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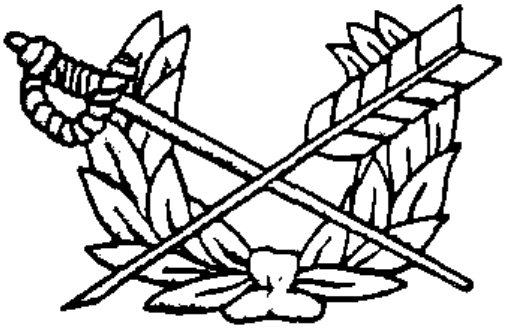

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MILITARY LAW REVIEW

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EYEWITNESS IDENTIFICATION IN MILITARY LAW

by
Colonel Francis A. Gilligan*
and
Major Alan K. Hahn**

I. INTRODUCTION

The special dangers involved in eyewitness identification have led to the development of a unique body of law. This article discusses primarily the unique constitutional and evidentiary problems involved in eyewitness identification.

From the constitutional standpoint, many law enforcement officials and prosecutors readily see the right to counsel and due process issues, but overlook the fourth amendment issues. Additional problems arise from interpreting the "codification" of the right to counsel and due process rules in Military Rule of Evidence (Rule) 321. Finally, the existence of an independent source may allow an in-court identification even if a violation of the right to counsel, due process, or the fourth amendment excludes evidence of the pretrial identification.

From an evidentiary view, Rules 321 and 801(d)(1)(C) raise questions concerning when prior statements of identification are admitted for truth and when they are admitted only to bolster the identification witness' credibility. Other problems exist concerning the admissibility of expert testimony on the unreliability of eyewitness identification and the propriety of such measures as in-court lineups and special cautionary instructions.

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II. SIXTH AMENDMENT—ACCRUAL OF THE RIGHT TO COUNSEL

Rule 321 divides the question of right to counsel between "military lineups"[1] and "nonmilitary lineups."[2] This distinction was made because the military does not have a preliminary hearing, information, or indictment and so cannot easily assimilate civilian law. The drafters sought by the distinction between the two types of lineups to comport with the sixth amendment standard established by the Supreme Court.[3]

A. RIGHT TO COUNSEL AT NONMILITARY LINEUP

The right to counsel at a nonmilitary lineup for the purposes of identification accrues at the same time as "shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups."[4] The keys to these principles are the Supreme Court decisions of *United States v. Wade*[5] and *Gilbert v. California*.[6]

In *Wade* the Court ruled prospectively[7] that a post-indictment[8] lineup was a critical stage of the prosecution which required the presence of counsel. In *Wade* and *Gilbert*, a witness had previously identified the defendant at a lineup conducted after the indictment and after appointment of counsel. To enforce the right to counsel, the Court provided that failure to provide counsel resulted in *per se* exclusion[9] of the pretrial identification. Subsequent identifications, including in-court identifications, were also excluded unless the prosecution showed by clear and

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[1]Mil. R. Evid. 321(b)(2)(A).

[2]Mil. R. Evid. 321(b)(2)(B).

[3]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 321(b)(2) analysis (1980) [hereinafter cited as Mil. R. Evid. 321 analysis].

[4]Mil. R. Evid. 321(b)(2)(B).

[5]388 U.S. 218 (1967).

[6]388 U.S. 263 (1967).

[7]Stovall v. Denno, 388 U.S. 293, 297 (1967).

[8]While *Wade* involved a post-indictment lineup, the language of the opinion was broad enough to encompass "any pretrial confrontation." *Wade*, 388 U.S. at 227. *Gilbert* and later cases, however, characterized *Wade* as being limited to post-indictment lineups. *Gilbert*, 388 U.S. at 272. Moore v. Illinois, 434 U.S. 220, 224 (1977).

[9]*Gilbert*, 388 U.S. at 272-73. *See also Moore*, 434 U.S. 231-32. The Court did not address, and there is no authority from the Supreme Court, as to whether this exclusionary rule applies if the sole identification witness is unable to make an in-court identification due to senility, forgetfulness, death, or fear engendered by threats.

convincing evidence that the in-court identification had a basis independent of the pretrial identification.[10]

In *Wade* the Court found a post-indictment lineup to be a critical stage because: (1) eyewitness identification is recognized as being inherently untrustworthy;[11] (2) there is the ever present danger of suggestive influences in the presentment of an accused for identification;[12] (3) the presence of counsel may deter the use of suggestive lineup practices;[13] and, (4) it is nearly impossible for counsel to reconstruct what happened at a lineup conducted without counsel, thereby substantially curtailing the accused's ability to cross-examine and attack the credibility of the in-court identification.[14]

The impact of *Wade* was severely limited by the Supreme Court's decision in *Kirby v. Illinois*,[15] where the Court decided that individuals are not entitled to a lawyer at a lineup until the "initiation of adversary judicial criminal proceedings."[16] This initiation occurs when "the government had committed itself to prosecute"[17] and "the adverse positions of [the] government and defendant have solidified."[18] At this point the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[19]

Kirby's language is unclear as to the exact procedural stage at which the accused is entitled to counsel at a confrontation for identification. The opinion states only that the answer depends on when the "initiation of adversary judicial criminal proceedings" takes place. Although Chief Justice Burger's concurring opinion seemed to indicate that this initia-

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[10]On one hand, the Court stated it was meaningless to merely exclude the pretrial identification because the defense may be compelled to bring out the pretrial identification anyway to show its unfairness, and the defense would thereby unintentionally bolster the in-court identification by dwelling on the pretrial identification. The defense, therefore, has an opportunity to exclude both the pretrial and the in-court identification. *Wade*, 388 U.S. at 240, 241. On the other hand, the Court also felt it was unjustified to exclude an in-court identification when an independent source for the identification existed. The *per se* exclusion of the pretrial identification was thought to be sufficient to deter police misconduct by depriving the government of the opportunity to bolster the witness by evidence of previous identifications. *Gilbert*, 388 U.S. at 241-42. *See infra* notes 262-283 and accompanying text.

[11]*Wade*, 388 U.S. at 228.

[12]*Id.* at 228-39.

[13]*Id.* at 236.

[14]*Id.* at 227-35, 239.

[15]406 U.S. 682 (1972).

[16]*Id.* at 689.

[17]*Id.*

[18]*Id.*

[19]*Id.*

tion occurs when the accused has been formally charged,[20] the plurality opinion suggests that this right accrues at the time of formal charge, preliminary hearing, indictment, information, or arraignment.[21] While not naming a specific stage when the accused is entitled to counsel, the Court did set forth a rule that can be easily followed by law enforcement officials. The accused is not entitled to counsel at any confrontation for identification prior to formal charge, preliminary hearing, indictment, information, or arraignment, provided that these stages of the prosecution are not purposely delayed to deny the accused the right to counsel.[22]

Some lower courts have interpreted *Kirby* to mean that an arrest without a warrant,[23] an arrest pursuant to a warrant,[24] or an arrest plus confinement triggers the right to counsel at a lineup.[25] Other courts have ruled, however, that an arrest is not a "formal charge" or "initiation of [the] adversary criminal proceedings."[26] A third line of cases have declared that no right to counsel exists prior to the information or indictment.[27]

This third view was rejected in *Moore v. Illinois*,[28] when the Supreme Court held that the defendant was entitled to counsel at a showup conducted at the time of the preliminary hearing. The Court specifically rejected the argument that a defendant is entitled to counsel only after the indictment.[29] The Court also rejected arguments that the right to counsel did not accrue at showups[30] or at judicial proceedings such as a preliminary hearing.[31] The Court stated that *Wade* and *Kirby* apply to all confrontations after the "initiation of adversary judicial criminal proceedings," whether at the stationhouse or in the courtroom.

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[20]*Id.* at 691.

[21]*Id.* at 689.

[22]State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873, 882-83 (1973).

[23]*See, e.g.*, State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974).

[24]*See, e.g.*, Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972); State v. Morris, 484 S.W.2d 288 (Mo. 1972).

[25]*See, e.g.*, Patler v. Slayton, 503 F.2d 472 (5th Cir. 1974); People v. Coleman, 381 N.Y.S.2d 692 (App. Div. 1976).

[26]*See, e.g.*, United States v. Duvall, 537 F.2d 15 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976); Lane v. State, 506 S.W.2d 212 (Tex. Cr. App. 1974); West v. State, 229 Ga. 427, 192 S.E.2d 163 (1972).

[27]*See, e.g.*, Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1972); Ashford v. State, 274 So. 2d 517 (Fla. App. 1973); State v. St. Andre, 263 La. 48, 267 So. 2d 190 (1972).

[28]434 U.S. 220 (1977).

[29]*Id.* at 228. The 7th Circuit erroneously read "*Kirby* as holding that evidence of a corporeal identification conducted in the absence of defense counsel must be excluded only if the identification is made after the defendant is *indicted*. . . . Such a reading cannot be squared with *Kirby* itself. . . ." (emphasis in original).

[30]*Id.* "Although *Wade* and *Gilbert* both involved lineups, *Wade* clearly contemplated that counsel would be required in both [lineups and showups] situations. . . ." *Id.* at 229.

[31]*Id.* at 229.

The right to counsel rule of *Wade*, *Gilbert*, and *Kirby* has been attacked from both directions. On one hand, an exclusionary rule which disqualifies a knowledgeable witness from testifying is contrary to the general trend of evidentiary law to reduce witness disqualifications.[32] Witness disqualification, as opposed to merely excluding objects, is a drastic remedy otherwise disfavored by the Supreme Court even for constitutional violations.[33] Congress unsuccessfully attempted to overrule the cases by statutorily mandating the admission of eyewitness testimony in federal trials.[34] In addition to *Kirby*, however, the harsh effects of the rule have been ameliorated in police practices by use of the photo lineup[35] and liberal application of the independent source test.[36]

On the other hand, *Kirby* has been attacked as inconsistent with the intent of *Wade* and as insufficiently protective of the accused. The *Kirby* decision was consistent with the holding in *Wade* but did not rely on its underpinnings.[37] Justice Brennan's opinion in *Wade* relied upon the sixth amendment and the accused's right to counsel in criminal proceedings, but the purpose of the right to counsel announced in *Wade* and *Gilbert* was primarily to ensure the fairness of the identification proceedings and a fair trial.[38] It was not limited to the case when the suspect was already indicted. The dangers of pretrial confrontation for the purpose of identification exist whether or not adversarial judicial criminal proceedings have been initiated.[39]

B. RIGHT TO COUNSEL AT MILITARY LINEUPS

The *Wade-Gilbert* right to counsel rules were originally adopted in military case law[40] and then in the 1969 Manual for Courts-Martial.[41] The original military rule predated the *Kirby* "initiation of adversary

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[32]*See generally* McCormick's Handbook of the Law of Evidence § 71 (E. Cleary 3d ed. 1984).

[33]United States v. Ceccolini, 425 U.S. 268 (1978) (testimony of witness not excludable as fruit of illegal search); Michigan v. Tucker, 417 U.S. 433 (1974) (applying *Miranda* retroactively, the Court declined to exclude testimony of witnesses discovered from unwarned interrogation).

[34]18 U.S.C. § 3502 (1976). *See generally* Wright, Federal Practice and Procedure: Criminal 2d § 414.1 (1982). The statute expressly applies only to Article III courts and does not therefore on its face apply to courts-martial.

[35]*See infra* notes 80-84 and accompanying text.

[36]*See infra* notes 262-283 and accompanying text.

[37]Both *Wade* and *Gilbert* were post-indictment cases. The Court referred to this fact in *Wade* at least twice. *Wade*, 388 U.S. at 219, 237.

[38]*Wade*, 388 U.S. at 226, 227.

[39]*See generally* Levine & Tap, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. Pa. L. Rev. 1079 (1973).

[40]United States v. Webster, 40 C.M.R. 627 (A.B.R.), *petition denied*, 18 C.M.A. 640, 40 C.M.R. 327 (1969).

[41]Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 153a [hereinafter cited as MCM, 1969].

judicial criminal proceedings" test and established a right to counsel at a military lineup when the soldier was an accused[42] or suspect,[43] that is, when the criminal investigation had focused on an individual.[44]

Kirby's "initiation of adversary judicial criminal proceedings" test was finally adopted in military law with the promulgation of Rule 321 in 1980.[45] Because of the difficulty in transposing the *Wade-Kirby* rules directly to the military, the drafters adopted a rule to satisfy their holdings and rationales. The military rule is summarized as follows:

> An (1) accused or suspect is entitled to (2) counsel at a (3) lineup for the purpose of identification (4) conducted by persons subject to the Uniform Code of Military Justice (5) after the preferral of charges or the imposition of pretrial restraint under R.C.M. 304 for the offense under investigation.

1. An accused or suspect

Rule 321(b)(2)(A) retains the MCM, 1969, paragraph 153a language that only an accused or a suspect is entitled to counsel at a military lineup. A soldier becomes an accused after charges have been sworn.[46] When one becomes a suspect is more problematic. The courts had apparently used only an objective test to determine whether the soldier was a suspect regarding right to counsel at a lineup. Analogous case law dealing with when a soldier is a suspect under Article 31(b) indicates, however, that the test for "suspect" is both subjective and objective.[48] The soldier is a suspect if the investigator actually suspects the soldier or reasonably should suspect him or her. Even if the accused or suspect tests are satisfied, however, there is no entitlement to counsel unless the other prerequisites to the rule are met or unless the right accrues earlier.[49]

2. Counsel

When the right to counsel accrues, "counsel shall be provided by the United States at no expense to the accused or suspect and without regard to indigency or lack thereof before the lineup may proceed."[50] Coun-

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[42]An accused is one against whom charges have been sworn. *See* Uniform Code of Military Justice arts. 1(9), 30, 10 U.S.C. §§ 801(9), 830 (1982) [hereinafter cited as UCMJ].

[43]Whether the soldier has become a suspect is an objective test. United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).

[44]*Webster*, 40 C.M.R. at 634.

[45]Exec. Order No. 12,198 (March 12, 1980).

[46]*See supra* note 42. This provision of Mil. R. Evid. 321 is redundant in that preferral of charges of itself triggers the right to counsel.

[47]United States v. Longoria, 43 C.M.R. 676, 679 (A.C.M.R. 1971).

[48]United States v. Morris, 13 M.J. 297, 298 (C.M.A. 1982); United States v. Henry, 21 C.M.A. 98, 44 C.M.R. 152, 155 (1971); United States v. Schafer, 13 C.M.A. 83, 32 C.M.R. 83, 88 (1962).

[49]*See infra* notes 73-79 and accompanying text.

[50]Mil. R. Evid. 321(b)(2)(A).

sel is defined as "a judge advocate certified in accordance with Article 27(b)."[51] There is no right to individual military or civilian counsel. The limitation of the right to counsel to assigned military counsel is based on the assumption that substitute counsel satisfies the requirements of *Wade*.[52]

3. Lineup for the purpose of identification

This phrase, which originated in MCM, 1969, paragraph 153a, has led to some confusion because the common definition of "lineup" does not include the term "showup." Lineup describes an event where the suspect is placed in a group of persons and the witness views the group attempting to pick out the guilty party. A showup is a one-on-one confrontation between the witness and the suspect.[53] The Supreme Court has held that one-on-one identification procedures implicate the right to counsel,[54] though exceptions such as accidental viewings[55] and on-the-scene showups[56] have been permitted. Photographic lineups are not covered by the right to counsel.[57] A more accurate phrasing would reflect the Supreme Court language and apply the right to counsel at a "corporeal confrontation for identification."[58]

In the military context certain unique issues have arisen as to what is a lineup for purposes of the rule. Because of the law enforcement role of commanders,[59] lineups conducted by commanders are covered by the right to counsel.[60] A showup at an Article 15 proceeding ("Office Hours") was held not to be a lineup for right to counsel purposes because it was a "quasi-judicial proceeding" during which the commander was deciding what to do with a subordinate charged with an offense.[61] The validity of this ruling is doubtful after *Moore v. Illinois*[62] which held that an in-court identification (showup) at a pretrial *judicial* proceeding (a prelimi-

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[51]The 1980 version of Rule 321(b)(2)(A) defined counsel as "a judge advocate or law specialist within the meaning of Article 1 or a person certified in accordance with Article 27(b)." The phrase "or law specialist" within the meaning of Article 1" was deleted as unnecessary in 1984. Mil. R. Evid. 321 analysis (1984).

[52]For more detailed discussion *see infra* notes 100-110 and accompanying text.

[53]Gilligan, *Eyewitness Identification*, 58 Mil. L. Rev. 183, 185 n.19 (1972).

[54]Moore v. Illinois, 434 U.S. 220, 229 (1977).

[55]*See infra* notes 89-94 and accompanying text.

[56]*See infra* notes 85-88 and accompanying text.

[57]United States v. Ash, 413 U.S. 300 (1973).

[58]*See* United States v. Wade, 388 U.S. 218, 229 (1967); United States v. Ash, 413 U.S. 300 (1973). In any event, the drafters recognized the term "lineup" was ambiguous and noted that recourse to case law would be necessary. Mil. R. Evid. 321 analysis (1980).

[59]*Cf.* United States v. Ezell, 6 M.J. 307 (C.M.A. 1979); United States v. Adolf, 15 M.J. 775 (A.C.M.R. 1982).

[60]United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970).

[61]United States v. Torres, 47 C.M.R. 192, 194 (N.C.M.R. 1973).

[62]434 U.S. 220 (1977).

nary hearing) required the presence of counsel.[63] Thus, *a fortiori*, the right to counsel should attach at a quasi-judicial proceeding. The problems of counsel unavailability due to military circumstances, *i.e.*, remote locations, ships at sea, have been raised but have not been directly resolved.[64] Unlike fourth amendment jurisprudence, an exigent circumstances exception does not exist for the right to counsel.[65] Photo lineups, however, could be used. Finally, it has been found that it is not a lineup for right to counsel purposes for a witness who personally knew the suspect to point out the suspect to investigators when the witness offered to name the suspect but the investigators wanted the suspect pointed out to prevent confusion.[66]

4. Conducted by persons subject to the UCMJ

The right to counsel for military lineups attaches only if the lineup is conducted by persons subject to the Uniform Code of Military Justice (UCMJ) or their agents.[67] Included are lineups conducted by law enforcement officials and superiors of the accused.[68] Although not expressly stated in the rule, there is a requirement of officiality;[69] self-help identification procedures pursued by private persons do not trigger the right to counsel.[70] The right to counsel at lineups conducted by domestic authorities are governed by "the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups."[71] There is no right to counsel at lineups conducted by foreign police who are not acting as agents for military authorities.[72]

5. After preferral of charges or the imposition of pretrial restraint under R.C.M. 304 for the offenses under investigation

The 1969 Manual in paragraph 153a implemented the right to counsel rule in an expansive manner. The right attached when the accused was a

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[63]*Id.* at 229.

[64]In United States v. Wright, 50 C.M.R. 365 (N.C.M.R. 1975), the accused was on a vessel in port at Trieste, Italy. The nearest judge advocate was in Naples, Italy. The accused was subject to an on-deck lineup the morning after the offense. The court lamely concluded the procedure was not a lineup, or alternatively, that it was "on the scene," despite the fact that the crime occurred the night before. *See infra* notes 85-88 and accompanying text. Finally, the court concluded that even if it was an illegal lineup, there was an independent basis for the in-court identification. *See infra* notes 262-283 and accompanying text.

[65]*Cf.* Mil. R. Evid. 315(g) (allows exigent circumstances exception to this warrant requirement).

[66]United States v. Beebe, 47 C.M.R. 389 (A.C.M.R. 1973).

[67]Mil. R. Evid. 321(b)(2)(A).

[68]*See supra* notes 59-60 and accompanying text.

[69]United States v. Holmes, 43 C.M.R. 430, 432 (A.C.M.R. 1970).

[70]*See id.*

[71]Mil. R. Evid. 321(b)(2)(B).

[72]United States v. Waldrop, 41 C.M.R. 907 (A.F.C.M.R. 1970). Mil. R. Evid. 321 analysis (1980).

suspect, regardless of whether any adversarial criminal proceedings were initiated. The original Military Rule of Evidence 321(b)(2)(A) attempted to conform military law to *Kirby* by stating that the right to counsel attached when charges were preferred or when pretrial restraint under paragraph 20 was imposed (pretrial confinement, restriction, or arrest).[73] Although this rule cut back on the accused's entitlement to counsel, it had the advantage of being easy to apply. It is far easier to determine when charges have been preferred, for example, than to determine whether a soldier has become a suspect.

The amendments to the counsel rule of Rule 321 resulted from incorporating by reference the expanded definition of pretrial restraint under Rule for Courts-Martial 304 of the 1984 Manual for Courts-Martial which goes beyond the former paragraph 20 to include conditions on liberty as a form of pretrial restraint that triggers the right to counsel. Because of the broad definition of conditions on liberty and because any commissioned officer may impose conditions on liberty on any enlisted person,[74] the rule could be accidentally triggered or be triggered without the knowledge of the trial counsel or law enforcement agency.

The discussion and language of Rule for Courts-Martial (R.C.M.) 304 show that the rule is not aimed at a one time order such as to report for interrogation or to be in a lineup,[75] or that it was meant to include an apprehension.[76]

The amended Rule 321(b)(2)(A) only requires that pretrial restraint under R.C.M. 304 be imposed and does not require that the restraint be continuing or in effect at the time of the lineup, although this was probably the intent of the drafters.[77] This problem, which also existed with the old rule, has never been judicially addressed. For example, will the soldier who is restricted to the company area for one day to be available for questioning be entitled to counsel three weeks later at a lineup even though charges have not been preferred and no other forms of pretrial restraint have been imposed?

Also, issues may arise concerning whether actions not previously considered as related to pretrial restraint such as suspension of privileges or retention beyond end of term of service (ETS) constitute a condition on liberty. For example, a soldier who is suspected of committing an offense downtown may lose pass privileges, or a commander as a matter of

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[73]Mil. R. Evid. 321 analysis (1980).

[74]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 304(b)(2) [hereinafter cited as R.C.M.].

[75]*See generally* United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983).

[76]*See generally* Mil. R. Evid. 321 analysis (1980).

[77]*Cf.* R.C.M. 707(b)(2), which tolls the running of time for speedy trial purposes if the pretrial restraint is lifted for a significant period.

policy may suspend leave for soldiers who are under investigation. Are those lost privileges conditions on liberty?

Finally, issues will arise as to whether conditions on liberty which do not meet the procedural requirements of R.C.M. 304 will nonetheless trigger the rule. For example, is the rule triggered if conditions on liberty are ordered by an NCO who has not been delegated pretrial restraint authority[78] or an officer from whom authority has been withheld?[79]

C. PHOTOGRAPHIC LINEUPS

Because of the ambiguity in the definition of lineup in Rule 321(b)(2)(A), the rule generally applied in the trial of criminal cases in the United States will determine the right to counsel at photograhic lineups.[80]

In *United States v. Ash*,[81] the Supreme Court held that there was no right to counsel at a photographic lineup even though the lineup took place after the initiation of adversary judicial criminal proceedings. The majority recognized problems of unreliability and the difficulty in reconstructing what happened, but felt that photo lineups were less suggestive and more easily reconstructed than corporeal lineups.[82] The Court held that a photo lineup did not constitute a "critical stage" in the criminal prosecution requiring the presence of counsel to assist the accused in confronting the government within an adversarial arena. Comparing a photographic array to the prosecutor's pretrial interview of a witness, the Court found that the accused had no right to be present at either proceeding and therefore no requirement for counsel existed.

In a pre-*Ash* case, the Army Court of Military Review adopted a similar approach by holding that the right to counsel applies only to corporeal, not photographic, exhibitions of an accused to witnesses.[83] The photographs used in a photo lineup would also be admissible to bolster the identification.[84]

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[78]R.C.M. 304(b)(2), (3).

[79]R.C.M. 304(b)(4).

[80]*See supra* notes 53-58 and accompanying text.

[81]413 U.S. 300 (1973).

[82]*Id.* at 313-17, 321. *But see* State v. Wallace, 285 So. 2d 796, 801 (La. 1973); People v. Stewart, 63 Mich. App. 6, 233 N.W.2d 870 (1975).

[83]United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1981).

[84]*See* United States v. Gordon, 18 M.J. 463 (C.M.A. 1984).

D. ON THE SCENE IDENTIFICATIONS

Both civilian[85] and military[86] courts have adopted the position that no counsel rights attach at on the scene showups. The primary rationale is that on-the-scene identifications are fresh and therefore more accurate and reliable than later lineups.[87] The delay occasioned by putting a lineup together and summoning counsel may diminish the reliability of any identification obtained, thus defeating a principal purpose of the counsel requirement.[88] Additionally, showups reduce unnecessary detention of innocent suspects.

E. ACCIDENTAL VIEWINGS

In *Stovall v. Denno*,[89] the Supreme Court stated that the reason for fashioning the exclusionary rule of *Wade* and *Gilbert* was to "deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice and in the absence of counsel."[90] Courts have refused to enforce counsel requirements to truly accidental viewings at the stationhouse or courthouse on the logical grounds that an unintentional exposure cannot be deterred so exclusion would not serve the purpose of the rule.[91] In addition, while accidental viewings have been held to violate due process and result in excluded, unreliable identifications,[92] most accidental viewings are found not to be unnecessarily suggestive,[93] but rather enhance the reliability of the witness' identification.[94]

F. POST-LINEUP INTERVIEWS

The courts have declined to entitle defense counsel to attend post-lineup interviews between police and witnesses.[95] Courts have reasoned that *Wade* only protects the face-to-face confrontation, that the evils *Wade*

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[85]United States v. Hines, 455 F.2d 1317 (D.C. Cir.), *cert. denied*, 406 U.S. 975 (1971); Russell v. United States, 403 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969).

[86]United States v. Smith, 2 M.J. 562 (N.C.M.R. 1976); United States v. Cyrus, 41 C.M.R. 959 (A.F.C.M.R. 1971). *See* United States v. Mesolella, 42 C.M.R. 495, 498 n.1 (A.C.M.R. 1970).

[87]*See also* United States v. Batzel, 15 M.J. 640, 463 (N.M.C.M.R. 1982).

[88]The same rationale that earlier identifications are more reliable underlies Rule 801(d)(1)(C) which admits prior statements of identification as non-hearsay. *See infra* notes 298-304 and accompanying text.

[89]388 U.S. 293 (1967).

[90]*Id.* at 297.

[91]United States v. Young, 44 C.M.R. 670, 677 (A.C.M.R. 1971); *see also* United States v. Massaro, 544 F.2d 547 (1st Cir. 1976) (opinion by Justice Clark).

[92]*See, e.g.*, Green v. Loggins, 614 F.2d 219 (9th Cir. 1980).

[93]United States v. Hansel, 699 F.2d 18, 40 (1st Cir. 1983).

[94]United States v. Massaro, 544 F.2d 550, 551 n.6 (1st Cir. 1976) (cases collected).

[95]Daigre v. Maggio, 705 F.2d 786 (5th Cir. 1983); United States v. Kehrer, 41 C.M.R. 892 (A.F.C.M.R. 1969).

seeks to avoid (prejudice at lineup and inability to cross-examine) are diminished at a post-lineup interview, and that "there generally is no right to be present at prosecution interviews of witnesses."[96] Courts have suggested that the result would differ if counsel is denied the opportunity to reconstruct all elements of the lineup and related interviews,[97] if there are suggestive statements or actions by government agents while counsel is excluded,[98] or if access to witnesses is interfered with or denied.[99]

III. CONTENT OF THE RIGHT TO COUNSEL

Assume the accused or suspect is entitled to counsel at a lineup. Is the accused entitled to counsel of the accused's own choosing? May counsel testify at trial about the lineup? What is the role of counsel at a lineup?

A. SUBSTITUTE COUNSEL

Rule 321(b)(2)(A) does not provide for counsel of the accused's or suspect's own selection. It merely provides that if counsel is requested, "a judge advocate or a person certified in accordance with Article 27(b) shall be provided by the United States at no expense to the accused or suspect."[100] By implication there is no right to individual military or civilian counsel,[101] even if the accused already has such counsel for that offense.[102]

In *Wade* the Court stated, "[W]e leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay."[103] The Court further stated, "Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical

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[96]*See generally* United States v. Bierby, 588 F.2d 620 (8th Cir. 1978), *cert. denied*, 440 U.S. 927 (1979).

[97]United States v. Banks, 485 F.2d 545 (5th Cir. 1973).

[98]*Id.*

[99]United States v. Rich, 580 F.2d 929 (9th Cir. 1977), *cert. denied* 439 U.S. 935 (1978). *See also* United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980). Telling witnesses they have the option of not talking to the defense counsel is not interference. *Rich*, 580 F.2d at 934.

[100]Mil. R. Evid. 321(b)(2)A).

[101]*See* United States v. Kirby, 427 F.2d 610 (D.C. Cir. 1970) (not error to use Legal Aid lawyer where assigned counsel not notified through administrative error). *Cf.* R.C.M. 305(d)(2) which provides for individual civilian counsel but not individual military counsel when counsel is requested before an interrogation.

[102]*Cf.* R.C.M. 305(e) which requires notice to counsel before questioning an accused when the questioner knows or reasonably should have known that counsel has been either appointed or retained with respect to that offense.

[103]*Wade*, 388 U.S. at 237.

stage for the presence of the suspect's *own* counsel."[104] Relying on this language, the Army Court of Military Review held in *United States v. Longoria* that substitute counsel met the requirements of *Wade* even though there was no establishment of an attorney-client privilege.[105]

Exactly what substitute counsel must do to eliminate the hazard of confrontation is unclear. At a minimum, substitute counsel should be available to aid the defense counsel in understanding and reconstructing the lineup so there may be meaningful cross-examination at trial.[106] Substitute counsel's role at the lineup is more problematic. It is unclear whether counsel at a lineup should passively observe or actively object and make suggestions.[107] It may be that substitute counsel's deterrent value, along with providing information about the lineup, serves to avert prejudice.[108]

Although Rule 321(b)(2)(A) merely requires a judge advocate, the language in *Wade* implies that the court wished to subject the police to an impartial observer not connected with the police.[109] Substitute counsel will also help by providing a presumably reliable witness to the lineup procedures who may testify without ethically disqualifying the trial defense counsel.[110]

B. PROPRIETY OF COUNSEL'S TESTIMONY AT TRIAL

Use of substitute counsel avoids the prohibitions of Disciplinary Rules 5-101 and 5-102,[111] which provide that unless relating to an uncontested matter, a matter of formality, or unless the lawyer has distinctive value to the client, an attorney should withdraw if it is obvious that he or she ought to be called as a witness on behalf of the client. A further excep-

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[104]*Wade*, 38 U.S. at 237 n.27 (emphasis in original).

[105]United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).

[106]*Longoria*, 47 C.M.R. at 680, 681. United States v. Field, 473 F.2d 98, 102 (D.C. Cir. 1973) (Bazelon, C.J., concurring). *Compare* United States v. Estes, 485 F.2d 1078 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 923 (1974) (accused not prejudiced by failure of substitute counsel to confer with defense counsel or participate in pretrial preparations) *with* Marshall v. United States, 436 F.2d 155, 160 n.18 (D.C. Cir. 1970) (government must take affirmative action to provide defense counsel with substitute counsel's observations).

[107]*See infra* notes 117-120 and accompanying text. *See also* Zamora v. Guam, 394 F.2d 815 (9th Cir. 1968) (no error where lawyer thought lineup was connected to a murder instead of robbery for which convicted).

[108]*See* United States v. Field, 473 F.2d 98, 102 n.9 (D.C. Cir. 1973) (Bazelon, C.J., concurring). *Wade*, 388 U.S. 236, 237.

[109]*See Wade*, 388 U.S. at 236-37. *Cf.* United States v. Payne, 3 M.J. 354 (C.M.A. 1977) (Art. 32 investigating officer should be advised by an impartial legal advisor).

[110]United States v. Kirby, 427 F.2d 610, 614 (D.C. Cir. 1970).

[111]Model Code of Professional Responsibility, DR 5-101(B), 5-102(A) (1980). The Model Code of Professional Responsibility applies to lawyers involved in Army court-martial proceedings. Dep't of Army, Reg. No. 27-10, Military Justice, paras. 5-8 and 6-11 (15 March 1985).

tion would be if the lawyer's testimony was essential to the ends of justice.[112] The rules would also disqualify government counsel witnesses. In *United States v. Austin*,[113] the Army Court of Military Review indicated that a trial counsel who gave testimony relating to the fairness of a unit formation lineup should not have been allowed to continue in the case.[114] Notwithstanding the violation of ethical standards, however, his testimony was held to be competent.[115] To avoid disqualification, the lawyer-witness should take along a third party to view any identification process.[116]

C. ROLE OF COUNSEL

In *United States v. Ash*,[117] the Supreme Court's majority opinion interpreted *Wade* as requiring counsel because the lineup is a "trial-like confrontation" and counsel is necessary to prevent "overreaching by the prosecution."[118] This passage implies a number of positions; of them, two extremes may be set forth. On the one hand, passive counsel alone may deter overreaching, but the Court's stress on the similarity of the lineup to a trial implies that counsel may be required to take an active adversary role. On the other hand, active counsel creates various perceptions of participants in the criminal justice system. Police officers feel if they follow counsel's requests, the lineup may be subject to manipulation by trained legal counsel for one side only. The witness may feel that the rights of the suspect are being protected but not those of the victim's. In a partial answer to these views, the Army Board of Review held in *United States v. Webster*[119] that counsel is merely present as an observer to prevent abuse and bad faith by law enforcement officers and to provide a basis for attacking the identification at trial.[120] The lineup was held not to be a full adversary procedure. Thus, the requests of counsel need not be followed, but where counsel points out a suggestive fact that has been overlooked, the exclusionary rule will serve as an incentive to follow the request. Requests thought to gain the accused an unfair advantage need not be adhered to.

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[112]United States v. Stone, 13 C.M.A. 52, 32 C.M.R. 52 (1962).

[113]46 C.M.R. 950 (A.C.M.R. 1972).

[114]The court indicated that the military judge should have prevented the trial counsel from continuing even absent a defense objection. *Id.* at 951.

[115]*Id.*

[116]*See generally* ABA Standards for Criminal Justice, The Prosecution Function Standard 3-3.2(b); The Defense Function Standard 4-4.3(d) (2d ed. 1982) (lawyer should interview witness in presence of third party unless prepared to forego impeachment as to inconsistent statements made during interview).

[117]413 U.S. 300 (1973).

[118]*Id.* at 312-14. *See generally* ALI Model Code of Pre-Arraignment Procedure 428-433 (1975).

[119]40 C.M.R. 627 (A.B.R. 1969).

[120]*Id.* at 634-35.

Counsel may be placed in embarrassing situations or, in some circumstances, on the horns of a dilemna. To force lawyers to actively object and suggest corrections requires them to fulfill a role that may be embarrassing. If suggestions are followed, an identification from the now scrupulously fair lineup may well be used to increase the credibility of the identification.[121] Counsel who take a passive role at the lineup and fail to object or suggest corrections to an obvious deficiency, may be waiving issues. Passive observation is a function that could be performed by video recordings and other mechanisms for reproduction.[122] Civilian courts are split on waiver,[123] and military law is silent. The ALI Model Code of Pre-Arraignment Procedure indicates that police officials are not required to follow counsel's suggestions but that objections are not waived if immediately made.[124] The Model Code provides, however, that absence of objection may be relevant to show acquiescence to the identification procedure.[125]

D. WAIVER OF THE RIGHT TO COUNSEL

Rule 321(b)(2)(A) provides that for military lineups,[126] "the accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made."[127] While this language mirrors Rule 305(g)(1)'s language for waiver of counsel before interrogation, the content of the warning and the response of the accused are not as developed as in the interrogation area.

As to content of the warning for a military lineup, the accused should be told there will be a lineup for the purpose of identification and that a military lawyer will be provided at no cost to the accused.[128] This assumes the validity of Rule 321(b)(2)(A)'s not requiring individual mili-

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[121]*See, e.g.*, United States v. Gordon, 18 M.J. 463 (C.M.A. 1984) (photograph of lineup relevant to bolster credibility of identification witness).

[122]Photographing or videotaping of the lineup has led, however, to an ingenious circumvention of the right to counsel. Courts have upheld procedures whereby police conduct a lineup and show the photograph or videotape to the witness without counsel present. *See, e.g.*, People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212 (1971). *See generally* L. Taylor, Eyewitness Identification § 7.5 (1982).

[123]In *Wade*, the Supreme Court only implied that counsel can make suggestions. "[L]aw enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence." *Wade*, 318 U.S. at 238. *See generally* E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Criminal Evidence 368 (1979) and cases cited therein.

[124]ALI Model Code of Pre-Arraignment Procedure 432 (1975).

[125]*Id.* at 432-33.

[126]Mil. R. Evid. 321(b)(2)(B) provides that the validity of waiver for a nonmilitary lineup "shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups."

[127]There seemingly has been an escalation in the language characterizing waiver. The Supreme Court in Wade only required an "intelligent waiver." 388 U.S. at 237. The predecessor rule to Rule 321(b)(2)(A) provided for voluntary and intelligent waiver.

[128]*See generally* United States v. Ayers, 426 F.2d 524, 527 (2d Cir. 1970).

tary counsel or individual civilian counsel at a lineup.[129] There may be waiver with less precise warnings, however. In *United States v. Shultz*[130] a valid waiver was found when the accused, as part of a battalion formation, was told that the battalion would be subjected to an identification procedure and that if they did not want to participate without "legal counsel" they could fall out and inform the first sergeants or company commanders.[131]

As to responses from the accused, there are no clear requirements as with interrogations that the accused affirmatively acknowledge understanding his or her rights and affirmatively decline the right to counsel.[132] In *Shultz* the court allowed silence, *i.e.*, staying in the formation, to function as a waiver.[133]

Rule 321 and military case law are silent on the issues of whether unreasonable delay by counsel after notification of the lineup results in waiver and whether the accused must be warned that the lineup will be delayed for a reasonable time to allow the lawyer to appear. Given no right to an individual military or civilian counsel, delay problems should be infrequent in military practice. Unreasonable delay even by the "substitute counsel" envisioned by Rule 321(b)(2)(A) should result in waiver, however, so counsel cannot unreasonably hinder prompt lineups.[134]

The Model Rules for Law Enforcement, Eyewitness Identification,[135] would require as part of the warning that the lineup will be delayed for a reasonable period to allow counsel to appear. While desirable, this provision is less important in military practice where individual military or civilian counsel is not provided for in Rule 321(b)(2)(A). A military accused who merely is advised of the right to a free military counsel is unlikely to be misled and believe that a specific lawyer may be busy at the

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[129]*See supra* notes 100-110 and accompanying text.

[130]19 C.M.A. 311, 41 C.M.R. 311 (1970).

[131]*Shultz* is the only military case on waiver of right to counsel at a lineup. It is not mentioned in the Drafter's Analysis to Rule 321. This omission may have been inadvertent or an attempt to impose a more stringent rule.

[132]Mil. R. Evid. 305(g)(1), 314(e).

[133]The validity of silence as waiver might be questioned because *Wade* in its brief reference to waiver of counsel cited Carnley v. Cochran, 396 U.S. 506 (1962), which held that failure to demand counsel does not amount to waiver. Arguably *Wade* applied *Carnely's* interpretation the right to counsel at a state criminal trial to pretrial identifications. *See generally* L. Taylor, Eyewitness Identification 156, 157 (1982).

[134]*See* United States v. Clark, 499 F.2d 802, 808 (4th Cir. 1974) (accused waived right to counsel where delayed hiring counsel for an unreasonable period of time). Earlier identifications have been recognized as having greater reliability. *See supra* notes 85-88 and *infra* notes 281-287 and 298-304 and accompanying text. *Cf.* Mil. R. Evid. 305(e) (counsel notified of impending interrogation need only be given a reasonable time to attend before interrogation may proceed).

[135]Model Rules for Law Enforcement, Eyewitness Identification, Rule 404 (1974).

time and unwilling to attend. In any event, if such a warning rule is adopted, it should not be strictly applied.

Even if the defense succeeds in suppressing a pretrial identification by a motion, counsel may be forced nonetheless to bring out facts regarding the pretrial identification to attack the weight of the in-court identification.[136] This may be true, for example, if the military judge rules the pretrial identification inadmissible for a right to counsel violation but allows an in-court identification because there is an independent source.[137] Defense introduction will then operate as waiver as to facts relevant to the pretrial identification. This places the prosecution in a tactical dilemma. When the defense brings out the pretrial identification, it may look as though the prosecution sought to hide the evidence. To avoid this, the prosecution should raise the issue before the trial on the merits and ask the court to have the defense counsel elect whether counsel wants evidence of the pretrial identification admitted to attack the in-court identification or ruled inadmissible for all purposes.[138]

IV. SIXTH AMENDMENT—PROPRIETY OF THE IN-COURT IDENTIFICATION

A violation of the right to counsel at a pretrial identification results in exclusion of evidence of such pretrial identification.[139] Unless the in-court identification is also suppressed, however, suppression of the pretrial identification merely prevents bolstering the credibility of the in-court identification with the pretrial identification.

The Supreme Court did not adopt a *per se* rule excluding *all* identification testimony of a witness who previously identified the accused in vio-

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[136]United States v. Greene, 21 C.M.A. 543, 45 C.M.R. 317 (1972) (prejudicial error to refuse to allow defense to test in-court identifications by cross-examination regarding pretrial identifications which had been suppressed for violation of right to counsel at a lineup). *See* United States v. Gholston, 15 M.J. 582, 584 (A.C.M.R. 1983) (defense decision to not object to "blatantly suggestive" identification a legitimate trial tactic); United States v. Reynolds, 15 M.J. 1021, 1023 (A.F.C.M.R. 1983) (defense decision to concede accused's presence at crime scene a realistic trial tactic).

[137]*See infra* notes 262-283 and accompanying text.

[138]Alternatively, the prosecution might object to introduction of the pretrial identification and state the reasons in the presence of the jury. Such an objection would require a basis other than that the defense had successfully suppressed the evidence because the defense is entitled to cross-examine as to matters affecting the credibility of the witness and the weight of the identification. United States v. Greene, 21 C.M.A. 543, 45 C.M.R. 317 (1972). An objection for the sole purpose of alerting the court members that the prosecution was not trying to hide evidence would be an impermissible attempt to place inadmissible matter before the court. *See* Ethical Consideration 7-25; ABA Standards for Criminal Justice, Prosecution Function 3-5.6(b) and commentary (2d ed. 1980); Underwood, *Adversary Ethics: More Dirty Tricks*, 32 Def. L.J. 585, 603-06 (1983).

