



*Military
Law
Review*

**MILITARY LAW IN COMMUNIST CHINA:
DEVELOPMENT, STRUCTURE AND
FUNCTION**

Captain David C. Rodearmel

**THE DOCTRINE OF PRIMARY JURISDICTION
AND FEDERAL PROCUREMENT FRAUD: THE
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MILITARY LAW IN COMMUNIST CHINA: DEVELOPMENT, STRUCTURE AND FUNCTION

by Captain David C. Rodearmel*

I. INTRODUCTION

The United States' relationship with the People's Republic of China (PRC) has evolved over the past thirty-five years from one of armed conflict, through a cautious period of detente, and into the present era of limited but developing cooperation. China's armed forces, the largest in the world, remain of great interest and importance.¹ While studies of China's legal system have appeared in the West with increasing frequency, surprisingly little has been written concerning its military legal system.² Admittedly, several difficulties arise in attempting such a study. Until recently, the primary problem with studying Chinese law has been finding it. Especially during the Cultural Revolution (1966-1976), law was virtually entirely displaced by rule through policies and directives of the Chinese Communist Party (CCP). Secondly, sensitivity about "state secrets" is especially acute in the PRC. Documents concerning the military, to include military law, are generally classified, and relatively few have emerged from China. Nevertheless, from those source documents which have become available, from official policy statements, and from accounts of military trials, an adequate representation may be drawn of the de-

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¹The armed forces of the PRC are collectively entitled the Chinese People's Liberation Army (PLA). In 1986, the PLA had a total strength of approximately 2,950,000 (71.5% army, 11.9% navy, and 16.6% air force). 1987 *Britannica Book of the Year* 623.

²Only one survey of the subject has appeared in the West. See Tsien, *L'Evolution Actuelle de la Justice Militaire en Chine*, 8 *Recueils de la Societe Internationale de la Droit Penal Militaire et de Droit de la Guerre* 177 (1981).

velopment, structure and function of the military legal system of Communist China.³

The general functions of a system of military law are to govern the persons within the military and to maintain discipline so as to assure the accomplishment of assigned tasks.⁴ The functions of the Chinese Communist military legal structure are significantly broader, largely due to the unique political characteristics of the Chinese People's Liberation Army (PLA). As Mao Tse-tung⁵ wrote in 1929, "the Chinese Red Army is an armed body for carrying out the political tasks of the revolution."⁶ The role of military law and discipline thus assumes a broader aspect in this politicized army, which is reflected in the definition of military discipline from the authoritative Chinese military dictionary *Ci Hai*:

A standard with which the armed forces must comply to guarantee political, organizational, and operational consistency. The military discipline of the Chinese People's Liberation Army is based on political consciousness and is the guarantee that the revolutionary line will be carried out. It is a basic factor in combat effectiveness.⁷

As will be shown herein, there are two main functions of the Chinese Communist military legal system: (1) to maintain a high degree of political unity between the CCP and the PLA; and (2) to maintain military order and discipline and thereby increase military potential. In response to changed political conditions or periods of crisis, the military legal system has on occasion been called upon to enlarge its legal and administrative jurisdictions to include the civil sector under

³The term "Communist China" is used because the CCP's armed forces and military legal system predate the establishment of the PRC by over 20 years.

⁴Military law has both a broad and a narrow sense. It has been defined as: "A system of regulations for the government of armed forces. That branch of the laws which respects military discipline and the government of persons employed in the military service." Black's Law Dictionary 896 (5th ed. 1979). "In its wider sense, it includes also that law which, operative only in time of war or like emergency, regulates the relations of enemies and authorizes military government and martial law." W. Winthrop, *Military Law and Precedents* 5 (2d ed. reprint 1920).

⁵Chairman of the Chinese Communist Party from 1935 until his death in 1976. The *pinyin* system for transliterating Chinese, adopted by the PRC in 1979, is used herein for PRC names of persons and places since that date. For names of persons and places before 1979, the more familiar Wade-Giles system of transliteration is retained.

⁶Mao, *On Correcting Mistaken Ideas in the Party*, in *Selected Military Writings of Mao Tse-tung* 53, 54 (1968) [hereinafter *Selected Military Writings*].

⁷*Ci Hai* 850 (1979), quoted in R. Dolan, *A Comparative English-Chinese Dictionary of Military Terms* 73 (U.S. Defense Intelligence Agency 1981).

its authority. Military Tribunals of Military Control Committees have constituted the legal authority for large areas of Communist China during significant periods of its history, when conditions of what may be termed "martial law" prevailed. At the same time, the military legal system has had the continuing task of maintaining order and discipline within the PLA itself.

This article will examine the development, structure, and function of the Chinese Communist military legal system in its broader sense, to include its political and martial law roles. To limit this study to an artificially narrow examination of the maintenance of internal discipline alone would distort the significance and role of military law in Communist China.

II. HISTORICAL FRAMEWORK

To understand the role of the military legal system of Communist China, it is first necessary to gain a basic appreciation of certain concepts within the broader milieu of traditional Chinese law. The legal system of the People's Republic of China is not merely communist law, but also Chinese law. Although the legal system of the PRC has drawn heavily from Soviet sources, it also retains, to a significant degree, many of the distinctive features of China's own legal heritage. It must, therefore, be analyzed in the context of Chinese history.

Much of China's historical legal development is typified by the continuing tension inherent in a dichotomy of two competing models of law. These models have been labeled, on the one hand, "external,"⁸ "formal,"⁹ "bureaucratic,"¹⁰ or "jural"¹¹; on the other, "internal," "informal," "mobilizational," or "societal." The jural model stands for formalized, codified rules of universal application, enforced by a regularized judicial system. The societal model stands for the application of internalized societal norms and customary values, enforced in a particularized fashion (depending on one's class or social status) by extrajudicial agencies and social organizations.

⁸Victor Li, *The Evolution and Development of the Chinese Legal System*, in *China: Management of a Revolutionary Society* 221 (J. Lindbeck ed. 1971).

⁹J. Cohen, *The Criminal Process in the People's Republic of China, 1949-1963*, at 20 (1968).

¹⁰Lubman, *Form and Function in the Chinese Criminal Process*, 69 *Colum. L. Rev.* 535, 566 (1969).

¹¹Leng, *The Role of Law in the People's Republic of China As Reflecting Mao Tse-tung's Influence*, 68 *J. Crim. L. & Criminology* 356 (1977).

A. TRADITIONAL CHINESE LEGAL CONCEPTS¹²

The Confucian philosophy that guided traditional China held that upright and benevolent personal behavior and proper observance of social relationships produced societal order and well-being. Upright behavior on the part of individuals would bring ordered harmony in their families, which would in turn lead to well-governed states and, ultimately, world peace.¹³ This behavior was governed by *li* (moral code, or customary law). The preference for moral persuasion and example over rule by harsh punishments and formalized codes was expressed by Confucius:

Lead the people by laws and regulate them by penalties, and the people will try to keep out of jail, but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum (*li*), and the people will have a sense of shame, and moreover will become good.¹⁴

The Confucian philosophy was rivaled by the Legalist school of thought, which favored a harsh, punitive system of positive law (*fa*)¹⁵ in order to maintain public order and create a strong state. The legalists criticized *li* as being an unstable basis for government "since the *li* are unwritten, particularistic, and subject to arbitrary interpretation."¹⁶

While the Confucian philosophy eventually triumphed as the basis of traditional Chinese society, aspects of legalism were incorporated as well. Laws were primarily penal in emphasis, to punish violations of the codified dominant Confucian ethical norms. The law was nevertheless rarely invoked to uphold these norms; only where moral persuasion and societal pressures had failed was the law needed. Law was mainly concerned with those acts of moral impropriety or criminal violence that were seen as violations of the whole social order and, ultimately, the entire harmonious order of the universe. "The belief that disastrous natural phenomena—floods, droughts, tem-

¹²For a comprehensive treatment of law in traditional China, see D. Bodde & C. Morris, *Law in Imperial China* (1967); Chu Tung-tsu, *Law and Society in Traditional China* (1961); and S. van der Sprenkel, *Legal Institutions in Manchu China* (1962).

¹³*Ta Hsueh* (The Great Learning), in *Masters of Chinese Political Thought* 201, 202 (S. de Grazia ed. 1973).

¹⁴*The Analects* VI:3.

¹⁵For an exposition of the meanings and functions of *li* and *fa*, see Benjamin Schwartz, *On Attitudes Toward Law in China, in Government Under Law and the Individual* (M. Katz ed. 1957), reprinted in Jerome Cohen, *supra* note 9, at 37.

¹⁶Bodde & Morris, *supra* note 12, at 23.

pests, insect pests—were the consequences of human disorder provided further theoretical justification for punishment of wrongdoers: they were a double menace to society."¹⁷

Because the Chinese legal system was intended to protect societal harmony and punish those who violated the rules of good order and conduct, many of the protections that evolved in Western societies to guard the rights of individuals against the state failed to emerge in China. First, the concept that an accused is presumed innocent until proven guilty did not develop in China.¹⁸ Second, there was no principle of equality before the law; rather, differing treatment was accorded based on the relative class and social status of the offender and victim.¹⁹ Third, voluntary surrender and confession, in keeping with Confucian ethics, were strongly encouraged and could be a mitigating factor in criminal cases; on the other hand, failure to confess was generally seen as obduracy and could constitute an aggravating factor.²⁰ Torture as a means of obtaining a confession during trials was specifically allowed under the penal code of the Ch'ing dynasty (1644-1912).²¹ Fourth, if the laws did not specifically address a given offense or penalty, a magistrate could apply another statute by analogy.²² Finally, there were no defense attorneys to assist the accused. Because the laws penalized as disruptors of tranquility both those who incited others to institute court actions, as well as those who profited from them, the development of a legal profession was problematic.²³

Due to the harsh, punitive nature of the formal legal system, the people regarded it with distaste and fear. "Don't eat anything poisonous, and don't break the law," ran a Chinese proverb. Or again: "[A]void litigation; for once go to law and there is nothing but trouble."²⁴ The formal legal system was therefore avoided to the greatest extent possible. To resolve disputes and adjudicate minor offenses, an informal legal system of extrajudicial organs and procedures devel-

¹⁷S. van der Sprenkel, *supra* note 12, at 29.

¹⁸See generally Gelatt, *The People's Republic of China and The Presumption of Innocence*, 73 J. Crim. L. & Criminology 259 (1982), and Thieme, *The Debate on the Presumption of Innocence in the People's Republic of China*, 10 Rev. Socialist L. 277 (1984).

¹⁹Bodde & Morris, *supra* note 12, at 33.

²⁰See generally Rickett, *Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity*, 30 J. of Asian Stud. 797 (1971).

²¹S. van der Sprenkle, *supra* note 12, at 68.

²²Bodde & Morris, *supra* note 12, ch. VI, sec. 3.

²³S. van der Sprenkle, *supra* note 12, at 69.

²⁴W. Scarborough, *A Collection of Chinese Proverbs* 88, 354 (C. Allen rev. 1926), in S. van der Sprenkle, *supra* note 12, app. 3.

oped, in keeping with the Confucian mandate that tranquility be maximized. The clan (*tsu*), the guild, councils of local gentry or elders, and other local institutions resolved most conflicts through mediation, conciliation, and imposition of minor disciplinary sanctions.²⁶ These informal, or societal, institutions became the predominant system of dispute resolution in traditional China.

B. MILITARY LAW IN IMPERIAL CHINA

Traditional Chinese society displayed a curiously ambivalent attitude toward the profession of arms. While the classical literature is replete with the exploits of ancient warrior heroes, Confucian society had little esteem for the soldier, ranking him fifth in the traditional social hierarchy (after the scholar, the farmer, the artisan, and the merchant).²⁶ "Good iron is not wrought into nails, good men do not become soldiers" ran a Chinese proverb.²⁷ Nevertheless, seven "martial classics," with Sun Tzu's *Art of War* preeminent among them, are studied to this day.²⁸

The antecedents of Chinese military law extend into the deep reaches of antiquity. An Assistant Judge Advocate General of the Republic of China Armed Forces has written that a system of military discipline to facilitate the execution of orders was in existence during China's mythic golden age over four thousand six hundred years ago, "when Hwang-ti waged war with Chi-yu at the battle of Cho Lo, and issued his first regulations."²⁹ At least a rudimentary system of military law must have developed by the fourth century B.C., when Sun Tzu's classic, *The Art of War*, was compiled. Sun Tzu wrote of the importance to discipline of "consistent rules to guide the officers and men," together with an enlightened system of rewards and punishments to enhance military discipline and loyalty.³⁰ A traditional system of military regulations developed from these antecedents and served as the basis of the military legal system down through the successive dynastic periods until the establishment of the Republic of China in 1912.

²⁶*Id.* chs. 7-9.

²⁶S. B. Griffith, *The Chinese People's Liberation Army* 204 (1967).

²⁷*Id.* In an effort to overcome this negative attitude, the fledgling Chinese Workers' and Peasants' Red Army styled its troops "fighters" or "warriors" (*chan-shih*) rather than the odious "soldiers" (*ping*). Edgar Snow, *Red Star Over China* 280 (2d ed. 1944).

²⁸Griffith, *supra* note 26, at 210. The British strategist, Capt. B. H. Liddell Hart characterized Sun Tzu's classic as "the concentrated essence of wisdom on the conduct of war," even less dated than Clausewitz, despite being over 2,000 years older. Sun Tzu, *The Art of War*, at v (S. Griffith trans. 1963).

²⁹Lee Ping-chai, *The Military Legal System of the Republic of China*, 14 *Mil. L. Rev.* 160 (1961).

³⁰Sun Tzu, *supra* note 28, at 127, 122.

The imperial legal codes contained separate sections devoted to regulating the military. The fifth division of the *Ta Ch'ing Lu-li*³¹ was devoted to "Military Laws," which punished such offenses as divulging state military secrets,³² unauthorized sale of military material,³³ and desertion.³⁴ To encourage officers to properly discipline their troops, eighty blows of the bamboo could be adjudged for failing to preserve military law and discipline.³⁵ On the other hand, the officer who ruled with too heavy a hand could be punished for "exciting and causing rebellion by oppressive conduct," a capital offense.³⁶

There was little differentiation between civilian and military law in the imperial system. No specialized military courts or tribunals existed.³⁷ Military defendants, like their civilian counterparts, were tried before the regular court system under the supervision of the imperial government's Board of Punishments.³⁸ Moreover, punishment under the "Military Laws" of the Ch'ing code was not limited to members of the military. Some of the military laws for which

³¹Ch'ing Dynasty penal code. Translated in Ta Tsing Lou Lee (G. Staunton trans. 1810). The fifth division is composed of five books, totaling 70 sections.

³²*Id.* § 202.

³³*Id.* § 212.

³⁴*Id.* § 217.

³⁵*Id.* § 209. A second offense could merit 100 blows.

³⁶*Id.* § 210. A death sentence here could only be executed after two years' imprisonment; often the offender was pardoned or had his sentence reduced during this period. Other, more serious crimes called for immediate execution.

³⁷Tsien, *supra* note 2, at 179.

³⁸Three representative trials of military defendants in the civilian court system are reported in Bodde & Morris, *supra* note 12. The Department for Kuangtung of the Board of Punishments sentenced Naval First Captain Ch'en P'an-kuei in 1807 to 80 blows with the heavy bamboo and one year of penal servitude for diverting funds from his sailors' payroll to repair his ship's sails and other equipment, in violation of the Ch'ing code's prohibitions on exceeding authorizations for expenditures. Because none of the funds had been appropriated to his personal use, and because he had restored them, the Board recommended to the Board of War that Ch'en be reinstated to his Office, and that his punishment be remitted. *Id.* at 478-80.

In 1825, Sergeant Li Ch'ung-shen unlawfully attempted to mediate a debt dispute in Chihli province. In an attempt to force a confession, Sergeant Li ordered his soldiers to beat one of the parties, Kuo Fu-chen, and his son. The enraged Kuo subsequently hanged himself. Sergeant Li was sentenced to 100 blows with the heavy bamboo, three years of penal servitude, and to pay the survivors 10 ounces of silver. "by analogy to the substitute on innocent persons whose deaths result from undue punishment [torture] received in the course of judicial examination." Yin Kao-sheng, the soldier who actually beat Kuo, was sentenced to 80 blows of the heavy bamboo, as "provided by the statute on doing what ought not to be done," the famous "catch-all" provision of the Ch'ing code. *Id.* at 458-60.

In Honan province in 1888, a soldier who was under orders to execute a condemned prisoner (by strangulation) became drunk and improperly executed the sentence (by the more "heavy" punishment of decapitation), in violation of an imperial edict. The soldier was sentenced to 100 blows of the heavy bamboo and dismissal from the Army. *Id.* at 474-75.

civilians could be punished were: crossing a border without examination at a government border post;³⁹ divulging state secrets;⁴⁰ purchasing military materiel sold without authorization;⁴¹ and harboring deserters.⁴² Finally, military personnel were also subject to punishment under laws other than simply those listed under the "Military Laws."⁴³

C. MILITARY LAW IN REPUBLICAN CHINA (1911 TO 1949)

The Hsin-hai revolution of 10 October 1911 led to the overthrow of the Ch'ing dynasty and the establishment of the Republic of China (ROC) in 1912. Dr. Sun Yat-sen, father of the Republic, was committed to the strengthening and modernization of all social institutions, to include China's legal system.⁴⁴ The Nationalist government undertook an ambitious program of codifying civil, criminal, and commercial laws, based on the codes of France, Germany, Switzerland, and Japan.⁴⁵ Many departures from the traditional Chinese system were

³⁹Ch'ing Dynasty penal code, *supra* note 31, § 220. The penalty of 100 blows and three years' imprisonment could be increased to death by strangulation after two years' imprisonment if the offender had communicated with foreign nations beyond the borders. Officers and guards who knew of the unauthorized border crossings, or who were not vigilant, could suffer similar penalties.

⁴⁰*Id.* § 202. Divulging military dispositions and plans to an enemy could bring death by beheading after two years' imprisonment. Privately opening and reading any sealed government or official dispatch was punishable by 60 blows; if the dispatch related to "any important military affairs," the punishment was increased to 100 blows and three years' banishment "as a divulger of state secrets," even though the law states no requirement that the secrets be transmitted to another.

⁴¹*Id.* § 212. The punishment was 40 blows if the article purchased was not "prohibited" (such as a weapon); purchasing prohibited articles could be punished by 80-100 blows and "perpetual banishment to a distance of 3,000 li."

⁴²*Id.* § 217. Punishable by 100 blows and military banishment.

⁴³Besides the cases summarized *supra* note 38, the *Peking Gazette*, 25 April 1800, relates the case of an Army commissioner who converted military supplies to his own use, in violation of § 129, "Fraudulent Appropriation of Public Property" (this section falls under the Ch'ing code's Third Division, "Fiscal Laws," Book IV—"Public Property," rather than under the Fifth Division, "Military Laws"). Forty blows of the bamboo and life exile to Tartary were adjudged. A lieutenant "who connived at, and encouraged the corrupt practices of the said commissioner" was also given 40 blows, but kept in his regiment, "holding, however, one of [the] most laborious and least desirable situations in it, as a further mark of disgrace." *Translated in Staunton, supra* note 31, app. 16. In conformity with the Confucian practice of treating defendants differently based on class or social status, the Ch'ing code provides for slightly lighter punishments for "offenders of the Military Class" in certain cases (§ 10).

⁴⁴On the development of the legal system of the Republic of China, see generally Chiu & Fa, *Law and Justice, in Contemporary Republic of China* 285 (J. Hsiung ed. 1981), and Chiu, *Legal Development in the Republic of China 1949-1981*, in *China: Seventy Years After the 1911 Hsin-hai Revolution* 287 (H. Chiu & S. Leng eds. 1984).

⁴⁵Chiu, *supra* note 44, at 290.

incorporated into the new codes.⁴⁶ Crime by analogy, as well as the Ch'ing code's catch-all section on "doing what ought not to be done" were abolished. In their place was adopted the principle of *nullem crimen sine lege* (no crime without a preexisting law making the act a crime). The traditional preferential treatment for officials and intellectuals, as well as the use of torture to gain confessions, were prohibited. The development of a modern legal profession was now encouraged. Still, a number of traditional features remained in the new legal system. Significant among them was the continued encouragement of voluntary surrender and confession as potentially mitigating factors.⁴⁷

The extensive codification of civilian law undertaken during the Republican period was paralleled by the development of a military legal system. Regulations promulgated by presidential mandate on 26 March 1915 established a separate system of military courts.⁴⁸ While these regulations established considerable differentiation between the military and the civilian legal system, the jurisdiction of the military courts was fairly broad. Soldiers could be tried by court-martial for violations of the civilian Criminal Code "or any other law providing punishment for its violation."⁴⁹ Crimes committed before a soldier joined the service could nevertheless be tried by court-martial, but if crimes committed while in the service were not detected until after the soldier had left the army, the ordinary courts had jurisdiction in most cases.⁵⁰

Military legal developments were rapid following the establishment of the Kuomintang⁵¹ government in 1927. A military criminal law was promulgated in 1929,⁵² followed by a military trial procedure law in 1930.⁵³ The 1934 code of martial law provided for the extension of general military jurisdiction over specified offenses, which could then be tried before military courts or assigned to civilian courts.⁵⁴ The Nationalists' military legal development was completed on Tai-

⁴⁶*Id.* at 290-91.

⁴⁷*Id.* at 291; Rickett, *supra* note 20.

⁴⁸Regulations Governing Military Criminal Cases (Promulgated by Presidential Mandate on March 26, 1915; Revised on April 17, 1918 and August 18, 1921), art. 1, in 1 *Legal and Political System in China 186-89* (H. Bhatia & T. Chung eds. 1974).

⁴⁹*Id.*

⁵⁰*Id.* art. 16.

⁵¹"National People's Party" or Nationalists, the political party of Sun Yat-sen and subsequently Chiang Kai-shek.

⁵²Criminal Law of the Armed Forces, in *Compilation of the Laws of the Republic of China 503* (1967) [hereinafter *Compilation*].

⁵³Lee, *supra* note 29, at 180.

⁵⁴*Compilation*, *supra* note 52, at 497.

wan with the adoption in 1956 of a modernized procedural Military Trial Law.⁵⁵

III. FOUNDATIONS OF MILITARY LAW IN COMMUNIST CHINA

A. MARXIST-LENINIST CONCEPTS OF LAW

Communist legal theory emphasizes the class nature of law and its subordination to political and economic dictates. Rejecting a stabilizing role for law, Marx and Engels viewed it as a political tool of class rule, created to promote the interests of the ruling classes: "[Y]our jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class."⁵⁶ Lenin also adopted this view of law: "A law is a political instrument; it is politics."⁵⁷

Under Marxist theory, capitalist society must undergo a "revolutionary transformation" into a communist society, where the state and its laws will wither away. This "political transition period" Marx called "the revolutionary dictatorship of the proletariat."⁵⁸ As to the means required to bring about this transformation, Marx declared that there was "only one means to *curtail*, simplify and localize the bloody agony of the old society and the bloody birth-pangs of the new, only one means—the revolutionary terror."⁵⁹ Lenin characterized the dictatorship of the proletariat as "a special kind of cudgel, nothing else,"⁶⁰ with which to beat down and crush the exploiting classes. As early as 1901, Lenin fully concurred with Marx's tactics for revolution: "In principle we have never renounced terror and cannot renounce it."⁶¹ Once in power, Lenin actually incorporated terror as a principle of Soviet law. In forwarding his own draft of a proposed article to the 1922 Soviet criminal code, Lenin wrote:

The main idea . . . [is] to put forward publicly a thesis that is correct in principle and politically (not only strictly jur-

⁵⁵*Id.* at 539. On the operation of the ROC military legal system, see generally Lee, *supra* note 29; see also Chiu & Fa and Chiu, *supra* note 44, for its operations with respect to civilians under continuing martial law.

⁵⁶K. Marx & F. Engels, *Manifesto of the Communist Party*, ch. 2, in *The Marx-Engels Reader* 469, 487 (R. Tucker ed. 2d ed. 1978).

⁵⁷J. Hazard, *Communists and their Law* 69 (1969).

⁵⁸K. Marx, *Critique of the Gotha Program*, ch. 4, in R. Tucker, *supra* note 56, at 525, 538.

⁵⁹1 E. H. Carr, *The Bolshevik Revolution* 155 (1985).

⁶⁰*Id.* at 141.

⁶¹*Id.* at 156.

idical), which explains the *substance* of terror, its necessity and limits, and provides *justification* for it.

The courts must not ban terror—to promise that would be deception or self-deception—but must formulate the motives underlying it, legalize it as a principle, plainly, without any make-believe or embellishment. It must be formulated in the broadest possible manner, for only revolutionary law and revolutionary conscience can more or less widely determine the limits within which it should be applied.⁶²

B. CHINESE COMMUNIST ATTITUDES TOWARD LAW

Mao Tse-tung and the Chinese Communist Party retained, whether consciously or not, many traditional Chinese attitudes toward law. Some of the parallels between traditional and communist Chinese law that will later be addressed with respect to the military legal system include: (1) a preference for informal dispute settlement and punishment for minor offenses; (2) the subordination of law to a dominant political philosophy; and (3) the lack of functional separation between law and bureaucracy. Nevertheless, it is from Marxist-Leninist ideology and the Soviet model that the basic concepts and formulations of the Chinese communist legal system were drawn.

In 1927 Mao wrote of the need for excesses, even terror, to break the hold of tradition by revolutionary action:

[A] revolution is not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained and magnanimous. A revolution is an insurrection, an act of violence by which one class overthrows another. . . . To put it bluntly, it is necessary to create terror for a while in every rural area, or otherwise it would be impossible to suppress the activities of the counter-revolutionaries in the countryside or overthrow the authority of the gentry. Proper limits have to be exceeded in order to right a wrong, or else the wrong cannot be righted.⁶³

Once in power, Mao's views of revolutionary legality and class justice remained little changed: "The state apparatus, including the army,

⁶²33 V. Lenin, *Collected Works* 221 (1960).

⁶³Mao, *Report on the Investigation of the Peasant Movement*, in *Selected Readings from the Works of Mao Tse-tung* 30 (1971) [hereinafter *Selected Readings*].

the police and the courts, is the instrument by which one class oppresses another. It is an instrument for the oppression of antagonistic classes; it is violence and not 'benevolence.'⁶⁴

The laws adopted in the early periods of the People's Republic of China reflected Mao's class-oriented doctrines. Law was chiefly a weapon to be used in suppressing "counterrevolution" and major crimes:

The criminal law of our country mainly attacks counterrevolutionary criminals and criminals who murder, commit arson, steal, swindle, rape, and commit other crimes that seriously undermine social order and socialist construction. We must make it clear that the sharp point of our criminal law is mainly directed at the enemies of socialism.⁶⁵

Mao explained his theoretical framework for analyzing and resolving societal conflicts in his 1957 speech, "On the Correct Handling of Contradictions Among the People."⁶⁶ Mao sharply distinguished "contradictions between ourselves and the enemy" ("antagonistic contradictions") from "contradictions among the people" ("nonantagonistic contradictions").⁶⁷ Mao defined "the people" as those who "favor, support and work for the cause of socialist construction"; "the enemy" were those who "resist the socialist revolution and are hostile to or sabotage socialist construction."⁶⁸ Mao also explained the methods to be used in resolving the two types of contradictions. To suppress contradictions involving the counterrevolutionary enemy, or criminals who "seriously disrupt public order," the methods of "dictatorship" would be applied. To resolve contradictions among the people, "democracy" ("the methods of persuasion and education" and "administrative regulations") would be applied. "Law-breaking elements among the people will be punished according to law, but this is different in principle from the exercise of dictatorship to suppress the enemies of the people."⁶⁹ Here the traditional preference for informal or administrative resolution of social conflicts was applied to "contradictions among the people"; minor crimes among the people would be resolved "according to law"; while the full weight of the state was reserved for the suppression of the counterrevolutionary "enemy" and major criminals.

⁶⁴Mao, *On the People's Democratic Dictatorship*, in *Selected Readings*, *supra* note 63, at 380.

⁶⁵Central Political-Judicial Cadre's School, *Lectures on the General Principles of Criminal Law in the People's Republic of China* 79, translated by Joint Publications Research Service (J.P.R.S.), No. 1331 (1962) [hereinafter *Lectures*].

⁶⁶*Selected Readings*, *supra* note 63, at 432.

⁶⁷*Id.* at 433-34.

⁶⁸*Id.*

⁶⁹*Id.* at 435-39.

C. MILITARY LAW IN THE CHINESE WORKERS' AND PEASANTS' RED ARMY (1927-1931)

The development of the Chinese Communist system of military law reflects the unique characteristics of the Chinese Communist armed forces. Besides the standard function of maintaining military discipline in order to increase military potential, Chinese Communist military law developed an even greater emphasis on the maintenance of the close political relationship between the military and the Chinese Communist Party (CCP).

The foundations of the Chinese Communist military legal system were laid early in the history of the CCP, and by the time the People's Republic of China was established in 1949, military law had already undergone considerable development. Commencing as a rather arbitrary and informal process, encompassing civilians as well as the military, the system evolved into one that at least formally differentiated the military from civilian society. Some internal procedural guarantees such as rights of appeal and of review also emerged. In light of the nearly constant state of revolutionary warfare that prevailed during this period, these developments are remarkable.

The CCP did not immediately organize its own army following its establishment in 1921; rather, it infiltrated and worked within the Kuomintang (KMT) on its "special task to do propagandistic and organizational work among the workers and peasants"⁷⁰ behind the lines. With the failure of its "mass line" policy to raise the workers and peasants in revolution following the CCP's Nanchang and Autumn Harvest armed uprisings of 1927, the Party began to develop a new strategy calling for its own army.

The CCP had no illusions regarding the necessity of armed struggle to achieve power and accomplish revolution. Mao later wrote: "The seizure of power by armed force, the settlement of the issue by war, is the central task and the highest form of revolution."⁷¹ The Chinese Communist doctrine of war descended from Clausewitz, through Marx, Engels and Lenin, to Mao. Lenin stated that Clausewitz's famous dictum ("War is merely the continuation of policy by other means"⁷²) "was always the standpoint of Marx and Engels, who regarded any

⁷⁰Manifesto of the Third National Congress of the CCP, June 1923, in I W. Kuo, *Analytical History of the Chinese Communist Party* 151-52 (2d ed. 1968).

⁷¹Mao, *Problems of War and Strategy*, in *Selected Military Writings*, *supra* note 6, at 269.

⁷²Clausewitz, *On War* 87 (Howard & Paret trans. 1984).

war as the *continuation* of the politics of the powers concerned—and the *various classes* within these countries—in a definite period.”⁷³ Mao later cited Clausewitz and Lenin in summing up his own view of the relationship between war and politics: “[P]olitics is war without bloodshed while war is politics with bloodshed.”⁷⁴

Mao had realized early on that the CCP would need its own army in order to achieve its goals. As he later emphasized, “Every Communist must grasp the truth, ‘Political power grows out of the barrel of a gun.’ Our principle is that the Party commands the gun, and the gun must never be allowed to command the Party.”⁷⁵ Far from outlining some sort of separation of powers or system of civilian control over the military, Mao simply held that the CCP’s goals could best be met by having its own army of overwhelming strength. He continued, “According to the Marxist theory of the state, the army is the chief component of state power. Whoever wants to seize and retain state power must have a strong army.”⁷⁶

In June of 1927 the Comintern cabled instructions to the CCP to form its own independent, “reliable army” of 20,000 Communists and 50,000 revolutionary workers and peasants. The same message instructed the CCP to organize a “Revolutionary Military Tribunal” to punish officers who maintained contact with Chiang Kai-shek or who “incite[d] the soldiers against the people, the workers and peasants.”⁷⁷ To implement these instructions, the CCP Central Committee published a resolution in August 1927 calling for the creation of “a new revolutionary army,” in which “there should be extensive political work and a party representative system, a strengthened party branch among soldiers, and dependable and loyal officers of revolution.”⁷⁸ A system of Party organizations within the army was soon implemented, at four levels: Army committee, regimental committee, battalion committee, and company branch, which included a party group in each squad.⁷⁹ The army’s ratio of Party members to nonparty members soon reached approximately one to three,⁸⁰ and was subsequently

⁷³Quoted in *Marxism-Leninism on War and Army* 7 (Moscow 1972, U.S.A.F. reprint 1978). In Lenin’s notes on Clausewitz he characterized Book 8, Chapter 6, entitled “War is an Instrument of Politics,” as “the most important chapter”; his own summation of Clausewitz was “war is a part of a whole, and this whole is politics.” Davis & Kohn, *Lenin as Disciple of Clausewitz*, *Military Review*, Sept. 1971, at 49, 50.

⁷⁴Mao, *On Protracted War*, in *Selected Military Writings*, *supra* note 6 at 187, 227.

⁷⁵Mao, *supra* note 71, at 274.

⁷⁶*Id.* at 275.

⁷⁷Comintern Instructions to CCP, in 10 *J. Stalin, Works* 35 (1954).

⁷⁸Resolution on the Political Task and Policy of the CCP, August 1927, in Kuo, *supra* note 70, at 437, 449-50.

⁷⁹Mao, *The Struggle in the Chinghang Mountains*, in *Selected Military Writings*, *supra* note 6 at 21, 31-32.

⁸⁰*Id.* at 32.

raised to one to two,⁶¹ which has been maintained into the modern era.⁶² During this early period, Mao repeatedly criticized those who maintained what he called "the purely military viewpoint" and emphasized the political nature of the Red army:

[T]he Chinese Red Army is an armed body for carrying out the political tasks of the revolution. Especially at present, the Red Army should certainly not confine itself to fighting; besides fighting to destroy the enemy's military strength, it should shoulder such important tasks as doing propaganda among the masses, organizing the masses, arming them, helping them to establish revolutionary political power and setting up Party organizations. . . . Without these objectives, fighting loses its meaning and the Red Army loses the reason for its existence.⁶³

One of the measures urged by Mao to correct the "military viewpoint" was the institution of what may be called, in the broad context of the CCP doctrine, a system of military law:

Draw up Red Army rules and regulations, which clearly define its tasks, the relationship between its military and its political apparatus, the relationship between the Red Army and the masses of the people, and the powers and functions of the soldiers' committees and their relationship with the military and political organizations.⁶⁴

Beyond a conventional system of regulations for the maintenance of military discipline, Mao called for regulation of the Army's relationship with the people and the Party. This broadened scope of military law has formed the basis of CCP doctrine to the present day. As the Revolutionary Military Tribunals ordered by the Comintern were not formally established until 1932, military discipline was maintained through informal processes within the Party committees until that time.

After the failure of the Nanching and Autumn Harvest uprisings in 1927, the remnants of the Communist insurgents took refuge in Chingkangshan, a former bandit stronghold in the mountains on the border of Hunan and Kiangsi Provinces. Here they were trained,

⁶¹*Id.* at 52 n.16.

⁶²*Id.*; In the 1950's, 90% of older officers, 30% of younger officers, and 10% of non-commissioned officers were CCP members. J. Guillermez, *The Chinese Communist Party in Power 1949-1976*, at 163-65 (1976). More recently, "35% of the military have been accepted into the Party." F. Butterfield, *China: Alive in the Bitter Sea* 76 (1982).

⁶³Mao, *On Correcting Mistaken Ideas in the Party*, in *Selected Military Writings*, *supra* note 6 at 53, 54.

⁶⁴*Id.* at 56.

indoctrinated, and reorganized into the Chinese Workers' and Peasants' Red Army. The first rudimentary rules of discipline for the Red Army were formulated by Mao in the spring of 1928:⁸⁵

1. Orders must be followed by action.
2. Things that belong to workers, peasants and small merchants are never to be touched.
3. Booty obtained from raids on local bosses⁸⁶ belongs to the public.

Six "points for attention" were developed in the summer of 1928 to ensure a good treatment of the peasantry, whose support was essential to the continued existence and development of the Red Army:

1. Put back the doors you have taken down for bed-boards.
2. Put back the straw you have used for bedding.
3. Speak politely.
4. Pay fairly for what you buy.
5. Return everything you borrow.
6. Pay for anything you damage.⁸⁷

After 1929, two additional points were added:

7. Do not bathe within sight of women.
8. Do not search the pockets of captives.⁸⁸

After several changes, and after slight variances developed in different units and areas,⁸⁹ the three rules and eight points were stan-

⁸⁵A *Report on the History and Condition of the Chu-Mao Red Army*, Sept. 1, 1929, in 6 *Contemporary China* 59, 73 (Kirby ed. 1968) [hereinafter *Chu-Mao Report*].

