advocate Officer Graduate Course.

[1]Hypnosis was used in the investigation of such cases as the Metropolitan Opera House murder, *see* New York Times, Oct. 14, 1980, § 6, at 1, col. 1; the Chowchilla, California, school bus kidnapping, People v. Schoenfeld, 111 Cal. App.3d 671, 168 Cal. Rptr. 762 (1980). *See* "The Svengali Squad," Time, Sept. 13, 1976, at 66; Kroger & Douce, *Hypnosis in Criminal Investigation*, 27 Int'l J. Clinical & Experimental Hypnosis 358, 367-68 (1979); and the Los Angeles Hillside Strangler murders, *see* New York Times, Dec. 2, 1977, at 16, col. 6.

[2]*Compare* W. Hibbard & R. Worring, Forensic Hypnosis (1981) *and* H. Arons, Hypnosis in Criminal Investigation (1967) *with* Diamond, *Inherent Problems in Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313 (1980).

journals,[3] of the law reviews,[4] of periodicals published for the prac-

---

[3]In this category are such articles as Ault, *FBI Guidelines for Use of Hypnosis*, 27 Int'l J. Clinical & Experimental Hypnosis 449 (1979); Hilgard & Loftus, *Effective Interrogation of the Eyewitness*, 27 Int'l J. Clinical & Experimental Hypnosis 342 (1979); Kroger & Douce, *supra* note 1; Orne *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311 (1979); Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 Int'l J. Clinical & Experimental Hypnosis 437 (1979); Schafer & Rubio, *Hypnosis to Aid the Recall of Witnesses*, 26 Int'l J. Clinical & Experimental Hypnosis 81 (1978); Warner, *The Use of Hypnosis in the Defense of Criminal Cases*, 27 Int'l J. Clinical & Experimental Hypnosis 417 (1979); Worthington, *The Use in Court of Hypnotically Enhanced Testimony*, 27 Int'l J. Clinical & Experimental Hypnosis 402 (1979); *Resolution*, 27 Int'l J. Clinical & Experimental Hypnosis 452 (1979); B. Diamond, *The Contamination of Evidence by Hypnotic Enhancement of Memory of Witnesses*, Remarks at the Meeting of the American Association for the Advancement of Science (Jan. 6, 1982) (on file, Criminal Law Division, The Judge Advocate General's School, Charlottesville, Va. [hereinafter cited as Diamond Remarks].

[4]In this category are such articles as Alderman & Barrette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases*, 18 Crim. L. Bull. 5 (1982); Barr & Spurgeon, *Testimony By Previously Hypnotized Witnesses: Should It Be Admissible?*, 18 Idaho L. Rev. 111 (1982); Diamond, *supra* note 2; Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 Ohio N.U.L. Rev. 1 (1977); Falk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 St. John's L. Rev. 30 (1982); Haward & Ashworth, *Some Problems of Evidence Obtained by Hypnosis*, 1980 Crim. L. Rev. 469; Herman, *The Use of Hypno-Induced Statements in Criminal Trials*, 25 Ohio. St. L.J. (1964); Johnson, *Hypnosis As a Criminal Investigative Technique in the Department of Defense*, 22 A.F.L. Rev. 20 (1980); Linsett & Farr, *The Use of Hypnosis in the Criminal Process*, 11 U.W.L.A.L. Rev. 26 (1979); Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?*, 19 Crim. L. Bull. 293 (1983); Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 Ohio St. L.J. 567 (1977); Comment, *The Probative Value of Testimony From the Hypnotically Refreshed Recollection*, 14 Akron L. Rev. 609 (1981); Comment, *Hypnosis—Its Role and Current Admissibility in The Criminal Law*, 17 Willamette L. Rev. 665 (1981); Note, *A Survey of Hypnotically Refreshed Testimony in Criminal Trials: Why Such Evidence Should Be Admitted in Iowa*, 32 Drake L. Rev. 749 (1983); Note, *Hypnotically Induced Testimony: Credibility versus Admissibility*, 57 Ind. L.J. 349 (1982); Note, *Hypnotism, Suggestibility and the Law*, 31 Neb. L. Rev. 575 (1952); Note, *Hypnotically Aided Testimony: The Abandonment of Frye*, 2 Rev. Litigation 231 (1982); Note, *Hypnosis: A Survey of Its Legal Impact*, 11 S.W.U.L. Rev. 1421 (1979); Note, *Awakening from the Exclusionary Trance: A Balancing Approach to the Admissibility of Hypnotically Refreshed Testimony*, 61 Tex. L. Rev. 719 (1982); Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 Va. L. Rev. 1203 (1981); Note, *Safeguards Against Suggestiveness: A Means of Admissibility of Hypno-Induced Testimony*, 38 Wash. & Lee L. Rev. 197 (1981); Special Student Section—Evidence—North Carolina Cases, *Admissibility of Present Recollection Restored by Hypnosis*, 15 Wake Forest L. Rev. 357 (1979); Recent Decisions, *Evidence: Hypnotically Enhanced Testimony—A Question of Admissibility or Credibility for Criminal Courts?.*, 58 Notre Dame L. Rev. 101 (1982); Evidence, *Safeguarding Admissibility of Hypnotically Enhanced Testimony*, 5 W. New Eng. L. Rev. 281 (1982).

ticing bench and bar,[5] and of the popular press.[6] As investigators have increasingly employed hypnosis to "enhance" or to "refresh" the memories of witnesses, the judiciary, particularly state courts, have entered the debate. As of early 1984, the appellate courts of Arizona,[7] California,[8] Colorado,[9] Florida,[10] Georgia,[11] Illinois,[12] In-

---

[5]In this category are such articles as McCarty, *Hypnotically Refreshed Evidence*, 14 Advocate 382 (1982); Keisel, *Crash Memory Hazy: Hypnosis Brings It Out*, 68 A.B.A.J. 900 (1982); *Hypnotized Witnesses May Remember Too Much*, 64 A.B.A.J. 187 (1978); Goodenough, *Hypnosis in a Trance*, 30 Fed. B. News & J., Dec. 1983, at 490; Feldman, *Hypnosis: Look Me in the Eyes and Tell Me That's Admissible*, Barrister, Spring 1981, at 5; Monrose, *Justice With Glazed Eyes: The Growing Use of Hypnosis In Law Enforcement*, Juris Dr., Oct.-Nov. 1978, at 54; Jenkins, *Hypnosis—A New Technique in Crime Detection*, 8 Student Lawyer, Apr. 1980, at 26; Docksai, *Validity of Hypnosis-Enhanced Testimony Questioned*, Trial, Dec. 1983, at 6; Margolin & Coliver, *Forensic Uses of Hypnosis: An Update*, Trial, Oct. 1983, at 45; Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, Trial, Apr. 1981, at 56; Margolin, *Hypnosis-Enhanced Testimony: Valid Evidence or Prosecutor's Tool?*, Trial, Oct. 1981, at 42; Sannito & Mueller, *The Use of Hypnosis in a Double Manslaughter Defense*, Trial Diplomacy J., Fall 1980, at 30.

[6]In this category are such articles as Harvey, *"Hypnosis: A Crook Catcher, A Healing Art,"* Military Police, Winter 983, at 10; Science, Oct. 14, 1983, at 184; "The Svengali Squad," Time, *supra* note 1; "Hypnosis: 'Useful in Medicine, Dangerous in Court,'" U.S. News & World Report, Dec. 12, 1983, at 67; New York Times, Jul. 10, 1983, at E8, col. 1; Oct. 14, 1980, at C1, col. 1.

[7]State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 (1983) (en banc); State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982) (en banc); State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800 (1982) (en banc); State v. Thomas, 133 Ariz. 533, 652 P.2d 1380 (1982) (en banc); State v. Stolp, 133 Ariz. 213, 650 P.2d 1195 (1982) (en banc); State v. Encinas, 132 Ariz. 493, 647 P.2d 624 (1982) (en banc); State v. Poland, 132 Ariz. 269, 645 P.2d 784 (1982) (en banc); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982) (en banc); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981) (en banc); State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1981) (en banc); State v. Young, 135 Ariz. 437, 661 P.2d 1138 (Ariz. App. 1982).

[8]People v. Shirley, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (en banc), *cert. denied*, 103 S. Ct. 133 (1982); People v. Adams, 137 Cal. App.3d 353, 187 Cal. Rptr. 505 (1982); People v. Parrison, 137 Cal. App.3d 538, 187 Cal. Rptr. 123 (1982); People v. Williams, 132 Cal. App.3d 920, 183 Cal. Rptr. 498 (1982); State v. Aquino, 131 Cal. App.3d 966, 182 Cal. Rptr. 656 (1982).

[9]People v. District Court, 652 P.2d 582 (Colo. 1982) (en banc); People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

[10]Crum v. State, 433 So.2d 1384 (Fla. App. 5th Dist. 1983); Key v. State, 430 So.2d 909 (Fla. App. 1st Dist. 1983); Brown v. State, 426 So.2d 76 (Fla. App. 1st Dist. 1983); Clark v. State, 379 So.2d 373 (Fla. App. 1st Dist. 1979).

[11]Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974).

[12]People v. Gibson, 117 Ill. App.3d 270, 72 Ill. Dec. 672, 452 N.E.2d 1368 (1983); People v. Smrekar, 68 Ill. App.3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979).

diana,[13] Iowa,[14] Kansas,[15] Louisiana,[16] Maine,[17] Maryland,[18] Massachusetts,[19] Michigan,[20] Minnesota,[21] Mississippi,[22] Missouri,[23] Nebraska,[24] New Jersey,[25] New Mexico,[26] New York,[27] North Caro-

---

[13]Peterson v. State, 448 N.E.2d 673 (Ind. 1983); Clark v. State, 447 N.E.2d 1076 (Ind. 1983); Stewart v. State, 442 N.E.2d 1026 (Ind. 1982); Pearson v. State, 441 N.E.2d 468 (Ind. 1982); Forrester v. State, 440 N.E.2d 475 (Ind 1982); Merrifield v. State, 400 N.E.2d 146 (Ind. 1980); Morgan v. State, 445 N.E.2d 585 (Ind. App. 1983).

[14]State v. Seager, 341 N.W.2d 410 (Iowa 1983).

[15]State v. Williams, 229 Kan. 646, 630 P.2d 694 (1981).

[16]Landry v. Bill Garrett Chevrolet, Inc., 434 So.2d 1103 (La. 1983) (mem.), *rev'g* 430 So.2d 1051 (La. App. 1983); State v. Moore, 432 So.2d 209 (La. 1983); State v. Wren, 425 So.2d 756 (La. 1983); State v. Culpepper, 434 So.2d 76 (La. App. 1982).

[17]State v. Commeau, 438 A.2d 454 (Me. 1981).

[18]State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983), *aff'g* 52 Md. App. 186, 447 A.2d 1272 (1982); State v. Metscher, 464 A.2d 1052 (Md. App. 1983); Harker v. State, 55 Md. App. 460, 463 A.2d 288 (1983); Norwood v. State, 55 Md. App. 503, 462 A.2d 93 (1983); Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (1981); State v. Temoney, 45 Md. App. 569, 414 A.2d 240 (1980), *vacated on other grounds*, 290 Md. 251, 429 A.2d 1018 (1981); Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

[19]Commonwealth v. Brouillet, 389 Mass. 605, 451 N.E.2d 128 (1983); Commonwealth v. Watson, 388 Mass. 536, 447 N.E.2d 1182 (1983); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); Commonwealth v. Stetson, 384 Mass. 545, 427 N.E.2d 926 (1981); Commonwealth v. Juvenile, 381 Mass. 727, 412 N.E.2d 339 (1980).

[20]People v. Gonzales, 417 Mich. 968, 336 N.W.2d 751 (1983), *reconsidering* 415 Mich. 615, 329 N.W.2d 743 (1982), *aff'g* 108 Mich. App. 145, 310 N.W.2d 306 (1981); People v. Perry, 155 Mich. App. 533, 321 N.W.2d 719 (1982), *vacated*, 417 Mich. 908, 330 N.W.2d 852, *aff'd*, 126 Mich. App. 86, 337 N.W.2d 324 (1983); People v. Jackson, 144 Mich. App. 649, 319 N.W.2d 613 (1982); People v. Nixon, 144 Mich. App. 233, 318 N.W.2d 655 (1982), *vacated*, 417 Mich. 932, 330 N.W.2d 855, *rev'd*, 125 Mich. App. 807, 337 N.W.2d 33 (1983); People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 387 (1981), *vacated*, 417 Mich. 937, 331 N.W.2d 730 (1983); People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980).

[21]State v. Blanchard, 315 N.W.2d 427 (Minn. 1982); State v. Mack, 292 N.W.2d 764 (Minn. 1980).

[22]House v. State, 34 Crim. L. Rptr. 2425 (Miss. Jan. 25, 1984).

[23]State v. Little, 34 Crim. L. Rptr. 2330 (Mo. App. E.D. Jan. 3, 1984); State v. Greer, 509 S.W.2d 423 (Mo. App. W.D. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981).

[24]State v. Patterson, 213 Neb. 686, 331 N.W.2d 500 (1983); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981).

[25]State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

[26]State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (App. 1981).

[27]People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255, *aff'g* 88 App. Div. 2d 17, 452 N.Y.S.2d (4th Dep't 1983); People v. McAfee, App. Div. 2d 898, 463 N.Y.S.2d 916 (3d Dep't 1983); People v. Boudin, 118 Misc.2d 230, 460 N.Y.S.2d 879 (Sup. Ct. Rockland County 1983); People v. Smith, 117 Misc.2d 737, 459 N.Y.S.2d 528 (Sup. Ct. Dutchess County 1983); People v. Lucas, 107 Misc.2d 231, 435 N.Y.S.2d 461 (Sup. Ct. New York County 1980); People v. McDowell, 103 Misc.2d 831, 427 N.Y.S.2d 181 (Sup. Ct. Onondaga County 1980); People v. Lewis, 103 Misc.2d 881, 427 N.Y.S.2d 177 (Sup. Ct. New York County 1980).

lina,[28] North Dakota,[29] Oklahoma,[30] Oregon,[31] Pennsylvania,[32] Tennessee,[33] Washington,[34] Wisconsin,[35] and Wyoming[36] have considered the propriety of permitting a witness who has hypnotized prior to trial to testify on the merits. The United States Courts of Appeal for the Second,[37] Fifth,[38] Ninth,[39] and District of Columbia Circuits,[40] as well as several United States district courts,[41] have also considered a variety of evidentiary questions generated by the use of hypnosis.

Although they have not experienced the increasing use of hypnosis or the explosion of litigation that has accompanied it, the armed forces of the United States have also become involved with the issue of hypnosis. The law enforcement agencies of the three services—the Air Force Office of Special Investigations (AFOSI), the United States Army Criminal Investigation Command (USACIC), and the United States Naval Investigative Services (NIS)—have all promulgated policies regulating the employment of hypnosis.[42] They have, however, used hypnosis sparingly. One study concludes that

---

[28]State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983); State v. McQueen, 294 N.C. 96, 244 S.E.2d 414 (1978); State v. Peoples, 60 N.C. App. 474, 299 S.E.2d 311, *petition allowed*, 308 N.C. 193, 302 S.E.2d 247 (1983).

[29]State v. Brown, 337 N.W.2d 138 (N.D. 1983).

[30]Robinson v. State, 34 Crim. L. Rptr. 2337 (Okla. App. Jan. 13, 1984); Stafford v. State, 669 P.2d 285 (Okla. App. 1983).

[31]State v. Luther, 63 Or. App. 86, 663 P.2d 1261 (1983); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971).

[32]Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); Commonwealth v. McCabe, 303 Pa. Super. 245, 449 A.2d 670 (1983); Commonwealth v. Taylor, 249 Pa. Super. 171, 439 A.2d 803 (1982).

[33]State v. Glebock, 616 S.W.2d 897 (Tenn. App. 1981).

[34]State v. Martin, 33 Wash. App. 486, 656 P.2d 526 (1982); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982).

[35]State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386 (1983); State v. White, 26 Crim. L. Rptr. 2168 (Milwaukee County Cir. Ct. Mar. 27, 1979).

[36]Gee v. State, 662 P.2d 103 (Wyo. 1983); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

[37]United States v. Miller, 411 F.2d 825 (2d Cir. 1969).

[38]United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973).

[39]United States v. Awkward, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1971).

[40]United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982).

[41]United States v. Charles, 561 F. Supp. 694 (D. Tex. 1983); United States v. Waksal, 539 F. Supp. 834 (D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); United States v. Narciso, 446 F. Supp. 252 (D. Mich. 1977); Emmett v. Ricketts, 397 F. Supp. 1025 (D. Ga. 1975).

[42]*See* Air Force Reg. 124-4, Forensic Hypnosis (17 Dec. 1981), CIDR 195-1, CID Operations, App. Q (Ch. 2, 14 Jan. 1983). NIS Investigators' Handbook, para. 1821.

AFOSI used it only ten times from March 1978 to February 1980, or in approximately .07 percent of the investigations conducted in the same period, and only five times in the preceding eight years.[43] The NIS used hypnosis six times from January 1979 to February 1980, and three times in the preceding three years.[44] Finally, USACIC used hypnosis at least twelve times from 1976 to February 1980.[45]

Hypnosis has played an even smaller role in the military judicial process. No published opinion of the Court of Military Appeals or of the courts of military review has addressed the issues arising from the use of hypnosis during criminal investigations. Several commentators, however, have furnished the factual backgrounds of courts-martial in which the use of hypnosis was an issue. A Navy judge advocate has described five cases in which the victims were hypnotized to assist them in the identification of the perpetrators. In the first, a 1975 Navy general court-martial, the military judge ruled that the victim of an attempted murder could not identify his assailant in open court because of the unreliability of a previous identification obtained through hypnosis.[46] In a joint Army trial arising from the kidnapping, rape, and robbery of a female soldier, the military judge permitted the victim to testify only to those facts which she had recalled prior to undergoing hypnosis. He based his ruling on paragraph 142*e* of the 1969 Manual for Courts-Martial, which declared inadmissible, *inter alia*, "the statements of the person interviewed. . . during a. . . hypnosis-induced interview."[47] A Navy military judge ruled similarly in two companion cases arising from

---

[43]Johnson, *supra* note 4, at 35, 41, 41 n.95.

[44]*Id.* at 36, 41.

[45]*Id.* at 36-37, 41.

[46]Diloff, *supra* note 4, at 1-3, *describing* United States v. Andrews, GCM 75-14 (N.E. Jud. Cir., Navy-Marine Corps Judiciary, Philadelphia, Pa., Oct. 6, 1975). For another dsecription of the case, *see* Orne, *supra* note 3, at 329-30. Orne appeared as a defense expert in this case.

[47]Diloff, *supra* note 4, at 20-21, *describing* United States v. White; United States v. Smith, CM 432510. The court members acquitted both White and Smith. In its entirety, Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 142*e* [hereinafter cited as MCM, 1969] read:

> *Polygraph tests and drug-induced or hypnosis-induced interviews:* The conclusions based upon or graphically represented by a polygraph test and the conclusions based upon, and the statements of the person interviewed made during a drug-induced or hypnosis-induced interview, are inadmissible in evidence in a trial by court-martial.

The drafters of the 1969 Manual added this paragraph to give effect to judicial rulings on the admissibility of the result of polygraph tests and "truth serums." *See* U.S. Dep't of Army, Pamphlet No. 27-2 Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, at 27-14 (July 1970).

the same rape.[48] An Air Force commentator has described the circumstances in which hypnosis was employed in *United States v. Rodriguez*.[49] The accused was charged with killing his wife by the culpably negligent discharge of a pistol into her head. In an effort to substantiate or disprove the defense of accident, one of the first persons to reach the crime scene, a medic, underwent hypnosis and was subsequently permitted to testify as to his observations.[50] The reliability of the witness's hypnotically refreshed recollection and the impact of paragraph 142*e* were not issues on appeal, and the finding of guilty and the sentence were affirmed on other grounds.[51] At the present time, the Army Court of Military Review is considering *United States v. Harrington*,[52] in which the question of the admissibility of the testimony of a previously hypnotized witness was squarely presented. During the investigation of the June 1981 murder of four soldiers and the attempted murder of a fifth, the sole survivor underwent hypnosis in an effort to ascertain the identity of the man who had shot him. He identified the appellant and was permitted to testify to this at trial.

The preceding *tour d'horizon* suggests that the admissibility of testimony previously "refreshed" or "enhanced" by hypnosis is the subject of spirited debate in the state and federal courts. With the substitution of the Military Rules of Evidence for previous Manual evidentiary rules on 1 September 1980[53] and the consequent supersession of paragraph 142*e*,[54] such testimony may now be admissible into evidence at courts-martial if it satisfies the tests of relevance and probative value. This possibility raises questions con-

---

[48]Dilloff, *supra* note 4, at 21, 23 n.98, *describing* United States v. Barr; United States v. Walker, GCM 25-74 (N.E. Jud. Cir., Navy-Marine Corps Judiciary, Philadelphia, Pa., Oct. 24, 1974).

[49]8 M.J. 648 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 48 (C.M.A. 1980).

[50]Johnson, *supra* note 4, at 53-54.

[51]8 M.J. at 649, 653.

[52]CM 442125 (A.C.M.R., argued June 22, 1983). Until mid-July 1983, the author represented the government during the appellate review of this case.

[53]Exec. Order No. 12, 1980, 3 C.F.R. 151 (Mar. 12, 1980).

[54]The Analysis of the Military Rules of Evidence states in relevant part:

> The deletion of the explicit prohibition on [polygraph, drug-induced, and hypnosis-induced] evidence is not intended to make such evidence per se admissible, and is not an express authorization for such procedures. Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact."

Analyais to Mil. R. Evid. 702, *reprinted in* MCM, 1969, at A18-93.

cerning the standards by which eyewitness and scientific testimony are evaluated. It may therefore be salutory to examine the phenomenon of hypnosis, to review the disparate treatment accorded by the civilian courts to the testimony of previously hypnotized witnesses, and to formulate an analytical framework for assessing the admissibility of such testimony before courts-martial.[55]

II. HYPNOSIS AND MEMORY

A. DEFINITION AND HISTORY

The American Medical Association has defined hypnosis as

> a temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. These phenomena include alterations in consciousness and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind.[56]

It has also been defined as "a sleepless state that nevertheless permits a wide range of behavioral responses to stimulation."[57] The term itself was devised in 1843 by a surgeon, James Baird.[58]

Known since ancient times, the phenomenon of hypnosis first became the subject of study in Europe in the late eighteenth century when Franz Anton Mesmer (1734-1815) and his followers claimed therapeutic powers apparently derived from the effect of psychological suggestion on patients. Although a commission of inquiry discredited Mesmer—he had attributed his curative powers to "animal magnetism"—interest in the phenomenon did not die. Throughout the nineteenth century, debate waxed and waned; in some periods, hypnosis enjoyed popularity as a medical technique; in others, it was treated as a species of quackery. In the twentieth century, the development of psychiatry and psychology and the increased interest in the treatment of emotional disorders led to renewed ex-

---

[55]This article will not discuss the admissibility of either testimony from a witness who observed the responses of another under hypnosis or testimony from a witness hypnotized while on the stand. *See* Annot., 92 A.L.R.3d 442 (1979).

[56]Council on Mental Health, *Medical Use of Hypnosis*, 168 J.A.M.A. 186 (1958).

[57]9 New Encyclopedia Britannica (Macropaedia) 133 (1979).

[58]Diamond, *supra* note 2, at 318 n.21.

amination and use of hypnosis.[58] In 1958, the American Medical Association endorsed hypnosis as a therapeutic technique: "The use of hypnosis has a recognized place in the medical armamentarum and is a useful technique in the treatment of certain illnesses when employed by qualified medical and dental personnel."[60]

The growing acceptance of hypnosis for therapeutic purposes prompted the development of forensic hypnosis; that is, law enforcement agencies sought to adapt the use of hypnosis to the investigation of crime. The first instruction in hypnosis for police officials was given in 1959 by Harry Arons. In the next nine years, Arons trained approximately 350 law enforcement officers. In 1975, the Los Angeles Police Department set up an investigative hypnosis program under the direction of Dr. Martin Reiser.[61] In the first three years of its existence, the program conducted approximately 350 interviews in which hypnosis was employed.[62] By 1978, agents of both the Federal Bureau of Investigation and the Alcohol, Tobacco and Firearms Bureau, and police officers in Denver, Houston, Los Angeles, New York, Portland, San Antonio, and Washington, D.C., had received training in the use of hypnosis.[63] One writer has estimated that, by 1981, more than one thousand detectives had undergone such training.[64] Additionally, in the last five years, the investigative agencies of the armed forces have begun to employ hypnosis.[65]

---

[58]For more detailed accounts of the historical background of hypnosis, *see* 9 New Encyclopedia Brittanica, at 134-35; Barr & Spurgeon, *supra* note 4, at 112-13; Diamond, *supra* note 2, at 317-21; Falk, *supra* note 4, at 33; Hibbard & Worring, *supra* note 2, at 20-21; Spector & Foster, *supra* note 4, at 567-68.

[60]168 J.A.M.A. at 187. For a description of the uses of hypnosis in the field of medicine, *see* 9 New Encyclopedia Britannica, at 139.

[61]Hibbard & Worring, *supra* note 2, at 21, 23-24.

[62]Feldman, *supra* note 5, at 5.

[63]Diamond, *supra* note 2, at 313.

[64]Margolin & Coliver, *supra* note 5, at 105 n.2. Another writer has estimated that, by 1981, 10,000 police officers had received training in hypnosis. Feldman, *supra* note 5, at 54.

[65]Unlike many police departments, military investigators do not hypnotize subjects. By regulation, only properly qualified medical personnel perform investigatory hypnosis. CIDR 195-1, para. Q-3 states:

> QUALIFICATIONS OF HYPNOTISTS. Hypnosis will only be induced by mental health professionals (psychiatrists, clinical psychologists, or psychiatric social workers) who have had specialized training in hypnosis, possess clinical experience in the use of hypnosis techniques, and are eligible for full membership in either the American Society of Clinical Hypnosis (ASCH), the Society of Clinical and Experimental Hypnosis (SCEH) or the International Society of Hypnosis (ISH).

Accord Air Force Reg. 124-14, para. 2c; NIS Investigators' Handbook, paras. 1812.1(a), 1813.3.

The increasing use of hypnosis for law enforcement purposes has triggered extensive debate over its efficacy as an investigative technique and its effects on those who undergo it. The debate among students of hypnosis focuses on the nature of hypnosis and of human memory. One school of thought attributes hypnosis to neurological changes which result in an altered state of consciousness. Another focuses on the social interaction between the subject and the hypnotist and explains hypnosis in terms of responsiveness to stimuli and suggestion. A third approach is based on Freudian theories of psychoanalysis.[66] Despite their inability to agree on the underlying explanation for why hypnosis occurs, most experts do agree on the techniques of induction and the behavior of hypnotized persons.

The hypnotist induces the sleeplike state, or hypnotic trance, with the cooperation of the subject. Induction ordinarily involves the establishment of rapport between the hypnotist and the subject, the relaxation of the subject, and the fixation of the subject's attention through increasingly specific suggestions of the hypnotist.[67] The resulting hypnotic trance varies in depth from light to very deep and each level is manifested by distinct characteristics.[68] When the subject is fully hypnotized, he may experience a broad range of responses. These include selective focusing of attention, availability of past memories, heightened ability for fantasy production, distortions of reality, and increased suggestibility.[69]

The utility of hypnosis for investigative purposes lies in the hypnotized subject's apparent ability to recall the details of past events which he was previously unable to remember. The hypnotist ordinarily attempts to accomplish this by suggesting to the hypnotized subject that he will return to the time of a particular event, that he will observe it, that he will describe what occurs, and that he will remember what he has seen after he emerges from the trance, this has been called hyperamnesia.[70] In other instances, the subject appears to relive the event as though he is participating in it; this technique has been called either age regression or revivification.[71] The

---

[66]Diamond, *supra* note 2, at 316-17; Note, Va. L. Rev., *supra* note 4, at 1207-08; 9 New Encyclopedia Britannica, at 135.

[67]Arons, *supra* note 2, at 156-59; Hibbard & Worring, *supra* note 2, at 64, 83-90; 9 New Encyclopedia Britannica, at 135-36.

[68]Arons, *supra* note 2, at 137-38.

[69]E. Hilgard. The Experience of Hypnosis 6-10 (1968). For other descriptions of hypnotic phenomena, *see* Hibbard & Worring, *supra* note 2, at 44-45; 9 New Encyclopedia Brittanica, at 136-37.

[70]Hibbard & Worring, *supra* note 2, at 161-63; Kroger & Douce, *supra* note 1, at 363.

[71]*Compare* Orne, *supra* note 3, at 315-16 *with* Hibbard & Worring, *supra* note 2, at 160-61; Kroger & Douce, *supra* note 1, at 362-63.

response of the subject varies. In some cases, the subject does not recover any previously undisclosed information.[72] In others, he is able to provide detailed new information.[73]

Whether the subject's description of a particular event is historically accurate is also the subject of debate. One school of thought maintains that the human mind functions like a camera, automatically recording each experience and storing it for "instant replay." Because of the continuous process of "recording," older, less important impressions, are partially lost. Through hypermnesia, however, in this view, it is possible to tap these "buried" memories and enhance accurate recall.[74] The second school of thought, which today enjoys general acceptance in the scientific community, rejects the exact recording model. It postulates that the mind initially acquires information at the time of an experience, retains it, and eventually may retrieve it. What is retrieved, however, may differ considerably from what was acquired because recollection (retrieval) is actually a reconstruction based on original perception as affected by subsequent influences during the retention phase.[75] If one of the subsequent influences was the induction of hypnosis, the subject's recollection may be a distorted description of the past, *i.e.*, a pseudomemory, rather than an accurate one.

Commentators have identified four characteristics of the hypnotic state which may result in the creation of pseudomemories: the increased state of suggestibility experienced by the subject (hypersuggestiveness); a possible desire to please the hypnotist (hypercompliance); the possibility that the subject will fill in gaps in his actual recollection with fantasy (confabulation); and the subject's heightened certitude about the accuracy of his recollections when he emerges from the trance. These factors are interrelated. Hypnosis involves a state of heightened suggestibility and the hypnotist, con-

---

[72]Hilgard & Loftus, *supra* note 3, at 353; Kroger & Douce, *supra* note 1, at 370.

[73]Kroger & Douce, *supra* note 1, at 367-70; Orne, *supra* note 3, at 318-19; Putnam, *supra* note 3, at 438; Schafer & Rubio, *supra* note 3, at 84-90; Docksai, *supra* note 5, at 6-7; Margolin & Coliver, *supra* note 4, at 49.