[139]Mil. R. Evid. 321(d)(1). The exclusion of the pretrial identification is a *per se* rule, Gilbert v. California, 388 U.S. 263, 273 (1967), whether or not there is an independent source. Moore v. Illinois, 434 U.S. 220, 231 (1977).

lation of the right to counsel. In *Wade* the Court stated that violation bars an in-court identification unless the government can "establish by clear and convincing evidence that the in-court identifications [are] based upon observations of the suspect other than the lineup identification."[140] Rule 321(d)(1) adopted the independent source test, providing that "any later identification by one present at such unlawful lineup [because of absence of counsel or invalid waiver] is also a result thereof unless the military judge determines that the contrary has been shown by clear and convincing evidence."[141]

V. DUE PROCESS

A. INTRODUCTION

The due process exclusionary rule as announced by the Supreme Court and as implemented in military case law and Rule 321 is confusing at best. The continued confusion has been engendered by the shifting language and emphasis in Supreme Court cases. While the object of the due process exclusionary rule is now clear, *i.e.*, exclusion of suggestive identification procedures which result in unreliable identifications, the analytical method is still ill-defined.

B. SUPREME COURT DEVELOPMENT

The seminal due process case was *Stovall v. Denno*,[142] in which the witness suffered a savage knife attack when she tried to prevent the murder of her husband. Her wounds required major surgery and it was uncertain whether she would survive. The day after surgery the police brought to her bedside the suspect, Stovall, whose keys and shirt were found at the scene of the crime. Five white police officers and two white representatives of the prosecutor's office were present. Stovall was black and was handcuffed to one of the police officers. The police asked the victim whether the suspect "was the man."[143] She made a positive identification in the hospital room and later made an in-court identification.

Seeking *habeas corpus* relief, Stovall claimed that the confrontation "was so unnecessarily suggestive and conducive to mistaken identification that he was denied due process of law."[144] The Court held that there was no denial of due process since under the totality of circumstances, given the victim's critical condition, the hospital showup was "imperative." The Court said in effect that while the showup was suggestive, it

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[140] *Wade*, 388 U.S. at 240.

[141] For more detailed discussion on the application of the independent source test *see infra* notes 298-304 and accompanying text.

[142] 388 U.S. 293 (1967).

[143] *Id.* at 294.

[144] 388 U.S. at 302.

was necessary under the circumstances. The Court's focus was apparently on the identification procedure itself—was it unnecessarily suggestive? The Court was silent as to how and when to analyze whether the identification procedure was also "conducive to irreparable mistaken identification."

Nine months later in *Simmons v. United States*,[145] the Court added to the analytic confusion. In considering whether the use of a photographic lineup to identify bank robbers prior to their capture violated due process, the Court shifted its language to hold that *photographic* pretrial identifications would be excluded "only if the photograhic identification procedure was so impermissibly suggestive as to give rise to a *very* substantial likelihood of irreparable misidentification."[146]

The Court used a two-step analysis, first considering that, like *Stovall*, the procedure, although somewhat suggestive,[147] was necessary under the circumstances given that the robbers were at large and that the FBI needed to act quickly. Unlike *Stovall*, however, the Court, even after finding the procedure necessary, went on to the second step and determined that the procedure did not give rise to a very substantial likelihood of misidentification.

Confusing points remained, however. First, step two of the test added the adjective "very" to the *Stovall* language of "substantial likelihood of irreparable misidentification." Presumably this higher standard was for photographic lineups because they were considered less reliable than corporeal lineups.[148] Second, the focus and possible outcomes of the two step test was unclear. In *Stovall*, a suggestive procedure that was necessary did not violate due process. In *Simmons*, the procedure was also necessary but the Court went on to examine the conduciveness to mistaken identification. There apparently was a dual focus, the procedure itself and whether the procedure was conducive to mistaken identification. Left unanswered was whether a procedure that was only unnecessarily suggestive would be suppressed without regard to whether it was conducive to mistaken identification.

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[145]390 U.S. 377 (1968).

[146]*Id.* at 384 (emphasis added). The Court rejected a *per se* exclusion of photographic lineups, preferring case-by-case analysis.

[147]While not ideal, the six photo lineup held a day after the crime when the robbers wore no face masks and the crime scene was well lit was found not to violate due process. The Court would have preferred more than six photos, however, and would have preferred that some of the witnesses by shown only a more reliable corporeal lineup after the suspect's capture. *Id.* at 386 n.6.

[148]*Id.* at 383, 384, and 386 n.6.

In *Foster v. California*,[149] the Supreme Court found a due process violation but did not clarify the analysis. The Court found that repetitive lineups and showups were suggestive[150] and made the identification "all but inevitable."[151] Without separate analysis of the two steps the Court added new language and concluded that the procedures "so undermined the reliability of the eyewitness identification as to violate due process."[152]

In *Coleman v. Alabama*,[153] a plurality of the Court ignored the first step (whether the lineup was unnecessarily suggestive), and analyzed suggestiveness in context of the second step, that is whether the lineup was "so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification."[154] Analytical confusion continued after *Coleman* not only because the Court failed to do a clear two-step analysis, but also because it applied *Simmons'* more stringent "*very* substantial likelihood" standard for photographic and corporeal lineups.[155] The Court's direction was at least becoming clear, however, emphasizing the identification and the likelihood of misidentification and not the identification procedure itself.

The issues were partially resolved in *Neil v. Biggers*,[156] which involved a stationhouse showup of the suspect to the rape victim seven months after the crime. During the crime the victim viewed the perpetrator under various lighting conditions for fifteen to thirty minutes. After the crime she gave the police a detailed description of the assailant. Over the intervening seven months she viewed several lineups and examined between thirty and forty photographs, but did not identify any of the individuals as the assailant even though some resembled the defendant. Finally, she was asked to come to the police station to view a lineup containing the defendant, who had been arrested on another charge. The police could not find suitable fillers for the lineup, however, and two detectives simply walked Biggers past the victim in what was in effect a showup. The victim made the identification and testified at trial and at

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[149]394 U.S. 440 (1969). This is the only Supreme Court case to find a due process violation.

[150]In *Foster* the police first placed the defendant in a lineup with two shorter, heavier men, with only the defendant wearing clothing like those worn in the holdup. When that failed to produce an identification, the police arranged a face-to-face confrontation with the victim. When the victim was still not sure, the police showed him the defendant in a five-man lineup in which the defendant was the only person in the second lineup who had also appeared in the first. *Id.* at 441-43.

[151]*Id.* at 443.

[152]*Id.*

[153]399 U.S. 1 (1970).

[154]*Id.* at 5, 6.

[155]*See supra* notes 145 and 146 and accompanying text.

[156]409 U.S. 183 (1972).

the *habeas corpus* hearing that she was positive about her identification. Denying relief to Biggers, the Court stated:

> [T]he primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." . . . It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.[157]

The Court in *Biggers* agreed that the pretrial identification was suggestive, but whether that in itself required exclusion was not answered. The Court did state, however, that the purpose of excluding the evidence was to deter future violations by the police. The Court stated that the exclusionary rule "would have no place in the present case, since both the confrontation and the trial preceded *Stovall*."[158] The "central question," however, was "whether under the 'totality of circumstances' the identification was reliable even though the confrontation was suggestive."[159]

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[160]

Ten years later in *Manson v. Brathwaite*,[161] the Supreme Court finally addressed the issue of whether a pretrial identification should be excluded solely because it arose from an unnecessarily suggestive procedure without regard to the likelihood that it resulted in a mistaken identification. Brathwaite sold heroin to an undercover state trooper who later identified Brathwaite in a one-photo identification procedure. After his state court conviction was affirmed, Brathwaite filed a writ of *habeas corpus* which was dismissed without opinion by the district

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[157] *Id.* at 198.
[158] *Id.* at 199.
[159] *Id.*
[160] *Id.* These factors were reiterated in Manson v. Brathwaite, 432 U.S. 93 (1977), and have also formed the basis for independent source analysis. *See infra* notes 262-283 and accompanying text.
[161] 432 U.S. 93 (1977).

court. The Second Circuit reversed on the ground that the single photograph identification procedure was unnecessarily suggestive.

The Supreme Court reversed and examined two approaches to the issue. The first or *per se* approach was the view adopted by the Second Circuit which held that testimony of a pretrial identification that was unnecessarily suggestive must be excluded regardless of reliability. According to the court, three objectives were served by this approach: (1) elimination of evidence of uncertain reliability, (2) deterrence of misconduct by police and prosecutors, and (3) "fair assurance against the awful risks of misidentification."[162] The approach was designed to ensure that misidentification created no miscarriages of justice. Implicit is the fact that some excluded identifications might be reliable but a *per se* rule is required to deter the police and the prosecutors from using this type of evidence. The Court rejected this approach, stating, "The *per se* rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant."[163]

The Supreme Court adopted the second, more lenient *ad hoc* approach which examines the totality of circumstances to determine the reliability of the pretrial identification. In reaching its decision, the Court examined several interests. First is the interest of society in effective law enforcement through the admission of reliable and relevant evidence. Second, while recognizing the interest in deterrence, the Court stated that it would be achieved without adopting a *per se* rule. The Court emphasized that the exclusionary rule would apply when there was an unnecessarily suggestive identification which would lead to a substantial likelihood of misidentification at the time of trial: "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."[164]

Third, the Court indicated that "inflexible rules of exclusion . . . may frustrate rather than promote justice."[165] The Court concluded "that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."[166] In *dicta* the

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[162]432 U.S. at 110.
[163]*Id.* at 112.
[164]*Id.* at 116.
[165]*Id.* at 113.
[166]*Id.* at 114.

Court also indicated that reliability is the "guiding factor in [determining] the admissibility of both pretrial and in-court identifications."[167]

While analytical questions such as exactly how to test[168] for unreliability remain, the focus is clear—due process only excludes unreliable identifications.

C. DUE PROCESS IN MILITARY LAW

Unlike the right to counsel rule, the due process exclusionary rule was not included in the 1969 Manual. The rule was, however, adopted in case law.[169] Military cases generally have applied the two-step analysis, requiring that a procedure be unnecessarily suggestive and conducive to irreparable mistaken identification.[170] Before Rule 321 "codified" the due process rule in 1980, no military appellate court in a published opinion suppressed or approved a trial court suppression of a pretrial *or* an in-court identification for a due process violation. While the courts found some procedures to be suggestive,[171] in-court identifications were allowed because the procedure was found not to be "conducive to irreparable mistaken identification,"[172] to be based on an independent source,[173] or both.[174] Failure to suppress pretrial identification might be attributed to confusing precedent—the issue of whether pretrial identification should be suppressed merely because the procedure was unnecessarily suggestive was not decided until *Brathwaite* in 1977.[175] The failure to suppress in-court identification is a trait consistent with federal court treatment[176] and probably reflects a basic hostility to exclud-

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[167]*Id.* at 106 n.9.

[168]It should be noted that although *Brathwaite* was a photo case, the Court did not invoke the "*very* substantial likelihood of irreparable mistaken identification" standard of *Simmons*. *See supra* notes 145-148 and accompanying text.

[169]United States v. Webster, 40 C.M.R. 627 (A.B.R. 1969).

[170]United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971).

[171]United States v. Fors, 10 M.J. 367 (C.M.A. 1981) (accused only person in both lineups); United States v. Morrison, 5 M.J. 680 (A.C.M.R. 1978) (accused's photos had darker backgrounds); United States v. Gillespie, 3 M.J. 721 (A.C.M.R. 1977) (photo lineup showing six photos not including the accused, then one photo of the accused, then three more photos of the accused); United States v. Lotze, 50 C.M.R. 234 (A.C.M.R. 1975) (assumed *arguendo* that showing the unconscious accused in the dispensary to witness was unnecessarily suggestive); United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971) (photo lineup with two photos of the accused, a black, and a third photograph of a caucasian).

[172]United States v. Fors, 10 M.J. 367 (C.M.A. 1981); United States v. Gillespie, 3 M.J. 721 (A.C.M.R. 1977); United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971).

[173]United States v. Talavera, 2 M.J. 799 (A.C.M.R. 1976); United States v. Lotze, 50 C.M.R. 234 (A.C.M.R. 1975); United States v. Fortune, 49 C.M.R. 616 (A.C.M.R. 1974); United States v. Clifton, 48 C.M.R. 853 (A.C.M.R. 1974); United States v. Young, 44 C.M.R. 670 (A.F.C.M.R. 1971); United States v. Cyrus, 41 C.M.R. 959 (A.F.C.M.R. 1970). Typically, these cases found an independent source without first completing the two step test.

[174]United States v. Quick, 3 M.J. 70 (C.M.A. 1977).

[175]*See supra* notes 161-167 and accompanying text.

[176]Wright, Federal Practice and Procedure: Criminal 2d § 414.1 (1982).

ing testimony of competent witnesses[177] on a matter that, but for the rule, would normally go to the weight of the evidence.

The Manual first addressed the due process exclusionary rule in 1980 in the original Rule 321(b)(1), which defined an unlawful identification process as one which was "unnecessarily suggestive or otherwise in violation of the due process clause. . . ." The original exclusionary rule itself, Rule 321(d)(2), stated that pretrial identifications which were merely unnecessarily suggestive were excludable. In-court identifications were admitted if the excluded unnecessarily suggestive pretrial identification "did not create a very substantial likelihood of irreparable mistaken identification" and if the government proved by clear and convincing evidence that the subsequent (*i.e.*, usually in-court) identification was not based on the improper (*i.e.*, unnecessarily suggestive) pretrial identification. Thus the rule on its face adopted the *per se* rule the Supreme Court rejected in *Brathwaite*[178] by excluding evidence of pretrial identification procedures which were unnecessarily suggestive without regard to reliability.

While the President may prescribe more restrictive rules that are constitutionally required,[179] the drafter's analysis to the original rule indicated in three places that the rule was intended to adopt *Brathwaite's* reliability test and not to exclude identification procedures that merely were unnecessarily suggestive.[180] No published appellate opinion directly addressed the conflict between the rule's plain meaning and the drafter's intent,[181] though in one case a panel of the Air Force Court of Military Review noted with apparent approval that the trial judge had excluded a showup that was merely unnecessarily suggestive.[182]

Rule 321 was amended in 1984[183] to more clearly adopt the *Brathwaite* holding that only unreliable identifications are to be excluded.[184] Rule 321(b)(1) defines unlawful as "unreliable" which in turn is defined as being "under the circumstances . . . so suggestive as to create a substantial likelihood of misidentification." Rule 321(d)(2)'s new exclusionary rule requires the government to prove that the pretrial identification procedure "was reliable under the circumstances." If excluded, later identifications (*i.e.*, usually in-court) are also excluded unless shown by clear and convincing evidence to have an independent source.

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[177]*See supra* notes 32-33 and accompanying text.
[178]*See supra* note 164 and accompanying text.
[179]*See* UCMJ art. 36.
[180]Mil. R. Evid. 321(b)(1) and (d)(2) analysis (1980).
[181]*See, e.g.*, United States v. Gordon, 18 M.J. 463 (C.M.A. 1984); United States v. Tyler, 17 M.J. 381 (C.M.A. 1984); United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982).
[182]United States v. White, 17 M.J. 953 (A.F.C.M.R. 1984).
[183]Exec. Order No. 12,473 (13 July 1984).
[184]Mil. R. Evid. 321 analysis (1984).

D. TESTING FOR A DUE PROCESS EXCLUSION

While the amended Rule 321 clarifies what the rule seeks to exclude, *i.e.*, unreliable identifications, it is ambiguous as to a precise analytical methodology in testing for a due process exclusion and for an independent source.

The initial issue is whether testing for unreliability should be a one or two-step test. The rule itself is silent but the analysis to the amended rule apparently opts for one step, stating:

> In determining whether an identification is reliable, the military judge should weigh all the circumstances, including the opportunity of the witness to view the accused at the time of the offense; the degree of attention paid by the witness; the accuracy of any prior descriptions of the accused by the witness; the level of certainty showed by the witness in the identification; and the time between the crime and the confrontation. Against these factors should be weighed the corrupting effect of a suggestive and unnecessary identification. *See Manson v Brathwaite*, *supra*; *Neil v. Biggers*, 409 U.S. 188 (1972).[185]

The prevailing test in military[186] and non-military[187] cases, however, has two steps. First, it must be determined whether the procedure was unnecessarily suggestive. Testing first for unnecessary suggestiveness not only is analytically more precise but is supported by the rationale of the Supreme Court's decisions. If the purpose of the rule is to deter police misconduct[188] and the police conducted a fair (*i.e.*, not unnecessarily suggestive) procedure, the exclusionary rule should not apply. Nowhere in the Supreme Court cases does the Court indicate it wishes to protect the accused from unreliable identifications that did not involve police misconduct. The language of the rule[189] and the one-step test itself[190] imply that the procedure itself must be unnecessarily suggestive before further analysis is done.[191] If the procedure was not unnecessarily suggestive, no further analysis is required though most courts assume *arguendo*[192] that the procedure was unnecessarily suggestive and go on to the second step.[193]

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[185]*Id.*

[186]*See supra* notes 170-174 and accompanying text.

[187]E. Imwinkelreid, P. Giannelli, F. Gilligan, & F. Lederer, Criminal Evidence 370 (1979).

[188]*See supra* notes 163-164 and accompanying text.

[189]"An identification is unreliable if [it] is so suggestive as to create a substantial likelihood of misidentification." Mil. R. Evid. 321(b)(1).

[190]"Against these [Biggers] factors should be weighed the corrupting effect of a suggestive and unnecessary identification." Mil. R. Evid. 321 analysis (1984) (citations omitted).

[191]*See infra* notes 198-200 and accompanying text.

[192]*See supra* notes 171-174.

[193]*See, e.g.*, United States v. Bruner, 657 F.2d 1278 (D.C. Cir. 1981).

The second step is contained in Rule 321(b)(1): whether, under the circumstances, the identification procedure is so suggestive as to create a substantial likelihood of misidentification.[194] Here, as the amended rule's analysis suggests,[195] the circumstances including the *Biggers'* factors[196] of opportunity to observe, *etc.*, should be weighed against the corrupting effect of an unnecessarily suggestive procedure.[197]

An additional issue is whether the drafters to the amended Rule 321 intended to exclude pretrial identifications that are suggestive regardless of necessity. Rule 321(b)(1) defines unreliability solely as whether "under the circumstances, [it] is so suggestive as to create a substantial likelihood of misidentification." The drafter's analysis and the Supreme Court cases, however, clearly indicate that procedures must be "unnecessarily" or "impermissibly" suggestive.[198] As with *Stovall's* critically injured witness, sometimes suggestive procedures are required under the circumstances. In such a case there is no police misconduct.[199] It may be, however, that the drafters of the military rule meant as a policy matter to exclude evidence of a pretrial identification that was suggestive regardless of the necessity for the identification. Secondly, the drafters may have reached the conclusion that if an identification would lead to a likelihood of unreliability it should be excluded. No case states that a necessarily suggestive identification can be admitted even though there is a substantial likelihood of mistaken identification. In other words, even if the identification was *necessarily* suggestive, if it leads to a substantial likelihood of mistaken identification, there is a violation of due process. At the least, the rule is ambiguous, thereby requiring the application of the prevailing rule that the identification procedure must be *unnecessarily* suggestive.[200]

E. TESTING FOR AN INDEPENDENT SOURCE

The amended rule and its analysis are silent as to *how* to test for an independent source. The problem arises because Rule 321(d)(2) states that even if the pretrial identification is unreliable, the witness may still make an in-court identification if the government proves by clear and convincing evidence that the in-court identification is based upon an

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[194]*Biggers*, 409 U.S. at 198.

[195]*See* text accompanying note 185.

[196]For a full listing of factors *see supra* notes 269-283 and accompanying text.

[197]*Brathwaite*, 434 U.S. at 444.

[198]*See supra* notes 142-146 and accompanying text.

[199]*Id. See also* United States v. Batzel, 15 M.J. 640, 644 (N.M.C.M.R. 1982) (showup necessary where victim's eyes were swelling shut).

[200]Mil. R. Evid. 101(b). *See generally supra* notes 187-188, 198 and 199 and accompanying text.

independent source and not on the unreliable pretrial identification.[201] The problem, which stems from the underlying cases and not from the rule, is logical because the test for independent source requires yet another analysis of the factors surrounding the witness' opportunity to observe and strength of identification.[202] If the pretrial identification process was so corrupted by the suggestive police procedures as to be unreliable, how could there be an independent source for the in-court identification? A finding of unreliability necessarily means that the witness' initial perceptions were weak and uncertain. This problem has caused commentators to suggest that a more logical and consistent approach would be to admit or exclude both pretrial and in-court identification evidence based upon the reliability factors.[203] A resolution based upon Supreme Court language is available, however. Unreliability is a matter of degree. Unreliability for purposes of excluding the pretrial identification adopted the lower standard of merely requiring "a substantial likelihood of misidentification."[204] The test for independent source should be the higher standard of *Simmons*[205] and *Biggers*[206], *i.e.*, even an unreliable pretrial identification will not prevent an in-court identification unless it was conducive to a *very* substantial likelihood of *irreparable* mistaken identification.[207]

F. APPLICATION OF THE DUE PROCESS TEST TO FOREIGN AND DEFENSE CONDUCTED LINEUPS

Unlike the right to counsel rule of Rule 321(a)(2)(A) and (b)(2), the due process rule of Rule 321(c)(2)(B) and (b)(1) is not expressly limited to identification procedures that are conducted by military or U.S. domestic authorities or their agents. Rule 321 implicitly, therefore, applies the due process tests to identification procedures conducted by foreign police. Case law simply assumes that the due process test so applies.[208]

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[201]The Supreme Court has not explicitly held that an independent source may be proven despite an unreliable identification resulting from an unnecessarily suggestive procedure.

[202]United States v. Wade, 388 U.S. 218, 241 n.33 (1977). *See generally* United States v. Fors, 10 M.J. 367 (C.M.A. 1981) (independent source found despite lineup that violated the right to counsel and was unnecessarily suggestive); United States v. Quick, 3 M.J. 70 (C.M.A. 1977).

[203]*See generally* N. Sobel, Eyewitness Identification, Legal and Practical Problems 4-12 (2d ed. 1983).

[204]Mil. R. Evid. 321(b)(1).

[205]390 U.S. at 384.

[206]409 U.S. at 198.

[207]*See, e.g.*, United States v. Field, 625 F.2d 862 (9th Cir. 1982).

[208]United States v. Talavera, 2 M.J. 799 (A.C.M.R. 1976). *See* United States v. Waldrop, 41 C.M.R. 907 (A.F.C.M.R. 1969). *Cf.* Mil. R. Evid. 311(c)(3) (searches by foreign police unlawful which subjected accused to gross or brutal maltreatment); Mil. R. Evid. 305(b)(2) (foreign interrogations unlawful if statement obtained through coercion, unlawful influence, or unlawful inducement).

If the defense conducts its own identification procedures, the Supreme Court has stated in *dicta* that such "evidence . . . may be excluded as unreliable under the same standards that would be applied to unreliable identifications conducted by the Government."[209]

G. APPLICATION OF THE DUE PROCESS TEST TO OTHER TYPES OF IDENTIFICATIONS

Military courts are applying Rule 321's due process exclusionary rule to other than person identifications. In *United States v. Chandler*[210] the rule was applied to a voice identification procedure. In *United States v. Tyler*,[211] the Court of Military Appeals applied the due process test to a procedure by which investigators tested a witness' ability to distinguish sugar and coffee creamer from cocaine. Writing broadly, Chief Judge Everett's majority opinion stated, "The principles applicable to identifications of persons would also seem to apply to the identification of substances and objects."[212]

VI. FOURTH AMENDMENT

A. IN GENERAL, LINEUPS WITH PROBABLE CAUSE

The effect of the fourth amendment's exclusionary rule on identification evidence is often overlooked. Unlawful seizures of the person may result in exclusion of the pretrial and in-court identification.[213] Neither the Manual nor Rule 321 set forth procedures for ordering a suspect to

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[209]United States v. Ash, 413 U.S. 300, 318 n.11 (1972). While the quoted comment refers to photographic identifications, the logic would apply to all identification procedures. Although the government does not have fifth and sixth amendment rights, the courts have stated the government does have the right to have a case decided on the basis of trustworthy evidence. United States v. Noble, 722 U.S. 225 (1975) (upheld trial court refusal to allow testimony of defense investigator where investigator would not produce notes for use in cross-examination); United States v. Richardson, 15 M.J. 42 (C.M.A. 1983) (as a general rule proper to strike testimony of defense witness under Rule 301(f)(2) who claims self-incrimination privilege on cross-examination). *See also* United States v. Hill, 18 M.J. 459 (C.M.A. 1984). If the identification process is conducted by others than the police or defense, however, most courts refuse to apply the due process test. *See generally* N. Sobel, Eyewitness Identification, Legal and Practical Problems § 5-4 (2nd ed. 1983).

[210]17 M.J. 678 (N.C.M.R. 1983).

[211]17 M.J. 381 (C.M.A. 1984).

[212]*Id.* at 386.

[213]United States v. Crews, 445 U.S. 463, 477 (1980) (pretrial identification obtained through photograph taken during illegal detention suppressed but in-court identification based upon independent source); Gregory v. Wyrick, 730 F.2d 543, 544 (8th Cir. 1984) (Heany, C.J., concurring) (unlawful arrest in home without warrant should result in exclusion of lineup identification); United States v. Fisher, 702 F.2d 372 (2d Cir. 1983) (arrest without probable cause resulted in exclusion of identification based upon showup). The full reach of the exclusionary rule is, however, unclear. In *Crews*, the court was unable to agree whether an accused's face (physiognomy) is something of evidentiary value that could be suppressed. 445 U.S. at 774, 775. A majority did agree, however, that the mere fact that an accused's presence at trial as a result of an illegal arrest does not require suppression of his face as the fruit of an illegal arrest. *Id.*

appear in a lineup or for photographing. As a general rule, however, once there is probable cause to believe the suspect committed an offense, the suspect may be apprehended and brought in for identification procedures[214] or ordered to report to the investigators for such procedures.[215]

B. LINEUPS IN A UNIT FORMATION

Some lineup situations do not require probable cause. In a situation unique to the military, the Air Force Court of Military Review held in *United States v. Kittel*[216] that it was not a seizure within the meaning of the fourth amendment for a commander to require personnel in his unit to appear in a military formation when the purpose of the formation was to identify an unknown subject. The commander had called a formation upon a belief that those who stole money from an Airman's Club were in his squadron. Kittel, who did not normally stand this regularly scheduled formation, was required to attend. The court analogized the situation to *United States v. Dionisio*[217] which held that compelling the accused as one of twenty other potential defendants to give voice exemplars for identification purposes at a grand jury was not a fourth amendment seizure. The commander, like the grand jury, has investigatory responsibility to determine if a crime has been committed.[218] Although the holding of *Kittel* was that lineup formations for *unknown* suspects did not implicate the fourth amendment, the result should be the same for *known* suspects. While there was no direct military authority,[219] there is no fourth amendment distinction in a lineup formation merely because the suspect is known or unknown.[220] The commander, like the grand jury in *Dionisio*, still has the same investigatory powers and responsibilities[221] and, as a citizen in *Dionisio* was found not to have

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[214]*See generally* ALI Model Code of Pre-Arraignment Procedure §§ 160.2(7), 170.1, 170.2 and Commentary (1975). If the apprehension is in a private dwelling, however, a warrant or authorization is required. *See supra* note 213 and accompanying text. *See also* R.C.M. 302(e).

[215]*Id. See generally* ABA Standards for Criminal Justice Discovery and Procedure Before Trial, Standard 11-3.1 (2d ed. 1982).

[216]49 C.M.R. 225 (A.F.C.M.R. 1974).

[217]410 U.S. 1 (1973).

[218]*See also* United States v. Hardison, 17 M.J. 701, 703 (N.M.C.M.R. 1983) (upheld *sub silentio* a unit formation lineup which sought an *unknown* suspect).

[219]In United States v. Shultz, 19 C.M.A. 311, 41 C.M.R. 311 (1970), the court approved *sub silentio* a battalion formation lineup which sought a *known* suspect.

[220]*See supra* notes 218 and 219. As in *Shultz*, the principal distinction between a lineup formation with a known or unknown suspect is in the right to counsel. *See supra* notes 46-49 and accompanying text. There *would* be a fourth amendment distinction if there was probable cause to believe the suspect committed the offense because then the suspect could be taken into custody and ordered to submit to identification procedures. *See supra* notes 214 and 215 and accompanying text.

[221]410 U.S. at 12 n.10. The fourth amendment result in *Dionisio* did not depend on whether the accused was one of many or the sole person subpoenaed. *Id.* at 10 n.8, 12. *See also* United States v. Mara, 401 U.S. 19, 22 (1973) (grand jury subpoena ordering only the defendant to produce handwriting sample did not implicate fourth amendment).

a reasonable expectation to not be called before a grand jury, the soldier has no reasonable expectation not to be ordered into a formation.[222] Alternative arguments to uphold lineup formations, *i.e.*, that detentions for identification procedures are lawful without probable cause, and that any order to a service member to report for an identification procedure does not implicate the fourth amendment at all, have broader implications and are discussed more fully below.

C. LIMITED STATIONHOUSE DETENTIONS FOR IDENTIFICATION PROCEDURES WITHOUT PROBABLE CAUSE

In *Davis v. Mississippi*[223] and *Hayes v. Florida*[224] the Supreme Court found that warrantless involuntary stationhouse detentions without probable cause violated the fourth amendment. In *Davis* the Court found a violation in the repeated warrantless questionings and fingerprintings of the accused as part of a dragnet. In *Hayes* the accused was involuntarily removed from his home, detained, and fingerprinted without a warrant and without probable cause. In *Hayes*, Justice White's majority opinion stated the fourth amendment is violated

> [W]hen the police, without a probable cause or a warrant, forcibly remove a person from his home or other place where he is entitled to be and transport him to the police station where he is detained, although briefly, for investigative purposes [there is a fourth amendment violation]. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.[225]

The *Hayes* Court held out two alternatives to the warrantless seizure which results in a stationhouse detention. First, it noted a brief *field* detention for fingerprinting upon reasonable suspicion might be permissible.[226] Second, the Court repeated the suggestion in *Davis*[227] and *Dunaway v. New York*[228] that judicially authorized seizures on less than

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[222]United States v. Middleton, 10 M.J. 123, 128 (C.M.A. 1981) (no reasonable expectation of privacy from a commander's inspection).

[223]394 U.S. 721 (1969).

[224]105 S. Ct. 1643 (1985).

[225]*Id.* at 1647.

[226]*Id.* "None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment."

[227]394 U.S. at 727, 728.

[228]442 U.S. 200, 215 (1978).

probable cause and removal to the police station for fingerprinting might be permissible.[229]

In summary, there are four possibilities for detentions for fingerprinting procedures. First, a seizure from a private dwelling or anywhere with a warrant and probable cause is clearly lawful.[230] A seizure from a place other than a private dwelling and a stationhouse detention requires probable cause if there is no judicial authorization.[231] Third, an expeditious procedure at the stationhouse based only on a reasonable suspicion may be permissible if judicially authorized.[232] Finally, a brief detention and procedure in the field based upon a reasonable suspicion may be permissible.[233]

D. APPLICATION TO IDENTIFICATION PROCEDURES

The considerations relevant to fingerprinting should be equally applicable to identification procedures. Thus, identification procedures resulting from warranted seizures with probable cause from a private dwelling, or with probable cause and no warrant if the seizure is not from a private dwelling, present no problem.[234] Similarly, brief field detentions, upon reasonable suspicion, if allowed for fingerprinting, should be allowed for an identification procedure such as photographing.[235] The Court's *dicta* in *Davis* which suggested judicially authorized stationhouse detentions based upon reasonable suspicion, also suggested that this *dicta* might not apply to lineups because of their unreli-

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[229]*Hayes*, 105 S. Ct. at 1647. "We also do not abandon the suggestion in *Davis* and *Dunaway* that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting."

[230]*See supra* notes 214 and 225 and accompanying text.

[231]*See supra* note 225 and accompanying text.

[232]*See supra* notes 227-229 and accompanying text. There may be an exigent circumstances exception. *Hayes*, 105 S. Ct. at 1647-48 n.3. "Nor is there any suggestion in this case that there were any exigent circumstances making necessary the removal of Hayes to the station house for the purpose of fingerprinting."

[233]*See supra* note 226 and accompanying text.

[234]For definition of private dwelling in the military *see* R.C.M. 302(e)(2).

[235]Corporeal identification procedures other than on-the-scene showups would be practically difficult to set up during a brief field detention. *See generally supra* notes 85-88 and accompanying text.

[236]394 U.S. at 727.

ability.[236] Despite this suggestion, courts[237] and state statutes[238] have allowed judicially ordered appearances for lineups and photographing on less than probable cause. Such limited detentions, based merely on a reasonable belief, are simply reasonable fourth amendment seizures.[239] This result is probably not changed by *Dunaway v. New York*[240] in which the Supreme Court held that probable cause is required for a *custodial* stationhouse interrogation because of the lesser degree of intrusion involved in a limited detention.[241] Indeed the Court itself in *Dunaway* and subsequently in *Hayes* suggested that such limited detentions with judicial authorizations are permissible at least for fingerprinting.[242] Military law has yet to explicitly recognize, however, that such limited detentions are lawful with less than probable cause.[243]

The application of *Dunaway's* rule that probable cause is required for custodial stationhouse interrogations is unsettled in military law generally and in its application in the military to orders to report for identification procedures and to limited detentions for identification procedures. In *United States v. Schneider*,[244] the Court of Military Appeals recognized that differences in military and civilian life prevented literal application of *Dunaway* to military law. While not setting out comprehensive guidelines, the court did state that there are situations related to valid military duties where a soldier might be required to report and pro-

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[237]*See infra* note 241. Wise v. Murphy, 275 A.2d 205 (D.C. App. 1971) (person identified in photo lineup as "possible" rapist may be ordered by court into a lineup); Mevola v. Fico, 81 Misc. 2d 206, 365 N.Y.S.2d 743 (1975) (suspect can be compelled by court to participate in lineup based upon reasonable belief). *See* Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968) (court would make defendant available for lineups involving crimes for which there is less than probable cause to arrest). *Cf. Segura v. United States*, 104 S. Ct. 3380 (1984) (reasonable to secure a dwelling based upon probable cause while a warrant is being sought); United States v. Davis, 2 M.J. 1005 (A.C.M.R. 1976) (commander can detain soldier for one hour while attempting to determine if he has probable cause to search).

[238]*See generally* W. Ringel, Searches and Seizures, Arrests and Confessions § 18.2(b) (2d ed. 1984) (collects statutes); ALI Model Code of Pre-Arraignment Procedure § 170.2(6) (1975). In *Hayes* the Court noted that lower court opinions conflict on the validity of these statutes. 105 S. Ct. at 1648.

[239]*See* United States v. Hensley, 105 S. Ct. 675 (1985) (investigatory stop based upon "wanted flyer" reasonable); United States v. Sharpe, 105 S. Ct. 1568 (1985) (20 minute *Terry* stop reasonable); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk based upon articulable suspicion is reasonable); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative inspection of commercial and residential premises for fire, health, and safety violations is reasonable under fourth amendment).

[240]442 U.S. 200 (1979).

[241]It has also been argued contrary to the suggestion in *Davis'* dicta that lineups, although not as scientific as fingerprints, are not always less accurate particularly if counsel and due process rights are scrupulously observed. Wise v. Murphy, 275 A.2d 205 (D.C. App. 1971).

[242]*See supra* notes 227 and 228 and accompanying text.

[243]*See generally* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (searches not recognized in Rules may nonetheless be reasonable). *See also* Mil. R. Evid. 314(b). *But see supra* note 238 and *infra* note 250 and accompanying text.

[244]14 M.J. 189 (C.M.A. 1982).

vide information where probable cause was not required.[245] While recognizing that the focus in military law has been on the self-incrimination protections of Article 31 rather than fourth amendment infringements on freedom of movement, the court held nonetheless that *Dunaway's* probable cause requirement did apply to the military.[246]

E. ORDERS TO REPORT

While the courts have struggled to interpret *Schneider*,[247] a panel of the Navy-Marine Court of Military Review in *United States v. Hardison*,[248] has held, contrary to *Schneider*, that an order to report for *any* reason, including a law enforcement purpose, is not a fourth amendment seizure.[249] *Hardison* specifically held that an order to report for fingerprinting and photographing which resulted in a later photo lineup did not implicate the fourth amendment.

F. INDEPENDENT SOURCE

The Supreme Court held in *United States v. Crews*,[250] that even if there is a fourth amendment violation, an in-court identification nonetheless could be made if there was an independent source for that identification.[251] Crews was identified from a photographic lineup, but his photo was obtained during an illegal arrest. In refusing to suppress the in-court identification, the Court found that the illegal arrest did not taint any of the "three distinct elements" that normally comprise an in-court identification. First, the arrest did not produce the victim's identity at trial since she was known to the police well before the accused's illegal arrest. Second, applying the *Biggers'* criteria, the Court found an independent source.[252] Finally, the Court recognized that as a general rule the accused's physical presence at trial is not challengeable on the grounds of an illegal arrest.

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[245]*Id.* at 192-93.

[246]*Id.* at 193-94.

[247]United States v. Scott, 17 M.J. 724 (N.M.C.M.R. 1983) (no seizure where suspect "escorted" to NIS office but told there that he was free to terminate the interview at any time); United States v. Price, 15 M.J. 628 (N.M.C.M.R. 1982) (suspect "made available for interview" by NIS agents not in custody). In a pre-*Schneider* decision, the Court of Military Appeals found that an order to report was not a seizure under the fourth amendment in the absence of objective indications that the suspect was being restrained for law enforcement purposes. United States v. Sanford, 12 M.J. 170, 174 (C.M.A. 1981). *See also* United States v. Spencer, 19 M.J. 184 (C.M.A. 1984). Court was silent on whether first sergeant sending accused to investigator's office was a seizure.

[248]17 M.J. 701 (N.M.C.M.R. 1983).

[249]*Id.* at 705.

[250]445 U.S. 463 (1980).

[251]*Id.* at 472-73. *See also supra* note 213.

[252]*Id.* at 473 n.18. *See infra* notes 262-283 and accompanying text.

VII. SELF-INCRIMINATION ASPECTS OF IDENTIFICATION PROCEDURES

Unless the accused is asked to provide evidence of a testimonial or communicative nature,[253] there is no self-incrimination issue under the fifth amendment or Article 31(a) of the UCMJ.[254] The following identification investigatory techniques have been found not to be privileged: appearing in a lineup,[255] giving voice[256] and handwriting[257] exemplars and physical and dental[258] examinations. Similarly, standing, walking, assuming a stance, making a gesture, trying on clothing, trimming hair, and growing a beard[259] are not protected. Requiring the accused to re-enact a crime, although ill-advised does not violate the right against self-incrimination.[260]

Additionally, efforts by a suspect to change his appearance before a lineup has been found to be relevant to show consciousness of guilt and comments on the suspect's efforts are not impermissible comments on the accused's right against self-incrimination.[261]

VIII. INDEPENDENT SOURCE AND HARMLESS ERROR

A. INDEPENDENT SOURCE

If the accused's sixth, fifth,[262] or fourth amendment rights are violated, an out-of-court identification may be excluded. The Supreme Court has indicated, however, that if there is an independent basis an in-court identification is still admissible.[263] The purpose of this independ-

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[253]Schmerber v. California, 384 U.S. 757 (1966). *See also* United States v. Bay, 748 F.2d 1344 (9th Cir. 1984) (since exhibition of tattoos not testimonial, reversible error to require accused to take stand for cross-examination when merely wants to exhibit tattoos).

[254]While formerly more protective, art. 31 has now been found to provide no greater protection than the fifth amendment self-incrimination privilege. United States v. Harden, 18 M.J. 81 (C.M.A. 1984); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

[255]United States v. Wade, 388 U.S. 218 (1967); United States v. Webster, 40 C.M.R. 627 (A.C.M.R. 1969).

[256]United States v. Dionisio, 410 U.S. 1 (1972); United States v. Chandler, 17 M.J. 678 (A.C.M.R. 1983).

[257]United States v. Mara, 410 U.S. 19 (1973); United States v. Harden, 18 M.J. 81 (C.M.A. 1984).

[258]United States v. Martin, 9 M.J. 731 (N.M.C.M.R. 1979), *aff'd on other grounds*, 13 M.J. 66 (C.M.A. 1982); United States v. Cain, 5 M.J. 844 (A.C.M.R. 1978); United States v. Culver, 44 C.M.R. 564 (A.F.C.M.R. 1971).

[259]United States v. Holt, 218 U.S. 245 (1910); United States v. Rosato, 3 C.M.A. 143, 17 C.M.R. 143 (1953); United States v. Webster, 40 C.M.R. 627 (A.C.M.R. 1969).

[260]Avery v. Procunier, 750 F.2d 444 (5th Cir. 1985).

[261]United States v. Jackson, 476 F.2d 249 (7th Cir. 1973).

[262]For the analytic difficulties of testing for unreliability and independent source, *see supra* notes 201-207 and accompanying text.

[263]*See supra* notes 139-141, 201-207, 250-252 and accompanying text.

ent source rule is to place the government in the same position as it was before the illegal activity.[264] The Court has recognized the peculiar dangers of applying the independent source rule to eyewitness identifications, *i.e.*, that the image of the perpetrator may be "crystallized" by the lineup[265] and that the witness is "apt" to retain the memory of the person in the lineup or photo rather than the image of the perpetrator.[266] The remedy for these dangers, however, is the cross-examination[267] and the higher standard of proof, clear and convincing evidence, to show the independent source.[268]

Five factors that the Supreme Court has relied upon in all three factual situations are:

Factors Considered	*Supports or Negates Finding an Independent Basis*
Opportunity the witness had to view the criminal at the time of the crime[269]	Ambiguous factor
Witness' degree of attention[270]	Ambiguous factor
Accuracy of the witness' prior description of the criminal[271]	Ambiguous factor

[264]*See generally* Nix v. Williams, 104 S. Ct. 2501, 2510 (1984); Segura v. United States, 104 S. Ct. 3380, 3387-88 (1984).

[265]*Wade*, 388 U.S. at 240. *Ash*, 13 U.S. at 313 n.8.

[266]*Simmons*, 390 U.S. at 383-84.

[267]*Id.* at 384.

[268]*See* Nix v. Williams, 104 S. Ct. 2501, 2510 n.5 (1984).