⁸⁶In requisitioning funds, the Red Army was ordered to confiscate property, burn houses, and kill some of the local magnates as examples. Political Department of the Workers' and Peasants' Red Army, 4th Division, "Brochure Concerning the Requisition of Funds," cited in Oda, *Criminal Law and Procedure in the Chinese Soviet Republic*, in *The Legal System of the Chinese Soviet Republic 1931-1934*, at 53 (W. Butler ed. 1983).

⁸⁷General Headquarters, Chinese People's Liberation Army (GHQ-CPLA). *On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention*, in *Selected Military Writings*, *supra* note 6 at 343, 344 n.1.

⁸⁸*Id.* While the *Selected Military Writings* editors credit Mao with these additions, Mao told Edgar Snow they were added by Lin Piao. Snow, *supra* note 27, at 176.

⁸⁹GHQ-CPLA, *supra* note 87, at 343. In relating the original rules to Edgar Snow, Mao omitted Points 7 and 8, substituting, "Be honest in all transactions with the peasants," and "Be sanitary, and especially establish latrines a safe distance from people's homes." Point 3 was expanded: "Be courteous and polite to the people and help them when you can." Snow, *supra* note 27, at 176. In 1937 Mao listed Disciplinary Rule 3 as "Be neither selfish nor unjust." Mao, *On Guerrilla Warfare* 92 (Griffith trans. 1961). Mao probably did not wish to offend Nationalist sensibilities by using the original version and its endorsement of expropriations during the United Front then prevailing for the war with Japan.

andardized and reissued by the General Headquarters of the Chinese Peoples' Liberation Army on 10 October 1947.⁹⁰ These remain the foundations of military discipline in the PLA, codified in Article 2 of the 1984 PLA Discipline Regulation.⁹¹

The Three Main Rules of Discipline

1. Obey orders in all your actions.
2. Do not take a single needle or piece of thread from the masses.
3. Turn in everything captured.

The Eight Points for Attention

1. Speak politely.
2. Pay fairly for what you buy.
3. Return everything you borrow.
4. Pay for anything you damage.
5. Do not hit or swear at people.
6. Do not damage crops.
7. Do not take liberties with women.
8. Do not ill-treat captives.

This simple code, easily memorized by even uneducated soldiers,⁹² served as an educational tool illustrating two of the primary goals of the Red Army—to maintain military discipline, and to maintain good relations with the masses, whose support was essential to the Red Army concept of operations.⁹³ Military discipline in the Red Army thus served pragmatic political considerations as well as strictly military ones. Mao wrote in 1929: "The discipline of the Red Army is a practical propaganda to the masses. Now discipline is more lax than before; therefore it produces an unfavorable impression on the masses."⁹⁴

⁹⁰GHQ-CPLA, *supra* note 87, at 343.

⁹¹See *infra* note 312 and accompanying text.

⁹²The code was not only frequently recited, but also sung daily in a Red Army marching song. Snow, *supra* note 27, at 176. The code, together with its underlying political purposes, was part of the basic political training of new Red Army soldiers. Resolution of the Ninth CCP Congress of the Red Fourth Army, Dec. 1929 [hereinafter Resolution], in 2 *Collected Works of Mao Tse-tung, 1917-1949* at 165, 186, 189, *translated by Joint Publications Research Service No. 71911 (1978)* [hereinafter *Collected Works*].

⁹³In *On Guerrilla Warfare*, Mao listed this code as a factor in achieving a "unity of spirit" that should exist between the people and the troops. "The former may be likened to water and the latter to the fish who inhabit it. . . . It is only undisciplined troops who make the people their enemies and who, like the fish out of its native element, cannot live." Mao, *supra* note 89, at 92-93.

⁹⁴Resolution, *supra* note 92, at 182.

Mao's solution for the problem of poor discipline was simple: "The three disciplinary rules must be strictly enforced."⁹⁵

Offenses more serious than violations of the disciplinary code were subject to harsh punishment in accordance with the following 1929 Red Army basic penal rules:

1. Wartime Discipline. Officers may shoot anyone who retreats before battle, who refuses to march forward or who otherwise disobeys orders.

2. General Discipline. Anyone who has committed any of the following crimes shall be executed: collaboration with the enemy, rebellion, defection with or without arms, rape, arson, manslaughter and fraud. Anyone resorting to gambling shall have all his money confiscated and be deprived of one month's allowance. Anyone resorting to prostitutes will be punished as if he had failed to return to his camp at night. If riots arise from prostitution, punishment in the form of death, hard labour or physical punishment will be inflicted according to the seriousness of the case. Other offenses shall be punished according to their nature.⁹⁶

D. MILITARY LAW IN THE CHINESE SOVIET REPUBLIC (1931-1934)

On 7 November 1931 the CCP proclaimed its own government for the mostly rural and impoverished areas it controlled—the Chinese Soviet Republic (CSR). Before it was crushed by the Nationalist government in 1934, the CSR had developed a considerable body of law. Despite nearly constant warfare against "counterrevolutionaries" within the CSR areas and the Nationalists without, foundations for a rather elaborate legal structure were laid. Statutes were enacted to provide for a system of courts, land and labor laws, a marriage law, even a "statute on investment of capital in industrial and trade

⁹⁵*Id.* at 185.

⁹⁶Chu-Mao Report, *supra* note 85, at 72-73. Although corporal punishment was permitted under these penal rules, Mao considered the practice a remnant from feudal warlords and a "monstrosity." Mao advocated the abolition of corporal punishment as an enhancement to morale, and called for the Red Army penal regulations to be revised. Resolution, *supra* note 92, at 190-92. The practice evidently remains a problem in the PLA; the new "Eight Prohibitions," proposed in August 1986 as a supplement to the Three Main Rules of Discipline and Eight Points for Attention, proscribe corporal punishment in the first "prohibition." See *infra* text accompanying note 419.

enterprises."⁹⁷ Much of the experience gained during the CSR period is reflected in the legal system established after 1949 in the People's Republic of China.

At the First All-China Congress of Soviets in November 1931, Mao's concept of a thoroughly politicized Red Army was reemphasized. The Congress proclaimed the Chinese Workers' and Peasants' Red Army to be "a political army . . . of class-conscious warriors," in which "the strictest and most conscious revolutionary discipline must prevail," and that "the organizations of the Communist Party and the Young Communist League are inalienable, integral parts of the Red Army."⁹⁸ The class nature of the Red Army was made clear: only workers, peasants, and the urban poor could join. Members of "the ruling or exploiting class" (militarists, landlords, gentry, bureaucrats, capitalists, rich peasants, and members of their families) were not permitted.⁹⁹ As incentives for enlisting, and to improve morale, certain benefits and privileges were extended to Red Army soldiers and their families, such as land allotments, tax exemptions and survivor benefits.¹⁰⁰ Failure to provide these privileges was punishable as a counter-revolutionary crime.¹⁰¹

The role of the developing military legal system during the CSR period was not limited to maintaining internal discipline in the Red Army. The Red Army Military Courts were an integral part of the broader tasks of the CSR legal system: "the establishment of revolutionary order and protection of the rights of the people's masses."¹⁰² As is evident from the title of the first CSR directive establishing a judicial system, the "Provisional Procedure for Deciding Cases on Counter-Revolutionary Crimes and Instituting Judicial Organs," the preeminent thrust of this system was the suppression of "counter-revolutionaries."¹⁰³ Two of the major instruments used by the CCP for this task were the State Political Security Bureau (SPSB) and the

⁹⁷For legal developments during the CSR period see generally S. Leng, *Justice in Communist China 1-10* (1987), T. Lotveit, *Chinese Communism 1931-1934* ch. 5 (1973), and *The Legal System of the Chinese Soviet Republic 1931-1934* (W. Butler ed. 1983) [hereinafter Butler].

⁹⁸Resolution of the All-China Congress of Soviets Concerning the Red Army, November 1931, in *Fundamental Laws of the Chinese Soviet Republic 35-36* (N.Y.: International, 1934).

⁹⁹*Id.*

¹⁰⁰*Id.* at 39-43.

¹⁰¹*Id.* at 45.

¹⁰²Provisional Procedure for Deciding Cases on Counter-Revolutionary Crimes and Instituting Judicial Organs, 13 Dec. 1931 (Directive No. 6 of CEC-CSR), in Butler, *supra* note 97, app. 19.

¹⁰³*Id.* See generally P. Griffin, *The Chinese Communist Treatment of Counterrevolutionaries: 1924-1949* (1976).

military tribunals of the Red Army. The SPSB was established as the CCP's own secret service in 1928, patterned after the Soviet GPU.¹⁰⁴ It was authorized to investigate and file accusations in counterrevolutionary cases, while trial and judgment were formally reserved to state judicial organs (to include those of the Red Army).¹⁰⁵ Because the SPSB was authorized to try and execute counterrevolutionaries during the period of civil war and Soviet expansion,¹⁰⁶ however, its powers were virtually absolute. SPSB sections were to be established within the Red Army at corps and division level; agents could be assigned to lower echelons as well.¹⁰⁷ The Red Army was required to maintain a close relationship with the SPSB in order to concentrate on purging "bad elements" and liquidating counterrevolutionary activities, and to place units at the disposal of the SPSB when necessary.¹⁰⁸

Red Army military tribunals were formalized on 1 February 1932 when the Central Executive Committee (CEC) of the CSR promulgated the "Provisional Organizational Regulations for Military Courts of the Chinese Soviet Republic."¹⁰⁹ These regulations, although in force for only a short period, established models for the Chinese Communist military legal system that have continued, in many respects, to the present day.¹¹⁰ Four types of military courts were established at three levels: primary and primary field military courts, in echelons down to division level; a superior military court for the entire Red Army; and, as a tribunal of last resort, the Supreme Military Judicial Conference, to be established within the Supreme Court.¹¹¹

¹⁰⁴2 Kuo, *supra* note 70, at 285; Lotveit, *supra* note 97, at 115; Oda, *supra* note 86, at 59.

¹⁰⁵Organic Program of the State Political Security Bureau of the Chinese Soviet Republic, in Butler, *supra* note 97, app. 18, art. 10.

¹⁰⁶*Id.*

¹⁰⁷*Id.* art. 5.

¹⁰⁸*Id.* art. 8.

¹⁰⁹A translation is at *infra* app. C. [hereinafter Military Courts Organizational Regulations]. Original in *Shih-sou tsu-liao-shih kung-fei tsu-liao* (Hoover Institution, microfilm, 1960) no. 008.5524/3754/0553, reel 7, item 15. A Russian translation of these regulations, subsequently translated into English, is in Butler, *supra* note 97, app. 17.

¹¹⁰See *infra* chapter V. These are the only known organizational regulations for Chinese Communist military courts. See *infra* text accompanying notes 192-93, 284-85.

¹¹¹Military Courts Organizational Regulations, *supra* note 109, arts. 4-7. The incorporation of the military courts into the overall CSR judicial system is reflected in the Organic Law of the Central Soviet, Feb. 17, 1934, in 4 Collected Works, *supra* note 92, at 225. The military courts, civil courts, and criminal courts were all established under the Supreme Court (art. 36), which was to review decisions of the provincial and higher military courts (art. 37). No pretense of judicial independence was made; the Supreme Court was subject to the CSR Central Executive Committee (art. 34). The CEC periodically reviewed and revised Supreme Court decisions. See Resolution on the Conviction of Important Military Criminals of the Reformed Faction of the AB Group by the Provisional Supreme Court, Feb. 1932, in 3 Collected Works, *supra* note 92, at 67.

The jurisdiction of the military courts extended beyond the members of the Red Army to include residents of battle zones.¹¹² The courts could punish violations of "the criminal law, the military criminal law, or some other law," as well as espionage cases.¹¹³ Cases involving "violations of common discipline but not of the law" were specifically excluded from the courts' jurisdiction, however.¹¹⁴ This exclusion again illustrates the CCP preference for the societal model, in that lesser offenses were to be handled administratively rather than judicially.

Military trial courts were composed of one judge and two elected assessors.¹¹⁵ Appellate and reviewing courts were composed of a presiding judge and two panel judges.¹¹⁶ Verdicts could be appealed to the next higher level court,¹¹⁷ and death sentences were reviewed by the next higher court, whether appealed or not.¹¹⁸

The Regulations also established the Military Procuracy. Military procurators were empowered to conduct preliminary investigations, bring cases before the military courts, and represent the state at trial.¹¹⁹ Primary and superior military procuracies were established and attached to the military courts of the respective level.¹²⁰

The February 1932 military courts statute, together with its civilian counterpart adopted in June,¹²¹ marked the peak of the trend toward normalizing judicial procedure and restricting the power of the SPSB. Thereafter, in view of the worsening military situation with the Kuomintang, attitudes toward procedural safeguards for the accused hardened, and differentiation between the military and civilian legal systems deteriorated.

The Central Executive Committee (CEC) reemphasized the doctrine of class struggle in its Directive 21 of 15 March 1933 "On the Question

¹¹²Military Courts Organizational Regulations, *supra* note 109, art. 2.

¹¹³*Id.* art. 1. Neither a criminal law nor a military criminal law was ever enacted by the CSR, although enactment of a criminal law was proposed in 1933. See Oda, *supra* note 86, at 67. The PRC finally enacted a criminal law in 1978, and a military criminal law in 1981.

¹¹⁴Military Courts Organizational Regulations, *supra* note 109, art. 1.

¹¹⁵*Id.* arts. 12, 13. The use of assessors (also called lay judges or jurors), who were elected from among the officers and soldiers (or from Party organizations for civilian courts), was borrowed from the Soviet Union. This regulation is the first Chinese Communist enactment to mention them. Their primary function was to educate the masses concerning law and judicial procedures. Assessors were to be relieved of other military duties for their one-week term.

¹¹⁶*Id.* art. 12.

¹¹⁷*Id.* arts. 18, 20.

¹¹⁸*Id.* art. 21.

¹¹⁹*Id.* arts. 27, 28.

¹²⁰*Id.* art. 24.

¹²¹Provisional Rules on the Organization of Judicial Sections and Court Procedure, 9 June 1932, in Butler, *supra* note 97, app. 15 [hereinafter Provisional Court Procedure].

of Suppressing Internal Counterrevolution,"¹²² which called for strict attention on the part of government organizations at all levels to suppressing counterrevolutionaries. "Resolute and rapid measures must be taken to repress them severely," it warned. Proclamations of a temporary state of martial law were authorized "when the situation is pressing." Judicial organs were ordered to deal quickly and ruthlessly with counterrevolutionary cases: "[A]ll elements whose crimes have been clearly proven, starting with the alien class elements among them, must immediately be put to death." Directive 21 also suspended Article 26 of the civilian court regulations, which had required review by higher courts before executing death sentences,¹²³ and allowed: "[D]eath sentences may be carried out first and the cases reported to superiors afterward."

The increasingly difficult situation produced two additional problems for the CCP: runaways from the Soviet areas, and deserters from the Red Army. To control runaways, strict controls were placed on allowing people to leave the Soviet areas. Only persons "determined to have a need to go outside the area" were permitted to depart. "They must be subjected to close examination and not allowed to leave the area at will."¹²⁴ An exit visa specifying the departure route and a travel pass, both issued by the SPSB, were required. Mass meetings were employed to encourage runaways to go home, and relatives and friends were pressured to urge runaways to return. The Red Army and other government organizations were ordered to cooperate with the SPSB "in order to intensify the Red martial law."

Desertion from the Red Army became a severe problem. In a five-month period of 1933, the First Army Corps had 203 deserters, the Third Army 98, and the Fifth Army 110.¹²⁵ In one area, 80% of the troops ran away.¹²⁶ "Class deviates" within the Red Army, as well as incorrect and coercive leadership by officers, were cited as explanations for the high desertion rates.¹²⁷ Other factors included dissatisfaction among forced conscripts and difficult living conditions at the

¹²²On the Question of Suppressing Internal Counterrevolution, 15 Mar. 1933 (Directive No. 21 of CEC-CSR), in 3 Collected Works, *supra* note 92, at 154.

¹²³Provisional Court Procedure, *supra* note 121, art. 26. Article 21 of the Military Courts Organizational Regulations, *supra* note 109, contained a similar requirement for review of death sentences, but a note thereto allowed execution with subsequent confirmation "under extraordinary military conditions."

¹²⁴On Strict Control of Departing Persons, 27 Dec. 1932 (Order No. 37 of CEC-CSR), in 3 Collected Works, *supra* note 92, at 134.

¹²⁵P. Griffin, *supra* note 103, at 59.

¹²⁶*Id.*

¹²⁷On the AWOL Problem in the Red Army, 15 Dec. 1933 (Order No. 25 of CEC-CSR), in 4 Collected Works, *supra* note 92, at 86.

front. In response to the desertion problem, the CCP organized campaigns within its "Enlarging the Red Army Movement." A propaganda campaign promising lenient treatment was directed at winning back the majority of the deserters, while harsh punishments were given to leaders and repeat offenders.

A uniform procedure to deal with the desertion problem was promulgated in CEC Order Number 25 on 15 December 1933.¹²⁸ Soldiers who deserted with their rifles were to be summarily shot upon apprehension. Leaders and organizers of desertion were to be executed after being made examples at mass trials. Repeat offenders were to be tried by the military courts and could be sentenced to penal servitude or death. Individual deserters who went home (without their weapons) "for lack of political consciousness," however, were to be subjected to "propaganda and agitation" while their families continued to receive the preferential treatment due the families of Red Army men in general,¹²⁹ "so that they will return to the army of their own free will." Those who still refused to return were required to indemnify the state for any clothing, supplies or family assistance they had received. Harboring deserters was prohibited. Those who failed to carry out this order were to be dealt with as having aided and abetted desertion and undermined the Red Army.

A typical mass trial of deserters took place on 26 April 1933 in Juichang *hsien* (county).¹³⁰ Representatives from over 30 *hsien* and from 80 Model Regiments participated. An agent of the SPSB served as procurator, presenting the evidence against two counterrevolutionary Social Democrats and two poor peasants who had sincerely confessed their mistakes. After the various representatives spoke out in turn against the evils of desertion, the crowd demanded death for the two Social Democrats, who were shot after being paraded through the town. The two peasants were sentenced to hard labor, one to a long term, and the other to one year.

From the fall of 1933 through 1934, the CSR was threatened by the Kuomintang's Fifth Encirclement Campaign. A new strategy of military and economic blockade, on the advice of German advisors, was proving to be more successful than previous Kuomintang assaults. In response to the increased Kuomintang threat, the CCP adopted more drastic measures in a climate of lessened legal restraints. The new chairman of the Council of People's Commissars,

¹²⁸ *Id.*

¹²⁹ See *supra* text accompanying note 100.

¹³⁰ P. Griffin, *supra* note 103, at 61.

Chang Wen-t'ien, complained that the judicial system was applying the soviet laws incorrectly and too leniently in counterrevolutionary cases.¹³¹ In February 1934, the SPSB in Red Army units and local governments was formally authorized to arrest, try, and even execute spies and counterrevolutionaries without going through the military or local courts. Executions were to be subsequently reported to the Central SPSB. If military or local government officials disagreed with an SPSB death sentence, the sentence was to be carried out anyway, and the Council of People's Commissars would subsequently "determine whether the punishment was right or wrong."¹³²

Criticism of the legal system increased. Liang Po-t'ai, the Commissar of Justice, complained in his article of 1 March 1934 in *Hung-se Chung-hua* (Red China) that judicial cadres did not understand that "the laws are developing in accordance with the demands of the revolution."¹³³ He continued: "What is to the advantage of the revolution, that is the law. Whenever it is to the advantage of the revolution the legal procedure can at any time be adapted. One ought not to hinder the interests of the revolution because of legal procedure."

The trend toward a more radical legal system culminated on 8 April 1934, when the CEC promulgated the "Judicial Procedure of the CSR"¹³⁴ and the "Statute of the CSR Governing the Punishment of Counterrevolutionaries."¹³⁵ These two statutes would govern the operation of the legal system until the fall of the CSR in October 1934.

In the Judicial Procedure the CSR abandoned its previous tentative steps toward a regularized and differentiated legal system, with a

¹³¹Chang complained that judicial personnel did not understand "that the soviet laws are produced to meet the demands of the struggle against counter-revolution, and they are not made in order to serve as a basis for extenuating the crimes of the counter-revolutionaries." He criticized the earlier system of reviewing death sentences as "letting the enthusiastic demands of the masses be cooled off by the many 'approvals,' and causing the effect of the executions of counter-revolutionaries in inciting the struggle of the masses, and in educating the masses, to be very badly weakened." *Tou-Cheng* No. 49, at 6, 7, quoted in Lotveit, *supra* note 97, at 125, 140.

¹³²Decree No. 5, CEC-CSR, 9 Feb. 1934, quoted in T. Lotveit, *supra* note 97, at 122.

¹³³Liang Po-t'ai, *The Main Line of the Judicial Organs: Suppress the Counter-Revolution*, *Hung-se Chung-hua*, Mar. 1, 1934, at 3, quoted in T. Lotveit, *supra* note 97, at 140.

¹³⁴Judicial Procedure of the Chinese Soviet Republic, 8 Apr. 1934, in 4 *Collected Works*, *supra* note 92, at 240-42. Also translated in Butler, *supra* note 97, app. 16 (hereinafter *Judicial Procedure*).

¹³⁵Statute of the Chinese Soviet Republic Governing the Punishment of Counter-revolutionaries, 8 Apr. 1934, in 4 *Collected Works*, *supra* note 92, at 243-48. Also translated in Butler, *supra* note 97, app. 20, and in P. Griffin, *supra* note 103, app. B (hereinafter *CSR Statute on Counterrevolutionaries*).

separate military legal system having jurisdiction only over military personnel. Article 8 of the Judicial Procedure resinded the military court statute of 1 February 1982, along with the civilian courts statute of 9 June 1982 and the provisional judicial procedure of 13 December 1981. The military courts were now granted a concurrent sweeping jurisdiction to apprehend, try, sentence, and execute "all criminals."¹³⁶ The broad powers earlier granted the SPSB in Decree 5 were confirmed. The system of automatic confirmation of judgments by higher courts was abolished.¹³⁷ In its place was granted a right to appeal to the next higher court within seven days. Counterrevolutionaries, landlords, and gentry were denied appellate rights in border areas, in areas under attack and in unspecified "critical situations." Their sole procedural guarantee was a two-level system of preliminary hearings and final trials.¹³⁸ A preliminary hearing at a primary military court was to culminate in a final trial at the next higher level military court. No appeal was to be allowed after decision under this two-level system, however, unless the procurator was dissatisfied with the decision.

The Statute on Punishing Counterrevolutionaries further reflects the deterioration of the distinction between civilian and military law as military offenses were intermingled with civilian crimes in one statute of general application. Soldiers surrendering to the enemy with their weapons or other military equipment, or who persuaded others to surrender, were to be executed.¹³⁹ The provisions of the December 1983 AWOL order were incorporated into Article 18, which prescribed the death penalty for Red Army members who organized or lead desertion, or who individually deserted the Red Army five or more times. Other military-related crimes included deserting orders; abandoning, or selling military materiel; disobeying orders "with a counterrevolutionary purpose," or otherwise creating confusion at the front; murdering "the revolutionary masses," stealing or destroying their property, or otherwise damaging "the prestige of the Soviet and the Red Army among the masses"; revealing state or military secrets; and making or possessing "counterrevolutionary propaganda" material.¹⁴⁰

¹³⁶Judicial Procedure, *supra* note 134, art. 3. This authority was also granted to provincial and *hsein* judicial sections, and to local committees for the eradication of counterrevolutionaries.

¹³⁷*Id.* art. 5.

¹³⁸*Id.* art. 6.

¹³⁹CSF Statute on Counterrevolutionaries, *supra* note 136, art. 18.

¹⁴⁰*Id.* arts. 19, 20, 21, 15, and 13.

1. Evaluation of the CSR Period.

The Chinese Communist military legal system underwent considerable development during the CSR period. Although its military jurisdiction was enlarged to include civilians in a virtual state of martial law during the last year of the CSR, the basic norms of a differentiated military legal system with jurisdiction essentially limited to military members were in place by 1932. The military courts system was the first judicial organization to be formalized in the CSR and the first to embody many of the Soviet-model features that would become typical in the PRC, including the procuracy, lay assessors, and the collegial bench.

a. Preference for informal adjudication.

The operation of the military courts reflected the traditional Chinese preference for resolving conflicts at a lower level whenever possible. Since Red Army members were by definition members of the favored classes, their transgressions were to be handled leniently. Breaches of military discipline were kept out of the military courts, where only grave breaches of law and counterrevolutionary crimes were to be punished. Until the Statute on Punishing Counterrevolutionaries was enacted in 1934, military courts had only the military's own early basic laws and disciplinary codes, along with several Party and CSR orders or directives, to apply. Once a case was brought to court a guilty verdict could routinely be expected, because the procurators and the SPSB would have already thoroughly investigated and rendered a preliminary decision. In cases of great importance, usually involving counterrevolutionaries, mass trials were employed.

b. Subordination of law to state policy.

The traditional Chinese subordination of law to the dominant state philosophy was also apparent during the CSR period. The political goals of the CSR legal system were to establish revolutionary order and protect the rights of "the people's masses."¹⁴¹ Because the CSR was a "democratic dictatorship of the proletariat and peasantry,"¹⁴² equality before the law applied only to "workers, peasants, Red Army soldiers, and all toilers and their families."¹⁴³ The CSR denied rights of citizenship to "militarists, bureaucrats, landlords, the gentry, village bosses, monks, [and] all exploiting and counter-revolutionary

¹⁴¹ See *supra* text accompanying note 102.

¹⁴² Constitution of the Chinese Soviet Republic, 7 Nov. 1931, art. 1, in C. Brandt, B. Schwartz and J. Fairbank, *A Documentary History of Chinese Communism* 220-24 (1952), art. 1.

¹⁴³ *Id.* art. 4.

elements."¹⁴⁴ This discrimination of legal treatment based on class was evident in many CSR legal enactments. For example, CEC Order Number 6 (December 1931)¹⁴⁵ prescribed heavy punishments for counterrevolutionary elements from landlord-gentry, rich peasant, and capitalist backgrounds, as well as for ringleaders. Members of counterrevolutionary organizations recruited from the ranks of workers, peasants, and the toiling masses, however, were to receive "light judgments."

A similar provision appears in Article 11 of the Organic Program of the SPSB. Punishment was to be "defined by the class line."¹⁴⁶ Workers, peasants, and Red Army members who participated in counterrevolutionary activities as mere followers were to be treated leniently, through reprimands, detention, dismissal from the military, or loss of civil rights. Similar offenses committed by members of the enemy classes would be punished severely.

The 1934 Statute on Punishing Counterrevolutionaries also provided lighter penalties for crimes committed by workers, peasants, or individuals who had rendered meritorious services to the Soviet.¹⁴⁷ Under the Judicial Procedure, "local magnates and landlords" were deprived of their right to appeal court decisions.¹⁴⁸

The class-oriented approach to justice in the CSR was summed up by Mao Tse-tung in his report to the Second All-China Congress of Soviets in January 1934: "The objective of the Soviet courts is the suppression of crimes committed by the landlord bourgeoisie, and sentences meted out are generally light on crimes committed by worker-peasant elements. . . . [T]he Soviet courts severely suppressed the activities of the counterrevolutionary elements, and the Soviet should not display any leniency whatsoever toward such elements."¹⁴⁹ Since Red Army members were by definition included among the favored classes (indeed, members of bad classes could not enlist), these class provisions were advantageous. They reinforced the tendency to max-

¹⁴⁴*Id.* art. 2.

¹⁴⁵See *supra* note 102.

¹⁴⁶Organic Program of the SPSB, *supra* note 105, art. 11.

¹⁴⁷CSR Statute on Counterrevolutionaries, *supra* note 135, art. 34: "Worker and peasant criminals who are not leaders, or whose crimes are not serious, should be given lighter sentences than those of the landlord bourgeoisie, in accordance with the stipulation of these articles." Art. 35: "For those who rendered meritorious service to the Soviet, sentences for their crimes should be lightened, in accordance with the stipulations carried in the articles."

¹⁴⁸Judicial Procedure, *supra* note 134, art. 5.

¹⁴⁹Report of the Central Executive Committee and the People's Committee of the CSR to the Second All-Soviet Congress, 23 Jan. 1934, in 4 Collected Works *supra* note 92, at 155, 175.

imize administrative handling of transgressions, leaving most Red Army soldiers' disciplinary offenses outside the jurisdiction of the military courts.

c. Voluntary surrender and confession.

The Chinese tradition of extending leniency toward offenders who voluntarily surrendered and confessed their crimes was incorporated into the CSR legal system. The CSR went still further, however, granting leniency to those who, after detection of their offenses, "repented" and aided the authorities by exposing coconspirators.¹⁵⁰

d. Analogy.

Article 38 of the Statute on Punishing Counterrevolutionaries provided for punishment of crimes not specified in the statute by application of analogy: "Any counterrevolutionary criminal behavior not included in this statute shall be punished according to the article in this statute dealing with similar crimes."

The incorporation of the principle of analogy in CSR law was both rooted in traditional Chinese law, and derived from the laws of the Soviet Union. Application of criminal statutes by analogy was allowed under the imperial codes, but was abolished in the codes of the Republic of China (ROC).¹⁵¹ In Russia, analogy had been included in the early Tsarist codes, until its abolition in the 1903 code revision.¹⁵² After the Bolshevik seizure of power, there being relatively few legal rules, tribunals were to rely on the application of "revolutionary communist legal consciousness."¹⁵³ When the Soviet codes were eventually established, analogy was restored to fill any gaps in the laws.¹⁵⁴

E. THE "UNITED FRONT" PERIOD

On October 16, 1934, 90,000 Red Army members broke through the Nationalist armies encircling the CSR area and began the "long march," ostensibly "to fight Japan in the North."¹⁵⁵ Thirteen months and over 6,000 miles later, fewer than 20,000 survivors were attempting to rebuild their forces in their barren new base, Yen-an, in northern Shensi province. To avoid destruction by a final Kuomintang

¹⁵⁰Organic Program of the SPSB, *supra* note 105, art. 11; CSR Statute on Counterrevolutionaries, *supra* note 135, art. 36.

¹⁵¹See *supra* text accompanying notes 46 & 47.

¹⁵²R. Makepeace, *Marxist Ideology and Soviet Criminal Law* 105 (1980).

¹⁵³*Id.* at 71, 72.

¹⁵⁴*Id.* at 106. The doctrine was finally eliminated in the 1960 RSFSR Criminal Code.

¹⁵⁵CCP Anti-Japanese Declaration for National Salvation, Nov. 28, 1935, in 5 *Collected Works*, *supra* note 92, at 1.

extermination campaign, the CCP skillfully sought to take advantage of public opinion to force a "united front" with the Nationalist government against Japan. After the Sino-Japanese War broke out in July 1937, the CCP Central Committee made four public pledges in connection with the newly-concluded united front: (1) to abide by Sun Yat-sen's Three People's Principles (nationalism, democracy, people's livelihood); (2) that the CCP "abandons all its policy of overthrowing the KMT by force and the movement of sovietization, and discontinues its policy of forcible confiscation of land from landlords"; (3) to abolish the CCP's "Soviet government" and to unify the nation; and (4) to abolish the Red Army and to reorganize its troops into the national army under the control of the National Government.¹⁵⁶ In contrast with its public propaganda of cooperation, the CCP privately planned to utilize the critical wartime situation to implement Mao's policy of "70 per cent expansion, 20 per cent dealing with the Kuomintang, and 10 per cent resisting Japan."¹⁵⁷ Mao outlined a three-stage United Front strategy to his military cadres: first, a compromising stage to safeguard the CCP's existence and development; second, a struggle phase to build CCP political and military strength; and third, an offensive stage to seize power.¹⁵⁸

The CCP consolidated its rule in the Shensi-Kansu-Ningsia Border Region, the Shansi-Chahar-Hopei Border Region, and other areas that remained the bases of CCP operations throughout the Second World War. During this period, the military legal foundations laid and subsequently abandoned during the Chinese Soviet Republic were reestablished and developed. The Red Army was renamed the Eighth Route Army, and the courts were nominally under the jurisdiction of the National Supreme Court. In reality, the judicial systems of the Eighth Route Army and of each border region operated as separate entities.

During this period, the military legal system further developed its dual function of maintaining military discipline and furthering the political objectives of the CCP. In 1937, Mao outlined three basic principles of political work within the Eighth Route Army which illustrate the political role of the military legal system:

First, the principle of unity between officers and men, which means eradicating feudal practices in the army, prohibiting beating and abuse, building up a conscious discipline, and

¹⁵⁶The CCP's Public Statement on KMT-CCP Co-operation, Sept. 22, 1937, in C. Brandt, B. Schwartz and J. Fairbank, *supra* note 142, at 245-47.

¹⁵⁷ Kuo, *supra* note 70, at 292.

¹⁵⁸*Id.*

sharing weal and woe—as a result of which the entire army is closely united. Second, the principle of unity between the army and the people, which means maintaining a discipline that forbids the slightest violation of the people's interests, conducting propaganda among the masses, organizing and arming them, lightening their economic burdens and suppressing the traitors and collaborators who do harm to the army and the people—as a result of which the army is closely united with the people and welcomed everywhere. Third, the principle of disintegrating the enemy troops and giving lenient treatment to prisoners of war. Our victory depends not only upon our military operations but also upon the disintegration of the enemy troops.¹⁵⁹

In February 1938, the Shansi-Chahar-Hopei (SCH) Border Region government reissued a 1937 ROC statute on "Emergency Crimes Endangering the Republic."¹⁶⁰ While the exigencies of war and martial law were reflected in the extension of military jurisdiction over a lengthy list of offenses committed "for the purpose of endangering the Republic," some important refinements in the legal system, previously abandoned by the CSR, were reestablished. Article 8 provided that military tribunals must report their decisions, together with the facts of the case tried, "to their superior organ of military justice for approval prior to implementation." Article 9 further required military or police organs to immediately notify their governing organs of all arrests made. Cases not covered by this emergency statute were to be handled under the provisions of the criminal law of the ROC (Article 10).

In October 1938, the SCH border region government promulgated its own separate Revised Statute Concerning Punishment of Traitors.¹⁶¹ In many respects similar to the CSR statute on counterrevolutionaries, the SCH statute reflected the different conditions of the United Front in that the traitors were no longer the "counterrevolutionaries," but were now defined as those who cooperated with an enemy country. Like the 1937 ROC statute, the SCH border region statute provided for military jurisdiction over a lengthy list of offenses committed to help "the enemy," such as selling him materiel and food;

¹⁵⁹Mao, Interview with the British Journalist James Bertram, Oct. 25, 1937, in 2 Selected Works of Mao Tse-tung 53 (1965).

¹⁶⁰Revised Laws Governing Emergency Crimes Endangering the Republic, Sept. 4, 1937, reissued Feb. 10, 1938 by the Shansi-Chahar-Hopei Border Region Administrative Committee, in P. Griffin, *supra* note 103, app. J.

¹⁶¹Revised Statute Concerning Punishment of Traitors, Oct. 15, 1938, in P. Griffin, *supra* note 103, app. K.

disclosing information concerning the military, political, or economic situation; sabotage; and currency offenses (Article 14). While the earlier statute on emergency crimes provided for review only by the next higher organ of military justice, the October statute required a summary of the decision, together with the evidence and the defense offered, to be sent to the highest organ of military affairs of the central government for decision (Article 15). The highest military organ could then choose among four courses of action: (1) approve the decision, (2) transfer the case to other organs, (3) send new personnel to retry the case, or (4) retry the case itself. Article 5 severely discouraged false accusations: "Those who falsely accuse others of any crime under this statute should be punished according to that article."

Further differentiation between military and civilian jurisdiction was reestablished in the 1939 Shensi-Kansu-Ningsia (SKN) Border Region "Martial Law."¹⁶² Military jurisdiction was limited under the statute to those civilians committing one of the enumerated, mostly military-related crimes within a war zone or contiguous area when martial law was in effect. Even in these cases the military judicial organs had the option of transferring the case to the civilian courts for trial (Article 5). A requirement that appropriate compensation be made for destroyed or requisitioned property in martial law areas further demonstrates the role of military law as a means of maintaining popular support for the army (Articles 6 and 7). Additional evidence of this policy is seen in the 1939 SKN border region statute "Governing Punishment of Traitors in Wartime,"¹⁶³ which made burning and looting capital offenses (Article 3).