[74]Arons, *supra* note 2, at 35-39; Hibbard & Worring, *supra* note 2, at 163, 165-68; M. Reiser, Handbook of Investigative Hypnosis 8, 78 (1980).

[75]Hilgard & Loftus, *supra* note 3, at 344-45; Orne, *supra* note 3, at 321; Putnam, *supra* note 3, at 437. For more detailed descriptions of the reconstructive view of memory recall, *see* United States v. Valdez, 722 F.2d 1196, 1200 (5th Cir. 1984); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 189 n.9, 644 P.2d 1266, 1274 n.9 (1982) (en banc); People v. Shirley, 31 Cal. 32 18, 41-45, 181 Cal. Rptr. 243, 265-69, 641 P.2d 775, 798-802 (en banc), *cert. denied*, 103 S. Ct. 133 (1982); State v. Collins, 296 Md. 670, 672, 464 A.2d 1028, 1030 (1983); Alderman & Barrette, *supra* note 4, at 7-9; Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 976-89 (1977).

sciously or unconsciously, may influence the content of the subject's recollections. For example, the use of leading questions may influence the subject towards a preconception held by the hypnotist. The induction of the hypnotic trance involves the generation of rapport between the hypnotist and the hypnotic subject. The hypnotist is able to relax the subject because the subject trusts him and is willing to comply with his suggestions. Because of his desire to cooperate, the subject may invent details rather than admit his inability to recollect any additional information. Finally, because of the loss of critical judgment that characterizes the hypnotic trance, the subject is unable to distinguish among his own memories, the suggestions of the hypnotist, and any confabulation which may have occurred. Upon emerging from the trance, the subject may honestly believe that his newly created "memory" is an accurate description of the past. His subjective confidence in its accuracy may be such that he is immune to cross-examination.[76]

The effects of hypnosis may therefore be summarized as follows. It may result in accurate recollection of past events, distorted recollection, or recollection the historical accuracy of which cannot be assessed. The subject's critical judgment is lowered so that he is more susceptible to outside influences; nevertheless, his ability to recall past events may in fact be heightened. Moreover, hypnosis may be a valuable technique for restoring repressed memories where the subject has been the victim of physical violence or of other trauma, and where he has selectively forgotten unpleasant details. Nevertheless, there are potential hazards. Because of the natural human need for organized thinking, a subject may attempt to fill in the gaps in his memory. The information used as a filler may be derived from the subject's actual memory, from the subject's rearrangement of his memory, or from external sources, such as the suggestions of friends or investigators. The hypnotist probably will be unable to distinguish among these "memories" and thus cannot assess the historical accuracy of the subject's recollections.

---

[76]Hilgard & Loftus, *supra* note 3, at 353-54; Orne, *supra* note 3, at 317-22, 326-27; Orne, Affidavit in Support of Amicus Curiae California Attorneys for Criminal Justice in Opposition to Petition for Rehearing, *People v. Shirley*, at 9-10, 13-15, 19-20 (copy filed as a defense supplemental citation of authority, *United States v. Harrington*, (CM 442125)) [hereinafter cited as Orne, Affidavit, *People v. Shirley*]; Orne, Affidavit in Support of Amicus Curiae California Attorneys for Criminal Justice, *Quaglino v. California* No. 77-1288, *cert. denied* 439 U.S. 875 (1978) at 9-11 (on file, Criminal Law Division, The Judge Advocate General's School, Charlottesville, Va.) [hereinafter cited as Orne, Affidavit, *Quaglino v. California*]; Putnam, *supra* note 3, at 444-46.

B. THE COMMENTATORS

Having rejected the view that hypnosis is a mechanism for tapping human memory through instant reply, scientific and legal commentators have debated its value as an investigative device and its impact on witnesses. The unreliability of the subject's recollections due to suggestibility and confabulation, and the possibility that he may be "hardened" against cross-examination and so deprive an accused of his right of confrontation, are the focal points of the debate, and have led some to reject hypnosis as an investigatory technique. Others, however, have noted that hypnosis does seem to produce additional information of value to an investigation. The key, therefore, lies in reducing the possibilities for suggestion and confabulation through the adoption of a variety of procedural safeguards. Dr. Martin T. Orne is the principal proponent of this point of view. Initially, he noted:

> Hypnosis may be useful in some instances to help bring back forgotten memories following an accident or a crime while in others a witness might, with the same conviction, produce information that is totally inaccurate. This means that material produced during hypnosis or immediately after hypnosis, inspired by hypnotic revivification, may or may not be historically accurate. As long as this material is subject to independent verification, its utility is considerable and the risk attached to the procedure minimal. There is no way, however, by which anyone—even a psychologist or a psychiatrist with extensive training in the field of hypnosis—can for any particular piece of information determine whether it is an actual memory versus a confabulation unless there is independent verification.
>
> . . . .
>
> The use of hypnosis is an investigative context, with the sole purpose being to obtain leads, is clearly the area where hypnotic techniques are most appropriately employed.[77]

Orne distinguished three situations where hypnosis is typically employed and analyzes the potential benefits and hazards of its use. In the first type of case, the investigators have no suspect and seek information from a witness, often the victim; Orne argues that, where no one has developed a preconceived version of events, "the situa-

---

[77]Orne, *supra* note 3, at 318, 327.

tion approaches the ideal case for hypnosis to be most appropriately employed: to develop investigative leads."[78] In the second class of cases are those in which the investigators already have a theory of the case, a suspect, or both. There is considerable danger that the known or presumed facts will be suggested to the hypnotized witness/victim-subject and that his recollection will thereby become suspect.[79] In the last class of cases are those in which the subject has made inconsistent statements and the investigators seek to validate one of the versions through hypnosis. Ordinarily, such an effort results in the subject's development of great certitude about one version which cannot be broken down through cross-examination.[80] Orne believed that the dangers which are present in any use of hypnosis for investigatory purposes are greatly exacerbated in the second and third categories of cases. In the first class of cases, he has recommended the use of the following safeguards:

> 1. Hypnosis should be carried out by a psychiatrist or psychologist with special training in its use. He should not be informed about the facts of the case verbally; rather, he should receive a written memorandum outlining whatever facts he is to know, carefully avoiding any other communications which might affect his opinion. Thus, his beliefs and possible bias can be evaluated. It is extremely undesirable to have the individual conducting the hypnotic sessions to have any involvement in the investigation of the case. Further, he should be an independent professional not responsible to the prosecution or the investigators.

---

[78]*Id.* at 328. Two other researchers have written:

> Generally speaking, our premise in that eyewitness accounts of crimes are often clouded by the anxiety experienced at the time; the use of hypnosis often helps an eyewitness more accurately recall the incident, including many important details that would not have been remembered otherwise. It is possible that the relationship with the hypnotist provides a comfortable setting which makes it easier for the person to remember; . . .

Schafer & Rubio, *supra* note 3, at 81.

[79]Orne, *supra* note 3, at 328-29. Dilloff, *supra* note 4, at 18, has said:

> The hypnosis of a victim of a crime is probably the most dramatic and dangerous use of hypnosis in the legal sphere. In many situations a subject has already been apprehended and the victim is unable to identify him. The hypnosis of the victim and a resultant post hypnotic identification is [*sic*] used to "confirm" the authorities' arrest.

[80]Orne, *supra* note 3, at 327-28, 332-34.

2. All contact of the psychiatrist or psychologist with the individual to be hypnotized should be videotaped from the moment they meet until the entire interaction is completed. The casual comments which are passed before or after hypnosis are every bit as important to get on tape as the hypnotic session itself. (It is possible to give suggestions prior to the induction of hypnosis which will act as posthypnotic suggestions.)

Prior to the induction of hypnosis, a brief evaluation of the patient should be carried out and the psychiatrist or psychologist should then elicit a detailed description of the facts as the witness or victim remembers them. This is important because individuals are able to recall a good deal more when talking to a psychiatrist or psychologist than when they are with an investigator, and it is important to have a record of what the witness's beliefs are before hypnosis. Only after this has been completed should the hypnotic session be initiated. The psychiatrist or psychologist should strive to avoid adding any new elements to the description of his experience, including those which he had discussed in his wake state, lest he inadvertently alter the nature of the witness's memories—or constrain them by reminding him of his waking memories.

3. No one other than the psychiatrist or psychologist and the individual to be hypnotized should be present in the room before and during the hypnotic session. This is important because it is all too easy for observers to inadvertently communicate to the subject what they expect, what they are startled by, or what they are disappointed by. If either the prosecution or the defense wish to observe the hypnotic session, they may do so without jeopardizing the integrity of the session through a one-way screen or on a television monitor.

4. Because the interactions which have preceded the hypnotic session may well have a profound effect on the sessions themselves, tape recordings of prior interrogations are important to document that a witness has not been implicitly or explicitly cued pertaining to certain in-

> formation which might then be reported for apparently the first time by the witness during hypnosis.[81]

Several other commentators have recognized that the nature of hypnosis itself, *e.g.*, suggestibility, and the manner and circumstances of induction may contribute to the distortion of the subject's recollection of the past. To minimize the danger that the hypnotist will consciously or unconsciously influence the content of the subject's version of events, they, too, indorse the use of procedural safeguards.[82]

Dr. Bernard L. Diamond, a professor of law and psychiatry in California, has adopted a completely different position.[83] Acknowledging that "[h]ypnosis may have some value as an investigatory instrument when used to enhance memory,"[84] he has maintained that

> once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. Hypnotized persons, being extremely suggestible, graft onto their memories fantasies or suggestions deliberately or unwillingly communicated by the hypnotist. After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert or trier of fact. The risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction or fabrication of evidence.[85]

---

[81]*Id.* at 355-36. Orne proposed these safeguards in May 1978. Affidavit, *Quaglino v. California*, *supra* note 76, at 25-27. He maintains that the safeguards, "while intended to help identify and control the production of memory distortions, cannot prevent confabulation or the amalgamation of memory, suggestion, and confabulation that may occur during hypnosis." Orne, Affidavit, *People v. Shirley, supra* note 76, at 15-16. The FBI and USACIDC guidelines for the conduct sessions are generally similar to those proposed by Orne. They differ to the extent that they require the presence of an agent in the room and permit him to speak to the hypnotized subject. Ault, *supra* note 3, at 449-50; CIDR 195-1, para. Q-11.

[82]Diloff, *supra* note 4, at 7-8; Falk, *supra* note 4, at 52; Note, Ind. L. J., *supra* note 4, at 364, 368-70, Note, Rev. Litigation, *supra* note 4, at 250-52; Note, Va. L. Rev. *supra* note 4, at 1229-32; Note, Wash & Lee L. Rev., *supra* note 4, at 201, Willamette L. Rev., *supra* note 4, 690-92; Special Student Section, Wake Forest L. Rev., *supra* note 4, at 369-73; Evidence, W. New Eng. L. Rev., *supra* note 4, at 290-95. Alderman & Barrette, *supra* note 3, at 20-22, recommend the use of elaborate safeguards in the absence of a per se prohibition on the use of hypnosis.

[83]After hearing testimony by Diamond, one court observed; "While Dr. Diamond is highly regarded for his work in the field of forensic psychology, he is not considered to be (and does not consider himelf to be) an expert in the field of hypnosis." People v. Boudin, 118 Misc. 2d 230, 232, 460 N.Y.S. 2d 879, 880-81 (Sup. Ct. Rockland County 1983).

[84]Diamond, *supra* note 2, at 332 (footnote omitted).

[85]*Id.* at 314.

Diamond rested his rejection of hypnosis on three distinct groups of arguments. First, he stated, the subject cannot avoid suggestion; cannot distinguish between his own thoughts and suggestions from the hypnotist; cannot avoid confabulation; will continue to suffer distortions of memory after the hypnosis; will enjoy enhanced confidence in the accuracy of his recollections and thus be immune to cross-examination; and may even believe that he was never hypnotized at all. Second, the hypnotist cannot avoid making suggestions to the subject; cannot verify the accuracy of the subject's recollection either by the richness of the detail or by independent corroboration; cannot assess the procedures used in a hypnotic session in order to estimate the accuracy of the information obtained; and cannot detect whether the subject is feigning hypnosis. Finally, Diamond asserted that is difficult to make an adequate record of the hypnotic session.[86]

Diamond has also rejected the possibility that the safeguards proposed by Orne will protect a witness/subject against the dangers inherent in the use of hypnosis First, he maintained that it is not possible to find a neutral health care professional to act as the hypnotist. He ascribed this to media publicity and to "hopelessly naive or enthusiastic" psychiatrists and psychologists who are ignorant of the dangers of suggestion.[87] He applauded the videotaping of the session, but insisted that more than just the subject be filmed so that the entire scene will be available for review.[88] While approving of the memorialization of the subject's prehypnotic recollections, he insisted that the hypnosis will eliminate any honest doubts and so bolster the subject's confidence that he will be resistant to contradiction and impeachment.[89] Likewise, while the exclusion of the investigators from the session may be helpful, the subject "is truly aware of what is expected and what responses will meet with approval from the interrogators."[90] Diamond also argued that it is un-

---

[86]*Id.* at 333-42.

[87]Diamond Address, *supra* note 3, at 6. Diamond's penchant for invective is well-established. In his article, he stigmatized many psychiatrists and psychologists as "naive," Diamond, *supra* note 2, at 314. He claimed that testimony of previously hypnotized witnesses has been admitted into evidence only because "busy judges lacked the benefit of counsel. . . of scholarly authority. . ., and of [dispassionate] expert testimony. . .." and because they were influenced "by often naive legal scholarship and biased expert testimony." *Id.* at 315, 348. He labelled Spector and Foster "very naive." He asserted that "the value of hypnosis for investigative purposes has been greatly overstated by exaggerated claims in irresponsible books and articles" and he spurned as "gimmicks" truth serums and hypnosis. *Id.* at 332 n.93.

[88]Diamond Remarks, *supra* note 3, at 7-8.

[89]*Id.* at 8-9.

[90]*Id.* at 9.

likely that the subject will come to the hypnotic session with only his own recollections. Through earlier interviews, he will have learned the views of the police and thus the contamination of his memory of the event will already have commenced.[91] Diamond's view of the dangers of hypnosis have impressed the appellate judiciary of some states[92] and have enjoyed the acceptance of some commentators.[93]

III. THE COURTS

A. AN OVERVIEW

The appellate courts are as widely divided as the scientific and legal commentators in reviewing cases in which the testimony of a previously hypnotized witness was admitted into evidence at trial. Although most courts agree on the potentially dangerous impact of hypnosis on the recollection and testimony of a witness, they differ sharply on the standard for its admissibility, on how much testimony should be admitted, and to what extent procedural safeguards are necessary or effective. The numerous decisions fall into four principal categories. In the first are those which hold that the possibilities of hypersuggestion, hypercompliance, and confabulation affect only the weight, not the admissibility, of the testimony of a previously hypnotized witness. In this category are the decisions which analogize the use of hypnosis to other devices used to refresh the recollection of a witness. The second group of cases has recognized the nature and effects of hypnosis and determines admissibility by balancing tests in which the circumstances of the hypnotic session and the content of the witness' pre- and posthypnotic statements are examined to assess their probative value. Many cases in this category involve the use of procedural safeguards to minimize the possibility of pseudomemories stemming from confabulation and suggestion. The third category adopts Diamond's view; experts do not recognize hypnosis as a valid mechanism for the accurate restoration of memory and a previously hypnotized witness is incompetent because his testimony is no more than a mosaic of memory, suggestion, and confabulation. The last category is a modified version of the third; the witness is incompetent to testify regarding any posthypnotic information but may testify to that which he revealed prior to hypnosis.

---

[91]*Id.* at 10.
[92]*See infra* text accompanying notes 123-40.
[93]Alderman & Barrette, *supra* note 4, at 37; Ruffra, *supra* note 4, at 314-16, 323.

B. ADMISSIBILITY, NOT CREDIBILITY

The Maryland Court of Special Appeals was the first American court to announce its views on the admissibility of the testimony of a previously hypnotized witness. The victim of a sexual assault had been discovered in a state of shock, unable to remember what had occurred after the accused had shot her. During three subsequent interviews with the police, she told three different stories. Approximately one month later, a clinical psychologist hypnotized her at the behest of the police. Therefore, she maintained that her memory had been refreshed regarding the circumstances of the accused's assault on her. The admission of her testimony was upheld on appeal:

> On the witness stand she recited the facts and stated that she was doing so from her own recollection. The fact that she had told different stories in the past or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts, in the case the jury, must decide.[94]

Although the Maryland court reversed itself in July 1982 and the overruled this decision,[95] the analytical approach it enunciated in the opinion won wide acceptance. The courts of Florida,[96] Georgia,[97]

---

[94]246 A.2d at 306.

[95]Collins v. State, 52 Md App. 186, 197, 447 A.2d 1272, 1283 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983). An earlier opinion had questioned the validity of the *Harding* decision. Polk v. State, 48 Md. App. 382, 388, 427 A.2d 1041, 1047-49 (1981).

[96]Clark v. State, 379 So.2d 373, 375 (Fla. App. 1st Dist. 1979) ("[The victim's] identification was made not while in a hypnotic state, but from his present recollection refreshed by his having been put under hypnosis. The credibility thereof was for the jury to determine").

[97]Creamer v. State, 232 Ga. 136, 138, 205 S.E.2d 240, 242, (1974) ("The fact that [the witness] had been placed under hypnosis by [the psychologist] and the purpose therefore were made clear to the jury").

Illinois,[98] Indiana,[99] Missouri,[100] North Carolina,[101] North Dakota,[102] Oregon,[103] Tennessee,[104] and Wyoming[105] have held that the tools of the adversarial process—cross-examination, testimony by defense witnesses, and instructions on credibility—are sufficient to illuminate the theoretical unreliability of a previously hypnotized witness. They have adhered to this position after the reversal of position by the Maryland panel.[106]

---

[98]People v. Smrekar, 68 Ill. App. 3d 379, 24 Ill. Dec. 707, 712, 385 N.E. 2d 848, 853 (1979) ("When a witness is capable of giving testimony having some probative value, the witness is permitted to testify with evidence of impairment of the ability of the witness to accurately recall evidence or that suggestive material has been used to refresh the witness' recollection going only to the weight to be given to the testimony of the witness.").

[99]Pearson v. State, 441 N.E.2d 468, 473 (Ind. 1982) "The fact of hypnosis should be a matter of weight with the trier of fact. . .."). *Accord* Morgan v., State, 445 N.E.2d 585, 594 (Ind. App. 1983).

[100]State v. Greer, 609 S.W.2d 423, 436 (Mo. App. W.D. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981). ("[T]he evidence based [on hypnosis] was not inadmissible as a matter of law, but rather such hypnotic process goes to the weight of the testimony. . . and is a matter for determination by the finder of fact").

[101]State v. McQueen, 295 N.C. 96, 111, 244 S.E.2d 414, 429 (1978) ("[W]e are concerned with the admissibility of testimony which the witness says is her present recollection of events which she saw and heard, the credibility of her testimony being left for the jury's appraisal").

[102]State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983) ("We believe that an attack on credibility is the proper method of determining the value of hypnotically induced testimony.").

[103]State v. Jorgensen, 8 Or. App. 1, 4, 492 P.2d 312, 315 (1971) ("Defendant's strenuous objection to their testimony. . . goes to its weight rather than its admissibility [citation omitted]. Credibility of both witnesses was for the jury").

[104]State v. Glebock, 616 S.W.2d 897, 903, 904 (Tenn. App. 1981) (citing with approval United States v. Adams, 581 F.2d 193, 198 n.12 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); State v. Jorgensen, 8 Or. App. 1, 4-5, 492 P.2d 312, 315-16 (1971); Harding v. State, 5 Md. App. 230, 239, 246 A.2d 302, 311-12 (1968), *cert. denied*, 395 U.S. 949 (1969).

[105]Chapman v. State, 638 P.2d 1280, 1282 (Wyo. 1982) ("Appellant's attack on the credibility of the witness was before the jury. The success of such attack was for determination by the jury").

[106]. *See, e.g.*, State v. Waters, 308 N.C. 348, 352, 302 S.E.2d 188, 192 (1983); Gee v. State, 662 P.2d 103, 103-04 (Wyo. 1983); Crum v. State, 433, So.2d 1384, 1385 (Fla. App. 5th Dist. 1983); Key v. State, 430 So.2d 909, 912 (Fla. App. 1st Dist. 1983); People v. Gibson, 117 Ill. App.3d 270, 274, 72 Ill. Dec. 672, 676, 452 N.E.2d 1368, 1372 (1983); Morgan v. State, 445 N.E.2d 585, 588 (Ind. App. 1983); State v. Peoples, 60 N.C. App. 474, 477, 299 S.E.2d 311, 314, *petition allowed*, 308 N.C. 193, 302 S.E.2d 247 (1983). *See also* Brown v. State, 426 So.2d 76, 90 (Fla. App. 1st Dist. 1983) (reversal of *Harding* irrelevant because Maryland applies incorrect standard); State v. Little, 34 Crim. L. Rptr. 2330, 2330 (Mo. App. E.D. Jan. 3, 1984) (state has burden of proving absence of impermissibily suggestive hypnotic session. *But see* Peterson v. State, 448 N.E.2d 673, 677-78 (Ind. 1983) (error to admit identification made only after hypnosis).

The federal courts have, on the whole, taken a similar position. The Ninth Circuit Court of Appeals led the way in ruling on evidence derived from out-of-court hypnosis. Addressing an argument that the testimony of the victim-plaintiff of a helicopter crash was rendered "inherently untrustworthy" because he had been hypnotized several times, the court said:

> [The plaintiff] testified from his present recollection, refreshed by the treatments. His credibility and the weight to be given such testimony were for the jury to determine. [The defendant] was entitled to, and did, challenge both the remembered facts and the hypnosis procedure itself by extensive and thorough cross-examination of [plaintiff] and the hypnotist.[107]

Subsequently, the court extended the approach to criminal cases. While expressing concern that hypnosis "carries a dangerous potential for abuse" and recommending the maintenance of a record of the hypnotic session to facilitate the detection of suggestions attributable to the hypnotist, it repeated its belief that "the fact of hypnosis affects credibility, but not admissibility."[108] Several United States district courts have also taken this position.[109]

---

[107]Wyller v. Fairchild Hiller Corp. 503 F.2d 506, 609-10 (9th Cir. 1971). *Accord* Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) ("[The victim] was present and personally saw and heard the occurrences at the time of the accident. She was testifying about her present recollection of events she had witnessed. That her present memory depends upon refreshment claimed to have been induced under hypnosis goes to the credibility of her testimony not to her competence as a witness. Although the device by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document").

[108]United States v. Adams, 581 F.2d 193, 198-99 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978). *Accord* United States v. Awkward, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979). *But see* United States v. Brooks, 677 F.2d 907, 914 n.6 (D.C. Cir. 1982) (admissibility of hypnotically refreshed testimony deemed "highly questionable").

[109]United States v. Waksal, 539 F. Supp. 834, 838 (D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 663 (11th Cir. 1983); United States v. Narciso, 446 F. Supp. 252, 282 (D. Mich. 1977) ("The relation of events. . . depends on many factors, e.g., the ability to observe, memory, interest, mental condition, probability and corroboration. Consequently, the resolution of that type of factual situation has traditionally been the function of the jury and relies on the strength of the adversarial process").

C. BALANCING TESTS AND PROCEDURAL SAFEGUARDS

The Ninth Circuit, the United States district courts which relied upon its decisions, and numerous state courts analogized the testimony of a previously hypnotized witness to one whose memory had been refreshed in some manner. They were content to take a liberal approach to the technique used to jog memory; as the Ninth Circuit observed long ago in different circumstances:

> It is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some characters. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.[110]

Other courts, however, were not content with this analysis. Their suspicions rested on the nature of hypnosis itself which has the potential to replace the witness's own recollection with pseudo-memories based on suggestion and confabulation.[111] Their remedies assumed several forms. The premise underlying all of them is this: because experts recognize hypersuggestiveness and confabulation as the principal hazards of the hypnotic process, procedural safeguards can be formulated to minimize them.

The most common approach has involved an analysis of the circumstances of the hypnotic session. In its simplest form, the court assures itself that the hypnotist did not "plant" the identification of the accused in the victim's mind, the accused not having been a suspect at the time.[112] Other courts have looked at the consistency of the witness's statements before and after hypnosis.[113] Still others have elaborated a variety of safeguards which the proponent of the previously hypnotized witness must satisfy. Thus, Illinois, Missouri,

---

[110]Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926).

[111]". . .[H]ypnosis is not comparable to the other methods of refreshing recollection long accepted at common law. . . . What distinguishes hypnosis is the fact that suggestion is an essential and inseparable element of the process. . . ." People v. Hughes, 59 N.Y.2d 523, 533, 453 N.E.2d 484, 494, 466 N.Y.S.2d 255, 265 (1983). *Accord* People v. Gonzales, 415 Mich. 615, 618, 329 N.W.2d 743, 746 (1982).

[112]State v. Commeau, 438 A.2d 454, 458 (Me. 1981).

[113]United States v. Waksal, 539 F. Supp. 834, 838 (F. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); Clark v. State, 447 N.E.2d 673, 681 (Ind. 1983); State v. Seager, 341 N.W.2d 410, 429 (Iowa 1983); State v. Moore, 432 So.2d 209, 214-15 (La. 1983); State v. Wren, 425 So.2d 756, 759 (La. 1983); Pearson v. State, 441 N.E.2d 468, 468 (Ind. 1982); State v. Glebock, 616 S.W.2d 897, 905 (Tenn. App. 1981).

and Washington courts have looked to the qualifications and independence of the hypnotist; the presence or absence of suggestions regarding persons and events during the hypnotic session; the existence of independent corroboration of the witness's testimony; the opportunity of the witness to observe the event which he purported recall under hypnosis; and the consonance of the witness's pre- and posthypnotic statements.[114] Courts in New Jersey and New Mexico have endeavored to assure themselves "that the use of hypnosis in a particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."[115] These courts have therefore conditioned admissibility of the testimony of a previously hypnotized witness upon a preliminary showing, by clear and convincing evidence, that Orne's safeguards had been observed.[116] Wisconsin courts have also utilized these safeguards and required the trial judge to assess the suggestiveness of the hypnotic session, the witness' opportunity to observe the event in question, and the content of the witness' prehypnotic statements.[117]

A final approach involves an assessment of the relevance of the testimony and a balancing of the probative value of relevant testimony against the dangers of unfair prejudice, confusion of the issues, or misleading of the finder of fact. In the context of the testimony of a previously hypnotized witness, the possibility of suggestiveness or confabulation in a particular hypnotic session would militate against its admission. An assessment of the likelihood of their presence would depend on a variety of factors, such as the con-

---

[114]People v. Gibson, 117 Ill. App.3d 270, 274, 72 Ill. Dec. 672, 676, 452 N.E.2d 1368, 1372 (1983); State v. Martin, 33 Wash. App. 486, 490, 656 P.2d 526, 528-29 (1982); State v. Long, 32 Wash. App. 732, 734, 649 P.2d 845, 847 (1982); State v. Greer, 509 S.W.2d 423, 432, 434 (Mo. App. W.D. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981). While the Missouri Court of Appeals, Western District, has required the opponent of the testimony to demonstrate that hypnosis resulted in "a very substantial likelihood of irreparable misidentification," *Greer*, 609 S.W.2d at 436, the Court of Appeals, Eastern District, reversed the burden of proof. The proponent must show, by clear and convincing evidence, "that the hypnotic session was not impermissively suggestive." *Little*, 34 Crim. L. Rptr. at 2337.

[115]State v. Hurd, 86 N.J. 525 534, 432 A.2d 86, 95-98 (1981). *Accord* State v. Beachum, 97 N.M. 682, 688, 643 P.2d 246 652. (App. 1981).

[116]*Hurd*, 86 N.J. at 534, 432 A.2d at 95-98; *Beachum*, 97 N.M. at 689, 643 P.2d at 253-54. Interestingly, the New Mexico Supreme Court affirmed a conviction for murder, kidnapping, and robbery even where the safeguards mandated in *Beachum* were not followed; its basis for this ruling was the similarlity of the witness's pre- and posthypnotic statements. State v. Hutchinson, 99 N.M. 616, 621, 661 P.2d 1315, 1320 (1983).

[117]State v. Armstrong, 110 Wis.2d 555, 563, 329 N.W.2d 386, 394 (1983). *Accord* State v. White, 26 Crim. L. Rptr. 2168, 2168 (Milwaukee County Cir. Ct. Mar. 27, 1979).

sistency of the witness's statements before and after hypnosis, the witness' awareness of the investigator's suspicions regarding a particular suspect, the existence of independent corroboration of the witness's memory as enhanced by hypnosis, the qualifications, independence, and knowledge of the hypnotist, the circumstances of the hypnotic session itself, and the existence of a videotaped record of the entire session.[118] Applying these tests in *United States v. Valdez*, the Fifth Circuit concluded that the circumstances of the case indicated that an impermissibly suggestive identification had resulted from hypnosis, and that such an identification was more prejudicial than probative. The evidence showed that the witness had not identified the accused prior to hypnosis; that the identification was uncorroborated by other evidence at trial; that the hypnotist, although a health care professional, knew about the investigation; that other law enforcement agents were present during the hypnotic session and participated in it without being videotaped; that almost one hundred suggestive, leading questions were asked; and that the witness was fully aware that the investigators suspected the accused. Consequently, the court held:

> We do not formulate a per se rule of inadmissibility for cases not involving personal identification. In a particular case, the evidence favoring admissibility might make the probative value of the testimony outweigh its prejudicial effect. If adequate procedural safeguards had been followed, corroborated post-hypnotic testimony might be admissible. However, when, as here, a hypnotized subject identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic testimony is inadmissible whatever procedural safeguards were used to attempt to sanitize the hypnotic session.[119]

In January 1984, Mississippi also adopted a hybrid rule which combined the use of procedural safeguards with the application of a balancing test. The trial judge must conduct a pretrial review of the proferred testimony to insure that the hypnotic session was properly conducted, *i.e.*, qualified psychiatrist or psychologist as hypnotist; written record of information given to the hypnotist; audio- or videotape of the subject's prehypnotic recollection; audio- or videotape of the hypnotic session; exclusion of all but the hypnotist and the subject, that the opponent of the evidence had access to the recordings and will have wide latitude to cross-examine the subject

---

[118]United Sates v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984).
[119]*Id.*

and the hypnotist, and that other admissible evidence corroborates the hypnotically refreshed memory.[120] If the testimony satisfies this eight prong test, the judge may still exclude it unless its probative value "outweighs the risk of unfair prejudice to the accused."[121]

A United States district court and intermediate appellate courts in Florida and Louisiana have also balanced the facts and circumstances of particular cases in order to determine whether the evidence discovered through hypnosis is more probative, *i.e.*, reliable, than prejudicial, *i.e.*, the product of suggestion and confabulation.[122]

D. PER SE INADMISSIBILITY

Between April 1980 and July 1982, the courts in six states examined the admissibility of the testimony of a previously hypnotized witness, concluded that hypnosis is not a scientifically accepted method of restoring accurate memory, and declared that such witnesses cannot testify regarding the events whose clarification had been the purpose of the hypnosis.