[269]Neil v. Biggers, 409 U.S. 188, 199-200 (1972); United States v. Wade, 388 U.S. 218, 241 (1967); United States v. Fors, 10 M.J. 367 (C.M.A. 1981); United States v. Quick, 3 M.J. 70 (C.M.A. 1977); United States v. White, 17 M.J. 953, 963 n.27 (A.F.C.M.R. 1984); United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982); United States v. Morrison, 5 M.J. 680 (A.C.M.R. 1980); United States v. Gillespie, 3 M.J. 721 (A.C.M.R. 1977); United States v. Clifton, 48 C.M.R. 852 (A.C.M.R. 1974); United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971); United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970). *Cf.* United States v. Crews, 445 U.S. 463, 473 n.18 (1980).

[270]Neil v. Biggers, 409 U.S. 188, 199-200 (1972); United States v. Wade, 388 U.S. 218, 241 (1967); United States v. White, 17 M.J. 953, 963 n.27 (A.F.C.M.R. 1984); United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982); United States v. Morrison, 5 M.J. 680 (A.C.M.R. 1980); United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970). *See* United States v. Crews, 445 U.S. 463, 473 n.18 (1980).

[271]Neil v. Biggers, 409 U.S. 188, 199-200 (1972); United States v. Wade, 388 U.S. 218, 241 (1967); United States v. Fors, 10 M.J. 367 (C.M.A. 1981); United States v. Quick, 3 M.J. 70 (C.M.A. 1977); United States v. White, 17 M.J. 953, 963 n.27 (A.F.C.M.R. 1984); United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982).

Factors Considered	*Supports or Negates Finding an Independent Basis*
Level of certainty demonstrated by the witness at identification process[272]	Ambiguous factor
Length of time between crime and identification process[273]	Ambiguous factor

Other factors that may be considered are:

Factors Considered	*Supports or Negates Finding an Independent Basis*
Existence of a discrepancy between any pre-lineup description and the actual appearance of the accused[274]	Negates finding a reliable identification
Any identification of another person prior to the lineup[275]	Negates finding a reliable identification
Failure to identify the accused on a prior occasion[276]	Negates finding reliable
No discrepancy[277]	Supports finding a reliable identification

[272]United States v. Crews, 445 U.S. 463, 473 (1980); Neil v. Biggers, 409 U.S. 188, 199-200 (1972); United States v. Wade, 388 U.S. 218, 241 (1967); United States v. Quick, 3 M.J. 70 (C.M.A. 1977); United States v. White, 17 M.J. 953, 963 n.27 (A.F.C.M.R. 1984); United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982); United States v. Morrison, 5 M.J. 680 (A.C.M.R. 1978); United States v. Gillespie, 3 M.J. 721 (A.C.M.R. 1977); United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).

[273]Neil v. Biggers, 409 U.S. 188, 199-200 (1972); United States v. Wade, 388 U.S. 218, 241 (1967); United States v. Fors, 10 M.J. 367 (C.M.A. 1981); United States v. Quick, 3 M.J. 70 (C.M.A. 1977); United States v. White, 17 M.J. 953, 963 n.27 (A.F.C.M.R. 1984); United States v. Batzel, 15 M.J. 640 (N.M.C.M.R. 1982); United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970).

[274]United States v. Fors, 10 M.J. 867 (C.M.A. 1981); United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970).

[275]United States v. Wade, 388 U.S. 218, 241 (1967); United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971); United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970).

[276]United States v. Fors, 10 M.J. 367 (C.M.A. 1981); United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970).

[277]United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).

Factors Considered	*Supports or Negates Finding an Independent Basis*
Prior photographic identification from a large group of photographs[278]	Ambiguous factor
The exercise of unusual[279] care to make observation	Supports finding a reliable identification
Prompt identification at first confrontation[280]	Supports finding a reliable identification
Fairness of lineup	Supports finding a reliable identification
The presence of a perpetrator with distinctive physical characteristics[282]	Supports finding a reliable identification
Statement of witness that in-court identification independent of illegal identification[283]	Supports finding a reliable identification

B. HARMLESS ERROR

Even if there is a sixth, fifth, or fourth amendment violation and no independent source, an appellate court may find improperly admitted identification testimony harmless beyond a reasonable doubt.[284]

IX. PRIOR IDENTIFICATIONS—HEARSAY AND BOLSTERING ISSUES

A. IN GENERAL

Aside from constitutional issues, introduction of prior identifications as a matter of evidentiary law is complicated in military law by the existence of two Military Rules of Evidence which govern admissibility. Rule

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[278]United States v. Wade, 388 U.S. 218, 241 (1967). *See also* United States *ex rel.* Woods v. Rundle, 326 F. Supp. 592 (E.D. Pa. 1971).

[279]United States v. Sera-Leyva, 433 F.2d 534 (D.C. Cir. 1970).

[280]United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).

[281]*Id.*; United States v. Holmes, 43 C.M.R. 430 (A.C.M.R. 1970).

[282]United States v. Gillespie, 3 M.J. 721 (A.C.M.R. 1977).

[283]*Id.*; United States v. Clifton, 48 C.M.R. 852 (A.C.M.R. 1974); United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971).

[284]*See, e.g.*, United States v. Pilgrim, 2 M.J. 1072 (A.C.M.R. 1976); United States v. Porter, 50 C.M.R. 508 (N.C.M.R. 1975).

321(a)(1) addresses the admissibility of pretrial identifications generally while Rule 801(d)(1)(C) defines when pretrial statements of identification may be admitted as non-hearsay, *i.e.*, as substantive evidence for the truth of the matter asserted. These Rules will first be examined separately and then areas of overlap will be explored. Finally, the bolstering rule regarding use of lineup photographs will be discussed.

B. RULE 321(a)(1)

Rule 321(a)(1)[285] descends directly from pre-Rule case law and Manual[286] provisions governing the admissibility of pretrial identifications and has no equivalent in the Federal Rules of Evidence which rely solely on Federal Rule 801(d)(1)(C). A sentence by sentence examination would be helpful.

Rule 321(a)(1)'s first sentence states that relevant out-of-court identifications are admissible if the other Rules are satisfied. Although not readily apparent from Rule 321(a)(1) itself, the drafters stated the intent of this provision was to insure compliance with the hearsay rule and to eliminate the need for condition precedent of an in-court identification for any relevant out-of-court identification.[287] While calling this a "significant change,"[288] the provision in fact merely recognized what cases had already done. Out-of-court identifications that met hearsay exceptions were already admissible without an in-court identification.[289] If the out-of-court identification did not meet a hearsay exception it was not admissible unless it met the Manual's corroboration provision[290] which had a condition precedent of an in-court identification by the witness

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[285]Mil. R. Evid. 321(a)(1) provides:

> Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. The witness making the identification and any person who has observed the previous identification may testify concerning it. When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony as to identity even if the credibility of the witness has not been attacked directly, subject to appropriate objection under this rule.

[286]Manual for Courts-Martial, United States, 1949, para. 139; Manual for Courts-Martial, United States, 1951, para. 153a.

[287]Mil. R. Evid. 321(a)(1) analysis (1980).

[288]*Id.*

[289]United States v. Burge, 1 M.J. 408 (C.M.A. 1970) (spontaneous exclamation); United States v. Moore, 47 C.M.R. 680 (A.C.M.R. 1973) (spontaneous exclamation of robbery victim); United States v. Grant, 3 C.M.R. 628 (A.F.B.R. 1952) (spontaneous exclamation of child victim of indecent acts).

[290]*See infra* notes 293-297 and accompanying text.

being corroborated.[291] The corroboration provision and the condition precedent of the in-court identification by the identifying witness are retained in Rule 321(a)(1)'s third sentence.

The second sentence of Rule 321(a)(1) clarifies *who* can testify about an out-of-court identification by providing that "any person who has witnessed the previous identification may testify concerning it." While straightforward on its face, this sentence creates significant problems regarding the hearsay rule which will be discussed below.[292]

The third sentence of Rule 321(a)(1) contains the corroboration rule and provides that an in-court identification of any person[293] by a witness may be corroborated, even before an attack on the witness' credibility, by proof of pretrial identifications. Such testimony is not admitted for the truth of the matter as substantive evidence but rather for the limited purpose of bolstering the credibility of the eyewitness.[294] The corroboration provision originated in the 1949[295] Manual and was continued in the 1951 Manual[296] "on the theory that since identification testimony is so inherently susceptible to mistake and suggestion, proof of a similar identification by the eyewitness has substantial evidential value."[297]

In summary, Rule 321(a)(1) merely retained previous Manual and case law provisions. While that law was clear, the adoption of Rule 801(d)(1)(C) has created significant issues of interpretation. Neither the rules themselves nor the drafter's analysis clearly reconcile Rule 321(a)(1) with the plain meaning and federal interpretations of Rule 801(d)(1)(C).

C. RULE 801(d)(1)(C)

Rule 801(d)(1)(C) was taken without change from the Federal Rules of Evidence and provides that "a [prior] statement is not hearsay if: . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person."

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[291]United States v. Parham, 14 C.M.A. 161, 33 C.M.R. 373 (1963); United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971); United States v. McCutchins, 41 C.M.R. 442 (A.C.M.R. 1969); United States v. Wilson, 8 C.M.R. 256 (A.B.R. 1952).

[292]*See infra* notes 345-347 and accompanying text.

[293]The rule that an in-court identification of persons other than the accused could be corroborated was originally announced by the Court of Military Appeals and adopted in the 1969 Manual. United States v. Tobita, 3 C.M.A. 267, 12 C.M.R. (1953) (in-court identification of prosecutrix could be corroborated). MCM, 1969, para. 153a. *See also* United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).

[294]But if the testimony met also a hearsay exception, it was admitted as substantive evidence. United States v. Burge, 1 M.J. 408 (C.M.A. 1976).

[295]MCM, 1949, para. 139.

[296]MCM, 1951, para. 153a.

[297]Manual for Courts-Martial, United States, 1951, Legal and Legislative Basis, 242.

The legislative history of Federal Rule 801(d)(1)(C) indicates[298] that Congress adopted Wigmore's[299] rationale that in-court identifications have little probative value because the witness knows the accused is present and generally knows the accused sits in a certain location.[300] The events from time of the offense until trial often solidify the witness' belief in the accused's identity.[301] Pretrial identifications, on the other hand, are made closer in time to the crime, before the witness' memory has dimmed, and are therefore more probative and reliable.[302] Additional reliability is gained from the right to counsel and due process protections.[303] Because of the reliability, pretrial identifications are admitted as substantive evidence.[304]

Rule 801(d)(1)(C) is broadly written and is being broadly interpreted in the federal courts. Unlike Rule 321(a)(1)'s bolstering rule, Rule 801(d)(1)(C) does not require on its face, nor have cases required,[305] that the declarant make an in-court identification. The rule does not even require the witness to vouch for the accuracy of the prior identification.[306] This is consistent with the legislative history which indicated congressional concern over memory-dimming delays,[307] bribery, and threats to witnesses[308] preventing prosecution notwithstanding reliable pretrial identifications. As the rule and legislative history state, it is sufficient if the declarant of the pretrial identification simply testifies at the trial and is subject to cross-examination concerning the statement.[309]

A related problem is whether a declarant who forgets or denies making the previous statement can adequately be "subject to cross-

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[298]S. Rep. No. 199, 94th Cong., 1st Sess., *reproduced in* 11 Moore's Federal Practices § 801-41 (1982); H. Rep. No. 355, 94th Cong., 1st Sess., *reproduced in* 1975 U.S. Code Cong. & Ad. News 1092-94.

[299]4 Wigmore, Evidence § 1130 (Chadbourn rev. 1972).

[300]*See also infra* notes 416-424 and accompanying text.

[301]*See supra* note 299. *See also* United States v. Wade, 388 U.S. 218, 240 (1967).

[302]A commentator has suggested that prior statements of identification possess such reliability that even if Fed. R. Evid. 801(d)(1)(C) had not been passed by Congress such statements would have often been sufficiently trustworthy to be admitted under the residual hearsay exceptions. J. Weinstein & M. Burger, Weinstein's Evidence ¶ 801(d)(1)(C) [01] (1984).

[303]*See supra* note 298.

[304]11 Moore's Federal Practice § 801.41 [5] (1982).

[305]United States v. Ingram, 600 F.2d 260 (10th Cir. 1979); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977); United States v. Hudson, 564 F.2d 1377 (9th Cir. 1977); United States v. Dawson, 556 F. Supp. 418 (E.D. Pa. 1982).

[306]*See generally* D. Binder, Hearsay Handbook 413 (1983).

[307]H. Rep. No. 355, 94th Cong., 1st Sess., *reproduced in* 1975 U.S. Code Cong. & Ad. News 1094.

[308]*Id.*; S. Rep. No. 199, 94th Cong., 1st Sess., *reproduced in* 11 Moores' Federal Practice § 801.41 (1982).

[309]*See supra* note 306. *See also* McCormick's Handbook of the Law of Evidence § 251 (E. Cleary 3d ed. 1984) (enough under Fed. R. Evid. 801(d)(1)(C) that declarant be present in court, testify on subject of identity, and be available for cross-examination).

examination" for purposes of the rule and the confrontation clause. The Supreme Court in *California v. Green*[310] explicitly left open the question of when a witness' lapse of memory so affects the accused's right to cross-examination as to deny the right of confrontation.[311] Some courts have adopted Justice Harlan's concurring view in *California v. Green*[312] that all the confrontation clause does is make the declarant physically available, under oath, and not unavailable through exercise of the self-incrimination privilege.[313] The Supreme Court in other cases,[314] other federal courts,[315] and commentators[316] look to each situation to see whether cross-examination is sufficient to give the fact finder a satisfactory basis for evaluating the truth of the statement.[317] As to adequate cross-examination for purposes of Rule 801(d)(1)(C) itself, it has been suggested, contrary to the legislative history,[318] that the pretrial statement of a declarant who claims lack of memory should be governed by Rule 804(b)(5),[319] the residual hearsay exception for unavailable witnesses.[320]

Federal courts have interpreted[321] *Rule 801(d)(1)(C) to allow the witness*[322] or any third party witness [323] to the previous identification to testify concerning it. The third party witness may testify about the identification even without an in-court identification if the declarant eyewitness testifies and is subject to cross-examination.[324]

Under the rule, a statement of identification need not be given at or by any particular time. The 1971 draft of the rule required the identifica-

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[310]California v. Green, 399 U.S. 149 (1970).

[311]*Id.* at 168, 169.

[312]*Id.* at 174, 186-89.

[313]United States *ex. rel.* Thomas v. Cuyler, 548 F.2d 460 (3d Cir. 1977). *See also* Douglas v. Alabama, 380 U.S. 415, 419 (1965) (confrontation denied when witness claimed self-incrimination privilege and would not admit pretrial statement was his).

[314]Nelson v. O'Neil, 402 U.S. 622 (1971) (witness denied statement but testified about underlying facts); Douglas v. Alabama, 380 U.S. 415 (1965).

[315]United States v. Baker, 722 F.2d 343 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1312 (1984); Vogel v. Percy, 691 F.2d 843 (7th Cir. 1982); United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), *cert. denied*, 431 U.S. 910 (1977).

[316]McCormick's Handbook of the Law of Evidence § 251 (E. Cleary 3d ed. 1984); J. Weinstein & M. Burger, Weinstein's Evidence ¶ 801(d)(i)(A) [02]-[09] (1982).

[317]California v. Green, 399 U.S. at 158-61.

[318]*See supra* notes 309, 310.

[319]M. Graham, Handbook of Federal Evidence § 801.13 (1981).

[320]Mil. R. Evid. 804(a)(3) (witness unavailable when testifies to a lack of memory of statement).

[321]*See infra* note 336 and accompanying text.

[322]United States v. Cueto, 611 F.2d 1056 (5th Cir. 1980).

[323]*Id.*; United States v. Elemy, 656 F.2d 507 (9th Cir. 1977); United States v. Fritz, 580 F.2d 370 (10th Cir.) (en banc), *cert. denied*, 439 U.S. 947 (1978); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

[324]United States v. Elemy, 656 F.2d 507 (9th Cir. 1977). *See* United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

tion to be " '*soon*' after perceiving him." "Soon" was deleted as being unnecessarily rigid.[325] Similarly, there are no restrictions as to where the statement of identification is made.[326]

What a statement of identification is has been broadly construed and has included identifications from photos,[327] sketches drawn by police,[328] and sketches drawn by the witness.[329] Police notes and statements have met mixed results. In *United States v. Coleman*,[330] a police note containing information from the accused's drivers license was found admissible under Federal Rule 801(d)(1)(C). In *United States v. Fritz*,[331] a police officer's testimony to the effect that a fellow police officer remembered the accused from another case was a statement of identification. In *United States v. Meyers*,[332] the Army Court of Military Review allowed an undercover investigator's note that "The Black male was later identified as SP4 MEYERS" under Rule 801(d)(1)(C). While the majority opinion of the Court of Military Appeals did not address the issue when affirming *Meyers*, Chief Judge Everett's dissenting opinion stated that because the record did not indicate *how* Meyers "was later identified," the statement did not fit the rule because it was not clear that the statement of identification was based upon the personal senses of the declarant.[333]

D. OVERLAP OF RULES 321(a)(1) AND 801(d)(1)(C)

For identifications of persons,[334] Rules 321(a)(1) and 801(d)(1)(C) almost completely overlap.[335] The overlap is caused by the expansive

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[324]*See generally* 11 Moore's Federal Practice § 801.41 [4.-1] (1982).

[325]*See, e.g.*, United States v. Distler, 671 F.2d 954 (6th Cir. 1981) (identification made at grand jury); United States v. Marchand, 654 F.2d 983 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 732 (1978) (grand jury).

[326]United States v. King, 590 F.2d 253 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1578 (1979); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 732 (1978). The photographs themselves are admissible. *See* United States v. Gordon, 18 M.J. 463 (C.M.A. 1984).

[327]United States v. Moskowitz, 581 F.2d (2d Cir. 1978), *cert. denied*, 439 U.S. 871 (1971). The majority found the police sketch was not a statement under Fed. R. Evid. 801(a) but once the witness testified the sketch was relevant to show the likeness the witness identified. *Id.* at 20, 21. One judge, however, found the sketch to be a statement under Fed. R. Evid. 801(d)(1)(C). *Id.* at 22 (Friendly, J., concurring).

[328]United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 732 (1978).

[329]631 F.2d 908 (D.C. Cir. 1980).

[330]580 F.2d 370 (10th Cir.) (en banc), *cert. denied*, 439 U.S. 947 (1978).

[331]14 M.J. 749, 751 (A.C.M.R. 1982), *aff'd*, 18 M.J. 347 (C.M.A. 1984).

[332]*Meyers*, 18 M.J. at 353, 354.

[333]Both Rules 321(a)(1) and 801(d)(1)(C) apply to identifications of people. In United States v. Tyler, 17 M.J. 381 (C.M.A. 1984), the court applied parts of Mil. R. Evid. 321 to the identification of substances. *See infra* text accompanying note 347.

[334]For a complete discussion of possible areas where the Military Rules of Evidence do not overlap, *see infra* notes 340-354 and accompanying text.

interpretation the federal courts have given Federal Rule 801(d)(1)(C). While Rule 801(d)(1)(C) has not yet been developed in military case law,[336] the application of the federal interpretations[337] will render Rule 321(a)(1) unnecessary. To illustrate this point, a series of situations will be posed and discussed.

(1) If the eyewitness testifies and makes an in-court identification, the eyewitness can also testify about his or her own prior out-of-court identifications. Rule 801(d)(1)(C) allows such prior identifications as substantive evidence.[338] Rule 321(a)(1) adds nothing in this situation as it provides that out-of-court identifications are admissible "if otherwise admissible under these rules."[339] Rule 321(a)(1)'s corroboration rule would appear on its face to apply and to limit the eyewitness' testimony about his or her out-of-court identification to corroboration and not admit it for truth.[340] The Court of Military Appeals, however, held in *United States v. Burge* that Rule 321(a)(1)'s predecessor corroboration provision "does not affect extrajudicial statements, even though identifying in nature, which otherwise qualify for admission as an exception to the general hearsay rule."[341]

(2) If the eyewitness testifies and does *not* make an in-court identification, a witness to a prior out-of-court identification may testify concerning it, and it is admissible as substantive evidence under federal case interpretations of Federal Rule 801(d)(1)(C) if the eyewitness is subject to cross-examination concerning the statement of identification.[342] Rule 321(a)(1) adds nothing in this situation. The corroboration rule in Rule 321(a)(1)'s third sentence does not apply because the condition precedent of an in-court identification is not met.[343] The second sentence of Rule 321(a)(1), *i.e.*, "[t]he witness making the identification and any person who has observed it may testify concerning it," is no immediate help because it has not yet been interpreted whether such testimony by a witness to an out-of-court identification is non-hearsay because it is not of-

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[336]The Court of Military Appeals has yet to interpret Mil. R. Evid. 801(d)(1)(C) in a majority opinion. *See, e.g.*, United States v. Gordon, 18 M.J. 463 (C.M.A. 1984) (issue waived); United States v. Meyers, 18 M.J. 347 (C.M.A. 1984) (issue addressed only in dissenting opinion).

[337]Congress has mandated that, so far as practicable, the Manual rules of evidence shall apply those rules generally recognized in the trail of criminal cases in U.S. district courts. UCMJ art. 36

[338]*See supra* notes 321-323 and accompanying text. *See generally* S. Satzburg, L. Shinasi, & D. Schlueter, Military Rules of Evidence Manual 164, 165 (1981).

[339]*See supra* notes 287-291 and accompanying text.

[340]*See* Mil. R. Evid. 101(b) (rules of evidence in federal courts to be applied in courts-martial only if not inconsistent with or contrary to the Manual).

[341]United States v. Burge, 1 M.J. 408, 411 (C.M.A. 1976).

[342]*See supra* notes 305-320 and accompanying text.

[343]*See supra* notes 291, 293-297 and accompanying text.

fered for truth,[344] non-hearsay under Rule 801(d)(1)(C),[345] or whether it must meet a hearsay exception.[346] Adoption of any of these three theories would not assist in any event because each provides a basis for admissibility independent of Rule 321(a)(1)'s second sentence.[347]

(3) If the eyewitness testifies and makes an in-court identification, a witness to a prior out-of-court identification may testify concerning it. Federal case interpretations allow such testimony by a witness to the out-of-court identification as substantive evidence under Federal Rule 801(d)(1)(C).[348] Rule 321(a)(1) overlaps and conflicts in this situation because the corroboration rule of Rule 321(a)(1)'s third sentence would admit this testimony not for truth, but for corroboration. Again, although it can be argued that Rule 321(a)(1) is inconsistent with the federal rule of evidence and therefore controls,[349] *Burge*[350] held that the corroboration rule does not affect statements which otherwise qualify for admission under hearsay exceptions.[351]

(4) If the eyewitness does not testify, a witness to an out-of-court identification may not testify concerning it unless a hearsay exception, *i.e.*, excited utterance, exists. This result is the same under both rules. Rule 801(d)(1)(C) does not apply because the declarant did not testify and is not subject to cross-examination concerning the statement. Rule 321(a)(1)'s corroboration rule does not apply because the condition precedent of an in-court identification is not met.

There are two possible areas where the rules may not overlap. First, Rule 321(a)(1) expressly provides that it applies to identifications other than of the accused. Rule 801(d)(1)(C)'s language is broad, however, stat-

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[344]The theory is that the witness to the out-of-court identification is merely testifying to something within the witness' personal knowledge, *i.e.*, that an identification was made. Such testimony is relevant given the testimony of the eyewitness even absent an in-court identification. *See generally* Wharton's Criminal Evidence § 187 (E. Toscia 1972); Gasperini, *Eyewitness Identification Under the Military Rules of Evidence*, The Army Lawyer, May 1980, 42, at 42-43.

[345]*See supra* notes 321-324 and accompanying text. The Court of Military Appeals has avoided this issue. *See* United States v. Gordon, 18 M.J. 463, 466 (C.M.A. 1984).

[346]The drafter's analysis states that the second sentence of Mil. R. Evid. 321(a)(1) "is not an express exception authorizing the witness to testify to an out-of-court identification notwithstanding the hearsay rule, rather it is simply an indication that in appropriate circumstances, *see* Rules 803 and 804, a witness to an out-of-court identification may testify concerning it." Mil. R. Evid. 321(a)(1) analysis (1980). Implicitly the drafters seem to reject the federal case view that such statements qualify under Rule 801(d)(1)(C).

[347]United States v. Burge, 1 M.J. 408 (C.M.A. 1976).

[348]*See supra* note 345.

[349]*See supra* note 340.

[350]*See supra* note 341 and accompanying text.

[351]While Rule 801(d)(1)(C) is technically non-hearsay and not an exception, the classification as non-hearsay is merely a legislative classification. *See generally* Moore's Federal Practice § 801.41 (1982).

ing that the rule applies to identifications of a "person" and there is nothing in case law or the legislative history to indicate it would not apply to identifications of persons other than an accused. Similarly, nothing in the rationale of Rule 801(d)(1)(C), *i.e.*, that prior identifications are closer in time to the event and are more reliable, should prevent its application to persons other than an accused.[352] Thus the existence of this possible area of non-overlap is doubtful. Second, the Court of Military Appeals indicated in *United States v. Tyler*[353] that parts of Rule 321 will apply to identification of substances and objects. While Rule 801(d)(1)(C) is expressly limited to persons so is Rule 321 when read as a whole. As with Rule 321, the court could easily apply the principles of Rule 801(d)(1)(C) to identifications of other persons as well.[354]

In summary, with the doubtful exceptions just noted, Rule 321(a)(1) adds nothing in the area of admissibility of statements of identification of persons that is not covered by federal interpretations of Rule 801(d)(1)(C). Everything admitted under Rule 321(a)(1) is admitted by Rule 801(d)(1)(E).[355] Everything excluded by Rule 321(a)(1) is excluded by Rule 801(d)(1)(C). The expansive interpretations given Rule 801(d)(1)(C) have rendered Rule 321(a)(1) unnecessary. The use of both rules simply creates unneeded confusion. There are no practical or uniquely military considerations that counsel against following congressional guidance that the Manual should apply federal rules of evidence generally recognized in criminal trials in federal district courts.[356]

E. BOLSTERING BY USE OF PHOTOGRAPHS OF A LINEUP

In *United States v. Gordon*,[357] the court found photographs of a lineup in which the victim identified the accused to be relevant "because it tends to establish the fairness of the lineup and thereby strengthen the Government's identification."[358] The court also noted that admissibility

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[352]*See generally* United States v. Tobita, 3 C.M.A. 267, 12 C.M.R. 23 (1953) (Manual's corroboration rule applies to identifications of persons other than accused). *See generally* 4 Wigmore Evidence § 1130 (Chadbourne rev. 1972).

[353]17 M.J. 381 (C.M.A. 1984).

[354]*See* United States v. Booz, 451 F.2d 719 (3d Cir. 1971) (pre-Fed. R. Evid. common law identification rules applied to license plate number). *See generally* D. Binder, Hearsay Handbook 419 (1983) (Rule 801(d)(1)(C) should apply to objects).

[355]The bolstering rule of United States v. Gordon, 18 M.J. 463 (C.M.A. 1984), that photographs of lineup are relevant to establish the fairness of the lineup and thereby bolster the government's identification is a rule of relevance that does not depend on either Mil. R. Evid. 321(a)(1) or Mil. R. Evid. 801(d)(1)(C).

[356]UCMJ art. 36.

[357]18 M.J. 463 (C.M.A. 1984).

[358]*Id.* at 467.

did not depend on a defense claim of suggestiveness[359] and, on the facts of *Gordon*, did not even require the witness to testify about the lineup.[360]

X. EXPERT PSYCHOLOGICAL TESTIMONY

A. IN GENERAL

Although the evidence is anecdotal,[361] it is widely believed that eyewitness identification evidence leads to many wrongful convictions.[362] To lessen the dangers of erroneous eyewitness identification, defense counsel have sought to introduce expert testimony of psychologists to educate jurors. Psychologists testify about suggestiveness in lineups and photospreads;[363] problems of witnesses in perceiving and remembering events, and retrieving information from the memory;[364] effects of stress and violence[365] on witness accuracy; cross-racial identification;[366] and problems of word choice in interrogation and post-event information affecting testimony.[367] Studies indicate that expert testimony does indeed increase juror skepticism of eyewitness evidence.[368] Studies have not shown, however, that expert testimony increases a juror's ability to discriminate between accurate and inaccurate identifications.[369] While commentators have generally favored utilization of expert testimony,[370] a few psychologists have expressed misgivings because of the incompleteness of research data,[371] uncertainty that jurors need expert help,[372] and damage to the profession resulting from battles of experts.[373]

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[359]*Id.*

[360]*Id.* at 466.

[361]Loftus, *Silence Is Not Golden*, 38 Amer. Psychologist 564 (1983).

[362]*See generally* United States v. Wade, 388 U.S. 218, 228-30 (1967).

[363]*See generally* K. Ellison & R. Buckhout, Psychology and Criminal Justice 108-110, 309-18 (1981) [hereinafter cited as Ellison & Buckhout].

[364]*See generally* E. Loftus, Eyewitness Testimony 20-109 (1979) [hereinafter cited as Loftus].

[365]*See generally* Ellison & Buckhout, *supra* note 363, at 94-96; Loftus, *supra* note 364, at 33-36, 153-156.

[366]*See generally* Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984) [hereinafter cited as Johnson].

[367]*See generally* Loftus, *supra* note 364, at 54-87.

[368]McCloskey & Egeth, Eyewitness Identification, *What Can a Psychologist Tell a Jury?*, 38 Amer. Psychologist 550, 555 (1983) [hereinafter cited as McCloskey & Egeth]. A response to this article is Loftus, *Silence Is Not Golden*, 38 Amer. Psychologist 564 (1983). A rebuttal to Loftus is McCloskey & Egeth, *A Time To Speak, or a Time To Keep Silent*, 38 Amer. Psychologist 573 (1983).

[369]McCloskey & Egeth, *supra* note 368, at 555-56.

[370]Weinstein, *Review of Eyewitness Testimony*, 81 Colum. L. Rev. 441, 454 (1981); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Testimony*, 29 Stanford L. Rev. 969 (1977); Johnson, *supra* note 366, at 958-74.

[371]McCloskey & Egeth, *supra* note 368, at 556-58.

[372]*Id.* at 551-55.

[373]*Id.* at 558-60.

B. MILITARY AND FEDERAL TREATMENT

Military treatment of expert psychological testimony has been scant. The military cases, like the federal cases noted below, provide some guidance but typically defer to the trial court's discretionary decision to admit or keep out the testimony. In *United States v. Hulen*,[374] the Court of Military Appeals upheld a trial judge's refusal to allow testimony by a psychologist on cross-racial identification. Because the defense only made an offer of proof of the proferred expert's own single study, the court found the record failed to show the testimony met the *Frye* test of general acceptance in the relevant scientific community.[375] *Hulen* provides little current guidance,[376] however, since the continued validity of *Frye* in military law is an open question[377] and, even if *Frye* is still valid, problems of cross-racial identity are generally accepted in the psychological community.[378]

In *United States v. Hicks*,[379] the Army Court of Military Review adopted the leading federal case, *United States v. Amaral*,[380] to test for admissibility. The test requires a qualified expert, a proper subject, conformity to a generally accepted explanatory theory, and probative value compared to prejudicial effect. The court applied the test and upheld the trial court's decision not to allow expert testimony on the effects of stress and the taint on an in-court identification of a suggestive lineup.

While simple on its face, the four-part test of *Amaral-Hicks* masks difficult problems that the federal courts have struggled with. The first test, a qualified expert, poses no greater obstacle than Rule 702, which provides that an expert may be qualified by his "knowledge, skill, training, or education." The second test, proper subject matter, is far more problematic and embraces two frequently used rationales used to ex-

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[374]3 M.J. 275 (C.M.A. 1977).

[375]*Id.* at 276-77. Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923).

[376]Judge Cook's *dicta* in *Hulen's* majority opinion that testimony that met the *Frye* test must be admitted was rejected by Judges Perry and Fletcher and by the Army Court of Military Review in United States v. Hicks, 7 M.J. 561 (A.C.M.R.), *petition denied*, 7 M.J. 249 (C.M.A. 1979) which found, consistent with federal treatment, that even if *Frye* is met, admission of the testimony is discretionary with the military judge.

[377]The applicability of *Frye* after adoption of Mil. R. Evid. 702 (scientific evidence admissible if will assist the trier of fact) has been recognized, but not resolved by the Court of Military Appeals. United States v. Hammond, 17 M.J. 218, 220 n.4 (C.M.A. 1984); United States v. Snipes, 18 M.J. 172 (C.M.A. 1984); United States v. Martin, 13 M.J. 66, 68 n.4 (C.M.A. 1982). The courts of military review, however, continue to apply *Frye*. *See, e.g.*, United States v. Bothwell, 17 M.J. 684 (A.C.M.R. 1983) (psychological stress evaluation not generally accepted).

[378]Ten studies show a substantial impairment in the ability of white American subjects to recognize black faces. Two other studies provide only indirect support. *Johnson*, *supra* note 366, at 938-40, 958-73.

[379]7 M.J. 561 (A.C.M.R. 1979).

[380]488 F.2d 1148 (9th Cir. 1973).

clude psychological testimony: that the jury does not need expert assistance in understanding problems of eyewitness identification,[381] and that the testimony invades the province of the jury.[382] The issue of the jury's need for the evidence has been disputed even by psychologists,[383] and courts have found that cross-examination,[384] argument of counsel,[385] and instructions[386] are sufficient to highlight problems. While these advocacy tools may be adequate to illustrate some dangers in eyewitness testimony, they may be inadequate to illustrate psychologists' conclusions that run contrary to what the average person believes. For example, jurors believe, contrary to psychologists' conclusions, that confidence and accuracy are positively related[387] and that stress enhances perception,[388]

There are many other areas concerned with the subject matter of testimony that do not normally need expert assistance. These could be divided into the areas concerning elements of competency: the ability to observe; ability to remember; and ability to recall. Most individuals are aware of the concept of perceptual selectivity. Whether an individual will observe an entire event depends upon the surrounding circum-

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[381]*See, e.g.*, United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973). *See generally* Johnson, *supra* note 366, at 967-70.

[382]The invading the province of the jury issue is framed as commenting on a witness' credibility, an ultimate issue for the factfinder. *See, e.g.*, United States v. Brown, 540 F.2d 1048 (10th Cir.), *cert. denied*, 429 U.S. 1100 (1976). *See generally* Johnson *supra* note 366, at 970-71. Other courts have rejected the "invasion" issue because Fed. R. Evid. 704 has generally rejected limitations on experts' opinions on ultimate issues. *See* United States v. Watson, 587 F.2d 365, 369 n.5 (7th Cir. 1978); State v. Chapple, 660 P.2d 1208 (Ariz. 1983).

[383]*See supra* notes 371-372 and accompanying text.

[384]Cross-examination may not be a panacea, however, because it is difficult to cross-examine a witness on something the witness may not acknowledge, such as difficulty in cross-racial identification, and the cross-examination may only serve to inadvertently bolster the identification by dwelling on it. *See generally* Watkins v. Sowders, 449 U.S. 341, 356-57 (1981) (Brennan, J., dissenting); Johnson, *supra* note 366, at 953; *see also supra* note 10.

[385]Argument, however, is restricted to facts in evidence and matters of common knowledge. If no psychological data were admitted either by expert testimony or a stipulation an argument regarding problems of cross-racial identification might be objected to as arguing facts not in evidence. *See generally* Johnson *supra* note 366, at 955-67.

[386]Instructions have been proposed as cures for eyewitness identification problems in two ways. First, there have been calls for general cautionary instructions on the dangers of eyewitness identification. *See infra* notes 433-450 and accompanying text. Second, tailored instructions on particular problems such as cross-racial identification have been advocated. *See generally* Johnson, *supra* note 366, at 974-84.

[387]*The relationship between a witness' confidence in the identification and its accuracy is* tenuous. A witness who is confident in identification testimony may not be accurate. *See generally* Loftus, *supra* note 364, at 100-01. Experts have asserted that a witness' confidence is related to the witness' personality traits and time spent rehearsing testimony with the prosecutor. *See generally* Johnson, *supra* note 366, at 942.

[388]*See generally* Ellison & Buckhout, *supra* note 363, at 94-96. *But see* McCloskey & Egeth, *supra* note 371, at 555 (claim that stress impairs perception may be valid but empirical data insufficient).

stances and the interests of that particular individual. Laypeople know that perception of time varies. When people are under stress they will estimate the time as being very long; if they are enjoying themselves they will underestimate the time. Another area that has an impact on the ability to observe are the conditions: poor lighting, fog, and distance. An expert is not needed to explain that. The concept of expectancy is also common knowledge. An individual who expects an event to happen will be more observant than an individual who is surprised. Most people are not good observers to startling events. Lastly, personal needs and biases will have an impact on the accuracy of eyewitness identification. When an individual witnesses a crime involving a loved one there will be certain biases in the form of quibbling, omitting facts, or exaggerating facts.

An expert is not needed to testify concerning the ability to remember. Most people know that memory decays over time. That this decay results in the witness filling in the gaps so the event makes sense to the witness is a common sense matter. The court members could also be reminded that an individual's verbal ability will have an impact on an individual's ability to recall. Additionally, suggestions prior to trial, at a lineup, or at the trial itself through cross examination also have an impact on the ability to recall. These common sense matters could be argued to court members.

The third part of the test, conformity to a generally accepted explanatory theory, presents many issues regarding the application of the *Frye* test. General acceptance of an explanatory theory is a version of the *Frye* test that presents an unresolved issue, *i.e.*, whether *Frye* requires general acceptance of the *theory* underlying the technique used or phenomenon observed or merely that the technique or phenomenon itself be generally accepted.[389] While many psychological phenomenon are generally accepted, the precise explanation may be still evolving.[390] Further, the California Supreme Court has held that the *Frye* test does not apply to expert psychological testimony on eyewitness identification. The court distinguished expert *witnesses* from scientific evidence involving *machines*, such as a polygraph, which may be surrounded by an aura of infallibility.[391] Courts that continue to apply *Frye* to this type of expert testimony are beginning to find general acceptance.[392] Persuasive evidence of general acceptance may be found in that the Ameri-

[389]*See generally* Gianelli, *The Admissibility of Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 Colum. L. Rev. 1197, 1211-12 (1980) [hereinafter cited as Giannelli]; Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 193 (1983).

[390]*See generally* Johnson, *supra* note 366, at 971.

[391]People v. McDonald, 690 P.2d 709 (Cal. 1984).

[392]United States v. Smith, 736 F.2d 1103 (6th Cir. 1984).

can Psychological Association has recognized eyewitness identification as a sub-field.[393] *Frye*, however, is often inconsistently applied[394] and some courts continue to find that such psychological testimony is not generally accepted.[395] Finally, the constitutional right to present a defense may overcome the *Frye* test if it prohibits reliable and probative evidence.[396]

The fourth part of the test, comparing probative value to prejudicial effect, mirrors the general evidentiary requirement of Rule 403[397] and is often invoked.[398] The issue has been resolved by considering factors such as the need for the testimony considering the adequacy of cross-examination, argument, and instructions,[399] and the prejudice from the aura of special reliability and trustworthiness.[400]

Overall, federal treatment of expert psychological[401] testimony has reflected the hostility of military courts and has generally upheld discretionary trial court decisions to exclude the experts on a variety of grounds.[402] Recent federal and state cases, however, may signal a shift in

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[393]*Id.* at 1106.

[394]*See generally* Giannelli, *supra* note 389, at 1208-21.

[395]*See, e.g.*, United States v. Dodson, 16 M.J. 921 (N.M.C.M.R. 1983). In *Dodson*, the court summarily found an expert's proferred testimony on eyewitness identification not to be generally accepted, *citing* United States v. Fosher, 590 F.2d 381 (1st Cir. 1981) and United States v. Amaral, 488 F.2d 1148 (1973). *Fosher* only found that the offer of proof *in that case* did not show general acceptance. 590 F.2d at 383. *Amaral* explicitly did not reach the issue. 488 F.2d at 1153-54.

[396]*See generally* Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial, Confrontation and Compulsory Process*, 101 Mil. L. Rev. 1, 73-74 (1983); Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 196-98 (1983).

[397]United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984).

[398]*See, e.g.*, United States v. Dodson, 16 M.J. 921 (N.M.C.M.R. 1983). *See generally* Johnson *supra* note 366, at 971-73.

[399] United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975).

[400]United States v. Fosher, 590 F.2d 381 (1st Cir. 1979). *But see* People v. McDonald, 690 P.2d 707 (Cal. 1984) (aura of special reliability and trustworthiness less a problem with expert witnesses than machines such as the polygraph).

[401]While generally unreceptive to defense psychological experts, federal courts have been more lenient in allowing government photographic experts to testify as to clothing and faces in bank surveillance photographs matching the accused's. United States v. Green, 525 F.2d 386 (8th Cir. 1977) (similarities between clothes in photo and accused's); United States v. Snow, 552 F.2d 105 (6th Cir. 1977) (expert compared photos of accused with bank surveillance photos).

[402]United States v. Parham, 725 F.2d 450 (8th Cir. 1984); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982) (impermissible comment on weight and credibility; cross-examination sufficient); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979) (not reliable enough for *Frye* test; not sufficiently beyond knowledge of jurors to satisfy Fed. R. Evid. 702; prejudice from aura of special reliability); United States v. Watson, 587 F.2d 365 (7th Cir. 1978) (expert testimony not needed in view of prompt and positive identification; work on cross-racial identification inadequate to justify admission); United States v. Brown, 540 F.2d 1048, *cert. denied*, 429 U.S. 1100 (1976) (invades province of jury); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973) (cross-examination adequate); United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975) (cross-examination,

attitude. In *Kampshoff v. Smith*,[403] the Second Circuit, relying heavily on psychological literature, found prejudicial error in the admission of unconstitutionally obtained[404] identification testimony even though it was corroborated by accomplice testimony. In affirming the grant of a writ of *habeas corpus*, the court noted that "[j]uries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness of the need to recall has on witnesses."[405] In *United States v. Smith*,[406] the Sixth Circuit found harmless error in refusing to allow expert psychological testimony. Holding that the four-part *Amaral-Hicks* test was met, the court found that in the prior four years expert psychological testimony on eyewitness identification had gained reliability.[407] The court cautioned, however, that the testimony should be tied to the specific facts of the case at hand. In *United States v. Downing*,[408] the Third Circuit found error in the trial court's determination that expert psychological testimony on eyewitness identification could never be "helpful" under Rule 702. Rejecting the *Frye* test as a condition precedent for the admissibility of scientific evidence, the court stated that the critical element was reliability. The court went on to require a three-part preliminary inquiry to determine admissibility under Rule 702: (1) the soundness and reliability of the process or technique used in generating the evidence; (2) the possibility the evidence would overwhelm, mislead, or confuse the jury; and (3) the proferred connection between the scientific evidence and the disputed facts in the case. Specifically focusing on expert testimony on eyewitness identification, the court held that relevancy required the defendant to make a detailed offer of proof explaining precisely how the expert's testimony is relevant to the eyewitness identifications at hand. The court vacated the judgment and remanded for hearings on reliability and relevance.