The separation of the military and civilian legal systems was reinforced by the 1942 SKN "Statute Protecting Human and Property Rights,"¹⁶⁴ enacted at the height of the United Front period. The statute provided that "except in periods of martial law, nonmilitary personnel who commit crimes will not be tried by military law" (Article 13). The statute provided for a number of additional procedural safeguards, for both the military and civilian legal systems. The right to appeal was allowed (Article 18). Cases involving the death penalty were to be reviewed and approved by the central border region government before execution, even if no appeal was filed, although emergency wartime situations could be exempted from this requirement

¹⁶²Draft Statute of the Shensi-Kansu-Ningsia Border Region Concerning Martial Law During War, 1939, in P. Griffin, *supra* note 103, app. E.

¹⁶³Draft Statute of the Shensi-Kansu-Ningsia Border Region Governing Punishment of Traitors During War Times, 1939, in P. Griffin, *supra* note 103, app. D.

¹⁶⁴The Shensi-Kansu-Ningsia Border Region Statute Protecting Human and Property Rights, Feb. 1942, in P. Griffin, *supra* note 103, app. C.

(Article 19). Arrested persons and any evidence were to be presented to the procurator or the Public Security Bureau within twenty-four hours of the arrest (Article 9), and judicial organs were to decide the case within thirty days of receiving it (Article 11).

Military trials during this period were conducted publicly and followed a rather informal procedure, as might be expected in a wartime situation:

While the masses did not yell and shout slogans, as in the mass trials, they were free to question the criminal during the proceedings. The defendant and witnesses testified and the judge questioned them. Agnes Smedley describes the chief judge of one such court as a young officer with five years of regular schooling. His chief education had been in the army. She says, "Of ordinary law he knew nothing, but he knew patriots, he knew traitors, and he knew politicians who would be traitors if they could."¹⁶⁵

By the end of this period the Chinese Communist military legal system had undergone considerable substantive and procedural development. While retaining the role of regulating internal military discipline, the military legal system was functionally differentiated from the civilian system as its jurisdiction over civilians and civilian offenses was progressively limited.

IV. DEVELOPMENT OF MILITARY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

A. PERIOD OF CONSOLIDATION (1949-1953)

As the second world war ended, the long-standing bitter rivalry between the CCP and the Kuomintang reached a climax that resulted in renewed civil war and the triumph of Communist power throughout all of mainland China. During this period of struggle and rapid expansion, the military legal system was again called upon to enlarge the scope of its jurisdiction to include the civilian sector. As areas came under Communist control, the administrative and legal functions were assumed by the military.

In February 1949, the Central Committee of the CCP issued a directive abrogating the legal codes of the ROC and prescribing the judicial principles to be applied in the "liberated areas." "Work of the people's judiciary," it stated, "should not be based on the Kuomin-

¹⁶⁵P. Griffin, *supra* note 103, at 91-92 (quoting A. Smedley, *Battle Hymn of China* 483 (1943)).

tang's Six Codes but should be based on new people's laws."¹⁶⁶ While a unified system of laws was lacking in the communist areas, regional and party directives or regulations provided some form of legal order. Because no comprehensive military codes were introduced to replace those of the Kuomintang, various military units maintained their own separate disciplinary regulations.¹⁶⁷

On the eve of the proclamation of the PRC, a provisional constitution was adopted. This "Common Program,"¹⁶⁸ in accordance with the policy of the CCP, declared the complete abolition of the laws and courts of the Nationalist government: "All laws, decrees and judicial systems of the Kuomintang reactionary government which oppress the people shall be abolished. Laws and decrees protecting the people shall be enacted and the people's judicial system shall be established" (Article 17). The Common Program further provided that the PLA should establish Military Control Committees as the governing organs in all newly-liberated areas, to "lead the people in establishing revolutionary order and suppressing counterrevolutionary activities" (Article 14). The military control committees and their military tribunals were to exercise administrative and legal authority during the period of consolidation and reorganization until elections could be held and the local People's Governments could assume power.

The role and functions of the military tribunals during the early part of this transitional period are illustrated by the case of Wang Kuo-jui, a PLA truck driver in Shanghai.¹⁶⁹ On 3 June 1949, shortly after the Communist takeover of Shanghai, Wang was speeding in his army truck when he struck and killed a bicycling university student. The Political Department of the Shanghai Garrison Headquarters investigated the case, and Wang admitted his guilt. The Judge Advocate Division of the Political Department quickly imposed a death sentence "in order to enforce our army's strict discipline," and "as a warning to future careless drivers," which was announced in the press on 6 June 1949. No law or regulation was cited as the basis for the crime or sentence. The sentence elicited appeals for clemency from

¹⁶⁶Quoted in S. Leng, *supra* note 97, at 23.

¹⁶⁷Military Court of the Anhui Provincial Military District, *Strengthening the Legal System in the Military to Ensure Victory in War*, translated in Foreign Broadcast Information Service, People's Republic of China Daily Report [F.B.I.S.], July 13, 1981, at 01.

¹⁶⁸The Common Program of the Chinese People's Political Consultative Conference, Sept. 29, 1949, in *Fundamental Legal Documents of Communist China* 34 (A. Blaustein ed. 1962).

¹⁶⁹*Chieh-fang Jih-Pao* (Liberation Daily), Shanghai, June 6, 7, and 16, 1949, translated in A. Rickett, *Legal Thought and Institutions of the People's Republic of China: Selected Documents* 213-19 (U. Pa. Inst. for Legal Res., mimeographed, 1964).

the public. The case was submitted for review to the Commander, the Political Commissar, and the Deputy Commander of the East China Military District, and the following order was announced:

Driver Wang Kuo-jui, who caused the death of a person while operating a vehicle against police regulations, should receive the death penalty. However, many people of the working class and educational and business communities have earnestly appealed by mail or telegraph for a commutation so that the culprit, Wang, may have a chance to redeem himself through meritorious service. Respectful of public opinion, this headquarters hereby commutes the death penalty to three years penal servitude.¹⁷⁰

The *Wang* case shows the dominant operational role of the political authorities in investigating, adjudicating and reviewing the case. Besides keeping order and demonstrating its strict military discipline, the new communist regime also educated the masses by first imposing the death sentence as an example and then commuting it "in respect of public opinion," in accordance with the long-standing policy of seeking the support of the people.

During this period of consolidation the PRC gradually filled the void left by the complete abrogation of all the Nationalist codes by enacting statutes governing specific crimes, such as the Statute on Penalties for Corruption,¹⁷¹ and the Statute on Punishment for Counterrevolutionary Activity.¹⁷² As had been the case during the CSR period, the legal system was mainly directed at suppressing "counterrevolutionaries."

The Statute on Punishing Counterrevolutionaries contained numerous enumerated counterrevolutionary offenses, as well as two broad articles to cover almost any eventuality. Article 18 made the act retroactive to cover offenses committed before the establishment of the PRC, and Article 16 adopted the traditional principle of analogy: "Persons who have committed other crimes for counterrevolutionary purposes that are not specified in this Statute are subject to the punishment applicable to the crimes which most closely resemble those specified in this Statute." Additionally, the 1951 Provisional Regulations for the Preservation of State Secrets further expanded

¹⁷⁰*Id.* at 218.

¹⁷¹Statute on Penalties for Corruption in the Chinese People's Republic, Apr. 21, 1952, in Blaustein, *supra* note 168, at 227.

¹⁷²Statute on Punishment for Counterrevolutionary Activity, Feb. 20, 1951, in Blaustein, *supra* note 168, at 215 [hereinafter PRC Statute on Counterrevolutionaries].

the scope of counterrevolutionary offenses by adopting sweeping and vague definitions of what constitutes state secrets, to include almost anything not publicly released, as well as the catchall phrase "other state affairs that must be kept secret."¹⁷³ In nationwide mass campaigns, such as the Land Reform and Suppression of Counterrevolutionaries movements, military tribunals and ad hoc people's tribunals¹⁷⁴ conducted mass trials and condemned millions to death or long-term "reform through labor."¹⁷⁵ Mao called for stern measures to be taken against counterrevolutionaries, to include abrogation of the traditional practice of "suspending a [death] sentence for two years."¹⁷⁶ For those "counterrevolutionaries" purged from the Party, Government, and PLA, however, a more lenient line was adopted:

[G]enerally it is necessary to exercise the principle of imposing the capital punishment on 10–20 percent of them and adopt the policy of passing the death sentence on the rest, then placing them on probation with forced labor, and watching over the consequences. In this way, we will be able to gain the sympathy of society, avoid mistakes on our part in regard to this problem, and split up and disintegrate our enemies. This will be advantageous in utterly destroying the counterrevolutionary force, and preserve a big labor force, which will be beneficial to national production and construction.¹⁷⁷

The military tribunals often administered civilian as well as military cases during this period. In June 1950, the Military Tribunal

¹⁷³Provisional Regulations for the Preservation of State Secrets, June 8, 1951, in 2 China L. Rep. 274-78, art. 2 (1983).

¹⁷⁴See generally Organization Regulations of People's Tribunals, translated in Current Background (Hong Kong: U.S. Consulate General), No. 151, Jan. 10, 1952.

¹⁷⁵Mao admitted that 800,000 "enemies of the people" had been "liquidated" up to 1954 in the unedited version of his 1957 speech "On the Correct Handling of Contradictions Among the People." Cohen, *supra* note 9, at 10 n.17. A French authority has estimated that five million Chinese were executed between 1949 and 1952. Guillermez, *supra* note 82, at 24 n.8. The Nationalist Chinese claim the 1949-1952 toll was 19.3 million killed. Ministry of Justice Investigation Bureau, 2 The Charts of the Existing Conditions of the Chinese Communists 34 (1972). In June 1957, Premier Chou En-lai reported to the National People's Congress that 16.8% of counterrevolutionaries tried had been sentenced to death and 42.3% had been sentenced to reform through labor, with the remainder receiving administrative punishments. Amnesty International, Political Imprisonment in the People's Republic of China 29 (1978).

¹⁷⁶Mao, *Comments on the Work of Suppressing and Liquidating Counterrevolutionaries*, June 15, 1951, in Miscellany of Mao Tse-tung Thought (1949-1968) pt. 1, at 6, 8 (Joint Publications Research Service [J.P.R.S.] No. 61269-1, Feb. 20, 1974).

¹⁷⁷Resolutions of Third National Conference on Public Security, May 15, 1951, in *id.* at 9, 10.

of the Peking Municipal Military Control Committee announced several death sentences in espionage and robbery cases.¹⁷⁸ As late as August 1951, the same Military Tribunal announced the decision of 418 cases concerning counterrevolutionary offenses.¹⁷⁹ Military jurisdiction over civilians accused of counterrevolutionary activity was limited by the 1951 statute on counterrevolutionaries to those periods when military control committees were functioning.¹⁸⁰ It should also be noted that the 1951 statute does not intermingle civilian offenses with strictly military offenses, as did the 1934 CSR statute on counterrevolutionaries. Thus the military and civilian legal systems were clearly separate by this time, even though provision was made for extending military jurisdiction over civilians during times of crisis.

The operation of military tribunals in trying civilians under the 1951 Statute on Punishing Counterrevolutionaries is illustrated by an espionage case decided 17 August 1951 by the military court of the Peking Military Control Committee.¹⁸¹ Lo Jui-ching, Procurator General of the Peking Municipal Peoples Procurator's office, charged seven defendants of various nationalities with "conspiracy to armed assault, concealing arms and ammunition, and spying out secrets of the Chinese State," under the direction of the United States.¹⁸² There was no provision for defense, and the defendants were not represented by defense counsel. The Public Security Bureau had already investigated and "proved with conclusive evidence" the guilt of the accused. Typically, all the defendants confessed their guilt. The military court found all the defendants guilty of violating various articles of the Statute on Punishment for Counterrevolutionary Activity. In accordance with Article 18 of the statute, the court applied the statute retroactively, as all of the crimes were committed before the statute was enacted on 20 February 1951. Indeed, five of the seven defendants had been in custody since 26 September 1950. The court was careful to cite Article 20 of the statute as the legal basis for its jurisdiction over the civilian defendants, as the period of military control had not

¹⁷⁸*Jen-min Jih-pao* (People's Daily), June 3, 1950, cited in T. Hsia, Guide to Selected Legal Sources of Mainland China 12 (1967).

¹⁷⁹*Jen-min Jih-pao*, Aug. 25, 1951, cited in L. Gudoshnikov, Legal Organs of the People's Republic of China (Moscow 1957), translated in Joint Publications Research Service No. 1698, at 79.

¹⁸⁰PRC Statute on Counterrevolutionaries, *supra* note 172, art. 20: "The affairs of persons who have committed crimes specified in this Statute while military administrative committees are functioning are subject to consideration by military tribunals set up by the headquarters of military districts, military administrative committees, or organizations combatting banditry."

¹⁸¹*The Trial and Conviction of U.S. Spies in Peking: Texts of the Indictment and Verdict*, People's China (Supplement), Sept. 1, 1951.

¹⁸²*Id.* at 3.

yet ended in Peking.¹⁸³ Two of the defendants were sentenced to death, and the others to terms of imprisonment ranging from five years to life. Evidently no appeal was allowed, as the two death sentences were executed on the day the verdict was pronounced.¹⁸⁴

B. "CONSTITUTIONAL" PERIOD (1954-1965)

During the early years of the Constitutional period, there was a clear ascendancy of the more formalized "jural" model of justice over the informal "societal" model that had prevailed during the period of consolidation. The Constitution¹⁸⁵ promulgated on 20 September 1954 reflected a new effort to achieve a regularized and institutionalized system. Like the 1936 Constitution of the USSR,¹⁸⁶ the PRC Constitution promised that courts would be independent and subject only to the law (Article 78), and that all citizens were "equal before the law" (Article 85). Citizenship, however, was not universal: "The state deprives feudal landlords and bureaucrat-capitalists of political rights for a specific period of time according to law" (Article 19). Nevertheless, the legal system was regularized to such an extent that a preeminent Chinese legal text could declare: "Judicial organs can only impose punishment on the basis of the law and in accordance with the seriousness and size of the crimes and the attitude and behavior of the criminal. It is not permissible to handle matters not in accordance with the law."¹⁸⁷

The military was also regularized under the 1954 Constitution. The armed forces of the CCP, having achieved the seizure of national power from the Kuomintang, and having learned from the experiences of the Korean war, now assumed the role of a national force. The state, rather than the Party, was now to control the armed forces, with the PRC chairman as commander in chief (Article 42). A regular officer corps¹⁸⁸ and a system of national conscription¹⁸⁹ were also introduced.

¹⁸³ See *supra* note 180.

¹⁸⁴ *U.S. Spy Ring Smashed in Peking*, People's China, Sept. 1, 1951, at 25, 27.

¹⁸⁵ Constitution of the People's Republic of China, Sept. 20, 1954, in Blaustein, *supra* note 168, at 1-33 [hereinafter Constitution (1954)].

¹⁸⁶ Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, 1936, arts. 112, 123, in *The Soviet Legal System* 61-79 (W. Butler comp. 1978). See generally Cohen, *China's Changing Constitution*, 1 *Nw. J. Int'l L. & Bus.* 57 (1979).

¹⁸⁷ Lectures, *supra* note 65, at 189.

¹⁸⁸ See generally Regulations on Active Service of CPLA Officers, Feb. 8, 1955, translated in Current Background No. 312, Feb. 15, 1955.

¹⁸⁹ See generally Military Service Law, July 30, 1955, translated in Current Background No. 344, Aug. 8, 1955, at 4-11. A new version of the Military Service Law was enacted May 31, 1984, translated in Foreign Broadcast Information Service, June 6, 1984, at K1.

A separate formal system of military courts was established by the 1954 Constitution and the organic laws enacted under its authority. Besides establishing a Supreme People's Court and local people's courts, the Constitution provided for military courts as part of a system of "special courts" (Article 73). The Organic Law of the People's Courts,¹⁹⁰ adopted one day after the Constitution was proclaimed, specified the establishment of military courts as one of the special courts (Article 26). Military procuracies were also authorized under the provision for special people's procuracies of the Organic Law of the People's Procuratorates.¹⁹¹ While both statutes specified that the organization of military courts and procuracies would be prescribed separately by the National People's Congress,¹⁹² no such acts have been published in the official "Collection of Laws and Regulations of the People's Republic of China."¹⁹³ If enacted, these organizational regulations probably were classified under the broad 1951 Regulation for the Preservation of State Secrets.

Military courts and procuracies were established at all levels in September 1954.¹⁹⁴ Their function during this period was described in a later New China News Agency report:

Under the leadership of party committees and political organs at various levels, the military legal organs cooperated with and exercised a check-and-balance with the security department, enforced and protected the law, dealt effective blows to sabotage activities of class enemies at home and abroad, protected the legitimate rights and interests of all PLA commanders and fighters, and purified the PLA ranks. They played a role in strengthening the army and insuring the successful execution of battle plans and various tasks.¹⁹⁵

The highest organ of military law was the Military Division of the Supreme Peoples' Court. The Military Division had a status equal to the Court's three general divisions (two criminal and one civil).¹⁹⁶ The chief judge of the Military Division was concurrently a member of the judicial committee of the Supreme People's Court.¹⁹⁷

¹⁹⁰Organic Law of the People's Courts of the PRC, Sept. 21, 1954, in Blaustein, *supra* note 168, at 131.

¹⁹¹Organic Law of the People's Procuratorates of the PRC, Sept. 21, 1954, in Blaustein, *supra* note 168, at 144.

¹⁹²Organic Law of the People's Courts, art. 27; Organic Law of the People's Procuratorates, art. 1.

¹⁹³T. Hsia, *supra* note 178, at 12.

¹⁹⁴New China News Agency, *PLA Revives Military Courts, Procuratorates*, Dec. 6, 1978, translated in F.B.I.S., Dec. 8, 1978, at E21.

¹⁹⁵*Id.*

¹⁹⁶T. Hsia, *supra* note 178, at 12.

¹⁹⁷*Id.*

Military courts were organized in each of the country's eleven Military Regions and at the Military Provincial District level.¹⁹⁸ The military courts tried cases involving "contradictions between ourselves and the enemy or criminal elements who violate criminal law."¹⁹⁹ A functionally specialized class of judge advocate officers to carry out legal duties was provided in the Regulations on the Service of Officers.²⁰⁰

In the absence of a unified PRC criminal code or a military criminal code, the military courts initially applied a series of separate regulations such as the "PLA Provisional Military Regulation for Eastern China" or the "Provisional military law and discipline of the 9th corps of the Chinese People's Volunteers in time of war."²⁰¹ PRC statutes governing specific crimes were also applied.²⁰² In 1963, a unified military discipline regulation was issued, followed by an internal administration regulation in 1964.²⁰³ As there was no known military procedural code or guide equivalent to the U.S. Manual for Courts-Martial, the military courts generally followed principles and procedures similar to those of the civilian court system.²⁰⁴

The operation of the higher military courts during this period is illustrated by two related espionage cases decided by the Military Tribunal of the Supreme People's Court on 23 September 1954.²⁰⁵ The Tribunal was composed of Chief Judge Chia Chien and Judges Chu Yao-tang and Chang Hsiang-chien.

In the first case, the Military Procurator of the Supreme People's Procuratorate filed charges of espionage against eleven U.S. airmen (ranging in rank from Colonel to Corporal) whose B-29 had been shot down over China near North Korea on 12 January 1953. Significantly, no mention is made of the defendants' making the customary admissions of guilt, although two of the accused apparently revealed some incriminating information. Nevertheless, all were found guilty of espionage and reconnaissance activity, as well as attempting to "re-supply and maintain liaison with other U.S. special agents," in vio-

¹⁹⁸ Yang, *Organization of Military Regions and Power Seizure*, Chinese Communist Affairs, Oct. 1967, at 48.

¹⁹⁹ Code of Military Discipline of the Chinese People's Liberation Army, Nov. 25, 1975, art. 3, translated in *Issues & Studies*, Oct. 1976, at 89, 90 [hereinafter PLA Discipline Regulation (1975)].

²⁰⁰ Regulations on Active Service of CPLA Officers, *supra* note 188, art. 4.

²⁰¹ Military Court of the Anhui Provincial Military District, *supra* note 167, at O1.

²⁰² See *supra* text accompanying notes 171-72.

²⁰³ *Two Documents From the CCP CC Military Commission*, *Issues & Studies*, Oct. 1976, at 88 (editor's note).

²⁰⁴ Handbook on the Chinese Armed Forces 5-28 (U.S. Defense Intelligence Agency 1976).

²⁰⁵ *Judgment on U.S. Espionage Cases*, People's China (Supplement), Dec. 16, 1954.

lation of Articles 6, 11, and 16 of the Statute on Punishing Counterrevolutionaries. The U.S. wing commander was sentenced to 10 years' imprisonment; the operations officer received a "lightened" sentence of eight years since he had "shown repentance" during the investigations and trial. The pilot was sentenced to six years' imprisonment, and the crew members were given "mitigated sentences" of five or four years because they did not bear the "main responsibility."

In the second case, two U.S. civilians and nine Chinese nationals ("former military officers of the Chiang Kai-shek gang") were accused of espionage and, on the part of the Chinese, high treason. The indictment alleged that the nine Chinese defendants had been parachuted into China in July, September, and October 1952. The two Americans were captured when their plane was shot down on 29 November, in an attempt to contact and resupply the nine Chinese defendants. In accordance with the traditional Chinese practice of confession, all the defendants "admitted the crimes committed by them." Under articles 3, 6, 7, 11, 14 and 16 of the Statute on Punishing Counterrevolutionaries, the two Americans were sentenced to terms of life and twenty years' imprisonment, respectively. Four of the Chinese defendants were sentenced to death. Another four were "given lighter sentences" of life imprisonment because they had "shown repentance during the trial." One defendant, having "shown true repentance during the trial," was given a "mitigated sentence" of fifteen years' imprisonment.

These two cases reflect the institutionalization and regularization of the military court system achieved during the Constitutional period. In contrast with the previously-considered 1951 espionage case decided by the Military Tribunal of the Peking Military Control Committee,²⁰⁶ the 1954 cases were heard at the highest level of a fully established system of military courts. While the 1951 case had been prosecuted by the Peking Municipal Procuratorate, the state was represented in the 1954 cases by the Military Procurator of the Supreme People's Procuratorate. Significantly, defense counsel were appointed to represent the defendants in the 1954 cases; no defense counsel had been provided in the 1951 case.²⁰⁷ Nevertheless, the Military Tribunal of the Supreme People's Court never addressed the source of its jurisdiction over the defendants in the 1954 case, none of whom were members of the PLA. The 1951 case had cited as its source of jurisdiction Article 20 of the statute on punishing counter-

²⁰⁶ See *supra* text accompanying notes 181-84.

²⁰⁷ Article 76 of the 1954 Constitution guaranteed an accused the right to defense.

revolutionaries, which permitted civilians to be tried by military tribunals while military control committees were administering the civil government. As military administration was no longer in effect in 1954, the jurisdictional basis for these cases is unclear.

Even as the 1954 cases demonstrate the modernization and regularization of the military court system, they also reveal several characteristic features retained from the traditional Chinese and early Communist judicial systems. First, the traditional penchant for procuring confessions is evident. The related traditional practice of granting leniency for repentance shown after confession is also retained.²⁰⁸ Finally, the court applied the traditional principle of analogy by citing the analogy article of the Statute on Punishing Counterrevolutionaries as one of the bases for its judgment.²⁰⁹

Cases of lesser gravity involving breaches of military discipline or minor criminal offenses were generally handled administratively within local military units. Reflecting the dominant role of the Communist Party in military affairs, the administration of military discipline was a joint responsibility of the commander and the unit political commissar. Party committees, supervised by the commissar, are organized at each level of the PLA "to serve as the nucleus of unified leadership and solidarity in the Army units. . . . All important issues . . . must be referred to the Party committees for discussion and decision." The commander and the commissar are both "the leading officers of the Army units, jointly responsible for the Army's work."²¹⁰ The commissars have authority over prevention of desertion or dereliction of duty, investigation and complaints, discipline, and the handling of prisoners of war.²¹¹

²⁰⁸This practice is codified in Article 14 of the Statute on Punishing Counterrevolutionaries: Persons who have committed crimes specified in this Statute may be treated leniently, their punishment may be mitigated or may be completely exempted from punishment if one of the following circumstances obtains: "(1) They voluntarily appear before the people's government; admit their guilt, and sincerely repent of their crimes; (2) Before the discovery or investigation of a crime or after it they frankly confess to what they have done and are sincerely repentant and by their selfless work atone for the crime."

²⁰⁹See *supra* text accompanying note 172.

²¹⁰Regulations on PLA Political Work, 1963, I.3, quoted in H. Jencks, *From Muskets to Missiles: Politics and Professionalism in the Chinese Army, 1945-1981*, at 236 (1982).

²¹¹*Id.* at 240. Political Commissars regularly received instructions on how to administer discipline in their units. Commissars at the regimental level received a weekly "Bulletin of Activities" from the PLA General Political Department, classified "secret." As an example, Bulletin 13 (Mar. 20, 1961) reported three cases of soldiers who committed suicide due to inadequate handling of discipline by political officers and commanders. *Translated in The Politics of the Chinese Red Army: A Translation of the Bulletin of Activities of the P.L.A. 356-59* (J. Cheng ed. 1966).

C. CULTURAL REVOLUTION PERIOD (1966-1976)

The regularization of the military legal system, as well as its clear differentiation from the civilian system, virtually disappeared during the Cultural Revolution. Once again, as had been the case during the earlier civil war periods, military jurisdiction was extended to include the civilian sector during this new time of crisis.

The ascendancy of the jural model during the Constitutional Period was short-lived. Even before the Cultural Revolution was launched, the process of regularization of the legal system had given way to a rising tide of radicalism. The preeminence of law proclaimed in the 1954 Constitution and the 1954 Lectures on Criminal Law was superseded by a more Maoist doctrine explained in an article written by the Department of Law of the People's University of China: "Every aspect of our legal work must be placed under the absolute leadership of the Communist Party," whose policy "is not only the basis of law making, it is also the basis of law execution."²¹² The legal system must "combine principle with flexibility" so as to be responsive to "the permanent revolution in society."²¹³ Flexibility would also be better served by less precision in the laws: "Some people think that the more detailed the law, the better it is. This is an impractical idea."²¹⁴

Mao Tse-tung launched the Cultural Revolution in 1966, in an attempt to regain political dominance and impose Maoist norms on society. Hordes of youthful Red Guards zealously attacked the existing state and party power structure under the slogan of "continuing revolution." Tremendous disruption resulted; hundreds of thousands were persecuted, and many were killed.²¹⁵

The formal legal system was a particular target of the Maoists. On

²¹²Political and Legal Work Research Group, Department of Law, People's University of China, *Several Problems Relating to the Legal System of the Chinese People's Democracy, Cheng-fa Yen-chiu* (Political and Judicial Study), Apr. 1959, at 3-8, translated in A. Rickett, *supra* note 169, at 9, 12.

²¹³*Id.* at 10, 11.

²¹⁴*Id.* at 11.

²¹⁵According to the indictment of the trial of the Gang of Four (Nov. 1980-Jan. 1981), a total of 729,511 people (including over 80,000 PLA members) were allegedly framed and persecuted in the years 1966-1976, of whom more than 34,800 (including 1,169 PLA members) were persecuted to death. A Great Trial in Chinese History 20-21, 173-184 (1981). *Agence France-Presse* estimated that 400,000 to 800,000 were killed from 1966 to 1969. Butterfield, *supra* note 82, at 343-49. The Nationalist Chinese claim two million were killed from 1966 to 1970. Ministry of Justice Investigation Bureau, *supra* note 175, at 34.

31 January 1967 the *People's Daily* printed an editorial entitled "In Praise of Lawlessness,"²¹⁶ calling for the complete destruction of the "bourgeois" law so that a more "proletarian" law could be established. The Red Guards denounced the 1954 organic laws of the courts and procuracies and the entire structure of "legal procedure, judicial proceedings, etc." as "feudal, capitalist, and revisionist."²¹⁷ The concepts of "everyone is equal before the law," "presumption of innocence," and representation by defense counsel were condemned.²¹⁸ Independent administration of justice was termed a "poisonous weed."²¹⁹ Quoting Mao as instructing, "Depend on the rule of man, not the rule of law," the Red Guards proclaimed that "our carrying out work according to Chairman Mao's instruction is the highest criterion in the execution of law."²²⁰ Following Mao's 1967 instruction to "smash *Kung-chien-fa*" (police procuracy and courts),²²¹ the courts and public security organs were severely disrupted, and the procuracy was abolished entirely.²²²

Mao's ally, Lin Piao, head of the PLA, soon ordered the army into the conflict to support the Maoist faction. The CCP Central Committee decision "On Resolute Support for the Revolutionary Masses of the Left," announced 23 January 1967, implemented Mao's orders that "[t]he PLA should actively support the revolutionary leftists."²²³ It called upon the PLA to lend "active support" to the Maoist faction and, if necessary, "send out troops to support them positively." Opponents were branded as counterrevolutionaries, who were to be "resolutely suppressed." If they resisted, "the army should strike back with force." Implementing instructions issued by the Military Commission of the Central Committee on 28 January purported to set

²¹⁶Translated in Survey of China Mainland Press [SCMP] (Hong Kong: U.S. Consulate General), No. 3879, Feb. 14, 1967, at 13.

²¹⁷Completely Smash the Feudal, Capitalist and Revisionist Legal Systems, Survey of China Mainland Magazines [SCMM] (Hong Kong: U.S. Consulate General), No. 625, Sept. 3, 1968, at 23.

²¹⁸*Id.* at 24, 25.

²¹⁹*Id.* at 27. The provision for judicial independence in Art. 78 of the 1954 Constitution was omitted from the Maoists' 1975 Constitution.

²²⁰*Id.* at 23, 24. The Maoists called for a strict class interpretation of law: "Law is one of the weapons used to curb the sabotage activities of the class enemies, and is strong in class character. The mastery of law by the proletariat is for the purpose of defending its state power. Because of this, law must be commanded by the Party like the gun, and can never be allowed to dominate the Party." *Id.* at 28.

²²¹Quoted in Leng, *supra* note 11, at 359.

²²²T. Hsia and K. Haun, *The Re-Emergence of the Procuratorial System in the People's Republic of China*, 20-27 (Library of Congress Far Eastern Law Division, 1978).

²²³Decision of the Chinese Communist Party Central Committee on Resolute Support for the Revolutionary Masses of the Left, Jan. 23, 1967, *Current Background* No. 852, May 6, 1968, at 49.

guidelines for PLA "support the left" activities.²²⁴ The PLA would take "resolute measures of dictatorship against conclusively proven" rightists and counterrevolutionaries. Within the PLA, however, the struggle would be tempered: "Handling of contradictions among the people in the same way as dealing with the enemy is not permitted." Arrest of PLA members without orders was forbidden, as was corporal punishment.

In this time of crisis, as was the case during the period when the PRC was established and consolidated, military control committees were created to exercise direct military administrative and legal control throughout China. The 11 February 1967 proclamation announcing the establishment of the Peking Municipal Military Control Committee stated that "criminal acts supported by iron-clad evidence shall be dealt with by the Military Control Committee according to law."²²⁵ Within a fortnight the Peking military control committee announced the banning of certain factions and the arrest of their leaders.²²⁶ On 16 February 1968, Vice-Premier Hsieh Fu-chih introduced a five-man military control committee for the Supreme Court and announced: "The Center has decided to impose military control on all organs of dictatorship."²²⁷ Similar supervisory "three-way alliances" of revolutionary cadres and the masses, led by PLA members, were also to be imposed on the Supreme People's Procuratorate and "practically all government organs and agencies." Military control over *Kung-chien-fa* was subsequently established throughout most of China. The PLA was authorized to dispatch "Central Support-the-Left Units" to "take up posts in every military region and provincial military district to carry out the task of supporting the left."²²⁸ The PLA was granted authority to "pursue and arrest" opponents and "charge them and punish them according to law."²²⁹

²²⁴ Order of the Military Commission of the Central Committee, Jan. 28, 1967, Current Background No. 852, May 6, 1968, at 54.

²²⁵ Proclamation of the PRC Ministry of Public Security and the PLA Peking Garrison Headquarters, Feb. 11, 1967, Current Background No. 852, May 6, 1968, at 67.

²²⁶ Bulletin of the PLA Military Control Commission of the Peking Municipal Public Security Bureau, Feb. 25, 1967, in Chinese L. & Gov't, Fall/Winter 1971-72, at 328.

²²⁷ Vice Premier Hsieh Fu-chih's Talk at the Supreme People's Court, Feb. 16, 1967, Survey of China Mainland Press No. 4157, 1968, at 4. Several of the Supreme Court members were subsequently persecuted and expelled from the CCP. L. Tao, *Criminal Justice in Communist China* (pt. 2), Issues & Studies, July 1977, at 19, 48. In 1969, the court members were "sent down" to work in the fields of Hubei province. They were not allowed to return to Peking until after 1973. J. Tao, *La Cour Populaire Supreme de la Republique Populaire de Chine*, 37 *Revue Internationale de Droit Compare* 107, 111 (1985).

²²⁸ Some Directives Concerning the Dispatching of the "Central Support-the-Left" Units in All Military Regions and Provincial Military Districts, June 10, 1968, in Chinese L. & Gov't, Fall/Winter 1971-72, at 330, 332.

²²⁹ The July 23 [1969] Proclamation, in Chinese L. & Gov't, Fall/Winter 1970-71, at 269, 271.

Virtually all state institutions were placed under the direct control of the CCP. The 1973 Party Constitution proclaimed that state organs, the PLA and militia, labor unions, and social organizations "must all accept the centralized leadership of the Party."²³⁰ This situation of direct Party control was reflected in the new state constitution adopted by the Maoists in 1975. Calling the CCP "the core of leadership of the whole Chinese people," the new constitution declared that the PLA and militia were "led by the Communist Party of China" and that "the Chairman of the Central Committee of the Communist Party of China commands the country's armed forces."²³¹

While the courts were not formally abolished during the Cultural Revolution, they functioned only sparingly. More often, serious cases were handled by mass trials, "revolutionary committees," or organs of the military control committees.²³²

Despite the exigencies of an obviously chaotic situation, some internal checks apparently were initially maintained within the legal system, even though much of it had come under military control. Honan radio announced in May 1968 that death sentences pronounced by the Chengchou City Military Control Committee had been reviewed and approved by the Supreme People's Court.²³³ Some subsequent cases, however, apparently were not reviewed. In March 1970 the Kunmin Municipality Military Control Committee in Kunmin Province announced a number of sentences, including fifteen death sentences, which "were executed immediately," evidently with no appeal or review allowed.²³⁴

The complete triumph of the societal model of justice during the Cultural Revolution period is demonstrated in three representative court decisions of various military control committees.²³⁵ In a January 1971 decision of a county military control committee in Yunnan Prov-

²³⁰ Constitution of the Communist Party of China, Aug. 28, 1973, art. 7, in *The Tenth National Congress of the CCP (Documents)* 61, 69 (1973).

²³¹ Constitution of the People's Republic of China, Jan. 17, 1975, arts. 2, 15 [hereinafter *Constitution (1975)*], in T. Hsia and K. Haun, *The 1975 Revised Constitution of the People's Republic of China*, app. B (*Library of Congress Far Eastern Law Division* 1975). See generally *The New Constitution of Communist China* (M. Lindsay ed. 1976).

²³² Leng, *supra* note 11, at 360.

²³³ Chiu, *The Judicial System Under the New PRC Constitution*, in Lindsay, *supra* note 231, at 89 n.87.

²³⁴ Hsia, *The Tenth Party Congress and the Future Development of Law in China*, in House Comm. on Foreign Affairs, *Oil and Asian Rivals, Sino-Soviet Conflict—Japan and the Oil Crisis*, Hearings before Subcomm. on Asian and Pacific Affairs, 93d Cong., 1st & 2d Sess. 379, 404 (1973-74).