The initial case in this approach to the issue was *State v. LaMountain*,[123] in which the Arizona Supreme Court observed, without citation of authority:

> Although we perceive that hypnosis is a useful tool in the investigative stage, we do not feel the state of the science (or art) has been shown to be such as to admit testimony which may have been developed as a result of hypnosis. A witness who has been under hypnosis. . . should not be allowed to testify when there is a question that the testimony, may have been produced by that hypnosis.[124]

Within three weeks of *LaMountain*, the Minnesota Supreme Court decided *State v. Mack*.[125] After reviewing the facts of the case, the testimony of the expert witnesses, and the writings of numerous commentators, the court declared that "a witness whose memory

---

[120]House v. State, 34 Crim. L. Rptr. at 2425, 2426 (Miss. Jan. 25, 1984).

[121]*Id.*

[122]United States v. Charles, 561 F. Supp. at 697 (error to admit identification resulting from suggestive hypnotic suggestion conducted by investigators unavailable at trial); Brown v. State, 426 So.2d at 90-93 (balancing test prescribed for trial court on remand); State v. Culpepper, 434 So.2d at 78, 83 (probative value exceeded by potential prejudice attendant upon use of untrained hypnotist and suggestive methods).

[123]125 Ariz. 547, 611 P.2d 551 (1981) (en banc).

[124]*Id.* at 551, 611 P.2d at 555.

[125]292 N.W.2d 164 (Minn. 1980).

has been 'revived' under hypnosis ordinarly must not be permitted to testify in a criminal proceeding to matters which he or she 'remembered' under hypnosis."[126] The court focused its analysis on the scientific community's view on the reliability of hypnosis in the restoration of accurate memory, and concluded that hypnosis does not enjoy general acceptance for this purpose in view of the dangers of suggestion, confabulation, and enhanced confidence.[127] Accordingly, utilizing the doctrine of *Frye v. United States*,[128] the court prohibited admission of the previously hypnotized victim's testimony.[129]

In the following twenty months, the potential hazards of the hypnotic process persuaded Arizona,[130] Michigan,[131] Pennsylvania,[132] and Nebraska[133] to exclude the testimony of witnesses who had undergone hypnosis in the course of the investigation.

---

[126]*Id.* at 771.

[127]*Id.* at 768-71.

[128]293 F. 1013 (D.C. Cir. 1923). In holding the results of a polygraph examination inadmissible, the court enunciated what has become a widely used test for assessing the admissibility of evidence derived from scientific tests:

> Just when a scientific principle or discovery crosses the line between experimental and demonstrable states is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field to which it belongs.

293 F. at 1014.

[129]292 N.W.2d at 772.

[130]State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 644 P.2d 1266, 1272 (1982) (en banc) ("[U]ntil hypnosis is recognized and generally accepted in the scientific community as a reliable tool to enhance memory accurately it is inadmissible in a criminal trial"); State v. Mena, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981) (en banc) (testimony "tainted by hypnosis" must be excluded until "hypnosis gains general acceptance. . . as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy. . . .").

[131]People v. Gonzales, 108 Mich. App. 145, 153, 310 N.W.2d 306, 314 (1981) ("[H]ypnosis as a technique to enhance memory recall has not received sufficient scientific recognition of reliability to allow the post-hypnotic 'recollections' of witnesses to be introduced into evidence. . . ."); People v. Tait, 99 Mich. App. 19, 23, 297 N.W.2d 853, 857 (1980) ("Hypnosis has not 'achieved that degree of general scientific acceptance' which will permit its introduction").

[132]*Commonwealth v. Nazarovitch, 496 Pa. 97, 104, 436 A.2d 170, 177 (1981)* ("We do not believe that the process of refreshing recollection by hypnosis has gained sufficient acceptance in its field as a means of accurately restoring forgotten or repressed memory").

[133]State v. Palmer, 210 Neb. 206, 213, 313 N.W.2d 648, 655 (1981). ("[U]ntil hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview").

California and Maryland were the last jurisdictions to announce a per se rule excluding the testimony of any previously hypnotized witness. In *People v. Shirley*,[134] the California Supreme Court reversed a conviction for rape and unlawful entry becaue the prosecutrix testified concerning matters which she recalled for the first time after hypnosis. In a sweeping opinion, the court enumerated the dangers of the hypnotic process,[135] concluded that procedural safeguards are inadequate and unworkable,[136] found that hypnosis is not generally accepted as reliable as required by *Frye*,[137] and held "that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward."[138] In *Collins v. State*,[139] the Maryland

---

[134]31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied*, 103 S. Ct. 133 (1982).

[135]31 Cal.3d at 45, 181 Cal. Rptr. at 270, 641 P.2d at 802-04.

[136]*Id.* at 29, 181 Cal. Rptr. at 254, 641 P.2d at 786-87.

[137]*Id.* at 30, 39, 47, 181 Cal. Rptr. at 255, 264, 272, 641 P.2d at 787-88, 796-98, 804.

[138]*Id.* at 47, 181 Cal. Rptr. at 272, 641 P.2d at 804. The decision has been the subject of considerable criticism. *See, e.g.*, Barnett, *The Emerging Court*, 71 Cal. L. Rev. 1134, 1168-69; Note, Drake L. Rev., *supra* note 4, at 760-62. The former Presiding Justice of the California Court of Appeals has made the harshest observations:

> *Shirley* is more of a polemic than an opinion. As a polemic it makes interesting reading. The protagonists are so clearly defined.
>
> The pro-hypnosis expert is a lowly police psychologist, wretchedly educated ("Ed. E."), who is, of all things, a director of a "proprietary school" in Los Angeles. (Just what that has to do with this case escapes me.) This police psychologist is so dumb that he accepts at "face value" and "without question" the "somewhat extravagent conclusions" of a neurosurgeon who is apparently pretty much of a dumkoph [*sic*] himself.
>
> On the other hand, the anti-hypnosis experts are "highly experienced," "nationally known," "pioneers," and "respected authorities" who present the "generally accepted view" which is set forth in "scholarly articles" and "leading scientific studies." Thus, the guys in the white hats and those in the black hats are clearly defined and appropriately labelled.
>
> The authorities suffer the same treatment.
>
> Somehow, lost in the shuffle, is the fact that the majority rule in this country is that hypnotically induced testimony is admissible.
>
> . . . .
>
> According to *Shirley*, cases following that rule rely on an authority which "summarily disposed" of this issue with "little or no analysis." The part I really like is the classification of all contra authorities as "moribund."
>
> . . . .
>
> Of course the cases to the contrary are "well reasoned" and "leading." Certainly.

People v. Williams, 132 Cal. App. 3d 923-24, 183 Cal. Rptr. 498, 500-01 (1982) (Gardner, J., concurring).

[139]52 Md. App. 186, 447 A.2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983).

Court of Special Appeals concluded that, measured by *Frye*, "the use of hypnosis to restore or refresh the memory of a witness is not accepted as reliable by the relevant scientific community and that such evidence is therefore inadmissible."[140]

E. LIMITED ADMISSIBILITY

While some commentators praised the rigid exclusionary rule enunciated in *Shirley* and similar cases,[141] many courts soon began to have doubts about the value of such a sweeping rule. The decisions had spoken approvingly of the use of hypnosis for investigatory purposes.[142] If, however, law enforcement officials were encouraged to hypnotize a victim to obtain additional leads, they would lose their only witness to the offense. Placed in such a dilemma, most investigators would forego the possibility of new information in light of the certainty of a ruling of inadmissibility. Reconsidering its decision in *Collins*, the Arizona Supreme Court recognized the quandary in which it had placed the police and held:

> As a practical matter, if we are to maintain the rule of incompetency, the police will seldom dare to use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent. Thus, applying the *Frye* test of general acceptance and weighing the benefit against the risk, we modify our previous decision and hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. That witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis.[143]

---

[140]52 Md. App. at 197, 447 A.2d at 1283.

[141]For approval of a per se ban on hypnotically enhanced testimony, *see, e.g.*, Alderman & Barrette, *supra* note 4, at 37; Barr & Spurgeon, *supra* note 4, at 131; Ruffra, *supra* note 4, at 323-24.

[142]*See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 187, 644 P.2d 1266, 1273 (1982) (en banc) ("this court recognizes that hypnosis has proven to be a valuable investigative tool"); People v. Shirley, 31 Cal.3d 18, 48, 181 Cal. Rptr. 243, 273, 641 P.2d 775, 805 (en banc), *cert. denied*, 103 S. Ct. 133 (1982) ("we do not undertake to foreclose the continued use of hypnosis by the police for investigative purposes. . . ."); Collins v. State, 52 Md. App. 186, 197, 447 A.2d 1272, 1283 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983) ("hypnosis may be used only for investigative purposes. . . ."); People v. Gonzales, 108 Mich. App. 145, 153 n.9, 310 N.W.2d 306, 314 n.9 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982) ("In cases where the police may want to use hypnosis as an investigative tool, we adopt the *Hurd* standards. . . ."); State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980) ("We do not foreclose. . . the use of hypnosis as an extremely useful investigative tool. . . .").

[143]State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 209, 644 P.2d 1266, 1295 (1982) (en banc).

The courts of Maryland,[144] Minnesota,[145] Nebraska,[146] and Pennsylvania,[147] also adopted the pragmatic approach of *Collins II*. The Michigan Court of Appeals initially modified its previous ruling and distinguished between pre- and posthypnotic information.[148] After the state's supreme court had ruled that previously hypnotized witnesses are unavailable following a hypnotic session,[149] it remanded all of the intermediate appellate court's decisions for further review consistent with this ruling. The Supreme Court then modified its ruling, stating that it had not announced a per se prohibition on the testimony of previously hypnotized witnesses.[150] The court of appeals accordingly decided that a witness was not disqualified from testifying regarding information revealed before the hypnotic session.[151] Thus, of the five courts that had absolutely barred a previously hypnotized witness from testifying, only California adhered to its ruling in the following three years.

Three other courts have also joined the group of jurisdictions which apply a rule of limited admissibility. The Colorado Court of Appeals concluded that hypnosis is not generally accepted as scientifically reliable; that procedural safeguards are inadequate to prevent its potential dangers; and that only information revealed and recorded prior to hypnosis could be admitted.[152] The Supreme Judicial Court of Massachusetts had previously considered cases in which hypnosis had been employed, but had never ruled directly on the issue.[153] In 1983, the court found hypnosis deficient under *Frye* but left an exception for witnesses testifying to their prehypnotic recollections.[154] Prior to July 1983, lower courts in New York had divided in their handling of the issue; some had excluded hypnotically refreshed testimony on grounds of *Frye* but admitted facts

---

[144]State v. Collins, 296 Md. 670, 688, 464 A.2d 1028, 1044 (1983).

[145]State v. Koehler, 312 N.W.2d 108, 110 (Minn. 1981).

[146]State v. Patterson, 213 Neb. 686, 690, 331 N.W.2d 500, 504 (1983).

[147]Commonwealth v. Taylor, 249 Pa. Super. 171, 173, 439 A.2d 803, 804 (1982).

[148]People v. Jackson, 114 Mich. App. 649, 654, 319 N.W.2d 613, 618 (1982); People v. Wallach, 110 Mich. App. 37, 54, 312 N.W.2d 387, 404-05 (1981), *vacated*, 417 Mich. 937, 331 N.W.2d 730 (1983).

[149]People v. Gonzalas, 415 Mich. 615, 620, 329 N.W.2d 743, 748 (1982).

[150]People v. Gonzalas, 417 Mich. 968, 968, 336 N.W.2d 451, 751 (1982).

[151]People v. Perry, 126 Mich. App. 86, 87, 337 N.W.2d 324, 325 (1983) (on remand).

[152]People v. Quintanar, 659 P.2d 710, 711-13 (Colo. App. 1982).

[153]Commonwealth v. Stetson, 384 Mass. 545, 551, 427 N.E.2d 926, 932 (1981) (harmless error); Commonwealth v. Juvenile, 381 Mass. 727, 729, 412 N.E.2d 339, 341-43 (1980) (insufficient record, but procedural safeguards should be employed in future).

[154]Commonwealth v. Brouillet, 389 Mass. 605, 607, 451 N.E.2d 128, 130 (1983); Commonwealth v. Kater, 388 Mass. 519, 526 n.6, 447 N.E.2d 1190, 1197 n.6 (1983); Commonwealth v. Watson, 388 Mass. 536, 539, 447 N.E.2d 1182, 1185 (1983).

recalled prior to the hypnotic session.[155] Others, holding that hypnosis affects weight, not admissibility, had admitted the testimony if procedural safeguards were employed,[156] but the failure to do so did not warrant exclusion.[157] The New York Court of Appeals ultimately followed the lead of other courts which deemed the witness incompetent only as to what was recalled after hypnosis[158]

IV. ANALYSIS

A. DEFICIENCIES OF CURRENT CASE LAW—GENERAL

All of the four principal approaches to the question of the admission of the testimony of a previously hypnotized witness are open to criticism. For example, the equation of hypnosis to other recognized methods of refreshing recollection is deficient on two grounds. It overlooks both the potentially distorting impact of the hypnotic process on the subject and the difficulty of disentangling actual memories from possible suggestion and confabulation. It does not recognize the differences in timing and location of the two methods. The traditional methods of refreshing recollection occur in open court; the finder of fact can observe the witness' lapse of memory, hear the explanation for it, and evaluate the credibility of both the device used to refresh the witness and the subsequent testimony. A hypnotic session, however, ordinarily occurs in private prior to any judicial proceedings. Thus, the finder of fact may never know precisely what took place. On the other hand, the use of procedural safeguards, such as *e.g.*, a neutral hypnotist or videotaping of the hypnotic session, may reduce the possibility of contamination of the witness's recollection. Additionally, the finder of fact and appellate courts will have a basis for evaluating the manner in which the hypnotic session was conducted. Procedural safeguards will not, however, be an unmixed blessing. First, they may be cumbersome

---

[155]People v. Hughes, 59 N.Y.2d 523, 531, 453 N.E.2d 484, 492, 466 N.Y.S.2d 255, 263 (1983); People v. Smith, 117 Misc. 2d 737, 751, 459 N.Y.S.2d 528, 542 (Sup. Ct. Dutchess County 1983).

[156]People v. McDowell, 103 Misc. 2d 831, 834, 427 N.Y.S.2d 181, 184 (Sup. Ct. Onondaga County 1980). *Cf.* People v. Lewis, 103 Misc. 2d 881, 883, 427 N.Y.S.2d 177, 179 (Sup. Ct. New York County 1980) (accused not entitled to call expert who conducted suggestive hypnotic interview without procedural safeguards).

[157]People v. Lucas, 107 Misc. 2d 231, 231, 435 N.Y.S.2d 461, 461 (Sup. Ct. New York County 1980).

[158]People v. Hughes, 59 N.Y.2d 523, 534, 453 N.E.2d 484, 495, 466 N.Y.S.2d 255, 266 (1983).

and difficult to implement. Second, they may not be wholly effective in minimizing the dangers of suggestion and confabulation. Finally, their use will entail a case-by-case review of each hypnotic session, both at trial and on appeal. This review will be time-consuming and may result in inconsistent decisions based on the unique facts of each case. Nevertheless, these two approaches are more credible than either the per se exclusionary rule applied in California or the partial exclusionary rule applied in other jurisdictions.

B. DEFICIENCIES OF THE EXCLUSIONARY RULE

The courts which have prohibited introduction of testimony from a witness hypnotized during the pretrial investigation have uniformly done so on the basis of the *Frye* test; they have concluded that hypnosis lacks general scientific acceptance as a mechanism for the restoration of reliable human memory and thus evidence derived from it is inadmissible. This application of the *Frye* test is, however, based on erroneous premises. It equates the testimony of an eyewitness describing his own experiences and observations with that of an expert relating the results of a scientific test which he performed. Moreover, it utilizes reliability, a question of weight, as a gauge for admissibility.

The admission of hypnotically refreshed testimony should not depend upon the application of the *Frye* test. *Frye* and its progeny deal with the admissibility of expert testimony regarding the outcome of scientific or mechanical tests. If the testimony is based upon a test or technique, such as in *Frye*, the polygraph, which does not yield reliable results, it has no relevance or probative value and should not be considered by the finder of fact. In essence, the validity of the scientific test, technique, or theory is itself on trial. Before the trial judge may admit the results, the judge must be satisfied that it rests on a sound scientific foundation. To ascertain whether it passes muster, the judge refers to that portion of the scientific community which is conservant with the question. If the experts are in substantial agreement on the reliability of the test, the evidence is admissible; if they believe that it is unreliable, or if they are divided in their assessment, the evidence is excluded. This approach, however, does not apply to the testimony of an eyewitness. Unlike the expert whose testimony is irrelevant unless it is reliable, the eyewitness relates his own version of events. His observations, even if they are refreshed in whole or in party by hypnosis, simply are not expert opinion deduced from a scientific test or technique. Unlike expert

opinion whose reliability is the touchstone of its relevance, hence, of its admissibility, eyewitness testimony is manifestly relevant because it has some tendency to prove or to disprove the issues of the case. Whether the witness' observations were accurate or inaccurate, or whether they were genuinely refreshed or merely contaminated by pretrial hypnosis, are questions of weight for consideration and resolution by the finder of fact. Recognition of the significant differences between expert scientific testimony and eyewitness testimony have prompted many courts to reject the *Frye* test as the standard for the admission of the evidence of a previously hypnotized witness. For example, the Fifth Circuit Court of Appeals recently held:

> The "*Frye* test," however, applies in terms to the admissibility of expert testimony and experimental data [footnote omitted]. The issue here is not the admissibility of a hypnotist's observations or statements made by the witness during hypnosis but instead the admissibility of the testimony of a lay witness in a normal waking state.[19]

> [19]. . .We . . . decline to apply a test designed for pseudoscientific data in a manner that would render a lay witness incompetent to give previously admissible testimony.[159]

A second analytical error committed by this school of thought is the assumption that an eyewitness whose testimony is not historically accurate is incompetent to testify. This assumption underlies the repeated comparison of hypnosis to scientific tests

---

[159]United States v. Valdez, 722 F.2d 1196, 1200-01 & 1201 n.11 (5th Cir. 1984). *See also* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 644 P.2d 1266, 1299 (1983) (en banc) (Cameron, J., dissenting); State v. Seager, 341 N.W.2d 410, 429 (Iowa 1983); State v. Collins, 296 Md. 670, 464 A.2d 1028, 1048-49 (1983) (Murphy, J., dissenting); State v. Armstrong, 110 Wis.2d 555, 562, 329 N.W.2d 386, 393 (1983); Key v. State, 430 So.2d 909, 911 (Fla. App. 1st Dist. 1983); Brown v. State, 426 So.2d 76, 89-90 (Fla. App. 1st Dist. 1983). The New Jersey Supreme Court concluded that *Frye* provided the standard for judging the admissibility of hypnotically refreshed testimony, but rejected historical accuracy as the measure of reliability:

> The purpose of using hypnosis is not to obtain truth, as a polygraph or "truth serum" is supposed to do. Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness. . . . In light of this purpose, hypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness, which are often historically inaccurate. . . . [W]e are satisfied that the use of hypnosis to refresh memory satisfies the *Frye* standard in certain instances.

State v. Hurd, 86 N.J. 525, 531, 432 A.2d 86, 92 (1981) (citations omitted).

designed to measure the truthfulness of the subject, such as polygraphs and truth sera.[160] This comparison is, however, inexact; as two writers have observed:

> Unfortunately, hypnosis has become linked in the minds of the courts and commentators with the polygraph and narcoanalysis as a technique for mechanically ascertaining the truth of the witness' testimony. Requiring hypnosis to perform a truth-determinant function, however, distorts the scientific process and aborts its potential benefit to litigation. The value of hypnosis lies in its scientifically-established reliability as a device for retrieving relevant testimony previously forgotten or psychologically repressed, *regardless* of the factual truth or falsity of that testimony.[161]

The concept of competence involves the capacity of a witness to describe certain matters; the accuracy of that description involves the question of its reliability. Competence, in other words, is the threshold for admitting testimony, whereas reliability or credibility are issues of weight subject to impeachment by the other side and to evaluation by the finder of fact. The courts which declare previously hypnotized witnesses incompetent have confused competence with credibility. That a witness will be historically accurate in his description of an event has never been, and, in practical terms, never can be, the standard for measuring competence and admissibility. In support of their insistence upon historical accuracy, various courts have pointed to the potential dangers of hypnosis: suggestibility, hypercompliance, confabulation, deliberate falsification, denial of confrontation, and excessive impact on the finder of fact.[162] Each of

---

[160]*See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 644 P.2d 1266, 1272 (1983) (en banc) ("The admissibility of posthypnotic testimony can be likened to that of polygraph and truth serum results"); People v. Gonzales, 108 Mich. App. 145, 147, 148 n.3, 310 N.W.2d, 306, 308, 309 n.3 (1981) ("[W]e believe that hypnosis. . . is akin to the polygraph examination" and "since the prosecutor's own witness concedes that hypnosis is not as able to guarantee truth as a polygraph, as an *a fortiori* proposition, it must be inadmissible at trial").

[161]Spector & Foster, *supra* note 4, at 584 (footnotes omitted).

[162]*See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 185-88, 644 P.2d 1266, 1270-75 (1983) (en banc); People v. Shirley, 31 Cal.3d 18, 45, 181 Cal. Rptr. 243, 270, 641 P.2d 775, 802-04 (en banc), *cert. denied*, 103 S. Ct. 133 (1982); People v. Hughes, 59 N.Y.2d 523, 529, 453 N.E.2d 484, 489-90, 466 N.Y.S.2d 255, 260 (1983); Commonwealth v. Nazarovitch, 496 Pa. 97, 100, 436 A.2d 170, 173-75 (1981); State v. Mack, 292 N.W.2d 764, 768-69 (Minn. 1980); Collins v. State, 52 Md. App. 186, 194, 447 A.2d 1272, 1280 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983); People v. Gonzales, 108 Mich. App. 145, 148, 310 N.W.2d 306, 309-10 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982).

these factors sounds in credibility, not competence; their presence must be assessed in light of the circumstances of each particular case. It is not enough to say that they may theoretically affect the witness; the opponent must show that they *did* affect the witness before the testimony can be deemed unreliable. Such a process of contradiction lies at the heart of the adversary process and can only be accomplished during the trial itself. The wholesale exclusion of testimony before trial because of "the phantom dangers"[163] ascribed to hypnosis ill-serves the search for truth based upon the admission of all relevant testimony which bears on the issues of the case.

The fallacy of establishing historical accuracy as the standard for competence of a previously hypnotized witness and of utilizing *Frye* to justify it is further undercut by the failure of the same courts to apply the standard to all eyewitness testimony. The vagaries of such testimony have been abundantly chronicled by psychologists and legal commentators. Its potential unreliability and inaccuracy are due to many factors. At the time of the event, the witness' own condition and powers of perception and the physical setting itself, including conditions such as lighting, distance, and length of observation, will determine what he initially sees and remembers. Subsequently, he will attempt to fit his impressions into a coherent pattern and, in the course of this, discard information, obtain some from other people, and even invent matters in order to "fill in the gaps." Finally, the circumstances of the later identification—his desire to please the investigators, their witting or unwitting suggestions to him—may further alter his recollections of the event. Throughout the entire process of acquisition, retention, and retrieval of information, the witness' own biases, preconceptions, and personal motives may further distort his capacity to describe what actually transpired.[164] The Sixth Circuit succinctly summed up these concerns in the following analysis:

> Many investigators believe that perception and memory are not purely deductive, but have substantial inductive components. Witnesses focus on gross or salient characteristics of any sensory experience, and fill in the details,

---

[163]State v. Stolp, 133 Ariz. 213, 215, 650 P.2d 1195, 1197 (1982) (en banc) (Hollohan, J., concurring and dissenting).

[164]E. Loftus, Eyewitness Testimony (1979); N. Sobel, Eyewitness Identification: Legal and Practical Problems (2d ed. 1981); Hilgard & Putnam, *supra* note 3, at 345-52; Levine & Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. Pa. L. Rev. 1079 (1973); Putnam, *supra* note 3, at 439-40; Note, 2 Rev. Litigation, *supra* note 4, at 235-38; Marshall, Marquis, & Oskamp, *Effects of Kind of Question and Atmosphere on Accuracy and Completeness of Testimony*, 84 Harv. L. Rev. 1620 (1971); Note, 29 Stan. L. Rev., *supra* note 75, at 976-89.

> not according to the observed facts of the experience, but according to some previously internalized pattern they associate with the perceived gross characteristics. In addition, the construction of memory is greatly influenced by the post-experience suggestion. Suggestions compatible with the witness' internalized stereotype are likely to become part of the witness' memory, not because they are in fact similar to the actual experience, but because they fit the preconceived stereotype.
>
> Also, unreliability can be compounded by inaccurate perception of even the gross characteristics of the experience. Some studies have shown that even under ideal conditions, height estimates by different witnesses can vary by more than two feet. Even the estimates of experienced police officers can vary by as much as five inches, and their weight and age estimates can vary by as much as twenty pounds and fifteen years.[165]

It is readily apparent that the potential for suggestion, confabulation, and fabrication exist with respect to eyewitness testimony. If the higher standard of reliability required by *Frye* is used to exclude hypnotically refreshed testimony because it suffers from these vices, it should logically also be applied to all eyewitness testimony. If not, there is little justification for applying different standards of admissibility to types of evidence which are essentially similar.[166]

---

[165]United States v. Russell, 532 F.2d 1063, 1066 (6th Cir. 1976) (citations omitted), *cited with approval in* United States v. Tyler, 714 F.2d 664, 667 (6th Cir. 1983). For other descriptions of the inaccuracy and eyewitness testimony, *see* Gilbert v. California, 388 U.S. 263, 273-74 (1967); United States v. Wade, 388 U.S. 218, 228-29 (1967).

[166]Several judges have pointed out the logical inconsistency of treating eyewitness testimony differently from hypnotically enhanced testimony. *See* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 191, 644 P.2d 1266, 1277 (1983) (en banc) (Hollohan, C.J., dissenting) ("If we apply the court's concern with suggestibility and difficulty of cross-examination to all witnesses, we would not allow a lawyer to talk to his witness before trial, we would exclude most identification testimony, and relatives and friends of a party would be excluded as witnesses"); People v. Shirley, 31 Cal.3d 18, 53, 181 Cal. Rptr. 243, 288, 641 P.2d 775, 810 (en banc) (Kaus, J., dissenting), *cert. denied*, 103 S. Ct. 133 (1982) ("given the majority's own rendering of modern views concerning the nature and fallibility of hypnotized human memory. . ., it may not be entirely facetious to suggest that if we are to exclude eyewitness testimony unless shown to be scientifically reliable, we may have little choice but to return to trial by combat or ordeal"); State v. Hurd, 86 N.J. 533, 541, 432 A.2d 86, 94 (1981) ("[i]t should be recognized that psychological research concerning the reliability of ordinary eyewitnesses reveals. . . shortcomings [similar to those of hypnotically refreshed memory]"); State v. Long, 32 Wash. App. 732, 733, 649 P.2d 845, 846 (1982) ("Fallibility in perception and recall because of psychological factors as well as attitudes, preferences, biases and expectations of a witness are well known to court and counsel").

The other grounds adduced for excluding the testimony of a previously hypnotized witness are no more persuasive. The alleged curtailment of the accused's constitutional right to confront and cross-examine the prosecution witnesses is no barrier to the admission of the testimony. There is a controversy over whether, in fact, the witness does become more self-confident after hypnosis and thus is "hardened" against cross-examination.[167] Even if one accepts that "hardening" may take place, however, it does not justify the exclusion of the testimony. This phenomenon may occur even without hypnosis; repeated questioning, coupled with a desire to please one's interlocutors, may freeze a witness's version of events and instill great confidence in him.[168] It has never been proposed that such witnesses are incompetent. More significantly, the narrow focus on cross-examination overlooks the fact that successful impeachment depends on more than "hesitancy, expressions of doubt, and body language indicating lack of self-confidence."[169] A party traditionally takes the opposition's witnesses as he finds them. An advocate confronted by a plausible and damaging opposition witness may avail himself of a rich variety of tactics to attack his credibility. He may bring out the witness' prior inconsistent statements and highlight his inability to recall, prior to hypnosis, the details which he now claims to remember. He may develop the witness' bias against the accused or his motive for testifying in a particular way. He may attack the witness' ability to observe the event which he now claims to have seen. He may call his own witnesses to contradict the witness' version of events. He may even call experts to point up the possibility

---

[167]People v. Boudin, 118 Misc. 2d 230, 233, 460 N.Y.S.2d 879, 881-82 (Sup. Ct. Rockland County 1983) (testimony of three experts about the lack of scientific evidence of "concreting").

[168]Loftus, *supra* note 161, at 84-86.