Finally, some state courts have begun to find abuses of discretion where judges have refused to admit expert psychological testimony. In *People v. McDonald*,[409] the California Supreme Court found that when an eyewitness' identification is a key issue, but is not substantially cor-

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argument, and instructions sufficient; prejudice from aura of special reliability). *Cf.* United States v. Sims, 617 F.2d 1371 (9th Cir. 1980) (no error to fail to provide funds to employ defense psychologist under 18 U.S.C. 3006A(e) where cross-examination effective). *See generally* Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 Mil. L. Rev. 77 (1984).

[403]698 F.2d 581 (2d Cir. 1983).

[404]The identification procedure was impermissibly suggestive. *Id.* at 583.

[405]*Id.* at 585 (footnotes omitted).

[406]736 F.2d 1103 (6th Cir. 1984).

[407]*Id.* at 1106.

[408]763 F.2d 1224 (3d Cir. 1985).

[409]690 P.2d 709 (Cal. 1984).

roborated by evidence giving it independent reliability, failure to allow expert testimony on specific psychological factors shown by the record will ordinarily result in error. In *State v. Chapple*,[410] the court found an abuse of discretion when expert psychological testimony that ran contrary to common understanding, and which provided evidentiary support for counsel's argument, was precluded. The court found various factors such as the tenuous relationship between confidence and accuracy[411] to be relevant to facts in the case and found that the average juror may be unaware of the effects of these factors on memory.

C. HYPNOTICALLY-REFRESHED TESTIMONY

Expert assistance and testimony has been sought by hypnotically enhancing the eyewitness' memory. Hypnotically refreshed testimony is highly controversial.[412] In *United States v. Harrington*,[413] the Army Court of Military Review found that hypnotically refreshed testimony satisfied the *Frye* standard "and is admissible in a criminal trial if the use of hypnosis in that case was reasonably likely to result in recall comparable in accuracy to normal human memory."[414] The court, however, required the proponent to comply with a six-step procedure to establish admissibility.[415]

XI. IN-COURT IDENTIFICATION PROCEDURES

While lacking in probative value,[416] in-court identifications nonetheless have been recognized as being highly suggestive. The fact that in-court identifications are identification procedures for purposes of the due process rule is frequently overlooked. In *United States v. Moore*,[417]

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[410]660 P.2d 1208 (Ariz. 1983).

[411]*See supra* note 387.

[412]*See generally* Plotkin, *The Previously Hynotized Witness: Is His Testimony Admissible?* 106 Mil. L. Rev. 163 (1984).

[413]18 M.J. 797 (A.C.M.R. 1984).

[414]*Id.* at 802.

[415]The six steps are:

> First, the interview should be conducted by an independent psychiatrist or psychologist experienced in the use of hypnosis. Second, the psychiatrist or psychologist should not be regularly employed by the prosecution or defense. Third, any information concerning the case which is revealed to the hypnotist by either party must be recorded in some manner, preferably by videotape. Fourth, a detailed statement from the witness should be obtained prior to the hypnotic session. Fifth, all contact between the hypnotist and the subject must be recorded. Sixth, and finally, only the hypnotist and the subject should be present during any phase of the hypnotic session.

Id. at 803 (citation omitted).

[416]*See supra* notes 298-304 and accompaning text.

[417]434 U.S. 220 (1977). In *Moore*, however, the court's language was broad enough to include all judicial proceedings and its chief concern was the suggestiveness of what is in essence a showup.

the Supreme Court recognized the suggestiveness of judicial proceedings in holding there was a right to counsel at a preliminary hearing. Federal courts have recognized the due process issue at pretrial judicial proceedings[118] as well as at trial.[119]

In *Moore* the Supreme Court suggested defense options[120] available at the court's discretion to alleviate the suggestiveness: requesting a pretrial lineup,[121] sitting with the spectators during the identification,[122] and seeking to cross-examine the witness out of turn to test the identification before it hardened. Although not mentioned by the Court in *Moore*, an in-court lineup is another remedy available at the discretion of the court.[123] Other in-court identification procedures that the *government* might request, *e.g.*, having the accused stand for identification,[124] wearing clothing and disguises,[125] and shaving beards and moustaches,[126] are within the court's discretion and may trigger due process considerations. The accused may wish to exhibit characteristics such as scars or tattoos. Such an exhibition is not testimonial and does not require the accused to take the stand for cross-examination.[127]

It is extremely difficult for the accused to prevail against a judge's discretionary ruling in this area. An abuse of discretion must result in a violation of the due process test for identification procedures[128] and must not be harmless error.[129]

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[118]Boyd v. Henderson, 555 F.2d 56 (2d Cir. 1977) (arraignment).

[119]United States v. Archibald, 734 F.2d 938 (2d Cir. 1984); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970).

[120]*Moore*, 434 U.S. at 230 n.5.

[121]United States v. Brown, 699 F.2d 585 (2d Cir. 1983); United States v. McDonald, 441 F.2d 259 (9th Cir. 1971); United States v. Ravich, 421 F.2d 1196 (2d Cir.) *cert. denied*, 400 U.S. 834 (1970). A state supreme court has held, however, that there is a right to a pretrial lineup when identification is a material issue and mistaken identification is a likelihood. Evans v. Superior Court, 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974).

[122]United States v. Edward, 439 F.2d 150 (3d Cir. 1971). *See* Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1979), *cert. denied*, 404 U.S. 834 (1971).

[123]United States v. Archibald, 734 F.2d 938 (2d Cir. 1984); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970); Nask v. State of Maryland, 371 F. Supp. 801 (D. Md. 1973). *See* United States *ex. rel.* Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977).

[124]United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Zamiello, 432 F.2d 72 (9th Cir. 1970); United States *ex. rel.* Stovall v. Denno, 35 F.2d 731 (2d. Cir. 1966), *aff'd*, 388 U.S. 293 (1967).

[125]United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978).

[126]United States v. Valenzuela, 551 F. Supp. 1118 (C.D. Cal. 1982).

[127]United States v. Bay, 748 F.2d 1344 (9th Cir. 1984) (reversed where judge ruled that exhibition of tattoos would require accused to be cross-examined).

[128]*See, e.g.*, United States v. Williams, 436 F.2d 1166 (9th Cir. 1970). *See supra* notes 185-197.

[129]United States v. Archibald, 734 F.2d 938 (2d Cir. 1984) (harmless error to refuse in-court lineup); United States v. Bright, 630 F.2d 804 (5th Cir. 1980) (harmless error to require accused to stand for identification by witnesses).

Counsel must request permission from the judge to engage in any trial tactics such as substituting another person for the accused at the counsel table. Such action may not only result in disciplinary action,[430] but may also result in prosecution of the attorney. In *United States v. Thoreen*,[431] an attorney's use of a sutstitute at the counsel table without notifying the government or the judge was found to be an obstruction of justice under the federal contempt statute.[432] Even though Thoreen revealed the ruse after the government rested, the court found his active misrepresentations to the factfinder, *i.e.*, that the substitute was the accused, deceived the court and impeded the search for truth.

XII. CAUTIONARY INSTRUCTIONS

Commentators,[433] psychologists,[434] and some courts view cautionary jury instructions as at least a partial solution to the problems of eyewitness identification. Although military authority is scant,[435] a clear federal trend favors cautionary instructions.[436] The leading case is *United States v. Telfaire*,[437] in which the D.C. Circuit approved for future use Model Special Instructions on Identification,[438] which focus juror atten-

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[430]DR 1-102(A)(4) (lawyer shall not engage in deceit or misrepresentation); DR 7-102(A)(6) (lawyer shall not create or preserve evidence that knows is false); DR 7-106(C)(5) (lawyer shall not deviate from known customs of practice of the bar without notice). *See generally* United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981).

[431]653 F.2d 1332 (9th Cir. 1981).

[432]18 U.S.C. § 401 (1976). *Cf.* MCM, 1984, Part IV, para. 96, (obstruction of justice). A World War II military defense counsel was successfully prosecuted under the General Article for "a delay in the orderly progress of said General Court-Martial" for using a substitute at the counsel table. The attorney did not reveal the use until after the substitute was convicted. The attorney's conviction was set aside on constitutional grounds because of inadequate time (80 minutes) to prepare his defense. Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[433]*See generally* Johnson, *supra* note 366, at 974-82; Note, *Eyewitness Identification and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 Wash. U.L.Q. 1387 (1983).

[434]*See generally* Loftus, *supra* note 364, at 189-90.

[435]Apparently the sole military case is United States v. Foster, 13 M.J. 789 (A.C.M.R. 1982). In *Foster* the court found that the instructions given, particularly regarding credibility of witnesses and inconsistent statements, clearly focused on the identification issue. *Id.* at 794. The issue as to a special "misidentification" instruction was waived. *Id.* 794 n.4.

[436]*See generally* Johnson, *supra* note 366, at 977-78.

[437]469 F.2d 552 (D.C. Cir. 1972).

[438]The *Telfaire* instruction is as follows:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identify, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identifiction of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.
>
> Identification testimony is an expression of belief or impression by the wit-

tion on the reliability factors used by the Supreme Court in the right to counsel and due process cases.[439] Telfaire's own conviction was affirmed without special instructions, however, because the instructions given adequately focused the jurors' attention and there were no special diffi-

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ness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness has had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this not not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable that one which results from the presentation of the defendant alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

Id. at 558-589. The bracketed sentences are to be used if appropriate. *Id.* at 589. *See also* 1 E. Devitt & C. Blackman, Federal Jury Practice and Instructions § 15.19 (2d ed. 1977).

[439]Stovall v. Denno, 388 U.S. 293 (1967); United States v. Wade, 388 U.S. 218 (1967). *See generally supra* notes 261-262 and accompanying text.

culties in the identification which was confirmed by an apparently accidental on-the-scene showup.[440] Moreover, the court did not compel future use of the instruction, but stated that "a failure to use this model, with appropriate adaptions, would constitute a risk in future cases that should not be ignored."[441]

All the federal circuit courts that have decided the issue have either approved or required a cautionary instruction.[442] Those circuits which merely approved a cautionary instruction have usually deferred to the trial judge's discretion to give the instruction and have found no abuse of discretion or harmless error if a cautionary instruction was not given. Existing instructions and counsel's cross-examination and argument have been found sufficient to focus the jury's attention on the issue, or, the cautionary instruction has been found unnecessary where the government's case did not hinge on a single eyewitness or where other evidence corroborated the identification.[443] Even circuits requiring an instruction have not done so under all circumstances, although reversible error has been sometimes found.[444] If instructions are required, *Telfaire*

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[440]*Telfaire*, 469 F.2d 554 n.4, 556-57.

[441]*Id.* at 557.

[442]The Fifth and Eleventh Circuits have not decided the issue. *See generally* Johnson, *supra* note 366, at 977-78.

[443]United States v. Kavanaugh, 572 F.2d 9 (1st Cir. 1978) (prefers special instruction but failure to give was harmless error due to defense's cross-examination, adequacy of other instructions, and independent evidence of identification); United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972) (instruction should be given if requested; reversed for failure to so instruct and denial of opportunity to object to instructions outside jury's presence); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978) (while better practice to give instruction, no error where other instructions adequate); United States v. Evans, 484 F.2d 1178 (2d Cir. 1973) (not error in light of counsel's full opportunity to develop evidence and adequacy of other instructions); United States v. O'Neal, 496 F.2d 308 (6th Cir. 1974) (instructions given were adequate but "some additional cautionary language might be added"); United States v. Collins, 559 F.2d 561 (9th Cir.), *cert. denied*, 434 U.S. 907 (1977) (no abuse of discretion where did instruct identification testimony "should be considered with great caution and weighed with great care"); United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980) (no abuse of discretion where there were two eyewitnesses, corroborating evidence, and instructions given were adequate); United States v. Thoma, 713 F.2d 107 (10th Cir. 1983) *cert. denied*, 104 S. Ct. 721 (1984) (instruction not required to fairly present case to jury where there were several eyewitnesses).

[444]United States v. Barber, 442 F.2d 517 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971) (pre-*Telfaire* case which prospectively required an instruction similar to *Telfaire*); United States v. Holley, 502 F.2d 273 (4th Cir. 1974) (circuit will prospectively view with "grave concern" failure to give substantial equivalent of Telfaire); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976) (reversed for failure to instruct, announced rule that will view with "grave concern" failure to give substantial equivalent of *Telfaire*); United States v. Greene, 591 F.2d 471 (8th Cir. 1979) (reversed for failing to follow circuit rule that specific and detailed identification instructions should be given if identification based solely or substantially on eyewitness testimony).

or its substantial equivalent is favored but not always required.[445] Some circuits which have favored the discretionary approach to the cautionary instruction also accept less detailed instructions.[446]

A further refinement of the cautionary instruction issue is the notion that instructions should be given on particular problems that psychologists have identified. For example, Judge Bazelon advocated a specific instruction dealing with cross-racial identification in his concurring opinion in *Telfaire*.[447] No court has yet adopted Judge Bazelon's view, however.[448] One commentator has gone further and suggested that instructions address not only specific problems that psychologists have identified but that the instruction include the psychologists' data.[449]

While acceptance has not come for instructions tailored to specific psychological problems and underlying psychological data, military law clearly lags behind the federal trend of approving or requiring cautionary instructions such as *Telfaire* or substantial equivalents.[450]

XIII. CONCLUSION

We have sought to comprehensively set out the current state of the law, identify trends, and suggest solutions regarding the constitutional, evidentiary, instructional, and in-court problems of eyewitness identification. The unique dangers of eyewitness identification are many and have resulted in the development of this large and specialized body of law. Greater understanding of the practical and legal problems of eyewitness identification will help lessen the danger of a miscarriage of justice due to mistaken identification.

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[445]United States v. Anderson, 739 F.2d 1254 (7th Cir. 1984) (Committee on Federal Criminal Jury Instructions of the Seventh Circuit pattern instruction was "substantial equivalent" of *Telfaire*); United States v. Greene, 591 F.2d 71 (8th Cir. 1979); United States v. Holley, 502 F.2d 273 (4th Cir. 1974); United States v. Barber, 442 F.2d 517 (3d Cir. 1971) (pre-*Telfaire* case required instruction similar to *Telfaire*).

[446]United States v. Field, 625 F.2d 1982 (9th Cir. 1980); United States v. Scott, 578 F.2d 1186 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978) (short instruction found in E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 1518 (3d ed. 1977) approved).

[447]*Telfaire*, 469 F.2d at 559-61. *See also* Johnson, supra note 366, at 976-77 (suggests improvement on Judge Bazelon's proposal).

[448]*See generally* Johnson, *supra* note 366, at 981-82.

[449]*Id.* at 982-86.

[450]*See supra* note 435.

IDENTIFYING AND CHARGING COMPUTER CRIMES IN THE MILITARY

by
Captain Michael L. Stevens*

I. Introduction

The computer has become a pervasive force in American society since the 1950s.[1] In 1976, more than two million people in the United States had *computer-related jobs as programmers, operators, and maintenance* technicians.[2] It was estimated that in 1978 there were more than 100,000 main-frame computers and 200,000 mini-computers in operation in the United States,[3] and that by 1990 there will be over eighty million micro-computers in existence.[4] The computer has so permeated the American way of life that it was selected as Time Magazine's " 'machine' of the year" for 1982.[5]

The computer has become critical to our national defense, financial transactions, and information transmissions. The federal government alone has over 18,000 medium and large scale computers at approximately 4,500 locations.[6] The General Service Administration projects

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[1]Electronic calculating devices were first developed in the 1940s. It was not until the 1950s, however, that a computer was developed that could operate from an internally stored program, and it was not until 1954 that the first commercially salable computer was developed. J. Soma, The Computer Industry 15-21, (1976).

[2]Volgyes, *The Investigation, Prosecution, and Prevention of Computer Crime: A State-of-the-Art Review*, 2 Computer L.J. 385, 386 (1980) [hereinafter cited as Volgyes]

[3]*Id.*

[4]H. Rep. No. 894, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 509 [hereinafter cited as H. Rep. No. 894].

[5]Time Magazine, Jan. 3, 1983.

[6]H. Rep. No. 894, *supra* note 4, at 514.

that by 1990 there will be between 250,000 and 500,000 micro-computers in use in the federal government.[7]

While the use of computers increases in legitimate government and business activities, the use of those same computers in illegitimate activities is not far behind. Because the criminals have never been averse to using new technology to further their craft, the government must be vigilant in thwarting their ever increasing advances. The criminal justice system has remained "largely uninformed concerning the technical aspects of computerization. . . ."[8] The purpose of this article is to provide the military attorney with an analytical framework upon which to understand the role of computer-related crimes in the military justice system.

II. The Extent of Computer-Related Crime

The military is not immune to computer-related crimes. Four attempts were made in 1974 to sabotage computer operations at Wright-Patterson Air Force Base by employing such techniques as using magnets to destroy computer data, loosening electrical wires to stop the main-frame computer from receiving power, and gouging electronic equipment with sharp tools. Fortunately, the financial losses from these attempts were small.[9]

Nor was the incident at Wright-Patterson an isolated occurrence; other incidents involving crimes by computer have occurred in the military. On August 24, 1970, an Army Mathematics Research Center at the University of Wisconsin was bombed by political dissidents. The explosion killed a researcher, caused nearly $2.5 million in property damage, and destroyed an accumulation of twenty years of important data which represented an investment of nearly $16 million.[10] A disgruntled Army officer in 1970 erased purchasing data from magnetic tapes in Washington, D.C., while awaiting retirement.[11] In 1979, a senior airman was convicted for destroying telephone toll tickets before they could be entered

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[7] *Id.*

[8] *Id.* at 515.

[9] *Federal Computer Systems Protection Act: Hearings on S. 1766 Before the Subcomm. on Criminal Laws & Procedures, Senate Judiciary Comm.*, 95th Cong., 2d Sess. 100 (1978) (statement of Donald L. Scantlebury, Dir., Fin. & Management Div., U.S. Gen. Acc't Office) [hereinafter cited as Protection Act Hearings].

[10] *Id. See* T. Whiteside, Computer Capers 5-6 (1978) [hereinafter cited as Whiteside]; D. Parker, S. Nycum & K. Oüra, Computer Abuse 94 (1973) [hereinafter cited as Parker, Nycum, & Oüra].

[11] Parker, Nycum, & Oüra, *supra* note 10, at 94 (Case No. 7017N).

into the computer for billing.[12] More recently a staff sergeant altered computer records as part of a larceny scheme at Rhein-Main Air Base.[13]

The cost of computer crimes in the military can reach enormous proportions. At Kelly Air Base, San Antonio, Texas, the government paid nearly $100,000 to bogus companies for aircraft fuel that was never delivered.[14] A government employee working at the air base created these bogus companies as part of a computer scheme to defraud the government. The employee had "in depth knowledge of the computerized fuel accounting system which he helped develop and install."[15] During the early 1970s, a South Korean crime organization, with the help of Americans, was able to exploit a United States Army computer.[16] Over $17 million in American food, uniforms, vehicle parts, and other goods was stolen each year from Army installations. Not only are the financial costs of computer crime staggering, the negative impact on military readiness can threaten national security.

The General Accounting Office (GAO) released in 1976 a report entitled "Computer Related Crimes in Federal Programs."[17] Thirty-three of

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[12]United States v. Payne, 9 M.J. 681 (A.F.C.M.R. 1980).

[13]United States v. Ridgeway, 19 M.J. 681 (A.F.C.M.R. 1984). Other reported convictions in the military involving the use of computers to commit a crime include United States v. Kulp, 5 M.J. 678 (A.C.M.R. 1978) (conviction for graft for accepting money to effect assignment transfers by using the computer at the United States Army Military Personnel Center); United States v. Langston, 41 C.M.R. 1013 (A.C.M.R. 1970) (forging a payroll check by altering keypunch cards prior to processng by the finance computer).

[14]Protection Act Hearings, *supra* note 9, at 97 (statement of Donald L. Scantlebury).

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> In 1974, AFOSI and FBI investigations discovered and prevented the fraudulent shipment of U.S. Government property valued at $830,000. This investigation was pursued and further disclosed that fraudulent diversion of U.S. Air Force communications equipment through computer manipulation had occurred during 1972-74. A review of the computer transactions revealed that shipments of 145 items, valued at nearly $575,000 had been diverted from the Air Force and sold to unknown commercial sources. An additional 45 items, valued at nearly $330,000 had been shipped but were subsequently recovered by military authorities and the FBI. The individuals responsible for the incidents were apprehended and prosecuted.

Id.

[16]Law Enforcement Assistance Admin., U.S. Dep't of Justice, Computer Crime—Criminal Justice Resource Manual 370 (1979) (Case No. 7723) [hereinafter cited as DOJ Manual].

[17]General Accounting Office, Computer Related Crimes in Federal Programs (1976), *reprinted in Sen. Comm. on Gov't Operations: Problems Associated with Computer Technology in Federal Programs and Private Industry*, 94th Cong., 2d Sess. 71-91 (Comm. Print 1976) [hereinafter cited as GAO Report]. One author has opined that the "GAO report provides the only reliable data [on computer crime] because it is based on well-documented cases with verifiable losses. . . ." Taber, *A Survey of Computer Crime Studies*, 2 Computer L.J. 275, 310 (1980) [hereinafter cited as Taber]. He also had high praise for the military law enforcement agencies, stating that their reported computer crimes "are real crimes and that the facts of the cases are reasonably close to being as stated." *Id.* at 281.

the sixty-six computer-related crimes reported in the federal government involved the military services.[18] The Army's Criminal Investigation Command reported thirteen cases - twelve reports of fraudulent record entries and one report of a conflict of interest violation on the part of managers.[19] The Naval Investigative Service reported four cases, which included one incident of obtaining free computer time, two instances of false record entries, and one instance of a stolen program.[20] The Air Force Office of Special Investigations reported thirteen cases, all related to false record entries.[21]

The statistics for computer-related crimes in the federal government are significant. The average loss from a reported computer-related crime in the federal government was $44,110,[22] and the median loss was $6,749.[23] Sixty-seven percent of the cases in the GAO report involved fraud,[24] and a majority of the cases involved false record entries.[25] Most of the crimes in the GAO report consisted of "submitting manually prepared, but falsified, forms to a computerized record keeping system."[26] More importantly, "[a]t least 50 were committed by technologically naive users of the systems, not by computer professionals."[27] "The potential for defrauding the U.S. Government via computers is terrifying. The Department of Defense uses more than 3,000 computers. DOD, with the aid of some of these computers, disburses nearly $25 billion annually and about $6.5 billion is paid out completely by computer."[28]

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[18]*Sen. Comm. on Gov't Operations: Computer Security in Federal Programs*, 95th Cong., 1st Sess. 149 (Comm. Print 1977) [hereinafter cited as Staff Study]. The GAO Report originally reported 69 cases of computer crime in the federal government. The figures used herein are corrections based on the statement of Joseph P. Welsch, Deputy Ass't Sect'y of Defense for Management Sys. (Dec. 3, 1976). *Id.* at 149.

[19]Staff Study, *supra* note 18, at 149.

[20]*Id.*

[21]*Id.* at 149-50. For example, the false record entries included falsification to obtain preferred assignments and to permit re-enlistment of an ineligible soldier.

[22]GAO Report, *supra* note 17, at 89-91.

[23]Taber, *supra* note 17, at 280.

[24]*Id.* at 282.

[25]*Id.*

[26]*Id.*

[27]*Id.*

[28]Protection Act Hearings, *supra* note 9, at 3 (statement of Sen. Joseph R. Biden, Jr.). The nature and extent of DOD reliance on computers was explained as follows:

> First, the DOD requires computers for such applications as personnel and logistic management, installation and inventory control, military and civilian pay, contractor and supplier payment, and maintenance scheduling, among others, in order to assure efficient and economical management or administration. This category constitutes by far the largest concentration of ADP resources in DOD.
>
> Second, command and control and intelligence functions require computer support with the attendant requirements for real time, large storage, semi-automated response, random access, and high reliability. Such computers are critical to the DOD mission.

Nonmilitary studies of computer-related crime provide even more alarming statistics. Losses from computer-related crimes have been estimated at between $100 million and $300 million annually in the United States.[29] The estimated average take from a computer crime is over $450,000.[30] Only one of every one hundred computer crimes is detected,[31] and only fifteen percent of the detected computer-related crimes are ever reported to law enforcement authorities.[32] Of those crimes reported, only three percent resulted in jail sentences.[33]

More importantly, the chances of being prosecuted for a computer-related crime are only 1 in 22,000.[34]

> The victim of a computer crime may also assume that the local law enforcement agency has no investigators capable of investigating a computer crime, that there are no prosecutors capable of adequately taking such a case to trial, and that there are no judges sufficiently sophisticated to conduct the trial and sentencing in such a case.[35]

For the enterprising criminal, computer-related crime provides an exceptional opportunity for a low-risk but high-yield endeavor.

III. DEFINING COMPUTER-RELATED CRIME

Significant debate has been engendered not only in defining computer crime, but also in developing an appropriate term for describing the

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> Third, computers continue to be essential in research, development, and test instrumentation and computation.

Staff Study, *supra* note 18, at 144-45.

[29]D. Parker, Crime by Computer 29 (1976) [hereinafter cited as Parker]. The cost of computer crime was estimated to be as low as $100 million by the United States Chamber of Commerce and as high as $3.5 billion by the Harvard Business Review. 125 Cong. Rec. § 711 (daily ed. Jan. 25, 1979). One author has raised serious questions about the reliability and accuracy of the research by Mr. Parker and the Stanford Research Institute (SRI) because "it is based on poor documentation, unacceptable methods, and unverified (indeed unverifiable) losses." Taber, *supra* note 17, at 310. For a summary of the research by the SRI on computer abuse *see* Parker, Nycum, & Oïra, *supra* note 10, and Parker, *Computer Abuse Research Update*, 2 Computer L.J. 329 (1980). For further analysis of the SRI computer abuse research *see* Taber, *On Computer Crime (Senate Bill S. 240)*, 1 Computer L.J. 517 (1979) [hereinafter cited as Taber, *On Computer Crime*].

[30]Parker, *supra* note 29, at 29.

[31]Law Enforcement Assistance Admin., U.S. Dep't of Justice, The Investigation of Computer Crime—An Operational Guide to White Collar Crime Enforcement 6 (1980) [hereinafter cited as DOJ Computer Crime Investigation Guide].

[32]Swanson & Territo, *Computer Crime: Dimensions, Types, Causes, and Investigation*, 8 J. Police Sci. & Ad. 304, 305 (1980) (only 15% of computer crimes detected are unreported) [hereinafter cited as Swanson & Territo]; Parker, *supra* note 29, at 29; DOJ Computer Crime Investigation Guide, *supra* note 31, at 6 (only 14% of computer crimes detected are reported).

[33]DOJ Computer Crime Investigation Guide, *supra* note 31, at 6.

[34]*Id.*

[35]*Id.*

computer's involvement in crimes.[36] This article will use the terms "computer crime" and "computer-related crime" interchangeably to mean "any illegal act for which knowledge of computer technology is essential for successful prosecution."[37] Although this definition is very broad, it focuses the attorney upon the real issue in criminal law: computer technology and its relevance to successfully prosecuting criminal behavior. The computer-related crime may include instances where the crime actively involves the computer in its commission, as well as instances of passive use of the computer. For instance, the computer is used passively when it merely contains evidence such as business records that may be used in prosecuting a criminal.[38]

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[36]Donn B. Parker uses the term "computer abuse" and "any incident associated with computer technology in which a victim suffered or could have suffered loss and a perpetrator by intention made or could have made gain." Parker, *supra* note 29, at 12. Mary R. Volgyes defines "computer crimes" as "acts involving the use of information processing systems resulting in loss, damage, or injury." Volgyes, *supra* note 2, at 388. The General Accounting Office uses the term "computer-related crime" and provides the following definition:

> We define computer-related crimes as acts of intentionally caused losses to the Government or personal gains to individuals related to the design, use, or operation of the systems in which they are committed. Computer-based data processing systems are comprised of more than the computer hardware and the programs (software) that run on them. The systems include the organizations and procedures—some manual—for preparing input to the computer and using output from it. Computer-related crimes may result from preparing false input to systems and misuse of output as well as more technically sophisticated crimes, such as altering computer programs.

GAO Report, *supra* note 17, at 74.

Irving J. Sloan uses "computer crime" to identify illegal computer abuse which directly involves computers in the commission of a crime. Sloan prefers the broader term of "computer-related crime" which includes "any illegal act for which knowledge of computer technology is essential for successful prosecution." I. Sloan, The Computer and the Law 3 (1984) [hereinafter cited as Sloan]. Donald Ingraham believes that a computer crime is really nothing more than a traditional crime assisted by a computer. Ingraham, *On Charging Computer Crime*, 2 Computer L.J. 429, 431 (1980). Consequently, some commentators prefer the term "computer-assisted crime" rather than computer-related crime or abuse. Schjøberg, *Computer-Assisted Crime in Scandanavia*, 2 Computer L.J. 457 (1980).

[37]DOJ Manual, *supra* note 16, at 3.

[38]*Id.* For example, the Military Rules of Evidence have various provisions dealing with the use of computer evidence. *See, e.g.*, Mil. R. Evid. 803(6) (data compilations in any form as records of regular conducted activity); Mil. R. Evid. 803(7) (absence of regular conducted activity); Mil. R. Evid. 803(7) (absence of entry in records of regular conducted activity); Mil. R. Evid. 803(8) (data compilations in any form as public records and reports); Mil. R. Evid. 803(9) (data compilations as records of vital statistics); Mil. R. Evid. 803(10) (absence of public record or entry); Mil. R. Evid. 901(b)(7) (authentication of public records or entries including data compilations); Mil. R. Evid. 901(b)(8) (authentication or identification of ancient documents or data compilations); Mil. R. Evid. 902(4) (certified copies of public records includes data compilations); Mil. R. Evid. 1001(1) (writings and records definition includes magnetic impulse or electronic recording or other form of data compilation); Mil. R. Evid. 1001(3) ("If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.' "); Mil. R. Evid. 1005 (proving public records which includes data compilations as public records). However, counsel for both sides should heed the words of Judge Van Graafeiland: "As one

The role that a computer plays in committing a crime generally falls into one of four categories: the computer is the *object* of the crime; the computer creates a unique *environment* for the commission of the crime; the criminal uses the computer's data processing capabilities as the *in-*

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of the many who have received computerized bills and dunning letters for accounts long since paid, I am not prepared to accept the product of a computer as the equivalent of Holy Writ." Perma Research & Development v. Singer, 542 F.2d 111, 121 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976) (Van Graafeiland, Jr., dissenting).

Counsel should not assume the computerized data is an accurate reflection, but rather should take the proponent of the evidence to task by making sure the proper foundation is laid and, at least, shedding light on the weight to be given the admitted evidence. Keep in mind that computers, as well as the data stored in them, are vulnerable. Not only is the computer program subject to modification or manipulation by employees, the program itself may contain errors and inconsistencies in design. Critical errors may arise from mechanical malfunctions, power failures, faulty program design, human mistakes, and risks of fraudulent alterations. Data stored on magnetic media can be destroyed easily if not properly preserved. Counsel should employ the services of an expert to ensure the evidence is properly preserved for trial. The advice would cover such mundane things as the prevention of stacking magnetic tapes in a manner which could cause warpage.

Another important evidentiary consideration involves the specific description of items to be seized so that a warrant passes constitutional muster. Although the description of property to be seized in a warrant is to be construed with reasonable latitude depending upon the nature of the property to be seized and the manner of the seizure (Marron v. United States, 275 U.S. 192 (1927)), it must be specific enough so that the seizing officials do not have unreasonable discretion. *Cf.* Delaware v. Prouse, 440 U.S. 648, 654 (1979). Considering the complexity of computer technology and the many ways that computer information may be stored, *e.g.*, paper printouts, keypunch cards, and magnetic reels, tape and disks, drafting a warrant can be difficult. *See* DOJ Computer Crime Investigation Guide, *supra* note 31, at 57. The warrant must cover the technical aspects and be comprehensible. For an example of a computer evidence warrant, *see id.* at app. 5.

When using a warrant to seize computer evidence, the technical expert-affiant should be available for questioning by the magistrate, the warrant should be specific regarding the time periods of the records which are to be seized, and should state that permission will be obtained from the owner of the computer system, if at all possible. *Id.* at 24-25.

Employing an expert to assist the searching officers has yielded mixed results. *Compare* State v. Seigliano, 583 P.2d 893, 896 (Ariz. 1978) (use of victim-informant upheld) and People v. Superior Court of Marin County, 598 P.2d 877 (Cal. 1979) (upheld use of victim-informant to assist police in identifying items to be seized because was acting as agent for police; practice upheld when items adequately described but could be mistaken for other similar kinds of property) *with* People v. Tockgo, 145 Cal. App. 3d 635, 644, 193 Cal. Rptr. 503, 509-10 (1983) (victim-informant cannot be used at scene to identify items to be seized pursuant to warrant) and People v. Superior Court of Kern County, 77 Cal. App. 3d 69, 143 Cal. Rptr. 382 (1978) (victim-informant cannot legitimately be used at the scene to assist police in identifying items to be seized). However, Military Rule of Evidence 315(e) appears to sanction the use of an expert because any commissioned officer, warrant officer, petty officer, noncommissioned officer, or law enforcement officer in the execution of guard or police duties is authorized to conduct a search when a search authorization has been granted. The only requirement is that the expert come within one of the categories listed by the rule. Using an expert to operate the computer system to acquire the data to be seized, however, runs the risk of a later allegation that the data was changed by the operator's meddling. DOJ Computer Crime Investigation Guide, *supra* note 31, at 25.

strument for perpetrating the crime; or, the computer is used as a *symbol* for purposes of fraud or intimidation.[39]

The first category, *i.e.*, the computer as the *object* of the illegal activity, includes sabotage, theft, or destruction of computer hardware or programs.[40] The computer may be "physically attacked such as by firing a bullet into the computer, bombing the computer center, or erasing its tapes."[41] This category of computer crime tends to fit within traditional common law crimes.

The second role played by computers in the commission of an offense involves the creation of a unique *environment* in which the criminal activities can take place. Someone familiar with the computer's operating system may program the computer to "erase" valuable files or cause the system to "crash."[42] A business might infiltrate a competitor's computer system to steal trade secrets[43] or data to obtain an advantage in bidding on a contract.[44]

The third category involves the criminal using the computer's data processing capability as the *instrument* for perpetrating the crime.[45] An individual might use the computer without authority for his or her own purposes or even manipulate the computer to perform tasks for a financial benefit. Examples include programming a computer to automatically write checks to an unauthorized payee,[46] espionage of government computers relating to weapons,[47] or using the employer's computer without authority to operate a business.[48] It has even been suggested that a murder could be perpetrated by "causing a deliberate malfunction of a life support system, misapplication of air traffic control computers, or espionage of computers governing military weapons."[49] Because this category involves manipulating the computer to achieve the criminal's

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[39]Parker, *supra* note 29, at 18-22. August Bequai categorizes computer crimes into two areas—the computer is either the *tool* or the *target* of the criminal. The computer is a tool when it is used to commit a crime of deceit, concealment, or fraud in an attempt to obtain property or gain an advantage over someone. The computer is the target of the crime when the criminal takes action, or threatens to take action, against the computer, including hardware, software or data. A. Bequai, Computer Crime 4 (1978) [hereinafter cited as Bequai].

[40]Gemignani, *Computer Crime: The Law in '80*, 13 Ind. L. Rev. 681, 682 (1980) [hereinafter cited as Gemignani].

[41]Hyman, *Larceny Enters the Electronic Age: The Problem of Detecting and Preventing Computer Crimes*, 18 Gonz. L. Rev. 517, 520 (1983) [hereinafter cited as Hyman].

[42]*Id.*

[43]*See, e.g.*, Ward v. Superior Court of Alameda County, 3 Computer L. Serv. Rep. (Callaghan) 206 (Super Ct. Cal. 1972); Hancock v. State, 402 S.W.2d 906 (Tex. 1966).

[44]Gemignani, *supra* note 40, at 682-83.

[45]Parker, *supra* note 29, at 18-21.

[46]United States v. Jones, 553 F.2d 351 (4th Cir.), *cert. denied*, 431 U.S. 968 (1977).

[47]Gemignani, *supra* note 40, at 683.

[48]People v. Weg, 450 N.Y.S.2d 957 (N.Y. Crim. Ct. 1982).

[49]Gemignani, *supra* note 40, at 683.

goals and objectives, it presents the greatest and most extensive threat, as well as the most lucrative method for committing computer-related crimes.[50]

The use of a computer as the *symbol* in a fraud or intimidation scheme represents the fourth role that a computer may play in the commission of a crime. For example, someone could blackmail the government or a business by threatening to disclose confidential information or trade secrets. This could occur even though the individual had not yet obtained the information.[51]

IV. DETECTING AND INVESTIGATING COMPUTER-RELATED CRIMES

Statistics reveal that computer crime is becoming a significant phenomena. The number of reported cases, however, is undeniably small. This inconsistency is probably predicated upon the difficulties in detecting and investigating computer-related crimes, as well as the reluctance of victims to report the incidents to law enforcement authorities.

A. DIFFICULTY IN DETECTION

A computer-related crime must be detected before it can be investigated and successfully prosecuted. An overwhelming number of reported cases have been discovered accidentally - an alert operator observes something unusual happening on the computer terminal[52] or a computer print-out is delivered by mistake.[53] In New York, a $1.5 million bank embezzlement was discovered when a police raid upon a bookie revealed that a bank teller earning $11,000 per year was betting $30,000 per day.[54] One individual successfully completed a $10.2 million electronic fund transfer swindle only to be turned in by his attorney.[55]

The military has also encountered problems in detecting computer-related crimes. In *United States v. Ridgeway*,[56] an audit of the Rhein-Main Air Base Passenger Terminal revealed a shortage of $180 at the

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[50]Hyman, *supra* note 41, at 521.

[51]*Id.*

[52]United States v. Seidlitz, 589 F.2d 152 (4th Cir. 1978), *cert. denied*, 441 U.S. 992 (1979) (The defendant had gained access to his former employer's computer by using a remote terminal and another person's access code to the computer. An alert employee noticed that an imposter was signed on to the system because the person whose access code was being used was in sight of the employee and was not using a computer terminal at the time.).

[53]*See, e.g.*, *Ward*, 3 Computer L. Serv. Rep. at 206.

[54]Coughran, *Outlook for Prosecution in Computer Abuse Cases*, 1 Crim. Just. J. 397, 402 (1978) [hereinafter cited as Coughran].

[55]Becker, *Rifkin, A Document History*, 2 Computer L.J. 471, 475 (1980).

[56]19 M.J. 681 (A.F.C.M.R. 1984).

baggage counter. The Air Force Office of Special Investigations established video surveillance and discovered the accused removing money and placing it in his pocket. When apprehended, the accused confessed to taking $1,500 from the excess baggage fund. The discrepancy between the $180 suspected theft and the $1,500 actual theft was revealed when the accused "explained that, at the time of each theft, he altered computer data as well as passenger and baggage processing forms in an effort to avoid detection."[57] Although unable to completely remove all of the computerized audit trail, the accused successfully shielded nearly eighty-eight percent of his theft from auditors. In *United States v. Harris*,[58] the Navy-Marine Court of Military Review was presented with a jurisdictional issue because of the delayed discovery of a false claim submitted by a Reserve officer while on active duty. This case may be a portent of things to come as the court noted that "[s]uch delayed discovery is likely to recur as military organizations rely increasingly on computers, which often present convoluted audit trails."[59]

Once the crime is detected, the victim has often been reluctant to report it to the police. In the civilian sector it has been estimated that only fifteen percent of the detected computer crimes are ever reported.[60] This low rate is understandable in a civilian setting where financial institutions and other businesses are reluctant to incur unfavorable publicity by pressing charges and to risk a loss of the public's confidence.[61] Experience in the military has indicated that commanders are probably more likely to take action against an individual who has perpetrated a crime. Due to the vast array of procedures for handling violations of the law in the military, however, not all cases will end with a court-martial.

Detection of computer-related crimes is also hampered by the computer's exceptional vulnerability to attack by enterprising criminals. The computer has five phases of operation in which it is prone to illegal manipulation. These stages include input, programming, the central processing unit, output, and communications.[62]

A criminal can alter input into the computer and thereby control the form and content of the computer's product. "By inputting false data into the computer, the criminal can cloak his crime in the seemingly legitimate form of computer output. . . . Moreover, since output mistakes

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[57]*Id.* at 683.
[58]11 M.J. 690 (N.M.C.M.R. 1981).
[59]*Id.* at 693 n.3.
[60]Swanson & Territo, *supra* note 32, at 305.
[61]Coughran, *supra* note 54, at 402.
[62]Bequai, *supra* note 39, at 9-11.

are common, the criminal can blame any discovered alterations of input on unintentional error."[63]

Programming is the second stage of computer operation.[64] The computer program is a series of instructions which controls the computer's operations. By altering the computer's programming instructions, the criminal can cause the computer to operate in a manner consistent with the illegal scheme. Some computer programs tend to be complex, so program changes are not only difficult to accomplish, they are difficult to recognize.[65] For example, in *United States v. Jones*; the computer's accounting functions were re-programmed to write checks to an unauthorized payee.[66]

The computer's central processing unit provides the core apparatus for accomplishing computer functions - *e.g.*, storing and retrieving information, accessing peripheral devices such as terminals and printers, and running the software program. Modifying the central processing unit does not provide a fertile area for the criminal because it is much more difficult to change than the input and programming phases. Consequently, the central processing unit is more likely to be a target for sabotage or vandalism.[67]

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[63]Note, *A Suggested Legislative Approach to the Problem of Computer Crime*, 38 Wash. & Lee L. Rev. 1173, 1174 n.7 (1981). *See, e.g.*, United States v. Langston, 41 C.M.R. 1013 (A.C.M.R. 1970) (accused convicted of forging payroll checks by altering keypunch cards prior to input and processing by the finance center computer). The technique of modifying data before or during input to the computer is known as "data diddling." Sloan, *supra* note 36, at 9-10.

[64]Various techniques can be used to alter a computer's program. The "Trojan Horse" technique refers to placing instructions in the computer covertly so that the computer will perform unauthorized functions but will also continue to perform its intended purpose. Sloan, *supra* note 36, at 10. "Salami Techniques" include programming the computer to steal by taking a small amount of money or assets from a large number of sources so that there is little chance of being detected. *Id.* at 11. For example, taking a few cents from all the checking accounts in a bank is a "salami technique" used in embezzlement. Vandalism may be accomplished by using "logic bombs" in computer programs. A "logic bomb" is a set of instructions in a computer program that allows the computer to function normally until a certain condition is met. *Id.* at 13-14. For example, programming the computer to verify the current date each day can lay the foundation for a logic bomb so that when the computer verifies a predetermined future date it performs a series of illegal instructions.