²³⁵ A number of military control committee sentencing documents are analyzed in Chiu, *Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents*, 68 *J. of Crim. L. & Criminology* 374 (1977), and in Edwards, *Reflections on Crime and Punishment in China, With Appended Sentencing Documents*, 16 *Colum. J. Transnat'l L.* 45 (1977).

ince,²³⁶ four local defendants were sentenced: an "American imperialist spy" and an "American and Chiang spy" were each sentenced to twenty years' imprisonment; one "counterrevolutionary" of "landlord family background" was sentenced to ten years, "in accordance with the party policy of 'dealing leniently with those who confess and severely with those who resist'"; and a "current counterrevolutionary" of "landlord family background" who, "although she was criticized and educated by the masses several times, . . . still refused to repent and reform herself," was sentenced "to be placed under control for five years."²³⁷ The tribunal utilized the sentencing notice as an opportunity to educate the masses:

We severely warn a handful of class enemies: you have already fallen into the vast expanses of the ocean of people's war. Your only way out is to turn yourselves in and confess your crime. If you put up a stubborn resistance, you will definitely be subjected to severe punishment by the iron fist of the dictatorship of the proletariat.²³⁸

Twenty-two criminals were sentenced by the military control committee of Szu-Mao region, Yunnan Province, on February 11, 1972.²³⁹ Among the offenses punished were killing, burglary, and "undermining a military marriage."²⁴⁰ Three "bandit Chiang spies" and two killers were sentenced by the military control committee of Meng-lien county in Yunnan Province on 8 August 1972. Three received twenty-year prison terms, while two received "lenient" sentences of five and fifteen years based on their confessions.²⁴¹

None of the three military control committee decisions cite any

²³⁶Notice of the CPLA Military Control Committee (Section) of the Public Security Organ, the Procuratorial Organ, and the Court of Ching-hung County, Hsi-hsuan-pan-na Chou, Jan. 26, 1971, in Chiu, *supra* note 235, at 393, doc. 2 [hereinafter PLA MCC Notice, Jan. 26, 1971].

²³⁷Control, the lowest criminal penalty imposed by the courts, is a form of supervised labor where the offender remains in society under surveillance. See the listing of informal, administrative, and criminal penalties in Amnesty International, *supra* note 175, at 57, 58.

²³⁸PLA MCC Notice, Jan. 26, 1971, *supra* note 236, at 394.

²³⁹Notice of the CPLA Military Control Committee of the Public Security Organs of the Szu-Mao Region of Yunnan Province, Feb. 11, 1972, in Edwards, *supra* note 235, at 97, doc. C.

²⁴⁰Adultery or cohabitation with the spouse of a PLA member has long been a criminal offense, although adultery *per se* is not. The violator here was sentenced to three years' imprisonment, which is the maximum penalty for this offense under the subsequently-enacted Criminal Law of the People's Republic of China, art. 181 (1979), translated in 73 J. Crim. L. & Criminology 138 (1982).

²⁴¹Notice of the CPLA Military Control Section of the Public Security Organs of Meng-lien County, Yunnan Province, Aug. 8, 1972, in Edwards, *supra* note 235, at 93, doc. B.

legal authority under which they operated, nor any laws or statutes applied to determine the various sentences, other than the phrases "according to law" and "in accordance with party policy." Nor is any mention made of any defense of the accused. "Lenient treatment" was often given to those who confessed, and more severe treatment was threatened for "those who resist." These policies would discourage an accused from attempting a defense or challenging any evidence presented by the authorities.

The formal military legal system was not spared by the Maoists' attacks on *Kung-chien-fa*. The system of military courts and procuracies was "dismantled" during the Cultural Revolution, and would not be officially revived until October 1978.²⁴² The administration of military justice was left to party organs. All disciplinary actions (as well as important questions of any kind)²⁴³ were required to be discussed in and approved by the unit Party committees before being carried out by the commanders or political commissars.²⁴⁴ Mao's name and doctrines were widely incorporated into new editions of the military disciplinary and administrative regulations.²⁴⁵ Mao's doctrine of the class nature of justice was embodied in Article 3 of the 1975 discipline regulations, in which leaders were admonished to apply Mao's doctrine of contradictions²⁴⁶ to disciplinary cases:

Strictly distinguish and correctly handle contradictions of two different natures and conscientiously grasp policies. As to mistakes in the nature of contradictions among the people, the guidelines of unite-criticize-unite, learn from past mistakes to avoid future ones, and cure the illness to save the patient should be resolutely upheld. As to contradictions between ourselves and the enemy or criminal elements who violate criminal law, disposition should be made according to law with reference to specifics of the case.

According to Mao's doctrine, even in the most serious cases (such as counterrevolution), offenders were to be more leniently treated if they

²⁴²New China News Agency, *supra* note 194, at E21.

²⁴³People's Liberation Army Code of Interior Management, Nov. 25, 1975, art. 3 [hereinafter PLA Internal Administration Regulation], *translated in Issues & Studies*, Oct. 1976, at 98.

²⁴⁴PLA Discipline Regulation (1975), *supra* note 199, art. 4.

²⁴⁵See *supra* notes 199 & 243. For example, Article 3 of the Disciplinary Regulation declared: "Theories of Marxism, Leninism, and Mao Tse-tung Thought concerning dictatorship of the proletariat and Chairman Mao's line of army-building are the guidelines for maintaining and consolidating the discipline of our army." Similarly, Article 2 of the Internal Administration Regulation proclaimed: "Correctness of ideological and political line determines everything."

²⁴⁶See *supra* text accompanying notes 66-69.

were members of favored classes such as the army or other government offices. Capital punishment was not to be employed for these offenders "not because they have done nothing to deserve death, but because killing them would bring no advantage, whereas sparing their lives would."²⁴⁷

The PLA's supervision over *Kung-chien-fa* gradually receded until "normalcy" was again restored in 1973. The extensive involvement of the PLA in the Chinese administrative and legal structure during the Cultural Revolution might seem, on its face, to be a violation of Mao's oft-quoted dictum that "the Party commands the gun and the gun must never be allowed to command the Party."²⁴⁸ Closer examination, however, reveals that this was not a *putsch* carried out by those espousing "the strictly military viewpoint," but rather a mobilization of a political army, under the firm control of Mao's party function, in furtherance of political goals. Premier Chou En-lai sought to refute a civilian versus military analysis of the Cultural Revolution by explaining to American journalist Edgar Snow that "we are all connected with the army, and the army connects all of us."²⁴⁹

V. MILITARY LAW IN POST-MAO CHINA

A. INTRODUCTION

Since the death of Mao Tse-tung in September 1976 and the subsequent ouster of the "Gang of Four,"²⁵⁰ China has entered a new era of reform and limited liberalization. One of the most notable developments has been the commitment of the more pragmatic post-Mao leadership, led by Deng Xiaoping, to a stable legal order and a regularized system of justice. The new leadership has recognized the need for strengthened legal institutions to guard against such arbitrary abuses as occurred during Mao's Cultural Revolution (the blame for which has subsequently been shifted to "renegades"): "Having had enough of a decade of turmoil caused by Lin Biao and the Gang of

²⁴⁷Mao, *On the Ten Great Relationships*, Apr. 25, 1956, in Chairman Mao Talks to the People 61, 78 (S. Schram ed. 1974). Mao suggested that, rather than executing these offenders, they should undergo "labor reform, so that rubbish can be transformed into something useful. Besides, people's heads are not like leeks. When you cut them off, they will not grow again. If you cut a head off wrongly, there is no way of rectifying the mistake even if you want to." *Id.* at 78.

²⁴⁸See *supra* note 75 and accompanying text.

²⁴⁹The New Republic, May 22, 1979, at 9, quoted in Chinese L. & Gov't, Winter 1970-71, at 271.

²⁵⁰Leading Maoists led by Mao's widow, Jiang Qing. See generally *Symposium: The Trial of the "Gang of Four" and its Implication in China* (J. Hsiung ed. U. Md. Sch. L. Occasional Papers/Reprints Series in Contemporary Asian Studies No. 3-1981 (40)).

Four, the people want law and order more than anything else. Democratization and legalization which the Chinese people have been yearning for are now gradually becoming a reality."²⁵¹

In response to the lawlessness of the Cultural Revolution, China has made considerable progress in restoring the respectability of the jural model of law, in stressing rule by law over rule by man, and in providing a degree of regularization and normalization to its restored legal system.

In March 1978, a new state constitution was adopted that mitigated some of the more radical features of the 1975 version.²⁵² The new constitution revived the rights of the accused to a defense and to an open trial.²⁵³ The procuracy was also restored.²⁵⁴

In October 1978, Minister of Public Security Zhao Cangbi delivered a speech on strengthening the legal system in which he called for the enactment of a criminal code, a civil code, and numerous environmental and economic laws.²⁵⁵ That minister Zhao was speaking with authority was evident from the December 1978 declaration of the CCP Central Committee:

In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systemized and written into law in such a way as to insure the stability, continuity and full authority of this democratic system and these laws. There must be laws for people to follow, these laws must be observed, their enforcement must be strict and lawbreakers must be dealt with. From now on legislative work should have an important place on the agenda of the National People's Congress and its Standing Committee. Procuratorial and judicial organizations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, keep to the facts; guarantee the equality of all

²⁵¹*Publicizing the New Laws*, Beijing Review, July 20, 1979, at 4.

²⁵²Constitution of the People's Republic of China, Mar. 5, 1978, in Documents of the First Session of the Fifth National People's Congress of the People's Republic of China 125-72 (1978) [hereinafter Constitution (1978)]. One of the Maoist features remaining in the 1978 Constitution was the retention of the CCPC Chairman as commander of the PLA (art. 19); added was a citizen's duty to support the Party (art. 56). See generally Cohen, *supra* note 186, for a comparative analysis of the 1954, 1975, and 1978 Constitutions.

²⁵³Constitution (1978), *supra* note 252, art. 41.

²⁵⁴*Id.* art. 43. See generally T. Hsia and K. Haun, *supra* note 222.

²⁵⁵T. Hsia & K. Haun, Peking's Minister of Public Security on Strengthening the Legal System 47-56 (Library of Congress Far Eastern Law Division 1979).

people before the people's laws and deny anyone the privilege of being above the law.²⁵⁶

The Party's call was answered by the Fifth National People's Congress. Numerous codes and laws were enacted beginning in 1979, to include the Criminal Law,²⁵⁷ the Criminal Procedure Law,²⁵⁸ and organic laws for the People's Courts²⁵⁹ and the People's Procuratorates.²⁶⁰ Under the new organic laws, the restored legal system reviewed many of the verdicts decided during the Cultural Revolution; between 1977 and mid-1980 more than 2,800,000 "unjust verdicts" were reversed.²⁶¹

The renewed ascendancy of the jural model of law reached new heights with the enactment of China's latest Constitution in December 1982.²⁶² An attempt to institutionalize the rule of law is apparent in Article 5, which proclaims that "(a)ll state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law." For the first time, legal restrictions are placed upon the Communist Party. The direct command of the PLA is removed from the CCPCC, at least formally, and vested in the newly established state Central Military Commission (Article 93).

The new Constitution proclaims that all citizens "are equal before the law" (Article 33). Unlike the 1954 version, the 1982 Constitution defines a "citizen" as anyone "holding the nationality of" the PRC. Disfavored classes need no longer be excluded from citizenship because, according to the preamble, they "have been eliminated in our country." "However," it warns, "class struggle will continue to exist within certain limits for a long time to come." The new Constitution does not continue the 1978 Constitution's citizens' duty to support

²⁵⁶ *Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*, Peking Review, Dec. 29, 1978, at 14.

²⁵⁷ The Criminal Law of the People's Republic of China, July 1, 1979, translated in 73 J. Crim. L. & Criminology 138 (1982) [hereinafter Criminal Law].

²⁵⁸ The Criminal Procedure Law of the People's Republic of China, July 1, 1979, translated in 73 J. Crim. L. & Criminology 171 (1982) [hereinafter Criminal Procedure Law].

²⁵⁹ The Law on the Organization of the People's Courts of the People's Republic of China, translated in *The Criminal Procedure Code of the PRC and Related Documents* 84 (C. Kim ed. 1985).

²⁶⁰ The Law on the Organization of the People's Procuratorates of the People's Republic of China, translated in Kim, *supra* note 259, at 96.

²⁶¹ S. Leng & H. Chiu, *Criminal Justice in Post-Mao China* 40 (1985).

²⁶² Constitution of the People's Republic of China, Dec. 4, 1982, translated in Beijing Review, Dec. 27, 1982, at 10-29 [hereinafter Constitution (1982)]. See generally Chiu, *The 1982 Chinese Constitution and the Rule of Law*, 11 Rev. Socialist L. 143 (1985).

the leadership of the CCP.²⁶³ Nevertheless, CCP control is confirmed by the continued adherence to the "Four Basic Principles" delineated by Deng Xiaoping in March 1979 as the basis of China's new "socialist legality":²⁶⁴ (1) the leadership of the CCP; (2) the guidance of Marxism-Leninism-Mao Tse-tung thought; (3) adherence to the people's democratic dictatorship (i.e. the dictatorship of the proletariat); and (4) following the socialist road.²⁶⁵ Under the tutelage of these principles, China's socialist legal system continues to amount to the policy of the CCP transformed and solidified into legal form, although its operation is generally more reasonable and predictable than in the past.

The restoration of the formal military legal system began on 20 October 1978 with the announcement that, "in accordance with the PRC Constitution," the PLA military courts were officially revived.²⁶⁶ The restoration was hailed as "an important organizational measure for strengthening our army's legal system and is of tremendous significance for grasping the key link in running the army well and fulfilling the general task for the new period." As part of the general national campaign for strengthening the legal system, the military political and legal organs would be "reviving and perfecting legal procedures in order to effectively protect socialist democracy and the legitimate rights and interests of cadres and fighters throughout the army, and to deal blows to sabotage activities of class enemies and criminals." Lin Biao and the Gang of Four were assigned the blame for having "disintegrated" the military's *Kung-chien-fa* during the Cultural Revolution, which had "gravely undermined the legal system of our army." The new military legal system would, it was promised, reinvestigate cases decided during the Cultural Revolution in order to quickly reverse injustices.²⁶⁷ The restoration of military judicial organs at local levels,²⁶⁸ as well as representative military court cases,²⁶⁹ were soon publicly announced.

The military procuracy officially resumed operations on 25 January 1979.²⁷⁰ A conference of chief military procurators from various PLA

²⁶³ See *supra* note 252.

²⁶⁴ S. Leng & H. Chiu, *supra* note 261, at 53.

²⁶⁵ Constitution (1982), *supra* note 262, at 11, Preamble.

²⁶⁶ New China News Agency, *supra* note 194, at E21-22.

²⁶⁷ *Id.* at E22.

²⁶⁸ Shanghai City Service, *Shanghai Military Courts Restored*, Feb. 25, 1980, translated in Foreign Broadcast Information Service, Feb. 29, 1980, at O4.

²⁶⁹ Peking Domestic Service, *Open PLA Military Court Sentences Army Cadres*, Dec. 7, 1978, translated in Foreign Broadcast Information Service, Dec. 8, 1978, at E22-23.

²⁷⁰ Beijing Domestic Service, *PLA Military Procuratorate Reestablished, Holds First Conference*, Mar. 20, 1979, translated in Foreign Broadcast Information Service, Mar. 21, 1979, at L20-21.

units met from 26 February to 2 March 1979 for training and study of relevant procuratorial documents, to include the newly-issued state arrest and detention act.²⁷¹ Huan Yukun, deputy director of the PLA General Political Department, admonished the conferees to "become dauntless prosecutors who have no fear of dying in the course of their duties."²⁷²

One of the greatest difficulties to be overcome in the restoration of the legal system was a critical shortage of trained lawyers and legal workers. The president of the Supreme People's Court announced at the National Conference of Presidents of Higher People's Courts and Military Tribunals in July 1979 that all legal workers above the level of assistant judge would be required to complete a training course within three years.²⁷³

Besides those trained for military legal work, thousands of PLA personnel were subsequently trained and transferred to civilian legal positions. This enabled the rapidly-expanding system to be staffed with reliable personnel of "good ideology and working style."²⁷⁴

Two-month courses soon began at national and local levels to train civilian and army political and judicial workers for the campaign to publicize the new legal system and its relation to "democracy and the four modernizations."²⁷⁵ Political and legal cadres from local PLA

²⁷¹*Id.* For text of the Arrest and Detention Act of the PRC, Feb. 23, 1979, see S. Leng & H. Chiu, *supra* note 261, at 187, doc. 3.

²⁷²Beijing Domestic Service, *supra* note 270, at L21. That military procurators and other legal workers continue to require encouragement to carry out their duties despite corruption and arbitrary superiors is evident from an article concerning military law enforcement during the Western Han Dynasty, published in *Guangming Ribao* on Nov. 7, 1984, at 3. Apparently a parable to be applied currently, the article praises the ancient incorruptible military law executioner Hu Jian for enforcing the law strictly, alertly, and calmly, "without deferring to the high and mighty." Hu executed a corrupt Imperial inspector under military law, although the inspector was a civilian. The Emperor excused this by decreeing that, as the violations of the law occurred in an army camp, military law was applicable. The moral of the parable appears to lie in Hu's written memorial to the throne: "It is said that military law is indispensable in the Army because it aims at building the power and prestige of the Army so that all Army officers and fighters may be in awe of it, and that punishment of those evildoers who have undermined the Army will inspire the Army." Liao Zhi, *Hu Jian Enforced the Law Without Deferring to the High and Mighty—A Story of Law Enforcement in Ancient Times*, translated in Foreign Broadcast Information Service, Nov. 15, 1984, at K9-11.

²⁷³Xinhua News Agency, *Presidents of People's Courts, Military Tribunals Meet*, Aug. 2, 1979, translated in Foreign Broadcast Information Service, Aug. 2, 1979, at L12-13.

²⁷⁴National judicial training classes for military officers transferred to judicial work, *Law Annual Report of China 1982/3*, at 210, 211 (Hong Kong: Kingsway, 1982).

²⁷⁵Xinhua News Agency, *Cadres Being Trained Throughout China to Publicize New Laws*, Aug. 2, 1979, translated in Foreign Broadcast Information Service, Aug. 2, 1979, at L13.

units were trained in the importance of establishing the legal system and achieving its purposes: "[Base [your] work on the facts and the law, get rid of the idea of privilege, correct illegal activities such as issuing random orders, making random arrests and forcing confessions from people."²⁷⁶ Similar campaigns within the PLA to study the legal system continue to this day. On 1 June 1986, the PLA instituted a new three-year program to educate soldiers on China's developing legal system, as part of a similar five-year nationwide campaign.²⁷⁷ The political basis for the campaign is explained in the PLA General Political Department's implementing circular: "To earnestly popularize legal knowledge, consciously observe party discipline and state law, and safeguard and respect state laws under the new historical conditions is an important political task for the Army."²⁷⁸

B. STRUCTURE

1. Military courts and procuracies.

The military courts of the PRC are authorized by the Constitution as an integral part of the state judicial system.²⁷⁹ They are organized under the Organic Law of the People's Courts,²⁸⁰ and assigned the common tasks of the people's court system:

[T]o punish all offenders . . . so as to safeguard the system of the dictatorship of the proletariat, the socialist legal system, and social order, . . . citizens' personal, democratic rights

²⁷⁶Kunming Yunnan Provincial Service, Yunnan PLA Units Organize Legal Training Course, Jan. 18, 1980, translated in Foreign Broadcast Information Service, Jan. 22, 1980, at 95.

²⁷⁷Xinhua News Agency, PLA Launches 3-Year Legal Education Program, July 25,

1986, translated in Foreign Broadcast Information Service, July 28, 1986, at R9.

²⁷⁸Beijing Domestic Service, Legal Knowledge Circular, Dec. 11, 1985, translated in

Joint Publications Research Service, China Report: Political, Sociological, and Military

Affairs, Jan. 7, 1986, at 122 [hereinafter JPRS-CPS]. Pedagogical techniques used in

past PLA legal publicity campaigns include slide shows, films, bulletin boards, dis-

cussions, and courses. Ai Pu & Ji Juxing, Guangzhou Military Region Conducts Legal

System Publicity and Education Activities, Renmin Ribao, May 13, 1985, translated in

JPRS-CPS, June 7, 1985, at 134, 135. Courses study the PRC Constitution, Criminal

Law, Military Service Law, Military Criminal Law, and a number of civil laws. The

studies are to assist PLA members to "get rid of such erroneous concepts as power

instead of law, punishment in place of law, and personal feelings taking precedence

of law which existed in their minds to one extent or another." The courses include a

final examination. Xinhua News Agency, Shenyang Military Region Leaders Take

Legal Exam, Apr. 24, 1986, translated in JPRS-CPS, May 27, 1986, at 65.

²⁷⁹Constitution (1982), art. 124. "The People's Republic of China establishes the

Supreme People's Court and the local people's courts at different levels, military courts

and other special courts."

²⁸⁰Organic Law of the People's Courts, *supra* note 259, art. 2. "The judicial authority

of the PRC is exercised by the following people's courts: . . . (2) military courts and

other special courts (as amended 1983, S. Leung & H. Chin, *supra* note 261, at 65 n.19).

and to guarantee the smooth progress of the socialist revolution and socialist construction.

The people's courts devote all their activities to educating citizens to be loyal to their socialist motherland and to voluntarily observe the Constitution and laws.²⁶¹

The military procuracies are also authorized by the Constitution,²⁶² and organized under the Organic Law of the People's Procuratorates.²⁶³ For the functional and organizational details of the military courts and procuratorates, the organic laws refer to separate enactments to be prescribed by the Standing Committee of the National People's Congress.²⁶⁴ These laws are classified under China's broad state and military secrets regulations, and have not been published.²⁶⁵ Nevertheless, considerable information concerning the organization and functions of the military justice organs can be found in available sources.

The Supreme People's Court is the highest organ in the military legal system. As of 1985, no separate military division had been established alongside the court's general divisions (two criminal, one civil, one economic). The task of reviewing military cases was assigned to sections within the criminal divisions.²⁶⁶

The Military Court of the People's Liberation Army is the highest military court below the Supreme Court, corresponding to the higher people's courts established for provinces, autonomous regions, and special municipalities. Tian Jia was named president of the court in 1982.²⁶⁷ The Military Procuratorate of the PLA, under Chief Procurator Yu Kefa, is the highest military procuratorial organ below the Supreme People's Procuratorate.²⁶⁸ Military courts and procuracies

²⁶¹*Id.* art. 3.

²⁶²Constitution (1984), art. 130: "The People's Republic of China establishes the Supreme People's Procuratorate and the local people's procuratorates at different levels, military procuratorates and other special procuratorates."

²⁶³Organic Law of the People's Procuratorates, *supra* note 260, art. 2.

²⁶⁴Organic Law of the People's Courts, *supra* note 259, art. 29; Organic Law of the People's Procuratorates, *supra* note 260, art. 2.

²⁶⁵Tsien, *supra* note 2, at 182.

²⁶⁶Each of the two criminal divisions is composed of three sections; each section corresponds to two administrative regions that existed before the Cultural Revolution. Each division thus includes a section for east and southwest China, a section for north and northeast China, and a section for northwest and south-central China. Military cases are assigned to the sections for east and southwest China. J. Tao, *supra* note 227, at 121.

²⁶⁷Law Annual Report of China, *supra* note 274, at 50, 51.

²⁶⁸*Id.* at 48, 49. The power to appoint or remove the President of the Military Court or the Chief Procurator of the Military Procuratorate is vested in the Standing Committee of the National People's Congress, at the suggestion of the President of the Supreme People's Court or the Procurator-General of the Supreme People's Procuratorate, respectively. Constitution (1982), art. 67(11), (12).

exist at the military region level, at the armed service level (army, navy, air force), at the general department level (unified staff, political and logistical departments supporting all branches of the PLA), and in each large unit, reportedly down to regimental echelons.²⁸⁹ The military judges are named by the Ministry of Defense,²⁹⁰ and the military courts are directly responsible to the Ministry of Defense, although they are also under the supervision of the Supreme People's Court.²⁹¹ As an integral part of the state judicial system, the military courts employ the same procedural rules as the civilian courts.²⁹²

2. Sources of law.

A considerable body of law has now been developed for application to the case of the PLA soldier who violates law or discipline. In major cases involving serious crimes or grave breaches of discipline, the soldier may undergo judicial punishment under the provisions of the Criminal Law, a supplementary military criminal law, or other state laws. For cases of lesser gravity, commanders, commissars, and party committees will collectively administer nonjudicial punishment under the PLA Discipline Regulations.

a. The Criminal Law.

The main purpose of the Chinese criminal justice system is to protect, first of all, the socialist order, and next, the personal rights of citizens. The Criminal Law²⁹³ fulfills this purpose by using "criminal punishments to struggle against all counterrevolutionary and other criminal conduct" to: (1) defend the system of the dictatorship of the proletariat, (2) protect socialist property of the whole people and property collectively owned by the laboring masses, (3) protect citizens' lawful privately-owned property, (4) protect citizens' rights of the person, democratic rights, and other rights, (5) maintain social order, order in production, order in work, order in education and research, and order in the lives of the masses of people, and (6) safeguard the smooth progress of the socialist revolution and the work of socialist construction.²⁹⁴

Crime is defined as any act that endangers the state, the socialist system, or society, and that is punishable by the Criminal Law. Eight

²⁸⁹Tsien, *supra* note 2, at 182.

²⁹⁰*Id.*

²⁹¹Barlow & Wagner, *Public Order and Internal Security*, in Dep't of Army, Pamphlet No. 550-60, China: A Country Study 425, 439 (1981) (Bunge & Shinn, eds.).

²⁹²Tsien, *supra* note 2, at 182.

²⁹³Criminal Law, *supra* note 257.

²⁹⁴*Id.* art 2.

categories of crimes and their penalties are listed in the Special Part. These offenses are: (1) crimes of counterrevolution, (2) crimes of endangering public security, (3) crimes of undermining the socialist order, (4) crimes of infringing upon the rights of the person and the democratic rights of citizens, (5) crimes of property violation, (6) crimes of disrupting the administrative order of society, (7) crimes of disrupting marriage and the family, and (8) dereliction of duty.²⁹⁵

The types of principal punishments applicable are: (1) control (a type of supervised labor with the offender remaining in society), which may range from three months to two years; (2) criminal detention (which may include compensation and one or two days' leave per month), which may range from fifteen days to six months; (3) fixed term imprisonment for six months to fifteen years (in prison or at "reform through labor" institutions for those physically able to labor); (4) life imprisonment; (5) the death penalty (including the traditional death penalty with suspension of execution for two years), executed by shooting.

To these are added supplementary penalties of fines, deprivation of political rights, and confiscation of property.²⁹⁶

The Criminal Law does not apply retroactively, as did the 1951 counterrevolutionary statute. Acts committed before the implementation of the Criminal Law are governed by the laws, decrees, and policies applicable at the time of the offense.²⁹⁷ While the presumption of innocence is still not adopted in Chinese law, provisions of the criminal procedure code afford some protections by requiring all evidence to be verified,²⁹⁸ by prohibiting illegal means of gathering evidence such as torture, threat, or enticement,²⁹⁹ and by prohibiting convictions based solely on the defendant's confession.³⁰⁰ The Criminal Law continues the traditional practices of rewarding voluntary surrender,³⁰¹ and, with certain restrictions, the application of analogy.³⁰²

²⁹⁵*Id.* pt. 2, chs. 1-8, arts. 90-192.

²⁹⁶*Id.* pt. 1, ch. 3, arts. 27-56.

²⁹⁷*Id.* art. 9.

²⁹⁸Criminal Procedure Law, *supra* note 258, art. 31.

²⁹⁹*Id.* art. 32.

³⁰⁰*Id.* art. 35.

³⁰¹Criminal Law art. 63.

³⁰²*Id.* art. 79: "A crime that is not expressly provided for in the Special Provisions of this Law may be determined and punished by reference to the most closely analogous article of the Special Provisions of this Law, but the matter must be submitted to the Supreme People's Court for approval."

b. The Military Criminal Law.

Until 1982, the PLA had never operated under a unified criminal code governing military crimes.³⁰³ Such a code was needed, according to the PLA General Political Department, to: (1) strengthen the army legal system, (2) correctly punish servicemen for their criminal offenses against their duties, (3) educate the large numbers of commanders and fighters in strictly abiding by the state's laws and honestly executing their duties, and (4) consolidate and enhance the army's combat effectiveness.³⁰⁴

On 10 June 1981, the NPC Standing Committee adopted a military criminal law, the PRC Provisional Regulations on Punishing Servicemen Who Commit Offenses Against Their Duties,³⁰⁵ which was implemented 1 January 1982. As part of the CCP campaign to strengthen the legal system, and in contrast with the usual treatment of military matters as state secrets, the law was announced and published in the press. The new military criminal law was adopted as "a supplement and continuation of the Criminal Law" to cover crimes committed by servicemen that are not written into the Criminal Law.³⁰⁶ Crimes committed by servicemen that are not covered by the military criminal law "will be handled in accordance with the related articles of the Criminal Law."³⁰⁷ Violations of military discipline that are "not punishable by criminal penalty" are not covered by the law.³⁰⁸ Such disciplinary violations are subject to nonjudicial punishment under the PLA Discipline Regulation.³⁰⁹ Minor violations of the military criminal law may also be "dealt with in accordance with military discipline" (Article 2).

The purpose of the military criminal law is "to wage struggle by means of penalty against all crimes against servicemen's duties and the state's military interests, to ensure victory in war and smooth progress in the army's modernization."³¹⁰ Because servicemen's crimes may cause "much greater harm" to the state, the law imposes "severer punishment for servicemen than for civilians for similar crimes."³¹¹

³⁰³ Anhui Military Court, *supra* note 167, at O2.

³⁰⁴ Xinhua News Agency, *Explanation of Regulations*, June 10, 1981, translated in Foreign Broadcast Information Service, June 12, 1981, at K4.

³⁰⁵ See *infra* app. A. Chinese text in 12 State Council Bulletin (1981), translation in Foreign Broadcast Information Service, June 12, 1981, at K1 [hereinafter *Military Criminal Law*].

³⁰⁶ *Explanation of Regulations*, *supra* note 304, at K4.

³⁰⁷ Military Criminal Law, art. 23.

³⁰⁸ *Explanation of Regulations*, *supra* note 304, at K5.

³⁰⁹ See *infra* text accompanying notes 312-17.

³¹⁰ *Explanation of Regulations*, *supra* note 304, at K4.

³¹¹ *Id.*

The various military offenses and their minimum and maximum penalties established by the law are summarized in the following table:

TABLE OF MILITARY CRIMES AND PUNISHMENTS*

(Authorized by the Provisional Regulations of the PRC on Punishing Servicemen Who Commit Offenses Against Their Duties, adopted 6 June 1981, effective 1 January 1982)

A. GENERAL OFFENSES

ARTICLE		PEACETIME		
		MAXIMUM CONFINEMENT	DEATH	WARTIME
3	Illegal abuse of firearms and equipment	3 years	No	—
	-particularly serious cases	3-7 years	No	—
4(a)	Betraying or losing state military secrets	7 years	No	3 years to life
(b)	Stealing, collecting, furnishing secrets to enemies	10 years to life	Yes	—
5	Leaving place of duty/neglecting duty	7 years	No	5-7 years
6	Desertion: noncombat	3 years	No	3-7 years
7	Illegally crossing the border (attempting to flee the PRC)	3 years	No	"more severe"
	-particularly serious cases	3-10 years	No	"more severe"
8	Permitting others to cross the border illegally	5 years	No	"more severe"
	-particularly serious cases	over 5 years	No	"more severe"
9	Maltreatment of subordinates—causing injury or grave consequences	5 years	No	—
	-causing death	over 5 years	No	—
10	Obstructing by force or threat the performance of duty of others	5 years	No	"more severe"
	-particularly serious cases	over 5 years	No	"more severe"
	-causing severe injury or death	life	Yes	"more severe"
11	Theft of weapons or materiel	5 years	No	"more severe"
	-particularly serious cases	5 years to life	No	death
12	Sabotage	3 years	No	"more severe"
	-particularly serious cases	3 years to life	Yes	"more severe"

*This table does not include common crimes, counterrevolutionary offenses, and other offenses against the state that are included in the PRC Criminal Law.

c. The PLA Discipline Regulation.

Nonjudicial punishment is administered in accordance with the provisions of the PLA Discipline Regulation promulgated in 1984.³¹²

³¹²People's Liberation Army Discipline Regulation, Jan. 27, 1984, translated *infra* app. B. The Chinese text appears in 1985 Yearbook on Chinese Communism 9-15 to 9-22 (Taipei 1985) [hereinafter PLA Discipline Regulation (1984)]. The 1984 Regulation, classified as a state military secret in the PRC, superseded the 1975 version (*supra* note 199), which in turn superseded the 1963 version. *Two Documents from the CCPCC Military Commission*, *supra* note 203 (editor's note).

B. COMBAT OFFENSES

ARTICLE		MAXIMUM CONFINEMENT	DEATH
13	Self-inflicted injury to evade duty	3 years	No
	-particularly serious cases	3-7 years	No
14(a)	Spreading rumors harmful to morale	3 years	No
	-particularly serious cases	3-10 years	No
14(b)	Colluding with the enemy to spread rumors harmful to morale	10 years to life	No
	-particularly serious cases	—	Yes
15	Abandoning wounded on the battlefield	3 years	No
16	Desertion from the battlefield	3 years	No
	-particularly serious cases	3-10 years	No
	-causing major battle losses	10 years to life	Yes
17	Disobedience of orders in battle	3-10 years	No
	-causing serious harm to war effort	10 years to life	Yes
18	False reports/falsifying orders	3-10 years	No
	-causing serious harm to war effort	10 years to life	Yes
19(a)	Voluntary surrender	3-10 years	No
	-particularly serious cases	10 years to life	No
19(b)	Aiding the enemy as a prisoner	10 years to life	Yes
20	Plundering or harming innocent residents in operational areas	7 years	No
	-serious cases	over 7 years	No
	-particularly serious cases	life	Yes
21	Maltreatment of captives	3 years	No

The regulation reflects the accumulated experience and philosophy of the Chinese Communist military legal system. The role of military law in fulfilling two paramount policy goals is clearly outlined: first, that military law reinforces the political nature of the PLA and recognizes the leading role of the CCP; and second, that military law operates to maintain discipline and efficiency of operation through a system of formal and administrative legal procedures.

The regulation summarizes the basic purposes for military discipline in the PLA: (1) implementing the line, principles and policies of the Communist Party of China, and obeying the state's Constitution, laws and regulations; (2) implementing the various orders, rules and regulations of the Army; (3) implementing orders, directives, and instructions of the higher level; (4) implementing the Three Main Rules of Discipline and the Eight Points for Attention.³¹³

The regulation establishes both rewards and punishments to reward outstanding performance, maintain discipline, and educate the troops. Rewards of commendation, medals of merit (of three classes), and personal or unit honorary title are conferred for such actions as

³¹³ PLA Discipline Regulation (1984), *supra* note 312, art. 2.

outstanding duty performance, rescue and relief, and for "inventions and creations."³¹⁴

The purpose of punishment is to "learn from past mistakes to avoid future ones and to cure the illness to save the patient" by reforming the violator's behavior.³¹⁵ In accordance with these principles, the regulation provides for a graduated system of disciplinary punishments to be administered at various command levels, depending on the grade of the offender and the gravity of the offense:

1. Warning;
2. Serious warning;
3. Demerit;
4. Major demerit;
5. Demotion from position (rank);
6. Dismissal from office;
7. Dismissal from military status.³¹⁶

The enumerated disciplinary violations for which these punishments are applied are:

1. Violating the policy of the Party and the Constitution, laws and regulations of the state;
2. Violating and disobeying orders, violating codes, regulations, institutions and systems;
3. Displaying a negative attitude in combat, cowardice in combat, failure to grasp combat opportunities;
4. Acting individually without orders or coordination from superiors and thereby hindering coordinated operations;
5. Damaging or losing public property, weapons, or equipment, or causing incidents due to violations of institutions;
6. Revelation of state and military secrets;
7. Failure to perform duties, delaying work;
8. Absence without leave, or failure to return from leave on time;

³¹⁴*Id.* ch. 2; PLA Discipline Regulation (1975) art. 6. The three classes of medals of merit are illustrated in Handbook of the Chinese People's Liberation Army 93 (U.S. Defense Intelligence Agency 1984).

³¹⁵PLA Discipline Regulation (1984), *supra* note 312, art. 20.

³¹⁶*Id.* art. 21.