[169]Diamond, *supra* note, 2 at 339. *See* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 188, 644 P.2d 1266, 1274 (1983) (en banc) ("The insistent manner of the witness and the apparent belief in the posthypnotic version of the occurrence may deprive the jury of the value of observing the demeanor of a witness as it would have been absent the hypnotic session"); People v. Shirley, 31 Cal.3d 18, 47, 181 Cal. Rptr. 243, 272, 641 P.2d 775, 804 (en banc), *cert. denied*, 103 S. Ct. 133 (1982) ("The resulting 'memory' may be so fixed in his mind that traditional legal techniques such as cross-examination may be largely ineffective to expose its unreliability"); Collins v. State, 52 Md. App. 186, 194, 447 A.2d 1272, 1280 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983) ("A witness. . . may become convinced of the absolute truth of the account he recited under hypnosis. . .. This conviction reduces the possibility of meaningful cross-examination. . .."); State v. Mack, 292 N.W.2d 764, 770 (Minn. 1980) ("Because the person hypnotized is subjectively convinced of the veracity of the 'memory,' this recall is not susceptible to attack by cross-examination"); Commonwealth v. Nazarovitch, 496 Pa. 97, 101, 436 A.2d 170, 174 (1981) ("The subject's firm belief in the veracity of his enhanced recollections is honestly held, and cannot be undermined through cross-examination").

that the witness' detailed memory is actually the product of confabulation and suggestion. Under these circumstances, it cannot be seriously argued that the accused's right of confrontation has been abridged. Both courts and commentators have rejected such a claim.[170]

The final reason adduced for the exclusion of hypnotically refreshed testimony—its alleged potential for confusing the finder of fact[171]—is as groundless as the other justifications previously examined. The adversary process rests upon the assumption that the finder of fact, guided by the instructions of the trial judge, will be able to thread its way through a maze of conflicting testimony, evaluate the merits of the competing claims, and arrive at a just resolution of the dispute. In modern legal practice, both civil and criminal, the finder of fact is regularly required to hear and weigh extremely technical expert testimony. For example, the use of the insanity defense frequently reduces the trial to a prolonged duel between the prosecution and the defense experts.[172] There is no reason to suppose that testimony refreshed by hypnosis will be any more mysterious than other forms of expert testimony. As one judge has trenchantly observed: "I am firmly of the belief that jurors are quite capable of seeing through flaky testimony and [p]seudo-scientific claptrap."[173] This is particularly true in the armed forces where the members of courts-martial are trained professionals, selected by the convening authority on the basis of "age, education, training, experience, length of service, and judicial temperament."[174] The *Frye* test and its progeny, rest their arguments on the fear that the trier of fact will be overawed by allegedly scientific evidence which may "assume a posture of mystic infallibility in the eyes of a jury or

---

[170]State v. Seager, 341 N.W.2d 410, 432 (Iowa 1983); State v. Armstrong, 110 Wis.2d 555, 563, 329 N.W.2d 386, 393-94 (1983); Brown v. State, 426 So.2d 76, 93 (Fla. App. 1st Dist. 1983); Note, Tex. L. Rev., *supra* note 4, at 727-29.

[171]*See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 644 P.2d 1266, 1272 (1983) (en banc) ("Hypnosis is cloaked in a veil of mysticism to the layperson. It seems to be a magical thing indeed that can produce fantastic recall and startling results. A jury is likely to produce undue emphasis on what transpired during a hypnotic session"); People. v. Gonzales, 108 Mich. App. 145, 152, 310 N.W.2d 306, 313 (1981) *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1984), ("It is far too likely that a jury would be even less critical of the testimony because of the indicia of reliability provided by such [procedural] safeguards"). *Accord* Ruffra, *supra* note 4, at 313-14.

[172]United States v. Hargrove, CM 443107, is a particularly vivid illustration of this act; seven defense experts and two government experts clashed over the mental respnsibility of a service member charged with firing an armor-piercing discarding sabot round into a tank, thereby killing two men and injuring two others.

[173]People v. Williams, 132 Cal. App.3d 920, 924, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring).

[174]Uniform Code of Military Justice art. 25(d)(2), 10 U.S.C. 825(d)(2) [hereinafter cited as U.C.M.J.].

laymen."[175] Such an assumption is unwarranted. First, those who so confidently denigrate the ability of court members to weigh evidence critically rarely cite empirical evidence for their assumptions. Second, these jurists overlook the natural scepticism that many Americans feel toward experts. Finally, empirical studies demonstrate that court members are not overwhelmed and mystified by expert testimony allegedly grounded in scientific principles. In fact, a leading study constitutes a "stunning refutation of the hypothesis that the jury does not understand" the evidence.[176]

In addition to the erroneous application of the *Frye* test to eyewitness testimony and the equally erroneous equation of credibility with competence, the decisions which have excluded the testimony of previously hypnotized witnesses exhibit certain other shortcomings which merit brief comment. First, there is great reliance upon the views of Diamond.[177] Such reliance is unwarranted; by his own admission his views are "extreme,"[178] "law and literature. . . [offer] only mixed support for [his] view that courts should never admit such testimony,"[179] and, as one court summarized his testimony: "[Diamond] indicated that he had not used hypnosis since 1968 and had conducted no laboratory experiments to support his conclusions. . . but based this entire thesis on his 'clinical experience' and the writings of others."[180]

A second criticism of the decisions excluding hypnotically refreshed testimony is their willingness to announce sweeping rules which are not justified by the facts of the cases before them. It is a maxim of jurisprudence that a court should limit itself to the immediate issues before it and should not issue quasi-advisory opinions. Nevertheless, in dealing with the issue of hypnosis, this is pre-

---

[175]United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974).

[176]H. Kalven & H. Zeisel, The American Jury 157 (1966). *See* United States v. Ridling, 350 F. Supp. 90, 98-99 (D. Mich. 1972).

[177]*See, e.g.*, State v. Collins, 296 Md. 670, 684, 462 A.2d 1028, 1041-42 (1983); People v. Shirley, 31 Cal.3d 18, 40 n.34, 45 n.45, 181 Cal. Rptr. 243, 265 n.34, 270 n.45, 641 P.2d 775, 797 n.34, 802 n.45 (en banc), *cert. denied*, 103 S. Ct. 133 (1982); Commonwealth v. Nazarovitch, 496 Pa. 97, 103, 436 A.2d 170, 173-75 (1981); People v. Gonzales, 108 Mich. App. 145, 150, 151-52, 310 N.W.2d 306, 310, 311-12 (1981), *aff'd*, 415 Mich. 615 329 N.W.2d 743 (1982).

[178]United States v. Waksal, 539 F. Supp. 834, 838 (D. Fla. 1982), *rev'd* on other grounds, 709 F.2d 653 (11th Cir. 1983).

[179]Diamond, *supra* note 2, at 332.

[180]People v. Boudin, 118 Misc.2d 230, 233, 460 N.Y.S.2d 879, 882 (Sup. Ct. Rockland County 1983).

cisely what has occurred.[181] The cases which have served as the vehicles for the enunciation of exclusionary rules have typically involved the efforts of marginally trained police hypnotists seeking to validate their own suspicions with blatantly suggestive techniques.[182] Rather than imposing blanket rules, the courts would have been better advised to adopt a balancing test and weigh the probative value of the evidence against its potential prejudice. Under the circumstances, the presence of suggestion and confabulation would have been sufficient to warrant exclusion of the testimony, while leaving the door open to testimony lacking these dangers.

A final criticism of the exclusionary rule lies in the bias which the courts which have adopted it exhibit against law enforcement agencies and in favor of the accused. This bias manifests itself in two ways. One court noted "a tendency toward more liberal admission" of hypnotically refreshed testimony and, with ill-concealed distaste, added: "It is significant, however, that this tendency clearly favors only the prosecution of criminal matters."[183] A jurisprudence which condemns an investigatory technique because of its apparent value to the state is unbalanced.

The second manifestation of this lack of balance lies in what might be termed the "defendant's exception." After reviewing the numerous arguments which it believed warranted the total exclusion of the testimony of a previously hypnotized witness—"such tainted evidence," in the words of the court[184]—the California Supreme Court declared:

> [W]hen it is the defendant himself. . . who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that

---

[181]At least one judge has noted and condemned this tendency: "I think that we should be very wary about establishing a broad, generally applicable exclusionary rule for all posthypnosis testimony on the basis of the rather egregious facts of this case alone." People v. Shirley, 31 Cal.3d 18, 53, 181 Cal. Rptr. 243, 278, 641 P.2d 775, 810 (en banc) (Kaus, J., dissenting), *cert. denied*, 103 S. Ct. 133 (1982).

[182]*See, e.g., Shirley*, 31 Cal.3d at 23, 181 Cal. Rptr. at 248, 641 P.2d at 780; State v. Palmer, 210 Neb. 206, 211, 313 N.W.2d 648, 652-53 (1981); Commonwealth v. Nazarovitch, 496 Pa. 97, 99, 436 A.2d 170, 171-72 (1981); State v. Mack, 292 N.W.3d 764, 767 (Minn. 1980); Polk v. State, 48 Md. App. 382, 386, 427 A.2d 1041, 1043-44 (1981); People v. Gonzales, 108 Mich. App. 145, 153-55, 310 N.W.2d 306, 314-16 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982).

[183]State v. Mack, 292 N.W.2d 764, 770 (Minn. 1980). *See also* People v. Hughes, 59 N.Y.2d 523, 530, 453 N.E.2d 484, 491, 452 N.Y.S.2d 408, 415 (1983) ("And like the present case, evidence is usually offered by the prosecutor. . . .").

[184]*Shirley*, 31 Cal.3d at 49, 181 Cal. Rptr. at 274, 641 P.2d at 806.

> case, the rule we adopt. . . is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf.[185]

The Supreme Judicial Court of Massachusetts has explicitly endorsed this rule.[186] There is something incongruous in the notion that an accused may always testify, regardless of the supposedly tainted nature of his evidence, and yet his victim is incompetent; thus, the proecution may not be able even to show that an offense occurred.[187] Although one commentator approved the "defendant's exception" as "a valid recognition of. . . guaranteed rights,"[188] it is actually a anomoly in the judicial process. The exaltation of the accused, at the expense of the victim in particular and of society as a whole, cannot be justified.

C. DEFICIENCIES OF THE PARTIAL EXCLUSIONARY RULE

Disturbed by the implications of a total prohibition on the admission of a previously hypnotized witness's testimony, many courts have adopted a modified exclusionary rule which permits the witness to testify to facts revealed prior to the hypnotic session.[189] While this rule appears to be a pragmatic balancing of the competing interests, it is in fact illogical and unworkable.

The exclusion of posthypnotic testimony rests, in the final analysis, upon the proposition that the hypnotic session may so distort the witness's memory that neither he nor anyone else can sort out his prehypnotic memory from his posthypnotic memory.[190] If this is true, the bifurcated rule of admissibility makes little sense because the witness no longer possesses his own memory of the past; his testimony will be a blend of fact, fantasy, suggestion, and confabulation. Only through coaching by counsel and close supervision by the trial judge will the witness be able to adhere rigidly to his

---

[185]*Id.* at 48, 181 Cal. Rptr. at 273. The Pacific Reporter does not include this sentence which the court added to its opinion on 4 June 1982.

[186]Commonwealth v. Kater, 388 Mass. 519, 526 n.6, 447 N.E.2d 1190, 1197 n.6 (1983).

[187]Similar concerns were voiced in State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 193, 644 P.2d 1266, 1279 (1982) (en banc) (Hollohan, C.J., dissenting); People v. Williams, 132 Cal. App.3d 920, 924, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring).

[188]Ruffra, *supra* note 4, at 321.

[189]*See supra* text accompanying notes 141-58.

[190]*See, e.g.,* Diamond, *supra* note 2, at 333-34, 335-36, 337.

prehypnotic statements. Such coaching and supervision raise major procedural, tactical, and ethical problems. First, it presupposes that the witness' prehypnotic statements have been preserved in minute detail and are available; most courts have neglected to specify standards or procedures for this and their failure has been justly criticized.[191] Second, by restricting the witness soley to his earlier statements, he may be put in the position of testifying to "facts" which he no longer believes to be true. This would constitute a violation of his oath, and the prosecutor who coached the witness to repeat them would expose himself to disciplinary action for foisting upon the court evidence which may be false.[192] Third, the prosecutor will have to restrict his direct examination of the witness to the prehypnotic statement; he will not be able to obtain elaboration or clarification because, by leaving the confines of the statement, the witness will enter areas allegedly tainted by hypnosis. Fourth, the defense will be similarly hampered because cross-examination concerning inconsistencies and omissions will invite the witness to respond from his posthypnotic memory, thereby opening the door to the allegedly unreliable and incompetent evidence which the modified rule seeks to exclude. Finally, the trial judge will have to insure that the witness adheres closely to his prehypnotic statement and that the parties understand and accept the procedures.[193] While the bifurcated approach was designed to create a bright line rule of easy applicability, it is, in fact, a procedural nightmare which may well entail confusion of the issues, waste of time, undue delay; and even the introduction of testimony which the witness does not consider true.

---

[191]*See, e.g.,* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 213, 644 P.2d 1266, 1299 (1982) (en banc) (Gordon, V.C.J., concurring and dissenting) ("Merely suggesting standards is unfair to those who will use hypnotic techniques. I would not have litigants guess at which or how many standards would be enough to satisfy this court. . . ."); State v. Collins, 296 Md. 670, 703, 464 A.2d 1028, 1051 (1983) (Murphy, C.J., dissenting) ("The rule the majority adopts today will most certainly call for some prescient guessing as to what this Court will accept in future cases as a 'clear demonstration' [of prior memorialization of the witness's statement]").

[192]Model Code of Professional Responsibility DR 7-102 (1979) prohibits, *inter alia*, the knowing use of perjured testimony, or the creation or preservation of false evidence. This Disciplinary Rule is binding on trial counsel and trial defense counsel. U.S. Dep't of Army, Reg. 27-10, Legal Services—Military Justice, para. 5-8 (1 Sept. 1982).

[193]Vice Chief Justice Gordon of the Arizona Supreme Court deserves credit for analyzing the numerous practical difficulties which implementation of the modified exclusionary rule will entail. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 201, 644 P.2d 1266, 1297-98 (1982) (en banc) (Gordon, V.C.J., concurring and dissenting).

D. A SOLUTION TO THE CONUNDRUM

Examination of both the per se and the modified exclusionary rules reveal that they suffer from serious shortcomings. On the other hand, it is impossible to overlook the unique nature of the hypnotic process and its potential for distorting the memory. In order to obtain the benefits of hypnosis—the recovery of additional information—while guarding against the hazards, it is necessary to steer a course between the Scylla of unlimited admissibility and the Charybdis of exclusion. Fortunately, the Military Rules of Evidence suggest an analytical framework for the admission of relevant testimony from previously hypnotized witnesses and for the exclusion of such evidence where its probative value is substantially outweighed by the danger of unfair prejudice.[194]

A precondition for testimony is the competence of the witness. Military Rule of Evidence 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Thus, if the witness observed the event in issue and there is evidence "sufficient to support a finding that [he had] personal knowledge" of it, he may testify.[195] Further, so long as the witness is willing to be sworn,[196] is neither the presiding military judge[197] nor a member of the court-martial,[198] and is not violating any of the rules of

---

[194]By focusing on the issue of relevance instead of on the inapposite tests for expert scientific testimony, the following discussion pretermits the question of the continuing validity of *Frye* and its progeny. For a persuasive argument that *Frye* is dead and has been replaced with a more liberal standard, *see* Imwinkelreid, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 100 Mil. L. Rev. 99, 104-06 (1983). The government espoused a similar position in *Harrington*. Reply to the Assignments of Error at 56-59, United States v. Harrington, CM 442125 (A.C.M.R. argued June 22, 1983). *See* United States v. Hammond, 17 M.J. 218, 220 (C.M.A. 1984) (Cook, J.); United States v. Martin, 13 M.J. 66, 68 n.4 (C.M.A. 1982) (Fletcher, J.). *But see* United States v. Moore, 15 M.J. 354, 372-74 (C.M.A. 1983) (Everett, C.J., dissenting); United States v. Bothwell, 17 M.J. 684, 686-87 (A.C.M.R. 1983); United States v. Dodson, 16 M.J. 921, 930 (N.M.C.M.R. 1983). Because Mil. R. Evid. 702 governs the admissibility of expert testimony, its inapplicability—and that of *Frye*—to lay eyewitnesses is again underscored. If, however, we assume for the sake of argument that the admissibility of the testimony of the previously hypnotized witness is measured by *Frye*, we find that such testimony is admissible. In applying *Frye*, the question is whether the scientific community accepts the proposition that hypnosis may enhance the memory of a witness. Even the most severe critics of the use of hypnosis do not deny this. *See, e.g.*, Diamond, *supra* note 2, at 340; Orne, *supra* note 3, at 317-18. It is true that the enhanced memory may be fallible, but the same may be said of the unaided memory as well. If, therefore, the relevant scientific community accepts hypnosis as a means of producing memory equivalent to that of any other witness, *Frye* is satisfied and the testimony admissible. State v. Hurd, 86 N.J. 533, 542, 432 A.2d 86, 95 (1982).

[195]Mil. R. Evid. 602.

[196]Mil. R. Evid. 603.

[197]Mil. R. Evid. 605(a).

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

evidence,[199] he is competent. The principle of *inclusio unius est exclusio alterius* should operate to prevent an expansion of the categories of incompetence to include persons who have previously been hypnotized. Several jurisdictions whose rules of evidence parallel those adopted by the armed forces have reached the same conclusion.[200] The drafters of the Military Rules of Evidence expressly endorsed an expansive definition of persons competent to testify; in this regard, they wrote: "the plain meaning of the [Military Rule of Evidence 601] appears to deprive the trial judge of any discretion whatsoever to exclude testimony on grounds of competency unless the testimony is incompetent under those specific rules already cited. . . ."[201] It therefore appears that a witness who states under oath that his testimony is based on his recollection of what he himself previously observed, even if he underwent hypnosis to sharpen that recollection, is competent to testify.

Having established that a previously hypnotized witness is, as a general matter, competent to testify, the next inquiry is whether his testimony satisfies the other criteria which govern the admission of evidence. Such an inquiry must open with recognition of the proposition that all relevant evidence is admissible.[202] The Military Rules of Evidence define such evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less likely than it would be without the evidence."[203] In the classic use of investigatory hypnosis, the victim or eyewitness is hypnotized in the hope of recovering additional information from him. Should the hypnotic session result in an identification of a suspect or in a more detailed account of the event, such information is indisputably a "fact. . . of consequence to the determination" of any subsequent prosecution and thus qualifies as relevant evidence.

The Military Rules of Evidence have created a presumption in favor of the admission of relevant evidence. The presumption, however, is subject to rebuttal, depending upon the content and circumstances of the testimony. The military judge possesses discre-

---

[199]*See* Mil. R. Evid. 501-512.

[200]United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984); State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983); Chapman v. State, 638 P.2d 1280, 1284 (Wyo. 1982); State v. Beachum, 97 N.M. 682, 688, 643 P.2d 246, 252 (App. 1981). *See also* State v. Seager, 341 N.W.2d 410, 430 (Iowa 1983); State v. Long, 32 Wash. App. 732, 733, 649 P.2d 845, 846 (1982).

[201]MCM, 1969, A18-36.

[202]Mil. R. Evid. 402.

[203]Mil. R. Evid. 401.

tionary authority to exclude otherwise relevant evidence "if its probative value is substantially outweighted [*sic*] by the dangers of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[204] In other words, when a party challenges the admissibility of evidence, the military judge must determine both its relevance and its potential value to the finder of fact. Because under ordinary circumstances the finder of fact is entitled to as much evidence as possible, the military judge may exclude relevant evidence only where the dangers it poses to the truth-seeking process substantially exceed the benefits flowing from its admission.

The proper application of the balancing test to the testimony of a previously hypnotized witness depends upon the definition of the potential benefits and hazards of such testimony. The benefit, unchallenged by even the severest critics of the employment of hypnosis for investigative purposes,[205] is the recovery of information which the witness was previously unable to recall. The hazard lies in the possibility that, because of suggestion, hypercompliance, and confabulation, the information may be a mixture of fact and fantasy. These considerations raise two other points. First, the hazards of the hypnotic process are not wholly unique; they parallel, possibly on a larger scale, those present in any testimony based on human memory. Second, the existence and magnitude of the hazards are linked to the manner in which the hypnotic session was conducted; they are functions of the techniques of induction and examination, rather than of the underlying theory of hypnosis. These factors suggest a standard for the judicial review of the probative value of the testimony of a previously hypnotized witness. The military judge should focus his analysis on the circumstances of the hypnotic session itself. If they were not unduly suggestive and if they appeared to produce recollections whose accuracy approximates that of an ordinary, fallible memory, the testimony is sufficiently reliable to be put before the finder of fact.

The Supreme Court has recognized that pretrial identification procedures such as lineups and showups may be unreliable because of the vagaries of eyewitness identification and that admission of such evidence may deprive the accused of due process of law.[206] Their

---

[204]Mil. R. Evid. 403.

[205]Diamond, *supra* note 2, at 340; Orne, *supra* note 3, at 317-18.

[206]Stovall v. Denno, 388 U.S. 293, 301-02 (1967); *Wade*, 388 U.S. at 229, 235; United States v. Gholston, 15 M.J. 582, 584 (A.C.M.R. 1982), *petition denied*, 16 M.J.125 (C.M.A. 1983).

results, however, are inadmissible only if "the identification procedure 'was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"[207] With regard to out-of-court identification testimony, the Supreme Court has mandated a two pronged test. First, the trial court must decide whether the procedure employed by the investigators was impermissibly suggestive. If it was not, the witness' testimony is admissible. If it was unduly suggestive, the court must inquire whether the out-of-court identification was reliable, despite the suggestive technique employed by the law enforcement agents. This inquiry turns on the witness' opportunity to view the accused, the witness' degree of attention, the accuracy of the witness' identification prior to the lineup or other identification procedure, the witness' certainty at the identification procedure, and the lapse of time between the witness' initial statement and any subsequent identification procedure. Thus, even if the procedure is unduly suggestive, an identification is admissible of it possesses sufficient indicia of reliability. Reliability, not suggestiveness, is therefore the touchstone of admissibility.[208] The reliability, hence, admissibility, of an out-of-court identification depends upon an examination of all the circumstances of the case.[209] Moreover, even if there is some question of the reliability of the identification testimony, the better practice is to admit it. As the Supreme Court has observed:

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.[210]

---

[207]Manson v. Braithwaite, 432 U.S. 98, 105 n.8 (1977) (citing Simmons v. United States, 390 U.S. 377, 384 (1968)).

[208]*Manson v. Braithwaite*, 432 U.S. at 106, 114; Neil v. Biggers, 409 U.S. 188, 198-200 (1972); Adail v. Wyrick, 711 F.2d 99, 101-02 (8th Cir. 1983); Dickerson v. Fogg, 692 F.2d 238, 244 (2d Cir. 1982); Passman v. Blackburn, 652 F.2d 559, 569-70 (5th Cir. 1981), *cert. ednied*, 455 U.S. 1022 (1982); United States v. Mefford, 658 F.2d 599, 569-70 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982); United States v. Fors, 10 M.J. 367, 368-69 (C.M.A. 1981); United States v. Quick, 3 M.J. 70, 71-72 (C.M.A. 1977).

[209]*Compare Manson v. Braithwaite*, 432 U.S. at 114; *Neil v. Biggers*, 409 U.S. at 199-201; Coleman v. Alabama, 399 U.S. 1, 4 (1970); *Simmons v. United States*, 390 U.S. at 384; *Stovall v. Denno*, 388 U.S. at 301-02; United States v. Batzel, 15 M.J. 640, 643 (N.M.C.M.R. 1983); United States v. Gillespie, 3 M.J. 721, 722-23 (A.C.M.R.), *remanded*, 4 M.J. 170 (C.M.A. 1977) (summary disposition) *with* Foster v. California, 394 U.S. 440, 442 (1969); United States v. Reynolds, 15 M.J. 1021, 1022 n.2 (A.F.C.M.R. 1983). *See generally* Gasperini, *Eyewitness Testimony Under the Military Rules of Evidence*, Army Lawyer, May 1980, at 42, 44-45.

[210]*Manson v. Braithwaite*, 432 U.S. at 116.

In many cases, the reliability of the identification evidence is the only real question before the finder of fact. In such a case, the finder of fact, with appropriate guidance from the trial judge, must weigh the identification against the circumstances in which it was obtained, and, thereafter, pronounce the finding. The system of Anglo-American jurisprudence has depended upon a judicial ability to weigh the competing arguments and to resolve them.[211] These principles apply readily to testimony derived from hypnosis because it is a species of eyewitness testimony and often involves the identification of individuals and the description of their actions.

Although suggestion and hypercompliance probably can never be wholly eliminated from the hypnotic process, the employment of procedural safeguards will reduce their potentially distorting impact on the subject.[212] It follows that, in assessing the probative value of posthypnotic testimony, the military judge should consider the extent to which these safeguards were utilized. If the investigation was conducted by the USACIC, he should insure that the procedures prescribed by the governing regulation were followed. The regulation provides that the USACIC will resort to hypnosis only after routine methods of investigation have proved unsuccessful,[213] when the subject potentially possesses important information,[214] and when the regional commander approves its use,[215] after the USACIC field office has consulted its servicing staff judge advocate. Should he object to the use of hypnosis, the regional commander will consult either his own judge advocate or the staff judge advocate, HQUSACIC.[216] Prior to the induction of hypnosis, the subject's version of events will be thoroughly explored and recorded in a written sworn statement.[217] Our professionally qualified health care professionals will induce hypnosis;[218] prior to doing so, they will review the subject's medical records.[219] The health care professional will be informed only of the nature, location, and date of the incident under investigation, and of the type of information being sought.[220] The health care professional will control the hypnotic session,[221] and will

---

[211] *See, e.g.*, Watkins v. Sowders, 449 U.S. 341, 347 (1981).

[212] *See* Kroger & Douce, *supra* note 1, at 317-22; Orne, *supra* 3, at 327-29, 335-37; Putnam, *supra* note 3, at 446; Schafer & Rubio, *supra* note 3, at 90, Warner, *supra* note 3, at 21-23.

[213] CIDR 195-1 para. Q-2a.

[214] *Id.* at para. Q-9a.

[215] *Id.* at para. Q-9b.

[216] *Id.* at para. Q-6b.

[217] *Id.* at para. Q-10.

[218] *Id.* at para. Q-3; for the definition of the qualifications, *see* note 65, *supra*.

[219] *Id.* at para. Q-7.

[220] *Id.* at para. Q-11c.

[221] *Id.* at para. Q-11a.

attempt to obtain the subject's story in narrative, as opposed to interrogatory, form.[222] To insure that the health care professional does not use leading or suggestive questions, a USACIC agent conversant with the case and with hypnosis will brief him and monitor the interview;[223] the extent to which the agent may participate in the session is left to the judgment of the health care professional and the agent.[224] The prehypnotic interview and the entire hypnotic session will be preserved on video and audio recordings.[225] Information obtained through hypnosis may not be made the basis of investigatory conclusions unless it is corroborated.[226] With the exception of the provision for the presence of a USACIC agent during the hypnotic session itself, these procedural safeguards resemble those recommended by Orne and accepted by many courts.[227] Their employment should reduce the potential distortion which distinguishes hypnotically enhanced testimony from that of ordinary eyewitnesses.[228] Of particular note is the requirement for corroboration; the existence of independent evidence of the witness' claim is a powerful guarantor of its probative value.[229] On the other hand, the failure to follow the established safeguards of the absence of independent corroboration may tend to establish the undue suggestiveness of the procedures and the unreliability of the results. In such circumstances, the military judge might well conclude that the prejudicial impact of such unreliable evidence substantially out-

---

[222]*Id.* at para. Q-11d.

[223]*Id.* at para. Q-11b. The presence of an investigator is contrary to Orne's recommendations and may raise doubts about the reliability of any information obtained through hypnosis. In view of the desirability of excluding possible sources of suggestion and of the USACIDC procedure of monitoring polygraph examinations through one-way mirrors, *see* U.S. Dep't of Army, Reg. No. 195-6, Criminal Investigation—Department of the Army Polygraph Activities, paras. 2-2*g*(4), 2-3*d* (1 Sept. 1980) the better practice would have the USACIDC agent observe the hypnotic session from a position outside the room without any direct participation in the interview itself.

[224]*Id.* at para. Q-11e.

[225]*Id.* at para. Q-12.

[226]*Id.* at para. Q-2b.

[227]The procedures used by AFOSI are similar. *See* U.S. Dep't of Air Force, Reg. No. 124-14, paras. 2, 3, and 4.

[228]*See, e.g.*, United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984); State v. Brown, 337 N.W.2d 138, 152-53 (N.D. 1983); State v. Armstrong, 110 Wis.2d 555, 563 n.23, 329 N.W.2d 386, 394 n.23 (1983); Brown v. State, 426 So.2d 76, 91-93 (Fla. App. 1st Dist. 1983); People v. Gibson, 117 Ill. App.3d 270, 274, 276, 72 Ill. Dec. 672, 676, 678, 452 N.E.2d 1368, 1372, 1374 (1983); State v. Martin, 33 Wash. App. 486, 489, 656 P.2d 526, 528-29 (1982); State v. Long, 32 Wash. App. 732, 734, 649 P.2d 845, 847 (1982); State v. Beachum, 616 S.W.2d 897, 903-04 (Tenn. App. 1981); State v. Beachum, 97 N.M. 682, 690, 643 P.2d 246, 253-54 (1981).

[229]*See, e.g.*, Kroger & Douce, *supra* note 1, at 367, 371; Orne, *supra* note 3, at 318; Schafer & Rubio, *supra* note 3, at 83.

weighs its probative value. On the basis of this conclusion, exclusion of the evidence would be warranted. The virtue of the balancing test lies in this principled evaluation of the merits of each witness' testimony; that which is worthy of consideration is admitted, whereas that which is untrustworthy is discarded.[230]

Some courts have rejected the use of procedural safeguards because they will necessitate a review of the facts of each case, thus consuming judicial resources and possibly resulting in inconsistent decisions.[231] These arguments are without merit. The application of *any* rule of evidence may entail litigation at trial and review on appeal. The deliberate exclusion of relevant evidence cannot be justified on the grounds that its admission will mean additional work for the judiciary. If the courts must work longer hours and if the case-by-case approach occasionally leads to inconsistent results, these are less onerous burdens than the intentional exclusion of relevant evidence from the finder of fact. A jurisprudence whose exclusive focus is on the restraint of the government ignores the necessary corrolary of restraint of the governed. When a judicial system no longer protects the innocent members of the community, it loses its *raison d'etre*. In such circumstances, society will approach the precipice, in the prescient words of Learned Hand; "A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow."[232]

E. THE PROCEDURAL SETTING

Having proposed a standard for evaluating the admissibility of the testimony of a previously hypnotized witness, it remains only to integrate it into the trial process as a whole. Without being exhaustive, adoption of the following procedures may be appropriate in a case where hypnotism is employed as an investigatory technique and where the opponent of the testimony lodges a timely objection.

---

[230]For approval of the balancing approach, *see* Falk, *supra* note 4, at 59-60; Note, Tex. L. Rev., *supra* note 4, at 741-42; Note, Va. L. Rev., *supra* note 4, at 1222-23, 1228-29, 1233-33; Note, Wash. & Lee. L. Rev. *supra* note 4, at 211-12. *See also* Gianelli *The Admissibility of Novel Scientific Evidence; Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197 (1980)

[231]Commonwealth v. Kater, 388 Mass. 519, 525, 447 N.E.2d 1190, 1196 (1983); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 208, 644 P.2d 1266, 1294 (1982) (en banc); People v. Shirley, 31 Cal.3d 18, 30, 181 Cal. Rptr. 243, 255, 641 P.2d 775, 787 (en banc), *cert. denied*, 103 S. Ct. 133 (1982); State v. Mack, 292 N.W.2d 764, 766 (Minn. 1980); People v. Quintanar, 659 P.2d 710, 712-13 (Colo. App. 1982).