[65]Finding changes in a computer program is akin to finding a needle in a haystack. For example, the "Trojan Horse" technique may require 250,000 instructions in the program, while the computer operating system and other computer programs used as part of that system may consist of more than six million instructions. Sifting the programs to fine illegal instructions would be too laborious an undertaking. Protection Act Hearings, *supra* note 9, at 63 (statement of Donn Parker, Stanford Research Institute). Furthermore, internal auditing and security programs within the computer may be altered to avoid discovery as was done in an Indiana computer case. *See, e.g.*, Gemignani, *supra* note 40, at 713.

[66]553 F.2d 351, 351.

[67]Note, *A Suggested Legislative Approach to the Problem of Computer Crime*, 38 Wash. & Lee L. Rev. 1173, 1174 n.7. (1981).

Output is the fourth stage of computer operations. Computer output in the form of information or documents can be extremely valuable to the criminal. The criminal may seek to obtain the information or to modify the output to his or her advantage. For example, modifying the amount payable on checks mailed by computer provides an obvious reward to the pecuniarily minded thief.[68]

Communication of data provides the final stage for accomplishing the computer crime. The communication process usually refers to the transmission of information over telephone lines between computers or remote terminals. Criminal intrusion during the communication stage can allow the user to gain access to information without being detected. More importantly, the communications link allows a remote user to access a distant computer by using an inexpensive terminal or personal computer. For example, in *Ward v. Superior Court*, the defendant used a remote terminal to direct the victim's main computer to send him a copy of a confidential program.[69] Any computer with a telephone link is subject to attack by anyone with a computer and the appropriate access code.[70]

B. LACK OF EXPERTISE OF INVESTIGATORS AND PROSECUTORS

Law enforcement officials and prosecutors often lack the requisite expertise to investigate and accumulate evidence in computer crimes. Furthermore, once the crime is discovered, it may require an enormous amount of time and expense to prepare the case for trial. In *State v. Thommen*,[71] the defendant was accidentally discovered to be using the state's computer system without authorization. Once the crime was discovered, the investigator still had to spend hundreds of hours to compile evidence, familiarize himself with the computer system, and manually sift computer print-outs covering the defendant's use of the computer. During the year it took to complete the investigation, evidence was gathered by allowing the defendant to continue using the computer without authorization.

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[68]*See, e.g.*, *Jones*, 553 F.2d. at 351; *Langston*, 41 C.M.R. at 1013 (input altered to increase amount of check to authorized payee).

[69]*Ward*, 3 Computer L. Serv. Rep. at 206.

[70]Computer programmers often insert "trap doors" into programs they have written to aid them in quickly making modifications at a later date. The fictional hacker in the movie *War Games* was able to use the military computer with the aid of a trap door placed in the program by its creator (the code name was "Joshua"). For a description of the havoc that computer hackers can wreak with computers, *see* Sandza, *The Night of the Hackers*, Newsweek Magazine, Nov. 22, 1984, at 17, and H. Rep. No. 894, *supra* note 4, at 516-17.

[71]State v. Thommen, No. 79-42B (Marion County Ct. Ind. Feb. 14, 1980) (described in Gemignani, *supra* note 40, at 713-18).

Prosecutors and investigators are reluctant to get involved in the prosecution of computer crimes.[72] The Federal Bureau of Investigation Academy in Quantico, Virginia, conducts courses on computer crime for law enforcement personnel,[73] and believes that with additional training prosecutors and investigators are more likely to pursue computer-related crimes.[74]

C. PROFILE OF A COMPUTER CRIMINAL

Computer criminals generally are those individuals who have access to computer input, output, or stored data. In the private sector they often are eighteen to thirty years old, well-educated, technically competent, and have an aggressive personality.[75] The perpetrator is usually an amateur, not a professional criminal.[76] Some seek personal reward or power, typical of most criminals. Many, however, wish to play a game, beat the system, play "Robin Hood" against the impersonal organization, teach someone a lesson, or take out their anger against their employer or the government,[77] making it difficult to spot a computer criminal because such motives may not be readily apparent.

The GAO report painted a somewhat different picture of the computer criminal in the government sector:[78] the computer criminal tends to be a person with limited technical knowledge of computers, such as a keypunch operator, rather than an individual with more technical knowledge such as a system programmer. Even though the crime may be detected, narrowing the list of suspects within the government will be dif-

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[72]Protection Act Hearings, *supra* note 9, at 35 (statement of Joseph E. Henehan, Chief, White Collar Crime Div., Dep't of Justice).

[73]*Id.* at 42-43 (statement of James M. Barko, Chief, Economic and Financial Crime Training Unit, Federal Bureau of Investigation) (The FBI conducts a one-week introduction to computers course covering general computer terminology. The investigator or detective is exposed to rudimentary programming and operating a computer. A more detailed four-week course concentrates on methods for handling cases in the new technological environment of computers, the new terminology, and the people who operate the computers—programmers and analysts.). For a more detailed summary of the FBI courses, see DOJ Computer Crime Investigation Guide, *supra* note 31, at app. 1. Law enforcement agencies within the Department of Defense have revised their curricula to include expanded instruction in computer technology and computer fraud. Staff Study, *supra* note 18, at 147-48.

[74]Protection Act Hearings, *supra* note 9, at 35 (statement of Joseph E. Henehan, Chief, White Collar Crime Div., Dep't of Justice).

[75]Sokolik, *Computer Crime—The Need for Deterrent Legislation*, 2 Computer L.J. 353, 365-66 (1980) [hereinafter cited as Sokolik].

[76]Hyman, *supra* note 41, at 522.

[77]Sokolik, *supra* note 75, at 367-68.

[78]GAO Report, *supra* note 17, at 4.

ficult because the typical computer criminal covers a wider spectrum of candidates than in the private sector.[79]

V. CHARGING THE COMPUTER CRIME

Once the offense has been detected and analyzed based upon the five roles in which a computer can be used in committing the crime, the real work begins: drafting the charges. The activity is not a crime unless the law defines it as a crime, and, regardless of the role played by the computer, the criminal law punishes people, not machines.

Understanding the computer's role in committing the crime is the first step in preparing the charges. The next step is to classify the crime into one or more of five traditional categories of criminal behavior: financial crime, informational crime, theft of property, theft of services, and vandalism. Although many computer crimes fall into these traditional categories, it requires careful analysis and drafting to fit the act into one of the statutory offenses.[80]

Financial crimes include theft of money or negotiable instruments and occur in computer systems designed to handle financial record-keeping transactions such as payroll and accounts payable or accounts receivable.[81] The taking of merchandise or property for personal use or sale to others qualifies as a property crime.[82] Informational crimes include gain-

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[79]The potential computer criminal can be classified into four main categories:

> (1) *intruders*, or unauthorized users of a system, (2) *consumers*, authorized users of the output or products of a computer system; (3) *producers*, the programmers, analysts, and others who create the products or design the services; and (4) *servicers*, the key punch or data entry clerks, maintenance personnel, and others who actually operate the information system.

Volgyes, *supra* note 4, at 394.

[80]Turnick, *Computer Law: An Overview*, 13 Loy. L.A.L. Rev. 315, 326 (1980); *accord* Staff Study, *supra* note 18, at 185-87 (statement of August Bequai, attorney in Washington, D.C.).

[81]*See, e.g.*, Uniform Code of Military Justice art. 121, 10 U.S.C. § 921 (1982) (larceny) [hereinafter cited as UCMJ]; UCMJ art. 123 (forgery); UCMJ art. 132 (frauds against the United States); UCMJ art. 134 (graft). In trying to categorize a computer-related crime for charging purposes, it is not always necessary to address the computer elements of the conduct. For example, in *United States v. Kulp*, 5 M.J. 678 (A.C.M.R. 1978), the defendant was convicted of graft for accepting money to effect assignment transfers in the personnel computer rather than the actual alteration of government records. *See* Manual for Courts-Martial, United States, 1984, Part IV para. 99 (altering public records) [hereinafter cited as MCM, 1984].

[82]*See, e.g.*, UCMJ art. 121 (larceny and wrongful appropriation); MCM, 1984, Part IV, para. 106 (receiving, buying, or concealing stolen property). Although Article 121 covers larceny of computer equipment, it is difficult to extend the crime to computer programs or software due to the military's restrictive definition of property as a tangible item. *E.g.*, United States v. Abeyta, 12 M.J. 507, 508 (A.C.M.R. 1981) ("Historically, the definition of property that can be the subject of larceny has been limited to tangible items."). For example, a computer program has been defined as "an instruction or statement or a series of instructions or statements, in a form acceptable to a computer, which permits the func-

ing access to a computer and obtaining valuable information from it, often for sale to others.[83] Theft of services includes the use of a computer without authority.[84] Vandalism involves intentionally damaging the computer's hardware, programs, or data.[85]

Drafting charges for computer-related crimes requires a thorough understanding of the facts of the case. Not only may the behavior fall under several punitive articles, the criminal nature of the conduct itself may not be readily apparent - such as copying a computer program which has been licensed by the government for use on a single microcomputer. Furthermore, the basis for service-connection when charging under the Uniform Code of Military Justice (UCMJ)[86] may not always be readily apparent given the remote access capabilities of computers. Various punitive articles under the UCMJ, as well as provisions under Title

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tioning of a computer system in a manner designed to provide appropriate products from such computer system," and computer software has been construed "to mean a set of computer programs, procedures, and associated documentation concerned with the operation *of a computer system*." S. *240, § 3, 96th Cong., 1st Sess. (1979)* [hereinafter cited as S. 240]. 18 U.S.C. § 641 (1982), however, has not been construed so narrowly or limited so closely to the common law definition of larceny:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . .
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than one year, or both.

Section 641 has been construed to include theft of computer information (United States v. Lambert, 446 F. Supp. 890 (Conn. 1978), *aff'd sub nom* United States v. Girard, 601 F.2d. 69 (2d Cir. 1974), *cert. denied*, 444 U.S. 871 (1980)) as well as computer time and services (United States v. Sampson, 6 Computer L. Service Rep. (Callaghan) 879 (N.D. Cal. 1978)). Obtaining computer services under false pretenses should be charged under Article 134. *See* MCM, 1984, Part IV, para. 78.

[83]*See, e.g.*, UCMJ art. 107 (false official statements); UCMJ art. 121 (larceny and wrongful appropriation); UCMJ art. 134 (removing a public record); 18 U.S.C. § 641 (1982) (theft of government property); Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 473, §§ 2102-2103, 1984 U.S. Code Cong. & Ad. News (98 Stat.) *2190-92 (to be codified at 18 U.S.C. § 1030)* (disclosure of information in computers used by or on behalf of the government) [hereinafter cited as 18 U.S.C. § 1030].

[84]*See, e.g.*, UCMJ art. 92 (violation of a lawful general regulation); MCM, 1984, Part IV, para. 78 (obtaining services under false pretenses); 18 U.S.C. § 641 (1982) (theft of computer information); Dep't of Army, Reg. No. 600-50, Personnel--General—Standards of Conduct for Dep't of Army Personnel, paras. 1-4 and 2-4 (Nov. 20, 1984).

[85]*See, e.g.*, UCMJ art. 108 (sale, loss, damage, destruction or wrongful disposition of military property of the United States); UCMJ art. 126 (arson); and 18 U.S.C. § 1030 (destruction of information in computers used by or on behalf of the United States government). An example of electronic vandalism would include an instance where, after being fired, an irate employee caused $10 million in damages by strolling through a computer room with a powerful electromagnet. Gonzalez, *Addressing Computer Crime Legislation: Progress and Regress*, 4 Computer L.J. 195 (1983).

[86]10 U.S.C. §§ 801-940 (1982).

18 of the United States Code, will be discussed regarding their relative advantages and disadvantages in preparing criminal charges.

A. LARCENY AND WRONGFUL APPROPRIATION

Article 121 of the UCMJ defines larceny and wrongful appropriation as the wrongful taking, obtaining, or withholding, "by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind." So long as the subject of the computer crime is tangible property, it can be handled as a traditional property crime.[87] The object of the computer theft, however, often extends beyond the tangible computer hardware and includes such intangible property as computer time and services,[88] information,[89] or records.[90]

Property covered by larceny includes "money, personal property, or article of value of any kind."[91] Military courts have been reluctant to extend "article of value of any kind" beyond the common law notion of tangible items.[92] Article 134 of the UCMJ, however, has been used to cover situations involving theft of services.[93] Refusing to allow the criminal law to grow beyond common law constraints has allowed some delicts to go unpunished in the civilian courts.

In *Lund v. Commonwealth*, the Virginia Supreme Court reversed the defendant's conviction for stealing computer time from a university.[94] The court reasoned that at common law, labor and services could not be the subject of larceny because it did not involve the taking and carrying away of a certain concrete article of personal property. The Colorado Supreme Court has ruled similarly, holding that information in hospital files cannot be the subject of larceny.[95] The Colorado and Virginia legislatures later amended their respective criminal codes to include computer information and time as property subject to larceny.[96]

Not all jurisdictions have experienced difficulty in using existing theft provisions to prosecute computer criminals. The federal provision, 18

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[87]*Abeyta*, 12 M.J. at 507.
[88]Lund v. Commonwealth, 232 S.E.2d 745 (Va. 1977).
[89]*Lambert*, 446 F. Supp. at 890.
[90]People v. Home Insurance Co., 591 P.2d 1036 (Colo. 1979).
[91]UCMJ art. 121.
[92]*Abeyta*, 5 M.J. at 507.
[93]*Id.*
[94]*Lund*, 232 S.E.2d at 748.
[95]*Home Insurance Co.*, 591 P.2d at 1036.
[96]Colo. Rev. Stat. § 18-5.5-101 (1984); Va. Code § 18.2-98.1 (1978) (repealed 1984) ("Computer time or services or data processing services or information or data stored in connection therewith is hereby defined to be property which may be the subject of larceny . . . , or embezzlement . . . , or false pretenses.") Virginia also passed in 1984 a comprehensive statute dealing with computer crimes. Va. Code §§ 18.2-152.1 to -152.14 (1984); 1984 Va. Acts 751.

U.S.C. § 641,[97] has been interpreted liberally to include computer information[98] and computer time and services[99] as "anything of value." Furthermore, section 641 proscribes the conversion of government property which "may include misuse and abuse of property."[100]

Charging section 641 as a noncapital crime or offense under subparagraph 3 of Article 134 of the UCMJ provides an excellent method for overcoming the archaic limitations of Article 121.[101] Section 641 is a crime of unlimited application because it has extra-territorial effect, *i.e.*, it can be used to charge theft of government property outside of the United States.[102] More importantly, the broader concepts of "anything of value" and "conversion" bring within its pale the theft of intellectual property.

Many, if not most, computer programs are licensed, rather than purchased, by the user. This applies to computer programs that operate on a main-frame or mini-computer, as well as on personal computers. When an individual copies a program licensed by the government without authority, he or she is not depriving the United States of its license because the government's copy of the program has not been destroyed. The individual has, however, violated the copyright of the software's owner and is liable for civil damages.[103] Section 641 permits the government to prosecute for unauthorized duplication of software leased by the United States because a license would qualify as "anything of value." Furthermore, "conversion" is a much broader term than "stealing" and should cover the offense because the individual has converted a copy of the program for personal use.[104] Even tough the government still possesses its software license and can still use the program, section 641 has been used to successfully prosecute thefts of unauthorized copies of government records.[105]

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[97]18 U.S.C. § 641 (1982).

[98]*Lambert*, 446 F. Supp. at 895.

[99]*Sampson*, 6 Computer L. Serv. Rep. at 879.

[100]Morrisette v. United States, 342 U.S. 246, 272 (1952).

[101]UCMJ art. 134 (allows crimes listed in Title 18, United States Code to be charged as violations of the UCMJ); MCM, 1984, Part IV, para. 60.

[102]United States v. Lazarro, 2 M.J. 76 (C.M.A. 1976).

[103]17 U.S.C. §§ 501-506 (1982). Copyright infringement for profit is a criminal offense. *Id.* § 506(b). It was designed, however, for the piracy of copyrights for a profit. *See* United States v. Atherton, 195 U.S.P.Q. (BNA) 615 (9th Cir. 1978). No reported cases were found where a computer software pirate was prosecuted under 17 U.S.C. § 506.

[104]Gemignani, *supra* note 40, at 700.

[105]*See* United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied sub nom.* Lupo v. United States, 429 U.S. 1038 (1977) (theft of unauthorized copies of Federal Bureau of Investigation files); United States v. Friedman, 445 F.2d 1076 (9th Cir.), *cert. denied sub nom.* Jacobs v. United States, 404 U.S. 958 (1971) (theft of copies of grand jury proceedings).

Illegally copying programs licensed by the federal government and operable on personal computers is not the exotic computer crime that makes headlines. Nonetheless, it is a significant problem in the computer software industry and is referred to as "software piracy." On January 17, 1985, the Association of Data Processing Service Organizations (ADAPSO) and MicroPro International Corp., a software manufacturer, filed suit against American Brands, Inc., and its subsidiary, Wilson Jones Co.[105] The complaint alleged that Wilson Jones willfully pirated copies of MicroPro's word processing programs. It appears that Wilson Jones copied the programs for use by trainees who retained the copies upon completion of the training.

The ADAPSO suit could have far-reaching consequences. Currently, the Department of the Army does not obtain the copyrights to most software programs it uses; instead it licenses the programs. It is imperative, therefore, that Army personnel not tolerate the illegal use and copying of software licensed for personal computers owned by the government.[107] The ADAPSO suit should provide impetus for trial counsel to take action in appropriate cases because claims could be filed against the United States for copyright infringement.[108]

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[105]N.Y. Times, Jan. 18, 1985, at D7, col. 6; Schmidt, *Corporate Piracy Under Attack by ADAPSO*, Paul Bernstein's Law MUG Newsletter, Feb. 1985, at 1, 12-13.

[107]Dep't of Army, Reg. No. 27-60, Legal Services—Patents, Inventions, and Copyrights, para. 8-1 (May 15, 1974) provides:

> It is the policy of the Department of the Army to avoid, whenever practicable, the infringement of privately-owned rights in inventions and copyrighted works. For this reason, necessary rights in such inventions and copyrighted works should be acquired when it is in the Government's interest to do so and when such rights can be acquired at a fair value. When infringement of such right does occur, it is the policy of the Department of the Army to take all necessary steps to investigate in a timely manner and, if appropriate, settle or otherwise dispose of claims of infringement asserted against the Department of the Army. . . . If any patent or copyright upon which a claim is based is found to be infringed, valid, and enforceable, efforts to settle the claim before suit against the United States has been instituted shall be made in accordance with this regulation.

It is imperative, therefore, that Army personnel ensure that no illegally duplicated programs are used on government computers. Also, government personnel should be prohibited from copying programs licensed by the United States or from copying programs licensed to other persons using government equipment. This, of course, does not prohibit the use of software that has been contributed to the public domain and which may be used by anyone. However, the status of software known as "shareware" is unclear. Shareware refers to software in which the owner retains the copyright but permits others to copy it. If the user is satisfied with the program or wishes technical support then he is requested to pay a fee to the owner for use of the program.

[108]In 1984, software piracy was estimated to cost the computer industry nearly $800 million in lost sales. Schiffres, *The Struggle to Thwart Software Pirates*, U.S. News & World Rep., Mar. 25, 1985, at 72. The Air Force Audit Agency reported in June 1984 that 49% of personal computer programs in use at eight air bases were pirated. *Id.*

Note the anomalous interplay between section 641 and Article 121 with regard to the crime of larceny. It is an offense under section 641 to duplicate a program licensed to the United States, but it is not an offense to duplicate a program licensed to a party other than the United States. Section 641 requires the property which is stolen or converted to be property of the United States or one of its departments or agencies. Otherwise there is no federal jurisdiction over the offense under section 641. On the other hand, Article 121 does not require that the stolen property belong to the government. But, copying a computer program is not an offense under Article 121 because a computer program is an intangible item and not covered by the military's definition of property subject to larceny. The unauthorized duplication of computer programs, however, may not always escape the scrutiny of a court-martial should the perpetrator make the copy using government equipment or property such as a computer or floppy disk. Unauthorized use of government computer facilities to illegally duplicate a computer program is punishable under either Article 134 as obtaining services under false pretenses or under Article 92 as a violation of Army Regulation 600-50.[109] Theft of a tangible floppy disk containing the intangible computer program would constitute larceny under Article 121. Furthermore, use of government equipment to photocopy the software's documentation or manual is punishable as a theft of paper,[110] theft of services,[111] or use of government equipment for unofficial purposes.[112]

Additional problems arise beyond defining property when charging a computer crime as larceny. In *Ward v. Superior Court*, the defendant had obtained a computer program from a competitor by causing a computer at one location to send a copy of that program to a computer at a remote location.[113] The judge decided that electronic impulses were not tangible and, therefore, not property. Even though one of the alleged offenses was theft of a trade secret, an intangible, the court required the asportation of something that was tangible. The tangible article was found to be the printed copy of the program that was prepared at the remote location, and the asportation was accomplished when the defend-

[109]Dep't of Army, Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-4 (20 Nov. 1984) [hereinafter cited as AR 600-50].
[110]UCMJ art. 121.
[111]UCMJ art. 134.
[112]UCMJ art. 92 (as violating AR 600-50, para 2-4).
[113]3 Computer L. Serv. Rep. 206, 208-09 (Super. Ct. Cal. 1972).

ant carried the copy of the printed program from the printer to his office.[114]

B. OBTAINING SERVICES UNDER FALSE PRETENSES

The crime of obtaining services under false pretenses purportedly fills the gap regarding theft of services and computer time left by the definition of larceny in the UCMJ.[115] Although value can be measured when the computer time taken includes a commercial, billable item such as computer assisted legal research, a problem may exist in proving the amount of time actually used without authority. Even then, taking $100 or less of computer time could only be punished with a bad conduct discharge and six months confinement by a court-martial.[116]

The value of the time taken from a computer is not necessarily the evil to be punished, rather it is the uncontrolled access to the system. Uncontrolled access to a system containing sensitive information breeds uncertainty as the extent of the criminal's "electronic trespass." For example, the investigator in *State v. Thommen* expressed concern that the defendant may have left "time bombs" within the system which could issue him a check at some later date and then erase the incriminating information.[117]

C. VIOLATION OF A LAWFUL GENERAL REGULATION

Article 92 of the UCMJ makes it a crime for a soldier to violate or fail to obey any lawful general order or regulation. For example, AR 600-50 is a punitive regulation and prohibits the use, or allowing the use of, government property of any kind, including property leased to the govern-

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[114]*Id.* Proving value may also be a problem. "As a general rule, the value of other stolen property is its legitimate market value at the time and place of theft." MCM, 1984, Part IV, para. 48c(1)(g). If there is no legitimate market value at the time and place of theft, then its value will be the lesser of its legitimate market value in the United States or its replacement cost at that time. *Id.* The value of misappropriated copies of computer programs should be their commercial value as evidenced by expert testimony and not the value of the computer paper on which the program is printed. *Hancock*, 402 S.W.2d at 906. This does not address, however, the question of value whenever the program or records taken have no commercial value. The program taken may reflect an enormous investment of time and money, and the government may not actually be deprived of the program if it is only copied by the thief. If the original program is destroyed as part of the theft, would its replacement value reflect the initial investment or the time required to install an archive copy of the program into the computer?

[115]MCM, 1984, Part IV, para. 78. Using a computer for unofficial purposes is also proscribed by Army Regulation 600-50 which is a punitive regulation punishable under Article 92. *But, cf.*, 450 N.Y.S.2d at 957 (dismissal of theft of services charge against a computer systems manager employed by the school board who used the school computers to monitor a betting system on horses because the defendant had been given general access to the computer system).

[116]MCM, 1984, Part IV, para. 78.

[117]Gemignani, *supra* note 40, at 717.

ment, for purposes other than official business.[118] It specifically includes computer facilities within the definition of government property,[119] enabling the prosecutor to avoid the issue of the value of the services taken and concentrate on the real issue of unauthorized use.

Charging the offender under Article 92 as a violation of AR 600-50 provides the prosecutor with probably the most flexible charge found in any jurisdiction for pursuing computer-related crimes. Any use of a government computer without authority is proscribed conduct under AR 600-50. Examples include using a government computer to illegally duplicate a program owned by or licensed to the government, to illegally duplicate a program belonging to another worker in the office, or to gain access to government computer records without authority.[120]

D. ALTERING OR REMOVING PUBLIC RECORDS

Article 134 prohibits anyone from willfully and unlawfully altering, concealing, removing, mutilating, or destroying a public record.[121] The term "public records" includes "data compilations, in any form, . . . setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report.[122] Removing a public record that is stored in a computer does not necessarily require the physical removal or destruction of the record. The removal will probably entail making a copy of the record, thereby leaving the original unaltered so as to minimize detection. Copying a computer record should be punishable under Article 134 by incorporating the same theory used in *United States v. DiGilio*.[123]

In *DiGilio*, the defendant made unauthorized photocopies of FBI files using government equipment. The unauthorized copies were considered government records and the removal of the copies constituted theft under section 641.[124] In *United States v. Friedman*, the court stated that

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[118]AR 600-50 para. 2-4. *Accord* DAJA-AL, 1977/5465, 29 Sept. 1977, Use of Government Computer Must Be For Official Government Purposes Only, *digested in* The Army Lawyer, Feb. 1978, at 6. Para 1-4 makes Army Regulation 600-50 punitive and therefore punishable under UCMJ art. 92 as a violation of a lawful general regulation.

[119]AR 600-50, para. 2-4.

[120]Presumably, no one will be charged with unauthorized use for playing computer tic-tac-toe or other games on the computer. Although such activities might be considered personal, they can serve a valid and official training function in helping develop familiarity with the computer system. Consequently, such trivial uses can serve a valid training function within limits and should be handled administratively. The unofficial use could be so egregious, however, that criminal action would be appropriate. *See, e.g.*, 232 S.E.2d at 745 (student used over $26,384.16. worth of computer time without authority).

[121]MCM, 1984, Part IV, para. 99b.

[122]MCM, 1984, Part IV, para. 99c.

[123]538 F.2d 972 (3d Cir. 1976), *cert. denied sub nom.* Lupo v. United States, 429 U.S. 1038 (1977).

[124]538 F.2d at 972.

information contained in grand jury transcripts was "Government property regardless of who may be said to own the particular sheets of paper or tapes on which said information is recorded."[125] A district court, relying upon *DiGilio* and *Friedman*, decided that there was no reason to "restrict the scope of § 641 to the theft of government paper and ink, or to unauthorized reproduction."[126] The court held that "any record" under section 641 also included the content of the record.[127]

E. FALSE OFFICIAL STATEMENTS

Computer access is often restricted to users with an authorized password which must be entered in the computer before the operator can use the system. Because passwords were intended to protect authorized government functions from perversion by prohibited practices,[128] using another's password could constitute a false official statement under Article 107 of the UCMJ. No distinction should be made whether the entity receiving the statement was a person or a machine. The analysis should key on whether the statement or password was required for gaining illegal access to the computer system.[129]

F. FORGERY

In *United States v. Langston*, the accused was convicted of forgery by altering keypunch cards before the cards were to be processed for payroll checks by the computer.[130] The defendant's action allowed him to increase his payroll check by $300. Even though the accused did not actually make the false writing, his actions in altering the computer input to increase the face amount of the check constituted a forgery. This analogy should hold true in all instances where a person has altered the

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[125]445 F.2d at 1087.

[126]*Lambert*, 446 F. Supp. at 895. The court's ruling can be extended to the oral disclosure of government information contained in records. However, the court did "not mean to suggest by [its] holding that § 641 may cover the unauthorized oral transfer of government information not found in government records." *Id.* at 895 n.6.

[127]*Id.* at 895.

[128]United States v. Aronsen, 8 C.M.A. 525, 528, 25 C.M.R. 29, 32 (1957).

[129]*Cf.* United States v. Candella, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); United States v. Ragins, 11 M.J. 42 (C.M.A. 1981) (submission of false documents to a nongovernmental entity qualified as an offense since the government would ultimately pay the false claim). *Compare* 18 U.S.C. § 1001 (1982) (prohibits any false, fictitious, or fraudulent statement or misrepresentation) *with* 18 U.S.C. § 912 (1982) (prohibits anyone to falsely pretend to be an officer or employee acting under the authority of the United States and who acts in such pretended capacity to obtain any money, paper, document, or thing of value).

[130]*Langston*, 41 C.M.R. at 1013.

computer's operations, at either the input of programming stages, to create a false writing.[131]

Article 132 of the UCMJ, which makes punishable frauds against the United States, may provide a better remedy than forgery in those instances where the individual submits paperwork to set the computer crime in motion instead of altering the computer program or its input. Not only does the submission of a false claim make prosecution much easier by establishing a clearly defined audit trail, it also directly addresses the prohibited conduct. For example, in *United States v. Schwartz*,[132] a personnel clerk instructed trainees to sign a blank allotment form as part of their in-processing procedures. The clerk then completed the allotment forms with the help of an accomplice who worked at an insurance firm. The allotments were then processed by the computerized finance system for payment to the insurance firm where the accomplice worked.

G. FEDERAL COMPUTER FRAUD AND ABUSE ACT

The Comprehensive Crime Control Act of 1984,[133] is the first federal legislation to specifically address the growing government concerns regarding computer crime. 18 U.S.C. § 1030 address three areas of illegal computer access: obtaining information protected by law against disclosure, such as national defense or foreign relations information; obtaining information in records of certain financial institutions or consumer reporting agencies; and accessing, using, modifying, destroying, or disclosing without authority information in computers used for or on behalf of the federal government.[134]

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[131] *But, cf., Jones*, 553 F.2d at 351 (The defendant was convicted of wire fraud by modifying a computer program to issue checks payable to an unauthorized payee. The court stated that the acts which caused the computer to print the fraudulent checks "did not constitute the making of a false writing, but rather amounted to the creation of a writing which was genuine in execution but false as to the statements of fact contained in such writing" and was therefore not a forgery.).

[132] 12 M.J. 650 (A.C.M.R. 1981).

[133] Comprehensive Crime Control Act of 1984, Pub. L. No. 473, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1837 (to be codified at 18 U.S.C. § 1030).

[134]

> (a) Whoever—
>
> (1) knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend and by means of such conduct obtains information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954, with the intent or reason to believe that such information so obtained is to be used to the injury of the United States or to the advantage of any foreign nation;

The third area of proscribed activity represents the bulk of cases that might be handled within the military. Specifically, section 1030(a)(3) makes it a crime whenever anyone

> knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and by means of such conduct knowingly uses, modifies, destroys, or discloses information in, or prevents authorized use of, such computer, if such computer is operated for or on behalf of the Government of the United States and such conduct affects such operation.

Attempts and conspiracies to violate section 1030(a) are also punishable offenses.[135]

Although the statute covers a broad range of illegal computer activities that have proven to be fertile ground for criminals, it specifically excludes a "person having accessed a computer with authorization and using the opportunity such access provides for purposes to which such access does not extend, if the using of such opportunity consists only of the use of such computer."[136] The legislative history of this provision makes it clear that Congress did not intend to make it a crime for a "person authorized to access a government computer who merely ex-

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> (2) knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and thereby obtains information contained in a financial record of a financial institution, as such terms are defined in the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.); or
>
> (3) knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and by means of such conduct knowingly uses, modifies, destroys, or discloses information in, or prevents authorized use of such computer, if such computer is operated for or on behalf of the Government of the United States and such conduct affects such operation;
>
> shall be punished as provided in subsection (c) of this section. It is not an offense under paragraph (2) or (3) of this subsection in the case of a person having accessed a computer with authorization and using the opportunity such access provides for purposes to which such access does not extend, if the using of such opportunity consists only of the use of the computer.

18 U.S.C. § 1030(a).

[135] 18 U.S.C. § 1030(b)(1)-(2).

[136] *Id.* § 1030(a). An authorized user can be punished, however, for using the system beyond his other authority if the information accessed deals with national defense, foreign relations, or atomic energy. *Id.*

ceeds such authorization by . . . doing [his or her] homework or playing computer games."[137] Administrative action, rather than criminal prosecution, was deemed more appropriate for incidents involving this type of unauthorized use.[138]

Authorized users can be punished should they modify, destroy, or disclose information stored in the computer system. Unauthorized use of government computer facilities can be prosecuted as theft of services under section 641 or as obtaining services under false pretenses under Article 134. In the Army, unofficial use of a government computer can be punished as a standards of conduct violation under Article 92. Presumably section 1030 does not preempt criminal action under other provisions of the criminal law for unofficial use of a government computer by an authorized user.[139]

The "knowing state of mind" requirement of section 1030 is satisfied by "an awareness of the nature of one's conduct, and . . . an awareness or firm belief in the existence of a relevant circumstance" relating to the illegal access of the computer.[140] This approach was designed to eliminate the defense of "willful blindness" where the perpetrator claims to be "aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist."[141]

For offenses against computers owned by the government or used on the government's behalf on a full-time basis, there is no requirement to show that government operations were affected. The phrase "such conduct affects such operation" in section 1030(a)(3) was designed to address crimes involving computers used only part-time for the benefit of the federal government.[142] This federal nexus requirement for privately-owned computers performing government operations may be satisfied if the illegal access involved the use, modification, or disclosure of data pertaining to the United States Government.

"[T]he term 'computer' means any electronic, magnetic, optical, electro-chemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage

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[137]H. Rep. No. 894, *supra* note 4, at 528. Personal use of government computers has been the subject of much debate regarding proposed federal legislation on computer crimes. *See e.g.*, Protection Act Hearings, *supra* note 9, at 91 (statement of Senator Joseph R. Biden, Jr.) (no desire to prosecute employees for making "Snoopy" calendars or playing games on the computer).

[138]H. Rep. No. 894, *supra* note 4, at 528.

[139]*Cf. id.*

[140]*Id.* at 522.

[141]*Id. See, e.g.*, United States v. Jewell, 532 F.2d 697, 700 n.7 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976); United States v. Newman, 14 M.J. 474 (C.M.A. 1983); Model Penal Code § 2.02(7).

[142]H. Rep. No. 894, *supra* note 4, at 528.

facility or communications facility directly related to or operating in conjunction with such device."[143] It does not include automated typewriters or typesetters, portable hand-held calculators, or similar devices.[144] Although memory typewriters and dedicated word-processors may be excluded from the definition, personal computers with the ancillary capability of performing word processing functions should be covered. The status of dedicated word-processors with the added capability for data manipulation or file management is unclear. The goal of the statute is to protect information stored within computers. Therefore, if the proscribed activity addresses a dedicated word-processor's data management capabilities and the information stored therein, section 1030 has been violated. If someone accesses information stored as part of a micro-computer's word-processing activity, however, the statute is not violated. 18 U.S.C. § 1030(e) uses the term "automated typewriters" which is more applicable to memory typewriters than to computerized dedicated word-processors. Although dedicated word-processors may not come within the exclusion of section 1030(e), the issue may boil down to what exactly was modified, disclosed, or used. Nonetheless, the conduct may be punishable under other statutory provisions such as removing a public record or unauthorized use of government equipment.

The maximum punishment for a section 1030(a)(3) violation involving unauthorized use, access, modification, destruction, or disclosure of information stored in a government computer is a $5,000 fine and/or one-year imprisonment.[145] If the defendant has previously been convicted under section 1030, then the maximum punishment is increased to a $10,000 fine and/or ten years imprisonment.[146]

Section 1030 was intended to eliminate loopholes in existing federal legislation and to avoid relying on untested theories for prosecuting computer crimes.[147] The legislative history of section 1030 reveals that "the law enforcement community, those who own and operate computers, as well as those who may be tempted to commit crimes by unauthorized access to them, require a clearer statement of proscribed activity."[148] Presumably, this clarification of proscribed activity does not preempt existing legislation and statutes for prosecuting computer criminals.

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[143] 18 U.S.C. § 1030(e).

[144] *Id.*

[145] *Id.* § 1030(c)(2)(A) (regarding punishment for offenses under 18 U.S.C. § 1030(a)(2)-(3)).

[146] *Id.* § 1030(c)(2)(B).

[147] H. Rep. No. 894, *supra* note 4, at 512.

[148] *Id.*

Prosecutors still must use other federal statutes because section 1030 does not address all aspects of computer crimes. Section 1030 is keyed to the access of information stored in computers used by or on behalf of the United States. First, it does not address crimes committed with or against information in privately-owned computers. An example of a crime using a privately-owned computer which is prosecutable under other federal statutes is *United States v. Kelly*[149] where the defendant was convicted for mail fraud using his employer's computer. Second, section 1030 specifically excludes instances where authorized users exceed their authorization and use the computer for unofficial purposes. No consideration is given even if the personal use is egregious.[150] Third, the object of the statute's protection is information in government computers. Therefore, computer programs owned or licensed by the government which are duplicated may not qualify as "information" under section 1030 because "computer program" and "computer software" are not defined. Furthermore, unauthorized copying of a computer program which was either owned by or licensed to a private individual would not be criminal under section 1030 even if a government computer was used to make the illegal copy. Fourth, vandalism or damage to hardware could escape criminal punishment under section 1030, even if it also caused damage to information in the computer, because it may have been accomplished without first "accessing" the computer.

Recent cases, however, have shown that some untested prosecution theories are workable. Disclosure of information in government computer records was successfully prosecuted under section 641 in *United States v. Lambert*.[151] Unauthorized use of computer time or services was successfully prosecuted using section 641 in *United States v. Sampson*.[152]

Even with its limitations, however, section 1030 has done more than merely clarify the federal law regarding computer crimes. It has made it easier to prosecute computer "hackers," *e.g.*, individuals try to access or "break-in" to a government computer using micro-computers and telephones. Under section 1030, they can be punished even if they fail to obtain passwords or access codes to the computer system. The value of any services or time taken need not be shown. Nor is it necessary to show that in the attempt the hacker intended to take information or use the system without authority. Evidence that the hacker was an unauthorized user of the system and that he or she was trying to access the com-

[149]507 F. Supp. 495 (E.D. Pa. 1981) (mail fraud conviction under 18 U.S.C. § 1341 (1974) in using employer's computer as part of scheme to defraud).

[150]Lund v. Commonwealth, 232 S.E.2d 745, 745 (Va. 1977).

[151]446 F. Supp. at 890.

[152]6 Computer L. Serv. Rep. at 879.

puter should be sufficient to sustain a conviction. The legislation makes it clear that the proscribed activity transcends the concepts of property as traditionally defined in the crime of larceny. Rather, the crime is the unauthorized access of a government computer—an electronic trespass on government property.

VI. ASSIMILATING STATE COMPUTER CRIME LAWS

In recent years, many states have enacted their own computer crime legislation modeled after the proposed Federal Computer Systems Protection Act of 1976[153] which was much more comprehensive than the computer crime legislation codified in section 1030. For example, a 1979 proposed Senate bill outlawed various forms of computer fraud and abuse involving computers in interstate commerce, as well as the unauthorized access, altering, damage, or destruction of any computer, computer system, network, software, program, or data.[154] Other states, like Virginia, have pursued an independent path in developing a standard of criminality with which to handle computer-related offenses. Trial counsel should examine state computer crime laws for possible assimilation pursuant to section 18 U.S.C. § 13.[155]

Virginia's experience in dealing with computer crimes provides a good study of one state's difficulties in developing a workable approach of defining proscribed computer activities. Consequently, the steps taken by Virginia in developing its current provisions relating to computer crime will be examined to highlight the problems of drafting charges using common law concepts. Furthermore, the Virginia Computer Crimes Act,[156] passed in 1984, will be examined in closer detail to illustrate other possible ways of addresing computer crime.

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[153]S. 1766, 95th Cong., 2d Sess. (1976). *See also* S. 240, *supra* note 82.

[154]S. 240, *supra* note 82, at § 3.

[155]18 U.S.C. § 13 (1982). *See, e.g.*, Alaska Stat. §§ 11.46.740, 11.46.985, and 11.46.990; Ariz. Rev. Stat. Ann. §§ 13-2301 to -2316 (1978); Cal. Penal Code § 502 (West 1978); Colo. Rev. Stat. §§ 18-5.5-101 to -102 (1984); Del. Code Ann. tit. 11, §§ 931-939 (1983); Fla. Stat. Ann. §§ 815.01 to .07 (West 1978); Ga. Code Ann. §§ 16-9-90 to -95 (Harrison 1981); Idaho Code §§ 18-2201-2202 (1984); Ill. Ann. Stat. ch. 38, § 16-9 (Smith-Hurd 1979); La. Rev. Stat. Ann. §§ 73.1-73.5 (West 1984); Md. Ann. Code art. 27, § 146 (1984); Mass. Gen. Laws Ann. ch. 266, § 30 (1983); Mich. Comp. Laws §§ 752.791-752.797 (1980); Minn. Stat. §§ 609.87-609.89 (1984); Mo. Ann. Stat. §§ 569.093-569.099 (Vernon 1982); Mont. Code Ann. §§ 45-6-310 to -311 (1981); Nev. Rev. Stat. §§ 205.473-205.477 (1983); 1984 N.J. Sess. Law Serv. 184 (1984) (to be codified at N.J. Stat. Ann. §§ 2C:20-1 and 2C:20-23 to -34; N.M. Stat. Ann. §§ 30-16A-2 to -16A-4 (1979); N.C. Gen. Stat. §§ 14-453 to -457 (1979); N.D. Cent. Code § 12.1-06.1-08 (1983); Okla. Stat. tit. 21 §§ 1952-1956 (1984); R.I. Gen. Laws §§ 11-52-2 to -52-5 (1983); S.C. Code Ann. §§ 16-16-10 to 16-16-40 (Law. Co-op 1984); S.D. Codified Laws Ann. §§ 43-43B-1 to 43B-8 (1984); Tenn. Code Ann. §§ 39-3-1401 to -1406 (1983); Utah Code Ann. §§ 76-6-701 to -704 (1979); Va. Code §§ 18.2-152.1 to -152.14 (1984); Wis. Stat. Ann. § 743.70; Wyo. Stat. §§ 6-3-501 to -505 (1983).

[156]Va. Code §§ 18.2-152.1 to -152.14 (1984); 1984 Va. Acts 751.