9. Threatening superiors or others with weapons;
10. Fighting, or disturbing the public order;
11. Obscene or indecent conduct, dissolute behavior;
12. Theft of public or private property;
13. Gambling, smuggling, speculation;
14. Seeing a danger and not assisting;
15. Counterblows and vengeance, framing others, making false accusations, or creating rumors;
16. Unprincipled behavior, condoning wrongdoers and violations;
17. Suppressing democracy and physically punishing subordinates;
18. Making falsities and fakes, and deceiving superiors;
19. Violating discipline in other aspects.³¹⁷

d. Other Regulations.

Under the PLA Discipline Regulation, violation of other state and military laws and regulations may be punished as a disciplinary offense.³¹⁸ Two of these regulations with frequent application are the PLA Internal Administration Regulation and the PLA Regulation on Safeguarding State and Military Secrets.

The Internal Administration Regulation³¹⁹ contains the general guidelines for the operation of the PLA. It outlines the duties and responsibilities of soldiers and company-level commanders, regulates military courtesies and uniform, and governs the daily management of soldiers, equipment, and materiel.

The PLA Regulation on Safeguarding State and Military Secrets illustrates the acute sensitivity in China toward keeping "secrets," and implements the numerous state provisions for guarding secrets. The Constitution proclaims the citizen's duty to "keep state secrets" (Article 53). In 1951, the PRC promulgated the "Provisional Regulations for the Preservation of State Secrets," the continuing validity

³¹⁷*Id.* art. 22.

³¹⁸*Id.* art. 22(1), (2).

³¹⁹PLA Internal Administration Regulation, *supra* note 243. This regulation was revised in Sep. 1984 and expanded from 71 to 163 articles, but is as yet unavailable in English. Chinese text in *1985 Yearbook on Chinese Communism* 9-22 to 9-43 (Taipei 1985).

of which was affirmed in 1980.³²⁰ The PLA issued its own implementing regulations on state and military secrets in 1956,³²¹ and again in 1978.³²² The PLA regulations contain broad "rules for the safekeeping of secrets":

1. Never discuss military secrets you shouldn't discuss.
2. Never ask questions about secrets you shouldn't know.
3. Never read secret documents you shouldn't read.
4. Never mention a secret in personal correspondence.
5. Never record secret information on anything other than secret information files.
6. Never discuss military secrets in places where such secrets should not be discussed.
7. Never take secret documents to public places or to the homes of relatives or friends.
8. Never discuss party, state or military secrets in front of family members, including your own children.
9. Never use public telephones, clear language telegrams or civilian post offices for handling secret information.³²³

Violations of state and military secrets regulations are punishable as disciplinary violations,³²⁴ as military crimes,³²⁵ or under the Criminal Law.³²⁶

C. PROCESS

The administration of military justice within PLA units is a joint responsibility of the Commander and the Political Officer.³²⁷ Both are

³²⁰Provisional Regulations for the Preservation of State Secrets, *supra* note 173. The regulations were reissued in April 1980. Foreign Broadcast Information Service, Apr. 14, 1980, at L7.

³²¹Cheng, *supra* note 211, at 236. A draft text of the third amendment and supplement of these classified regulations was circulated to political commissars in Feb. 1961, and appears in *id.* at 236-43.

³²²New China News Agency, *Military Commission Issues Documents on Security*, May 20, 1978, translated in Foreign Broadcast Information Service, May 22, 1978, at E1.

³²³Regulation on PLA Safeguarding of State and Military Secrets, 1978, quoted in *id.* at E1. These rules are also incorporated in the 1984 PLA Internal Administration Regulation, *supra* note 319, at app. 4.

³²⁴PLA Discipline Regulation (1984) art. 22(6).

³²⁵Military Criminal Law art. 4.

³²⁶Criminal Law art. 186.

³²⁷See text accompanying notes 210-11.

responsible for the overall operation of the unit, under the supervision of higher level "leaders" (commanders and political commissars) and the unit Party committees.³²⁸ Under the Military Discipline Regulation, both the commander and the political officer have authority to administer disciplinary punishment. All disciplinary actions must be submitted to the unit's Party committee or branch for discussion and decision before being carried out by the leadership.³²⁹

1. Nonjudicial punishment.

The PLA commander or political officer confronted with a violation of military discipline must first decide whether the offending soldier should, under the circumstances, be given disciplinary punishment or the less severe informal punishment of "education and criticism."³³⁰ This informal penalty may be carried out privately or in the presence of the offender's fellow soldiers at a company-level criticism meeting, presided over by the deputy commander or political officer. The offender is expected to confess his wrong, make an oral or written self-criticism, and promise to reform.³³¹ "Struggle," a harsher informal penalty widely used during the Cultural Revolution, entails denunciation, intimidation, and at times violence, before a large audience.³³² New provisions in the 1984 Discipline Regulation appear to be directed toward prohibition of "struggle" in the PLA; direct and indirect physical punishment, scolding, and insulting personal dignity are now prohibited.³³³

If the violation is deemed serious enough, disciplinary punishment may be imposed after investigation and evaluation. The facts and circumstances of the offense, as well as its effect upon the unit, must be considered. The violator's own statement, his past record and degree of recognition of the offense, and "the opinions of the masses" must also be taken into account.³³⁴ The investigation is to be handled in a timely manner, and punishment should be administered within two months.³³⁵ Approval for extension of this time limit is required from higher authorities. The accused has a right to a defense, but is cautioned against trying to hinder the proceedings.³³⁶ Should pun-

³²⁸ PLA Internal Administration Regulation art. 15.

³²⁹ PLA Discipline Regulation (1984) arts. 4, 23, 24.

³³⁰ *Id.* art. 22.

³³¹ Handbook of the Chinese People's Liberation Army, *supra* note 314, at 17; Amnesty International, *supra* note 175, at 57.

³³² Amnesty International, *supra* note 175, at 57.

³³³ PLA Discipline Regulation (1984) art. 32.

³³⁴ *Id.* art. 29.

³³⁵ *Id.* art. 30.

³³⁶ *Id.* art. 36.

ishment be deemed appropriate, only one of the enumerated disciplinary punishments may be imposed.³³⁷ Punishments may be announced face-to-face, before the troops, in meetings, or in writing, "in order to educate the violator and the troops."³³⁸ If the violator does not accept his punishment, he may petition for appeal within ten days; execution of the punishment is not suspended during the petition period, however.³³⁹ Superiors must act on the appeal in a timely manner, generally within two months.³⁴⁰ If the appeal is held valid, the original punishment "should be corrected."³⁴¹

Soldiers, as well as leaders, are entitled to bring accusations of disciplinary violations.³⁴² Accusations may be submitted through channels, or bypassing channels. False accusations constitute separate violations of the Discipline Regulation.³⁴³

The disciplinary penalties do not include confinement. Temporary custody of up to seven days may be imposed upon soldiers who manifest signs of potential desertion, fight to avoid punishment, violence, or suicide.³⁴⁴

The actual operation of nonjudicial punishment in the PLA disciplinary system, and the dominant role played by Party organs, is illustrated in two representative cases:

Beginning in December 1980, leaders of an engineer and construction regiment in the Wuhan Military Region were misappropriating state funds. The Party committee of the region's logistics department conducted an investigation and brought the situation to the attention of the regiment's Party committee. The regimental Party committee administered disciplinary punishments of serious warning to both the regiment commander and to the regimental political commissar, which was reported in August 1981.³⁴⁵

In December 1983, some leading cadres of a division in the Beijing Military Region bribed proctors and allowed cheating in admissions

³³⁷*Id.* art. 29.

³³⁸*Id.* art. 32.

³³⁹*Id.* art. 31.

³⁴⁰*Id.* art. 38.

³⁴¹*Id.* art. 37.

³⁴²*Id.* art. 35.

³⁴³*Id.* art. 22 (15).

³⁴⁴*Id.* art. 41. The seven-day limitation for temporary custody is new to the 1984 Regulation, presumably in response to abuses committed during the Cultural Revolution.

³⁴⁵Beijing Domestic Service, *Hubei PLA Group Disciplined for Finance Violations*, Aug. 18, 1981, translated in Foreign Broadcast Information Service, Aug. 21, 1981, at P2.

examinations. The offenses were investigated by the Military Region Party Committee, which administered disciplinary punishment. The division commander and political commissar both received serious warnings, and the deputy political commissar, who was directly responsible, was dismissed from his position. The chief examiner and proctor who accepted the bribes received criticism-education and "disciplinary measures." Fifty-two students involved in the fraud had their names removed from enrollment lists. The Military Region Party Committee issued a notice concerning the case for subordinate units to use "as a mirror" to rectify "unhealthy tendencies of using the power of office for private purposes and fraud." The notice was publicized in March 1984.³⁴⁶

2. *Judicial punishment.*

Serious violations of the military criminal law may be punished by the military courts. Cases involving minor violations of the military criminal law, "when not too much harm has been caused," might not be considered criminal offenses, but instead be dealt with "in accordance with military discipline."³⁴⁷

The functional responsibilities of the various components of the Chinese judicial system are outlined in the Criminal Procedure Law:

The public security organs are responsible for investigation, detention, and preparatory examination in criminal cases. The people's procuracies are responsible for approving arrest, conducting procuratorial control (including investigation) and initiating public prosecution. The people's courts are responsible for adjudication. No other organ, organization or individual has the right to exercise these powers.³⁴⁸

The pretrial proceedings entail (1) detention and arrest, and (2) investigation. Arrest must be reported to the procuracy within three days (seven days in special circumstances), for approval within another three days.³⁴⁹ If the arrest is approved, the suspect may be held pending investigation for up to two months (three months if approved by the procuracy of the next higher level).³⁵⁰ Extortion of confessions by torture, as well as gathering of evidence by threat, enticement, or

³⁴⁶Zhao, *Beijing Military Region Moves Against Exam Fraud*, Renmin Ribao, Mar. 22, 1984, at 4, translated in JPRS-CPS, *supra* note 278, June 28, 1984, at 110.

³⁴⁷Military Criminal Law art. 2.

³⁴⁸Criminal Procedure Law art. 3.

³⁴⁹Arrest & Detention Act of the PRC, *supra* note 271, art. 8.

³⁵⁰Criminal Procedure Law art. 92. Actual practice still falls short of these mandated time standards. See S. Leng & H. Chiu, *supra* note 261, at 89.

deceit are forbidden.³⁵¹ After the investigation is complete, the procurator decides whether to initiate a public prosecution before the courts. Prosecution is initiated by filing an indictment with a court.³⁵²

The jurisdiction of the military courts extends beyond active duty service members to include staff members and workers within the military establishment.³⁵³ Chinese jurists have argued that this provision covers offenders who are civilian employees in military technical and academic capacities, since their familiarity and close connection with the military would involve the national military interest.³⁵⁴ They further argue that civilians who are joint offenders with military personnel should be punished under the stricter provisions of the military criminal law for offenses covered by that law.³⁵⁵

The Constitutional right to defense (Article 125), as implemented in the Criminal Procedure Law (Article 26), includes the right to a defense lawyer. That right, however, apparently does not attach until "after the court has decided to open the court session and adjudicate the case," thus precluding pretrial assistance.³⁵⁶ The following functions for defense lawyers were specified in the 1980-81 trial of the Gang of Four: to protect the legitimate rights and interests of the defendants; to contribute to the correct handling of the trial in the Special Court; to publicize socialist democracy and socialist legality; and to help persuade the defendants to acknowledge guilt, obey the law, and accept reform.³⁵⁷

The primary-level military court is a collegial panel composed of one judge and two "people's assessors." Trials of first instance in higher-level courts may be heard by a panel of from one to three judges and from two to four assessors.³⁵⁸ The military judge is a serving officer who has undergone juridical training, and is appointed by the Ministry of Defense.³⁵⁹ The assessors are lay judges who are to represent the military masses and to participate in the conduct

³⁵¹Criminal Procedure Law art. 32.

³⁵²*Id.* art. 100.

³⁵³Military Criminal Law art. 25.

³⁵⁴Zhang & Jim, *Studies in How To Determine Those Subject To Military Functional Offenses*, 3 Faxue Yanjiu (Studies in Law) 28, 29-30 (1984).

³⁵⁵*Id.* at 31, 32. This position has been enacted in the U.S.S.R. Military Criminal Law, Dec. 25, 1958, art. 1, incorporated as art. 237 of the Criminal Code of the R.S.F.S.R., translated in H. Berman, *Soviet Criminal Law and Procedure* (1972). Joint crimes are treated in the PRC Criminal Law, art. 22.

³⁵⁶Criminal Procedure Law art. 110.

³⁵⁷Quoted in S. Leng & H. Chiu, *supra* note 261, at 95.

³⁵⁸Criminal Procedure Law art. 105; Tsien, *supra* note 2, at 182.

³⁵⁹Tsien, *supra* note 2, at 182.

and decision of the trial. They are selected from prepared lists, and are also to have received some legal training.³⁶⁰

The Criminal Procedure Law provides for three stages in the trial process: examination of evidence, deliberation, and judgment.³⁶¹ While trials in China are generally open to the public (unless "state secrets or the private affairs of individuals" are involved), military trials are open only to a military public.³⁶² After the opening formalities, the trial begins with questioning of the accused by the court members or, at the court's request, by the military procurator. After the panel has concluded its questioning, the victim and the defense may be allowed to put questions to the accused. Witnesses and material evidence are also examined. After the tribunal completes its inquiry, the military procurator and the victim may address the panel. The accused may then make a statement, following which the defense attorney may conduct the defense. The court may allow debate, at the close of which the accused may make his final statement. The court then recesses to deliberate and render judgment, "based on the facts and evidence that have been clarified and based on the relevant laws."³⁶³ The decision as to guilt or innocence, what crime was committed, and what punishment is to be applied, is announced publicly and posted in military areas.³⁶⁴ Once a case reaches trial, having been investigated by both the security organs and the procuracy, conviction is virtually a certainty.³⁶⁵

Either the accused or the military procurator may appeal the decision of the court of first instance to the next higher level court, which must review the case and uphold, revise, or overturn the judgment.³⁶⁶ Punishment may not be increased in cases appealed by defendants, but may be increased in cases appealed by the procurator. The decision of the reviewing court is final. Death sentences are to be reviewed by the Supreme People's Court, whether appealed or not.³⁶⁷ Sentences to imprisonment are served in military prisons.³⁶⁸

³⁶⁰*Id.* Since 1983, assessors may be replaced with panel judges at the discretion of the trial court. S. Leng & H. Chiu, *supra* note 261, at 67.

³⁶¹Criminal Procedure Law arts. 108-125.

³⁶²*Id.* art 111; Tsien, *supra* note 2, at 183.

³⁶³Criminal Procedure Law art. 120.

³⁶⁴*Id.* art. 121; Tsien, *supra* note 2, at 183.

³⁶⁵According to official statistics for the first nine months of 1981, 99.7% of prosecutions brought by the people's procuracy at all levels were found guilty by the people's courts. S. Leng & H. Chiu, *supra* note 261, at 70.

³⁶⁶Criminal Procedure Law arts. 129-143.

³⁶⁷*Id.* art. 144.; Tsien, *supra* note 2, at 183.

³⁶⁸Tsien, *supra* note 2, at 183.

Under the Criminal Procedure Law, criminal complaints and accusations may be filed by citizens with the public security organs, the procuracy, or the courts.³⁶⁹ The procedures for servicemen to follow in bringing criminal complaints directly to the attention of military courts were outlined by the editors of *Zhongguo Fazhi Bao* (China Legal Journal) on 2 May 1986, in response to a letter from a PLA recruit in Henan province.³⁷⁰ Private prosecutions may be commenced before military courts under the provisions of the Criminal Procedure Law, with the additional requirement that the unit Party committee assist in the investigation and production of evidence. If supported by sufficient evidence, the case may be transferred to the military procuracy for initiation of public prosecution, or it may be directly investigated and heard by the military court as a private prosecution. If the evidence is insufficient to support a criminal prosecution, the case may be referred to the complainant's unit Party committee for further investigation. If sufficient evidence is developed, the unit Party committee may refer the case back to the court. Violations that do not constitute criminal offenses may be referred for possible disciplinary action. The law requires that complainants be informed of the potential legal responsibility incurred for false accusations.³⁷¹

The actual operation of the military legal system in post-Mao China is difficult to assess. The examination and analysis of the textual provisions of statutes and regulations, and the drawing of conclusions as to their meaning and importance, may produce a distorted image of their application in actual practice. Reports of actual cases and the procedures employed therein would be helpful, but are, unfortunately, rare. Those few that are publicized are generally done so for political purposes, to illustrate a new mass campaign or to deliver a warning. Nevertheless, they do illustrate the growing role of the military court system in maintaining stability and discipline within the PLA while responding to political and legal developments.

A case tried before the Military Court of the Logistics Department of Chengtu Military Region was publicized in *Jiefangjun Bao* (Liberation Army Daily) to coincide with the restoration of the military court system in December 1978.³⁷² A supply depot deputy chief of staff and two subordinates were accused of taking bribes, embezzlement and theft. As the military procuracy had not yet been restored,

³⁶⁹Criminal Procedure Law arts. 59, 126-128.

³⁷⁰Translated in *Inside China Mainland*, Nov. 1986, at 28.

³⁷¹Criminal Procedure Law, art. 60. Filing false accusations is a criminal offense under article 138 of the Criminal Law, and a disciplinary offense under article 21(15) of the PLA Discipline Regulation (1984).

³⁷²Peking Domestic Service, *supra* note 269, at E22-23.

the case was investigated by a special Party study group. After considerable material evidence and the testimony of witnesses were presented, the accused all admitted their guilt. The military court sentenced the three accused to prison terms ranging from six to ten years, and expelled them from both the Party and the army.

D. LAW OF WAR

China has long had its own customs and traditions concerning the conduct of warfare, derived from its vast historical experience. Western principles of international humanitarian law developed comparatively recently, and these began to be assimilated in China only in the latter part of the nineteenth century. Since that time, China has been active in the formation of the multilateral agreements establishing the international laws of armed conflict.

Following her participation in the Hague Conferences of 1899 and 1907, China ratified eleven of the Hague Conventions.³⁷³ The Republic of China later ratified the 1925 Geneva Protocol prohibiting the use in war of asphyxiating and poisonous gases,³⁷⁴ and the 1929 Geneva Conventions on prisoners of war, and the wounded and sick.³⁷⁵ The ROC participated in the 1949 Geneva Diplomatic Conference that concluded the four Geneva Conventions now in general force but, although it signed these conventions, it has never ratified them.³⁷⁶

In 1947, during the civil war that ended with the establishment of the PRC, the CCP announced that it would not be bound by "any treaties which disgrace the country and strip away its rights" concluded by the Nationalist government after 10 January 1946.³⁷⁷ This policy was modified somewhat in the PRC's first outline constitution, the Common Program, which proclaimed that the Communist government would examine all treaties and agreements concluded by the Nationalist government, and would "recognize, abrogate, revise or re-negotiate them according to their respective contents."³⁷⁸ In accordance with this policy, the PRC announced on 13 July 1952 that it would "recognize" the Nationalist government's accession to the

³⁷³2 People's China and International Law 1415 (J. Cohen & H. Chiu eds. 1974).

³⁷⁴Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 71.

³⁷⁵1929 Geneva Conventions, 160 L.N.T.S. 383.

³⁷⁶2 People's China and International Law, *supra* note 373, at 1417.

³⁷⁷Statement by the Central Committee of the Chinese Communist Party on Agreements and Negotiations Between the Kuomintang and Foreign Governments, Feb. 1, 1947, *Hsin-hua jih-pao* (New China Daily), Feb. 6, 1947, at 2, translated in U.S. Department of State, *United States Relations With China* 719, 720 (1949).

³⁷⁸Common Program, *supra* note 168, art. 55.

1925 Geneva gas protocol, and its signature to the 1949 Geneva Conventions.³⁷⁹ The PRC's formal ratification of the Geneva Conventions was deposited on 28 December 1956.³⁸⁰

In recent years, the PRC has become more active in the development of the international laws of armed conflict. In 1981, the PRC ratified the United Nations Conventional Weapons Convention.³⁸¹ A PRC delegation participated in the first session (1974) of the Geneva Diplomatic Conference on Humanitarian Law (1974-77), which drafted two protocols additional to the 1949 Geneva Conventions,³⁸² and the PRC became the first permanent member of the UN Security Council to ratify both protocols on 14 September 1983.³⁸³

1. *Protection of prisoners of war.*

Humanitarian principles governing the treatment of prisoners of war (P.O.W.s) were recognized in China as early as the fourth century B.C., when Sun Tzu wrote: "Treat the captives well, and care for them."³⁸⁴ The Sung dynasty code of 963 A.D. prescribed death by beheading for a soldier who killed an enemy who had given up his arms during armed conflict or who had deserted and had come to surrender.³⁸⁵

Mao Tse-tung, a careful student of Sun Tzu, strongly advocated a pragmatic approach to the treatment of P.O.W.s. He considered humanitarian treatment of P.O.W.s to be a powerful propaganda tool and a potential source of strength to his nascent Red Army. In 1929, he wrote, "Preferential treatment of captives is an effective method of propagandizing to the enemy forces."³⁸⁶ Mao prescribed a five-part plan to both propagandize the enemy and strengthen his own forces by using captives: "refrain from searching them for money and things"; welcome captives warmly and do not insult them; give captives equal

³⁷⁹*On China's Recognition of the Protocol of June 17, 1925, Prohibiting Chemical and Biological Warfare; On China's Recognition of the 1949 Geneva Conventions*, People's China, Aug. 1, 1952, at 33.

³⁸⁰People's Republic of China Ratification of 1949 Geneva Conventions, Dec. 28, 1956, 260 U.N.T.S. 442.

³⁸¹People's Republic of China Ratification of 1981 United Nations Conventional Weapons Convention, 1982 Chinese Yearbook of International Law (Chinese International Law Society) 491.

³⁸²Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 83 (Bern 1978).

³⁸³PRC Accession to Protocols, 237 Int'l Rev. Red Cross 315 (1983).

³⁸⁴Sun Tzu, *supra* note 28, at 76. Sun Tzu's disciple, Chang Yu, explained the practical basis for this humanitarian rule: "All the soldiers taken must be cared for with magnanimity and sincerity so that they may be used by us." *Id.*

³⁸⁵*Cited in 2 People's China and International Law, supra* note 373, at 1414.

³⁸⁶Resolution, *supra* note 92, at 185.

material treatment as the Red Army soldiers; propagandize captives, and allow those who do not wish to remain to leave; and give the captives medical attention and monetary allowances equal to those received by the Red Army.³⁸⁷ When returned captives spread their stories of good Red Army treatment among their fellow, often ill-treated conscripts, they would be more likely to defect and less likely to fight effectively. This policy of preferential treatment of captives was taught in the basic training of new recruits and incorporated as the eighth point of attention in the Red Army disciplinary rules: "Do not ill-treat captives."³⁸⁸

After the intervention of the PLA in the Korean conflict in 1950, humanitarian treatment of P.O.W.s did not suit the dictates of communist policy. United Nations troops taken prisoner by the PLA found that their treatment depended on the extent to which they were willing to cooperate under the Chinese "lenient policy." This ill-named policy was based on the communist allegation that the conflict was one of American aggression and part of a capitalist conspiracy against peace:

The Chinese claimed that all United Nations prisoners taking part in this unjust war were war criminals, and that if they were captured their captors had the right to kill them. But, the Chinese argument went on, the soldiers of the "aggressors" were, after all, ordinary working men who had been duped and misled by their reactionary rulers. Therefore prisoners would not be summarily executed (hence the "leniency") but would be given the opportunity to reach a state of remorse and repentance for their crimes.³⁸⁹

Having defined the Korean conflict as a capitalist war of aggression, the PRC held that the UN troops were "war criminals" deserving punishment, not protection. Under the "lenient policy," P.O.W.'s were subjected to harsh conditions and brutal treatment as they underwent "reeducation."³⁹⁰ Over 5,000 Americans died because of Chinese and North Korean war atrocities, and more than a thousand survivors were victims of war crimes.³⁹¹

³⁸⁷*Id.*

³⁸⁸See *supra* text accompanying notes 88 & 91, and note 92.

³⁸⁹U.K. Ministry of Defence, *Treatment of British Prisoners of War in Korea* (1955), reprinted in H. Levie, *Documents on Prisoners of War* doc. 134, at 651, 652 (60 Naval War College International Law Studies 1979).

³⁹⁰See generally *id.* and U.S. Department of Defense, *P.O.W.: The Fight Continues After the Battle* (1955), reprinted in H. Levie, *supra* note 389, doc. 131, at 643.

³⁹¹Senate Comm. on Government Operations, *Korean War Atrocities*, S. Rep. No. 848, 83d Cong., 2d Sess. 13-15 (1954). Of 7,140 U.S. P.O.W.s in the Korean War, 2,701

On its side, the PRC accused the UN of illegal treatment and "barbarous massacres" of Chinese prisoners of war.³⁹² But at the end of the war, seventy-one percent of the Chinese P.O.W.s held by the UN Command refused repatriation to the PRC, electing instead to join the Nationalists on Taiwan.³⁹³

Since the Korean War, and since formally ratifying the Geneva Conventions, the PRC's treatment of prisoners of war has gradually improved. During the 1962 border conflict with India, the PRC captured over 3,900 prisoners of war. India protested the failure of the PRC to grant access to the prisoners by the International Committee of the Red Cross (ICRC), or the Indian Red Cross Society. Further protests were lodged against the parading of 27 Indian officers in various Chinese cities, and against PRC attempts to indoctrinate Indian prisoners of war.³⁹⁴ Nevertheless, there were no allegations of the types of atrocities committed during the Korean conflict.

During China's 1979 border conflict with Vietnam, both parties accepted the services of the International Committee of the Red Cross, and allowed it access to prisoners of war.³⁹⁵ By 22 June 1979, a repatriation agreement concluded by the national Red Cross societies of the two countries had been carried out, with 1,636 Vietnamese and 238 Chinese P.O.W.s repatriated.³⁹⁶ The Vietnamese had been treated well by their Chinese captors.³⁹⁷

died in captivity (about 38%) D. Rees, *Korea: The Limited War* 461 (1964). In contrast, only 4% of U.S. and U.K. P.O.W.s held during the Second World War by Nazi Germany and Fascist Italy died in captivity (9,348 of 235,473). International Military Tribunal for the Far East, The Tokyo War Crimes Trial, Nov. 1948, reprinted in 2 *The Law of War* 1029, 1056 (L. Friedman ed. 1972). Detailed records of war crimes committed by the Chinese and North Korean Communists were collected by the War Crimes Division of the U.S. Army Judge Advocate Section in Korea. By the end of the conflict, reports of war crimes committed by the Chinese (not including those attributed to the North Koreans) totalled 4,922, of which 3,279 were committed against U.S. personnel. Of the total reports, 3,139 (2,178 U.S.) were classified as "probable war crimes." As of 30 June 1953, 439 case files had been prepared with a view toward prosecution. U.S. Army Judge Advocate Section, Korean Communications Zone, War Crimes Division, Interim Historical Report 43, 49 (June 30, 1953) (copies on file in U.S. Army Judge Advocate General's School Library).

³⁹²Ch'en Pi-ch'iang, *Unconditional Repatriation—An Inviolable Principle of the Geneva Convention*, People's China, Jan. 16, 1953, at 26-28.

³⁹³Of 20,344 Chinese P.O.W.s, 5,777 returned to the PRC, and 14,567 went to Taiwan. J. Goulden, *Korea: The Untold Story of the War* 647 (1992). Many of the defectors may have been former Nationalist troops impressed into the PLA. Others may have been motivated by fear of punishment under the long-standing Communist prohibition on surrendering, now codified as art. 19 of the Military Criminal Law (punishable by 3 years to life imprisonment).

³⁹⁴2 *People's China and International Law*, *supra* note 373, at 1573-75.

³⁹⁵210 *Int'l Rev. Red Cross* 162 (1979).

³⁹⁶211 *Int'l Rev. Red Cross* 211 (1979).

³⁹⁷Chen, *China's War Against Vietnam, 1979: A Military Analysis*, J. E. Asian Affairs, Spring/Summer 1983, at 233, 257.

2. *Suppression of grave breaches of the Law of War.*

The Geneva Conventions obligate each contracting party to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions.³⁹⁸ Grave breaches are defined as those involving any of the following acts, if committed against prisoners of war; civilians; the wounded, sick, or shipwrecked; or others protected under the Conventions: willful killing; torture or inhuman treatment; compelling a protected person to serve in the forces of a hostile power; willfully depriving a protected person of rights of fair and regular trial prescribed in the Conventions; unlawful deportation, transfer, or confinement of protected civilians; and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.³⁹⁹

From the early civil war years, the Chinese Red Army's disciplinary code, the Three Rules of Discipline and Eight Points for Attention, included prohibitions against looting civilians, damaging civilian property and crops, and ill-treating captives in its disciplinary code.⁴⁰⁰ Although based on pragmatic and propaganda considerations, and only selectively enforced (those branded class enemies, counterrevolutionaries, or war criminals were not protected), they served as a basis for further legal development. The military criminal law enacted in 1981 includes two articles that may be seen as providing at least some of the legal sanctions against war crimes mandated by the Geneva Conventions. Article 20 punishes soldiers who plunder and harm "innocent residents in military operational areas" with prison sentences (up to life imprisonment) or death. Serious maltreatment of captives may be punished with up to three years' imprisonment. Presumably, soldiers who injure or kill prisoners of war may also be punished under the relevant articles of the Criminal Law.

The Geneva Conventions impose a further obligation to search out and try those who have committed grave breaches of the laws of war.⁴⁰¹ If the accused are prisoners of war, however, the failure to

³⁹⁸ Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 [hereinafter GWS], art. 49, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 [hereinafter GWS Sea], art. 50, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [hereinafter GPW], art. 129, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter GC], art. 146, 75 U.N.T.S. 287.

³⁹⁹ GWS art. 50; GWS Sea art. 51; GPW art. 130; GC art. 147.

⁴⁰⁰ See *supra* text accompanying notes 87 & 385.

⁴⁰¹ GWS art. 49; GWS Sea art. 50; GPW art. 129; GC art. 146.

accord them rights of fair and regular trial would itself constitute a grave breach.⁴⁰²

After the Second World War, the Nationalist government tried 605 war crimes cases involving 883 Japanese defendants,⁴⁰³ under the provisions of the 1946 Law Governing the Trial of War Criminals.⁴⁰⁴ Before being forced from the mainland to Taiwan, the Nationalists terminated their program of war crimes trials and transferred many of the convicted Japanese war criminals to Tokyo to serve out their terms in the hands of the allied occupation authorities.⁴⁰⁵ After the establishment of the PRC on the mainland, many Japanese accused of war crimes were held without trial until 1956. In June of that year the PRC, courting Japanese diplomatic recognition, announced a new "lenient policy": those Japanese who had "committed minor crimes or who had repented comparatively well" were to be dealt with leniently and not prosecuted; those who committed serious crimes would receive "lenient sentences according to their crimes and conduct while in custody"; and those who had committed "crimes both during the war and further crimes on Chinese territory after the Japanese surrender would be dealt with according to the combined crimes."⁴⁰⁶

Special military courts were organized by the Supreme People's Court to try the remaining Japanese war criminals.⁴⁰⁷ The accused were allowed to present a defense, and be represented by defense lawyers. In one such trial, eight defendants faced charges that included mass slaughter of 1,280 villagers, killing of civilians and prisoners of war, and use of poison gas and "germ warfare."⁴⁰⁸ The defendants all confessed and expressed their contrition before the court. The military court adjudged prison sentences ranging from twelve to twenty years, with the time already spent in custody deducted from the terms. Two days after this trial, the Supreme People's Procuratorate released 335 Japanese accused of war crimes, because they "had shown repentance during their custody or . . . were lesser criminals."⁴⁰⁹

⁴⁰²GPW art. 129.

⁴⁰³P. Piccigallo, *The Japanese on Trial* 173 (1979).

⁴⁰⁴Law Governing the Trial of War Criminals, Oct. 24, 1946, in 14 *Law Reports of Trials of War Criminals* 152 (1949).

⁴⁰⁵P. Piccigallo, *supra* note 403, at 170.

⁴⁰⁶NPC Decision on Japanese Criminals, June 21, 1956, *reprinted* in 2 *People's China and International Law*, *supra* note 373, at 1590.

⁴⁰⁷*Id.*

⁴⁰⁸New China News Agency, *Japanese War Criminals Tried in Shenyang*, June 21, 1956, *reprinted* in 2 *People's China and International Law*, *supra* note 373, at 1591-93.

⁴⁰⁹New China News Agency, *335 Japanese Criminals Set Free*, June 22, 1956, *reprinted* in 2 *People's China and International Law*, *supra* note 373, at 1594.

While the trial procedures received by the Japanese defendants were doubtlessly of at least equal fairness and regularity with any accorded PRC citizens at the time, it is questionable whether they can be considered as having met the minimum standards prescribed in the Conventions.⁴¹⁰

The recent extensive development of the Chinese legal system includes provisions for a considerable number of procedural and substantive guarantees, to include the right of defense and the prohibition of any coercion of confessions. A strict application of these new legal standards in any future trials of war crimes suspects by military courts would go far toward fulfillment of the obligations imposed by the Geneva Conventions.

VI. CONCLUSIONS

The military legal system of Communist China has successfully performed a number of important functions since the PLA was first organized in 1927. It has, first of all, fulfilled the basic task of maintaining discipline that is common to all armed forces; only trained, disciplined armies, and not mobs, can win wars. At the same time, the military legal system has played an essential part in fulfilling the political aspects of military discipline in the PLA. As we have seen, the maintenance of discipline in the Red Army was essential in securing the good will and support of the peasants during the civil wars. Mao taught that "Red Army discipline is a practical propaganda to the masses."⁴¹¹ Undisciplined troops could have turned the peasants to active hostility, and Mao's guerilla "fish" would then have had no "water" to surround and protect them.⁴¹² Instead, the military legal system was a means of achieving the politically-based discipline Mao outlined to govern relationships between officers and soldiers of the army, between the army and the people, and between captors and captives.⁴¹³ This "iron discipline" was sufficiently durable to weather years of civil war and resistance to Japan and to ultimately achieve the complete seizure of state power so long sought by the CCP. With power won, the CCP's army assumed an additional role as a national defense force, but the political aspect of discipline remained paramount. The first rule of discipline for the PLA, even before the tra-

⁴¹⁰Particularly those providing: "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused." GPW art. 99.

⁴¹¹Resolution, *supra* note 92, at 182.

⁴¹²See *supra* note 93.

⁴¹³See *supra* note 159 and accompanying text.

ditional three main rules and eight points, remains "implementing the line, principles, and policies of the Communist Party of China."⁴¹⁴

The military legal system has fulfilled a second function, as an important part of the development of the Chinese legal system as a whole. As we have seen, the military court system was the first formalized court system of Communist China, and the first to establish the roles of the procuracy and the assessors. Throughout the history of Communist China, the military legal system has been called upon in times of crisis to function as the main, and at times the sole, instrument for carrying out the judicial function. In civil war, at the beginning of the PRC, and during the Cultural Revolution, the military legal system was required to extend its scope and maintain order for much of Chinese society. In the post-Mao restoration and rapid expansion of "socialist legality," the military legal system has played a leading role, and it has proved to be a source for thousands of cadres to supply much of the national legal system with trained and politically reliable legal workers.

The Chinese legal heritage is reflected in the operation of the military legal system. The traditional preference for informal adjudication of disputes is apparent as the commanders and Party committees continue to handle cases of significant gravity through disciplinary rather than criminal procedures whenever practicable.⁴¹⁵ Several other traditional principles are maintained in the modern military legal system, to include sentencing by analogy, rewarding of voluntary surrender and confession, suspending execution of the death penalty for two years, and lack of a presumption of innocence. At the same time, considerable recent substantive and procedural development is evident. A formal, regularized system that provides significant procedural guarantees and safeguards is now in place. Even if their actual application is as yet unclear, the provisions for defense, strict requirements for collection and evaluation of evidence, and appellate rights provide a basis for optimism that a normalized system capable of giving the PLA offender reasonably fair treatment is emerging. The past class-oriented approach to justice is giving way before loud calls for "equality before the law."⁴¹⁶ The development of

⁴¹⁴PLA Discipline Regulation (1984) art. 2(1).

⁴¹⁵See *supra* text accompanying notes 345 & 346.