[232]L. Hand, The Spirit of Liberty, 190 (3d ed. 1960), *cited with approval in* Coleman v. Balkcom, 451 U.S. 449, 961-62 (1981) (Rehnquist, J., dissenting).

First, the proponent of the witness should disclose the fact of hypnosis to the opponent and should make available the witness' prehypnotic statements and the recordings of the hypnotic session. Early disclosure will prevent unfair surprise, facilitate adequate preparation, and contribute to an informed approach to the issue of admissibility.[233] Moreover, it will avoid the harsh rule of reversal which has followed failures to disclose the proposed appearance of a previously hypnotized witness.[234]

Second, if the opponent wishes to challenge the admissibility of the testimony, he should do so at an Article 39(a)[235] session prior to the entry of the accused's pleas. His challenge should take the form of a motion in limine to prevent the introduction of specified testimony, or of a motion for appropriate relief in the nature of a motion to suppress the evidence derived from hypnosis.[236] The military judge should then require the proponent of the witness to demonstrate that the testimony is relevant and admissible under Military Rules of Evidence 401 and 402. If the proponent crosses this threshold, the burden will shift to the opponent to show how the prejudicial impact of the testimony will substantially outweigh its probative value. In meeting this burden, the opponent should make precise allegations of the dangers which will follow admission of the testimony.[237] The principal objection will generally be to the presence of undue suggestiveness in the hypnotic session and the con-

---

[233]House v. State, 34 Crim. L. Rptr. 2425, 2426 (Miss. Jan. 25, 1984); People v. Hughes, 59 N.Y.2d 523, 536, 453 N.E.2d 484, 497, 466 N.Y.S.2d 255 268 (1983); State v. Armstrong, 110 Wis.2d 555, 564, 329 N.W.2d 386, 394-95 (1983); State v. Luther, 63 Or. App. 86, 91, 663 P.2d 1261, 1266 (1983); State v. Beachum, 97 N.M. 682, 690, 643 P.2d 246, 254 (App. 1981); People v. McDowell, 103 Misc. 2d 831, 834, 427 N.Y.S.2d 181, 184 (Sup. Ct. Onondaga County 1980).

[234]United States v. Miller, 411 F.2d 825, 830 (2d Cir. 1969); Emmett v. Ricketts, 397 F. Supp. 1025, 1040-43 (D. Ga. 1975). *But see* Gee v. State, 662 P.2d 103, 103-04 (Wyo. 1983) (Failure to disclose deemed harmless error).

[235]U.C.M.J. art. 39(a).

[236]For a valuable examination of the use of the motion in limine, *see* Siano, *Motions in Limine—An Often Neglected Common Law Motion*, The Army Lawyer, Jan. 1976, at 17.

[237]For the tactical considerations involved in an objection under Mil. R. Evid. 403, *see* Schinasi, *The Military Rules of Evidence: An Advocate's Tool*, The Army Lawyer, May 1980, at 3, 6. Under Mil. R. Evid. 403, the opponent has the burden of showing why otherwise relevant evidence should be excluded. Under Mil. R. Evid. 321(d), the proponent, *i.e.*, the government, has the burden of showing the admissibility of prior out-of-court identifications of the accused. Although the employment of standards similar to those in Mil. R. Evid. 321 have been recommended for assessing the reliability of information obtained through hypnosis, the burden on admissibility should not be allocated in the manner prescribed by Mil. R. Evid. 321. Because relevant evidence is admissible unless its opponent can justify its exclusion, and because hypnosis may result in the discovery of relevant evidence, the opponent should bear the burden of showing the military judge why such evidence is inadmissible.

sequent danger of admitting unreliable evidence. There are many ways of substantiating such a claim. At a minimum, however, the opponent will want to show a failure to comply with either the USACIDC procedures or the safeguards proposed by Orne, significant discrepancies between the witness's pre- and posthypnotic recollections, and the general unreliability of the testimony when it is evaluated by the Supreme Court's standards for eyewitness identifications. The moving party may also want to demonstrate the witness' possible motive to testify for the other side and the absence of independent corroboration. To enlighten the military judge, it may be useful to present expert evidence on the nature and effects of hypnosis and its potentially distorting impact in the case at bar. The proponent of the testimony may, of course, counter this attack by establishing the reliability of the procedures employed and of the evidence thereby obtained. Thereafter, the military judge should weigh all evidence and resolve the controversy under Military Rule of Evidence 403.

Third, if the military judge concludes that the probative value of the testimony is not substantially outweighed by its prejudicial impact, he may permit the previously hypnotized witness to testify.[238] The military judge should enunciate for the record those facts and circumstances which he considered in the balancing process mandated by Rule 403. These special findings might include an analysis of the suggestiveness and reliability of the information under the Supreme Court's standards for out-of-court identifications, an examination of the extent of which the standards proposed by com-

---

[238]If the military judge denies the motion in limine, the opponent should consider making a contemporaneous objection when the previously hypnotized witness takes the stand. A motion in limine is not the same as a timely objection to evidence and generally does not preserve an error for appellate review. Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980); State v. McKee, 312 N.W.2d 907, 911 (Iowa 1981); Vorthman v. Keith Myers Enterprises, 296 N.W.2d 772, 776 (Iowa 1980); Legenour v. State, 268 Ind. 441, 376 N.E.2d 475 (1978). *See also* People v. McClain, 60 Ill. App.3d 320, 376 N.E.2d 774, 776 (1978). *Cf.* State v. Glebock, 616 S.W.2d 897, 902 (Tenn. App. 1981) (failure to renew objection constituted waiver of issue). It is true that some might consider a second objection a "useless gesture" in light of the military judge's previous ruling. State v. Miller, 229 N.W.2d 762, 766-68 (Iowa 1975). Nevertheless, in view of the possibility that additional evidence and argument may change the military judge's mind—and, considering the unsettled state of the law in this area, who can say that they would be ineffective—the opponent should not run the risk of a subsequent determination that he abandoned his objection to the evidence. *Cf.* United States v. Grostefon, 12 M.J. 431, 435 n.9 (C.M.A. 1982) ("fact that weight of authority is against particular issue does not. . . make it frivolous"). As the Court of Military Appeals has noted, "In denying the motion *in limine*, the military judge. . . placed defense counsel on notice to renew his objection to this evidence when it was offered; so the failure of the defense to object. . . waived any objection to admissibility." United States v. Thomas, 11 M.J. 388, 392 (C.M.A. 1981).

mentators and required by law enforcement agency regulations were observed, a determination concerning the availability of corroborating evidence, and an assessment of the impact of the testimony on the case as a whole.[239] These findings of fact will provide a basis for evaluating the military judge's ruling and will facilitate judicial review.[240]

Fourth, the military judge should prohibit the proponent of the testimony from eliciting that the witness has undergone hypnosis; such testimony would be tantamount to bolstering the credibility of the witness before any attack is made on it.[241] On cross-examination, the opponent should be allowed considerable latitude in cross-examination of the witness because of the enhanced confidence with which hypnosis may have imbued him.[242] The opponent may also produce expert testimony regarding the potential shortcomings of hypnosis.[243] If the opponent raises the hypnosis issue, the proponent may rebut allegations of undue suggestiveness by examining the previously hypnotized witness about the reasons for his improved memory, by calling his own expert, such as the hypnotist, or by playing the video and audio recordings of the hypnotic session. If this last device is utilized, the military judge should caution the court members that the recordings are not offered as evidence of the truth of their content, but merely rebut allegations that the witness' testimony may have been improperly refreshed, that the hypnotic session was unduly suggestive, or that the testimony was a recent fabrication contrary to earlier statements.[244]

Finally, the military judge should instruct the court members on the issue of hypnosis. Because of the need to educate the court and to dispel any misconceptions about the phenomenon, the instructions should be given after the issue is raised by the opponent of the testimony, and prior to the members' deliberations on the findings.

---

[239]The military judge made such detailed special findings in United States v. Harrington, Record at 446-49.

[240]For the military judge's responsibility regarding special findings, *see* Green, *The Military Rules of Evidence and the Military Judge*, The Army Lawyer, May 1980, at 47, 51-52.

[241]United States v. Awkward, 597 F.2d 667, 670-71 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); State v. Armstrong, 110 Wis.2d 555, 564, 329 N.W.2d 386, 395 (1983). *See* United States v. Harrington, Record at 449-50.

[242]House v. State, 34 Crim. L. Rptr. 2425, 2426 (Miss. Jan. 25, 1984); Brown v. State, 426 So.2d 76, 93 (Fla. App. 1st Dist. 1983).

[243]State v. Armstrong, 110 Wis.2d 555, 564, 329 N.W.2d 386, 395 (1983); People v. Hughes, 59 N.Y.2d 523, 536, 453 N.E.2d 484, 497, 466 N.Y.S.2d 255, 268 (1983); State v. Seager, 341 N.W.2d 410, 432 (Iowa 1983).

[244]State v. Brown, 337 N.W.2d 138, 152-53 (N.D. 1983). *See* United States v. Harrington, Record at 653-54.

The military judge should caution them against giving undue weight to the testimony simply because of hypnosis, should point out that hypnosis is a means of refreshing memory, not of establishing truth, and should insist that they consider all the factors which bear on the witness's credibility.[245]

One other procedural question merits comment. Some have argued that, because of the potentially suggestive nature of hypnosis, the accused has a constitutional right to have his counsel attend any hypnotic session conducted by the investigators. In essence, they analogize the session to a lineup and contend that it is thus a critical stage of the proceedings at which the right to counsel attaches because of the unique dangers of mistaken identification inherent in such procedures.[246] This argument, however, fails on two grounds. First, in numerous instances, the investigators do not have a suspect, let alone an accused, when they seek to obtain additional information from a witness. Consequently, they are quite unable to inform counsel for the accused of their proposed course of action.[247] Second, prior to trial, the right to counsel attaches only after the formal commencement of adversary proceedings or at other critical stages of a prosecution.[248] A critical stage is one at which the accused needs a trained legal advisor at his side in order to comprehend the complexities of the law or to offset the advocacy of the attorney who represents the state.[249] In other words, as Justice Rehnquist has observed: "The theoretical foundation of the Sixth Amendment right to counsel is based on the traditional role of an attorney as a legal expert and strategist."[250] Thus, the Supreme Court has required the presence of counsel at such pretrial proceedings as ar-

---

[245]People v. Hughes, 59 N.Y.2d 523, 536, 453 N.E.2d 484, 497, 466 N.Y.S.2d 255, 268 (1983); Brown v. State, 426 So.2d 76, 93-94 (Fla. App. 1st Dist. 1983); Spector & Foster, *supra* note 4, at 595 n.141. *See* United States v. Harrington, Record at 653, 1264-65.

[246]Alderman & Barrette, *supra* note 4, at 10-20.

[247]The same criticism can be made of the disingenuous proposal to depose the witness prior to hypnosis because subsequently he will be "unavailable" to testify. People v. Gonzales, 415 Mich. 615, 620, 329 N.W.2d 743, 748 (1982). An essential element of a deposition is the opportunity of the party against whom it will be used to examine the deponent. U.C.M.J. art. 49; MCM, 1969, para. 117; Mil. R. Evid. 804(b)(1). This element cannot be satisfied where the identity of the accused is as yet unknown. State v. Brown, 337 N.W.2d 138, 149 n.8 (N.D. 1983).

[248]Estelle v. Smith, 451 U.S. 454, 469-71 (1981); Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); United States v. Fors, 10 M.J. 367, 373 (C.M.A. 1981) (Cook, J., concurring); United States v. Olah, 12 M.J. 773, 775 (A.C.M.R. 1981).

[249]United States v. Ash, 413 U.S. 300, 309-13 (1973).

[250]United States v. Henry, 447 U.S. 264, 293 (1980) (footnote omitted) (Rehnquist, J., dissenting).

raignment,[251] various types of preliminary hearings,[252] and corporeal identifications made after indictment.[253] In determining whether a stage is "critical," a key element is the confrontation of the accused by the state.[254] If the accused stands alone before the prosecutor or must make tactical decisions which require knowledge of substantive and procedural law, the constitutionally guaranteed rights to the assistance of counsel and a fair trial will generally entitle him to the presence of his attorney.[255] Conversely, where there is no actual confrontation between the accused and the state, the right to counsel does not attach, even in circumstances where there is a risk of misidentification. For example, in *United States v. Ash*,[256] the prosecutor showed potential trial witnesses a series of photographs to assess their ability to identify the accused. The accused argued that this postindictment identification procedure violated the Sixth Amendment because his counsel was not given an opportunity to be present. The Supreme Court rejected this argument. It reasoned that, because the accused himself was not present at the photographic display, he was not confronted by the government and therefore counsel was not needed to furnish legal advice or to place the accused on an equal footing with the prosecutor. The court concluded that the tools of the adversary process, discovery of the photographs and cross-examination concerning the witness' reaction to them, were sufficient guarantors of reliable in-court identifications.[257]

The reasoning of *Ash* applies with equal force to government conducted hypnosis of victims and witnesses. First, in the ideal case for the employment of hypnosis as postulated by Orne, there is no suspect or accused, and the purpose of the hypnotic session is the development of investigatory leads.[258] Second, even if the investigators have a suspect, the right to counsel does not attach to iden-

---

[251]Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961).

[252]Coleman v. Alabama, 399 U.S. 1, 9-10 (1970); White v. Maryland, 373 U.S. 59, 60 (1963).

[253]Moore v. Illinois, 434 U.S. 220, 229-31 (1977) (identification of accused by victim at preliminary hearing); *Gilbert*, 388 U.S. at 269-72 (lineup); *Wade*, 388 U.S. at 224-25, 236-37 (lineup). *See also* Stovall v. Denno, 388 U.S. 293, 296 (1967) (no right to counsel at pre-*Wade* showup).

[254]*Ash*, 413 U.S. at 315 n.9 (citing *Wade*, 388 U.S. at 229-30).

[255]*Wade*, 388 U.S. at 227, *cited with approval in* United States v. Wattenbarger, 15 M.J. 1069, 1074 (N.M.C.M.R. 1983).

[256]413 U.S. 300 (1973).

[257]413 U.S. at 309-19. *Accord* United States v. Talavera, 2 M.J. 799, 804 n.5 (A.C.M.R. 1976), *aff'd*, 8 M.J. 14 (C.M.A. 1979); United States v. Smith, 44 C.M.R. 904, 905-06 (A.C.M.R. 1971).

[258]Orne, *supra* note 3, at 328.

tification procedures until after indictment.[259] Under Military Rule of Evidence 321(b)(2)(A), the accused is entitled to counsel at a military lineup after the preferral of charges or the imposition of pretrial restraint. Third, even if the hypnotic session occurs subsequent to the formal initiation of criminal proceedings, the accused is not present and thus "there is no confrontation with [him] whatsoever."[260] Because there is no confrontation, the presence of the defense counsel is not necessary to counteract the superiority which the prosecutor enjoys over an unrepresented layman. The broad right of discovery afforded the accused and the opportunity to litigate the admissibility of the testimony of a previously hypnotized witness will insure that only reliable witnesses are permitted to testify at trial. Therefore, an accused has no Sixth Amendment right to the presence of counsel at the hypnosis of a victim or witness by the government.

V. CONCLUSION

Hypnosis may assist a witness to recall additional information. It is thus a valuable investigatory technique. Its use, however, may result in the recollection of pseudomemories based on suggestion, fabrication, or confabulation. These risks have persuaded some courts to declare the previously hypnotized witness incompetent entirely or incompetent to testify with regard to any matter recalled only after hypnosis. These are broad prophylactic rules, and they are open to sharp criticism. By prohibiting the use of the results of any hypnotic session, they potentially exclude evidence merely because, theoretically, such evidence may be unreliable. It would be a far sounder practice to examine the facts of each case to determine the character of the proffered evidence as the Military Rules of Evidence require. If it is indeed afflicted with the vices of suggestion and confabulation, its prejudicial potential is great, its probative value is small, and its exclusion is justified. On the other hand, if it is a reasonable approximation of ordinary, fallible human memory, its probative value is substantial and it should be admitted. The proposition underlying a court-martial is that the members will be able to discover the truth if provided with sufficient information by the parties. Consequently, a rule which excludes relevant and probative evidence undermines the ability of the finder of fact to determine

---

[259]*Ash*, 413 U.S. at 303 n.3; *Kirby v. Illinois*, 406 U.S. at 690.

[260]People v. Gibson, 117 Ill. App.3d 270, 277, 72 Ill. Dec. 672, 679, 452 N.E.2d 1368, 1375 (1983). *Accord* People v. McDowell, 103 Misc. 2d 831, 834, 427 N.Y.S.2d 181, 184 (Sup. Ct. Onondaga County 1980).

the issues of the case. The admission of the testimony of a previously hypnotized witness should depend upon an analysis of its relevance, probative value, and potential prejudicial impact. This analysis will, in turn, involve an examination of the facts and circumstances of the particular case. If the evidence is ultimately admitted, the weight to be accorded to it will be left to the court members, who traditionally are the sole judges of the credibility of the witnesses.

AN INTERNATIONAL HUMAN RIGHTS APPROACH TO VIOLATIONS OF NATO SOFA MINIMUM FAIR TRIAL STANDARDS

by Captain Benjamin P. Dean*

I. INTRODUCTION

As a consequence of the criminal jurisdiction provisions and safeguards provided in Article VII of the NATO Status of Forces Agreement[1] and the agreements which supplement the SOFA in the various NATO nations, explicit fair trial standards are guaranteed to American service members stationed in Europe if they are tried under the foreign law of courts in NATO member states. These safeguards stand as a model of minimum procedural fairness in international law by affording through a multilateral treaty certain fundamental rights to an individual accused. The enforceability of those guarantees, however, still suffers from a lack of definition in practice and the absence of any means within the treaty by which the individual service member could compel the United States government to enforce those rights. The purpose of this article is to examine the standards articulated in Article VII and their current interpretation and application by military trial observers, and to consider their meaning in light of specific human rights standards enforceable generally and in Europe. Finally, various alternatives will be considered which provide directly to the individual a substantial judicial remedy which insures a standard of procedural fairness independent of but equivalent to that of the NATO SOFA rights.

---

*Judge Advocate General's Corps, United States Army. Currently assigned to Office of the Staff Judge Advocate, 1st Cavalry Division, Fort Hood Texas, 1984 to present. Formerly assigned as Site Commander, Team 2, 12th U.S. Army Field Artillery Detachment, Codogne, Italy, 1980-81; 1st Battalion, 35th Field Artillery, Hunter Army Airfield, Georgia, 1978-80. J.D., University of North Carolina, Chapel Hill, 1984; B.A., University of North Carolina, Chapel Hill, 1977. Completed Defense Language Institute, Monterey, California, 1980; Field Artillery Officer Basic Course, 1977. Member of the bar of the State of North Carolina.

[1]Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, [1953] 7 U.S.T. 1792, T.I.A.S. No. 2845 [hereinafter cited as NATO SOFA].

II. THE NATO SOFA FAIR TRIAL GUARANTEES

A. ARTICLE VII AND THE SENATE RESOLUTION SAFEGUARDS

Article VII of the NATO SOFA governs the right and precedence of member nations to exercise criminal jurisdiction over visiting friendly forces. The Article represents the model for nearly all status of forces agreements between the United States and nations around the world receiving American service personnel.[2] It resolves the jurisdictional problem caused by the traditional conflict between the concepts of territorial sovereignty and the immunity of a visiting foreign sovereign under the "law of the flag doctrine."[3] Article VII provides a system of concurrent jurisdiction which allocates priorities of jurisdictional competence between the sending and receiving states over criminal offenses committed in the territory of the host nation.

Article VII has also become the most controversial article in the NATO SOFA because it has produced a jurisdictional overlap between the very different traditions of the common law and civil code legal systems represented among the NATO members.[4] The sending state has exclusive jurisdiction over those few offenses which are not offenses under host nation law.[5] As a practical matter, the exclusive jurisdiction of the United States within the territory of the

---

[2]*See* Coker, *The Status of Visiting Military Forces in Europe: NATO SOFA, a Comparison*, in 2 A Treatise on International Criminal Law 115 (M. Bassiouni & V. Nanda eds. 1973).

[3]The case in international law which best presents this classical dispute is Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) (holding a foreign warship in United States territorial waters immune from suit because of a waiver of jurisdiction over friendly troops during passage). For discussions of status of forces jurisdiction generally, *see* Beesley, *The Law of the Flag, the Law of Extradition, the NATO Status of Forces Agreement, and their Application to Members of the United States Army National Guard*, 16 Vand. J. Transnat'l L. 179 (1982); Schwenk, *Jurisdiction of the Receiving State over Forces of the Sending State Under the NATO Status of Forces Agreement*, 6 Int'l Law. 525 (1972).

[4]*See Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. (1953); *Supplementary Hearings on Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. (1953). Hearings on the operation of Article VII of the NATO SOFA before a subcommittee of the Senate Armed Services Committee are an annual requirement pursuant to Senate ratification of the treaty and reflect the degree of congressional concern manifested thereby.

Also, concerning the continuing controversial nature of Article VII and its interaction with civil law, *see* S. Lazareff, Status of Military Forces Under Current International Law 63-64, 128-29 (1971).

[5]NATO SOFA, art. VII, para. 2(a).

receiving state is limited to those offenses which are purely military in nature under the Uniform Code of Military Justice (UCMJ)[6] and those persons to whom the UCMJ may be applied.[7] The host nation has exclusive jurisdiction over offenses under its law committed by members of the force, its civilian component, and all dependents with respect to acts not punishable by the laws of the sending state.[8] In the areas of concurrent jurisdiction, the receiving state has the option either to exercise the primary right to prosecute or to waive the right by allowing the sending state to assume jurisdiction over the case.[9]

Integral to this recognition of the host nation's primary right to exercise criminal jurisdiction under Article VII, a list of specific fair trial guarantees is set forth in paragraph 9; this provision is applicable to all criminal trials in the courts of the NATO nations.[10] These minimum procedural standards entitle a service member to a prompt and speedy trial, advance knowledge of the specific charges, confrontation and compulsory production of witnesses, counsel of one's choice or free counsel, a competent interpreter, and the presence of a representative of one's own government.

In an effort to mitigate the effects of recognizing foreign jurisdiction over its visiting forces,[11] the United States Senate adopted a resolution on July 15, 1953 which articulated certain reservations of the Senate in giving its advice and consent to the NATO SOFA as a formal treaty.[12] It was "the sense of the Senate" that further pro-

---

[6]10 U.S.C. §§ 801-934 (1976).

[7]The exclusive jurisdiction of the United States as a sending state was greatly restricted by the elimination by American domestic law of some persons who were originally considered to be "persons subject to the military law" of the United States in peacetime as contemplated by para. 1(a) of Art. VII. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (dependent); Grisham v. Hagan, 361 U.S. 278 (1960) (dependent); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (civilian employee); Reid v. Covert, 354 U.S. 1 (1957) (dependents). Adverse administrative action not involving courts-martial, however, is still permissible. *See, e.g.*, U.S. Army Europe, Reg. No. 27-3, Misconduct by Civilians Eligible to Receive Individual Logistic Support (5 Jan. 1982).

[8]NATO SOFA, art. VII, para. 2(b).

[9]*Id.* para. 3. Under a supplementary agreement, a receiving state may grant a standing waiver in deferrence to an actual exercise of jurisdiction by the sending state with the condition that the waiver may be withdrawn in specific cases. *E.g.*, Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, July 1, 1963 (1963), 14 U.S.T. 531, T.I.A.S. No. 5351.

[10]NATO SOFA, art. VII, paras. 9(a)-(g).

[11]This effort was an attempt to satisfy those critics who believed the treaty relinquished a right of American jurisdiction over its forces abroad. *See supra* notes 3 and 4 and accompanying text.

[12]NATO SOFA, 7 U.S.T. 1792 1828.

tections against unfair trials in foreign courts were needed and specific implementing instructions were included within the resolution. The NATO SOFA itself, however, was not altered and, as a matter of customary international law, the reservations are not considered binding terms of the treaty; they are viewed, at most, as having the effect of American domestic law.[14]

The Senate Resolution added three important safeguards designed to provide an extra measure of procedural protection for the accused. First, the commander of American forces in the receiving state must, prior to trial, examine the laws of that nation with specific reference to the due process standards of the United States Constitution.[14] A further reservation states:

> [i]f, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected, . . . the commanding officer shall request the authorities of the receiving state to waive jurisdiction. . . and if such authorities refuse to waive jurisidiction, the commanding officer shall request through diplomatic channels. . . .[15]

Finally, the Resolution required the appointment, with the advice and consent of the senior American military representative in the host nation of a trial observer to represent the United States at the trial. The trial observer must attend the trial and report to the responsible American military commander in the receiving state "any failure to comply" with the SOFA guarantees. That commander, in turn, shall request the Department of State to take "appropriate action." This procedure implies a requirement that the

---

[13]The Senate Resolution was approved by the President's ratification of the treaty. *See* Schwenk, *supra* note 3, at 530-31, nn.23-26. For the view that the Senate provisions did not rise even to the dignity of formal reservations, *see* Note, *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, 58 Iowa L. Rev. 532, 539, n.33 (1973).

[14]The constitutional due process rights referred to in the Resolution have been generally interpreted to mean those procedural safeguards so integral to the American system of justice that they should be considered fundamental rights to the same extent as those made applicable to the states under the Fourteenth Amendment. *See e.g.*, U.S. Dep't of Defense, Interservice Legal Committee Memorandum on Fundamental Procedural Rights, para. II(2) (17 Nov. 1953). *See also* Schwenk, *Comparative Studies on the Law of Criminal Procedure in NATO Countries Under the NATO Status of Forces Agreement*, 36 N.C.L. Rev. 358 (1957).

[15]NATO SOFA, 7 U.S.T. 1792, 1828

responsible senior military commander also must determine that the trial in question was unfair before taking remedial action.[16]

Implementation of the Senate Resolution resulted in the promulgation of Department of Defense Directive 5525.1[17] which sets forth standards and procedures that are reproduced nearly verbatim in a tri-service regulation.[18] Although the Senate Resolution applies only to the NATO SOFA, the same procedures for safeguarding the interests of American military personnel will be applied in all overseas areas insofar as practicable.[19]

It is the Senate Resolution which assigns overall responsibility for implementation of the procedural safeguards to a single commander in each country.[20] The designated commander must insure the preparation and continuing review of a "country law study" of the substantive and procedural laws applicable within that country.[21] "Constant efforts" are to be made to establish an effective liaison with host nation authorities at all levels to maximize the extent of criminal jurisdiction exercised by the United States within the limits of Article VII and other applicable agreements. The commander also must attempt to secure custody of the accused in all cases pending completion of the foreign judicial proceedings, except when unusual circumstances exist.[22]

Whenever a request for waiver of foreign jurisdiction has been denied, a trial observer is selected.[23] The military trial observer serves primarily a reporting function, according to DOD Directive

---

[16]Some authors apparently have underestimated the legal resources available to a major unit commander within his immediate staff. *See, e.g.*, Sciacca, *Executive Discretion to Enforce the Fair Trial Guarantees of the NATO Status of Forces Agreement*, 6 N.Y.U.J. Int'l. L. & Pol. 343, 345 (1973) (stating that nothing in a commander's own background qualifies him either to examine the host nation's laws in light of the Constitution or to determine whether a potential denial of rights may exist in a particular trial).

On the other hand, the designated commanders should delegate as much discretion as Department of Defense and service regulations reasonably permit. This would enable the individual trial observer to offer reasoned evaluations of the fairness of the trial with which the legally trained observer is both personally and professionally familiar. Williams, *An American's Trial in a Foreign Court: The Role of the Military's Trial Observer*, 34 Mil. L. Rev. 1, 45 (1966).

[17]Dep't of Defense Directive 5525.1, Status of Forces Policies and Information (20 Jan. 1966) [hereinafter cited at DOD Dir. 5525.1].

[18]Status of Forces Policies, Procedures and Information, U.S. Dep't of Army, Reg. No. 27-50/SECNAVINST 5820.4D/AFR 110-12 (1 Dec. 1978) [hereinafter cited as AR 27-50].

[19]DOD Dir. 5525.1, sec. IV(a); AR 27-50, para. 1-1.

[20]AR 27-50, para. 1-2.

[21]*Id.* at para. 1-2.

[22]*Id.* at para. 1-3.

[23]NATO SOFA, art. VII, para. 9(g).

5525.1 and the combined service regulation implementing the Senate Resolution.[24] The observer may give only limited assistance to the defendant by advising defense counsel of the accused's rights under the appropriate international agreements and by obtaining witnesses or evidence under the control of the United States government.[25] "He will not be considered as a member of the defense team nor will he attempt to interject himself into the trial proceedings. If, however, any violations of trial safeguards are observed during the trial, he will notify the designated commanding officer immediately through appropriate channels."[26]

In any case in which it appears probable that the accused will not obtain a fair trial, the local major unit commander, normally the immediate general officer in command over the accused, must forward to the designated higher commander a report of the facts of the case, the basis for concluding that the trial will not be fair, and a specific recommendation for action to be taken.[27] This designated commander makes the critical decision whether a "substantial possibility" exists that the trial will not be fair, "under all the circumstances of the case," disregarding any procedural differences characteristic of that foreign country and without regard to any weighing of the expected evidence.[28] Only then will the designated commander request assistance through diplomatic channels.

B. EXECUTIVE DISCRETION TO ENFORCE THE GUARANTEES

The Senate Resolution's reference to a request for "appropriate action" through diplomatic channels has been interpreted to be the exclusive remedy under the NATO SOFA. The leading case on this issue, *Holmes v. Laird*,[29] establishes that enforcement of the individual rights created under Article VII is entirely a matter of the executive branch's control of foreign affairs, it is, therefore, beyond judicial powers of review. Although no more successful than earlier cases alleging violations of due process rights of service members in foreign courts,[30] *Holmes v. Laird* was the first case to include a claim

---

[24]DOD Dir. 5525.1, para. IV(D); AR 27-50, para. 1-5(b).
[25]AR 27-50, para. 1-5(b).
[26]*Id.*
[27]*Id.* at para. 1-4a(1).
[28]*Id.* at paras. 1-4a(2), (3).
[29]459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).
[30]*See* Reid v. Covert, 354 U.S. 1 (1957); Wilson v. Girard, 354 U.S. 524 (1957); Williams v. Rogers, 449 F.2d 513 (8th Cir.), *cert. denied*, 405 U.S. 926 (1971); Starks v. Seamans, 334 F. Supp. 1255 (E.D. Wis. 1971).

based directly on the violation of individual rights conferred by a status of forces agreement, rather than upon a violation of rights secured by the United States Constitution.