The inadequacy of the Virginia criminal statutes in defining a computer crime came to the forefront in 1978 when the Virginia Supreme Court announced its decision in *Lund v. Commonwealth*.[157] Charles Walter Lund was a graduate student at Virginia Polytechnic Institute and State University when he was convicted of stealing computer time from the university. The value of the computer time was estimated by experts to be $26,384.16. His conviction for larceny was reversed by the Virginia Supreme Court because "labor and services and the unauthorized use of the University's computer cannot be construed to be the subjects of larceny."[158] The court reasoned that labor, service, and unauthorized use were not concrete articles of personal property that could be taken and carried away.[159] The court issued a challenge, however, to the Virginia General Assembly: "Some jurisdictions have amended their criminal codes specifically to make it a crime to obtain labor or services by means of false pretense. . . . We have no such provision in our statutes."[160]

The Virginia General Assembly was quick to respond by amending the Virginia criminal code in 1978 to provide that "[c]omputer time or services or data processing services or information or data stored in connection therewith is hereby defined as property which can be the subject of larceny . . . embezzlement . . . or false pretenses."[161] This section proved to be a weak and hasty attempt at solving the problem of computer-related crimes. First, defining an intangible item as property subject to theft fails to address the manner in which that intangible might be taken and carried away.[162] Second, failing to define the various terms such as "computer time or services," "data processing services or information," or "in connection therewith" made the law unnecessarily vague.

The new law was challenged in *Evans v. Commonwealth*[163] as unconstitutionally overbroad. Although the defendants were convicted of petit larceny for embezzling a customer list from their former employer's computer, "[t]he trial did not proceed on the theory that the defendants embezzled a piece of paper."[164] Rather, the subject of the embezzlement was computer-stored information or data which had been copied onto a computer printout. The Virginia Supreme Court rejected the claim that

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[157]232 S.E.2d 745 (Va. 1977).
[158]*Id.* at 748.
[159]*Id.*
[160]*Id.*
[161]Va. Code § 18.2-98.1 (1978) (repealed 1984).
[162]*See, e.g.*, Ward v. Superior Court, 3 Computer L. Serv. Rep. at 208-09 (Although California law considered trade secrets to be property which was subject to theft, the trial judge nonetheless required the asportation of something that was tangible. In this case the tangible item asported was the computer printout of the stolen trade secret.).
[163]Evans v. Commonwealth, 308 S.E.2d 126 (Va. 1983).
[164]*Id.* at 128 n.2.

the statute was unconstitutional and held the defendants lacked standing to make the challenge because the statute clearly applied to the conduct for which they were convicted.[165]

Although defense counsel's arguments in *Evans* was rejected by the Virginia Supreme Court, it did not go unheeded. In 1984, the Virginia General Assembly repealed section 98.1 and passed a new computer crime law.[166] The most significant aspect of the Virginia Computer Crimes Act is the comprehensive manner in which it approaches computer crimes, almost to the point that some provisions appear internally redundant. Twelve relevant computer terms are defined, including computer, computer data, computer network computer operation, computer program, computer services, computer software, and property.[167] Fur-

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[165] *Id.* at 129.

[166] 1984 Va. Acts 751.

[167]

> "Computer" means an electronic, magnetic, optical, hydraulic or organic device or group of devices which, pursuant to a computer program, to human instruction, or to permanent instructions contained in the device or group of devices, can automatically perform computer operations with or on computer data and can communicate the results to another computer or to a person. The term "computer" includes any connected or directly related device, equipment, or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device.
>
> "Computer data" means any representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared and is intended to be processed, is being processed, or has been processed in a computer or computer network. "Computer data" may be in any form, whether readable only by a computer or only by a human or by either, including, but not limited to, computer printouts, magnetic storage media, punched cards, or stored internally in the memory of the computer.
>
> "Computer network" means a set of related, remotely connected devices and any communications facilities including more than one computer with the capability to transmit data among them through the communications facilities.
>
> "Computer operation" means arithmetic, logical, monitoring, storage or retrieval functions and any combination thereof, and includes, but is not limited to, communication with, storage of data to, or retrieval of data from any device or human hand manipulation of electronic or magnetic impulses. A "computer operation" for a particular computer may also be any function for which that computer was generally designed.
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> "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, causes the computer to perform one or more computer operations.
>
> "Computer services" includes computer time or services or data processing services or information or data stored in connection therewith.
>
> "Computer software" means a set of computer programs, procedures, and associated documentation concerned with computer data or with the operation of a computer, computer program, or computer network.

thermore, six areas of computer criminal activity are addressed.[168] To avoid any problems of preempting other provisions of the criminal statutes, the Act provides that it does not "preclude the applicability of any other provision of the criminal law . . . which presently applies or may in the future apply to any transaction or course of conduct which violates this article."[169]

Computers and computer networks, programs, software, and data fall within the ambit of the statute.[170] No distinction is made between computers owned by private businesses or individuals and computers owned by or used on behalf of state and local governments. The criminal behavior addressed includes computer fraud, computer trespass, com-

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"Financial instrument" includes, but is not limited to, any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction authorization mechanism, marketable security, or any computerized representation thereof.

"Owner" means an owner or lessee of a computer or computer network or an owner, lessee, or licensee of computer data, computer programs, or computer software.

"Person" shall include any individual, partnership, association, corporation or joint venture.

"Property" shall include:
1. Real property;
2. Computers and computer networks;
3. Financial instruments, computer data, computer programs, computer software and all other personal property regardless of whether they are:

a. Tangible or intangible;
b. In a format readable by humans or by a computer;
c. In transit between computers or within a computer network or between any devices which comprise a computer; or
d. Located on any paper or in any device on which it is stored by a computer or by a human; and

4. Computer services.

A person "uses" a computer or computer network when he:

1. Attempts to cause or causes a computer or computer network to perform or to stop performing computer operations;

2. Attempts to cause or causes the withholding or denial of the use of a computer, computer network, computer program, computer data or computer software to another user; or

3. Attempts to cause or causes another person to put false information into a computer.

A person is "without authority" when he has no right or permission of the owner to use a computer, or, he uses a computer in a manner exceeding such right or permission.

Va. Code § 18.2-152.2 (1984).

[168] Va. Code §§ 18.2-152.3 to -152.7, 18.2-152.14 (1984).

[169] *Id.* § 18.2-152.11.

[170] *Id.* § 18.2-152.2.

puter invasion of privacy, theft of computer services, and use of the computer as an instrument of forgery.

Computer fraud is the use of a computer without authority to obtain property or services by false pretenses, to embezzle, or to commit larceny, or to convert the property of another.[171] For purposes of the act, property is construed broadly and includes real and personal property such as computers, financial instruments, computer data, computer software, and computer programs whether tangible or intangible or whether in electronic transit between computers or remote terminals.[172] The difficulties in the common law definition of property and the requirement of asportation are not encountered under the Virginia law. The statute covers "conversion," which was interpreted in *Evans v. Commonwealth* to include the "unauthorized and wrongful exercise of dominion and control over another's personal property, to the exclusion of or inconsistent with the rights of the owner."[173] Consequently, computer fraud under Virginia law would include theft of computer records and programs whether owned or licensed by individuals or government bodies. An individual could be prosecuted under Virginia law for copying a computer program in violation of the owner's copyright, even though it would not be an offense under Title 18 of the United States Code, or for soldiers, the Uniform Code of Military Justice.[174]

Virginia's computer trespass provisions apply to trespasses of computers, as well as trespasses using the computer as an instrument.[175] In

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[171]

> Any person who uses a computer without authority and with the intent to:
> 1. Obtain property of services by false pretenses;
> 2. Embezzle or commit larceny; or
> 3. Convert the property of another shall be guilty of the crime of computer fraud.

Id. § 18.2-152.3.

[172]*Id.* § 18.2-152.2.

[173]308 S.E.2d at 129 (quoting Black's Law Dictionary 300 (5th ed. 1979)). *See also Morisette*, 342 U.S. at 272.

[174]The criminal copyright infringement provisions in Title 17, United States Code require a profit element; illegal copying for personal use would constitute a civil wrong but would not be a crime. 17 U.S.C. § 506 (1982).

[175]Va. Code §§ 18.2-152.4, 18.2-152.6, and 18.2-152.7 (1984).

> Any person who uses a computer without authority and with the intent to:
> 1. Temporarily or permanently remove computer data, computer programs or computer software from a computer or computer network;
> 2. Cause a computer to malfunction regardless of how long the malfunction persists;
> 3. Alter or erase any computer data, computer programs or computer software;
> 4. Effect the creation or alteration of a financial instrument on of an electronic transfer of funds; or

the latter instance, a trespass would occur when the computer was used as an instrument to cause injury to the person or property of another.[176] An example would include modifying a computer system responsible for performing life-support functions at a medical facility resulting in the death of or injury to a patient. The focus of the analysis, however, should not be on the computer element of the offense, but should concentrate on the injury to the person, which could be treated as an assault or a homicide.[177]

The altering, removing, or erasing of computer data, programs, or software and causing a computer to malfunction are crimes of computer trespass.[178] Creating or altering financial instruments or electronic fund transfers adds a new twist to the crime of forgery.[179]

The crime of invasion of privacy by using a computer goes one step further than 18 U.S.C. § 1030 by prohibiting any person from using a computer without authority to examine without authority "any employment, salary, credit, or any other financial or personal information relat-

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5. Cause physical injury to the property of another shall be guilty of the crime of computer trespass. . . .

Va. Code § 18.2-152.4 (1984).

Any person who willfully uses a computer, with intent to obtain computer services without authority, shall be guilty of the crime of theft of computer services. . . .

Va. Code § 18.2-152.6 (1984).

A person is guilty of the crime of personal trespass by computer when he uses a computer without authority and with the intent to cause physical injury to an individual.

Va. Code § 18.2-152.7A (1984).

[176] *Id.* §§ 18.2-152.4(5), 18.2-152.7.

[177] *See supra* text accompanying notes 45-50. For example, using the computer as an instrument to cause physical injury to a person may be prosecuted under UCMJ art. 118 (murder), UCMJ art. 119 (manslaughter), UCMJ art. 121 (assault), or UCMJ art. 134 (negligent homicide). Physical injury to property may be charged as a violation of UCMJ art. 108 (damage to military property of the United States) or UCMJ art. 109 (damage to property other than military property of the United States).

[178] Va. Code § 18.2-152.3(1)-(3) (1984).

[179] *Id.* § 18.2-152.3(4). *See also id.* § 18.2-152.14:

The creation, alteration, or deletion of any computer data contained in any computer, which if done on a tangible document or instrument would constitute forgery . . . will also be deemed forgery. The absence of a tangible writing directly created or altered by the offender shall not be a defense . . . if a creation, alteration, or deletion of computer data was involved in lieu of a tangible document or instrument.

ing to any other person with intent to injure such person."[180] The term "without authority" is defined as any person who has "no right or permission of the owner to use a computer, or [who] uses a computer in a manner exceeding such right or permission."[181] The extent of the injury contemplated by an invasion of privacy was left undefined and could later be interpreted to cover emotional harm or damage to reputation, because section 152.7, Title 18.2, already covers personal trespass by computer to cause physical injury to an individual.[182]

VII. SENTENCING CONSIDERATIONS

The importance of the sentencing phase of any trial can never be overstated. Experience has shown that in computer crimes, only three per cent of the trials result in jail sentences.[183] The civilian experience in computer trials has shown that computer criminals often receive minimal confinement, and, to add insult to injury, the criminal may also reap financial gains from the experience. For example, in an alleged computerized theft of over $1 million in electronic equipment, the defendant was sentenced to only sixty days at a prison farm.[184] With time off for good behavior, he ended up serving only forty days. Admittedly, much of the problem in obtaining an appropriate sentence in that case was the prosecution's inability to prove the extent of the theft. The defendant, however, not only served a disproportionately light sentence, he was later able to sell the story of his crime and set up a business as a computer consultant advising corporations on computer security.

In light of these sentencing difficulties, trial counsel must take every opportunity to educate the judge and the panel regarding the nature of the crime that has been committed. The sentencing phase of the trial allows the trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which

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[180]Va. Code § 18.2-152.5 (1984).

> A person is guilty of the crime of computer invasion of privacy when he uses a computer without authority and examines without authority any employment, salary, credit or any other financial or personal information relating to any other person with the intent to injure such person. "Examination" under this section requires the offender to review the information relating to any other person after the time at which the offender knows or should know that he is without authority to view the information displayed.

[181]Va. Code § 18.2-152.2 (1984). *But cf.* 18 U.S.C. § 1030(a)(3) (requires an authorized user who is exceeding his authority to modify, destroy, or disclose information before an offense is committed).

[182]*Compare* Va. Code § 18.2-152.4(5) (1984) (using a computer to cause physical injury to property) *with* Va. Code § 18.2-152.7 (1984) (using a computer to cause physical injury to an individual).

[183]DOJ Computer Crime Investigation Guide, *supra* note 31, at 6.

[184]Whiteside, *supra* note 10, at 40.

the accused has been found guilty."[185] The discussion following Rule for Courts-Martial 1001(b)(4) elucidates the extent of aggravation evidence that can be presented:

> Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[186]

Although aggravation evidence will depend upon the actual circumstances in each case, several possibilities exist in most types of computer cases. If the computer's programming has been altered or the data files have been removed or improperly perused, the government's computer experts may have had to survey the extent of the damage done to the system. This may have resulted in the computer being inoperable for a period of time, causing personnel to be under-utilized or delaying training activities. The time expended by the computer expert and lost by support personnel constitutes a direct and immediate adverse impact on the command's mission and efficiency which can be measured in financial terms. The time and expense necessary to develop security measures to ensure that the crime is not repeated should be a relevant aggravating circumstance. Time expended in replacing damaged files also has a financial impact on the government.

Computers are government issues designed to assist the military in the performance of its mission. Any military activity which is adversely affected because of the computer's unavailability is an aggravating circumstance for sentencing purposes. Trial counsel must make full use of the tools at their disposal to explain the extent of the accused's misconduct.

VIII. CONCLUSION

As the number of computers increases in the military, so does the number of computer crimes. Substantial difficulties exist in detecting, investigating, and prosecuting computer crimes. Federal law enforcement agencies, however, have increased their training in this area. As common law larceny grew to include such formerly innovative concepts as embezzlement, larceny by trick, and larceny by false pretenses, so must the modern law grow to encompass the nature of proscribed computer activity. Federal law has been strengthened to deal with computer

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[185]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter cited as R.C.M.].

[186]R.C.M. 1001(b)(4) discussion.

crimes; the Federal Computer Fraud and Abuse Act is a major step forward in modernizing the law. Many counsel feel that computer technology is incompatible with the practice of law. But, if criminals are going to use the computer, trial counsel also must become familiar with computer technology so that they may successfully prosecute cases involving computer crimes. Drafting a charge with sufficient particularity to satisfy constitutional muster will not be an easy task. Understanding the computer's role in the commission of an offense and successfully drafting a charge that fits the criminal behavior is, however, not counsel's only concern. Counsel must be aware of other difficulties presented by computer technology during the trial, *e.g.*, the accumulation and presentation of evidence. Ascertaining the true weight of legally admissible computer evidence will be difficult. If the computer itself is vulnerable to a crime, then the data it contains is vulnerable as well and may not be an accurate reflection of the underlying business activities. The computer is only a tool and it is not infallible.

It is imperative that trial counsel and defense counsel meet their responsibilities. The trial is an education process for the judge and the panel. It is the responsibility of counsel to "help close the gap of technical competence between the judge and jury on the one hand and data processing experts on the other."[187]

[187]Coughran, *supra* note 54, at 409.

INVENTORY SEARCHES

by Major Wayne Anderson*

I. INTRODUCTION

The Supreme Court recognized the inventory search[1] as an exception to the warrant requirement of the fourth amendment[2] in *South Dakota v Opperman*.[3] Inventory searches had been upheld as constitutional, however, by a majority of the state[4] and federal courts,[5] to include military courts,[6] prior to the Court's decision in *Opperman*.

One might expect a position that had been adopted by a majority of state and federal courts to find its way into the Supreme Court reporters without much fanfare. Such was not the case. The *Opperman* decision was the subject of much scholarly criticism. The criticism focused principally on the arguably transparent justifications for the inventory exception advanced by the Court[7] and on the Court's failure to establish any

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[1]"Inventory search" is really a misnomer in that "inventory" connotes a benign, caretaking function whereas "search" connotes an investigative activity undertaken to uncover crime or its fruits.

[2]U.S. Const., amend IV.

[3]428 U.S. 364 (1976).

[4]*Id.* at 371.

[5]*Id.* at 371-72.

[6]United States v. Kazmierczak, 16 C.M.A. 594, 37 C.M.R. 214 (1967).

[7]The government interests articulated in *Opperman* and later in Illinois v. Lafayette, 462 U.S. 640 (1983), include protection of the owner's property from theft and loss, protection of the police against disputes over lost and stolen property and false claims, and protection of the police and public from dangerous items that may be concealed in property that the police take into custody. The criticism leveled at these justifications is, in the abstract, persuasive. *See, e.g.*, W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.4 (1978).

The critics contend that protection of personal property is a transparent justification for an inventory in most cases. If the owner of the property is present at the time the property is taken into police custody, he can give specific instructions on how he wants his property *cared for; a general inventory under these circumstances is unnecessary. If the property* has been abandoned or left in a parked automobile, it is unlikely that there are any valuables in the automobile worth the trouble of an inventory, and even if there are, the police's duty to care for property should not be greater than that of the owner. The safety afforded by an impound lot should meet the police's minimal legal obligations to care for the property. The only time an inventory is justified to protect personal property, the critics contend, is when the owner is incapacitated. Reamey, *Reevaluating the Vehicle Inventory*, 19 Crim. L. Bull. 325, 335 (1984); Note, *Warrantless Searches and Seizures of Automobiles*

guidelines or limitations on the scope of inventories.[8] Notwithstanding the criticism, in its most recent decision on inventory searches, *Illinois v. Lafayette*,[9] the Court continued to justify them on the grounds relied on in *Opperman*[10] and declined to write a "police manual"[11] on preferred methods of conducting inventories.

The Supreme Court's decisions have resulted in disagreement and confusion over what standards should be applied in determining whether a particular inventory is "reasonable" under the fourth amendment. While many issues are left unresolved, the direction of the Court seems clear. This article will examine the development of the inventory exception to the warrant requirement of the fourth amendment and analyze the Supreme Court's most recent position. Finally, the article will discuss the importance of the inventory in the military and will critically examine the military courts' development of the law in this area.

II. EVOLUTION OF THE INVENTORY: *PRESTON* THROUGH *CADY*

The practice of law enforcement agencies in conducting inventories on the contents of automobiles that were impounded or otherwise in police custody was well established before the Supreme Court specifically sanc-

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and the Supreme Court from Carroll to Cardwell: Inconsistently Through the Seamless Web, 53 N.C.L. Rev. 722, 763 (1975); Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 835, 848 (1974).

Protection of the police against false claims has similarly been characterized as a weak justification for inventories. First, the actual incidences of any sort of claim against the police, whether false or valid, is probably quite low. Reamey, *supra*, at 339. Moreover, it is unlikely that the inventory process will have any impact on false claims. The existence of an inventory procedure will not prevent a claimant from claiming that the police deleted a valuable item from the inventory list or from claiming that the item was stolen before the inventory was conducted. *Opperman*, 428 U.S. at 379 (Powell, J., concurring). Finally, the standard of care imposed by law on police and other bailees is so low that there would be very few successful claims for lost or stolen property. One writer concluded, "[R]ealistically, the whole claims issue is stacked so heavily in favor of the police and storeage bailees that any modicum of protection afforted by present inventory procedures is virtually obviated." Reamy, *supra*, at 340.

Protection of the police and public (to include prisoners in appropriate cases) is the third government interest served by inventories. In the context of protecting police and prisoners from dangerous items in the possession of a person being incarcerated, there has been little criticism of the need for an inventory. Indeed, on these facts, the Supreme Court, unanimously agreed on the need for an inventory in *Lafayette*, 462 U.S. at 646-47. On the other hand, use of this justification has been severely criticized in situations such as the impoundment of an automobile for traffic control reasons. The critics do not believe that the remote degree of danger posed by an automobile that has been impounded for a parking violation, for example, justifies a response as intrusive as an inventory. *Opperman*, 428 U.S. at 390 n.8 (Marshal, J., dissenting); Reamey, *supra* at 341-42.

[8]Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 275, 363 (1984).

[9]462 U.S. 640 (1983).

[10]*Id.* at 647.

[11]*Id.*

tioned the procedure in *Opperman*.[12] Likewise, law enforcement agencies routinely inventoried the personal effects of individuals who were being incarcerated before the procedure was addressed in *Lafayette*.[13] Notwithstanding the pervasive use of the inventory by police agencies, the Supreme Court did not consider the constitutionality of inventory searches until *Opperman* even though there were earlier opportunities to do so.

In *Preston v. United States*,[14] decided in 1963, the Court arguably had its first opportunity to address the inventory question.[15] In *Preston*, the petitioner and two companions were arrested for vagrancy as they sat in Preston's automobile. The three suspects were taken to the police station to be booked and the automobile was towed to a garage. The policemen who arrested Preston and his companions subsequently went to the garage and conducted a search of the vehicle. They discovered two handguns in the passenger compartment and paraphernalia in the trunk[16] commonly used in burglaries and robberies. Preston was subsequently convicted of conspiracy to commit robbery.[17]

The police who searched Preston's automobile had no warrant. Indeed, they had neither probable cause nor a reasonable suspicion that they would find contraband or evidence of a crime. Their search was administrative in nature. The government argued that the evidence was admissible on the theory that the search was incident to the arrest.[18] The Court rejected this argument by concluding that the search was too remote in time and place to be a search incident to arrest.[19] The Court did not address the propriety of an administrative inventory of impounded automobiles even though the issue was arguably presented by the facts.

Even though the *Preston* case gave no hint of the existence of an inventory or administrative search exception to the warrant requirement, *Preston* is significant to the development of the inventory exception be-

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[12]428 U.S. at 369; *see generally* LaFave, *supra* note 7, at 565-66.

[13]*Lafayette*, 462 U.S. at 646. The Court said that it granted certiorari in this case because of the frequency with which this issue presented itself to the police and the courts. *Id.* at 643.

[14]376 U.S. 364 (1963).

[15]The inventory issue was not raised before the Supreme Court or before the appellate court. United States v. Sykes, 305 F.2d 172 (6th Cir. 1962). In framing the issue before the Court, however, Justice Black said, "We must inquire whether the facts of this case are such as to fall within *any* of the exceptions to the constitutional rule that a search warrant must be had before a search may be made." 376 U.S. at 367 (emphasis added). If the Court was truly looking for an exception into which these facts may have fallen, it might have considered the inventory-type exception.

[16]*Preston*, 376 U.S. at 365-66.

[17]*Id.* at 364.

[18]*Id.* at 367.

[19]*Id.* at 368.

cause it marks a frontier. After *Preston* the Court began to view warrantless, noninvestigatory administrative searches as "reasonable" under the fourth amendment. Members of the Court who were critical of the Court's new direction insisted that *Preston* had already marked the constitutional outer limits on searches of this nature.[20] At the time *Preston* was decided, the only warrantless searches of property lawfully in police custody that had been recognized by the Court were the "automobile exception,"[21] the search incident to a lawful arrest,[22] the "plain view" exception,[23] and the "exigent circumstances" exception.[24] Clearly then, upholding the constitutionality of noninvestigatory administrative searches represented yet another, and potentially far-reaching, exception to the warrant requirement of the fourth amendment.

After *Preston* the Court considered three cases involving noninvestigatory, administrative searches.[25] In each case, the Court upheld the admissibility of evidence that was discovered in what were essentially inventory searches, but did not rule on the constitutionality of inventory searches generally.

In *Cooper v. California*,[26] the petitioner was arrested for narcotics offenses. His automobile, which had been used to transport narcotics, was seized as evidence and held in custody pending state forfeiture proceedings. The vehicle was searched one week after it was seized and evidence relevant to one of the charged heroin transactions was discovered.[27] The Court ruled that the search was "reasonable" under the fourth amendment but limited its holding to searches of vehicles held for forfeiture proceedings.[28] In justifying its decision, the Court noted that the forfeiture proceedings did not take place until more than four months after the automobile was seized. The Court concluded that "[i]t would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."[29]

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[20]Cady v. Dombrowski, 413 U.S. 433 (1973) (Brennan, J., dissenting); United States v. Harris, 390 U.S. 234 (1968) (Douglas, J., concurring); Cooper v. California, 386 U.S. 58 (1967) (Douglas, J., dissenting).

[21]*Cady*, 413 U.S. at 451.

[22]*Id.* at 451-52.

[23]*Id.* at 452.

[24]United States v. Chadwick, 433 U.S. 1, 21 (1976).

[25]The cases referred to are Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Harris, 390 U.S. 234 (1968); and Cooper v. California, 386 U.S. 58 (1967).

[26]386 U.S. 58 (1967).

[27]*Id.*

[28]*Id.* at 62.

[29]*Id.* at 61-62.

While the *Cooper* decision was quite narrow in its application, it was a clear departure from *Preston*.[30] The Court had clearly signaled that there were circumstances other than those previously recognized that would justify the warrantless search of property lawfully in police custody.

The following Term, in *Harris v. United States*,[31] the Court upheld the admissibility of evidence that a police officer discovered in the course of inventorying an automobile that had been seized as evidence in a robbery investigation. The petitioner, Harris, was arrested as he entered his automobile. A cursory search of his vehicle incident to the arrest failed to reveal any evidence. The vehicle was taken to the police precinct where a police officer conducted an inventory of the vehicle's contents and condition pursuant to police department regulations. The purpose of the inventory was to secure valuables and to document, by use of a property tag, the circumstances of the impoundment. After completing the inventory, the police officer opened the passenger door to roll up the window because it had started to rain. There, on the metal strip under the door, he saw a registration card belonging to the victim of the robbery.[32] In ruling that this evidence was admissible, the Court specifically declined to rule on the constitutionality of the inventory procedure authorized by the department's regulation.[33] The Court found that the registration card was found *after* the inventory search was completed. The evidence, the Court found, was discovered while the police officer was performing a caretaking function for the protection of the property. Hence, the evidence was not discovered during any type of "search."[34] The seizure of the registration care was justified by the "plain view" doctrine.[35]

As in *Cooper*, the Court's decision in *Harris* was very narrow. The Court, perhaps artificially, distinguished the "caretaking function" of securing valuables in the automobile from other caretaking functions that did not involve a search. Even though the Court avoided the issue of whether this "caretaking" inventory search was reasonable, only one Justice took the opportunity to condemn it.[36]

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[30]In his dissenting opinion in *Cooper*, Justice Douglas contended that the facts of *Cooper* were "on all fours" with the facts in *Preston*. 386 U.S. at 65. The facts were indeed similar. The difference in results signified that the Court had created a new exception to the warrant requirement.

[31]390 U.S. 234 (1968).

[32]*Id.* at 235-36.

[33]*Id.* at 236.

[34]*Id.*

[35]*Id.*

[36]In a concurring opinion, Justice Douglas stated that his concurrence was based on the assumption that *Preston* had not been undercut and that the Court's decision did not sanction the inventory search that was being conducted immediately before the registration card was seized. *Id.* at 236-37 (Douglas, J., concurring).

Finally, in *Cady v. Dombrowski*,[37] the Court upheld the admissibility of evidence discovered during a "protective search" of respondent's automobile. Dombrowski was a police officer in Chicago, Illinois. On September 11, 1969, he was involved in a one car accident near West Bend, Wisconsin. He telephoned the local police and notified them of the accident. When the Wisconsin police officers picked Dombrowski up, they learned that he was a police officer in Chicago. Dombrowski was fairly intoxicated and after arriving at the police station he was arrested for drunk driving. After he was booked, Dombrowski was taken to a hospital to receive treatment for the injuries he had sustained in the accident. Shortly after his admission to the hospital, he unexpectedly lapsed into a coma. In the meantime, by order of the police, Dombrowski's automobile had been towed to a private garage.[38] In Wisconsin, police officers were required to keep their service revolvers with them at all times and the Wisconsin police thought that Dombrowski's revolver might be in the automobile. Moreover, the officers feared that the vehicle was vulnerable to intrusion by vandals. As it was standard procedure to conduct a search for a police officer's service revolver under circumstances such as this,[39] one of the police officers went to the garage where the automobile was located to look for a handgun. During the course of his search, he discovered blood-covered clothing and a night stick with Dombrowski's name on it.[40] This evidence, together with additional evidence that was discovered during the investigation which followed, resulted in Dombrowski's conviction for first degree murder.[41]

In ruling that the search of Dombrowski's automobile was reasonable under the fourth amendment, the Court emphasized two specific factual findings. First, the Court noted that by virtue of the police action, the automobile was neither on the premises of nor in the custody of its owner.[42] Even though the vehicle had been towed to a private garage, "the police had exercised a form of custody or control"[43] over it. The police arranged to have the vehicle towed and stored as part of their legitimate traffic safety responsibilities because Dombrowski was unable to care for it himself.[44] Hence, the automobile was constructively and properly in police custody. Second, the Court emphasized that this search was conducted pursuant to standard police procedures.[45] The

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[37]413 U.S. 433 (1973).
[38]*Id.* at 435-36.
[39]*Id.* at 443.
[40]*Id.* at 437-38.
[41]*Id.* at 434.
[42]*Id.* at 447-48.
[43]*Id.* at 442-43.
[44]*Id.* at 443.
[45]*Id.*

Court seemed comforted by the knowledge that the police officer was following a standard administrative procedure and was not indiscriminately conducting his own criminal investigation.

The Court rejected the argument that the search was unconstitutional because there was a less intrusive means of protecting the public from the potential danger the police perceived. It was argued that the public safety could have been just as well protected by placing a guard over the automobile.[46] The Court stated that even though, in the abstract, a less intrusive means of protecting the public may have been utilized, that does not, by itself, render the means employed "unreasonable" under the fourth amendment.[47] This principle was reiterated in *Lafayette*[48] and has far-reaching implications on the permissible scope of an inventory search.[49]

The *Cady* decision, together with those in *Cooper* and *Harris*, paved the way for the Court's decision in *Opperman*. These cases did more than establish the general principle that certain warrantless, noninvestigatory, administrative searches were "reasonable" under the fourth amendment; they also established a body of specific rules and principles under which the inventory exception would operate.

III. OPPERMAN AND LAFAYETTE

A. RECITAL OF FACTS AND LAW

In *Opperman* the respondent's automobile was routinely impounded after receiving two tickets in the same day for illegally parking in a restricted zone. A police officer at the impound lot saw a watch on the dashboard and other personal property on the floor of the back seat. He had the car unlocked and conducted an inventory of the automobile's contents pursuant to standard police procedures. In the course of the inventory, he opened the unlocked glove compartment and discovered a bag of marijuana.[50] At trial, the motion to suppress the evidence was denied and Opperman was convicted of prossession of marijuana.[51]

After granting certiorari, the Supreme Court held that the inventory search, which was conducted pursuant to standard police procedures prevalent throughout the country, was not "unreasonable" under the fourth amendment.[52]

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[46]*Id.* at 447.
[47]*Id.*
[48]462 U.S. at 648.
[49]*See infra* notes 70-73 and accompanying text.
[50]*Opperman*, 428 U.S. at 365-66.
[51]*Id.* at 366.
[52]*Id.* at 376.

The Court recognized that police frequently remove and impound automobiles as part of police traffic control activities as well as when they are seized as evidence. The Court said that the right of police to seize and remove automobiles under these circumstances "is beyond challenge."[53] Once the vehicle has been impounded, it is standard police procedure to inventory the vehicle's contents. "These procedures developed in response to three distinct needs: the protection of the owner's property . . .; the protection of the police against claims or disputes over lost or stolen property . . .; and the protection of the police from potential danger. . . ."[54]

In *Lafayette*, the respondent was arrested for disturbing the peace. When he was arrested he was carrying a purse-type shoulder bag, which he carried with him to the police station. After Lafayette was booked, his personal property, to include the bag, was inventoried. During the inventory, ten amphetamine pills were found inside a cigarette case that was in the shoulder bag.[55] The police officer who conducted the inventory admitted that the purse was small enough that he could have secured it by sealing it in a bag or by placing it in a container or locker.[56] The officer searched the bag because "it was standard procedure to inventory 'everything' in the possession of an arrested person."[57]

In upholding the constitutionality of this inventory procedure, the Court found it "entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed."[58] The government interests supporting the inventory process were essentially the same as those articulated in *Opperman*: namely, protection of the arrested person's property from loss or theft, protection of the police against false claims, and protection of the police and prisoners alike from dangerous items that may be concealed on the arrested person or in his possession.[59]

The Court rejected the argument that the police were required to use the least intrusive means of protecting legitimate government interests, and held that it was not "unreasonable," as part of a routine procedure, for police to conduct an inventory search of *any* container or article in the possession of a person being incarcerated.[60]

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[53]*Id.* at 369.
[54]*Id.* (citations omitted).
[55]*Lafayette*, 462 U.S. at 642.
[56]*Id.*
[57]*Id.*
[58]*Id.* at 646.
[59]*Id.*
[60]*Id.* at 648.

B. ANALYSIS

1. Distinguishing Opperman *and* Lafayette.

At the outset it is important to point out that even though *Opperman* and *Lafayette* both involved inventories, the circumstances under which the inventoried property came into police custody makes a critical difference. In *Lafayette*, the inventoried property came into police custody incident to Lafayette's arrest. On the other hand, in *Opperman* the inventoried property came into police custody incident to a police traffic control function. While the basic principles applicable to inventories apply to both situations, they apply with different emphasis. For example, the thoroughness of the search is a relevant issue in all inventory searches, but the permissible scope of a pre-incarceration inventory of an arrested person's property is much greater than the permissible scope of an inventory of an automobile that has been towed to a police impound lot.

Property may lawfully come into police custody under circumstances other than those addressed in *Opperman* and *Lafayette*. The circumstances range from the seizure of property pursuant to a forfeiture statute to the removal of a disabled vehicle from a busy highway.[61] These differences must be taken into account when applying the principles articulated in *Opperman* and *Lafayette*.

Another distinction from a practitioner's standpoint is that there may be a number of alternative theories for conducting a search depending on how the property came into police custody. For example, the search of property taken into police custody incident to an arrest may be justified by the "automobile" exception, the "exigent circumstances" exception, or as a search incident to arrest. The inventory is not mutually exclusive of these other exceptions; indeed it seems to overlap them all. Exactly how the courts will treat this overlap remains to be seen; it may well be that the inevitable discovery doctrine[62] will be extended to evidence that would have been found during a routine inventory.[63] With the expansion

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[61]For example, a very thorough inventory may be conducted on the contents of property seized pending a forfeiture proceeding. The government has a quasi-possessory interest in this type of property that entitles the government great leeway in the way it treats the property. Indeed, one circuit has concluded that if a vehicle is lawfully seized pursuant to a forfeiture statute, it may be searched without a warrant. United States v. Johnson, 572 F.2d 227 (9th Cir. 1978).

[62]*See* Nix v. Williams, 104 S. Ct. 2501 (1984); Kaczynski, *Nix v. Williams and the Inevitable Discovery Exception to the Exclusionary Rule*, The Army Lawyer, Sept. 1984, 1, at 1.

[63]At least two courts have applied the "inevitable discovery" rule to cases in which the evidence improperly seized would likely have been discovered during a subsequent valid inventory. United States v. Glenn, 577 F. Supp. 930 (W.D. Mo. 1984); State v. Ferguson, 678 S.W. 2d 873 (Mo. Ct. App. 1984).

of the inventory exception, the exceptions may have swallowed the rule with respect to property obtained incident to an arrest.[64]

2. Is the inventory valid if the police obtain custody of the property unlawfully?

In both *Opperman* and *Lafayette*, there was no question that the inventoried property was lawfully in the government's custody. While the Court did not specifically rule that the government must have *lawful* custody of the property as a condition precedent to a lawful inventory, that result seems implicit in the Court's rulings. Throughout the *Opperman* and *Lafayette* decisions the Court used the words "lawful" and "lawfully" when referring to the manner in which the property came into the government's possession. For example, in *Opperman* the Court said, "The Vermillion police were indisputably engaged in a caretaking search of a *lawfully* impounded automobile."[65] Similarly, in *Lafayette*, the Court framed the issue by asking "whether . . . it is reasonable for police to search the personal effects of a person under *lawful* arrest as part of a routine administrative procedure. . . ."[66]

One may argue that the derivative evidence rule should not apply to inventories because an inventory is not part of the criminal investigatory process; it is a benign, noninvestigatory, administrative procedure only collaterally associated with a criminal investigation. Perhaps the fear that police officials would make unlawful arrests and seizures in hopes of finding admissible evidence in the ensuing inventory or perhaps the belief that police should not profit from their own acts of misconduct are legitimate reasons for not adopting such a position. Whatever the reason may be,[67] the concensus seems to be that the property must lawfully be in police custody before evidence discovered in an ensuing inventory will be admitted.[68] Thus, if a military commander unlawfully placed a soldier in pretrial confinement, the soldier's property would not

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[64]In his dissenting opinion in United States v. Chadwick, 433 U.S. 1 (1976), Justice Blackmun contends that the exceptions have so emasculated the rule that the Court should adopt "a clear-cut rule permitting property seized in conjunction with a valid arrest in a public place to be searched without a warrant." *Id.* at 21 (Blackman, J., dissenting).

[65]428 U.S. at 375 (emphasis added).

[66]462 U.S. at 643 (emphasis added).

[67]The courts that have decided the issue generally rely on the derivative evidence rule, but offer no analysis as to why the rule should apply. *See, e.g.*, United States v. Pappas, 613 F.2d 324 (1st Cir. 1980); *see also* Reamey, *supra* note 7, at 327. In *Pappas* the court noted that the derivative evidence rule generally would result in the exclusion of evidence obtained during an inventory if the seizure of the property was unlawful. The court held, however, that where the property was unlawfully seized as a result of the police's good faith reliance on the language of a forfeiture statute subsequently found to be overbroad, evidence obtained during the ensuing inventory was admissible. 613 F.2d at 331.

[68]*See generally* Reamey, *supra* note 7, at 327; LaFave, *supra* note 7, at §§ 5.5(b), 7.5(e).

lawfully be in government custody and the ensuing inventory would not be lawful.[69]

3. Scope: How intrusive may the inventory be?

The nature of the government interests protected by the inventory procedure defines the permissible scope of the intrusion. An inventory procedure designed to secure personal property in automobiles involved in accidents should employ methods that are limited to effectuate that end; but, the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of a 'less intrusive' means."[70] The reason for the Court's approach is a pragmatic one. To require the police to sort out the least intrusive means of protecting a legitimate government interest would not be reasonable. Police cannot be expected to make "fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."[71]

The task of formulating inventory procedures to protect legitimate government interests has been left in the hands of police agencies.[72] Moreover, standard procedures formulated by police agencies will not be "second-guessed"[73] by the Court. The police may follow department inventory procedures confident in the knowledge that their inventory will not later be found "unreasonable" under the fourth amendment because they failed to employ some "less intrusive means" of serving the governmental interest at stake.

In summary, the Court's guidance on the permissible scope of an inventory has for the most part been very general. From *Lafayette* we know the limitations, or lack thereof, on inventorying property of a person being incarcerated. From *Opperman* we know that the inventory of an automobile is not limited to items in plain view, and from *Cooper* we know that there is a greater right to intrude when property is being held in police custody for a prolonged period of time. If the Court has offered little in the way of specific guidance, it has unequivocally established its general philosophy. The Court has given a vote of confidence to police

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[69]Illegal pretrial confinement should be distinguished from pretrial confinement that is terminated upon review by a military magistrate or military judge as provided in Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial, 305(i) and (j) [hereinafter cited as R.C.M.]. Under R.C.M. 305(i)(1) the reviewing authority only "determines the necessity of continued pretrial confinement. . . ," he does not rule on the lawfulness of the initial confinement. Similarly, a military judge's determination under R.C.M. 305(j)(1) that continued pretrial confinement is not justified does not equate to a ruling that the initial pretrial confinement was unlawful.

[70]*Lafayette*, 462 U.S. at 647.

[71]*Id.* at 648.

[72]*Id.*

[73]*Id.*

agencies. Police agencies may develop their own standard procedures for protecting legitimate government interests and, unless those procedures are a mere pretext for a criminal investigation, the Court will not "second guess" the police nor will it require police officers to employ "less intrusive means" than their standard procedures require based upon the peculiarities of an certain case.

IV. INVENTORIES IN THE MILITARY

A. BACKGROUND

Proper utilization of the inventory process has a potentially significant impact on military criminal justice because the need and opportunity to inventory occur far more frequently than in a nonmilitary context. Army regulations require that a soldier's personal property be inventoried and secured if he is absent without authority or hospitalized,[74] placed in temporary detention,[75] or incarcerated in the stockade.[76] Regulations also require unit commanders to inventory the uniforms of junior enlisted soldiers with every change of assignment.[77] Other items, such as furniture provided for barracks, bachelor enlisted quarters, or bachelor officer quarters may be inventoried periodically[78] or upon a change of the property book officer.[79] All property that comes into the custody of military law enforcement agencies, whether it has been seized as evidence or obtained otherwise, must be inventoried.[80] Moreover, the regulations do not list all the circumstances in which an inventory would be appropriate. The very nature of the military organization often requires commanders to exercise custodial authority over property that would be exercised by a family member or neighbor in a nonmilitary setting. It is not uncommon for a unit commander, almost by default, to acquire custody over all of a soldier's property, both military and personal, when the soldier is absent without authority, incarcerated, ill, or unexpectedly absent from the unit on emergency leave or special assignment for a significant period of time. All of these situations would warrant an inventory.[81]

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[74]Dep't of Army, Reg. No. 700-84, Issue and Sale of Personal Clothing, paras. 12-12*a*, 12-14 (15 June 1983) [hereinafter cited as AR 700-84].

[75]Dep't of Army, Reg. No. 190-38, Military Police Detention Cell Operations, para. 5*b* (15 June 1978).

[76]Dep't of Army, Reg. No. 190-47, United States Army Correctional System, para. 5-1 (C1 1 Nov. 1980).

[77]AR 700-84, paras. 11-1, 11-2.

[78]*See* United States v. Hines, 5 M.J. 916 (A.C.M.R. 1978).

[79]*See generally* Dep't of Army, Reg. No. 710-2, Supply Policy Below the Wholesale Level, ch. 2 (1 Oct. 1981).

[80]Dep't of Army, Reg. No. 190-22, Searches, Seizures, and Disposition of Property, para. 2-5 (1 Jan. 1983).

[81]*See* United States v. Dulus, 16 M.J. 324 (C.M.A. 1983).

Because of the pervasive use of the inventory in the military, it is not surprising to find that the Court of Military Appeals addressed the constitutionality of the inventory process several years before the issue went before the Supreme Court. The law that developed from these early cases is not inconsistent with the law developed by the Supreme Court. If anything, the military law is more restrictive in that it imposes standards not required by either *Opperman* or *Lafayette*.