⁴¹⁶See Li & Wang, *Adhere to the Principle That All Men Are Equal Before the Law, Safeguard the Authority and Dignity of the Law*, Red Flag, June 16, 1986, at 24-27. *translated in* Joint Publications Research Service, China Report: Red Flag, Aug. 7, 1986, at 42, 43, 45-48. Equality before the law is now proclaimed in the Constitution (1982), art. 23: "All citizens of the PRC are equal before the Law"; and in the Organic Law of the People's Courts, art. 5: "In conducting trial, the people's courts treat all citizens equally according to the law, irrespective of nationality, race, sex, occupation,

a legal system according equal treatment to the high and mighty as well as to the masses is viewed as essential in order to prevent disorders like those that wracked China during the Cultural Revolution, and as a prerequisite to economic development. This more egalitarian approach is reflected in the 1984 PLA Discipline Regulation, which no longer utilizes Mao's distinction between "contradictions among the people" as opposed to "contradictions between the enemy and ourselves"⁴¹⁷ as a basis for administering discipline, and in which directives to purge "class enemies" from the ranks of the PLA⁴¹⁸ no longer appear.

The modern Chinese military legal system still faces problems in its development. Internal PLA discipline problems are apparently at a serious enough level that a new supplement to the Three Main Rules of Discipline and the Eight Points for Attention is being introduced. The "Eight Prohibitions" are "new rules" for general enforcement:

- (1) prohibition against beating, swearing at, and corporal punishment for soldiers;
- (2) prohibition against receiving gifts from soldiers;
- (3) prohibition against infringement of soldiers' interests by cadres;
- (4) prohibition against imposing fines on soldiers;
- (5) prohibition against alcoholism;
- (6) prohibition against gambling;
- (7) prohibition against reading pornographic materials; and
- (8) prohibition against deception.⁴¹⁹

Another problem for the Chinese military legal system is the lack of genuine independence. Statutes promising judicial independence do not mean that any real independence from the CCP exists. Like all Chinese institutions, courts must accept Party leadership. Nevertheless, the CCP has proclaimed its intention to allow courts to decide individual cases without undue outside influence: "[CCP] leadership refers mainly to leadership by means of policy and principle and

social background, religious belief, education, financial status or length of residence, and without allowing any special privileges."

⁴¹⁷ PLA Discipline Regulation (1975) art. 3(c).

⁴¹⁸ *Id.* art. 16.

⁴¹⁹ Beijing Domestic Service, *Yu Qiuli Proposes 'Eight Prohibitions' for PLA*, Aug. 8, 1986, translated in Foreign Broadcast Information Service, Aug. 11, 1986, at K1.

Any act of an active duty PLA serviceman that infringes on his duties and endangers the state's military interests and is punishable

Article 2

army units.
 carry out their duties and strengthening the combat capability of
 they commit against their duties, educating them to conscientiously
 tions are formulated with a view to punishing servicemen for offenses
 the "Criminal Law of the People's Republic of China," these regula-
 On the basis of the guiding ideology and fundamental principles of

Article 1

OF CHINA ON PUNISHING SERVICEMEN WHO COMMIT OF-
 FENSES AGAINST THEIR DUTIES.*
 [Adopted 10 June 1981 by the Standing Committee of the 5th Na-
 tional People's Congress at its 19th session]

APPENDIX A

Despite continuing problems, expectations for sustained develop-
 ment of the Chinese military legal system arise from the fact that
 the attainment of "socialist legality" remains an important policy
 goal of the CCP. While it is most unlikely that the CCP will loosen
 its power over its state and its armed forces by establishing a truly
 independent legal system, CCP power need not be threatened by ac-
 cording PLA soldiers basically fair and equal treatment under the
 military legal system. The recent development of the military legal
 system indicates that a new criteria of basic procedural fairness is
 indeed being applied to its traditional functions: maintaining disci-
 pline and combat effectiveness in the world's largest armed forces;
 and maintaining the political unity of the army with the Chinese
 Communist Party.

political and ideological leadership, rather than interference in the
 judicial organs' exercise of their powers or replacing the judicial or-
 gans in the exercise of those powers.⁴²⁰ Nevertheless, so long as
 Premier Deng's "Four Principles" (CCP leadership, Marxism-Lenin-
 ism-Mao Tse-tung thought, people's democratic dictatorship, and so-
 cialist road) remain the basis for the operation of the military legal
 system, meaningful judicial independence cannot be achieved.

by law is considered a serviceman's offense against his duties. However, in cases of markedly mild offenses and when not too much harm has been caused, the act is not considered an offense and will be dealt with in accordance with military discipline.

Article 3

Any person who violates the regulations on using firearms and equipment and causes serious accidents arising from his negligence and resulting in severe injury or death of others may in serious cases be sentenced to fixed-term imprisonment of not more than three years of detention at hard labor, and in cases with particularly serious consequences to fixed-term imprisonment of not less than three years and not more than seven years.

Article 4

Any person who violates the law and regulations on guarding the state's military secrets by betraying or losing important state military secrets may in serious cases be sentenced to fixed-term imprisonment of not more than seven years or detention at hard labor.

Any person who commits the above offense during wartime may be sentenced to fixed-term imprisonment of not less than three years and not more than ten years, and in particularly serious cases to fixed-term imprisonment of not less than ten years or life imprisonment.

Any person who steals, collects or furnishes military secrets for enemies or foreigners may be sentenced to fixed-term imprisonment of not less than ten years, life imprisonment or death.

Article 5

Any person in command or on duty who causes serious consequences by leaving his post or neglecting his duties may be sentenced to fixed-term imprisonment of not more than seven years or detention at hard labor.

Any person who commits the above offense during wartime may be sentenced to fixed-term imprisonment of not less than five years.

Article 6

Any person who deserts the army in violation of the military service law may in serious cases be sentenced to fixed-term imprisonment of not more than three years or detention at hard labor.

Any person who commits the above offense during wartime may be sentenced to fixed-term imprisonment of not less than three years and not more than seven years.

Article 7

Any person who crosses the boundary (border) illegally to flee the country may be sentenced to fixed-term imprisonment of not more than three years or detention at hard labor, and in serious cases to fixed-term imprisonment of not less than three years and not more than ten years.

During wartime, offenders may be subject to heavier punishment.

Article 8

Any serviceman on active duty at the border or coastal defense line who practices favoritism or commits other irregularities or allows another person to cross the boundary (border) without authorization may be sentenced to fixed-term imprisonment of not more than five years or detention at hard labor, and in serious cases to imprisonment of not less than five years. During wartime, the punishment may be more severe.

Article 9

Any serviceman who abuses his power of office to maltreat or persecute a subordinate and whose offenses are so vile as to have caused serious injuries or other serious consequences may be sentenced to fixed-term imprisonment of not more than five years or detention at hard labor. For offenses that result in the death of a person, offenders may be sentenced to fixed-term imprisonment of not less than five years.

Article 10

Any person who resorts to violence or threat to obstruct command personnel or personnel on shift or station duty from performing their duties may be sentenced to fixed-term imprisonment of not more than five years or detention at hard labor, and in serious cases to fixed-term imprisonment of not less than five years. In especially serious cases or in cases of serious injuries or deaths resulting from such offenses, offenders may be sentenced to life imprisonment or death. During wartime, the punishment may be more severe.

Article 11

In cases of theft of weapons, equipment or military supplies, offenders may be sentenced to fixed-term imprisonment of not more than 5 years or detention at hard labor, and in serious cases, to fixed-term imprisonment of not less than five years and not more than ten years. In especially serious cases, offenders may be sentenced to fixed-term imprisonment of not less than ten years or life imprisonment.

During wartime, the punishment may be more severe, and offenders may be given the death sentence if the offenses are especially serious.

Article 12

Any person who commits the crime of sabotaging weapons, equipment or military installations may be sentenced to fixed-term imprisonment of not more than three years or detention at hard labor. In cases of sabotage of major weapons, equipment or military installations, offenders may be sentenced to fixed-term imprisonment of not less than three years and not more than ten years. In especially serious cases, offenders may be sentenced to fixed-term imprisonment of not less than ten years, life imprisonment or death. During wartime the punishment may be more severe.

Article 13

Any serviceman who deliberately inflicts injuries to himself in order to evade his military obligations during wartime may be sentenced to fixed-term imprisonment of not more than three years, and in serious cases to fixed-term imprisonment of not less than three years and not more than seven years.

Article 14

Any person who fabricates rumors to mislead others and undermine army morale during wartime may be sentenced to fixed-term imprisonment of not more than three years, and in serious cases to fixed-term imprisonment of not less than three years but not more than ten years.

Any person who colludes with the enemy to spread rumors so as to mislead others and undermine army morale may be sentenced to fixed-term imprisonment of not less than ten years or life imprisonment. In especially serious cases, offenders may be given the death sentence.

Article 15

Any person who is directly responsible for deliberate abandonment of wounded on the battlefield, particularly in those cases that are considered abominable, may be sentenced to fixed-term imprisonment of not more than three years.

Article 16

All servicemen who are afraid of fighting and desert from the battlefield will be sentenced to three years' imprisonment or less; in serious cases, they will be sentenced to three to ten years' impris-

onment; and in cases which caused major losses in battle or war, they will be sentenced to ten years to life imprisonment or death.

Article 17

All servicemen who disobey orders during a battle, thus jeopardizing the outcome of a war, will be sentenced to three to ten years' imprisonment, and in cases of serious harm to the battle or war effort they will be sentenced to ten years to life imprisonment or death.

Article 18

All servicemen who intentionally make a false report about the military situation and fake military orders, thus jeopardizing military operations, will be sentenced to three to ten years' imprisonment, and in cases of serious harm to the battle and war effort they will be sentenced to ten years to life imprisonment or death.

Article 19

All servicemen who are afraid of death in battle and voluntarily lay down weapons and surrender to the enemy will be sentenced to three to ten years' imprisonment, and in cases of a serious nature they will be sentenced to ten years to life imprisonment.

All servicemen who, after surrendering to the enemy, help the enemy will be sentenced to ten years to life imprisonment or death.

Article 20

All servicemen who plunder and harm innocent residents in military operational areas will be sentenced to seven years' imprisonment or less; in serious cases, they will be sentenced to more than seven years' imprisonment; and in cases of a particularly serious nature, they will be sentenced to life imprisonment or death.

Article 21

All servicemen who seriously maltreat captives will be sentenced to three years' imprisonment or less.

Article 22

In times of war, servicemen who are sentenced to three years' imprisonment or less with a reprieve because there is no actual danger may be allowed to atone for their crimes by performing good services. When they have performed really good services, the original sentence may be rescinded, and they will no longer be considered criminals.

Article 23

All servicemen on active duty who commit crimes not listed in these regulations will be handled in accordance with the related articles of "The Criminal Law of the People's Republic of China."

Article 24

As to servicemen who commit serious crimes, their decorations, medals and titles of honor may be recalled, in addition to their being punished.

Article 25

All staff members and workers of the military establishment who commit crimes listed in these regulations will be punished in accordance with these regulations.

Article 26

These regulations will become effective as of 1 January 1982.

APPENDIX B

*CHINESE PEOPLE'S LIBERATION ARMY DISCIPLINE REGULATION**

[Promulgated 27 January 1984 by the Central Military Commission of the People's Republic of China]

Chapter I. General Principles

Article 1

The discipline of the Chinese People's Liberation Army is a strict discipline based on political consciousness. It is an important factor for the combat effectiveness of the Army and a guarantee for uniting ourselves, winning victories over the enemy, and accomplishing all tasks. Members of the whole Army must consciously and strictly observe military discipline, faithfully and loyally fulfill their sacred duty of defending the socialist motherland and the people under all kinds of arduous and dangerous conditions, firmly implement orders, and must not violate any discipline.

* Chinese text in *1985 Yearbook on Chinese Communism* 9-15 to 9-22 (Taipei: Institute for the Study of Chinese Communist Problems). Translated by Daniel Chen.

Article 2

Basic content of the Chinese People's Liberation Army discipline:

1. Implementing the line, principles, and policies of the Communist Party of China, and observing the state's Constitution, laws, and regulations;

2. Implementing the various orders, rules, and regulations of the Army;

3. Implementing orders, directives, and instructions of the higher level;

4. Implementing the Three Main Rules of Discipline and the Eight Points for Attention.

The Three Main Rules of Discipline: (1) Obey orders in all your actions; (2) Do not take a single needle or piece of thread from the masses; (3) Turn in everything captured.

The Eight Points for Attention: (1) Speak politely; (2) Pay fairly for what you buy; (3) Return everything you borrow; (4) Pay for anything you damage; (5) Do not hit or swear at people; (6) Do not damage crops; (7) Do not take liberties with women; (8) Do not ill-treat captives.

Article 3

To maintain and consolidate the discipline of our army, all members of the Army must be educated in its morale, laws, regulations, and discipline.

The execution of discipline must be clear-cut concerning rewards and punishments. To those who distinguish themselves in accomplishing the mission, obeying and upholding discipline, appropriate rewards should be granted. To those who violate discipline, appropriate punishment should be given, depending on the situation.

Article 4

The leadership at every level has the direct responsibility to maintain discipline, and has the authority to grant either rewards or punishments in accordance with these regulations. All leaders at all levels must serve as models in strictly obeying, maintaining, and protecting discipline. When administering rewards or punishments, leaders must apply the principles and facts in a timely and appropriate manner, without partiality, not substituting sentiment for policy. In general situations, all punishments and rewards should be submitted to the

Party committee (branch) for discussion and determination, and be carried out by the leadership.

Article 5

Military personnel must conscientiously obey and maintain discipline. When one violates discipline and is stopped and dissuaded by others, he should make immediate corrections; the exemplary behavior or deeds of others observed should be diligently learned from and applied; upon observing other military personnel violating discipline, one should dissuade and stop them; upon observing others violating the law, one must step forward and persistently stop it. All the above-mentioned circumstances should be timely reported to superiors.

Chapter II. *Rewards* (omitted)

Chapter III. *Punishments*

Section 1. Purpose of punishments, categories and requirements.

Article 20

Punishment is an auxiliary educational means to maintain and consolidate discipline. Its purpose is to learn from past mistakes, to avoid future ones, and to cure the illness to save the patient; to strengthen unity; and to heighten combat effectiveness.

Article 21

Categories of punishment.

1. Warning;
2. Serious warning;
3. Demerit;
4. Major demerit;
5. Demotion from position (rank);
6. Dismissal from office;
7. Dismissal from military status.

Demotion from position (rank), generally demote one position or one rank; cadres demoted from position should at the same time be demoted in salary. For enlisted men, the punishment of demotion from position applies to sergeants, demotion of rank applies to volunteers, dismissal from office applies to sergeants and deputy sergeants.

Article 22

To those who perpetrate one of the discipline-violating acts listed below, which result in damages or adverse effects, or violate laws, or commit criminal violations of the law but, according to the law, they are exempted from being charged for criminal responsibility, should, according to the circumstances, be given education and criticism or appropriate disciplinary punishment.

1. Violating the policy of the Party and the Constitution, laws, and regulations of the state;
2. Violating and disobeying orders, violating codes, regulations, institutions, and systems;
3. Displaying a negative attitude in combat, cowardice in combat, failure to grasp combat opportunities;
4. Acting individually without orders or coordination from superiors and thereby hindering coordinated operations;
5. Damaging or losing public property, weapons, or equipment, or causing incidents due to violations of institutions;
6. Revelation of state and military secrets;
7. Failure to perform duties, delaying work;
8. Absence without leave, or failure to return from leave on time;
9. Threatening superiors or others with weapons;
10. Fighting, or disturbing the public order;
11. Obscene or indecent conduct, dissolute behavior;
12. Theft of public or private property;
13. Gambling, smuggling, speculation;
14. Seeing a danger and not assisting;
15. Counterblows and vengeance, framing others, making false accusations, or creating rumors;
16. Unprincipled behavior, condoning wrongdoers and violations;
17. Suppressing democracy and physically punishing subordinates;
18. Making falsities and fakes, and deceiving superiors;
19. Violating discipline in other aspects.

Those who have violated the state's law so as to necessitate in-

dictment for criminal responsibility shall be transferred to the judicial departments for trial according to the law.

Section 2. Authority for punishment.

Article 23

Authority for punishment of enlisted men (including voluntary soldiers):

The company commander and political instructor have authority to issue warning.

The battalion commander and political instructor have authority to issue warning and serious warning.

The regiment commander and political commissar have authority to issue warning, serious warning, demerit, major demerit, demotion from position, demotion from rank, or dismissal from position.

The division commander and political commissar, the army commander and political commissar, and the military region commander and political commissar have authority over all categories of punishment.

Article 24

Authority for punishment of cadres of platoon-level or higher:

The battalion commander and political instructor have authority to issue warning to platoon-level cadres.

The regiment commander and political commissar have authority to issue warning, serious warning, demerit, and major demerit to platoon-level cadres; for company-level cadres they have authority to issue warning and serious warning.

The division commander and political commissar have authority to issue warning, serious warning, demerit, and major demerit to cadres of battalion-level or below.

The army commander and political commissar have authority to issue warning, serious warning, demerit, and major demerit to cadres of regiment-level or below.

The military region commander and political commissar have authority over all categories of punishment for cadres of battalion-level or below, and have authority to issue warning, serious warning, demerit, and major demerit to cadres of division and regiment level.

Enforcement of demotion from position, demotion of rank, or dis-

dismissal from position shall be carried out by authorities responsible for appointment and dismissal.

Authority for punishment of dismissal from military status for cadres of regiment-level and above, and authority for punishment of cadres of army level and above, is vested in the Chairman of the State Central Military Commission.

Demotion of rank shall be enforced in accordance with the Chinese People's Liberation Army Regulations on the Service of Officers.

Article 25

(omitted)

Article 26

(omitted)

Article 27

All general headquarters, branches of the armed forces, armed service branches, and equivalent units have the same authority of punitive action as that vested in the military region.

Article 28

Deputy commanders at every level have the authority of punitive action when they are acting as the commander.

Section 3. Enforcement of Punishment.

Article 29

Punitive actions must be determined with solemnity and care. Especially during wartime, it is essential to maintain the aggressive attitude of combat leaders. All punishments imposed by superiors on their subordinates must be based on investigation, research, and clear resolution of any mistaken facts, as well as the following:

1. A comprehensive and historical evaluation must be made of the facts, nature, details, circumstances, and influences of the errors committed, as well as the violator's past performance and his degree of recognition of the mistake. It is necessary to listen to both the opinions of the masses and the statement of the violator. The violator should be educated to repent to the wrongdoing.

2. Each wrongdoer should receive only one punishment.

Article 30

Superiors are to handle violations in a timely manner. In general, punitive actions should be administered within two months. If the

case is especially complicated, or other unusual circumstances necessitate extension of this time limit, the case should be submitted to the higher level for approval.

Article 31

In determining punishment it is necessary to first meet with the violator and hear his statement. If the violator does not accept his punishment, he may petition for appeal within ten days. Execution of punishment will not be suspended during the petition period.

Article 32

Announcement of the decision and of the punishment, in order to educate the violator and the troops, may be made as follows: face-to-face, before the troops, in meetings, or in writing.

Persevere in giving violators persuasive education and assistance, do not discriminate against them, and prohibit physical punishment, scolding, or indirect means of physical punishment. Insulting personal dignity is especially prohibited.

Article 33

Superiors of every level must constantly supervise punishments administered by subordinates. Whenever they discover any inappropriate punishments, superiors should direct subordinates to correct them promptly. All punishments administered shall be recorded and filed.

Chapter IV. *Accusation and Appeal*

Article 34

Accusation and appeal are the democratic rights of servicemen, which are designed to bring into play the role of supervision of the masses, and to guarantee that punishments will be enforced correctly.

Article 35

Soldiers have the right to make accusations against those who have perpetrated offenses against law and discipline. Those who consider the punitive actions taken against them to be improper have the right to appeal. Accusations and appeals should be based on facts and should not falsely accuse others.

Accusations and appeals may be submitted through channels, or bypassing channels. Those bypassing channels should be submitted in writing.

Soldiers' accusations against nonmilitary personnel should be re-

ported to political organs, which will assess the situation and, if necessary, render assistance.

Article 36

The accused have the right to defense, but they should not try to make things difficult for, or try to hinder, the accuser in submitting accusations, nor should they attempt counterattacks or revenge.

Article 37

The rights of accusation and appeal of military personnel should be fully protected. Superiors of every level and any organ shall not detain or stop accusations and appeals made by military personnel, nor will they cover for or protect the accused. If the accusation should be transferred to other relevant departments, it should be transferred to a superior of the accused. If an appeal is proved true, and the original punishment was inappropriate, it should be corrected.

Article 38

Superiors of every level must immediately investigate and handle accusations and appeals made by military personnel. The period of handling generally should not exceed two months. The person making an accusation or appeal should be informed of the disposition in a timely manner.

Chapter V. *Handling of Special Cases*

Article 39

(omitted)

Article 40

(omitted)

Article 41

Soldiers who have manifested evident signs that they might desert out of fear of punishment, or that they might commit violence or suicide, etc., may be placed in temporary custody.

Temporary custody is a preventive measure, ordinarily involving isolation or appointment of personnel to watch over the actions of the detainee. Those under temporary custody should receive education. No torture is allowed. The detainee's problem should be investigated and handled appropriately. Dispositions should be reported to superiors in a timely manner. The period of temporary custody generally should not exceed seven days. If extension is necessary it should be

approved by superiors, but the accumulation should not exceed fifteen days.

Authority for imposing temporary custody is as follows:

Soldiers—approved by regiment commander.

Platoon and company cadres—approved by division commander.

Battalion and regiment cadres—approved by army commander.

Division cadres—approved by military region commander.

Army level cadres and above—approved by State Central Military Commission.

Article 42

Under emergencies commanders of every level are authorized to temporarily remove from their positions incompetent subordinate cadres, and to appoint substitutes, but they should report to their superiors as soon as possible and be held responsible for their actions.

Article 43

Upon discovering criminal acts such as deserting in combat, mutiny, violent acts and murder, and when there is no time to report the incident, soldiers should take immediate measures to stop it, report it to their superiors afterwards, and be held responsible for their actions.

Chapter VI. *Supplementary Articles*

Article 44

(omitted)

Article 45

(omitted)

Article 46

(omitted)

Article 47

(omitted)

Article 48

These regulations apply to active duty military personnel, to military staff members and to military establishment workers.

APPENDIX C

*PROVISIONAL ORGANIZATIONAL REGULATIONS OF THE
MILITARY COURTS OF THE CHINESE SOVIET REPUBLIC**

*CENTRAL EXECUTIVE COMMITTEE OF THE CHINESE
SOVIET REPUBLIC* ORDER number 3

In order to protect the rights of fighters, commanders, and personnel within the Red Army, and to uphold the Red Army's iron discipline, the Executive Committee specially promulgates "The Provisional Organizational Regulations of the Military Courts of the Soviet Republic's Red Army." The regulations promulgated here shall take effect as of 15 February 1932. After the Revolutionary Military Central Committee receives this order, it shall be transmitted to the headquarters of units of the Red Army and militia, and these shall organize military courts in accordance with the specifications of these regulations in order to administer all criminal adjudications within the Red Army and to render judgments regarding them.

Chairman	Mao Tse-tung
Vice-Chairmen	Hsiang Ying Chang Kuo-t'ao

1 February 1932

*PROVISIONAL ORGANIZATIONAL REGULATIONS OF THE
MILITARY COURTS OF THE CHINESE SOVIET REPUBLIC**Chapter I: General Principles*

Article 1

All members of the Red Army, guerilla bands, independent divisions and regiments, companies of Communist (Red) guards, and assorted armed groups in military service, no matter if they are military personnel or function in some other capacity, shall have their cases adjudicated by the military courts if they violate the criminal law, the military criminal law, or some other law. However, this does not apply to those whose actions are violations of common discipline but not of the law.

Article 2

In battle zones, the illegal actions of residents will be judged by the military courts whether the infraction was against the military

*Original in *Shih-sou tzu-liao-shih kung-fei tzu-liao* (Hoover Institution, microfilm, 1960) no. 008.5525/3754/0553, reel 7, item 15. Translated by Gary White (revised).

criminal (code) or some other law; activities such as spying or espionage, if within a battle zone, shall also be judged by the military courts.

Article 3

Each level of military courts must be organized according to the provisions of these regulations.

Chapter II: The System of Organization of the Military Courts

Article 4

Military courts shall be divided into the following four types: (i) primary military courts, (ii) primary field military courts, (iii) superior military courts, and (iv) the Supreme Military Judicial Conference.

Article 5

The primary military courts shall be established within the headquarters of the Red Army, division headquarters, the headquarters of military districts, and the headquarters of independent divisions; primary field military courts shall be established within the headquarters of the highest leadership in the battle-zone.

Article 6

The superior military courts shall be established within the Central Revolutionary Military Committee.

Article 7

The Supreme Military Judicial Conference shall be established within the Supreme Court.

Article 8

The primary military courts and the primary field military courts shall be subordinate to the superior military courts; and the superior military courts shall be subordinate to the Supreme Court.

(Note 1)

Until the Supreme Court is established, the Provisional Central Government shall temporarily organize a court to resolve cases to be reviewed by the Supreme Military Judicial Conference.

(Note 2)

For Soviet territory that is not yet contiguous with the central Soviet territory, the superior military courts established in the high-

est military committees shall also have the authority of courts of last resort.

Chapter III: The Composition of the Military Courts

Article 9

Primary military courts shall be composed of a (chief) judge and two (panel) judges, who shall comprise a judicial committee. The Superior military courts shall consist of a judicial committee composed of a (chief) judge, an assistant judge, and three panel judges, and (such committee) shall see to the necessary arrangements of the primary military courts. The Supreme Court shall determine what people shall comprise the Supreme Judicial Military Conference; the participation of representatives of the Central Revolutionary Military Committee is essential.

Article 10

The judge and the panel judges of the primary military courts shall be elected from representatives of the officers and soldiers and shall be approved by the superior military courts. The judge and the panel judges of the superior military court shall be nominated by the Central Revolutionary Military Committee and shall pass the approval of the Supreme Court.

Article 11

The commander of any level military unit may not concurrently serve as a judge or a panel judge of a military court.

Article 12

The court for the adjudications at the primary military court shall consist of three people. The judge shall be chairperson and the other two shall be assessors. Whenever cases are being examined by the superior military courts as a court of first instance, assessors must be used. However, for final reviews, no assessors shall be used; rather, the court shall consist of the presiding judge and the panel judges.

Article 13

Assessors shall be selected from among the officers and soldiers, and be changed once a week. For the period they act as assessors, they may be relieved of their military duties; when the assessor period is over, they shall return to the work of their original unit.

Article 14

Each level of military court must employ clerks and other (suitably) skilled personnel.

(Note 1)

If the caseload is light, the number of members of the military courts can be decreased; the primary military courts may be provided with as few as one judge. The superior military courts may be provided with as few as one judge and one panel judge.

(Note 2)

If the case to be judged is simple and does not involve anything essential, a single panel judge may decide it.

Chapter IV: The Jurisdiction of Military Courts and their Judicial Procedures

Article 15

The primary military courts shall judge as a court of first instance all of the cases of crimes of military leadership below the rank of division commander, fighters, and all staff serving within the military units.

Article 16

The primary military courts for the militia shall judge the military cases of the militia for the whole province.

Article 17

Primary field military courts shall judge all cases in areas where war is on, but shall still be courts of first hearing.

Article 18

The superior military courts are courts of last resort for judging cases already decided by primary military courts but appealed; at the same time they are courts of first hearing for the cases of command staff above the rank of division commander.

Article 19

The Supreme Military Judicial Conference is the court of last resort for judging cases already decided by superior military courts but appealed; at the same time they are the court that shall judge personnel doing important military work who are above the rank of corps commander.

Article 20

Except for the Supreme Military Judicial Conference, for the decided cases of all the other levels of military courts, all the accused shall have the right to appeal within the appeal period prescribed in the verdict. The time limit for appeals shall be from seventy-two hours

to one month, the appeal period is to be determined by the court deciding the particular case at the time.

Article 21

In all cases with verdicts calling for the death penalty, even if the accused does not initiate an appeal, the court judging the particular case must submit the court records to the higher court for confirmation (of the verdict).

(Note)

Under extraordinary military conditions a judgment may be executed, and copies of the file of the case sent to a higher court for subsequent confirmation.

Article 22

The judging of cases must be done in a format open to the public, allowing officers, soldiers, and military staff to observe; however, if a case involves military secrets, a secret form of hearing may be selected, but the announcement of the decision must be public.

Article 23

When hearing a case, the court does not necessarily have to hear the case at its normal location. (The court) can go to the location of the military unit and the place of work of the transgressor to decide the case.

Chapter V: The Military Procuracy—Its Organization and Responsibilities

Article 24

Wherever there are primary and superior military courts, there shall be established, respectively, a primary military procuracy and a superior military procuracy.

Article 25

The primary military procuracy shall have one procurator, one assistant procurator and several investigators. The superior military procuracy shall have one procurator general, two assistant procurators, and several investigators. In addition, five staff for assorted skilled positions such as secretaries and clerks may be employed.

(Note)

The staff personnel of the military procuracy can, depending upon the military units situations, be decreased from time to time.

Article 26

If the commanders of any level or political commissars discover evidence of an illegal act in a military unit, they may execute an arrest of the transgressor and deliver him over to the appropriate level military procuracy for investigation.

Article 27

The military procuracy shall be the institution responsible for investigations and inquests into military crimes. All cases, except for simple cases that are clear-cut and do not need further investigation, shall be sent to the military procuracy of the appropriate level for investigation. After the military procuracy has finished its investigation and issued its conclusion, they shall send the case to the military court for a hearing.

Article 28

The military procuracy is the prosecuting institution representing the state in cases of military crimes. It may investigate all cases of illegal activity within or relating to the military. Moreover, it may initiate a public complaint in a court, and during trial it may represent the state in appearing in court and lodging charges.

Article 29

During the investigation of a case, the procurator shall have sole authority to interrogate anyone connected with the case.

Article 30

At the time of summons for interrogation a court writ, an arrest warrant, or a procuracy writ may be used.

(Note 1)

A military court may use only court writs and arrest warrants.

(Note 2)

Headquarters of corps, divisions, and other military organizations in places of the competence of military courts should allocate personnel for use in the procuracy.

Chapter VI: Funding

Article 31

The costs of the military courts and military procuracies shall be provided for by the appropriate military unit according to a budget.

Chapter VII: Supplement

Article 32

These regulations are the public order of the Central Executive Committee.

Article 33

The Central Executive Committee shall have the power to revise these regulations from time to time or to suspend them.

Article 34

From the day that these regulations are publicly promulgated, they shall be in force.

Central Executive Committee

Chairman Mao Tse-tung

Vice-Chairmen Hsiang Ying
 Chang Kuo-t'ao

THE DOCTRINE OF PRIMARY JURISDICTION AND FEDERAL PROCUREMENT FRAUD: THE ROLE OF THE BOARDS OF CONTRACT APPEALS

by Captain Michael H. Ditton*

On 15 September 1986, a federal district court judge issued rulings in a criminal fraud case brought against a major defense contractor that triggered shockwaves throughout the government contracts community. In *United States v. General Dynamics Corp.*,¹ a federal judge held that the Armed Services Board of Contract Appeals (ASBCA) was a federal agency having primary jurisdiction over certain issues in a criminal contract fraud case. The criminal trial was interrupted pending determination of ten questions by the board.² The decision was a potential precedent-setting victory for the defendants that derailed a highly publicized Department of Justice prosecution and disrupted other potential cases.³ This decision threatened to upset a longstanding ASBCA practice of refusing to decide cases involving criminal fraud.⁴ It also appeared to expand the board's role from that

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¹United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D. Cal. 1986), *rev'd*, 828 F.2d 1356 (9th Cir. 1987).

On June 19, 1987, the district court judge dismissed the criminal fraud charges against General Dynamics Corp. and several named defendants on motion of the Department of Justice (DOJ). Citing newly discovered evidence, DOJ filed amendments to its pleadings essentially agreeing with the defendant's contentions concerning the best efforts nature of the contract. See *infra* notes 16, 165, and 167 and accompanying text.

²See *infra* text accompanying notes 10-18.

³The Justice Department had indefinitely postponed a grand jury investigation of alleged fraud by Ford Aerospace, the other contractor awarded a Division Air Defense gun (DIVAD) prototype contract and the eventual winner of the DIVAD competition. Inside the Pentagon, Nov. 28, 1986, at 3. The Secretary of Defense canceled the DIVAD project on 27 August 1985 because of concerns that the gun system was inadequate for the Army's needs.

⁴See *infra* section V.D.

of an adjudicatory body, deciding cases properly brought before it, to a full-fledged administrative agency issuing advisory opinions to federal courts.

Then, on April 2, 1987, the Ninth Circuit Court of Appeals reversed the district court in a split decision.⁵ Holding that the Armed Services Board of Contract Appeals was not a regulatory body, the court refused to apply the doctrine of primary jurisdiction.

This article evaluates the rationales for the district court and Ninth Circuit rulings in *General Dynamics* and explores the ramifications of applying the doctrine of primary jurisdiction in the area of government contract fraud. Specifically, the questions presented are whether the primary jurisdiction doctrine allows referral of contract issues in a criminal fraud case to a board of contract appeals, and if so, whether courts are required to refer those issues.

The doctrine of primary jurisdiction is not a well-defined rule, but a discretionary tool judges use to promote court-agency relationships.⁶ To properly answer the questions presented the article is divided into six parts. First we consider the decisions in *General Dynamics*. Second, a review of several Supreme Court cases traces the historical development of the primary jurisdiction doctrine. Recent lower court decisions then illustrate its current status. Third, the defense industry is analyzed to determine the nature of the industry and its regulatory scheme. Next, the issues in a criminal fraud case are examined through a discussion of criminal jurisdiction, procurement fraud theories, and various courts' application of the primary jurisdiction doctrine in criminal cases. Fifth, the powers and functions of boards of contract appeals are established through a review of their historical role and the impact of the Contract Disputes Act.⁷ Finally, after a reexamination of the *General Dynamics* decisions, the article proposes a solution in the form of a balancing test to resolve the applicability of the primary jurisdiction doctrine to criminal contract fraud cases. We turn now to the *General Dynamics* case.

I. THE *GENERAL DYNAMICS* DECISIONS

General Dynamics arose out of the Army's attempts to procure the division air defense gun (DIVAD, also known as the Sergeant York). As one of two private defense companies competing for award of a

⁵United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987).

⁶See *infra* section II.A.

⁷41 U.S.C. §§ 601-613 (1982 & Supp. III 1985).

large production contract to provide a new air defense weapon, General Dynamics was awarded a contract in 1978 to develop and manufacture two prototype DIVAD vehicles.⁶ In this preproduction contract both contractors would train Army crews and furnish field support and training aids during the testing phase. The contract awarded to General Dynamics originally provided for progress payments in the amount of about thirty-one million dollars, but this amount was eventually increased to forty-one million dollars in 1980. The two prototypes were delivered for testing in 1980. Ford Aerospace and Communications Corporation won the competition during development and operational testing. It received a base-year production contract with three annual production options. Following a public controversy over Sergeant York's capabilities, the Secretary of Defense canceled the procurement in August 1985 before exercising the third production option.⁸

The Defense Contract Audit Agency (DCAA) audited the preproduction contract and issued a report in 1984.¹⁰ It found that certain costs associated with developing the DIVAD prototypes were mischarged to accounts on other government contracts.¹¹ As a result, over seven million additional dollars had been recovered by General Dynamics, thus preventing a loss on the DIVAD contract. The Army referred the matter to the Department of Justice (DOJ), which convened a grand jury in 1984. The grand jury returned an indictment in December 1985 against the Pomona division of General Dynamics and several named defendants.¹²

Following the indictment, counsel for General Dynamics filed a notice of appeal with the ASBCA. The board subsequently denied the appeal, holding that it did not have jurisdiction over cases involving fraud.¹³ General Dynamics filed two more appeals shortly thereafter on claims submitted to a contracting officer on the cost reimbursement contracts. The contracting officers had withheld payment for certain costs charged to bid and proposals (B&P) and independent research and development (IR&D) accounts because of the fraud investiga-

⁶Contract number DAAK10-78-C-0058. The vehicle was also known by its designation "Sergeant York".

⁸U. S. News & World Rep., Sep. 9, 1985, at 11.

¹⁰Defense Contract Audit Agency, Audit Report No. 4501-3A486354, Mar. 14, 1984.