In *Holmes*, two American soldiers stationed in the Federal Republic of Germany in 1970 were charged by the German government with attempted rape and related charges after a revocation of a general waiver of jurisdiction.[31] Both were convicted and sentenced to three years' imprisonment by the German district court (*Landgericht*) on which final judgment was declared by the Federal Court of Justice (*Bundesgerichtshof*), the highest court in civil and criminal matters). While the appeal was pending, the soldiers broke restriction while in American custody and returned to the United States where they surrendered themselves to American authorities. They filed suit to enjoin the United States government from returning them to West Germany, arguing that such a return would abet the German violations of a lawful treaty.[32] The fair trial violations alleged in the suit presented a very strong case for relief.[33]

The United States Court of Appeals for the District of Columbia Circuit, however, denied relief. The court began by stating that the U.S. Constitution clearly could not be applied to the West German courts.[34] The court noted its discomfort that the American government representatives in a position to know the facts surrounding the case had not contradicted the allegations.[35] Nonetheless, it held that, even assuming that the NATO SOFA rights had been denied, the violations were beyond American judicial review.[36] While the court recognized that treaties are to be enforced by the courts as part of the supreme law of the land,[37] the NATO SOFA specifies its own corrective machinery which is exclusive, nonjudicial, and strictly diplo-

---

[31]*See supra* note 9.

[32]*See Holmes v. Laird*, 459 F.2d at 1214. For a discussion of the sufficiency of the NATO SOFA's self-executing custody provisions, *see* Heath, *Status of Forces Agreements as a Basis for United States Custody of an Accused*, 49 Mil. L. Rev. 45 (1970).

[33]The appellants alleged deprivations of the right to speedy trial, their counsel of choice, a competent interpreter, the confrontation of witnesses, and a fair appeal for want of a verbatim transcript of trial. All were rights which the appellants claimed directly or indirectly by the NATO SOFA and the United States Constitution, supported by principles of international law. *See id.* Other allegations were made of violations of the appellants' Fifth and Sixth Amendment rights as well. *Id.* at n.23.

[34]*Holmes v. Laird*, 459 F.2d at 1218.

[35]*Id.* at 1223.

[36]*Id.*

[37]U.S. Const. art. VI, cl. 2.

matic.[38] Because this enforcement mechanism is integral to the same international agreement from which the rights claimed by the appellants arise, the court concluded that intervention by the American courts was foreclosed by the terms of the document itself.[39] The Supreme Court denied a petition for writ of certiorari[40] and subsequent habeas corpus petitions proved futile. Since the court had found no basis for abrogating the American obligation to return the soldiers, the appellants were returned to the Federal Republic to serve their sentences.[41] The enforceability of the fair trial safeguards of Article VII therefore remains dependent on the willingness and ability of the executive branch to intercede in the particular case.

The *Holmes* decision expressly reserved the issue of whether officials in the American government were remiss in the discharge of any obligations which may have been owed to the appellants under the NATO SOFA.[42] This does not mean, however, that indirect attempts to compel judicially diplomatic activity on behalf of the individual would be any more successful in breaching the legal wall of executive discretion.[43] The court noted that Congress has provided

---

[38]*Holmes v. Laird*, 459 F.2d at 1222. Article XVI of the NATO SOFA provides for dispute resolution in the following terms: "All differences between the Contracting Parties relating to the interpretation or application of this Agreement shall be settled by negotiation between them without recourse to any outside jurisdiction." Unresolved disputes are to be referred to the North Atlantic Council.

[39]*Holmes v. Laird*, 459 F.2d at 1222.

[40]*Holmes v. Laird*, 409 U.S. 869 (1972).

[41]*See Holmes v. Laird*, 459 F.2d at 1219. *Also see* Beesley, *supra* note 3, at 209, 215 (stating that "readily apparent" authority permits such a return). One commentator has argued, however, that the denial of certiorari in *Holmes* should be treated cautiously. *Holmes v. Laird* and the precedent on which the decision relied should be reconsidered, under this view, because they constitute an unjustifiably broad policy of cooperation by the United States government with its NATO allies in the return of service members to foreign territory. The analysis in the *Holmes* decision skips a necessary step in its reasoning by failing to answer satisfactorily why the departure of the appellants from Germany did not terminate German jurisdiction over them based on the NATO SOFA. Nothing in the NATO SOFA explicitly requires extradition. Adherence to existing extradition treaties, which already incorporate the important political and diplomatic considerations, would afford impartial judicial participation and review of the legal basis for returning service personnel to a foreign country. They then would be provided the same protections in extradition that other persons subject to foreign jurisdiction enjoy. Norton, *United States Obligations Under Status of Forces Agreements: A New Method of Extradition?*, 5 Ga. J. Int'l & Comp. L. 1, 34-41, 62 (1975).

The central case by which the extradition problem was avoided in *Holmes* and its predecessors was Neeley v. Henkel (No. 1), 180 U.S. 109 (1901). A different interpretation of that early case may have been reasonable which would not have required a return of the soldiers merely because of the treaty terms. Sciacca, *supra* note 16, at 352-53.

[42]*Holmes v. Laird* 459 F.2d at 1224-25.

[43]*Id.* at 1225, n.107.

statutorily that a claim of unjust deprivation of liberty by a foreign government is addressable directly to the President,[44] but that statute explicitly states that the decision whether to act lies with the President. There are other cases where a failure to adhere to established administrative agency regulations has occurred, but the acts or failures complained of lead inevitably to diplomatic decisions rather than purely ministerial duties.[45] A final alternative avenue of judicial remedy by means of a constitutional tort action appears to be no longer available due to the recent Supreme Court decision in *Chappell v. Wallace*, wherein the Court prevented enlisted service members from suing their military superiors for alleged constitutional violations.[46] Given that the NATO SOFA provides no treaty mechanism by which the accused could appeal an unfavorable executive decision, that the courts will continue to use the diplomatic question doctrine, and that alternative domestic remedies are largely foreclosed, the individual service member is ultimately left with a set of personal rights created by the NATO SOFA which he is incapable of enforcing.[47]

III. THE APPLICATION OF THE NATO SOFA FAIR TRIAL STANDARDS BY MILITARY TRIAL OBSERVERS

A. THE ROLE OF THE TRIAL OBSERVER

The military trial observer, in his role as the official representative of the United States government at the foreign trial of an American service member, must perform his duties in conformance with the standards set by the Senate Resolution, DOD Directive 5525.1, and the joint service regulation. As noted previously, the trial observer's

---

[44]*Id.* at n.108 (citing 22 U.S.C. § 1732).

[45]*See* Sciacca, *supra* note 16, at 353-56.

[46]Chappell v. Wallace, 103 S. Ct. 2362 (1983), held that enlisted military personnel may not maintain a civil suit to recover damages from a superior officer for alleged violations of constitutional rights. For an analysis of intramilitary constitutional tort law, *see* Zillman, *Tort Liability of Military Officers: An Initial Examination of Chappell*, The Army Lawyer, Aug. 1983, at 29; Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 489 (1982) (questioning whether either executive or congressional action is better able than judicial action to resolve constitutional deprivations within the military sphere).

[47]In view of these considerations, future cases may attack more heavily the aspects of the initial subjection of the service member to the foreign jurisdiction or its continuity. These challenges would face problems of waiver and timing of the action. *See* Note, *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, 58 Iowa L. Rev. 532, 572-73 (1973).

explicit purpose is to serve a reporting function while adhering to a rather strict policy of nonparticipation in the trial proceedings.[48] These sources together with other regulations or directives of the particular unified command, designated representative command, and the subordinate major command determine to what extent, if at all, the trial observer actually may offer a conclusion as to whether or not the accused received a fair trial under all the circumstances. The tri-service regulation specifies that the trial observer's report must be a factual description or summary of the trial proceedings. The observer also must make, and provide the basis for, any conclusions rendered in addressing the host nation's compliance with the procedural safeguards of Article VII.[49] However, responsibility for making the initial decision on the actual fairness of the trial resides in the designated commander.[50] Unless the designated and subordinate command directives specifically authorize the trial observer greater latitude to offer his perceptions of the fairness of the trial, the service regulation may have the undesirable effect of reducing the observer's role to a mere reporter of facts.[51]

While there is a manifest need for an impartial and thorough report based on first-hand observation, the report is normally only one of several important reasons that international trial observers are dispatched to foreign trials. The observer's presence in itself represents the interest that a government or organization has in the trial's fairness; this tends to heighten general consciousness of judicial adherence to the appropriate guarantees. As a consequence, the presence also offers a measure of moral support to the accused so as to reassure the individual that he will have a better opportunity for a full and fair hearing.[52] Although the observer's immediate goal is to gather essential information on whether the defendant is receiving a fair trial, it is widely understood that his actual role is to help insure that the accused receives all the procedural protections to which he is entitled.[53]

---

[48]*See* AR 27-50, para. 1-5(b). *See also supra* notes 24-46 and accompanying text.

[49]AR 27-50, para. 1-5(d).

[50]*Id.*

[51]Williams, *An American's Trial in a Foreign Court: The Role of the Military's Trial Observer*, 34 Mil. L. Rev. 1, 43-44 (1966).

[52]Weissbrodt, *International Trial Observers*, 18 Stan. J Int'l L. 27, 58-59 (1982). Professor Weissbrodt noted that, because military trial observers are usually young military attorneys, they do not have the same impact by their presence simply because they lack the personal prestige which is the norm for international trial observers sent to politically sensitive trials of international human rights concern. *Id.* at 67, n.205. *See also* Martin-Achard, *Political Trials and Observers*, 6 Int'l Comm'n Jur. Rev. 24, 35 (1971).

[53]Weissbrodt, *supra* note 52, at 58.

What the joint service regulation implicitly recognizes, and seems designed to deal with in its restrictions on the military trial observer, is that these multiple functions do exist even for an impartial observer, but that the impartiality could be undercut by active intervention in the trial. Different trials in constantly changing circumstances may require, however, distinctly different balances of needs which the trial observer might serve such that he should be allowed some discretion in the degree of active participation.[54] As a minimum, the military trial observer is to submit his observations after the trial and also notify the designated commander through command channels as soon as any violations of procedural safeguards occur.[55] In view of this immediate notification to superiors and the positive effect of the observer's presence during the various trial proceedings, the report itself may be practically of secondary importance.[56]

Despite the rule of strict nonparticipation imposed on the military trial observer, there are clearly situations in which the observer should take reasonable actions short of actually interjecting himself into the proceedings.[57] Under appropriate circumstances, the observer could initially brief the accused, give timely and discreet advice to counsel on substantive and procedural law, insure the presence of witnesses, arrange for a competent interpreter, and even provide neutral information to judicial authorities as may be permitted. These actions would conform with both DOD Directive 5525.1 and the joint service regulation. Significantly, nothing in the Senate Resolution required this absolute prohibition of an active trial observer role, and one well may well contend that in some cases the failure to intervene would be inconsistent with the intent of the Resolution's safeguards.[58] At the very least, the military trial observer who fails to report obvious violations before the trial goes to completion not only violates a service regulation, but also has not justified his own presence there.[59]

---

[54]*Id.* at 61; Martin-Achard, *supra* note 52, at 34.

[55]AR 27-50, para. 1-5(b).

[56]Williams, *supra* note 51, at 43.

[57]*Id.* at 30, 49. Williams expressed the firm conviction, based on his study of military trial observers in practice, that the observer who does only what is required by merely attending the proceedings and filing reports is of minimal value in actually assuring a fair trial for the accused. The observer's greatest value lies in a more active involvement throughout the case, seeking to anticipate and eliminate the apparent problems which may lead to allegations of unfairness before the problems result in violations. *Id.* at 45-46.

[58]*See* Sciacca, *Executive Discretion to Enforce the Fair Trial Guarantees of the NATO Status of Forces Agreement*, 6 N.Y.U.J. Int'l L. & Pol. 343, 354 (1973). *Accord* Williams, *supra* note 51, at 30.

[59]*See* AR 27-50, para. 1-5(b). *See also* Sciacca, *supra* note 58, at 354.

B. INTERPRETATION AND APPLICATION OF THE FAIR TRIAL STANDARDS

In addition to the minimum procedural standards of Article VII and the safeguards of the Senate Resolution as implemented by service regulations, there are normally other documents such as supplementary agreements, agreed minutes, or public and private notes which may vary implementation of the fair trial guarantees somewhat among the NATO countries. With the text of all these sources well in mind, the trial observer must face the more difficult task of determining what standards are actually enforceable.[60] DOD Directive 5525.1 attempted to resolve with finality the question of what criteria are in fact to be applied in evaluating both the trial's adherence to proper procedures and ultimate fairness. However, the most extensive field study on the implementation of Article VII made since the early studies of Professors Snee and Pye[61] concluded that the DOD Directive almost inevitably fails to attain its objective of a uniform application of the fair trial standards by all the services because of its vagueness in practice.[62]

The designated commanding officer necessarily will rely on the facts surrounding the case and the conclusions on adherence to procedural standards as reported by the military trial observer. The commander then must make an evaluation of whether there is a substantial possibility under all the circumstances that the service member's fair trial rights have been violated by the foreign court.[63] He specifically must make the judgment based on the Article VII fair trial guarantees in light of those American trial rights which normally would be applied at trial.[64]

The service regulations have reproduced from DOD Directive 5525.1 a specific list of those rights insured by the Fourteenth Amendment as interpreted by the Supreme Court which are considered to be the applicable "due process of law in U.S. state court

---

[60]Stewart, *Fair Trial? The Trial Observer's Report*, 12 A.F. JAG. L. Rev. 276, 279 (1970).

[61]*See* J. Snee & K. Pye, Status of Forces Agreements and Criminal Jurisdiction (1957).

[62]*See* Williams, *supra* note 51, at 43-44. The Williams survey was based on interviews, letters and questionnaires involving over seventy persons who were serving or had served as military trial observers in a collective total of 2,680 foreign trials of American personnel in 18 different countries. *Id.* at 1.

[63]AR 27-50, para. 1-56.

[64]*Id.* at para. 1-4a(2).

proceedings."[65] This direct reference to the Constitution as a means of achieving uniformity in the interpretation and application of the NATO SOFA guarantees may have caused more problems than it was intended to alleviate.[66] The obvious problem, which the joint service regulation expressly recognizes,[67] is that no adequate analysis of the fairness of a civil law proceeding can be made merely through a point-by-point comparison of procedural elements. There is evidence, however, in the legislative history of the NATO SOFA, that at least some of the original participants believed that, because the United States would be the principal sending state, Article VII specifically was meant to accord American constitutional protections to American service personnel abroad.[68]

The relevant issue which remains today is whether such standards are actually enforceable under the treaty. Although the flagrancy of fair trial guarantees so dramatically highlighted in *Holmes v. Laird*[69] is rare, the case does illustrate the significant need for standards that are realistically enforceable. The brunt of this problem of whether an enforceable procedural standard has been violated initially falls on the military trial observer. This is particularly true if the observer is permitted greater discretion in the observations and conclusions he may forward as input into the designated commander's judgment on the trial's fairness.

---

[65]*Id.* at App. C. Those American constitutional standards are "intended as a guide." The rights as listed include the requirement of charges being based in a criminal statute that sets forth a specific and definite offense. The accused must be given adequate notice of the charges to permit preparation of a defense. One is to have the assistance of counsel and, if possible, counsel of one's own choice. The accused has the right to be present at trial, to confront witnesses against him, and to have compulsory production of favorable witnesses. In all criminal prosecutions, the state must bear the burden of proof in a public trial before an impartial court and without "unreasonable [prejudicial] delay." Compelled self-incrimination and evidence obtained through "unreasonable search and seizure" are prohibited. If necessary, the accused is entitled to a competent interpreter. The prohibitions also include *ex post facto* laws, bills of attainder, double jeopardy, and cruel and unusual punishment. *See* also note 14 and accompanying text *supra*.

[66]Williams, *supra* note 51, at 34.

[67]AR 27-50, para. 1-5(e)(2).

[68]*See generally* Snee, *NATO Agreements on Status: Travaux Preparatoires*, 54 U.S. Naval War Coll. Int'l Studies 165 (1961).

[69]459 F.2d 1211 (D.C. Cir. 1973). *See supra* note 29 and accompanying text.

IV. INTERNATIONAL HUMAN RIGHTS LAW AND ALTERNATIVE REMEDIES FOR NATO SOFA FAIR TRIAL VIOLATIONS

A. THE NATO SOFA IS AN INTERNATIONAL MODEL OF MINIMUM PROCEDURAL STANDARDS

Despite that the fair trial standards of Article VII have been expressed in such general terms that American constitutional interpretations still persist,[70] the attempts to so interpret them have not been very successful.[71] The overall success of the NATO SOFA, however, in resolving the jurisdictional overlap and as a unique precedent among international legal systems stands sharply in contrast.[72] The minimum procedural safeguards contained in the NATO SOFA are also an important precedent because they are still relatively precise and very familiar to a considerable number of nations throughout the world.[73] The participation and experience of the major civil law systems in Europe and Japan particularly demonstrate the adaptability of the NATO SOFA-type safeguards in practice.[74] These fair trial guarantees have been recommended even as a workable model for a more universal standard of minimum procedural fairness in international law.[75]

The procedural guarantees of the NATO SOFA as an international agreement unquestionably provide the military personnel of member states a far greater degree of protection than is afforded the ordinary individual abroad under customary international law.[76]

---

[70]Williams, *supra* note 51, at 34.

[71]Weisbrodt, *supra* note 52, at 104 n.386.

[72]*See* S. Lazareff, Status of Military Forces Under Current International Law 444-45 (1971).

[73]R. Ellert, NATO "Fair Trial" Safeguards 62 (1963).

[74]*Id.* at 63.

[75]*Id.* at 6, 65. Professor Ellert suggested an approach toward an orderly modification of international law on the NATO SOFA model of minimum procedural rights implemented either by multinational convention or, more feasibly, by inclosure in bilateral treaties of friendship, commerce, and navigation. *Id.* Some regional conventions, *see infra* text accompanying notes 100-25, have had the effect of implementing equivalent human rights guarantees. But the NATO SOFA's success has been due largely to the very strong functional impetus toward the political accommodations required to achieve NATO's defense objectives. This is consistent with the comments of trial observers in the Williams study which indicated that the courts in NATO countries usually go out of their way to be fair and lenient to American military personnel. *See* Williams, *supra* note 51, at 43.

[76]*See* Restatement (Second) of Foreign Relations Law of the United States § 165 (1965).

Three distinct positions on what international standard of treatment is due aliens may be identified in the absence of treaty guarantees: an objective international minimum standard, which may require better treatment for aliens than is afforded nationals of the particular state; the "national treatment" rule, providing equality for the alien with nationals; and an unimpeded application of local law, which could overtly discriminate against aliens.[77]

One of the most significant revelations of a study of military trial observers was the extent to which, in struggling with realistic and enforceable interpretations of the NATO SOFA-type fair trial standards, many observers had developed informally their own more easily enforceable norms for evaluating procedural violations. They seemed to be combining the explicit Article VII standards with the "national treatment" rule of international law.[78] This modified standard translates into an issue of whether the accused was treated better because of the Article VII guarantees than a national of the host nation would have under local law if facing similar charges. The study further concluded:

> What most observers do in fact, is to look at the whole trial and, under the circumstances, determine whether it was fair. Even if certain safeguards were not observed, they will not report an unfair trial unless the absence of such safeguards was prejudicial, or even if prejudicial, if the sentence was light.[79]

This approach could result in a waiver by American authorities of specifically guaranteed rights under Article VII that should be pressed on behalf of the individual and service members as a whole.[80] The study concluded that the national treatment hybrid was possibly the most feasible means of evaluating the fairness of foreign trials of American service members.[81] Other approaches more favorable to the accused may be just as readily enforceable in most cases to the extent that the Article VII rights or equivalent minimum procedural standards are enforceable as general international law or directly in the national courts as domestic law. These alternative remedies for the individual will be considered further.

---

[77]L. Henkin, International Law 693 (1980).

[78]*See* Williams, *supra* note 51, at 34.

[79]*Id.*

[80]Even to accept without question the result in *Holmes v. Laird* that the individual has rights created by the NATO SOFA which are personal to him but are enforceable only through executive discretion does not mean that they are rights which the U.S. government can waive for its nationals. *See* S. Lazareff, *supra* note 72, at 215, 225.

[81]*See* Williams, *supra* note 51, at 34.

B. MINIMUM PROCEDURAL STANDARDS UNDER THE INTERNATIONAL BILL OF HUMAN RIGHTS

The minimum standard of procedural fairness as part of traditional international law developed early among Western nations. It was always distinct from the national treatment standard because the former concept never purported to be a basis for dictating to another state how to treat its own nationals in its own courts.[82] The difference which international law attached to the treatment of nationals and aliens disappeared, however, when the law gave recognition to individual human rights and fundamental freedoms which transcended such a distinction based on status.[83] These human rights have taken shape over recent years in a number of general, regional, and bilateral instruments which have specifically defined and recognized these rights and freedoms as international law.[84]

Pursuant to authority granted by the United Nations Charter to promote universal respect for, and observance of, human rights and fundamental freedoms by joint and separate action of all members.[85] the United Nations has promulgated an International Bill of Human Rights by which all member nations have pledged to protect certain fundamental rights to fair criminal proceedings. These rights are contained in four separate instruments: the Universal Declaration of Human Rights,[86] the International Covenant on Civil and Political Rights,[87] the International Covenant on Economic, Social and Cul-

---

[82]L. Henkin, *supra* note 77, at 805.

[83]Garcia-Amador, *Violations of Human Rights and International Responsibility*, First Report on International Responsibility, 1956, U.N. Doc. A/CN.4/96 (1956), *reprinted in* 2 Y.B. Int'l L. Comm'n 173, 199-203.

On the source of human rights there is a doctrinal split. The older school of thought looks to the "natural rights" of mankind grounded in common notions of human nature and human dignity. *See* Donnelly, *Human Rights as National Rights*, 4 Human Rights Q. 391 (1982). An opposing view regards human rights as being based on a social justice concept by which human rights are an allocation of social benefits and burdens by a society's basic institutional structure. Beitz, *Human Rights and Social Justice*, in Human Rights and U.S. Foreign Policy 59 (P. Brown & D. MacLean ed. 1979).

[84]*See generally* L. Henkin, The Rights of Man Today (1978); H. Lauterpacht, International Law and Human Rights (1950, 1973); L. Sohn & T. Buergenthal, The International Protection of Human Rights (1973).

[85]U.N. Charter, arts. 55, 56.

[86]G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) (hereinafter cited as Universal Declaration). *See* Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character*, in Human Rights Thirty Years After the Universal Declaration 21 (B. Ramcharan ed. 1979).

[87]G.A. Res. 2200, 21 U.N. GAOR Supp. (16) 49, U.N. Doc. A/6316 (1967), *entered into force* Mar. 23, 1976 [hereinafter cited as Covenant on Civil and Political Rights].

tural Rights,[88] and the Optional Protocol to the International Covenant on Civil and Political Rights.[89] The Universal Declaration was adopted in 1948 by forty-eight nations of the U.N. General Assembly.[90] Among its provisions, it expressly states that everyone is entitled to a fair and public hearing by an independent tribunal of any criminal charge against him, to the presumption of innocence, to "all the guarantees necessary for [one's] defense," and freedom from retroactive penalties.[91] The International Covenant, at Article 14, further elaborates the minimum procedural rights of criminal defendants as outlined in the Universal Declaration.[92]

These minimum procedural guarantees under general international human rights law, however, have only limited direct significance as a remedy for the individual. Unless the individual can obtain redress for a human rights violation by a signatory state directly in the courts of that state, he has no international status to assert an

---

[88]G.A. Res. 2200, 21 U.N. GAOR Supp. (16) 49, U.N. Doc. A/6316 (1967), *entered into force* Jan. 3, 1976.

[89]G.A. Res. 2200, 21 U.N. GAOR Supp. (16) 49, U.N. Doc. A/6316 (1967), *entered into force* Mar. 23, 1976.

[90]The Universal Declaration was accepted by the European Communist states in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki 1975).

[91]Universal Declaration, arts. 10 & 11.

[92]Article 14, paragraph 3 of the Covenant on Civil and Political Rights, *supra* note 87, reads:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.

This is essentially an elaboration of the Universal Declaration's fair trial standards which has been applied even where the nation in question has ratified the Declaration but has not ratified the Covenant. *See* Weissbrodt, *supra* note 52, at 106.

international claim in his own capacity against the offending state.[93] An optional clause in Article 1 of the Protocol to the International Covenant on Civil and Political Rights implements recognition of the competence of the U.N. Committee on Human Rights to receive and "to consider" individual petitions. Mere discussions and recommendations regarding human rights are not considered a violation of the United Nation's nonintervention principles.[94] The U.N. Economic and Social Council passed Resolution 1503[95] in 1970 which provides the broadest scope of international human rights petitioning by individuals, even against non-U.N. members. Substantive examinations, howver, are only of those complaints which "reveal a consistent pattern of gross and reliably attested violations" of which any single petition might be merely evidence or a source of information.[96] Thus, as a practical matter, individuals have at most the same passive or inchoate rights under the International Bill of Rights as military personnel have under the NATO SOFA Article VII fair trial guarantee.[97]

For military trial observers, however, the International Bill of Rights standards could be very useful in assessing the fairness of foreign criminal proceedings. It should provide them a more generally applicable norm which they could apply more confidently because of the pre-eminence of the Universal Declaration and the Covenants in defining international procedural standards, standards which also may better reflect the real objective of the Senate Resolution's safeguards.[98]

---

[93]L. Henkin, *supra* note 77, at 685. *See* P. Jessup, A Modern Law of Nations 15 (1968).

[94]Ermacora, *Human Rights and Domestic Jurisdiction (Article 2, § 7, of the Charter)*, 124 Recueil des Cours 371, 432 (1968).

[95]48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. #4832/Add. 1 (1970).

[96]Tardu, *United Nations Response to Gross Violations of Human Rights: The 1503 Procedure*, 20 Santa Clara L. Rev. 559, 559-61 (1980).

[97]*See* R. Ellert, NATO "Fair Trial" Safeguards, 55 (1963). *See also* Gordon, *Individual Status and Individual Rights under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 Mil. L. Rev. 49, 66-67 (1983).

[98]Weissbrodt, *supra* note 52, at 104, n.385, 105.

C. PROCEDURAL FAIRNESS RIGHTS AND REMEDIES OF THE INDIVIDUAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Among the regional systems providing human rights guarantees, none surpasses the European Convention on Human Rights[99] either in stature or in the effectiveness of its enforcement machinery over a large number of countries.[100] The far-ranging human rights guaranteed by the European Convention are comparable to those in the International Bill of Rights. Article 6 of the Convention, in particular, contains essentially the same provisions for procedural fairness in criminal trials as Article 14 of the International Covenant on Civil and Political Rights. In addition to insuring "a fair and public hearing within a reasonable time by an independent and impartial tribunal" and the presumption of innocence, Article 6 states:

> Everyone charged with a criminal offense has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

---

[99]The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *signed* Nov. 4, 1950, *entered into force* Sept. 3, 1953 [hereinafter cited as European Convention]. Five Protocols to the Convention also have been concluded with four now in effect. Another major regional human rights system, which was patterned on the European Convention model, is the American Convention on Human Rights, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. O.E.A./Ser. L/V/II.23 doc. rev. 2, *signed* Nov. 22, 1969, *entered into force* July 18, 1978 [hereinafter cited as American Convention].

The European Convention on Human Rights is distinct from the system of legal institutions and individual rights represented by the European Communities. The three Communities—the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community—have as their principal purpose the economic integration of European member states. The Communities share a common European Court of Justice in which any natural person or legal entity may enforce what are primarily economic rights within a transnational or supranational structure. *See* H. Schermers, Judicial Protection in the European Communities (2d ed. 1979); A. Toth, Legal Protection of Individuals in the European Communities (1978).

[100]Twenty of the twenty-one member states of the Council of Europe had ratified the Convention. These include Belgium, Denmark, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Turkey, and the United Kingdom. France has ratified also but with two reservations and a declaration of interpretation. 1981 U.B. Eur. Conv. on Human Rights 32. Spain became a formal NATO member on May 30, 1982. NATO Information Service, NATO Handbook 3 (1982).

(b) to have adequate time and facilities for the preparation of his defense;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[101]

These minimum procedural rights of the European Convention also bear a strong resemblance to the fair trial standards of paragraph 9 of NATO SOFA Article VII.[102] Each instrument seeks to make the individual a beneficiary of specific rights under international law through the use of multilateral treaties.[103] Unlike the NATO SOFA, however, the European Convention and the Optional Protocol to the International Covenant on Civil and Political Rights clearly contemplate a degree of international status for the individual to seek enforcement of his rights.[104] Overall, in view of the substantial equivalence of the European Convention's procedural fairness guarantees with those of the NATO SOFA, the substantial body of case law that it has generated,[105] and the individual's opportunity

---

[101]European Convention, art. 6, para. 3.

[102]R. Ellert, *supra* note 97, at 63.

[103]*Id.* at 62, n.18.

[104]*See, e.g.*, European Convention, art. 13 ("Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority, . . .").

[105]The largest number of cases under the European Convention arise from Article 6, and Article 5 which guarantees freedom from unlawful restraint. C. Morrison, The Developing European Law of Human Rights 105 (1967). The Morrison analysis of the case law indicates elements of a fair trial that have been implied from the Convention. One of these is "equality of arms," or the procedural equality between defense and prosecution which must be preserved. Another is an "all-the-circumstances" test to be used in evaluating the trial in its entirety to determine if one unfavorable aspect of the trial was of such importance as to be decisive of fairness as a whole. *See id.* at 126-27. A final element of a fair trial which has received little notice but is quite important is the requirement that a convicting court provide a "reasoned judgment" for use on appeal. In general, Morrison concluded that an overall willingness to develop other elements of fair trial as may be necessary will continue. *Id.* at 130-31.

The "all-the-circumstances" test provides another parallel standard for evaluating NATO SOFA trials as provided in DOD Directive 5525.1 as discussed earlier. For further analysis of such parallels of fundamental rights and cases in general, *see* Morrison, *The Rights of the Accused under the United States Constitution and the European Human Rights Convention*, 1968 Wis. L. Rev. 192 (finding similarity of equality of arms and due process to be of "fundamental importance").

to judicially enforce those rights, the European Convention's minimum procedural standards should be of particular practical significance to defendants and military trial observers at criminal trials in Europe.[106]

The unique aspect of the European Convention is the system of international supervision and enforcement which exists independently of the national courts of the member states.[107] The controlling institutions insure observance of the commitments undertaken by the High Contracting Parties to the Convention and consist of three international bodies: the European Commission of Human Rights, the European Court of Human rights, and the Committee of Ministers of the Council of Europe.