The first Court of Military Appeals case to squarely addres the inventory issue was *United States v. Kazmierczak*.[82] In *Kazmierczak*, the court announced a three-part test[83] for determining whether an inventory authorized by Army regulation was reasonable under the fourth amendment. First, the court looked at the regulation to determine whether the inventory procedure in the regulation, on its face, violated the fourth amendment's protection against unreasonable searches and seizures.[84] Second, the court looked to "whether the inventory process was deliberately invoked as a pretext to ferret out possible evidence of a crime."[85] Third, the court asked "whether, apart from the good faith of the decision to inventory the accused's effects, the subsequent conduct of the parties amounted to an illegal search for evidence of a crime."[86]

The basic test announced in *Kazmierczak* has not been changed substantially by more recent case law or by the Military Rules of Evidence.[87] The posture of military law today, then, may be analyzed best by examining each of the *Kazmierczak* standards, as developed by military law, in light of *Opperman* and *Lafayette*.

B. ANALYSIS OF THE KAZMIERCZAK STANDARDS

1. Does the regulation, on its face, violate the fourth amendment?

The issue as framed by the Court of Military Appeals parallels the Supreme Court's examination into whether the inventory process involved is directed toward a legitimate government interest.

In *Kazmierczak*, the court reviewed the validity of a regulation that applied to the inventory of personal effects of a person being placed in confinement.[88] The stated purpose of the regulation was to safeguard the personal effects of the absent soldier. The court concluded that the safe-

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[82]16 C.M.A. 594, 37 C.M.R. 214 (1967).

[83]The *Kazmierczak* court listed only two steps, but the second step had two prongs. It is more convenient to consider the test as having three parts.

[84]16 C.M.A. at 599, 37 C.M.R. at 219.

[85]*Id.* at 601, 37 C.M.R. at 221.

[86]*Id.*

[87]Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 313(c) [hereinafter cited as Mil. R. Evid.].

[88]16 C.M.A. at 600, 37 C.M.R. at 220.

guarding purpose was a legitimate and reasonable justification for securing property, "especially in organizations comprised of transient personnel."[89] The court found added justification for securing the property of absent military personnel based upon the nature of the military unit.

> [The unit] must be ready for emergency operations in time of peace as well as war. Consequently, even the temporary absence of a member of the unit may require an immediate replacement. If the absent member has left his possessions in the unit these must be removed to make room for those of the replacement.[90]

Having articulated the need to secure property of absent personnel, the court went on to justify the inventory of the property so secured.

> Common sense indicates the absentee's effects cannot be tossed into a sack and stored. A delicate watch may be in the fold of a handherchief, or a loosely-capped container of cleaning fluid may be among some ties. Common sense also dictates that each article stored for the absentee should be listed to guard against a later claim of loss.[91]

Thus, six years before *Opperman*, the Court of Military Appeals concluded, as eventually the Supreme Court did in *Opperman*, that an inventory for the purpose of safeguarding personal property and protecting the government from false claims was "reasonable" under the fourth amendment. After the Court's decision in *Opperman*, the military courts recognized the government interest in protecting the police and public from dangerous items as a third possible justification for an inventory.[92] Under current military law, then, an inventory procedure that is designed to protect personal property, protect the government against false claims, or protect the police and public from dangerous items will probably not be found to be "unconstitutional on its face."

2. Did the manner in which the inventory was conducted amount to an illegal search?[93]

In posing this standard, the court recognized that even when there is a legitimate reason for conducting an inventory, the method employed cannot be beyond what is a reasonable means to effectuate the purpose

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[89] *Id.*
[90] *Id.* at 600-01, 37 C.M.R. at 220-21.
[91] *Id.* at 601, 37 C.M.R. at 221.
[92] *Dulus*, 16 M.J. at 326; *Hines*, 5 M.J. at 919.
[93] This prong of the test was actually mentioned third by the court; it is considered second here only as an aid in organization.

of the inventory or the evidence obtained thereby will be inadmissible. Overreaching in this fashion turns an "inventory" into a warrantless search.

In the military, service regulations will in many cases specify the inventory procedure to be employed. While the permissible scope of an inventory hinges on whether the procedure employed reasonably effectuates a legitimate purpose of the inventory, following an existing standard operating procedure "provides some assurance that the inventory is not a mere pretext for a prosecutorial motive."[94] Perhaps more importantly, the existence of an established procedure tends to insure that the intrusion will be limited in scope to the extent necessary to carry out the specific purpose of the inventory.[95] Moreover, if there is a regulatory procedure for conducting a particular type of inventory, and if the inventory procedure actually employed is more intrusive than that called for by the regulation, the inventory may be deemed to be an illegal search.

The absence of a regulation or standard procedure governing a particular inventory does not necessarily affect the validity of the inventory. For example, in *United States v. Dulus*,[96] the squadron section commander discovered that Dulus, an incarcerated soldier, had left several items of personal property in his automobile. The automobile was parked in the unit area. While there was no regulation requiring the commander to inventory these items, and thus no guidelines on how to conduct it, the court approved the commander's procedure, which was very similar to the procedure utilized for inventorying property left in the unit.

On the other hand, in *United States v. Eland*,[97] evidence discovered during an inventory that was required by command policy was excluded because the inventory was much more intrusive than was necessary to carry out the purpose of the inventory. In *Eland*, the Navy Master Chief who was inventorying the goods of a sailor who was absent from the unit looked through several notebooks "for no particular reason."[98] In them, he found notes incriminating Eland in a drug trafficking venture. In *United States v. Jasper*,[99] however, the court approved an intrusion into an envelope addressed to someone other than the accused that was found among the accused's belongings during an inventory. The court found

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[94]United States v. Jasper, 20 M.J. 112 (C.M.A. 1985).
[95]*Opperman*, 428 U.S. at 375 (citing United States v. Spitalieri, 391 F. Supp. 167, 169 (N.D. Ohio 1975)).
[96]16 M.J. 324 (C.M.A. 1983).
[97]17 M.J. 596 (N.M.C.M.R. 1983).
[98]*Id.* at 599.
[99]20 M.J. 112 (C.M.A. 1985).

that this intrusion was a reasonable means of determining ownership of the envelope and its contents.

3. Was the inventory process deliberately invoked as a pretext for a search?

This prong of the *Kazmierczak* test has been litigated frequently. In applying this prong the courts have focused on the subjective "good faith" of the person directing or conducting the inventory. To the extent the test focuses on one's subjective motivation, it should be abandoned; such a standard has no direct impact on whether the intrusion is "reasonable" under the Constitution. The primary problem presented by this standard is that it requires the court to assess the subjective intent of the person directing or conducting the inventory even when applicable procedures have been followed to the letter. The recent cases of *United States v. Law*[100] and *United States v. Barnett*[101] illustrate this point well.

In *Law*, a Naval Investigative Service (NIS) agent investigating a larceny offense learned that Sergeant Law was in the immediate vicinity of the crime at about the time it was committed. When he went to interview Sergeant Law, he discovered that Law had left Japan and returned to the United States on emergency leave. Because Law had less than three months remaining on his tour in Japan, he was going to be reassigned to a stateside unit. Through an acquaintance of Law the NIS agent discovered that Law had left three boxes and some other personal property in the barracks. The NIS agent suspected that the boxes contained the stolen property, and he brought these facts to the attention of Law's company commander. The commander was surprised to learn that any of Law's property was still in the unit. Because unit policy and Marine Corps regulations required the inventory of a marine's property under these circumstances, the commander directed his executive officer to inventory Law's property to safeguard it. He gave specific instructions that the three boxes were not to be opened; they were to be held only for safekeeping. With the NIS agent acting as an observor, the executive officer conducted the inventory as directed. While conducting the inventory, the executive officer opened an unsecured suitcase to see whether there was anything inside that would identify it as belonging to Law (Law's roommate was absent on temporary duty). Inside the suitcase he discovered evidence of the larceny.[102] A search was subsequently authorized and additional evidence was found in the three boxes.[103]

The existence of an on-going larceny investigation in which Law was a suspect and the presence of the NIS agent in the room during the inven-

[100] 17 M.J. 229 (C.M.A. 1983).
[101] 18 M.J. 166 (C.M.A. 1984).
[102] 17 M.J. at 231-32.

tory led the court to analyze the commander's subjective state of mind. The court ultimately concluded that the commander did not invoke the inventory process for an investigative purpose. In reaching this conclusion, the court emphasized the commander's skepticism over the NIS agent's suspicions,[104] the commander's faith in Law as a good noncommissioned officer,[105] and the specific instructions that he gave to the executive officer on how to conduct the inventory.[106]

In *Barnett*, the Court of Military Appeals wrestled with the "pretext" issue in a case in which the company commander candidly admitted that Criminal Investigation Division (CID) agents were present during an inventory to obtain evidence for use in trial should it be discovered.[107] The accused and three other soldiers were being placed in pretrial confinement and, as required by the regulation, their personal property was inventoried. Just as suspected, evidence was discovered in Barnett's personal effects.[108] While the commander admitted that one of the purposes of the inventory was to discover evidence for use in a trial, the court found that the "primary purpose" of the inventory was to secure the accused's property as required by the regulation. The court considered the language of Military Rule of Evidence 313(c) which says that an examination "for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings, is not an inventory."[109] Relying on this language, the court concluded that the law did not require the results of an inventory to be excluded from evidence if obtaining evidence was a "secondary purpose," as long as the "primary purpose" was a proper one.[110]

Neither *Opperman* nor *Lafayette* nor the Constitution require the military courts to go through this tortuous process of determining whether the person who directed the inventory did it for a subjectively proper purpose. While *Opperman* proscribes the use of an inventory *procedure*[111] that is a pretext for a search, it requires no inquiry into the subjective state of mind of the person directing or conducting it. Indeed, it is hard to imagine what relevance a subjectively improper purpose has if the inventory has an objectively legitimate purpose and is properly carried out. By way of illustration, assume Captain Candid, a company

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[103]*Id.* at 232.
[104]The commander said that he thought the NIS agent was "out in left field" with his suspicions. *Id.* at 235.
[105]*Id.* at 234.
[106]*Id.* at 238.
[107]18 M.J. at 168.
[108]*Id.*
[109]Mil. R. Evid. 313(c), *quoted in* United States v. Barnett, 18 M.J. at 169.
[110]18 M.J. at 169.
[111]*Opperman*, 428 U.S. at 375.

commander, has just learned that one of his less desirable soldiers has just gone AWOL. The soldier, Private High, did not even bother to stop by the barracks to pick up his clothing. CPT Candid is aware that CID has been looking into some of High's off-duty activities, specifically, suspected drug dealing. CPT Candid suspects that High's sudden absence is related to CID's interest in him. CPT Candid has suspected High of dealing drugs for a long time and he is almost sure that there are drugs in High's room in the barracks. After checking the CID evidence, CPT Candid concludes, with the benefit of legal advice, that there is no probable cause to search High's room. CPT Candid is aware, however, of his duties under Army Regulation 700-84 to promptly inventory the personal property of soldiers absent from the unit without leave.[112] CPT Candid has followed this procedure a few times and is familiar with the process. He directs the first sergeant to conduct an inventory of High's personal effects. CPT Candid is explicit in his instructions that this inventory should be no more intrusive or in any other way different from any other AWOL inventory. Naturally, drugs are found. Notwithstanding trial counsel's explanation of the subtle differences between "primary purpose" and "secondary purpose" as explained in *Barnett*, CPT Candid explains that, in his mind, he was using the inventory as a vehicle to get into High's locker and get the drugs out. While he would have conducted an inventory as required by regulation in any event, in this case the safeguarding of High's property was definitely of secondary importance.

In this hypothetical, the company commander is subjectively invoking the inventory process to obtain contraband and evidence of a crime. On the other hand, the vehicle he used was reasonable. In fact, it was required by regulation and the method of searching was limited by the purpose of the regulation. The reasonableness of an intrusion for purposes of the fourth amendment should be measured by balancing the legitimate government needs addressed by the inventory procedure against the rights of the individual; the subjective intent of the person who directs or carries out the valid inventory procedure is irrelevant.[113]

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[112]AR 700-84, para 12-12*a*.

[113]The facts of United States v. Talbert, 10 M.J. 539 (A.C.M.R. 1980), lend themselves very well to a demonstration of this principle. Private Talbert was apprehended by German police for driving an unsafe automobile. He and his automobile were turned over to the military police. The military police officer handling the investigation, SGT E, directed that the automobile be impounded. When SGT E conducted a search of Talbert's person, he found ten pills that later proved to be noncontrolled substances. After discovering the pills, however, SGT E decided to conduct an inventory of Talbert's automobile for "high value" items. Talbert insisted that there was nothing of value in the vehicle, but SGT E nevertheless conducted an inventory. In his search for high value items, SGT E looked in the trunk, in the glove compartment, on the visor, under the hood, and in a matchbox on the dashboard. He even sifted through the cigarette butts in the ashtray. As the court noted, the search extended to "places where only an extraordinarily vivid imagination at the best would have concluded that a person . . . would have kept 'high value' items." *Id.* at 542.

In its most recent discussion of the inventory issue, it appears that the Court of Military Appeals has moved away from an examination of the subjective intent of the person conducting the inventory. In *Jasper*, the court found that the subjective motivation of the sergeant who opened an envelope while conducting an inventory was not controlling. "Rather, an objective assessment of the facts and circumstances known to him at the time is necessary to determine the reasonableness of his actions."[114] Whether the court will adopt wholeheartedly the analysis it applied in *Jasper* remains to be seen. Nevertheless, it is difficult to reconcile the court's emphasis of the commander's subjectively proper "primary purpose" in *Barnett* and *Law* with the court's focus in *Jasper* on the objective reasonableness of the intrusion.

The subjective intent requirement of *Kazmierczak* has been incorporated in Military Rule of Evidence 313(c) to the extent that the rule requires the court to determine whether the "primary purpose" of the inventory was administrative in nature. The military courts are arguably not bound to apply the Rules, however, if they are more restrictive than is constitutionally required. While the Court of Military Appeals has never said that the Rules were not to be rigidly applied, in practice the court has applied them flexibly.[115] The Navy-Marine Court of Military Review has specifically found that

> [The] "constitutional rules" of the Military Rules of Evidence [Mil. R. Evid. 301 and 304-321] were intended to keep pace with, and apply the burgeoning body of interpretative constitutional law—including what it does, or does not, require—not to cast in legal or evidentiary concrete the Constitution as it was known in 1980.[116]

In any event, the "primary purpose" language in Military Rule of Evidence 313(c) should not be an insurmountable obstacle to discontinuing

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Sergeant E insisted, however, that he was not looking for evidence of crime; he was only looking for high value items, and the particular technique he employed had been standard procedure at Fort Dix. *Id.* at 541.

The court found that the inventory was a pretext for a search. While SGT E's technique for inventorying certainly raised questions about his subjective intent, it is unnecessary to engage in speculation of this type to properly resolve the case. The stated purpose for the inventory was to secure valuable items. Another purpose, although not articulated, would be to protect the government against false claims. The inventory technique employed in this case, such as sifting through cigarette butts and looking under the hood, was clearly "not limited to the purpose for which it was effectuated." 729 F.2d at 483. While keeping in mind the Supreme Court's guidance that police agencies need not employ the least intrusive means of serving the government interest at stake, it is clear that the technique employed here was but a pretext for a search.

[114]20 M.J. at 115.

[115]*See, e.g.*, United States v. Tipton, 16 M.J. 283 (C.M.A. 1983); Murray v. Haldeman, 16 M.J. 74 (1983).

[116]United States v. Postle, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

the analysis of the commanders' subjective motivation for directing an inventory.

V. CONCLUSION

The Supreme Court has clearly plotted its course in the area of the inventory exception to the warrant requirement of the fourth amendment. Many questions concerning the constitutional limits of the inventory process remain unanswered, but as long as legitimate governmental objectives can be articulated and as long as the inventory methods employed to meet those objectives are reasonable, the inventory procedure will, in all likelihood, be deemed "reasonable" under the fourth amendment.

The law developed by the military courts, while recognizing the constitutional validity of the inventory process, focuses undue attention on the subjective intent of the person directing or conducting the inventory. The military courts should shift their analytical emphasis away from the subjective intent of the person conducting the inventory and focus on whether the specific inventory procedures employed are limited to effectuate the legitimate purposes of the inventory.

REGULATORY DISCRETION: THE SUPREME COURT REEXAMINES THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT*

by Donald N. Zillman**

I. INTRODUCTION

The Federal Tort Claims Act (FTCA) celebrates its fortieth birthday in 1986.[1] The Act has largely achieved its objective of repudiating sovereign immunity in ordinary tort situations, thus making the United States liable in damages for the negligent or wrongful acts of its officers and employees. Victims of vehicular negligence, medical malpractice, or careless property maintenance by the United States now routinely receive compensation for meritorious claims.

The picture is less clear, however, when more novel theories of tort liability are involved. A major statutory limitation in the FTCA to such theories of liability is the ban on liability for a "discretionary function"

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[1]The Act was passed as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 842 (1946). The significant parts of the Act are codified at 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

of the government.[2] "Discretionary function" was not defined in the 1946 statute or its subsequent amendments. The legislative history regarding discretionary function was brief and for the most part unhelpful.[3] The United States Supreme Court attempted to clarify the meaning of the term in *Dalehite v. United States* in 1953.[4] *Dalehite* examined liability against the United States for the catastrophic explosion of fertilizer-grade ammonium nitrate that leveled Texas City, Texas, in 1947. Dozens of lower court decisions since *Dalehite* have suggested that the Supreme Court's opinion caused more confusion than it resolved. Yet, for another thirty years, the Supreme Court refused to decide another discretionary function case. During that time, the lower courts

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[2]28 U.S.C. § 2680(a) (1982) holds the United States may not be held liable under the Tort Claims Act for

> Any claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be accused.

The section contains two prohibitions on government liability. The first, "exercising due care, in the execution of a statute or regulation" has rarely been the subject of litigation because the requirement of "exercising due care" would undercut the allegation of a "negligent or wrongful act" on the part of a United States employee. Litigation involving section 2680(a) has focused on the second prohibition—the "discretionary function" prohibition.

[3]The legislative history is summarized in L. Jayson, Handling Federal Tort Claims § 246 (1984). In United States v. Varig Airlines, 104 S. Ct. 2755, *reh'g denied*, 105 S. Ct. 26 (1984), the Court cited the most revealing provision of legislative history regarding the meaning of the discretionary function exception.

> The legislative materials of the Seventy-seventh Congress illustrate most clearly Congress' purpose in fashioning the discretionary function exception. A Government spokesman appearing before the House Committee on the Judiciary described the discretionary function exception as a "highly important exception":
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> [It is] designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities and Exchange Commission, the Foreign Funds Control, Office of the Treasury, or others. It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.
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> On the other hand, the common law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill. Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea).[9]

Footnote 9 states: "The Committee incorporated the Government's view into its Report almost verbatim. H.R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942)."

[4]346 U.S. 15 (1953).

had expanded government tort liability by rejecting discretionary function defenses on the part of the government. The decisions were influenced by a willingness of plaintiffs' attorneys to assert a variety of imaginative tort claims against the United States. This expansion of United States liability corresponded to an expansion of the liability of state and local governments and government officers in tort and related actions.[5] Contemporary claims against the United States have not only asked for multi-million dollar damage awards, but have challenged significant government decisions. Recent FTCA cases have challenged atomic bomb testing,[6] chemical warfare programs,[7] the regulation of nuclear powerplants,[8] the regulation of financial institutions,[9] and government responsibility for the use of Agent Orange in Vietnam.[10]

The decision of the United States Supreme Court in *United States v. Varig Airlines*,[11] on June 19, 1984, provided an opportunity to reformulate discretionary function law. While the Court in *Varig* emphatically decided the two companion cases in the government's favor, it left much unclear. The opinion paid little attention to the evolution of discretionary function law since 1953. Even in the area of government liability for negligent inspection, the point at issue in the cases, the opinion left many matters unresolved. As a result, lower courts, administrative agencies, and attorneys will continue to struggle with the meaning of the discretionary function exception.

A previous 1977 study by the author examined the discretionary function exception through the mid-1970s.[12] The article noted that lower federal courts had recently begun to limit the government's immunity under the exception. This article will examine developments since 1977, paying particular attention to the *Varig* decision. The initial section will examine the numerous discretionary function decisions in the lower

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[5]*See* Zillman, *The Changing Meaning of Discretion: Evolution in the Federal Tort Claims Act*, 76 Mil. L. Rev. 1, 21-30 (1977) [hereinafter cited as Zillman].

[6]Allen v. United States, 588 F. Supp. 247 (D. Utah 1984). *See also* Begay v. United States, 591 F. Supp. 991 (D. Ariz. 1984) (exposure of uranium miners to cancer risks).

[7]United States v. Nevin, 696 F.2d 1229 (9th Cir. 1983).

[8]General Public Utilities v. United States, 551 F. Supp. 521 (E.D. Pa. 1982).

[9]*In re* Franklin Nat'l Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1979); First Savings v. First Federal Savings, 547 F. Supp. 988 (D. Hawaii 1982).

[10]*In re* Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980).

[11]104 S. Ct. 2755, *reh'g denied*, 105 S. Ct. 26 (1984).

[12]Zillman, *supra* note 5.

courts between 1977 and 1984.[13] The second section will analyze the decision of the Supreme Court in *Varig*. The concluding section will examine the impact of *Varig* on the lower court discretionary function cases. It will also suggest the critical issues that will confront courts in the years ahead.

II. THE EVOLUTION OF DISCRETIONARY FUNCTION LAW 1977-84

A. THE FACTUAL CONTENT OF THE CASES

The 1977 study of the discretionary function exception found that several areas of negligence had been recognized as not involving discretionary functions. The four most familiar were motor vehicle operation, routine building and property maintenance, medical malpractice, and negligent ground control of aircraft.[14] In the first three areas, state tort decisions had established rules of liability in cases not involving government defendants. FTCA cases, therefore, could follow those well recognized precedents. In the case of air traffic controller negligence, no significant nongovernmental body of law exists. To fill this void, FTCA cases defined standards of controller conduct by drawing on precedents from other cases of professional malpractice. In these four factual areas the courts had made clear that the United States could not escape liability by asserting that the government employee's action was discretionary.

In contrast, certain factual situations were regarded as discretionary functions, freeing the government from tort liability even though the other elements of an FTCA suit existed. Among these situations were flood control and irrigation activities, law enforcement, regulatory and licensing activities, and matters involving the military and foreign relations.[15] Two factual areas in 1977 had divided the courts on the application of the discretionary function exception. They were suits for sonic boom damages and suits for failure to exercise care for government psychiatric patients.[16] The latter actions were divided between cases which involved the patient harming himself and cases which involved

[13]The vitality of the discretionary function defense is illustrated by the fact that nearly 150 reported cases since 1977 have examined the discretionary function exception. The cases were discovered by the use of the term "discretionary function" in the WESTLAW system (copyright West Publishing Co.) by reference to discretionary function decisions in the West headnote "United States" and by the annotations to 28 U.S.C. § 2680(a). I discovered a total of 148 cases beginning with 565 F.2d 650 (1977) and 425 F. Supp. 1318 (1977) and ending with 735 F.2d 302 (1984) and 582 F. Supp. 1251 (1984). Seventy-four cases are from the court of appeals and seventy-four cases are district court cases not subsequently reviewed in a published decision by a court of appeals.

[14]Zillman, *supra* note 5, at 12.

[15]*Id.* at 13.

[16]*Id.* at 13-14.

harm caused by the patient to others. In either case the government was charged with negligence in the supervision and care of the patient.

The discretionary function cases decided from 1977 through 1984 generally upheld prior precedents, but introduced several new factual issues. No cases involved automobile accidents, nonpsychiatric medical malpractice, or aircraft controller negligence. Only one case involved sonic boom damage.[17] In these areas, therefore, we may surmise the courts have conveyed the message that the discretionary function exception will not be given serious consideration. The government has stopped raising the exception in these cases, either out of respect for precedent or from a sense that sound litigation strategy discourages raising clearly spurious defenses.

Government property maintenance cases continue to provide discretionary function decisions for the courts. Courts have both accepted[18] and rejected[19] the discretionary function exception in these cases. Many of the cases, however, involved the government's responsibility over undeveloped areas like parks, wilderness areas, public lands, and waterways. Here discretionary function questions blend with arguments over the government landowner's lack of duty or lack of negligence.[20] The cases have not contested government responsibility for premises maintenance in situations where the government building may be indistinguishable from commercial premises.

One area where the discretionary function cases have shifted in favor of the plaintiffs since 1977 is the patient or client supervision area. The considerable majority of recent cases have rejected the discretionary function exception in cases involving patient or client supervision.[21] A related line of cases has rejected the discretionary function exception for

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[17]Peterson v. United States, 673 F.2d 237 (8th Cir. 1982) (discretionary function rejected because pilot was off-course in violation of Air Force policy decision).

[18]Green v. United States, 629 F.2d 581 (9th Cir. 1980); Williams v. United States, 581 F. Supp. 847 (S.D. Ga. 1982); Henretig v. United States, 490 F. Supp. 398 (S.D. Fla. 1980); Coe v. United States, 502 F. Supp. 881 (D. Or. 1980) (burning on public lands).

[19]Butler v. United States, 726 F.2d 1057 (5th Cir. 1984); Doe v. United States, 718 F.2d 1039 (11th Cir. 1983) (rape in U.S. Post Office); Estate of Callas, 682 F.2d 613 (7th Cir. 1982).

[20]Ducey v. United States, 713 F.2d 504 (9th Cir. 1983); Green v. United States, 629 F.2d 581 (9th Cir. 1980) (DDT spraying on public lands); Coe v. United States, 502 F. Supp. 881 (D. Or. 1980); Stephens v. United States, 472 F. Supp. 998 (C.D. Ill. 1979).

[21]Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983); Payton v. United States, 679 F.2d 475 (5th Cir. 1982); Rise v. United States, 630 F.2d 1068 (5th Cir. 1980); Bryant v. United States, 565 F.2d 650 (10th Cir. 1977); Doyle v. United States, 530 F. Supp. 1278 (C.D. Cal. 1982); Moon v. United States, 512 F. Supp. 140 (D. Nev. 1981); Lipari v. Sears Roebuck, 497 F. Supp. 185 (D. Neb. 1980); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978).

the administration of vaccines.[22] The courts have concluded that this area is an aspect of professional malpractice and that government liability should be decided on that basis rather than by reference to protected government policy judgments.

The recent cases have continued to recognize areas previously protected by the discretionary function exception. Cases challenging government operation of irrigation or flood control projects have either applied the discretionary function exception or remanded the case for further findings.[23] Also, matters touching on national defense and foreign policy continue to be protected by the exception.[24]

Several recent cases have involved government responsibility for construction projects. Decisions have gone both ways on whether government participation in planning and constructing an airport or highway is protected by the exception.[25] Three cases examined government responsibility for the sale of surplus property.[26] Two of the cases involved the government's role in the sale of potentially carcinogenic asbestos. In all three cases the government action was held to be a protected discretionary function.

By far the largest number of discretionary function cases have involved government actions as regulators, inspectors, and law enforcers. Plaintiffs' contentions were that had government acted in a different fashion, defective property would not have caused injury, a

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[22]Hitchcock v. United States, 665 F.2d 354 (D.C. Cir. 1981); Loge v. United States, 662 F.2d 1268 (8th Cir. 1981) (certain testing failures). *But see* Lemer v. United States, 580 F. Supp. 37 (W.D. Tenn. 1984).

[23]Payne v. United States, 730 F.2d 1434 (11th Cir. 1984); Lindgren v. United States, 665 F.2d 978 (9th Cir. 1982) (remand); Burlison v. United States, 627 F.2d 119 (8th Cir. 1980); Miller v. United States, 583 F.2d 857 (6th Cir. 1978) (remanded); Morici Corp. v. United States, 500 F. Supp. 714 (D. Cal. 1980).

[24]Serrano Medina v. United States, 709 F.2d 104 (1st Cir. 1983) (exclusion from military post); Nevin v. United States, 696 F.2d 1229 (9th Cir. 1983) (biological warfare program); Canadian Transport v. United States, 663 F.2d 1081 (D.C. Cir. 1980) (refusal to let ship enter port for national security reasons); Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979) (remand-Interpol cooperation); Medina v. United States, 541 F. Sup. 719 (D.P.R. 1982) (exclusion from military post); Rappenecker v. United States, 509 F. Supp. 1018 and 1024 (N.D. Cal. 1980, 1981) (rescue of ship from foreign control); DePass v. United States, 479 F. Supp. 373 (D. Md. 1979) (INS detention of immigrant). *But see* Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (CIA mail intercept was not discretionary function because it is not legally authorized).

[25]Colorado Flying Academy v. United States, 724 F.2d 871 (10th Cir. 1984) (exception applies); Miller v. Dep't of Transportation, 710 F.2d 656 (10th Cir. 1983) (exception applies); Baird v. United States, 653 F.2d 436 (10th Cir. 1981) (exception applies); Wright v. United States, 568 F.2d 153 (10th Cir. 1977) (exception applies); Petznick v. OK Electric, 575 F. Supp. 698 (D. Neb. 1983) (exception does not apply); Melton v. United States, 488 F. Supp. 1066 (D.D.C. 1980) (exception does not apply).

[26]Shirey v. United States, 582 F. Supp. 1251 (D.S.C. 1984) (sale of surplus jeep), All Maine Asbestos Litigation, 581 F. Supp. 963 (D. Maine 1984); Stewart v. United States, 486 F. Supp. 178 (C.D. Ill. 1980).

dangerous criminal would have been stopped, or a fraudulent business practice would have been ended before plaintiff lost money.

While many of the cases involved several issues, some classification is useful. The first category of cases challenged law enforcement and prosecutorial activity. These have included such matters as a U.S. attorney's decision to prosecute,[27] the Solicitor General's choice to pursue an appeal,[28] a police officer's use of informants,[29] and officers treatment of persons in witness protection programs.[30] The most extreme claim was by a wounded bank robber who felt that the police use of force that injured him gave rise to an action against the government.[31] In virtually all these law enforcement cases the courts held that the actions were protected discretionary functions.

A subcategory of the enforcement and prosecution cases have involved the Internal Revenue Service's enforcement of the tax laws. The cases have involved challenges to decisions to prosecute,[32] decisions to pay informants,[33] and decisions on revenue rulings issued by tax officers.[34] In all cases the discretionary function exception has been applied.

A second category of cases involved the government as regulator of and permit granter for its own property. The cases involving government sales from the asbestos stock pile have already been noted.[35] Other cases involved requests for permits to use federally-owned lands. In two cases, one involving denial of a license for a motorcycle rally in a sensitive environmental area,[36] and the other involving the reduction of the number of authorized livestock under a federal grazing permit,[37] the courts held that the government action was discretionary in nature.

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[27]Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983); Ray v. Dep't of Justice, 508 F. Supp. 724 (E.D. Mo. 1981); Hoston v. Silbert, 514 F. Supp. 1239 (D.D.C. 1981).

[28]Foster v. Bork, 425 F. Supp. 1318 (D.D.C. 1977).

[29] Slagle v. United States, 612 F.2d 1157 (9th Cir. 1980); Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981).

[30]Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980); Bergmann v. United States, 689 F.2d 789 (8th Cir. 1982); Miller v. United States, 561 F. Supp. 1129 (E.D. Pa. 1983); Miller v. United States, 530 F. Supp. 611 (E.D. Pa. 1982); (decision whether to protect is discretionary); Reed v. Hadden, 473 F. Supp. 658 (D. Colo. 1979) (prisoner in protective custody).

[31]Amato v. United States, 549 F. Supp. 863 (D.N.J. 1982).

[32]Wright v. United States, 719 F.2d 1032 (9th Cir. 1983); Hutchinson v. United States, 677 F.2d 1322 (9th Cir. 1982); White v. Commissioner, 537 F. Supp. 679 (D. Colo. 1982). 28 U.S.C. § 2680(c) (1982) bars FTCA actions for "Any claim arising in respect of the assessment or collection of any tax. . . ."

[33]Carelli v. IRS, 668 F.2d 902 (6th Cir. 1982).

[34]American Ass'n of Commodity Traders v. Dep't of Treasury, 598 F.2d 1233 (1st Cir. 1979).

[35]*See supra* note 25.

[36]Thompson v. United States, 592 F.2d 1104 (9th Cir. 1979).

[37]Barton v. United States, 609 F.2d 977 (10th Cir. 1979).

A third category of cases challenged government regulatory activities over private businesses. The cases reflect the considerable government regulatory control over many aspects of American businesses. Frequently litigated areas have involved the FAA's control over civil aviation,[38] various agencies' regulation of banking practices,[39] the Food and Drug Administration's licensing of new drugs,[40] and the Mine Enforcement and Safety Administration's inspection of coal and other mining operations.[41] Other cases have involved regulatory activity of the Consumer Product Safety Commission,[42] the Occupational Safety and Health Administration,[43] the Nuclear Regulatory Commission,[44] the Department of Housing and Urban Development,[45] and the U.S. Army Corps of Engineers.[46]

Two kinds of factual situations have been litigated in these cases. In the first, the regulated party is the one challenging the government action. Typically, the plaintiff sued for economic loss due to the government's failure to act, slowness in acting, or improper regulation. Here the discretionary function exception consistently has been applied.[47] In the cases where discretionary function does not decide the issue, courts

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[38]Harr v. United States, 705 F.2d 500 (D.C. Cir. 1983); George v. United States, 703 F.2d 90 (4th Cir. 1983); Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982); Varig Airlines v. United States, 692 F.2d 1205 (9th Cir. 1982) and United Scottish Insurance Co. v. United States, 692 F.2d 1209 (9th Cir. 1982), *rev'd*, United States v. Varig Airlines, 104 S. Ct. 2755 (1984); Garbarino v. United States, 666 F.2d 1061 (6th Cir. 1981); Reminga v. United States, 631 F.2d 449 (6th Cir. 1980); Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1978); Rulli v. United States, 581 F. Supp. 1502 (W.D. Pa. 1984); Medley v. United States, 543 F. Supp. 1211 (N.D. Cal. 1982); Firemans Fund v. United States, 527 F. Supp. 328 (E.D. Mich. 1981); Eckles v. United States, 471 F. Supp. 108 (M.D. Pa. 1979); *In re* Air Crash Disaster, 445 F. Supp. 384 (D. Kan. 1977).

[39]Emch v. United States, 630 F.2d 523 (7th Cir. 1980); First State Bank v. United States, 599 F.2d 558 (3d Cir. 1979); Harmsen v. Smith, 586 F.2d 156 (9th Cir. 1978); First Savings & Loan v. First Federal, 531 F. Supp. 251 (D. Hawaii 1981) and 547 F. Supp. 988 (D. Hawaii 1982); *In re* Franklin Nat'l Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1979).

[40]Galley v. Astra Pharmaceutical, 610 F.2d 558 (8th Cir. 1979); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); Meserey v. United States, 447 F. Supp. 548 (D. Nev. 1977).

[41]Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983); Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981); Bernitsky v. United States, 620 F.2d 948 (3d Cir. 1980); Roberts v. United States, 531 F. Supp. 372 (D. Vt. 1981); Holland v. United States, 464 F. Supp. 117 (W.D. Ky. 1978).

[42]Jayvee Brand v. United States, 721 F.2d 385 (D.C. Cir. 1983).

[43]Irving v. United States, 532 F. Supp. 840 (D.N.H. 1982); Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

[44]General Public Utilities v. United States, 551 F. Supp. 521 (E.D. Pa. 1982).

[45]Donohue v. United States, 437 F. Supp. 836 (E.D. Mich. 1977).

[46]Lynch v. Corps of Engineers, 474 F. Supp. 545 (D. Md. 1978).

[47]Harmsen v. Smith, 586 F.2d 156 (9th Cir. 1978); Shapiro v. United States, 566 F. Supp. 886 (E.D. Pa. 1982); Lynch v. Corps of Engineers, 474 F. Supp. 545 (D. Md. 1978); Meserey v. United States, 447 F. Supp. 548 (D. Nev. 1977). *But see* Donohue v. United States, 437 F. Supp. 836 (E.D. Mich. 1977).

have either found a lack of duty on the part of the government to the regulated entity or another defense under the FTCA that bars recovery.[48]

The second factual pattern involved third parties who claimed damages for wrongful death, personal injury, or property damage. Here the allegation is that government regulation did not do its job and the government failure to inspect the defective airplane, coal mine, navigational device, drug or food product, or bank resulted in harm to the third party.[49] While the third party may have an action against the wrongdoing business, the action against the government provides an attractive alternative source of recovery. In these cases the courts have been slightly more sympathetic to plaintiffs than in suits by regulated parties, but not much more. Again, the cases are often decided on lack of duty to the injured party without reaching the discretionary function question.[50] The courts usually hold that the government's regulatory responsibilities are owed to the public as a whole rather than to individual victims of a failure of the process. In these areas the exact nature of the regulatory responsibility is often significant in deciding whether the discretionary function exception will apply.

The cases involving government regulations provide some of the best evidence that winning a discretionary function argument is only one step toward recovery for a plaintiff.[51] A number of other challenges to plaintiff's *prima facie* case and defenses win cases for the government. Since 1977 the most frequent "defense" invoked in discretionary function cases is that the government owes no duty to the plaintiff under existing tort law.[52] Factors that are relevant when deciding a discretionary function issue often are also relevant to the determination of whether the government owes a duty to a particular plaintiff. Other government "defenses" in the discretionary function cases are lack of

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[48]*See infra* notes 51-58.

[49]*See supra* notes 38-46.

[50]Bergmann v. United States, 689 F.2d 789 (8th Cir. 1982); Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981); Ortiz v. United States, 661 F.2d 826 (10th Cir. 1981); Galley v. Astra Pharmaceutical, 610 F.2d 558 (8th Cir. 1979); Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977); Ayala v. Joy Mfgr., 580 F. Supp. 521 (D. Colo. 1984); Gunnells v. United States, 514 F. Supp. 754 (S.D. W.Va. 1981); *In re* Franklin Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1979).

[51]*See* Zillman, *supra* note 5, at 15-16 for citation to pre-1977 cases.

[52]Grunnet v. United States, 730 F.2d 573 (9th Cir. 1984); Ortiz v. United States, 661 F.2d 826 (10th Cir. 1981); Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981); Galley v. Astra Pharmaceutical, 610 F.2d 558 (8th Cir. 1979); Harmsen v. Smith, 586 F.2d 156 (9th Cir. 1978); Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977); Amato v. United States, 580 F. Supp. 521 (D. Colo. 1984); Roberts v. United States, 531 F. Supp. 372 (D. Vt. 1981); McCreary v. United States, 488 F. Supp. 538 (W.D. Pa. 1980); Miller v. United States, 480 F. Supp. 612 (E.D. Mich. 1979); *In re* Franklin Nat'l Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1979).

government negligence,[53] lack of a government employee tortfeasor,[54] lack of proximate cause,[55] expiration of the statute of limitations,[56] violation of claims filing procedures,[57] or the prohibition of the claim by a statutory exemption other than section 2680(a) of the FTCA.[58] Collectively, the cases suggest that even if the discretionary function exception were abolished, there might be little change in government liability.

B. DEFINING DISCRETIONARY FUNCTION

While the courts have been fairly consistent in categorizing certain fact patterns as discretionary or nondiscretionary, they have had greater trouble in articulating a definition of "discretionary function." As noted, the FTCA and its legislative history provide little guidance.[59] The *Dalehite* decision was of only limited help. In the first place, *Dalehite*, with its foreign policy implications and mass disaster consequences, was a most unusual case.[60] The *Dalehite* opinion itself did not provide much guidance for deciding later discretionary function cases. The most cited language from *Dalehite* noted the distinction between government's "planning" and "operational" functions.[61] The former were discretionary and immune; the latter were nondiscretionary and could subject the government to liability.

By the late 1970s, *Dalehite* seemed a very imprecise precedent. Government tort law had changed in many respects since 1953.[62] While the Supreme Court did not decide another discretionary function case,

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[53]Doe v. United States, 718 F.2d 1039 (11th Cir. 1983); Slagle v. United States, 612 F.2d 1157 (9th Cir. 1980); Patton v. United States, 549 F. Supp. 36 (W.D. Mo. 1982); Coe v. United States, 502 F. Supp. 881 (D. Or. 1980); Henretig v. United States, 490 F. Supp. 398 (S.D. Fla. 1980); Holland v. United States, 464 F. Supp. 117 (W.D. Ky. 1978).

[54]Garbarino v. United States, 666 F.2d 1061 (6th Cir. 1981); Slagle v. United States, 612 F.2d 1157 (9th Cir. 1980).

[55]Doyle v. United States, 530 F. Supp. 1278 (C.D. Cal. 1982); Miller v. United States, 480 F. Supp. 612 (E.D. Mich. 1979); Holland v. United States, 464 F. Supp. 117 (W.D. Ky. 1978); Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980).

[56]Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980).

[57]Meserey v. United States, 447 F. Supp. 548 (D. Nev. 1977). *See generally* Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 La. L. Rev. 961 (1983).

[58]Grunnet v. United States, 730 F.2d 573 (9th Cir. 1984) (foreign country); Santoni v. FDIC, 677 F.2d 174 (1st Cir. 1982) (misrepresentation); Ortiz v. United States, 661 F.2d 826 (10th Cir. 1981) (misrepresentation); Green v. United States, 629 F.2d 581 (9th Cir. 1980); Takacs v. Jump Shack, 546 F. Supp. 76 (N.D. Ohio 1982) (misrepresentation).

[59]*See supra* note 3.

[60]*See* Zillman, *supra* note 5, at 6-9 for elaboration on the distinctive features of the *Dalehite* case.

[61]Dalehite v. United States, 346 U.S. 15, 42 (1953). "The decisions held culpable were all responsibly made at a planning rather than an operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

[62]*See* Zillman, *supra* note 5, at 16-30.

cases on related issues[63] and the development of an ample discretionary function jurisprudence in the lower courts rendered *Dalehite* a doubtful precedent. Several circuits were persuaded that *Dalehite* had been modified by the Supreme Court.[64] Others continued to recognize a "planning-operational" distinction but implied that it had taken on different meaning since 1953.[65] Several opinions questioned whether the "planning-operational" distinction did more than decide easy cases while leaving the difficult ones no closer to resolution.[66]

The lower courts have offered several lines of analysis in addition to the "planning-operational" distinction to assess discretionary function claims. The most notable was the identification of policy matters in the discretionary decision. Several circuits held that policy as a discretionary function stems from a need to protect the separation of powers. The objective, in the words of the Seventh Circuit, is to prevent "unwarranted intrusions by the courts into the decision-making process of other branches."[67] The Eighth Circuit held that "questions of policy [involving] the evaluation of the financial, political, economic and social effects of a plan" are discretionary.[68] This policy focus encourages courts to reject the discretionary function exception where the error is one of professional rather than governmental judgment.[69]

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[63]United States v. Muniz, 374 U.S. 150 (1963); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); United States v. Union Trust Co., 350 U.S. 907 (1955); Indian Towing Co. v. United States, 350 U.S. 61 (1955). *See generally* Zillman, *supra* note 5, at 9-11.