¹¹The other contracts, Army number DAAK40-78-C-0281 and Navy number N000123-75-1233, were cost-reimbursement contracts unrelated to the DIVAD contract.

¹²The named defendants included a corporate vice-president, the Pomona division general manager, the DIVAD project manager, and the financial administrator. No government employees were charged.

¹³General Dynamics Corp., ASBCA No. 32297, 86-2 B.C.A. (CCH) ¶ 18,903.

tion.¹⁴ On March 10, 1986, the board issued an order directing the contracting officer to issue decisions on these claims.¹⁵

Back in the district court the General Dynamics defendants filed a motion to dismiss the indictment on the grounds that the doctrine of primary jurisdiction required initial consideration of certain contract interpretation issues by the ASBCA.¹⁶

On 15 September 1986, Judge Ferdinand F. Fernandez granted this motion in part by staying the criminal proceedings and referring ten questions concerning contract issues in the case to the ASBCA.¹⁷ The judge reasoned that the highly regulated defense industry and the complex nature of the DIVAD contract produced issues requiring specialized expertise outside the conventional experience of judges. He also stated that failure to use the ASBCA would lead to a great lack of uniformity due to a danger of inconsistent court rulings.¹⁸

The Department of Justice filed an appeal of Judge Fernandez's ruling with the Ninth Circuit Court of Appeals.¹⁹ DOJ argued that the primary jurisdiction doctrine should be limited to cases where Congress has determined that the receiving agency or board should exercise the primary role in deciding the questions under review, and several factors identified by the district court actually militated against application of the doctrine.²⁰

The ASBCA adhered to its refusal to accept jurisdiction of the matter and rejected the referral.²¹ Noting that it had no jurisdiction under

¹⁴The two appeals were docketed together as one case, ASBCA No. 32494-197, on 26 February 1986. B&P and IR&D accounts are indirect cost pools that a contractor may establish to recover costs borne in working on projects in anticipation of preparing a bid or performing preliminary research related to a government contract. Since the DIVAD contract was a fixed-price contract, the alleged DIVAD-related work was charged to cost pools on the Army and Navy cost reimbursement contracts.

¹⁵The contracting officer had refused to issue final decisions. He stated he was without power to decide claims inseverable from the allegations of fraud. General Dynamics then appealed from his continued refusal, which was docketed as ASBCA No. 34051.

¹⁶General Dynamics counsel argued that the nature of the contract itself was ambiguous since it was labeled as a "fixed price (best efforts)" type contract, and that customary usage in the industry allowed the charges to the B&P and IR&D accounts. Brief in Support of Defendants' Motion to Dismiss at 9-15, *United States v. General Dynamics Corp.*, 644 F. Supp. 1497 (C.D. Cal. 1986) (No. CR 85-1123-FFF).

¹⁷The ten questions generally asked the board to determine the nature of the contract (firm, fixed-price; "best efforts"; or possibly a hybrid); whether the contract required the contractor to spend more than the contract price to accomplish the contract objectives; and, if not, whether the contractor could lawfully charge expenses to the B&P and IR&D accounts.

¹⁸644 F. Supp. at 1503-5.

¹⁹No. 86-5292 (notice of appeal filed October 15, 1986).

²⁰Brief for the Appellant at 22, *United States v. General Dynamics Corp.*, 828 F.2d 1356 (9th Cir. 1987) (No. 86-5292).

²¹*General Dynamics Corp.*, ASBCA No. 33633 (Feb. 2, 1987).

the Contract Disputes Act nor authority to issue advisory opinions under its charter, the board left little doubt about its position.²² The ASBCA would not be the willing partner contemplated by the district court.

The Ninth Circuit reversed the lower court. The Court initially held that the district court's stay was an appealable final decision because otherwise the government could find itself collaterally estopped from appeal.²³ It then went on to hold that deferral to the ASBCA was an impermissible delegation of the Article III judicial decision-making function and unwarranted interference with prosecutorial discretion.²⁴

II. THE DOCTRINE OF PRIMARY JURISDICTION

The doctrine of primary jurisdiction is a judge-made²⁵ set of rules that courts use to mark the boundaries between judicial and administrative jurisdiction. Commentators have variously described its operation as allocating power between courts and agencies to make initial determinations (and sometimes final determinations),²⁶ dividing responsibility between courts and agencies,²⁷ preventing premature or undue judicial interference with the administrative process,²⁸ resolving both procedural and substantive conflicts that occur

²²*Id.* at 5.

²³Because only the Court of Appeals for the Federal Circuit may review ASBCA decisions, 41 U.S.C. § 8079 (1) (1982 and Supp. III 1985); 28 U.S.C. § 1295 (a) (10) (1982 and Supp. III 1985), and the district court may not review the merits of an agency decision reviewed exclusively by another court, the government could face issue preclusion. "Thus, if General Dynamics were to appeal successfully an adverse ASBCA ruling, the district court would be required to accept the Federal Circuit's construction of the DIVAD contract. Similarly, if General Dynamics' version of the contract were affirmed by the ASBCA, that determination would be binding if the government were to forego its appeal, [footnote omitted] or if its appeal to the Federal Circuit were unsuccessful." *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1361 (9th Cir. 1987). General Dynamics would not be similarly estopped because the government is held to a higher standard of proof in the criminal prosecution. *Id.* at n.5.

²⁴*Id.* at 1362-67. The Department of Justice later requested dismissal of the charges after reviewing additional evidence that supported General Dynamics' interpretation of the contract. See *General Dynamics Dismissal Tied to Document Discovery*, Wash. Post, June 23, 1987, at A1, A8.

²⁵Just how "judge-made" the doctrine is is illustrated by the seminal case of *Texas and Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), where the issue was neither briefed or argued before the court. See also *Louisiana and Arkansas Ry. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966); *infra* text accompanying note 39.

²⁶4 K. Davis, *Administrative Law Treatise* § 22:1 (2d ed. 1983).

²⁷Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 Rutgers L. Rev. 867 (1976).

²⁸Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 Yale L. Rev. 315 (1956).

when agencies are created in an area of the courts' original jurisdiction,²⁹ and as a procedural device securing preliminary administrative determinations of regulatory matters.³⁰ The most flaccid definition states that the doctrine "provides guidance regarding whether a court should allow an initial opportunity to decide an issue in a case over which the court and the agency have concurrent jurisdiction."³¹ It is, however, distinct from the doctrine of exhaustion of remedies.³²

The courts and commentators all agree that the doctrine is not an easily stated rule. No single standard governs this area. The judicial analyses have been variously described as a balancing test,³³ a quest for statutory purpose,³⁴ or simply an ad hoc method of deciding the specific factual situation presented.³⁵

Perhaps the most that can be said is that primary jurisdiction principles come into play whenever a court seeks to decide a question that could be answered by an agency delegated authority to regulate the subject matter. A survey of the case law will develop the dynamic factors involved.

A. EVOLUTION OF THE DOCTRINE

The doctrine of primary jurisdiction evolved from a series of court decisions over a period of about eighty years roughly coinciding with the rise of the delegation of legislative and executive power to ad-

²⁹L. Jaffre, *Judicial Control of Administrative Action* 121 (1965).

³⁰von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 931 (1954).

³¹Travis, *Primary Jurisdiction: A General Theory and its Application to the Securities Exchange Act*, 63 Cal. L. Rev. 926 (1975).

³²In *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956), Justice Harlan explained the difference:

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64.

³³Note, *The Doctrine of Primary Jurisdiction: A Reexamination of its Purpose and Practicality*, 48 Geo. L.J. 563, 573 (1960).

³⁴Convisser, *supra* note 28, at 336.

³⁵Botein, *supra* note 27, at 878-84.

ministrative agencies. The development of administrative agencies was a response to the increasingly complex business of running the Federal Government. Several types of agencies were formed during this time, their character distinguished by the functions they performed and still exercise. Typically these include investigation, law enforcement, rulemaking, and adjudication. The largest independent agencies regulate entire industries through their power to license, to set rates, and to approve or prohibit business practices.³⁶ They combined executive, legislative and judicial powers formerly kept separate so as to effectively regulate concentrated industrial power.³⁷

The concept of primary jurisdiction defines how judicial powers are shared between courts and agencies. Within this concept several types of jurisdictional conflicts could arise.³⁸ For our purposes three categories are appropriate. These involve where exclusive authority rests in the agency, where jurisdiction is shared, and where exclusive jurisdiction rests in the courts. The expansive dynamics of primary jurisdiction are illustrated in a line of cases originating at the beginning of this century.

The landmark case of *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*³⁹ decided whether an oil company seeking redress for excessive rate charges in a common-law damages action must first apply to the Interstate Commerce Commission (ICC), which was responsible for determining the reasonableness of the disputed rates. The Supreme Court held that a shipper seeking reparation predicated

³⁶ See generally B. Schwartz & H. Wade, *Legal Control of Government Administrative Law in Britain and the United States* 26 (1972).

³⁷ *Id.*

³⁸ The commentators have outlined several jurisdictional areas where the court and agency interact. Botein, *supra* note 27, at 868, divides this universe into four parts: 1) primary exclusive jurisdiction, where a court is limited to substantive judicial review of agency action; 2) true primary jurisdiction, where the court seeks an initial determination by the agency; 3) statutory exemptions; and 4) agency immunizations in the antitrust field where the court may have no role except to interpret the exemption or immunization power of the agency.

Jaffre, *supra* note 29, at 121, develops three major categories: 1) where jurisdiction is shared between courts and agencies but referral is made to an agency because of a technical question, or because it involves an agency issue or because the agency can immunize the challenged conduct; 2) where jurisdiction is distinct but common questions of law and fact are involved; and 3) where jurisdiction is exclusive and the first body to assume jurisdiction decides the issue.

Davis, *supra* note 26, at 119, adheres to a single view that primary jurisdiction problems arise where jurisdiction is concurrent.

Travis, *supra* note 31, at 929, posits three theories of deferral: 1) where the agency has exclusive jurisdiction over the issue, 2) where exclusive jurisdiction is uncertain but defendant's conduct was "arguably lawful", and 3) where the agency has no jurisdiction but the agency's views would be of "material aid" to the court.

³⁹ 204 U.S. 426 (1907).

upon the unreasonableness of the established rate must first go to the ICC despite clear statutory language allowing a separate judicial remedy.⁴⁰ Otherwise the fundamental statutory purpose of producing uniformity of rates would be defeated:

[Various court decisions] would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted.⁴¹

Thus the desire for uniformity prevailed over clear statutory text.

A hint of future expansion in the doctrine was found in *Great Northern Ry. Co. v. Merchants Elevator Co.*⁴² In this 1922 case a carrier and a shipper disagreed about the propriety of freight charges for shipping grain. The Supreme Court held that judges could decide the complicated issues involving the carrier's tariff because the question in the end was simply one of interpreting language, a question of law. But Justice Brandeis, writing for the majority, noted that, if the tariff had used words in a technical or peculiar sense that could not have been understood without considering extrinsic evidence of their meaning, the Court would have regarded the question as one of fact to be referred to the ICC.⁴³ A determination about reasonableness of rates or other technicalities of railroading "is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable and such acquaintance is commonly to be found only in a body of experts."⁴⁴ Concern for expertise was now added to the desire for uniformity.

In *General American Tank Car Corp. v. El Dorado Terminal Co.*,⁴⁵ decided in 1940, the Supreme Court stated that whenever administrative questions are raised, the proper forum for their determination is the administrative agency, even if it is powerless to grant any relief for the plaintiff. El Dorado brought a contract action for money due

⁴⁰The Interstate Commerce Act of 1887, ch. 104, § 22, 24 Stat. 378, 387, provided: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

⁴¹204 U.S. at 441.

⁴²259 U.S. 285 (1922).

⁴³*Id.* at 294.

⁴⁴*Id.* at 291.

⁴⁵308 U.S. 422 (1940).

under the terms of a leasing agreement. The carrier defended on the ground that payment of the sum would amount to making a rebate prohibited by the Elkins Act.⁴⁶ The Court concluded that, even if the ICC was not able to grant damages for breach of a contract, it had primary jurisdiction because it had authority to determine the reasonableness of allowances and practices after full investigation. It was thus expert in this field. The courts, on the other hand, were only able to enforce claims arising out of the failure to comply with the Commission's lawful orders.

A major restatement of the doctrine appeared in 1952 in *Far East Conference v. United States*.⁴⁷ In that case the government brought an antitrust suit attacking a dual system of rates agreed on by a conference of water carriers for the benefit of member carriers. The Supreme Court dismissed the suit to give the Federal Maritime Board an opportunity to grant immunity to the defendants, which it had apparent authority to do under the Shipping Act.⁴⁸ The majority of the Court referred to a principle

now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.⁴⁹

Expertise was desirable because agencies were stocked with specialists and chartered to decide regulatory issues.

The next major case applying the principle of expertise came in 1956 in *United States v. Western Pacific Railway Co.*,⁵⁰ where the

⁴⁶49 U.S.C. § 11903 (1982).

⁴⁷342 U.S. 570 (1952).

⁴⁸Ch. 451, § 15, 39 Stat. 733 (1916) (presently codified as amended at 46 U.S.C. § 814 (1982)).

⁴⁹342 U.S. at 574.

⁵⁰352 U.S. 59 (1956).

Supreme Court held that interpretation of a tariff was within the primary jurisdiction of the ICC. The issue was whether transportation of napalm bomb casings fell under the tariff rate for bombs, or under the much lower rate for gasoline-filled drums. The government had argued that the shipments were not hazardous as defined by the term "incendiary bomb" used in the tariff and, therefore, the higher rate did not apply. The Court rejected this argument:

The difficulty with this line of argument is that we do not know whether the "incendiary quality of the freight" was in fact the reason for the high rate, still less whether that was the only reason and how much weight should be assigned to it. Courts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors, and the extent to which they are present or absent in the particular case, is tantamount to engaging in judicial guesswork. It was the Commission and not the court which originally determined why incendiaries should be transported at a high rate. It is thus the Commission which should determine whether shipments of napalm gel bombs minus bursters and fuses meet those requirements; that is, whether the factors making for certain costs and thus a certain rate on incendiaries are present in the carriage of such incomplete bombs.⁵¹

Agency expertise was desirable in this case because the agency exclusively possessed the means to properly construe the tariff—a task Congress had delegated to it.

Utilization of agency expertise is not always required. The *Western Pacific* court cited *Great Northern*⁵² and noted that, if the agency position was already clear or there was no need to probe into the reasonableness of the rate, referral was unnecessary.

[I]n many instances construing the tariff does not call for examination of the underlying cost-allocation which went into the making of the tariff in the first instance. We say merely that where, as here, the problem of cost-allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors

⁵¹*Id.* at 64.

⁵²*Id.* at 69.

are determinative on both issues, then it is the Commission which must first pass on them.⁵³

The preceding cases involved concurrent jurisdiction shared between court and agency. But what if the agency has no jurisdiction? This issue arose in early antitrust cases⁵⁴ and again in *Rosado v. Wyman*,⁵⁵ decided in 1970. In that case welfare recipients sued to prevent the expenditure of federal monies in support of New York's welfare program, asserting that it was incompatible with federal law. The Department of Health, Education and Welfare (HEW) had the power to cut off federal funds if a state's plan did not conform with federal statutory requirements. But welfare recipients could not obtain an administrative ruling because HEW had no procedures allowing the recipients to participate in the agency review. The Supreme Court decided that the judge need not defer to HEW. It was "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."⁵⁶ There was no jurisdiction to share with respect to these issues.

This statement was promptly turned on its head one year later in *Ricci v. Chicago Mercantile Exchange*.⁵⁷ In that case the Supreme Court held that a plaintiff could not ask a court to decide for itself an issue which the Commodity Exchange Commission was capable of determining, even though he was incapable of initiating Commission proceedings. Ricci claimed the exchange had used a blank membership authorization form signed by him to illegally transfer his exchange membership to a third party. Allegedly, this was in furtherance of a conspiracy violative of the Sherman Act,⁵⁸ Commodity Exchange Act,⁵⁹ and exchange rules. The defendants claimed that the rules allowed such a transfer and compliance with the rules was a defense to the antitrust charge. The Court held that the Commodity Exchange Commission had primary jurisdiction because its action

⁵³352 U.S. at 69.

⁵⁴*See, e.g.,* United States Alkali Ass'n v. United States, 325 U.S. 196 (1945); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932).

⁵⁵397 U.S. 397 (1970).

⁵⁶*Id.* at 404; accord *United States v. Elrod*, 627 F.2d 813, 818 (7th Cir. 1980) ("where no administrative remedy exists, the doctrine of primary jurisdiction does not apply").

⁵⁷409 U.S. 289 (1973).

⁵⁸Ch. 647, § 1, 26 Stat. 209 (1890) (presently codified as amended at 15 U.S.C. § 1 (1982)).

⁵⁹Ch. 369, 42 Stat. 998 (1922) (presently codified as amended at 7 U.S.C. §§ 1-24 (1982)).

could possibly immunize the defendant's act and some parts of the case were arguably within the Commission's statutory jurisdiction. A prior Commission adjudication of the question of whether the rules were followed would also be of "material aid" to a court in resolving the immunity question.⁶⁰ The material aid standard apparently has a very low threshold. As one commentator noted, "[t]his minimal quantum of aid will be present in almost any circumstance."⁶¹

A later Supreme Court pronouncement came in *Nader v. Allegheny Airlines, Inc.*⁶² Ralph Nader sued the airline for failing to honor his reservation due to overbooking. He sued in tort, based on fraudulent misrepresentation arising from the airline's failure to inform him in advance of its deliberate overbooking practices. The Supreme Court reversed the District of Columbia Court of Appeals, which had held that the Civil Aeronautics Board (CAB) must be allowed to determine in the first instance whether the defendant's failure to disclose its overbooking practices violated section 411 of the Federal Aviation Act.⁶³ That section provides, in part, that if the CAB considers such action to be in the public interest, it may order an air carrier to cease and desist from engaging in an unfair or deceptive practice.

The Court reviewed the primary jurisdiction doctrine and determined that, in this case, unlike *Abilene*, there was no conflict between the regulatory scheme and the existence of common-law remedies because the CAB had not required the carriers to engage in overbooking or to fail to disclose that they do so. Nor was there any need to secure the Board's expert judgment. "The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case."⁶⁴ Furthermore, allowing the CAB to determine if section 411 had been violated would not immunize the carrier from common-law tort liability for fraudulent misrepresentation because the statutory and common-law issues were not coextensive; one related to the public interest, the other to private rights. The CAB had no jurisdiction over the latter issues.

These cases indicate that, in addition to the original concern for uniformity, the Supreme Court has developed several other principles of primary jurisdiction. Expertise, both in the form of an agency's

⁶⁰409 U.S. at 302.

⁶¹Travis, *supra* note 31, at 948.

⁶²426 U.S. 290 (1976).

⁶³Codified at 49 U.S.C. § 1381 (1962).

⁶⁴426 U.S. at 305-06.

specialization and its ability to resolve unique policy decisions, came next. Then the availability of an administrative remedy, whether the regulation involved the public interest, and whether the agency could materially aid the court were added to produce a rather discretionary standard. A look at how the lower courts apply these factors reveals the state of confusion in this area.

B. CURRENT STATUS

Given the many general principles involved, the fuzziness of the criteria and the many varied fact patterns, it is not surprising that the lower courts have developed divergent approaches to determine when and how they use the doctrine. A brief survey of these approaches will illustrate its current status. To a certain extent the fact-specific nature of the industry or program involved determines the outcome.

Although primary jurisdiction originated in a case involving enforcement of private rights,⁶⁶ it has been applied most often in the area of public antitrust law. In this area the two competing national policies of regulation and competition collide, with agencies responsible for the former and courts the latter.⁶⁶ Within the antitrust field the pervasiveness of the regulatory scheme is important.⁶⁷ The existence of a statutory exemption or agency immunization power to uphold the challenged business activity and defeat the antitrust suit is also important. As Professor Kenneth C. Davis notes: "Fitting together antitrust law and regulatory law creates many problems of primary jurisdiction because courts are the principal enforcers of antitrust law and regulatory agencies have at least the initial responsibility for creating, interpreting, and applying regulatory policy."⁶⁸ This area of concurrent, sometimes competing, jurisdiction finds the classic use of the doctrine.

⁶⁶Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

⁶⁶Good explanations of these interactions are found in 4 K. Davis, *supra* note 26, at 109-10 and L. Jaffre, *Judicial Control of Administrative Action* 141-51 (1965). See also Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 *Yale L.J.* 330-36 (1956); Jaffre, *Primary Jurisdiction Reconsidered: The Antitrust Laws*, 102 *U. Pa. L. Rev.* 436 (1954); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 *Harv. L. Rev.* 929 (1954); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 *Harv. L. Rev.* 436 (1954). Although some commentators make a distinction between antitrust cases and those involving the regulated industries, the difference seems insignificant and is ignored here.

⁶⁷See, e.g., *Port of Boston Marine Terminal Ass'n v. Rediaktiebolaget Transatlantic*, 400 U.S. 62 (1970); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

⁶⁸K. Davis, *supra* note 26, at 120.

The courts have frequently applied the primary jurisdiction doctrine in cases involving the major regulated industries. These include the railroad,⁶⁹ shipping,⁷⁰ and trucking⁷¹ sectors of the transportation industry. Public utilities and energy,⁷² securities and commodities,⁷³

⁶⁹For additional cases involving the railroad industry and the ICC, see *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Consolidated Rail Corp. v. National Ass'n of Recycling Industries*, 449 U.S. 609 (1981); *Long Island R.R. v. Aberdeen & Rockfish Ry.*, 439 U.S. 1 (1978); *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973); *Pennsylvania Ry. v. United States*, 363 U.S. 202 (1960); *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173 (1959); *United States v. Chesapeake & Ohio Ry.*, 353 U.S. 77 (1956); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); *Texas & Pac. Ry. v. American Tie & Timber Co.*, 234 U.S. 138 (1914); *Engelhardt v. Consolidated Rail Corp.*, 756 F.2d 1368 (2d Cir. 1985); *Zapp v. United Transp. Union*, 727 F.2d 617 (7th Cir. 1984); *Hansen v. Norfolk & W. Ry.*, 689 F.2d 707 (7th Cir. 1982); *United States v. United States Steel Corp.*, 645 F.2d 1285 (8th Cir. 1981); *United States v. Atchison, Topeka & Santa Fe Ry.*, 725 F.2d 469 (9th Cir. 1980); *ICC v. Maine Cent. R.R.*, 505 F.2d 590 (2d Cir. 1974); *Transkentucky Transp. R.R. v. Louisville & Nashville R.R.*, 581 F. Supp. 759 (E.D. Ky. 1983).

⁷⁰For cases involving the shipping industry and the shipping boards, see *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40 (1978); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959); *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *Far East Conference v. United States*, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932); *Bethlehem Steel Corp. v. Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969); *Jacksonville Maritime Ass'n v. City of Jacksonville*, 551 F. Supp. 1180 (M.D. Fla. 1982).

⁷¹For cases involving the trucking industry and the ICC, see *Hewitt-Robins v. Eastern Freight-Ways*, 371 U.S. 84 (1962); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); *McClellan Trucking Co. v. United States*, 321 U.S. 67 (1944); *United States v. Yellow Freight Sys., Inc.*, 762 F.2d 737 (9th Cir. 1985); *American Trucking Ass'n v. Interstate Commerce Comm'n*, 682 F.2d 487 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Transway Corp. v. Hawaiian Export Serv., Inc.*, 679 F.2d 1328 (9th Cir. 1982); *Bradford School Bus Transit, Inc. v. Chicago Transit Auth.*, 537 F.2d 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *Mercury Motors Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973); *Locust Cartage Co. v. Transamerican Freight Lines Co.*, 430 F.2d 334 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970).

⁷²See, e.g., *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *California v. Federal Power Comm'n*, 369 U.S. 482 (1962); *Oasis Petroleum Corp. v. United States Dept't of Energy*, 718 F.2d 1558 (Temp. Emer. Ct. App. 1983); *Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503 (5th Cir. 1981); *Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 1022 (1980); *Sunflower Electric Coop. v. Kansas Power & Light Co.*, 603 F.2d 791 (10th Cir. 1979); *Tenneco Oil Co. v. Federal Regulatory Comm'n*, 580 F.2d 722 (5th Cir. 1978); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Allegheny Electric Coop. v. Power Auth. of New York*, 630 F. Supp. 1271 (S.D.N.Y. 1986); *Danden Petroleum, Inc. v. Northern Natural Gas Co.*, 615 F. Supp. 1093 (N.D. Tex. 1985); *Orange & Rockland Utils., Inc. v. Howard Oil Co.*, 416 F. Supp. 460 (S.D.N.Y. 1976).

⁷³See, e.g., *United States v. National Assoc. of Secs. Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975); *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). See generally Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 Cal. L. Rev. 926 (1976).

and banking⁷⁴ are all industries where the courts have favored the doctrine. The airlines⁷⁵ and communications⁷⁶ industries have seen less frequent acceptance of the doctrine.

Major federal program areas where the doctrine has been applied include labor relations,⁷⁷ health and safety,⁷⁸ city planning,⁷⁹ and political campaigns.⁸⁰ It has been rejected in cases involving the environment,⁸¹ state handicapped services⁸² and corrections.⁸³

⁷⁴See, e.g., *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1979); *United States v. Michigan Nat'l Corp.*, 419 U.S. 1 (1974); *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

⁷⁵For cases involving the airlines industry, and the Civil Aeronautics Board, see *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061 (1977); *Civil Aeronautics Bd. v. Aeromatic Travel Corp.*, 489 F.2d 251 (2d Cir. 1974); *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972); *Civil Aeronautics Bd. v. Modern Air Transport*, 179 F.2d 622 (2d Cir. 1950).

⁷⁶For cases involving the Federal Communications Commission, see *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); *Federal Communications Comm'n v. Radio Corp. of America*, 348 U.S. 86 (1955); *Writers Guild of America v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 496 F.2d 214 (3d Cir. 1974); *Solomon v. MCI Telecommunications Corp.*, 647 F. Supp. 78 (E.D. Mich. 1986).

⁷⁷Compare *South Prairie Construction Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976) (per curiam); *Amalgamated Ass'n of St., Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Union Pac. R.R. v. Price*, 360 U.S. 601 (1959); *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959); and *Computer Sciences Corp. v. N.L.R.B.*, 677 F.2d 804 (11th Cir. 1982) with *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 29 (1977); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *United Auto Workers v. Russell*, 356 U.S. 634 (1958). See generally *Sovern, Section 301 and the Primary Jurisdiction of the N.L.R.B.*, 76 Harv. L. Rev. 529 (1963).

⁷⁸See, e.g., *National Gerimedical Hosp. & Gerontology Cent. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981); *Skoller v. Blue Cross-Blue Shield of Greater New York*, 584 F. Supp. 288 (S.D.N.Y. 1984).

⁷⁹*Feliciano v. Romney*, 363 F. Supp. 656 (S.D.N.Y. 1973) (HUD).

⁸⁰See, e.g., *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981); *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190 (D.C. Cir. 1986).

⁸¹See, e.g., *Connecticut v. United States Emtl. Protection Agency*, 656 F.2d 902 (2d Cir. 1981). See generally *Hoffman, The Doctrine of Primary Jurisdiction Misconceived: End to Common Law Environmental Protection?*, 2 Fla. St. U.L. Rev. 491 (1974).

⁸²*New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982) (Office of Civil Rights).

⁸³*United States v. Elrod*, 627 F.2d 813 (7th Cir. 1980) (LEAA).

There are few cases in the area of government contracts.⁸⁴ Chief among them is a decision involving McDonnell Douglas, a large Air Force defense contractor. In *United States v. McDonnell Douglas Corp.*,⁸⁵ the contractor failed to comply with a Comptroller General subpoena for business records in connection with a General Accounting Office (GAO) review of certain contracts. The Comptroller General sought to enforce the subpoena in federal district court. The contractor filed a notice of appeal with the ASBCA contesting the subpoena. McDonnell Douglas argued that the subpoena was not for materials "directly pertinent" as required by the access to records clause in the contract.⁸⁶ The ASBCA dismissed the appeal without prejudice because there was no claim or contracting officer's final decision. The contractor argued to the court that the ASBCA had exclusive subject-matter jurisdiction of the "dispute" under the Contract Disputes Act. If not, then the doctrine of primary jurisdiction should be invoked to let the board initially decide the issue, because interpretation of the access clause was a contract dispute.

The Eighth Circuit held that Congress specifically empowered district courts to enforce subpoenas by statute. The Contract Disputes Act's statutory system of remedies was not applicable and did not conflict with this jurisdiction. Citing *Western Pacific*,⁸⁷ the court stated that the doctrine of primary jurisdiction was inappropriate because a referral must relate to the purposes the doctrine served.⁸⁸ Here Congress specifically entrusted district courts with enforcement of subpoenas, which impliedly required interpreting the scope of the

⁸⁴See, e.g., *McDonnell Douglas Corp. v. United States*, 754 F.2d 365 (Fed. Cir. 1985) (comptroller general subpoena of records); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220 (8th Cir. 1984) (comptroller general subpoena for records); *In re Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir.), cert. denied, 464 U.S. 820 (1983) (bankruptcy); *United States v. Medico Indus., Inc.*, 685 F.2d 230 (7th Cir. 1982) (bankruptcy); *Rohr Indus. v. Washington Metro. Area Transit Auth.*, 720 F.2d 1319 (D.C. Cir. 1983) (pre-CDA breach of contract claim); *Bethlehem Steel Corp. v. Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969) (shipbuilding contract clause interpretation); *Vogue Instrument Corp.*, 31 B.R. 87 (Bankr. E.D.N.Y. 1983) (bankruptcy); *Pouch Foods, Inc.*, 30 B.R. 1015 (Bankr. N.D. Ill. 1983) (bankruptcy).

⁸⁵751 F.2d 220 (8th Cir. 1984).

⁸⁶The access clause provided:

The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract . . . have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

⁸⁷352 U.S. 59 (1956).

⁸⁸751 F.2d at 224.

contract's access to records clause. The court also noted that the doctrine of primary jurisdiction should be used only if a factual question requires both expert consideration and uniformity of resolution. It cautioned that courts should be wary of invoking a doctrine that often results in additional expense and delay.⁸⁹

In an earlier case prior to the Contract Disputes Act, the District of Columbia district court refused to refer a breach of contract claim to the Army Corps of Engineers Board of Contract Appeals. In *Rohr Industries v. Washington Metropolitan Area Transit Authority*,⁹⁰ a contractor providing rail cars sued the transit authority in district court for breaching its contractual duty under the contract's disputes clause⁹¹ to provide an adequate disputes resolution mechanism. The district court decided that this claim could be more efficiently and accurately resolved by the board of contract appeals. But the D.C. Circuit reversed, noting that resolution of the contractual issues did not involve difficult technical questions beyond the judiciary's traditional competence. Referral to the board was not desirable because the board's prior four-year delay in acting on Rohr's claims was the basis of its breach of contract theory.⁹²

C. THE ROLE OF STATUTORY INTERPRETATION

Administrative agencies share a common heritage—they are created by some legislative or executive instrument. In primary jurisdiction analysis, interpreting the extent of the delegation of authority

⁸⁹*Id.*

⁹⁰720 F.2d 1319 (D.C. Cir. 1983).

⁹¹The disputes clause provided in pertinent part:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Board of Directors of the Washington Metropolitan Area Transit Authority. . . .

(c) If an appeal is taken from the decision by the Contracting Officer, a hearing will be held before the Corps of Engineers, Department of the Army, Board of Contract Appeals and a written opinion will be provided to the Board of Directors by the Board of Contract Appeals. For the purposes hereof, such opinion will be considered a recommendation for the action to be taken by the Board of Directors, or the General Manager, (its authorized representative. . . .

⁹²720 F.2d at 1323.

to an agency is often critical.⁹³ Often more than the enabling statute is involved, such as where the cause of action is based on a statute. The important issues here involve the kind and scope of authority delegated by the governing act, whether a statute exempts a challenged activity, whether an administrative remedy is provided and, perhaps most important, whether primary jurisdiction analysis is relevant at all. As Professor Davis states, "Many problems about allocation of power to a court or to an agency to make an initial decision are sheer questions of statutory interpretation, and the answer is so clear in the statute or in its legislative history that no principle about primary jurisdiction needs to be taken into account."⁹⁴

The courts use the traditional tools of statutory construction to determine the intended meaning. They initially consider the statutory text, its legislative history, and the underlying congressional purpose. Although not a primary jurisdiction case, the second *McDonnell Douglas* decision is a good example of this technique.

As noted earlier,⁹⁵ the Eighth Circuit upheld a district court's enforcement of a subpoena for contractor records and refusal to stay the case pending a decision by the ASBCA even though the court was required to interpret a government contract clause. In *McDonnell Douglas Corp. v. United States*,⁹⁶ the Court of Appeals for the Federal Circuit upheld the ASBCA's dismissal of the contractor's appeal, but reversed the board's ruling that it would have subject-matter jurisdiction if a claim had been presented to a contracting officer for decision. The court held that the Comptroller General was not required to submit a claim of access to a contractor's record to a contracting officer before seeking enforcement in the district court. The General Accounting Act of 1980⁹⁷ gave the Comptroller General a statutory charter to independently investigate both contractors and government agencies.

The court specifically rejected McDonnell Douglas's contention that the Contract Disputes Act covered all contract disputes save the stated exceptions (such as fraud). The contractor had argued that, since the Contract Disputes Act contained no exception for the Comptroller General, by implication Congress intended none. Agreeing with the

⁹³For a good discussion of the role of statutory interpretation in administrative law see Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1985).

⁹⁴K. Davis, *supra* note 26, at 114.

⁹⁵See *supra* notes 65-88 and accompanying text.

⁹⁶754 F.2d 365 (Fed. Cir. 1985).

⁹⁷31 U.S.C. § 54(e) (1982).

contractor's statement of the general purpose of the statute—to consolidate disputes adjudication—the court nevertheless held that the separate right contained in the GAO statute created an exception to this all-disputes coverage.⁹⁸

The court also noted that initial resort to the board would be costly, slow, and futile because any decision would not be binding.⁹⁹ The court reasoned that Congress would not vest subject-matter jurisdiction over this issue to a body unable to enforce, or prevent enforcement of, such claims.¹⁰⁰ The court also stated, "Further, we know of no authority which would have permitted the district court to have sought help from the board had it wished to know its views about the nature of the contractor's records."¹⁰¹

One often-cited principle in this area is the supposed judicial abhorrence for statutory repeals by implication.¹⁰² Yet the results are far from predictable. The *Abilene* case is a good example.¹⁰³ Perhaps the most that can be said is that statutory interpretation is a necessary complement to the doctrine of primary jurisdiction.¹⁰⁴ Properly used, it promotes the purposes of the doctrine by discerning the proper role of an administrative agency. One commentator summed up its importance succinctly:

[A] finding of exclusive jurisdiction is a conclusion of law. . . . A rigorous methodology of statutory construction is needed to keep this [a court's own policy preferences] from becoming a wholly discretionary process. . . . Statutory analysis requires a definition of the particular issue in dispute (*e.g.*, the defendant's conduct), followed by an analysis of the agency's function and power with respect to that issue. The court can determine the statutory power question at once if exclusive jurisdiction exists in one of its three principal meanings: (1) the issue concerns the scope of a rule or agreement already approved by the agency, (2) the issue could be decided pur-

⁹⁸ 754 F.2d at 371.

⁹⁹ *Id.* at 369, where the court stated: "Nevertheless, MDC [McDonnell Douglas Corp.] urges upon us this costly, slow, and tortuous proceeding, although it is really meaningless because the district court would not be bound by the board's findings and the board could do nothing about it one way or the other."

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See, e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963).

¹⁰³ *See, e.g.*, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), where the Court ignored a statutory provision providing for continuation of common law judicial remedies.

¹⁰⁴ Commentators critical of *Abilene* deem this the most important test. *See* L. Jaffre, *supra* note 29, at 124; Convisser, *supra* note 28, at 315.

suant to an express agency power, or (3) the issue could be decided pursuant to an implied power.¹⁰⁵

Before analyzing the particular issues in dispute, we turn to consider the setting of the *General Dynamics* case—the defense industry.

III. THE DEFENSE INDUSTRY

The nature of the regulated industry is always relevant in primary jurisdiction analysis. The pertinent parts of the defense industry include the defense contractors and procuring agencies, the regulated activity (federal procurement), and the regulatory bodies. The relationships among these elements help determine whether judicial deference is required under the doctrine of primary jurisdiction to prevent upsetting a regulatory scheme.