Each member state ratifying the Convention has agreed therein to accept the competence of the Commission to hear complaints brought against it by any other member state.[108] The Commission is composed of as many members as there are parties to the Convention.[109] The members of the Commission sit in their individual capacity and not as government representatives, so as to enhance "the independent exercise of their functions."[110] The Commission possesses investigatory, adjudicatory, conciliatory, and administrative authority in the disposition of cases referred to it. It attempts to reach a "friendly settlement" of the case among the parties on the basis of Convention principles.[111] An opinion is then published on resolved cases.[112] The Commission has no power to render a decision on the merits, however, and, if the parties fail to accept its recommendation, the case is forwarded to the Committee of Ministers.[113] They attempt a traditional diplomatic resolution as political representatives of their respective governments.[114]

An optional provision of the convention, Article 46, permits referral of unresolved cases by the Commission to the European Court of

---

[106]The European Convention has an active and ongoing role to play in preventing human rights violations that still occur in Europe today. *See, e.g.*, Andrews, *Human Rights: Trial Delays in Germany*, 7 Eur. L. Rev. 502 (1982) (noting the difficulty of protecting procedural rights while coping with international terrorism).

[107]Kruger, *The European Commission of Human Rights*, 1 Human Rights L.J. 66-67 (1980).

[108]European Convention, art. 24.

[109]*Id.* at art 20. Members are elected by the Committee of ministers for six-year terms. *Id.* at arts. 21, 22.

[110]*Id.* at arts. 4, 23.

[111]*Id.* at art. 28.

[112]*Id.* at art. 30. Most cases are resolved at this stage. F. Castberg, The European Convention on Human Rights 16-17 (T. Opsahl & T. Ouchterlony ed. 1974).

[113]European Convention, art. 31.

[114]*Id.* at art. 32.

Human Rights for a reasoned opinion if the state whose actions are being challenged has accepted the Article 46 provision for compulsory jurisdiction of the court.[115] Another optional provision, Article 25, establishes the individual complaints procedure which is by far the most important aspect of human rights adjudication under the European Convention.[116]

Pursuant to a member state's recognition of Article 25, direct petitions can be received by the Commission from individuals alleging violations of Convention guarantees committed by that state.[117] Article 25 includes the particularly important provision that the Commission may receive petitions from "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation" by a member state recognizing the Article.[118] The Commission has interpreted this provision to mean that it will accept petitions from individuals or groups regardless of nationality; under Article 1, member states have pledged to secure "to everyone within their jurisdiction" the rights of the Convention.[119]

The Commission must first declare the petition admissible under the Convention before it will be examined with the parties.[120] The

---

[115]As of December 31, 1981, the following states had made declarations still in effect recognizing Article 46: Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. 1981 Y.B. Eur. Conv. on Human Rights 34.

[116]Kruger, *supra* note 107, at 67.

[117]As of December 31, 1983, Article 25 recognizing individual petitions to the Commission had been accepted by sixteen Convention member states: Austria, Belgium, Denmark, the Federal Republic of Germany, France, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. 1981 Y.B. Eur. Conv. on Human Rights 32.

[118]In 1981, 404 individual applications were lodged with the Commission, representing a steady increase since 1977. *Id.* at 108. Of that number in 1981, two were American nationals, four in 1980, and two in 1979. *Id.* at 423.

Among the NATO member states, eligible to sign the European Convention, all are Convention members. This excludes the Unite States and Canada. Greece and Turkey and the only two NATO nations which do not recognize individual petitions to the European Commission.

[119]O'Boyle, *Practice and Procedure under the European Convention on Human Rights*, 20 Santa Clara L. Rev. 697, 703 (1980). *E.g.*, Sargin v. Federal Republic of Germany, 4 Eur. Human Rights Reports 276 (Eur. Comm'n on Human Rights 1981) (Turkish nationals in the FRG).

[120]Requirements for the admissibility of a petition include the allegation of an act for which a state bound by article 25 is itself responsible; that the petitioner is the victim, art. 25, and identified, art. 27; that the events occurred in the state's territory and after the Convention's entry into effect for that state, art. 63; that all national remedies have been exhausted, art. 26; that the right is protected specifically under the Convention, art. 25, and not "substantially the same" case as one previously examined, art. 27; and, that the petition is not "manifestly unfounded" nor an abuse of the right of petition. Art. 27.

dividual can only bring a case before the Commission; member states may bring cases directly to the court under Article 48. If the Commission, in examining an individual petition, has not achieved a friendly settlement, it has the discretion whether to refer the case to the Court. In this sense, as the individual is precluded by Article 44 from bringing cases directly to the court, the person has only a right of petition.[121] However, the Commission serves as an impartial organ composed of independent members acting in their own capacity. The more the body reviewing the petition resembles a court, the more substantial the petitioner's right and, therefore, the individual with the right to petition the European Commission is in the best position possible.[122]

From this point of view, the role of the Commission may be regarded as the first step in a judicial-type review by which the applicant still achieves a level of appeal above the national courts. As a functional matter, the petitioner to the European Commission has the same access as a party before a court to an established board of law in force by which the individual can know and anticipate the results of his precise legal position.[123] The successful petitioner also may anticipate "just satisfaction" in the form of a monetary remedy under Article 50 of the Convention in appropriate cases.[124]

The existence of such a recourse operates to the benefit of an individual accused in the European national courts. For the trial observer seeking enforceable legal guarantees by which to test the fairness of foreign proceedings against such an individual, the Convention provides a European human rights standard which can be applied with as much confidence as the minimum procedural guarantees of domestic law or the NATO SOFA.[125]

---

[121]C. Norgaard, The Position of the Individual in International Law 168 (1962).

[122]*Id.* at 170.

[123]*Id.* at 172.

[124]*E.g.*, Ringeisen v. Austria (No. 3) 1 Eur. Human Rights Reports 513 (Eur. Ct. on Human Rights 1973) (compensation to be paid personally to applicant in prescribed currency free from attachments).

[125]For further analysis of European human rights and remedies, *see generally* A. Robertson, Human Rights in Europe (2d ed. 1977). For detailed practice and procedure discussions, *see* J. Fawcett, The Application of the European Convention on Human Rights (1969); L. Mikaelsen, European Protection of Human Rights (1980); Z. Nedjati, Human Rights Under the European Convention (1978).

D. INVOCATION OF INTERNATIONAL FAIR TRIAL GUARANTEES AS DOMESTIC LAW IN THE NATO STATES

The unwillingness of American courts to review an executive failure to enforce the NATO SOFA provisions was seen in *Holmes v. Laird*, regardless of whether the treaty is deemed part of domestic law under the Constitution.[126] The individual accused may be able, however, to achieve judicial vindication of many of the Article VII rights directly in the national courts of the receiving state. It is purely a matter of international law as to whether states require or permit their courts to apply as domestic law the terms of valid international agreements.[127] If the treaty is regarded as domestic law, its priority or normative value, when in conflict with other statutes or the national constitution, must yet be determined.

West Germany and Italy each generally adhere to a "dualist" theory that a treaty can be applied by its courts only insofar as a legislative act has declared the treaty enforceable as domestic law or if the treaty was intended to be self-executing within domestic law. If any part of the treaty conflicted with its constitution, the German or Italian parliament would not have the power to legislatively modify the constitution.[128] Although the NATO SOFA Article VII guarantees are fundamentally consistent with the constitutions of these countries, their courts apparently have looked for some intent stated in the NATO Treaty to afford a remedy to the individual or implementing legislation beyond mere ratification in order to permit the individual to invoke the treaty rights as domestic law.[129] The lack of satisfaction of these additional requirements would explain why there has been little apparent success at direct invocation of the

---

[126]*See supra* note 39 and accompanying text.

[127]L. Henkin, *supra* note 77, at 116-17.

[128]*See* Grundgesetz art. 25 (Federal Republic of Germany); Constituzione art 10 (Italy). Judicial interpretations under both the German Basic Law and Italian Constitution, however, have accommodated the unique character of the European Community treaties which extend directly into domestic law. Both constitutions also give *general* rules of international law precedence over domestic law but an international agreement can be subordinated at any time by subsequent domestic legislation. A leading case illustrating this kind of constitutional analysis is Costa v. Ente Nazionale per l'Energia Elettrica (ENEL), Judgment of Mar. 7, 1964, Corte, const., It., 87 Foro It. I 465. This is also the status of treaties in Turkey.

[129]For a discussion of specific NATO SOFA cases in the German courts, *see* Schwenk, *Jurisdiction of the Receiving State over Forces of the Sending State under the NATO Status of Forces Agreement*, 6 Int'l Law. 525, 535 (1972). Professor Schwenk noted that at least one German lower court had applied the NATO SOFA as self-executing.

NATO SOFA safeguards as domestic law. Explicit legislation, however, is particularly unlikely in view of the NATO SOFA's Article XVI exclusive diplomatic remedy provision. Nonetheless, the individual accused should at least attempt, if possible, to assert as domestic law the protections contained in the same international agreement by which the foreign court takes domestic jurisdiction in the first place.

Closer to the other end of the spectrum of the domestic status given to international agreements, the Netherlands, Luxembourg, and, recently, Belgium have given precedence to international law as against prior or subsequent domestic legislation. In the Netherlands, the pre-eminence of international obligations in domestic law is explicit in the constitution.[130] However, even though the NATO SOFA provisions have primacy in these domestic courts, a literal interpretation of the agreement also might raise the same exclusive diplomatic remedy clause as an obstacle.[131]

In the United Kingdom, unlike most European nations, treaty ratification does not always involve a parliamentary act. Treaties, however, are automatically enforceable as domestic law only when Parliament does act on the treaty. This is also true in Ireland, Denmark, Iceland, Norway and Sweden.

The British Parliament is required to act in certain circumstances.[132] Parliamentary consent was necessary for the ratification of the NATO SOFA in 1954 before rights and duties affecting British citizens could be managed. The common British origin of all common law procedural standards, however, makes more likely that rights equivalent to those of Article VII, even interpreted in light of U.S. constitutional standards, are already guaranteed with a domestic remedy provided for the individual in the United Kingdom and other common law countries.

The status of the international human rights agreements as domestic law also varies among nations. Whether the Universal Declaration of Human Rights and the International Covenant on Civil and

---

[130]Statuut vor het Koninkrijk der Nederlanden (Constitutie Federation), art. 65 (Neth.).

[131]If the courts of a member state determined that an international remedy exists for enforcement by states, the national courts might feel free to provide a remedy by enforcing the NATO SOFA guarantees directly as binding international law. This would inure to the benefit of the individual accused who then could assert those rights under international law as domestic law.

[132]On the status of treaties as domestic law in the United Kingdom, *see* E. Wade & G. Phillips, Constitutional Law 39, 213-14 (5th ed. 1955).

Political Rights are self-executing as enforceable domestic law is doubtful in the majority of the states that have accepted them. However, all states that have adopted the Covenant have undertaken in Article 2 to implement legislative and, where necessary, constitutional provisions to insure that persons whose rights under the Covenant have been violated within the state's territory, whether by the state's own action or not, have an effective judicial remedy.[133] Sir Humphrey Waldock, President of the International Court of Justice at the Hague and a past president of both the European Commission and the European Court of Human Rights, stated that history has borne out the thesis of the classic English constitutional scholar Dicey that what matters most is not the high-sounding declarations of rights but the legal remedies.[134]

It is the enforceability of the major regional human rights protection systems that makes each of them[135] a viable legal recourse for the individual, not merely in the right of petition, but also in their status as domestic law. Although the European Convention is not domestic law in all its adopting states, it is self-executing for the other member states in light of the requirement to secure everyone within their jurisdiction those rights and a legal remedy for violations.[136] The domestic status of the Convention as a self-executing treaty is even greater for those European nations which have accepted the right of individual petitions under Article 25.[137] All the member states to the European Convention, however, appear to act on the principle that, as a minimum, wherever possible, the domestic law will not be interpreted in such a way as to conflict with the obligations the state has assumed under the agreement.[138] That is the

---

[133]The Covenant on Civil and Political Rights, art. 2, para. 2 states:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The language of paragraph 1 makes clear that the rights protected are personal by stating that each member state "undertakes to respect and to insure to all *individuals* within its territory and subject to its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . ." (emphasis added).

[134]*See* Waldock, *The Effectiveness of the System Set Up By the European Convention on Human Rights*, 1 Human Rights L.J. 1, 11-12 (1980).

[135]*See supra* note 99.

[136]*See* European Convention, arts. 1 & 13. For further discussion of the domestic application of the Convention and cases, *see* L. Sohn & T. Buergenthal, The International Protection of Human Rights 1238 (1973).

[137]Waldock, *supra* note 133, at 11.

[138]*Id.* at 10

local remedies rule, however, and there is certainly no question of the binding effect on the national legal system that a decision of the European Court will have on a member state which has accepted compulsory jurisdiction under Article 46. The right of recourse to the Commission, whether as a referral of a case by another member state or as an individual petition, in itself transforms the relationship between domestic law and international law under the Convention.[139] As Sir Humphrey Waldock has stated: "As soon as domestic lawyers realised that recourse to the Commission was a genuine legal means of redress, forming part of their own armoury of legal remedies, it began to assume for them, in their own systems, the role of a true Bill of Rights."[140]

The newer counterpart of the European Convention, the American Convention on Human Rights,[141] indirectly represents part of the impact that the European Convention has had on general international law. Thus, even if a host state were not a party to any of the international human rights, a military service member not covered by any NATO SOFA-type guarantees could offer the conventions and declarations as evidence in the domestic court of an objective minimum procedural standard under customary international law to be considered in light of a substantial body of international precedent.[142]

V. CONCLUSION

Military trial observers reporting on the foreign criminal trials of American service members pursuant to Article VII of the NATO SOFA face a dilemma of how to reconcile an American constitutional interpretation of minimum procedural guarantees with the realities of having to apply Article VII's generalized language to the diverse legal institutions participating in such an international agreement. The guarantees which for the trial observer are an uncertain standard are for the accused an even more uncertain remedy. The situation is made more acute for the individual by his dependence on executive discretion to enforce these rights.

---

[139]*Id.* at 11.

[140]*Id.* at 10.

[141]American Convention. Article 2 of the American Convention on Human Rights provides that "the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." Article 8 of the American Convention would provide a standard of procedural fairness in criminal trials of the American member nations that would be the substantial equivalent of Article 6 of the European Convention and of Article VII, paragraph 9 of the NATO SOFA.

[142]*See, e.g.*, Waldock, *supra* note 133, at 9.

The NATO SOFA was indeed a unique precedent as an international legal system, but parallel legal institutions have developed rapidly. A substantial body of international law now offers greater assurance to the military trial observer that a generally recognized minimum procedural standard supports the NATO SOFA-type protections. The International Bill of Rights and regional conventions evidence an objective minimum standard which should be invoked actively on behalf of an accused anywhere. They should certainly preclude a perceived practical need to readily accommodate the national treatment rule in countries which have explicitly obligated themselves to respect certain minimum human rights.

In the national courts of the NATO member states, the military trial observer has the benefit of three distinct legal reference points from which to evaluate procedural fairness: the NATO SOFA itself, the European Convention on Human Rights, and highly developed domestic law of those states. If the military trial observer is serving the independent and impartial function which the Senate safeguards intended, there should be little ambiguity as to what constitutes the standard of procedural fairness internationally defined and recognized in the caselaw generated under the European Convention on Human Rights.

Most importantly, the American service member himself has a substantial and personal means of vindicating his fundamental rights within the host nation, regardless of whether he is actually covered by the NATO SOFA or whether the United States government would decide to enforce the Article VII guarantees. The accused has available not only the normal guarantees under the domestic law of the European nations, but can also invoke the human rights standards either as international law to which that nation is obliged to observe, or as actual domestic law of the particular European nation.

Ultimately, the accused has the assurance of an effective right of individual petition for violations of minimum procedural fairness by European national authorities. The European Commission on Human Rights conducts an independent and impartial examination of admissible petitions which is in the nature of a full and fair judicial review. The Commission also provides an opportunity for most unresolved cases of serious violations to be forwarded to the European Court of Human Rights. The court holds recognized power to make binding decisions and to award just satisfaction in appropriate cases. These safeguards thereby transform the relationship of national and international human rights law to provide a direct link to a guaranteed international fair trial standard of which the individual should be advised and which he may choose to pursue on his own behalf.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

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

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

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

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Berry, John Stevens, *Those Gallant Men: On Trial in Vietnam* (No. 3).

Bush, John C. and William Harold Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law* (No. 14).

Carlson, Ronald L., Edward J. Imwinkelried, and Edward J. Kionka, *Materials for the Study of Evidence* (No. 4).

Diskin, Martin, editor, *Trouble in Our Backyard: Central America and the United States in the Eighties* (No. 5).

Gabriel, Richard A., *The Antagonists: A Comparative Combat Assessment of the Soviet and American Soldier* (No. 6).

Imwinkelried, Edward J., Ronald L. Carlson, and Edward J. Kionka, *Materials for the Study of Evidence* (No. 4).

Jacoby, Sidney B., John M. Steadman, and David Schwartz, *Litigation With the Federal Government* (No. 12).

Kionka, Edward J., Edward J. Imwinkelried, and Ronald L. Carlson, *Materials for the Study of Evidence* (No. 4).

Newfarmer, Richard, editor, *From Gunboats to Diplomacy: New U.S. Policies for Latin America* (No. 7).

Payne, Anthony, *The International Crisis in the Caribbean* (No. 8).

President's National Bipartisan Commission on Central America, *The Report of the President's National Bipartisan Commission on Central America* (No. 9).

Redden, Kenneth R., editor, *Modern Legal Systems Cyclopedia (Volume 1: North America)* (No. 10).

Schacht, Joseph, *An Introduction to Islamic Law* (No. 11).

Schwartz, David, Sidney B. Jacoby, and John M. Steadman, *Litigation With the Federal Government* (No. 12).

Steadman, John M., David Schwartz, and Sidney B. Jacoby, *Litigation With the Federal Government* (No. 12).

Stern, Herbert J., *Judgment in Berlin* (No. 13).

Thomas, A.J., Jr. and Ann Van Wynen Thomas, *The War-Making Powers of the President* (No. 14).

Thomas, Ann Van Wynen and A.J. Thomas, Jr., *The War-Making Powers of the President* (No. 14).

Tiemann, William Harold and John C. Bush, *The Right to Silence: Privileged Clergy Communication and the Law* (No. 15).

Wells, Donald L., *War Crimes and Laws of War* (No. 16).

Wildavsky, Aaron, editor, *Beyond Containment: Alternative Policies Toward the Soviet Union* (No. 17).

Woolsey, R. James, editor, *Nuclear Arms: Ethics, Strategy, Politics* (No. 18).

Zeigenfuss, Dr. James T., Jr., *Law, Medicine & Health Care: A Bibliography* (No. 19).

III. TITLES NOTED

Antagonists: A Comparative Combat Assesement of the Soviet and American Soldier, The, *by Richard A. Gabriel* (No. 6).

Beyond Containment: Alternative American Policies Toward the Soviet Union, *edited by Aaron Wildavsky* (No. 17).

For the Sake of Example: Capital Courts-Martial 1914-18, *by Anthony Babington* (No. 1).

From Gunboats to Diplomacy: New U.S. Policies for Latin America, *edited by Richard Newfarmer* (No. 7).

International Crisis in the Caribbean, The, *by Anthony Payne* (No. 8).

Introduction to Islamic Law, An, *by Joseph Schacht* (No. 11).

Judgment in Berlin, *by Herbert J. Stern* (No. 13).

Law, Medicine & Health Care: A Bibliography, *by Dr. James T. Ziegenfuss, Jr.* (No. 19).

Litigation with the Federal Government, *by John M. Steadman, David Schwartz, and Sidney B. Jacoby* (No. 12).

Materials for the Study of Evidence, *by Ronald L. Carlson, Edward J. Imwinkelried, and Edward J. Kionka* (No. 4).

Modern Legal Systems Cyclopedia (Volume 1: North America), *edited by Kenneth R. Redden* (No. 10).

Nuclear Arms: Ethics, Strategy, Politics, *edited by R. James Woolsey* (No. 18).

Report of the President's National Bipartisan Commission on Central America, The, *by the President's National Bipartisan Commission on Central America* (No. 9).

Right to Silence: Privileged Clergy Communication and the Law, The, *by William Harold Tiemann and John C. Bush* (No. 15).

Those Gallant Men: On Trial in Vietnam, *by John Stevens Berry* (No. 3).

To Promote Peace: U.S. Foreign Policy in the Mid-1980s, *edited by Dennis L. Bark* (No. 2).

Trouble in Our Backyard: Central America and the United States in the Eighties, *edited by Martin Diskin* (No. 5).

War Crimes and Laws of War, *by Donald A. Wells* (No. 16).

War-Making Powers of the President, The, *by Ann Van Wynen Thomas and A.J. Thomas, Jr.* (No. 14).

IV. PUBLICATION NOTES

1. Babington, Anthony, *For the Sake of Example: Capital Courts-Martial 1914-18*. New York, New York: St. Martin's Press, 1984. Pages: xii, 238. Postscript, Appendix, Bibliography, Index. Price: $21.95. Publisher's address: St. Martin's Press, 175 Fifth Avenue, New York, New York 10010.

The quality of military justice in wartime has always been a controversial subject. It has been asserted that, in war more than in peace, military justice becomes a tool of discipline, rather than an instrument of equitable enforcement of the criminal laws.

By 1914 within the British Army, however, the severity of the sanctions imposed by the British military justice system appeared to have been ameliorated. Throughout the Crimean and Boer Wars of the latter part of the 19th century, executions ranged from few to none. In addition, flogging, a punishment popular for centuries in the British Army, had been banned. As Britain entered World War I, then, a British serviceman could at least count upon fair punishment for offenses against military discipline.

From 1914 to 1920, however, 346 officers and men were summarily executed at dawn following their convictions in the field. The details of the trials and "appeals" had been secret for decades. Now, however, Anthony Babington, a British Circuit Judge, has gained access to those records and has chronicled the circumstances surrounding many of those cases. His conclusion is that the system as it operated during that period is nothing of which the British military establishment ought to be proud.

Typically, those charged with offenses were technically guilty. However, the defenses were, as typically, not presented or poorly presented. If a conviction was had, few mitigatory facts would be placed in front of the sentencing authority or before those commanders who were required to confirm the sentences. Notice to the accused of their sentence was oftentimes only slightly before their actual executions, sometimes only by hours.

The medical profession was also deemed delinquent. Many of the offenses for which executions were had appeared to have been committed during states of nervous exhaustion or "shell shock." The doctors who examined the accused are themselves accused by Babington of having "set themselves up as an extra branch of the provost corps, intent on securing the extreme penalty for such offenders whenever possible." A Postscript to the book by Major-General Frank Richardson discusses this particular phenomenon.

Supplemented by charts that indicate the offenses for which capital punishment was adjudged and enforced, *For the Sake of Example* provides a thought-provoking look at how military justice might run amok under the pressures of war.

2. Bark, Dennis L. (ed.), *To Promote Peace: U.S. Foreign Policy in the Mid-1980s.* Stanford, California: Hoover Institution Press, 1984.

pages: xxviii, 298. Price: $19.95. Publisher's address: Hoover Institution Press, Stanford University, Stanford, California 94305.

This decade, not yet half over, has already brought forth myriad challenges to the foreign policy of the United States. Whether in Lebanon, Iran, Central America, or in the skies above the Sea of Japan, the United States has had to respond coherently to forces inimical to our national security and world peace.

In *To Promote Peace: U.S. Foreign Policy in the Mid-1980s*, the Hoover Institution has collected seventeen essays that cover several of the areas of conflict and controversy that face the United States. These essays, authored by prominent thinkers and actors on the American stage, are designed to provoke debate and suggest policy alternatives for the United States as our nation enters the middle of the decade.

The subjects of the essays are as varied as the issues that face us. Development of the Third World, the role of the churches in the peace movement, American monetary and energy policies, and leadership styles for the 1980s are discussed in the opening chapters. The American place in the Atlantic Alliance, the Americas, the Pacific Basin, the Middle East, and Africa are also evaluated. The closing chapters note American relations with the Soviet Union and Eastern Europe, together with how the United States should approach its adversary overtly through arms control negotiations and covertly through intelligence gathering.

There is indeed little doubt that certain of the essays will provoke debate. Professor Melvyn Krauss of New York University, for example, advocates an American announcement of a phased troop withdrawal from Western Europe as a spur to rouse our NATO allies from a drift toward neutralism occasioned by "free riding" on the American defense budget. Less controversially, Professor Robert Wesson of the University of California at Santa Barbara argues for an elimination of trade barriers between the United States and Central America, but also deems necessary a reintroduction of Cuba into the community of Latin American nations. These are just some of the thoughtful pieces that comprise an interesting, if controversial, volume of contemporary political thought.

3. Berry, John Stevens, *Those Gallant Men: On Trial in Vietnam*. Novato, California: Presidio Press, 1984. Pages: xiii, 173. Price: $14.95. Publisher's address: Presidio Press, 31 Pamaron Way, Novato, California 94947.

It would be difficult to find a present or former JAGC officer who

is not armed with a treasury of "war stories"—of cases, trivial or momentous, in which that attorney flexed his or her lawyerly muscles in order to attain an equitable resolution for the client. The tales no doubt become embellished by time and the protagonist becomes ever more heroic against ever more daunting odds.

Some stories, however, require no window dressing to enthrall the audience. The central story of *Those Gallant Men: On Trial in Vietnam*, the defense of Green Berets accused of murdering a suspected Vietnamese double-agent, is such a story.

In 1969, John S. Berry, then serving in Vietnam as a captain in the Army JAGC, was called upon to defend one of the Green Berets so charged. The background of the case, much of which has only recently been released under the Freedom of Information Act and some of which remains classified and beyond the reach of the author, is broadly sketched. The author chronicles the Article 32 investigation, the involvement of Henry Rothblatt, and the political pressures that eventually caused the Army to dismiss the charges. While the author, now long out of the service, still credits the JAGC as "the world's. . . best law firm," two former JAGC general officers, and the U.S. Army commander in Vietnam, are portrayed as playing less than flattering roles in the court-martial process.

The ordeal of the Green Berets comprises the bulk of the book. The remainder, dealing with the presentation of extenuation and mitigation evidence for the hopelessly guilty client and the reasonable sentences thereby obtained, should ring intimately familiar to any military defense counsel. The frustrations of dealing with "the government" are also detailed. For example, when learning that the case against his client would be referred to trial based upon what he believed to be the most tenuous of evidence, Berry was described as having "started shouting and ranting" at the MACV staff judge advocate, a future TJAG.

Perhaps the most significant aspect of the book for the younger judge advocate of today who has not served in Vietnam is its description of how the military justice system *did* function in a combat zone. Courts were convened, trials were held, and the war was waged. As the Corps fashions doctrine for the conflicts of the future, the experiences of the past should not be overlooked.

4. Carlson, Ronald L., Edward J. Imwinkelried, and Edward J. Kionka, *Materials for the Study of Evidence*. Charlottesville, Virginia: The Michie Company, 1983. Pages: xxxiv, 798. Table of Cases, Index. Publisher's address: The Michie Company, 1 Town Hall Square, Charlottesville, Virginia 22906.

This casebook, the latest in The Michie Company's Contemporary Legal Education Series, tackles the law of evidence from an historical and analytical viewpoint. Beginning with brief chapters on the history, philosophy, and sources of American evidence law, the book then systematically attacks the various areas of evidentiary problems. Succeeding parts, which are in turn subdivided into chapters, concern witness competency, legal relevance, credibility evidence, unreliable evidence, hearsay, privileges, and presumptions, burdens of proof, and other substitutes for evidence. An Epilogue discusses a step-by-step approach to thinking about and using evidence law. Finally, a table of cases and detailed index provide excellent finding aids for the evidentiary researcher.

This volume varies somewhat from the standard casebook. To be sure, numerous cases are excerpted from which the practitioner may glean legal points and trial practice guidance. In addition to those, however, the authors, all distinguished professors of the law of evidence in their own right, have excerpted numerous articles and other writings that tend to make legal and practice pointers more explicit than the ordinary extract of a legal opinion. The questions and problems that follow several of these extracts are designed to challenge the student to apply in real-life situations the points of law or practice discussed.

This is not just another casebook; *Materials for the Study of Evidence* is a challenging new entry into the field of legal education.

5. Diskin, Martin (ed.), *Trouble in Our Backyard: Central America and the United States in the Eighties.* New York, New York: Pantheon Books, 1983. Pages: xxxv, 266. Index, About the Contributors. Price: $9.95 (paperback). Publisher's address. Pantheon Books, 201 East 50th Street, New York, New York 10022.

The ideological bent of this collection of essays is not difficult to discern. In the Foreword by John Womack, Jr. and the Introduction by its editor, Martin Diskin, United States policy toward the nations of Central America is castigated as wrong, simplistic, and generally imperialistic. The reader is informed that elections will take place in Nicaragua in 1985 "when enough public discussion and enlightenment will presumably have taken place to permit the use of constitutional and elected means," that the heckling and outright disrespect accorded Pope John Paul II in Managua constituted only a "vigorous debate," and that, as to the future, we can expect that "the United States can, and probably will, rain death on innocent people in Central America, as it did in Southeast Asia some years ago. . . ." With the prism through which the individual studies will be made thus set, the collection of essays begin.

The resulting collection contains eight discussions of various aspects of the Central American scene. In "Central America Today," Edelberto Torres-Rivas outlines the past history of the region and describes the current situation in which the region finds itself. In "Reagan and Central America," Louis Maira discusses the focus of the Reagan Administration's policy in Central America and the underlying assumptions upon which it has been based. In "Liberation and Revolution," Tommie Sue Montgomery describes the role of Christianity as a "subversive activity" in Central America. In "Reactionary Despotism in El Salvador," Enrique A. Baloyra reviews the tortured history of democracy in El Salvador and the prospects for its future. in "Revolution and Crisis in Nicaragua," Richard Fagan discusses the results of the 1979 overthrow of Anastasio Somoza and the current problems of the Nicaraguan Sandinista government, the overthrow of which the author sees as the simple and ultimate objective of the Reagan Administration. In "State Violence and Agrarian Crisis in Guatemala," Shelton H. Davis traces the roots of the Indian-peasant rebellion in that country. Finally, in "Guatamala," by Lars Schoultz and "Honduras," by Steven Volk, country studies of two nations of the violent region are provided. Finally, in an epilogue, subtitled "America's Backyard," Gunther Grass gratuitously equates the Sandinistas of Nicaragua with the supporters of Solidarity in Poland and discusses his hopes for the region's future.