Four Supreme Court cases since 1977 have discussed the discretionary function exception. In Butz v. Economou, 438 U.S. 478, 505 (1978), the Court, in discussing qualified immunity for executive branch officers, suggested that an FTCA action brought on these facts would be barred by the discretionary function exception. In Carlson v. Green, 446 U.S. 14 (1980), the Court justified a constitutional tort suit under the eighth amendment based, in part, on the inadequacies of the FTCA from the plaintiff's standpoint. The discretionary function exception was one of the inadequacies noted in Justice Powell's concurring opinion. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), the Court granted the President what amounted to absolute immunity for tortious actions. Justice Burger's concurring opinion cited the discretionary function exception as providing similar protection for the acts of high ranking government officials. Finally, in Block v. Neal, 460 U.S. 289 (1983), federal housing officials were charged with failing to inspect and supervise construction on property covered by a federal loan program. The Court held that the government was not protected from liability by the "misrepresentation" exception of the FTCA, 28 U.S.C. § 2680(h). The Court noted the government had not raised the discretionary function exception.

[64]Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983); Canadian Transport v. United States, 663 F.2d 1081 (D.C. Cir. 1980); Aretz v. United States, 604 F.2d 417 (5th Cir. 1979); Driscoll v. United States, 525 F.2d 136 (9th Cir. 1975); Downs v. United States, 522 F.2d 990 (6th Cir. 1975); Moyer v. Martin Marietta, 481 F.2d 585 (5th Cir. 1973).

[65]Madison v. United States, 679 F.2d 736 (8th Cir. 1982); Emch v. United States, 630 F.2d 523 (7th Cir. 1980); Thompson v. United States, 592 F.2d 1104 (9th Cir. 1979).

[66]Smith v. United States, 375 F.2d 243 (5th Cir. 1967); Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

[67]Preston v. United States, 696 F.2d 528, 542 (7th Cir. 1982).

[68]Madison v. United States, 679 F.2d 736, 739 (8th Cir. 1982).

[69]Griffin v. United States, 500 F.2d 1059, 3d Cir. 1974) is the leading case discussed in Zillman, *supra* note 5, at 32-33.

A second element in discretionary function decisions is the competence of the courts. As a frequently cited Pennsylvania district court case noted: "Objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions."[70]

A third factor in assessing discretionary function claims is whether the government official has been granted discretionary power by statute or regulation. The 1977 study noted that courts were attentive to the existence of legal authority in a government increasingly directed by statute and regulation.[71] The distinctions identified then have continued to appear in recent cases.

Where a statute or regulation sets policy and the government office or employee complies with it, the action is a protected discretionary function.[72] This is so even if the discretion is abused.[73] A statute or regulation may leave the decision to the unfettered judgment of the government official. Action within that grant of discretion is typically treated as protected by the exception.[74] Similarly, the government is protected against a claim that its officials did not choose to promulgate a regulation where they were not mandated to do so.[75] The most favorable situation for

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[70]Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978).

[71]Zillman, *supra* note 5, at 14-15.

[72]Miller v. United States, 583 F.2d 857 (6th Cir. 1978) (acts implementing the regulatory program would be immune); Wright v. United States, 568 F.2d 153 (10th Cir. 1977); Stephens v. United States, 472 F. Supp. 998 (C.D. Ill. 1979); *but see* Lakeland R-3 School District v. United States, 546 F. Supp. 1039 (W.D. Mo. 1982) (compliance with field manuals removes any policy decision and allows finding of unprotected operational negligence).

[73]The United States is immune from liability for a "discretionary function . . . whether or not the discretion involved be abused." FTCA § 2680(a) (1982).

[74]Colorado Flying Academy v. United States, 724 F.2d 871 (10th Cir. 1984) (no mandatory design of technical area existed); Bergmann v. United States, 689 F.2d 789 (8th Cir. 1982) (Justice Department policy on witness protection); Payton v. United States, 679 F.2d 475 (5th Cir. 1982) (parole statutes grant discretion when deciding prisoner release); Carelli v. IRS, 668 F.2d 902 (6th Cir. 1982) (statute makes IRS payments to informers discretionary); Reminga v. United States, 631 F.2d 449 (6th Cir. 1980) (statutes and regulations "replete with permissive words" and "general policy standards"); Green v. United States, 629 F.2d 581 (9th Cir. 1980) (order to remove livestock to "extent possible"); Barton v. United States, 609 F.2d 977 (10th Cir. 1979) (no "fixed or readily ascertainable standards" govern range depletion judgments); First Nat'l Bank v. United States, 552 F.2d 370 (10th Cir. 1977) (poison labelling regulations are in general terms and require "policy judgments" in their application); First Savings & Loan v. First Federal, 531 F. Supp. 251 (D. Hawaii 1981) (FSLIC has broad discretion in bank regulation); DePass v. United States, 479 F. Supp. 373 (D. Md. 1979) (statute grants INS inspector broad discretion in detailing individuals); Lynch v. Corps of Engineers, 474 F. Supp. 545 (D. Md. 1978) (Corps given wide discretion in licensing dredging projects); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978) (no specific guidance on FDA approval of DES drug).

[75]Garbarino v. United States, 666 F.2d 1061 (6th Cir. 1981); Brown v. United States, 573 F. Supp. 743 (M.D. Ala. 1983) (negligence in drafting guidelines is a discretionary function); Relf v. United States, 433 F. Supp. 423 (D.D.C. 1977).

plaintiffs involves a showing that the government official violated *mandatory* provisions of statute or regulation. In this situation courts have rejected the discretionary function exception.[76] Harking back to the "policy" distinction, courts have concluded in this situation that any policy choices were already made before the government official acted or that the mandate from higher authority made an action merely "operational."

A 1978 district court opinion summarized discretionary function law as a "patchwork quilt."[77] This conclusion was still accurate in June 1984 when the Supreme Court decided only the second discretionary function case in its history. Despite doctrinal confusion, the lower court decisions of recent years engaged in far more probing analysis of the reasons for the discretionary function exception than in the first decades of the FTCA. The great number and variety of discretionary function cases also provides a sound basis from which to rethink the exception.

III. THE SUPREME COURT DECIDES: VARIG AND UNITED SCOTTISH INSURANCE CO.

The Supreme Court's June 1984 discretionary function decision consolidated two aircraft injury cases.[78] In both cases, government liability was based on the failure of Federal Aviation Administration inspectors to discover a defect that caused death or serious injury to persons on the plane. In *Varig*, passengers died as the result of an airplane lavatory fire which spread toxic smoke throughout the plane. FAA regulations required waste receptacles to be made of fire resistant material as a condition of certification.[79] The United States defended on the grounds that the action was barred by the discretionary function and

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[76]Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983) (mine inspector was "merely implementing and enforcing mandatory regulations); Staton v. United States, 685 F.2d 117 (4th Cir. 1982) (higher level policy decision to capture rather than shoot dogs removes ranger's discretion); Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (no statutory or regulatory authority authorized CIA mail opening); Roberts v. United States, 531 F. Supp. 372 (D. Vt. 1981); Donohue v. United States, 437 F. Supp. 836 (E.D. Mich. 1977) (express violation of agency regulations makes the act operational error). *But see* Jayvee Brand v. United States, 721 F.2d 385 (D.C. Cir. 1983). In *Jayvee Brand*, sleepwear manufacturers challenged the procedures by which their product was regulated. Despite a showing that the mandatory procedural requirements had not been followed in the regulatory action, the court found this was a protected "abuse of discretion" under section 2680(a) because it would be a "major innovation" to allow an FTCA damages action "as an additional means of policing the internal procedures of governmental agencies." 721 F.2d at 391.

[77]Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

[78]United States v. Varig and United States v. United Scottish Insurance Co., 104 S. Ct. 2755 (1984).

[79]14 C.F.R. § 4b.381(d) (1956). Applicants "shall comply" with the regulation which provides the receptacle "shall be of fire resistant material and shall incorporate covers or other provisions for containing possible fires."

misrepresentation[50] exceptions to the FTCA, and that the negligence was not within the scope of the applicable California Good Samaritan rule. The district court in an unreported opinion granted the government's motion. The Ninth Circuit reversed, finding that the Good Samaritan issue was governed by the Restatement of Torts, 2nd, sections 323 and 324A.[51] Accordingly, the negligently performed service "must either have increased the risk of injury to the injured person or have caused him to rely on proper performance of the service."[52] The United States rejected the Ninth Circuit's view that it was performing a "service" by inspecting the plane. It contended instead that it was engaged in a "regulatory duty." The United States distinguished cases holding the government liable for the negligence of aircraft controllers as involving "operational activities." The Ninth Circuit found that the inspection standards were specific and that a comprehensive inspection was required before certification by the government. It further found that both aircraft purchasers and members of the public rely on the certifications. Accordingly, it held that the Good Samaritan rule applied and that the discretionary function exception did not apply because it was "primarily intended to preclude tort claims arising from decisions by executives or administrators when such decisions require policy choices."[53] Policy choices were not involved in this inspection: "A proper inspection will discover the facts. The facts will show either compliance or noncompliance."[54] The Ninth Circuit cited the Supreme Court decision in *Indian Towing Co. v. United States*[55] to support its view.

The second case, *United Scottish Insurance Co. v. United States*, also involved the crash of a plane as a result of a fire on board. The fire allegedly was caused by the defective installation of a heating system installed after the plane's manufacture. In accordance with FAA regulations, the plane had been given a supplemental certificate from the FAA authorizing the installation.[56] The district court held that FAA regulations had been violated and ruled for plaintiffs. The Ninth Circuit reversed and remanded on the issue of whether the FAA had breached a duty under California law.[57] The duty issue again turned on the Good Samaritan doctrine.[58]

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[50]Under 28 U.S.C. § 2680(h), the FTCA does not apply to "any claim arising out of . . . misrepresentation. . . ."

[51]692 F.2d 1205 (9th Cir. 1982).

[52]*Id.* at 1207.

[53]*Id.* at 1208-09.

[54]*Id.* at 1209.

[55]Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[56]14 C.F.R. § 21.113 (1983).

[57]United Scottish Insurance Co. v. United States, 614 F.2d 188 (9th Cir. 1982).

[58]Restatement (Second) of Torts §§ 323, 324A (1966).

The Ninth Circuit noted that both parties agreed that FAA regulations required the FAA to "inspect the installation [of the heater] prior to giving its approval" and that "both aircraft underwent numerous annual and 100 hour inspections" prior to the crash.[89] The district court had found that the Restatement of Torts applied and gave judgment for plaintiffs. The Ninth Circuit affirmed[90] and held that FAA officials "cannot in any way change or waive safety requirements" where requirements are clearly mandated by statute or regulation.[91] In these circumstances, there was no room for policy judgment. Judge Chambers' concurring opinion in *United Scottish Insurance Co.* noted that the interpretation of the discretionary function exception had changed over time and that government liability in this circumstances was appropriate. The Ninth Circuit again stated that the plane "had been inspected and certified for airworthiness" by the FAA.[92]

The Supreme Court granted *certiorari* in both *Varig* and *United Scottish*. Chief Justice Burger, writing for the unanimous Court, reversed the decisions of the Ninth Circuit on the discretionary function issue. The opinion began with a review of the statutory and regulatory authority for certification of aircraft under the Federal Aviation Act of 1958.[93] The opinion emphasized that with its limited number of employees, "the FAA obviously cannot complete this elaborate compliance review process alone."[94] Accordingly, the Aviation Act authorizes delegation of inspection and certification responsibilities to properly qualified private persons.[95] These persons are typically "employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design. . . ."[96] An additional provision of the statute grants the Secretary of Transportation discretion over "the manner in which such inspection, service, and overhaul shall be made, including provisions for examinations and reports by properly qualified private persons whose examinations or reports the Secretary . . . may accept in lieu of those made by its officers and employees."[97] The Court concluded that the FAA certification process "is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility of policing compliance."[98] As the Court read them, "From the records in

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[89] *United Scottish Insurance Co.*, 614 F.2d at 190.
[90] United Scottish Insurance Co. v. United States, 692 F.2d 1209 (9th Cir. 1982).
[91] *Id.* at 1212.
[92] *Id.* at 1210.
[93] 49 U.S.C. §§ 1421-1432 (1982).
[94] United States v. Varig, 104 S. Ct. 2755, 2762 (1984).
[95] 49 U.S.C. § 1355 (1982).
[96] *Varig*, 104 S. Ct. at 2762.
[97] 49 U.S.C. § 1421(a)(3)(A) (1982).
[98] *Varig*, 104 S. Ct. at 2766-67 (1984).

these cases, there is no indication that either the . . . trash receptacle or the . . . cabin heater was actually inspected or reviewed by an FAA inspector or representative."[99]

In the Court's view, therefore, the plaintiffs in the two cases challenged the FAA's decision to implement the spot-check system of compliance review and the application of that spot-check to the aircraft involved in the accidents. The Court held that both aspects were discretionary functions. The first aspect involved when "an agency determines the extent to which it will supervise the safety procedures of private individuals. . . "; this was "discretionary regulatory authority of the most basic kinds."[100] Such decisions "directly affect the feasibility and practicability of the Government's regulatory program, such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objective sought to be obtained against such practical considerations as staffing and funding."[101] Judicial review of such acts in tort suits would require the courts to "'second guess' the political, social, and economic judgments of an agency exercising its regulatory function."[102]

The Court determined that the acts of FAA employees executing the spot-check program were also protected by the discretionary function exception. Their decisions required "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources."[103] While "certain calculated risks" existed, these risks

> were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence of failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).[104]

The Court earlier rejected the contention that *Dalehite* had been eroded, if not overruled, by subsequent Supreme Court FTCA cases. "While the Court's reading of the Act admittedly has not followed a straight line, we do not accept the supposition that *Dalehite* no longer

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[99]*Id.* at 2766.
[100]*Id.* at 2768.
[101]*Id.*
[102]*Id.*
[103]*Id.*
[104]*Id.* at 2768-69.

represents a valid interpretation of the discretionary function exception."[105] While it was unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception, the legislative and judicial materials suggested two guidelines to the Court. First, "the nature of the conduct, rather than the status of the actor" should be examined.[106] The basic inquiry "is whether the challenged acts . . . are of a nature and quality that Congress intended to shield from tort liability."[107] Second, the exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."[108] As noted above, Congress wished to prevent judicial second guessing of certain legislative and administrative decisions. The discretionary function exception thus protected the government from liability "that would seriously handicap efficient government operations."[109]

IV. THE DISCRETIONARY FUNCTION EXCEPTION AFTER VARIG

The unwillingness of Congress to clarify the term "discretionary function" has left the job to the courts and administrative agencies. As noted, the varied opinions of the lower courts left discretionary function law uncertain. Under these circumstances, the Supreme Court's opinion in *Varig* should have been a very thorough restatement of discretionary function law and should have provided clear guidelines for the lower courts, administrative agencies, and counsel.

Unfortunately, *Varig* falls well short of this goal. The opinion is not, however, without its virtue. It decisively decided the cases at hand for the government. It also revitalized *Dalehite*. Less favorably, however, the decision was not terribly clear on the facts of the cases litigated, was short on analysis of the meaning of the discretionary function exception, and provided uncertain guidance for deciding future discretionary function cases.

The uncertainty over the facts of the cases reviewed is disturbing. Reading the opinions of the Supreme Court and the Ninth Circuit suggests that they were reviewing very different cases. The Ninth Circuit opinions focus on an actual inspection and the lack of care in performing it. Both *Varig* and *United Scottish* are portrayed by the Ninth Circuit as cases in which FAA inspectors had decided to inspect the planes, were operating under detailed regulations governing the matters

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[105] *Id.* at 2764.
[106] *Id.* at 2765.
[107] *Id.*
[108] *Id.*
[109] *Id.* (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)).

to be inspected, and had actually performed the inspections. Under these circumstances, the government's conduct did not involve policy choices or cost considerations. No mention was made in the three Ninth Circuit opinions of the FAA practice of delegating actual performance of the inspections to qualified private persons employed by the aircraft manufacturer. The circuit court opinions recognize that the discretionary function exception would apply to many aspects of government regulation. They conclude, however, that once the government has chosen to make the inspection itself, reasonable care must be exercised.

The Supreme Court opinion paints a far different picture. According to the Court's reading of the record, there was "no indication" that either of the allegedly defective elements on the planes was "actually inspected or reviewed by an FAA inspector or representative."[110] The government action under FTCA review, therefore, was the decision to implement this system of spot-checks and its application in the particular cases. The first matter was "plainly discretionary" in the view of the Court. Quite probably the Ninth Circuit would have agreed had that issue been put to it.[111] Similarly, the execution of the spot-checks by manufacturers' agents challenged not the FAA inspectors' actual examination of the airplane, but their judgments as to the reliability of the manufacturers' inspectors. The Supreme Court believed this involved policy judgments as to "the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources."[112] The Ninth Circuit would likely have endorsed this second conclusion as well.

The true facts of the cases may never be known.[113] The Supreme Court's reading of them may have disserved both plaintiffs and the

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[110]*Varig*, 104 S. Ct. at 2766. United States liability under the FTCA requires negligent or wrongful conduct by an officer or employee of the United States and does not include the negligence of an "independent contractor" of the government. 28 U.S.C. § 2671 (1982). *See* United States v. Orleans, 425 U.S. 807 (1976).

[111]*E.g.*, *United Scottish Insurance Co.*, 692 F.2d at 1212 ("All aircraft must comply with FAA requirements in order to be certified. . . . FAA officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements. Because no room for policy judgment or decision exists, a discretionary function is not being performed. . . .").

[112]*Varig*, 104 S. Ct. at 2768.

[113]The government contended: "The record fails to establish either who inspected the installation or even if there actually was an inspection. Accordingly, there is no evidence reflecting the quality of the inspection." Brief for the United States, *Varig*, at 10 n.10. *See also id.* at 37. *United Scottish Insurance Co.* in contrast contended: "It is clear from the record and the District Court so found that a Federal Aviation Administration inspector actually inspected the heater installation," Petition for Rehearing, United Scottish Insurance Co., in United States v. United Scottish Insurance Co., at 2. The district court found in *United Scottish* that: "29. The Federal Aviation Administration negligently inspected the aircraft herein after the installation of the heater in 1965. 30. The [FAA] negligently certificated the aircraft as airworthy after the installation of the heater in 1965." The

United States. Plaintiffs may have lost judgments because the Court decided to rule for the government on incorrect facts. The United States may have wished a resolution of the issues as framed by the Ninth Circuit, anticipating a holding that would have protected far more government regulatory activity than is protected by the *Varig* opinion.[114]

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district court opinion is contained in the United States' Petition for a Writ of Certiorari, at 17a. The district court opinion in *Varig Airlines v. United States* notes the United States acted "through its employees or through a designated representative" in the certification process. The district court opinion is contained in the United States' Petition for a Writ of Certiorari, at 9a.

[114]The United States' Brief summarized the federal role in aviation safety as that of a police officer providing back-up for the primary responsibility of the private aviation industry to insure aircraft safety. The language of the FTCA making the United States liable as "a private individual under like circumstances" was meant to bar actions stemming from "a core of governmental activities that are never engaged in by private citizens." *Id* at 23. Exceptions to this rule, like Indian Towing Co. v. United States, 350 U.S. 61 (1955) (government operation of a lighthouse) have involved situations where "the government agency involved had assumed direct, operational responsibility for the activity that caused the injury." The United States noted the large number of government regulatory activities and the "staggering" potential liability should suits of this sort be allowed. United States' Brief, at 26-29. The Brief contended that in many cases "virtually no specific proof of negligence or wrongful conduct by a federal employee will ever be available." *Id.* at 29. The next section of the Brief contended that this regulatory program could not appropriately be evaluated under the Good Samaritan rule. The government argued the discretionary function exception, stressing agency power to issue certificates "without verifying that there has been compliance with every minimum safety standard." *Id.* at 43. However, it also challenged the plaintiff's assertion that any inspections actually conducted by the FAA involved "the ministerial application of a clear standard to a particular fact situation." *Id.* at 42. Footnote 38 explains.

> The development and promulgation of the FAA's airworthiness standards is a function that involves technical judgment and policy considerations at the highest levels of the FAA. To a layperson, the airworthiness standards may appear to be very detailed and explicit. To the designer, engineer, flight test pilot or inspector, however, the standards are relatively general and require considerable discretion in their application. . . . Indeed, in order not to inhibit new design concepts or techniques, and to permit flexibility and new technologies, the airworthiness standards are intentionally worded to achieve a safety objective without establishing fixed design specifications.

The Reply Brief for the United States further asserts:

> Obviously, any discretionary function can be disaggregated so that a particular decision on nondecision made as part of the regulatory process appears to lose its characteristics as a discretionary function; no doubt some of the actions undertaken by the government in inspecting and handling the fertilizer in Dalehite . . . if viewed in isolation, could be characterized in some sense as operational. But this Court rejected that reasoning and held that the entire process was itself a discretionary function. . . . Similarly, here, the entire certification process is regulatory and judgmental in nature and therefore not a proper basis for liability under 28 U.S.C. § 2680(a).

The government briefs, therefore, urged a Supreme Court holding that would have protected much, if not all, of the inspection activity even if it had been performed by FAA employees and even if aspects of it had involved relatively ministerial acts.

Varig reaffirms *Dalehite* but adds little to our understanding of *Dalehite*. The *Varig* Court found it possible to isolate several factors in analyzing the exception and *Dalehite*, the first being that the nature of the conduct, rather than the status of the actor, is to be considered. However, this point seemed well understood from *Dalehite* and subsequent decisions. The Court concluded this brief discussion by noting that the "basic inquiry" is whether the challenged acts "are of the nature and quality that Congress intended to shield from tort liability."[115] Given Congress' failure to define "discretionary function" and the Act's brief legislative history, this guidance is of little use.

The Court's second factor is that the exception "plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals."[116] The Court continued that "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[117] This language suggests that the Court has adopted the views of lower courts who have moved away from the "planning-operational" test of *Dalehite* to a more policy oriented basis.[118] This conclusion is reinforced by the Court's reference to that factor in deciding the specific allegations of negligence on the part of the FAA:

> Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.[119]

The spot-check program stemmed from a shortage of FAA personnel. Similarly, FAA execution of the spot-check program involved "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources."[120]

How is "discretionary function" to be applied after *Varig*? The reaffirmation of *Dalehite* indicates that the "planning-operational" test is still valid. The "social, economic and political party" language is drawn

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[115] *Varig*, 104 S. Ct. at 2765.
[116] *Id.*
[117] *Id.*
[118] *See supra* text accompanying notes 67-69.
[119] *Varig*, 104 S. Ct. at 2768.
[120] *Id.*
[121] *E.g.*, Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

from lower court opinions, including ones questioning *Dalehite*.[121] The mention of "judicial 'second guessing' of legislative and administrative decisions" in the same sentence endorses the separation of powers arguments discussed in lower court cases.[122] *Varig* can thus be cited to support several different definitions of "discretionary function." This uncertainty is compounded by the difference in opinion as to the facts of the cases. *Varig* and *United Scottish* as seen by the Supreme Court make applying the discretionary function exception relatively easy. Probably any of the tests would protect the government from liability based on those facts. It would have been more difficult to decide the cases as they were structured by the Ninth Circuit. The Court then would have reviewed an act of alleged negligence in a situation where government officials had chosen to act and did not claim that the inspection or regulation was limited because of policy choices or budget considerations. The Court might have had to address the distinction made in the lower courts between acts of professional and governmental negligence.[123]

While the holding of *Varig* is rather limited,[124] government attorneys no doubt will cite *Varig* for the proposition that the government is protected by the discretionary function exception in a broad variety of licensing and inspection activities. The number and significance of such cases in recent years suggests the importance of the *Varig* precedent.[125] It is helpful, therefore, to categorize more precisely the inspection and licensing cases and to suggest the probable impact of *Varig*.

The first category of cases involves the liability of the government for the routine torts of employees committed while performing licensing and regulatory functions. For example, an FAA inspector is involved in an automobile accident enroute to an inspection or a license applicant is injured on the slippery floor in a government office. The legislative history indicates that the exception does not apply in these cases.[126] None of the discretionary function cases before *Varig*, and nothing in *Varig* itself, suggest that the government should be protected from liability in these situations. The alleged government wrongdoing is unrelated to the regulatory process, does not deal with matters of government policy, and is the sort of situation for which the courts regularly have provided redress under the FTCA.[127]

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[121]*See supra* notes 67-68.

[122]*See supra* note 69.

[124]"We hold that these actions against the FAA for its alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act." *Varig*, 104 S. Ct. at 2769.

[125]*See supra* notes 6-10.

[126]L. Jayson, Handling Federal Tort Claims § 247 (1964).

[127]None of the discretionary function cases decided since 1977 has dealt with such negligent acts of the regulator.

The second category of cases asserts government liability for the improper or excessive exercise of regulatory authority.[128] The claimant is typically the business or individual regulated, rather than a victim of the failure to regulate. These cases involve the exercise of government regulatory authority within statutory or regulatory guidelines and a subsequent finding that the regulatory action was wrong or unnecessary. For example, a party investigated by law enforcement authorities is later cleared of criminal charges, or a delay in licensing a new product to protect public health or safety is found to have been unwarranted and costly to the manufacturer.

These affirmative acts of government were treated as discretionary functions prior to *Varig* and *Varig* should reinforce that conclusion. This is the discretionary act of "the Government acting in its role as a regulator of the conduct of private individuals."[129] As such, social, economic, and political policy is almost inevitably in question. Congress and the President may feel that FTCA review of these cases will infringe on their powers. The court decisions that government regulated wrongfully challenges Congress' mandate to control public problems and its ability to delegate power to executive branch officials to deal with them. At the extreme, tort judgments against the government could deter government regulatory action.

Courts must also appreciate that tort standards may not exist to judge such alleged acts of government wrongdoing. The tough cases are those which raise questions of government motive. These questions may range from a good faith exercise of the decision to regulate, which is slightly influenced by political feelings, to a conscious campaign to "screw the enemies" of the Administration. Despite the factual appeal of plaintiff's cases in some of these areas, they inevitably involve the concerns expressed above. The message of *Varig* is not that prejudiced government actions are right, but that a tort suit against the government is not the desired way to deal with them.

The third category of cases involves the suit brought for the government's failure to inspect or regulate where that decision is not controlled by statute or regulation. Typically, the plaintiff is a person harmed when the person or product to be regulated does or goes wrong. In effect, this is the *Varig* fact situation as viewed by the Supreme Court. Statutes and regulations authorized the FAA to engage in a spot-check pattern of regulation. In *Varig* this form of regulation was compelled by personnel limitations at the FAA. There were too many planes needing inspection and too few FAA inspectors to perform every inspection in person. Like

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[128] *See supra* notes 47-58.

[129] *Varig*, 104 S. Ct. at 2765.

prior cases, *Varig* held that the agency's failure was protected by the discretionary function exemption. The factors supporting application of the exception are similar to those discussed in the "excessive regulations" cases—courts should not intrude into decisions left to other branches of government and a lack of tort standards to apply.

Varig does not resolve the issue of how much evidence the government must offer to support its contention that its decision not to regulate reflected policy judgments. The evidence as seen by the Supreme Court in *Varig* made a strong case for the government's conduct. Existing budgets would not allow full inspection by FAA administrators. A full inspection policy would substantially impede air travel in the United States. The FAA exercised sensible discretion in allowing experienced manufacturers to handle their own inspections.

A more difficult case arises when the government cannot offer any sound reason for its refusal to inspect or regulate. Suppose the agency can offer no reason for inaction beyond laziness of agency personnel, or that the agency has an informal policy to inspect those businesses with the best safety records and ignore those with the worst, or, at the extreme, that an inspection was not done because the inspectors were bribed not to make their regular visit. The government will probably argue that these are exercises of discretion, albeit an abused discretion. Such abuse of discretion is protected by the precise terms of 28 U.S.C. § 2680(a).[130] Alternatively, the government will contend that these are still decisions "grounded in social, economic, and political policy" that the *Varig* Court found immune from liability. In these situations, courts could be asked to resolve an underlying debate between a Congress desiring vigorous regulation and a President committed to removing regulatory burdens from business. Even though the more exteme of the unjustified nonregulation cases leaves one with an uneasy feeling, the remedy for government wrongdoing may lie elsewhere than the FTCA.

The fourth category involves the regulatory activity in which the actual inspection or licensing is done badly to the harm of a third party. These are the situations similar to the Ninth Circuit's understanding of *Varig* and *United Scottish*. Plaintiff claims justifiable reliance on the improper inspection and harm caused by the regulatory failure. If state law recognizes a duty owed by government to the injured plaintiff, the question remains whether the discretionary function exception applies. In these situations the contention that "social, economic, and political policy" is involved is reduced. The agency is not contending that personnel shortages prevented the regulatory activity or that political

[130]28 U.S.C. § 2680(a) exempts from liability "a discretionary function or duty . . . whether or not the discretion involved be abused."

judgments made it unwise. The inspection or licensing has taken place. Nonetheless, even though some inspection took place, budgetary or political considerations may govern how well it was done. The inspector stretched thin by a small budget may visit more sites than prudence allows or may be tempted to provide a "quick once-over" rather than the detailed look that may discover hidden defects. Alternatively, a shortage of experienced investigators may put the inspection in the hands of a junior staff member who will be less likely to discover failings.

The regulatory decision itself may require the exercise of discretion. In many instances, the regulator will be asked to balance a variety of factors in deciding whether to pass or fail the subject of the regulation.[131] The applicable statute, regulations, and office policies may say no more than certain matters shall be considered or may be considered in reaching a decision. The regulator is left with the responsibility of weighing the good, the adequate, and the substandard parts of the whole. Even at the level of the individual decision, this exercise of discretion may involve social, economic, or political matters. It may also be incapable of evaluation using tort law principles. *Varig* probably leaves these decisions protected by the discretionary function exception.

A different situation exists when the licensing or inspection decision turns not on matters of policy judgment but on lack of care in the inspection or licensing process. A test may have been improperly given. The measuring instrument may have been improperly calibrated or read. The aircraft inspector may have overlooked the matter of flamability in the lavatory or incorrectly assumed that the towel container was fire resistant. If those facts were pointed out to a group of inspectors they would conclude that a mistake had been made. In most instances, if the facts were pointed out to the inspector, he or she would have conceded an error in judgment.

This category of cases has been one area in which some lower courts rejected the discretionary function exception.[132] These are matters of professional negligence rather than policy judgment. Often the error appears "operational" within *Dalehite* terminology and judicial review of such matters will probably not affect relations between the branches of government. Further, these are areas in which familiar negligence standards can be applied to determine whether there has been a failing in duty performance. In the same way that the courts have reviewed the professional conduct of physicians, attorneys, scientists, and air traffic controllers, the professional performance of inspectors and licensing officials can be assessed.

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[131] *See supra* note 114.

[132] *See supra* text accompanying note 69.

Such a pro-plaintiff ruling would not resolve every case against the government. Plaintiffs still must prove that their claim would create a duty under the laws of the state in which the tortious action occurred. Federal liability for such negligence would follow, rather than lead, the negligence of private, state, and local inspectors and regulators.

What does *Varig* offer in this area? It suggests that the matter has not been decided. The Supreme Court's reformulation of the facts allowed it to avoid deciding this issue. The Supreme Court opinion suggests, however, that these activities may not be exempt from liability. The reaffirmed *Dalehite* decision might support the conclusion that many of the questions involved merely "operational" negligence. The acts in question might not be "of the nature and quality that Congress intended to shield from tort liability" because most do not require " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy. . . ."[133]

A contrary position is plausible. At the extreme, *Varig* can be overstated for the proposition that the discretionary function exception bars all claims arising out of regulatory activities. As noted, we may see this argument in dozens of government briefs in the years to come. Given the receptiveness of the Supreme Court to arguments limiting government liability under the FTCA,[134] this may be an accurate reading of the "real meaning" of *Varig*. Also, public policy may justify such a conclusion. Three factors caution against liability for any regulatory failure, at least without more explicit congressional guidance. First, precise line-drawing in the area is not possible. If some areas of regulatory action are not protected by the discretionary function exception, skilled plaintiff's lawyers will try to classify regulatory misconduct as unprotected regulatory action. The government will probably lose some cases that involve discretionary actions improperly characterized as nondiscretionary. Even when the government wins, valuable time and public funds have been spent.

Second, the massive expansion of the governmental regulatory structure since 1946 and the large dollar amounts at stake in many regulatory liability cases suggest caution in allowing suit against the government. Claims from a single aircraft accident could total over $100 million. A nuclear mishap could involve billion dollar claims.[135] Faced with this potential enormous liability, the government may choose to abandon regulatory activity altogether rather than risk liability for regulating badly.

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[133] *Varig*, 104 S. Ct. at 2765.

[134] *See, e.g.*, United States v. Kubrick, 444 U.S. 111 (1979); United States v. Orleans, 425 U.S. 807 (1976); Laird v. Nelms, 406 U.S. 797 (1972).

[135] GPU v. United States, 551 F. Supp. 521 (E.D. Pa. 1982).

This choice involves not just operational decisions, but policy matters as well.

Third, the inspection and licensing cases often seek to hold the government liable for not preventing the primary negligence of another party, typically a business corporation. In these circumstances, the plaintiff's action may be motivated more by government wealth than by government misconduct.

The final category of cases involves regulatory conduct that violates a statute or regulation. Prior to *Varig*, lower courts frequently treated these actions as nondiscretionary, reasoning that government policy has already been set by Congress or an administrative agency.[136] A wide variety of statutory or regulatory regulations have been examined in FTCA cases: constitutional violations,[137] violations of statute,[138] violations of regulations,[139] and violations of informal policies.[140] Even though the government employee was acting in a regulatory capacity and making high level judgments, courts were reluctant to allow an "illegal" act to escape liability under the FTCA.

Varig leaves these precedents in doubt because its reading of the facts obviated the need to decide the issue. The Court observed it reviewed "the acts of FAA employees in executing the 'spot check' program *in accordance with agency directives*. . . ."[141] The arguments of the pre-*Varig* cases remain sound and could be helpful in enforcing, rather than second guessing, the policy decisions of Congress and the agencies. On the other hand, the Court must appreciate that an "illegal action" exception to the discretionary function exception may neither be easy to administer nor sound policy. If violating some law or regulation removes the protection of the discretionary function exception, attorneys will devote considerable efforts to finding some misstep by the regulator. While some laws may be clear and easy to apply, others may be less precise and difficult to

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[136]*See supra* text accompanying note 76.

[137]Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (no decision whether authorized but unconstitutional act would lose section 2680(a) protection); Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981) (no decision on whether unconstitutional act would lose section 2680(a) protection).

[138]Payton v. United States, 679 F.2d 475 (5th Cir. 1982); Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978).

[139]Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983); Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982); Miller v. United States, 583 F.2d 857 (6th Cir. 1978); Roberts v. United States, 531 F. Supp. 372 (D. Vt. 1981); Donohue v. United States, 437 F. Supp. 836 (E.D. Mich. 1977).

[140]Peterson v. United States, 673 F.2d 237 (8th Cir. 1982); Gross v. United States, 676 F.2d 295 (8th Cir. 1982); Madison v. United States, 679 F.2d 736 (8th Cir. 1982); Staton v. United States, 685 F.2d 117 (4th Cir. 1982); Preston v. United States, 696 F.2d 528 (7th Cir. 1982).

[141]*Varig*, 104 S. Ct. at 2768 (emphasis added).

apply. Imagine that the government decides to license only persons under 6-feet 6-inches tall and of "good moral character" as airline pilots. The height requirement is precise and easy to enforce. If a 6-foot 8-inch individual manages to receive a pilot's license, the statute or regulation has been violated. The "good moral character" standard, however, without further regulatory explanation, is difficult to apply. Suppose an applicant was licensed despite a decade-old misdemeanor conviction for participating in a civil rights rally. Most probably, a court would find that the legal standard was not violated and that the agency was entitled to exercise discretion in interpreting its licensing standards. By contrast, suppose the applicant had a record of several felony extortion convictions and had lost several civil fraud cases. Even if the "good moral character" standard lacks precision around the edges, this applicant obviously does not have it. But, are we dealing here with a violation of law which prevents the government from using the discretionary function exception or merely an absue of discretion? If misapplying the "good moral character" standard was merely an abuse of discretion the exception remains valid and the United States is immune.[142]

Even when the legal standard is clear, there are various types of violations of law that may occur. At one level, the error may be unintended and trivial. The tape measure was held incorrectly or the data was recorded badly or misread for our too tall pilot. It would be a different case if the government regulators determined that the statutory height limit no longer made regulatory sense or that the critical need for pilots forced a choice between violating the legal standard or retarding civilian air transportation. Or, suppose that the President is wooing the influential "Tall People's League" for support in the next election. Each decision would be rich with "social, economic, and political policy."

The courts may take refuge by declaring that they are just "enforcing the law," but that often oversimplifies what is going on. Congress, or at least a majority of its present members, may support the "illegal" decision or be indifferent as to whether the law is enforced or not. Again, the question is not whether the courts have a role to play in correcting a disagreement over statutes and regulations, but whether an FTCA suit is a proper method to do it. In many instances, it may be a poor vehicle to resolve such a conflict between or among branches of government.

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[142]The 28 U.S.C. § 2680(a) distinction between violation of legal standard and an abuse of discretion was considered in United States v. Jayvee Brand, 721 F.2d 385 (D.C. Cir. 1983). Sleepwear manufacturers contended the government had not followed proper procedures in instituting a ban on their product. The court held that "making a discretionary decision without following mandated procedures should be characterized, for the purpose of the FTCA, as an abuse of discretion." *Id.* at 390. The circuit observed that it would be a "major innovation" to allow a damage action "as an additional means of policing the internal procedures of governmental agencies." *Id.* at 391.

Varig left those difficult issues to be decided another day. For the present, the assertion of an "illegal act" by the government's officers or employees will provide private plaintiffs an argument against application of the *Varig*-enhanced discretionary function exception.

VI. CONCLUSION

Varig has increased our understanding of the discretionary function exception. Unfortunately, it did not do enough. Even if the Supreme Court has correctly read the facts of the cases, it provided little analysis of the objectives of the discretionary function exception and little discussion of the exception's rich history in the lower courts since *Dalehite*. Given the uncertainty of the *Varig* holding and the Court's traditional reluctance to review discretionary function cases, lower courts will continue to be the significant interpreters of the exception.

VII. POSTSCRIPT

The body of the text examined discretionary function cases decided before the United States Supreme Court's June 1984 decision in *Varig*. Since that decision, twenty-three lower court decisions have been reported in the federal reporter system.[143] The decisions largely follow pre-*Varig* patterns of decision. Negligent property maintenance[144] and violations of law or regulation[145] defeat the discretionary function exception. The exercise of regulatory or prosecutional authority is protected by the exception.[146] *Varig* has been particularly useful to the government in cases where it has not taken a regulatory action and that failure has allegedly harmed plaintiff.[147]

Four cases are of special interest. Two accept and two reject the government's discretionary function claim. In *Flammia v. United States*,[148] plaintiff was shot by a released federal detainee of the Cuban Mariel

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[143]The reporters have been examined through 603 F. Supp. 1392 (1985) and 755 F.2d 675 (1985).

[144]Brown v. United States, 599 F. Supp. 877 (D. Mass. 1984); Kohn v. United States, 591 F. Supp. 568 (E.D. N.Y. 1984); Morris v. United States, 583 F. Supp. 1543 (W.D. Mo. 1984); Davidow v. United States, 583 F. Supp. 1170 (W.D. Pa. 1984).

[145]National Carriers Inc. v. United States, 755 F.2d 675 (8th Cir. 1985); McMichael v. United States, 751 F.2d 303 (8th Cir. 1985); Ruffalo v. United States. 590 F Supp. 706 (W.D. Mo. 1984).

[146]Hylin v. United States, 755 F.2d 551 (7th Cir. 1985); GPU v. United States, 745 F.2d 239 (3d Cir. 1984); Natural Gas Pipeline v. United States, 603 F.2d 502 (9th Cir. 1984); JA Industries v. United States, 603 F. Supp. 643 (W.D. Tex. 1984); United States v. Articles of Drug, 601 F. Supp. 392 (D. Neb. 1984); FSLIC v. Williams, 599 F. Supp. 1184 (D. Md. 1984); Industrial Fuel & Asphalt of Indiana v. United States, 592 F. Supp. 1287 (N.D. Ind. 1984); Heywood v. United States, 585 F. Supp. 590 (D. Mass. 1984).

[147]Hylin v. United States, 755 F.2d 551 (7th Cir. 1985); Feyers v. United States, 749 F.2d 1222 (6th Cir. 1984); GPU v. United States, 745 F.2d 239 (3d Cir. 1984).

[148]739 F.2d 202 (5th Cir. 1984).

boatlift. The plaintiff alleged negligence in the specific release decision. The Fifth Circuit held that Immigration and Naturalization Service authorities had "broad statutory discretion" in making individual release decisions as well as in setting the broad contours of the Cuban refugee program. Even the specific operational decision to release the lawbreaker was discretionary and protected.

In *Natural Gas Pipeline v. United States*,[149] a failure to properly inspect an aircraft was alleged. The facts indicated FAA inspectors had overlooked a defect. The Ninth Circuit held that *Varig* controlled the case and that the discretionary function exception applied.

The Eighth Circuit held against the government in an inspection case in *National Carriers Inc. v. United States*.[150] The negligence of a federal meat inspector resulted in the destruction of plaintiff's beef quarters. The circuit found that the inspector had violated a regulation governing contaminated meat and that the violation had caused plaintiff's damage. That violation removed the government's discretionary function protection.

The most far-reaching case is *Allen v. United States*,[151] which examined the United States' liability for radiation-caused cancers resulting from the Nevada atomic bomb testing of the 1950s. The decision from the Utah district court held that the government was negligent at an operational level and that the discretionary function exemption did not bar plaintiff's recoveries. The decision predates *Varig* by one month. Further appellate review will determine the relevance of *Varig*.

[149] 742 F.2d 502 (9th Cir. 1984).
[150] 755 F.2d 675 (8th Cir. 1985).
[151] 588 F. Supp. 247 (D. Utah 1984).

By Order of the Secretary of the Army:

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