The collection canvasses many areas of controversy in a region that has never and never will be devoid of controversy. If one recognizes that the views expressed in the book all emanate from a single ideological perspective, the reader may profit by exposure to them.

6. Gabriel, Richard A., *The Antagonists: A Comparative Combat Assessment of the Soviet and American Soldier*. Westport, Connecticut: Greenwood Press, 1984. Pages: xii, 208. Foreword by Sen. Sam Nunn. Figures and Tables, Bibliography, Index. Price: $29.95. Publisher's address: Greenwood Press, 88 Post Road, Box 5007, Westport, Connecticut 06881.

Since the onset of the Cold War in the 1940s, many attempts, many simplistic, many sophisticated, have been made to gauge the relative strengths of the American and Soviet armies. Comparisons have been based upon weaponry, numbers, quality of leadership, and range of combat experience. In many, it is difficult to determine whether the conclusions were adequately divorced from the preconceived notions of the analyst.

In *The Antagonists: A Comparative Combat Assessment of the*

Soviet and American Soldier, Richard A. Gabriel, a Professor of Politics at St. Anselm College and student of the Soviet military, has constructed a study of the personnel that make up the armed forces of both nations. His conclusions are flattering to neither, but should not inspire confidence in the quality of the American fighting force.

Professor Gabriel initially states his thesis that small unit cohesion has been the key to successfully waged combat campaigns over history and constructs his study to determine the factors that bear on that cohesion.

The army has played a different role in Soviet society than in American. The United States, from colonial times, had an abiding distrust of a large standing peacetime army. From the colonial past, the army, whether French, Spanish, or British, was viewed as an occupation force, a means through which the distant mother country asserted control over her subjects. In the Soviet Union, however, the army is viewed as serving purposes other than defense. The Red Army serves a "nation-building" function in bringing together the diverse ethnic minorities of the Soviet Union into a single force. In addition, the army issues commands in a single tongue, Russian, such that all conscripts are forced to learn it. Finally, the army instills in Soviet adolescents an unquestioning discipline and obedience to orders, a valuable service in a totalitarian society.

In his comparisons, Gabriel appears to indicate quantitative and qualitative Soviet advantages. The Red Army is larger, better equipped, more intelligent, and backed by a better reserve force than the American army. The noncommissioned officers of both services are scored as poor leaders. American officers are rated as "amateurish" in that they are inadequately trained and rotated too frequently to gain expertise in their fields, and as "entrepreneurial" in that they put their careers above the welfare of their troops. The Soviets, on the other hand, are little better. Although not plagued by an "up or out" promotion system and permitting longer tours in assignments, the Soviet officer corps is castigated as "armed bureaucrats" who seek to avoid responsibility for mistakes and distance themselves from their troops in the interest of not running afoul of the powerful political system that oversees their activity.

Discipline problems in the American and Soviet armies are essentially equivalent. While drugs are the central problem in the American force, alcohol causes disruption within the Red Army. In one respect, the author's information is dated; his description of the attitude of the American army toward drug abusers predated the more recent crackdown via urinalysis and other than honorable discharges on drug abusers.

Desertion and AWOL rates are said to be similar between the armies, notwithstanding the harsh penalties for desertion in the Soviet Union and the totalitarian nature of their society and armed force. Attacks on superiors, commissioned and noncommissioned officers, are said also to be similar in number, although, in this regard, the author's statistics reach back to the "fragging" incidents of Vietnam. In the case of the Soviet army, attacks are said to have been occasioned by the rigorous training received by the soldier or, more simply, alcohol abuse. Finally, the statistic of ultimate desperation, the suicide rate, is said to be remarkably higher within the Soviet army than the American force, perhaps a reflection of the spartan conditions that the troops must endure.

The author returns to the main theme of the book, unit cohesion, in the penultimate chapter. The Soviet military unit is designed to be held together by Marxist-Leninist ideology. To be sure, proficiency in soldierly skills is stressed in training, yet, the cement that is supposed to adhere one comrade to another is the common Marxism between them. The American unit, on the other hand, is sought to be unified in the American entrepreneurial ethic, that is, identifying individual goals with group goals, such that the individual, in striving to achieve his goals, also helps fulfill the unit's mission. However different in nature, the two modes of cohesion do have one thing in common; rather than attempting to inculcate in the soldiers a uniquely military ethos, they merely reflect the norms that are sought to be applied in civilian life as well. Also similarly, both are scored for their divergence from the traditional norm of what pressed men to fight, the development of interpersonal relationships within the small unit. Studies have shown that effective fighting forces fight neither for ideology nor personal interest; they fight for their fellow soldier. Professor Gabriel notes that, as both the Soviets and, to a lesser degree, the Americans have ignored this motivator, there is serious doubt about whether either army could prove to be a cohesive fighting force.

7. Newfarmer, Richard (ed.), *From Gunboats to Diplomacy: New U.S. Policies for Latin America*. Baltimore, Maryland: The Johns Hopkins University Press, 1984. Pages: xxii, 254. Selected Bibliography, Contributors. Price: $25.00 (hardcover), $11.95 (paperback). Publisher's address: The Johns Hopkins University Press, Baltimore, Maryland 21218.

In 1969, then-National Security Advisor Henry Kissinger lectured the Chilean foreign minister: "You come here speaking of Latin America, but this is not important. Nothing important can come from the South. . . . The axis of history starts in Moscow, goes to

Bonn, crosses over to Washington, and then goes to Tokyo. What happens in the South is of no importance."

One need read no further than the front page of any newspaper to determine the inaccuracy of that statement. Indeed, the author of it, having served as chairman of a Presidential commission that studied the problems and future of the region, probably would disavow it today. Yet, the recent American concern with Central America raises many issues that have long been benignly ignored.

In *From Gunboats to Diplomacy: New U.S. Polices for Latin America*, several students of Central American affairs have authored essays concerning the future of American policy in that region of the hemisphere.

After a brief orientation of the past and present American posture toward the region, the authors undertake country-by-country studies. Included are discussions of United States relations with Mexico, Guatemala, El Salvador, Honduras, Costa Rica, Nicaragua, Cuba, Brazil, Argentina, and Chile. The more pressing Latin American issue that affects the United States, the economic crisis, President Reagan's Caribbean Basin Initiative, and the refugee problem, are also addressed.

Almost uniformly, the authors find fault with past and current policy and urge new alternatives. For example, the United States is exhorted to cease aid to a repressive regime in Guatemala and to remove obstacles to unconditional negotiations with the Salvadoran rebels. With regard to Cuba, a policy of "gradual engagement" is proposed in which the United States is invited to become more pliant with the island nation and negotiate on those issues upon which agreement is possible and desirable.

A Selected Bibliography is provided for those desiring to conduct further research in the area.

8. Payne, Anthony, *The International Crisis in the Caribbean.* Baltimore, Maryland: The Johns Hopkins University Press, 1984. Pages: 177. Appendix, Select Bibliography, Index. Price: $18.50. Publisher's address: The Johns Hopkins University Press, Baltimore, Maryland 21218.

Just as the insurgengy in El Salvador has drawn the attention of the American policymakers and people to Central America, so, too, has the recent United States intervention in Grenada highlighted the security interests of the countries of the Caribbean region. In *The International Crisis in the Caribbean*, Anthony Payne, a Senior Lecturer in Politics at the British Huddersfield Polytechnic, takes issue

with perceived American security interests in the region and with American actions in pursuit of those interests.

The author's thesis may be stated simply: the troubles of the Caribbean region stem from the underdevelopment and poverty of the area and from the disappointed expectations of its inhabitants. The American fear of Soviet and Cuban influence is "paranoid." With the cautious exception of the early years of the Carter Presidency, United States policy toward the region has been uniformly hegemonistic, paternalistic, and exploitive. For the Reagan Administration, the author has no kind words. Indeed, in an Epilogue describing the intervention in Grenada, the United States is again scored for a military intervention in an innocent, Third World, "revolutionary" country which posed no threat to American security and in which there was an imagined danger to American citizens.

The author individually assesses the governments, economies, and foreign relations of the nations of the region. In addition, the movement toward concerted political and economic activities is discussed. In a useful appendix, statistics concerning the nations of the region, many of which may be little known to the reader, are provided. If one desires a critical appraisal of American policy toward its "own backyard," to include a discussion of the merits of the "colonial" status of Puerto Rico, this book should provide interesting reading.

9. President's National Bipartisan Commission on Central America, *The Report of the President's National Bipartisan Commission on Central America*. New York, New York: Macmillan Publishing Company, 1984. Pages: 158. Foreword by Henry A. Kissinger. Price: $7.95 (paperback). Publisher's address: Macmillan Publishing Company, 866 Third Avenue, New York, New York 10022.

On January 10, 1984 the President's National Bipartisan Commission on Central America, more commonly known as the "Kissinger Commission" after its chairman, the former Secretary of State, presented its report to President Reagan. Almost immediately, the report drew both praise and criticism from both liberals and conservatives who reviewed, and many who did not review, the document. Regardless of one's particular views of the report, however, the document will certainly serve as the point of departure for the debate over American policy in Central America for at least the balance of the decade.

The report is thankfully short and remarkably comprehensive. In eight chapters, the Commission reviews the political and economic history of the region and of the five countries upon which their study principally focused, Costa Rica, Nicaragua, Honduras,

Guatemala, and El Salvador. The Commission rejected alike the simplicities that the current crisis in the region was caused solely either by indigenous unrest or by external communist agitation. Instead, the report paints a picture of a Central America in an economic malaise that has been and is being exploited by Cuba and its principal supporter, the Soviet Union.

This report has been criticized for favoring a military solution to the region's problems. Committee member and former Democratic Party Chairman Robert Strauss has commented that those who have made such an accusation have obviously not read the report. Upon reading the report, one may conclude that Mr. Strauss seems correct. Indeed, the Commission has recommended an American policy toward Central America that would encourage the political, economic, and human development of the region; only four pages of the entire report make recommendations concerning military assistance. Similarly, much has been made of the "separate views" of individual Commission members, views which are described as dissents from the general consensus that had emerged to support the recommendations of the Commission. Yet, the separate views of the twelve Commission members, all of whom were selected to serve because of their experience or expertise in an area within the Commission's mandate, consist of less than seven pages. *Concurring* judicial opinions of single justices frequently run much longer.

In sum, the report deserves to be read by those who care to intelligently discuss the direction that American policy toward the region should take in the balance of the century. The reader may still not agree with the recommendations of the Commission, but the work and views of the Commission will certainly be better understood and appreciated.

10. Redden, Kenneth R. (ed.), *Modern Legal Systems Cyclopedia* (Volume 1: North America). Buffalo, New York: William S. Hein & Co., 1984. Pages: xxxii, 900. Price: $137.50. Publisher's address: William S. Hein & Co., 1285 Main Street, Buffalo, New York 12409.

A frequently-heard complaint voiced by American attorneys, military and civilian alike, stationed abroad is that they lack a fundamental understanding of the legal system of the country in which they find themselves. Given the increasing number of nations in which American troops may be stationed or on exercise, the present and past "Country Studies" of the DA Pamphlet series are often overtaken by events and, in any event, are frequently too general to provide any guidance for specific legal problems.

In the *Modern Legal Systems Cyclopedia*, Professor Kenneth R.

Redden of the University of Virginia has undertaken to collect detailed studies of the legal systems of major and minor countries alike in the modern world. In the first of several volumes, Professor Redden has compiled country and topical studies of the legal systems of the countries of the North American continent. In this first volume, the researcher may find useful factual and legal data concerning the American, American military, Canadian, and Mexican legal systems. Beyond those three chapters, one may find specific information on international accounting and reporting, a modern procedural framework for establishing the law of a foreign country, foreign investment in the United States, the international trade policy of the United States (by William E. Brock, the United States Trade Representative), extraterritorial application of United States antitrust laws, dispute panels of the General Agreement on Tariffs and Trade (GATT), the provision of legal services by an American attorney in a foreign country, and a comparison of the American exclusionary rule with the manner in which other nations deal with illegally obtained evidence.

Future volumes will concern the legal systems of the nations of Western Europe, Eastern Europe, Central America and the Caribbean, Africa, South America, Asia, the Pacific Islands, and the Middle East. Each volume will be periodically updated.

Professor Redden's monumental project may prove a useful tool for the civilian and military attorney alike.

11. Schacht, Joseph, *An Introduction to Islamic Law*. New York, New York: Oxford University Press, 1983. Pages: viii, 304. Chronological Table, Bibliography, List of Abbreviations, General Index, Index and Glossary of Arabic Technical Terms. Price: $18.95. Publisher's address: The Clarendon Press, Oxford University Press, 200 Madison Avenue, New York, New York 10016.

The Western world discovered the law of Islam only relatively recently. While the West was aware in a general sense of the system of punishments for crimes meted out in the Islamic world, it was only with the rebirth of Islamic fundamentalism, as witnessed in the Iranian revolution of the late 1970s, that the existence of a body of law, largely alien to our own, was widely recognized.

In *An Introduction to Islamic Law*, a reprint of a volume first published in 1964, the late Joseph Schacht, a former Professor of Arabic and Islamic Studies at Columbia University, dissected and explained the fundamentals of the law of Islam. Divided into historical and systematic sections, the book traces the roots of Islamic law and describes its current operation.

The book tackles more than the familiar penal law concepts. Chapters concerning persons, property, obligations and contracts, family law, inheritance, and procedure lead the uninitiated through the entire body of Islamic law. A Chronological Table highlights the growth and development of Islamic law and a Bibliography provides sources for further research. Especially helpful is the Index and Glossary of Arabic Technical Terms, which includes definitions and citations to locations within the text where the terms might be found.

For one with even only a passing interest in the events of Southwest Asia, *An Introduction to Islamic Law* provides a valuable frame of reference with which to view the internal workings of Islamic justice and legal systems.

12. Steadman, John M., David Schwartz and Sidney B. Jacoby, *Litigation With the Federal Government* (Second Edition). Philadelphia, Pennsylvania: American Law Institute-American Bar Association Committee on Continuing Professional Education, 1983. Pages: xiv, 502. Appendices. Price: $80.00. Publisher's address: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

This book is a revision of the original version, which issued in 1970. As the original, it provides a detailed guide for the novice and expert practitioner alike in litigating cases with the federal government. Replete with case citations and armed with well-constructed appendices that include the text of relevant statutes, rules, and regulations, tables of cases, statutes, rules, and regulations, this book is a valuable manual for the attorney.

Like the original edition, this revised version deals in great detail with litigation under the Tucker Act and the Federal Tort Claims Act, and several other areas, such as the law of mandamus and injunction against government officers, false claims and fraud against the government, attorneys' fees, contingent fees, conflict of interest, and discovery and privilege of government papers. Newer developments are also incorporated. There is thus a discussion of the Federal Courts Improvement Act of 1982, the Contract Disputes Act of 1978, and the expansion of the availability of an award of attorneys' fees under the Equal Access to Justice Act of 1980. Major court decisions are also discussed.

If the book has a shortcoming, it is its cursory dealing with litigation under the Freedom of Information Act. Covered in under three and one-half pages, the Act that has spawned a good deal of liti-

gation and a substantial amount of case law is only noted in its most general aspects.

In all other instances, *Litigation With the Federal Government* is an easy-to-read, easy-to-use manual for the attorney who is regularly or infrequently involved in facing the government in court.

13. Stern, Herbert J., *Judgment in Berlin*. New York, New York: Universe Books, 1984. Pages: 384, Postscript, Notes, Acknolwedgements. Price: $15.95. Publisher's address: Universe Books, 381 Park Avenue South, New York, New York 10016.

Courts of law frequently adjudicate what was right and what was wrong. Often, however, the courts are called upon to adjudicate between rights and determine which party to a lawsuit has the greater right to obtain, or be free from, the relief requested. Criminal courts sometimes must choose between rights, between the right of the individual accused to engage in certain conduct and the right of society to be protected from that accused engaging in it. Such a case is the subject of *Judgment in Berlin*.

On August 30, 1978, a Polish LOT airliner was diverted from its normal route from Gdansk, Poland, to East Berlin. The hijacker, armed with a pistol that had been regarded by a Polish customs officer as a "toy," caused the pilot to land the plane instead at Tempelhof Airport in West Berlin. In addition to the hijacker and his female accomplish and her child, eight other passengers deplaned and chose to remain in the West. Six hours later, the plane returned to East Berlin; no one had been harmed.

Under normal circumstances, the successful escape of an involuntary resident of an oppressive land would have been welcomed by American authorities. Indeed, the rights to "life, liberty, and the pursuit of happiness" are sanctified as "inalienable" in the Declaration of Independence and, under West German law, escape from the East was a lawful end to be pursued.

The United States and West Germany, however, were parties to an international convention on aircraft hijacking that required them to either prosecute or extradite hijackers of civil aircraft. Involved here was the right of society to protect itself in its civilian and commercial commerce in the airways from violent and, perhaps, tragic interruption. To achieve that protection, the prosecution of the interruptor, the hijacker, by *someone* was to be guaranteed. That the hijacker was trying to obtain freedom was no defense.

The West Germans would have none of the prosecution; prosecution of a Berliner for reaching for freedom across the obscenity

that is the Berlin Wall would have been more than unpopular, it would have been political suicide. With West Germany agreeing to foot the bill for the prosecution, however, the Americans would try the case. Thus, pursuant to High Commissioner Law No. 46 of 1955, the United States Court for Berlin was established. To sit as judge on that court, the Honorable Herbert J. Stern, federal district judge for the District of New Jersey and former renowned U.S. Attorney, was selected. *Judgment in Berlin* tells the story of the escape to the West, detention, trial, and eventual freedom of Hans Detlef Alexander Tiede and Ingrid and Sabine Ruske from the court's point of view. Judge Stern is not kind to the American prosecutors, the State Department, or the Army Command in Berlin. The facts of the case bear out that, while unkind, he might not have been unfair. The trial process was not freedom's most shining hour.

To be sure, the entire case was odd from the start. After initial confusion over who would prosecute, there was additional uncertainty as to who to charge. Once resolved, these problems gave way to finding a judge. Judge Stern was the third selected; one left Berlin without explanation and the second did no more during his tenure than promulgate the rules of court. One of the charges was itself bizarre, based upon a 1938 statutory relic of Nazi Germany that was still on the books in Berlin. After a granted suppression motion secured the dismissal of the charges against Ingrid Ruske, Herr Tiede was afforded a *jury* trial. American procedure and German law governed the proceedings; Judge Stern also ruled that the protections of the United States Constitution applied in the American Zone of Occupation.

However unique the court, the confrontations between counsel and judge rang familiar. To secure a conviction and avoid an international incident, however, it appeared, by Judge Stern's account, that the prosecutorial authorities straddled and, perhaps, fell astray of the standard of legal ethics to which they should have remained true. The reader is offered ample evidence to agree with the judge.

In addition to being the story of three desperate individuals seeking to breathe the air of freedom, *Judgment in Berlin* is a tale of judicial independence, even in a *sui generis* tribunal. In the end, it appeared that all interests had been served: the conviction of the hijacker of one charge had been had; he was sentenced to time served in pretrial confinement and was thus set free; Judge Stern was not intimidated. The rights of the individual and society had been accommodated and, however inadvertently, justice had been done.

14. Thomas, Ann Van Wynen and A.J. Thomas, Jr., *The War-Making Powers of the President*. Dallas, Texas: SMU Press, 1982. Pages: xiii,

177. Notes, Index. Price: $15.00. Publisher's address: SMU Press, Southern Methodist University, Dallas, Texas 75275.

In 1982, in the landmark case of *Chadda v. Immigration and Naturalization Service*, the Supreme Court cast doubt upon the constitutionality of the War Powers Resolution of 1973. That measure, it will be remembered, was a congressional attempt to curb the power of the President to commit without congressional authorization American combat troops overseas. Every President since Richard Nixon, who had vetoed the resolution only to have the veto overridden, has proclaimed the unconstitutionality of the measure, yet generally complied with the reporting requirements contained in it.

In *The War-Making Powers of the President*, a book predating *Chadda*, Professor of Political Science Ann Van Wynen Thomas and Professor of Law A.J. Thomas, Jr. trace the presidential uses of force since our inception as a nation, survey congressional efforts to control that authority, and assess the constitutionality of the War Powers Resolution. They conclude that, whatever the "signals" that the Resolution may sent to potential adversaries, presidential power has not in fact been cut back by it and that any President would, if faced with a choice between compliance and defense of what was considered a vital American interest, opt in favor of an extremely narrow reading of the Resolution. One might further argue that, after *Chadda*, the narrow reading might give way to disavowal and noncompliance with the terms of the Resolution.

15. Tiemann, William Harold and John C. Bush, *The Right to Silence: Privileged Clergy Communication and the Law.* Nashville, Tennessee: Abingdon Press, 1983. Pages: 252. Appendix: Statutes on Privileged Communication to Clergy. Notes and Acknowledgments. Subject Index, Author Index, Case Index. Price: $10.95 (paperback). Publisher's address: Abingdon Press, 201 Eighth Avenue South, Nashville, Tennessee 37202.

The subject of the relationship of religion and the law is currently a significant topic of discussion and disagreement in the Supreme Court, Congress, and state legislatures alike. One area, however, in which one would think that there would be little debate would be that of the privilege of an individual to communicate with a member of the clergy in the confidence that their discussion would forever be barred from being aired in a courtroom. *The Right to Silence: Privileged Clergy Communication and the Law,* an update of a 1964 book entitled *The Right to Silence: Privileged Communication and the Pastor*, demonstrates that this issue is not as settled as it may seem and that evidentiary and public policy issues still abound in this area of the law.

Our federalism accords each state the right to establish, *inter alia*, its rules for the admission of evidence in civil and criminal trials, subject only to the condition that those rules do not run afoul of the United States Constitution. Consequently, the rules of privilege for discussions between clergy or lay religious members and potential or actual litigants vary with the jurisdiction involved. In some cases, the legal rule may turn upon the religious rule; if the confession or communication is "enjoined" as a part of the rites of the religion, it may be privileged; if not, it may not be privileged. To acquaint the reader with this potentiality, the authors initially discuss the confessional requirements or provisions of most major religious groups in the United States.

Thereafter, the authors, both prominent nonlawyer members of the clergy, set to discuss the law, frequently on a case-by-case basis. As the cases inevitably arise in different jurisdictions which are frequently governed by different statutory definitions of the privilege, it is difficult to draw many conclusions. Of particular interest to the judge advocate, however, is the extended discussion of Military Rule of Evidence 503, which is both lauded as broader and criticized as narrower than many state statutes.

As the book is primarily directed to the clergy as a guide for their entanglements with the legal system, the authors conclude with some suggestions for those confronted with the dilemma of whether to disclose a particular communication. The appendix of state statutory provisions that deal with the privilege is especially useful in this regard. In sum, the book hopes to provide both a primer in the law to its primary audience, the clergy, as well as to provide an impetus to the legal profession to make uniform its rules of evidence to respect to the fullest extent possible all communications between religious members and others.

16. Wells, Donald A., *War Crimes and Laws of War*. Lanham, Maryland: University Press of America, Inc., 1984. Pages: x, 137. Appendices, Bibliography, Index. Price: $8.75 (paperbound). Publisher's Address: University Press of America, Inc., 4720 Boston Way, Lanham, Maryland 20706-9990.

The legitimacy of the Nuremberg and Tokyo war crimes trials has been debated almost since their inception. Did the trials merely constitute "victor's justice" or did the charges of crimes against peace, war crimes, and crimes against humanity have a basis in customary international law? Moreover, as regards present standards, *i.e.*, those that might be applied to future war crimes trials, what is the rationality of an international law of war that prohibits barbed

bullets, yet permits the use of napalm, fragmentation bombs, or, indeed, nuclear weapons?

In *War Crimes and Laws of War*, Donald A. Wells, a Professor of Philosophy at the University of Hawaii at Hilo, traces the history of the rules of armed conflict from the sixteenth century to the Nuremberg and Tokyo trials. His conclusion is that, whatever rules of war are ultimately promulgated, no nation will subordinate its sovereignty to them. The rules are therefore meaningless in practice.

The book focuses on three aspects of the issue: international congresses and agreements designed to regulate the conduct of nations, military manuals designed to dictate the conduct of armies and individual soldiers, and the war crimes trials of national leaders and individual soldiers accused of violating either. All are traced through history. Most interesting is the discussion of the various war crimes trials which, although brief, provides the reader with a summary of the modern prosecutions for violations of the rules of combat. The variety of sentences, ranging from death for the Commandant of the Andersonville prisoner-of-war camp to admonition to a general officer for having given a "take no prisoners" order, is particularly enlightening.

Finally, the Vietnam War is measured by the standards set at Nuremberg and found wanting. For example, the articulated bases for the bombing of North Vietnam are alleged to be as indefensible as the rationales for the crimes against humanity committed by the Nazis. Similarly, United States involvement in Vietnam is likened to the war of aggression waged by Germany and for which its leaders were tried. This section of the book is, even more than many others, a point at which the author doffs the scholar hat and takes on an advocatory role in advancing his position. Contrary positions are neither acknowledged nor distinguished. Rather, accepted as truths are that the Vietnam War was a "civil war," that it was a "domestic people's war," and that North Vietnam could not be an aggressor in "their own country." If one chooses to accept these premises, one might agree with the author. Unfortunately, the author leaves no room for anyone to dispute them.

For those interested in the field, an extensive bibliography is provided.

17. Wildavsky, Aaron (ed.), *Beyond Containment: Alternative American Policies Toward the Soviet Union*. San Francisco, California: ICS Press, 1984. Pages: xi, 264. Notes, Contributors, Index. Price: $21.95 (cloth), $8.95 (paperbound). Publisher's address: ICS

Press, Institute for Contemporary Studies, 785 Market Street, San Francisco, California 94103.

Since the late 1940s, and articulated in an article in *Foreign Affairs* by George Kennan in 1947, containment has been a truism of the United States' relations with the Soviet Union for almost 40 years. Supported aggressively by Presidents Truman in Greece, Turkey, and Korea, Eisenhower in Korea and Lebanon, Kennedy in Cuba and Vietnam, and Johnson in Vietnam, interest in "containing" communism by the willingness to "pay any price, bear any burden" began to wane with the Tet Offensive of 1968, only to be somewhat reborn with the reality of the Soviet invasion of Afghanistan in 1979.

The ultimate objective of containment, as originally posited in the Kennan article, however, has long been forgotten. Containment of communist expansion, it was believed, would eventually lead to a pluralization of the Soviet system, which had succeeded in ignoring failures and the need to change at home by legitimizing the communist system by successes and expansion abroad. Obviously, that domestic mellowing has not happened. In light of this "failure" of containment, the Institute for Contemporary Studies has collected ten essays on alternative policies toward the Soviet Union. All have containment as practiced since the Cold War as the starting point; all venture, however, "beyond containment" in proposing new American initiatives in its relations with the Soviet Union.

The theories are variously named. A theory of "selective engagement" whereby the United States would commit itself to the defense of only those interests deemed vital to the United States is advanced by Ernest B. Haas, the Hobson Research Professor of Government at the University of California at Berkeley. The editor of the book, Aaron Wildavsky, Professor of Political Science and Public Policy at Berkeley, proposes that the United States actively foster political pluralization within the Soviet Union, while practicing a policy of "maximal containment" in foreign affairs that would mobilize political, military, and economic forces to meet the challenges posed by the USSR and its proxies. Similar in view is the theory of "dynamic containment" offered by Max Singer, President of the Potomac Organization.

This volume is the third in a series published by the Institute for Contemporary Studies dealing with crucial issues of national defense and foreign policy.

18. Woolsey, R. James (ed.), *Nuclear Arms: Ethics, Strategy, Politics*. San Francisco, California: ICS Press, 1984. Pages: x, 289.

Notes, Contributors, Index. Price: $22.95 (cloth), $8.95 (paperbound). Publisher's address: ICS Press, Institute for Contemporary Studies, 785 Market Street, San Francisco, California 94103.

Of central interest on the world stage for the last forty years has been the issue of nuclear weapons. Methods to develop them, control them, and, idealistically, eliminate them have proliferated the halls of government and the pages of scholarly journals. Today, in place of issues such as "massive retaliation," one hears intense debate on such matters as the Catholic Bishops' letter, the nuclear freeze, and "Star Wars" technology.

In *Nuclear Arms: Ethics, Strategy, Politics*, the Institute for Contemporary Studies has collected several essays that attempts to provide a perspective for the debate on nuclear arms in the 1980s. Tackling such issues as the continued viability of "mutual assured destruction," "no first use," the intermediate range nuclear force deployment, and the vulnerability of the United States to terrorism, the book points out some disturbing realities concerning the strategic posture and planning of the United States and the Soviet Union.

Among the more engaging essays are Charles Krauthammer's dissection of the Bishop's letter in light of traditional deterrence theory, Brent Scowcroft's survey of the American strategic arsenal, Richard Burt's evaluation of the broader implications for Western unity of the NATO Pershing II and cruise missile deployment, Walter B. Slocombe's and Colin S. Gray's dissertations, respectively, on the prospects and pitfalls of arms control negotiations. Nonnuclear threats to the United States based upon vulnerability in energy production facilities and amenability to terrorist attack, and the prospects and dangers of extending either the arms race or defensive capabilities into space are also highlighted.

The latest in a series of publications dealing with crucial national issues, this book certainly constitutes a valuable contribution to the nuclear policy debates of the mid-1980s.

19. Ziegenfuss, Dr. James T., Jr., *Law, Medicine & Health Care: A Bibliography*. New York, New York: Facts on File, Inc., 1984. Pages: ix, 265. Price: $45.00. Publisher's address: Facts on File, Inc., 460 Park Avenue South, New York, New York 10016.

If the United States is, as charged by many, a litigous society, it is possible that one of the greatest fields of the litigation explosion is in the areas of medicine and health care and the law. In the discussion of topics such as brain death, abortion, and the rights of "Baby Doe" to medical treatment, well-established constitutional rights may

either conflict with or complement equally well-established tenets of the medical profession.

In *Law, Medicine & Health Care: A Bibliography*, Dr. James T. Ziegenfuss, Jr., a Professor of Health Care Management at Penn State University, provides a bibliography of over 3500 citations on medico-legal subjects for the practitioner in the field. In addition to cataloging scores of articles in the field, the author has also provided a listing of journals that specialize in the medicine and the law, as well as of law firms that regularly practice in the field of medicine and health care. Of particular interest to the litigator is the extensive bibliography of titles in medical malpractice.

A valuable research tool, the book is a welcome addition to the library of bibliographies on medicine and the law.

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

ROBERT M. JOYCE
Major General, United States Army
The Adjutant General