A. COMPOSITION OF THE INDUSTRY

The defense industry is made up of several large corporations and a multitude of smaller businesses. The relatively few large defense contractors receive a majority of the procurement contracts.¹⁰⁶ The industry is characterized by both unique weapon system acquisitions and routine procurement. Although the phrase "military-industrial complex" is little used today, it is still a valid characterization of the industry. The military departments and civilian contractors are tied together in large part because of the need to maintain a large industrial base geared to produce unique military items on relatively short notice in times of mobilization.¹⁰⁷

Unlike most major industries consisting of many buyers and sellers contracting with each other for goods and services, the defense marketplace has one major customer—the Federal Government. The Federal Government purchases billions of dollars of defense related goods, services, and construction every fiscal year.¹⁰⁸ About sixty percent of the federal procurement budget is spent on defense-related procurement.¹⁰⁹ Although small compared to the total market for commercial products, the federal market is the single largest concentration of purchasing power in the United States.¹¹⁰

¹⁰⁵Travis, *supra* note 39, at 939.

¹⁰⁶J.R. Fox, *Arming America* 43 (1974).

¹⁰⁷1 Report of the Commission on Government Procurement 4 (1972) (hereinafter Report).

¹⁰⁸J. Fallows, *National Defense* 4-7 (1981).

¹⁰⁹*Id.*

¹¹⁰3 Report, *supra* note 107, at 3.

This purchasing power is not exercised by a single central organization. Nor does a single body regulate the entire defense industry. Instead, each agency procures its own goods and services and many have no regulatory function at all. The agencies do represent the United States. This distinction has important ramifications. The Commission on Government Procurement explained:

Contracts are a principal means of accomplishing many important Government functions. The contractual arrangement between the Government and a contractor generates legal relationships that are substantially different from the relationships between regulatory agencies and the public. Although procurement regulations sometimes prescribe contract terms, prospective contractors usually can compensate for such requirements through pricing or other negotiable aspects of contracting. These differences are sufficient in degree, if not altogether in kind, to set procurement apart from the typical arbitral-type operations of traditional regulatory agencies.¹¹¹

The composition of the defense industry indicates that it is unique both because of paramount issues of national defense and because of the government's role as a powerful buyer. This inherent characteristic of federal procurement places a dual role upon the agencies; they are not only buyers but also part-time referees.

B. AMOUNT AND FORM OF GOVERNMENT REGULATION

One work cited by the lower court judge in *General Dynamics*¹¹² describes the defense industry as "totally regulated."¹¹³ The amount of governmental regulation is indeed great,¹¹⁴ but the regulations apply not only to the defense industry, but also to the space industry, furniture industry, paper industry, medical supplies industry and any other industry that does business with the Federal Government.

¹¹¹ 1 Report, *supra* note 107, at 40.

¹¹² *United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1503 (C.D. Cal. 1986), *rev'd*, 828 F.2d 1356 (9th Cir. 1987).

¹¹³ J. Gansler, *The Defense Industry* 258 (1980).

¹¹⁴ The Commission on Government Procurement determined in 1972 that a typical contracting officer in the Army Electronics Command possessed a five-foot shelf of procurement regulations he was responsible for knowing and applying to the extent they governed his area of procurement. This amount of regulations excluded inter-agency directives. 1 Report, *supra* note 107, at 33. Judge Fernandez noted that the DIVAD contract alone took up "several feet of shelf space." 644 F. Supp. at 1504.

Many reasons exist for the large number of rules and regulations. Changing political influences in the legislative and executive branches produce new and more detailed federal procurement methods. For example, an intricate set of rules has developed to accommodate the public need for full and open competition in procurement and the military need for sources able to produce increasingly sophisticated weapons. Concern for promotion of certain social and economic policies adds to the list of required clauses in government contracts.¹¹⁵

The sheer volume of business,¹¹⁶ institutional desire for standard formats and procedures,¹¹⁷ many levels of bureaucracy,¹¹⁸ and necessity to accommodate various specific legislative and executive directives previously described¹¹⁹ have produced detailed rules and regulations that may apply during the formation, administration, and claims stages of government contracting. The lack of a central procurement organization contributed to the haphazard growth of regulations. The Commission on Government Procurement explained:

[N]o organization is fully in charge of this activity that involves so much money and so many people, and has such important economic implications. . . . Alternatives for a simplified regulatory system were examined. Nevertheless, like topsy, the regulations 'just grew,' relatively free from top level review. The sheer volume of regulatory material and the frequency of changes had become impossible to comprehend or coordinate.¹²⁰

Yet the end product of a contract made against this background of numerous specific rules hardly seems more complex than agreements

¹¹⁵A table included in the Commission's report lists 39 separate statutes implementing social and economic programs that were in effect in 1972. 1 Report, *supra* note 107, at 114.

¹¹⁶See *supra* notes 108-09 and accompanying text.

¹¹⁷Much of the desire for uniformity in this area is due to the high turnover and uneven training levels of government procurement personnel. See 1 Report, *supra* note 107, ch. 5.

¹¹⁸The Commission on Government Procurement found a "snowball effect" on regulations that pass down through several echelons of bureaucracy:

Supplementing and implementing—and often repeating and rephrasing—the top-level procurement and collateral regulations are subordinate agency procurement and collateral regulations. These sometimes flow down to the fourth and fifth levels. For example, in the Army, the ASPR [Armed Services Procurement Regulations] and other primary regulations are amplified by five levels of intermediate regulations and instructions.

1 Report, *supra* note 107, at 38.

¹¹⁹See *supra* note 115 and accompanying text.

¹²⁰1 Report, *supra* note 107, at 188.

made in the private business community involving mergers and acquisitions, and the courts have interpreted these for decades. The trepidation judges feel towards the "infrangible mass"¹²¹ of a government contract is probably due more to the infrequency with which Article III judges are called upon to resolve government contract issues than any uniquely complex legal issue present in federal procurement.

C. THE REGULATORY BODIES

The Commission on Government Procurement also identified few true regulatory agencies present in the federal procurement field:

Today [1972] there are more than 150 departments, independent agencies, boards, committees, and commissions, ranging from giants like the Department of Defense [footnote omitted] to diminutives like the Committee on Purchases of Blind-Made Products. [footnote omitted] Most are the creatures of statute; some of Executive order.

All are *operational* in the sense that all procure at least office supplies and equipment. But with many, buying is negligible, and they have no further participation in procurement; for example, the National Mediation Board. [footnote omitted] Some agencies, such as the Small Business Administration, Department of Labor, and General Services Administration, are also *regulatory* in the sense that they shape the procurement of other agencies.¹²²

This distinction is important because referring issues to an administrative body that does not regulate the industry fails to promote the intended purpose of the primary jurisdiction doctrine.¹²³ Uniformity is not achieved if the agency's promulgations set no precedent, affect only a portion of the industry, or are easily upset by another agency's policy declaration. Expertise is not gained if the agency is not equipped to make policy choices and investigate market conditions like true regulatory bodies. Instead, judicial economy is enhanced in much the same manner as court employment of a master.

¹²¹Judge Fernandez's phrase describing the cumulative effect of the DIVAD contract, specifications and applicable defense procurement regulations. *United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1504 (C.D. Cal. 1986), *rev'd*, 828 F.2d 1356 (9th Cir. 1987).

¹²²4 Report, *supra* note 107, at 215-16 (emphasis in original).

¹²³See *supra* notes 28-30 and accompanying text.

Another difference relates to the rationale for excluding federal procurement from the requirements of the Administrative Procedure Act (APA):

The proprietary interest of the Government as a contracting party must be considered a significant factor differentiating procurement agencies from regulatory agencies whose role is that of an umpire reaching a policy decision as the result of adversary activity on the part of competing groups outside the Government. [citation omitted] This proprietary interest is the main reason the exemption for contracts was granted.¹²⁴

This duality of interest marks the federal procurement agencies as decidedly different from the major independent regulatory agencies.

Moreover, analysis of the pervasiveness of the federal regulatory scheme cannot stop with simply surveying the amount of regulation and uniqueness of the industry. A conclusion that an industry is heavily regulated is meaningless absent a relationship between the regulation and the regulator. Indeed, it is interference with an agency's regulatory scheme that the doctrine of primary jurisdiction seeks to avoid.¹²⁵ Thus the prime regulator must be identified and placed within the scheme to properly assess its degree of expertise, its capability to produce uniformity, its power to reconcile policy issues, and its ability to grant relief to the applicant.

This was recognized by the Ninth Circuit in its *General Dynamics* opinion:

The doctrine of primary jurisdiction operates as follows: "when there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." . . . The doctrine applies when "protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." . . . Thus, it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings

¹²⁴1 Report, *supra* note 107, at 40.

¹²⁵*Far East Conference v. United States*, 342 U.S. 570, 574 (1952).

that determines the scope of the primary jurisdiction doctrine.¹²⁶

Although not strictly regulatory bodies, many procurement agencies influence procurement policy.¹²⁷ The Department of Defense, the Office of Federal Procurement Policy, the Office of Management and Budget, military departments, the armed services committees, Congress, and the office of the President all set procurement policy, issue directives and regulations, investigate, and enforce the law.¹²⁸

In addition to the agencies listed above, the Department of Justice is the major agency responsible for fraud investigation, prosecution, and settlement of litigation.¹²⁹ It has always litigated criminal and civil fraud cases in federal court, leaving the military services to litigate nonfraud contract disputes before the boards.¹³⁰

Compare this situation with an independent regulatory agency, such as the Interstate Commerce Commission. The ICC has the duty of regulating the transportation industry to protect the public interest.¹³¹ To that end it investigates, makes rules and regulations, and adjudicates disputes over the reasonableness of carrier tariffs and whether various business combinations are immune from the anti-trust laws. Its regulations are qualitatively different from those in the defense industry. There, regulations reflect the superior bargaining position of the Federal Government as a buyer. It can set and change the rules of procurement. There is no balancing of the public interest performed by an independent agency like the ICC as the government and defense contractor go about their business. The public interest is protected by the workings of the political process in the executive and legislative branches. Various executive agencies do exercise policy-making power, but of a kind distinctly different than the major independent regulatory agencies.

The Ninth Circuit grasped this fundamental distinction when it observed:

¹²⁶United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987) (cites omitted).

¹²⁷The Commission found ten major sources of procurement policy in the three branches of government. 1 Report, *supra* note 107, at 10.

¹²⁸The agency directly responsible for promulgating the Cost Accounting Standards that are involved in *General Dynamics* has effectively ceased to exist. Funding for the Cost Accounting Standards Board expired on October 1, 1980.

¹²⁹See *supra* notes 144-45 and accompanying text.

¹³⁰See *infra* note 197 and accompanying text.

¹³¹49 U.S.C. § 1 (1982).

The Board [ASBCA] is not involved in the creation of regulations or in the drafting of military contracts and nothing in the CDA implies congressional intent to delegate policy-making or policy-implementing power to the Board. Thus, it has little in common with such bodies as the Interstate Commerce Commission and the Securities and Exchange Commission, which have quasi-legislative powers and are actively involved in the administration of regulatory statutes.¹³²

Before considering further the question of which agency is appropriate for primary jurisdiction purposes, the characteristics of the criminal fraud case must be explored.

IV. THE NATURE OF THE CRIMINAL FRAUD CASE

The decision to invoke the primary jurisdiction doctrine does not turn on whether the case involved is criminal or civil, nor does it depend on what cause of action is brought. The type of action at issue does determine on what questions the court thinks it needs help from the agency.¹³³ For example, the cause of action may rest on a statute whose effect is important for the reasons noted above.¹³⁴

A. FRAUD CASES IN GENERAL

Fraud in military procurement has emerged as a national issue. Reports of \$400 hammers and \$600 toilet seats have undermined public confidence in the procurement system.¹³⁵ The Federal Government has responded in several ways to the ensuing public clamor. Fraud investigation and prosecution units were organized,¹³⁶ indictments were obtained against the largest defense contractors,¹³⁷ fraud indicator pamphlets were published and disseminated to procurement

¹³²828 F.2d at 1365.

¹³³See, e.g., *United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1504 (C.D. Cal. 1986), *rev'd*, 828 F.2d 1356 (9th Cir. 1987).

¹³⁴See *supra* section II.C.

¹³⁵Fines, forfeitures, recoveries, and civil settlements more than doubled, from \$30.3 million to \$71.7 million, in 1986. 46 Fed. Cont. Rep. (BNA) 1007 (Dec. 15, 1986). As of May 1, 1985, 45 of the top 100 defense contractors were under investigation for criminal contract fraud. *Business Week*, July 7, 1985, at 24.

¹³⁶For example, DOD established a procurement fraud unit in 1982 and DOJ did the same shortly thereafter to handle major DOD fraud investigations and maximize coordination and joint decision making.

¹³⁷See Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Issues*, 14 Pub. Cont. L.J. 216 (1984).

officials at all levels,¹³⁸ and a high ranking DOD official called for corporate voluntary self-disclosure of criminal violations relating to fraud in the performance of government contracts.¹³⁹

The underlying public interest principle was explained by a DOJ official:

The trend to an immediate government response to allegations of fraud—criminal investigation and suspension—is fueled by some common goals and purposes. A primary purpose is to insure that federal procurement dollars are well spent, that the government receives the best possible product for the lowest possible price to achieve these goals, and that bidders are responsible.¹⁴⁰

The importance of this public interest is illustrated by the priority it enjoys within the Federal Government. "Generally speaking, the public and the governmental interest in detecting and prosecuting criminality outweighs other administrative and civil concerns of the government."¹⁴¹

It was in this context that DOJ obtained the indictment in the *General Dynamics* case. Procurement fraud issues underlaid the entire criminal case.

B. CRIMINAL JURISDICTION

In *General Dynamics*, the indictment specified one count of conspiracy in violation of 18 U.S.C. section 371,¹⁴² and six counts of false

¹³⁸Department of Defense Office of Inspector General, Indicators of Fraud in Department of Defense Procurement (June 1, 1984) (hereinafter Red Book).

¹³⁹Letter from William H. Taft, IV, Deputy Secretary of Defense (July 24, 1986), reprinted in 46 Fed. Cont. Rep. (BNA) 292-93 (Aug. 11, 1986).

¹⁴⁰Graham, *Mischarging: A Contract Cost Dispute or Criminal Fraud?*, 15 Pub. Cont. L.J. 208, 218 (1985).

¹⁴¹*Id.* at 219. The importance of fraud abatement is further indicated by the recent passage of the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, 100 Stat. 1185, and amendments to the False Claims Act, 31 U.S.C. §§ 3729-3731 (1982), the Anti-Kickback Act, 41 U.S.C. §§ 51-54 (1982), and various other fraud abatement provisions in the Defense Acquisition Improvement Act of 1986, Pub. L. No. 99-661, 100 Stat. 3910.

¹⁴²The elements of a conspiracy case are:

- (1) that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

statements in violation of 18 U.S.C. sections 1001 and 1002 (aiding and abetting).¹⁴³ Jurisdiction in the district court was thus based on these federal statutes. Original jurisdiction of federal criminal charges resides in the federal district courts.¹⁴⁴ "Congress has always in the broadest terms vested jurisdiction to try criminal cases in the lower courts There are no exceptions made."¹⁴⁵ But the fact that criminal charges are involved, normally the province of federal courts, is an inconsistent barrier against application of the primary jurisdiction doctrine.¹⁴⁶

In *Far East Conference v. United States*,¹⁴⁷ Justice Frankfurter, writing for the majority, specifically rejected Justice Douglas's argument that a federal court should not remit a criminal case to a board that had no authority to enforce the statute the Department of Justice was seeking to enforce. The conspiracy charges in *Far East* were properly administrative questions because adjudication turned on technical regulatory questions, because the agency had the power to exempt the conspiracy from the antitrust laws, and because the agency monitored the degree and type of competition in the industry.¹⁴⁸ Where these factors are absent, the result should be different. The Ninth Circuit's *General Dynamics* opinion recognized this conclusion and the danger of interfering with the government's authority to prosecute criminal cases:

Requiring the government to litigate issues central to a criminal prosecution in collateral agency proceedings is at odds with the general rule of prosecutorial discretion over the bringing of criminal indictments. [citations omitted] Only where an issue unambiguously requires initial agency determination under the primary jurisdiction doctrine, *see, e.g., Yellow Freight Sys.*, 762 F.2d at 462, and the referring court has the authority to review the agency's order, can the agency's regulatory interests be required or allowed to subordi-

¹⁴³The elements of the offense of false statements are:

- (1) that the accused knew the statements were false, (2) that the statements were actually false or that the accused concealed and covered up by trick, scheme, or device, (3) that the false statement or concealment was material, and (4) that the matter was within the jurisdiction of the United States.

Graham, *supra* note 140, at 216 and n. 45.

¹⁴⁴*See infra* note 197.

¹⁴⁵*Farnsworth v. Sanford*, 115 F.2d 376 (5th Cir. 1940), *cert. denied*, 313 U.S. 586 (1941).

¹⁴⁶*United States v. Pacific & Arctic Ry. & Navigation Co.*, 228 U.S. 87 (1913).

¹⁴⁷342 U.S. 570 (1952).

¹⁴⁸*Id.* at 576.

nate the government's authority to prosecute criminal offenses.¹⁴⁹

One of the cases cited by the government in its brief¹⁵⁰ and relied on by the Ninth Circuit in its opinion¹⁵¹ was *United States v. International Union of Operating Engineers*.¹⁵² That case demonstrates the role of statutory interpretation in issues of criminal jurisdiction. A union was indicted for violations of the Federal Election Campaign Act (FECA).¹⁵³ The district court dismissed the indictment because the Department of Justice had failed to exhaust an administrative remedy available at the Federal Election Commission (FEC)¹⁵⁴ prior to indictment. The remedy provided an enforcement process for investigating and deciding complaints of illegal campaign practices and provided that the FEC could institute civil proceedings after attempting conciliation, or refer the matter to the Department of Justice for criminal prosecution without prior conciliation efforts. The conciliation agreement, unless violated, served as a complete bar to further FEC action and as mitigating evidence in any criminal action brought by the Attorney General.

The Ninth Circuit reversed. Considering the statutory text and legislative history, the court found no indication that prosecuting a violation of FECA was conditioned upon prior consideration of the alleged violation by the FEC.¹⁵⁵ The court applied a presumption against congressional intent to limit the power of the Attorney General to prosecute offenses under the criminal laws of the United States.¹⁵⁶ The court concluded:

In sum, neither the language nor the legislative history of the Act provides the kind of 'clear and unambiguous expression of legislative will' necessary to support a holding that Congress sought to alter the traditionally broad scope of the Attorney General's prosecutorial discretion by requiring initial administrative screening of alleged violations of the Act.¹⁵⁷

The governmental interest in preserving prosecutorial discretion and federal jurisdiction over criminal cases is a powerful consideration

¹⁴⁹ *General Dynamics*, 828 F.2d at 1366.

¹⁵⁰ *Id.*, Brief for the Appellant.

¹⁵¹ *Id.* at 1366.

¹⁵² 638 F.2d 1161 (9th Cir. 1979).

¹⁵³ 2 U.S.C. §§ 431-435 (1982).

¹⁵⁴ 2 U.S.C. § 437(g) (1982).

¹⁵⁵ 638 F.2d at 1163-65.

¹⁵⁶ *Id.* at 1162.

¹⁵⁷ *Id.* at 1168.

courts must take into account. In the field of federal procurement, however, the nature of a fraud case produces other competing interests.

C. GOVERNMENT CONTRACTS FRAUD

Federal procurement fraud takes many forms. The major kinds of fraud include defective pricing, collusive bidding and price fixing, cost mischarging, product substitution, progress payment fraud, fast pay fraud, and bribery, gratuities and conflicts of interest.¹⁵⁸ A form of cost mischarging fraud was alleged in *General Dynamics*.¹⁵⁹ Allegedly, General Dynamics had improperly allocated costs incurred for work on the DIVAD contract to independent research and development (IR&D) and bid and proposal (B&P) accounts on separate cost reimbursement contracts. The government had further charged that several false reports and false cost ledgers were submitted to government officials. Sixty-five overt acts were allegedly committed in connection with the mischarging in furtherance of a criminal conspiracy.¹⁶⁰

Accounting mischarging is the fraud most frequently encountered by Defense Contract Audit Agency auditors.¹⁶¹ The costs involved were indirect costs, as opposed to direct costs such as time, labor and material costs. Since indirect costs may properly be charged to cost pools,¹⁶² it may be difficult to determine whether the contractor correctly allocated these costs. Assuming the contractor's allocation was wrong, the issue is often whether a mistake has occurred or whether the contractor intended to defraud the government. The jury instructions for several of the federal criminal statutes require that the government prove a specific intent to defraud the government.¹⁶³ Con-

¹⁵⁸For good descriptions of the interaction of these elements in government contracts cases, see generally Graham, *Mischarging: A Contract Cost Dispute or a Criminal Fraud?*, 15 Pub. Cont. L. J. 208, 216-25 (1985); see also J. Cibinic and R. Nash, *Administration of Government Contracts*, 84-90, 96-98 (2d ed. 1985).

¹⁵⁹Good summaries of the various theories appear in Graham, *supra* note 158, at 209-15; Kenney & Kirby, *A Management Approach to the Procurement Fraud Problem*, 15 Pub. Cont. L.J. 345, 350-55 (1985).

¹⁶⁰The alleged acts generally involved submitting false reports of expenditures incurred on the DIVAD contract and various writings indicating the government should not be allowed to view the accurate data.

¹⁶¹Red Book, *supra* note 138, at 22.

¹⁶²IR&D and B&P costs are governed by Federal Acquisition Regulation 31.205-18 (Sept. 30, 1987) and Defense Federal Acquisition Regulations Supplement 31.205-18 (6 Jan. 1986) [hereinafter FAR and DFARS, respectively]. Generally they are proper charges if allowable, allocable to the contract, and reasonable.

¹⁶³Graham, *supra* note 158, at 228.

tractors can, and do, defend on the ground that the regulations and cost principles permit such mischarges, or at least prevent a finding of specific intent to defraud.¹⁶⁴

For purposes of its primary jurisdiction motion General Dynamics claimed that the DIVAD contract was a unique fixed price contract,¹⁶⁵ and that the applicable IR&D and B&P regulations allowed the type of cost allocation they used.¹⁶⁶ Therefore, the issues in the case involved interpretation of contract terms and regulatory provisions, in addition to the issues of falsity of the documentary evidence and intent to deceive. The defendants argued that a reasonable interpretation of the contract terms and regulations would, in effect, immunize their conduct and prevent conviction based on fraud. The government, on the other hand, argued that defendant's conduct was not permitted and, even if allowed, the evidence of conspiracy could make this otherwise lawful conduct criminal.

Five of the ten referred questions sought a determination of the contract type. The other five questions concerned the application of the B&P and IR&D regulations. Only the latter questions appear to apply to a defense to the criminal charges. Much of what the defendants sought to prove concerning the nature of their "best efforts" would appear to run afoul of the parol evidence rule.¹⁶⁷

Of particular concern in deciding the primary jurisdiction question is whether the issues are crucial to the case. One approach is to characterize them as questions of law or fact. If they are questions of fact, referral to an administrative agency may be more palatable.¹⁶⁸ This law-fact distinction has been important in primary jurisdiction

¹⁶⁴Graham summarizes the defense:

The flexibility of the regulations makes it possible that a contractor intends to mischarge but on closer examination the cost principles, the standards of the contract makes the treatment allowable. In such a situation, the defense of legal impressibility [sic] is raised. "One cannot defraud another into paying money which that other person is obligated by law to pay." *United States v. O'Brien*, 501 F. Supp. 140, 143 (E.D. Pa. 1980) [other citations omitted].

Id. at 229 n. 18.

¹⁶⁵The parenthetical phrase "(best efforts)" was included in the contract after the usual term "fixed price". General Dynamics claimed this gave the contractor extraordinary leeway in developing the product and choosing what costs to incur. Defendant's Motion to Dismiss No. 1 at 9-18, *United States v. General Dynamics Corp.*, 644 F. Supp. 1497 (C.D. Cal. 1986) (No. CR 85-1123-FFF).

¹⁶⁶See *supra* note 162.

¹⁶⁷General Dynamics also argued that during negotiation of their proposal government employees made representations approving of their procurement plan.

¹⁶⁸On the other hand, it may unnecessarily invade the province of the fact finder, especially on issues of criminal intent.

cases,¹⁶⁹ and this may be especially so in criminal cases. As one commentator noted, "The test, then, for the exercise of judicial discretion in referring cases to administrative agencies is whether the issue is an *issue of fact* within the scope of the agency, and the *sole or dominant issue* in a given case."¹⁷⁰

In *General Dynamics*, the district court judge thought the ASBCA's decision as to the ten referred questions¹⁷¹ would "constitute a material aid in resolving this case."¹⁷² And if the board's decision did not resolve all of the major issues, the judge nevertheless felt that its determinations would aid him in admitting evidence, ruling on motions for acquittal, and instructing the jury.¹⁷³ Apparently the major issue for the judge was whether the manner of allocating costs was permissible. He indicated that an ASBCA interpretation approving *General Dynamics'* accounting charges would help resolve the "difficult question of whether a conspiracy could embrace purely lawful conduct."¹⁷⁴

This rationale wholeheartedly embraces the "material aid" test that originated in *Ricci v. Chicago Mercantile Exchange*.¹⁷⁵ Rather than pinning the decision on the benefit of uniformity and national policy choices that must be made by a nonjudicial body, the judge admitted that the real reason to defer to the ASBCA was to obtain its assistance in a difficult case. The Ninth Circuit rejected this approach, however: "The purpose of the primary jurisdiction doctrine is not to secure expert advice for the courts, but rather to secure a place for administrative power within our legal system."¹⁷⁶ Even if expertise were the sole criteria, courts have decided contract fraud cases without resort to the primary jurisdiction doctrine.¹⁷⁷

¹⁶⁹ See, e.g., *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 205 (1922); *United States v. Elrod*, 627 F.2d 813 (7th Cir. 1983); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979); *Jacksonville Maritime v. City of Jacksonville*, 551 F. Supp. 1130 (M.D. Fla. 1982).

¹⁷⁰ Note, *The Doctrine of Primary Jurisdiction: A Reexamination of its Purpose and Practicality*, 48 *Georgetown L.J.* 563, 571 (1960) (emphasis in original).

¹⁷¹ See *supra* note 17.

¹⁷² *United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1506 (C.D. Cal. 1986), *rev'd*, 828 F.2d 1356 (9th Cir. 1987).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 409 U.S. 289 (1973); see *supra* notes 57-61 and accompanying text.

¹⁷⁶ 813 F.2d at 1365.

¹⁷⁷ See, e.g., *United States v. White*, 765 F.2d 1469 (11th Cir. 1985) (conviction for conspiracy to make and file false claims by labor and material mischarging); *United States v. Sys. Architects, Inc.*, 757 F.2d 373 (1st Cir.), cert. denied, 106 S. Ct. 139 (1985) (conviction for making false statements and false claims by labor mischarging); *United States v. Kenny*, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981) (conviction for conspiracy to conceal business records); *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980) (defendant acquitted of making false statements by labor and materials mischarging).

D. PRIMARY JURISDICTION AND CRIMINAL FRAUD CASES

Most of the cases involving the doctrine of primary jurisdiction have been civil cases. Even the antitrust cases were mainly private enforcement actions of federal statutes. But courts have turned the government away from the courthouse door even when the agency deferred to was a party to the action.¹⁷⁸ Two recent decisions illustrate the different approaches courts have taken when faced with the issue of primary jurisdiction.

In *United States v. Yellow Freight System, Inc.*,¹⁷⁹ a trucking carrier was convicted under the Elkins Act¹⁸⁰ of knowingly granting an illegal concession to a shipper. The carrier had charged the shipper based on both volume and less-than-truckload (LTL) rates using a theoretical route never traveled. The district court found the higher LTL rate should have applied throughout and rejected the defendant's argument that industry practice allowed charges based on potential routing. The Ninth Circuit reversed, holding that whether the volume tariff applied to Yellow Freight's services, despite its deviations from the tariff's technicalities (the actual routing), was a threshold question of policy that must be decided before a court could determine the criminal issues.¹⁸¹ It was thus an appropriate subject for ICC determination pursuant to the primary jurisdiction doctrine.

The Ninth Circuit phrased the test in language from *Western Pacific*,¹⁸² declaring that issues of transportation policy ought to be considered by the ICC in the interests of uniform and expert adminis-

¹⁷⁸ See, e.g., *Far East Conference v. United States*, 342 U.S. 570, 576 (1952) ("whether the suit was filed by a private person or by the government, considerations of expertness were equally applicable") (Frankfurter, J.); *Compare Oasis Petroleum Corp. v. United States Dept. of Energy*, 718 F.2d 1558 (Temp. Emer. Ct. App. 1983) (doctrine applied against Department of Energy); *American Trucking Ass'n v. Interstate Commerce Comm'n*, 682 F.2d 487 (5th Cir. 1982), cert. denied, 460 U.S. 1022 (1983) (doctrine applied against ICC); *Computer Sciences Corp. v. NLRB*, 677 F.2d 804 (11th Cir. 1982) (doctrine applied against NLRB); and *United States v. United States Steel Corp.*, 645 F.2d 1285 (8th Cir. 1981) (doctrine applied against ICC) with *United States v. Elrod*, 627 F.2d 813 (7th Cir. 1980) (doctrine did not apply against Law Enforcement and Assistance Agency); *United States v. Atchison, Topeka & Santa Fe Ry.*, 725 F.2d 469 (9th Cir. 1980) (doctrine did not apply against ICC); *Civil Aeronautics Bd. v. Aeromatic Travel Corp.*, 489 F.2d 251 (2d Cir. 1974) (doctrine did not apply against CAB); and *Civil Aeronautics Bd. v. Modern Air Transp.*, 179 F.2d 622 (2d Cir. 1950) (doctrine did not apply against CAB).

¹⁷⁹ 762 F.2d 737 (9th Cir. 1985).

¹⁸⁰ 49 U.S.C. § 41(i) (1976) (recodified as amended at 49 U.S.C. § 11903 (1982)).

¹⁸¹ 762 F.2d at 740.

¹⁸² *United States v. Western & Pac. Ry. Co.*, 352 U.S. 59, 63 (1956); see *supra* text accompanying notes 47-49.

tration of a regulatory scheme. Construction of the tariff would involve a choice between underlying policies favoring different groups of carriers and shippers: "These are difficult issues of fact and policy inextricably intertwined with the construction of the tariff's terms, and better left to the ICC's special expertise."¹⁸³

The Third Circuit refused to apply the doctrine of primary jurisdiction when faced with an issue of statutory construction in *United States v. Boffa*.¹⁸⁴ In that case several businessmen were convicted of racketeering charges in connection with operating several corporations. Violations of three federal statutes were charged, including the mail fraud statute. Defendants alleged that the predicate acts of mail fraud were based on unfair labor practices, and that Congress did not intend that violations of employees' rights in this matter could serve as the basis for a mail fraud prosecution. Because of the existence of the unfair labor practices, defendants alleged that the National Labor Relations Board (NLRB) had primary jurisdiction over the case, citing *San Diego Building Trades Council v. Garmon*.¹⁸⁵ In *Garmon* the Supreme Court had held that state and federal courts must defer to the exclusive competence of the NLRB when an activity is arguably protected by the National Labor Relations Act (NLRA).¹⁸⁶ In *Boffa* the Third Circuit held that the mail fraud statute was not impliedly repealed by enactment of the NLRA. Looking to congressional intent, the court found nothing in the legislative history to suggest repeal of the separate federal statutes regulating criminal conduct in the labor field. Applying the strong judicial policy against repeals, the court found neither a positive repugnancy between the statutes nor an occupation of the entire field by the NLRA that would preempt the earlier mail fraud statute.¹⁸⁷

The two circuits used different approaches and reached opposite conclusions in these criminal cases. The difficult issue of tariff construction involving transportation policy choices persuaded the Ninth Circuit to defer to the ICC in *Yellow Freight*. The Third Circuit rejected a similar argument in *Boffa*, where the defendants had argued that the congressional policy favoring the regulation of labor disputes by the NLRA would be undermined by conflicting federal regulation. In rejecting these contentions the Third Circuit closely examined the policies underlying the doctrine to determine the presumed intent of Congress. The question then became whether Congress intended to

¹⁸³ 762 F.2d at 741.

¹⁸⁴ 686 F.2d 919 (3d Cir. 1982), cert. denied, 465 U.S. 1066 (1984).

¹⁸⁵ 359 U.S. 236 (1959).

¹⁸⁶ *Id.* at 246.

¹⁸⁷ 686 F.2d at 932-33.

work an implied repeal of the existing mail fraud statute when it enacted the NLRA.

The different results are probably due more to the type of agency and industry involved than any significant philosophical divergence. Ever since the *Abilene* decision,¹⁸⁸ the ICC had been determining issues of transportation policy involving tariff rates. The National Labor Relations Board, on the other hand, determined issues of employer-employee relations and the argument the mail fraud scheme was also an unfair labor practice under exclusive NLRB jurisdiction did little to further the purpose of the NLRA or demonstrate a serious conflict with a regulatory scheme.

In *General Dynamics* the Ninth Circuit recast its primary jurisdiction test. Instead of relying on *Western Pacific*, as it had in *Yellow Freight*, the Court centered its analysis on the nature of the regulatory structure and the role of the regulating agency.¹⁸⁹

Finally, it should be noted that the General Accounting Office also does not take jurisdiction of bid protests alleging a criminal violation. "The enforcement of criminal statutes and investigation of criminal violations are the prerogative of the Department of Justice."¹⁹⁰

It is now necessary to consider the agency thrust into the limelight by the *General Dynamics* referral, for it is the role of the agency itself that should properly be the deciding factor in primary jurisdiction determinations.

V. THE BOARDS OF CONTRACT APPEALS

The *General Dynamics* defendants sought to refer their case to the ASBCA on the basis of the primary jurisdiction doctrine. The board's role in federal procurement and the authority Congress and the executive branch delegated to it are important in understanding the board's relationship with the courts and the industry it serves.

The Contract Disputes Act of 1978¹⁹¹ is the centerpiece of federal procurement disputes legislation. This statute serves as the enabling statute for the boards of contract appeal, and, through its jurisdictional limitations, defines the agency's role. Before turning to the Act a brief history of the boards of contract appeals will illuminate their traditional tasks.

¹⁸⁸Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 246 (1907).

¹⁸⁹United States v. General Dynamics Corp., 828 F.2d 1356, 1362-67 (9th Cir. 1987).

¹⁹⁰Comp. Gen. Dec. B-199407 (Sept. 21, 1981) 81-2 CPD ¶ 228.

¹⁹¹41 U.S.C. §§ 601-613 (1982 and Supp. III 1985).

A. THE HISTORICAL ROLE OF THE BOARDS OF CONTRACT APPEALS

Boards of contract appeals were originally established to resolve defense contracting disputes during World War I. They were established pursuant to the authority of the Secretary of War.¹⁹² Withstanding an early challenge, their legality was upheld on the basis of the Secretary's general authority to administer his department.¹⁹³ A contractor was not bound by a board's decision unless he consented, however, so the practice of including disputes clauses in government contracts quickly gained acceptance. The early military boards used during and after the two world wars were composed of well-paid and highly competent experts supported by professional staffs. They commanded the confidence and respect of the contracting community.¹⁹⁴ Their powers did not exceed their stated role of adjudicating contract claims.

Two areas of controversies were excluded from the jurisdiction of these boards. Breach of contract claims¹⁹⁵ and fraud claims¹⁹⁶ were litigated in federal district court.

Historically, allegations of contractor fraud were referred by the agency's contracting department to the Department of Justice (DOJ). Charged with representing the United States in court,¹⁹⁷ DOJ exercises prosecutorial discretion in determining whether to seek an indictment against the contractor. DOJ also exercises settlement authority over all government contract cases, including those involving fraud, in federal courts.¹⁹⁸

Boards of contract appeal grew in number following World War II as several executive departments and agencies created their own boards

¹⁹²For a general history of the development of the boards of contract appeals see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 *Law & Contemp. Probs.* 39 (1964). See also P. Latham, *Government Contract Disputes* 11-20 (1986).

¹⁹³*United States v. Adams*, 7 U.S. (7 Wall.) 463 (1868); see also *United States v. Corliss Steam Engine Co.*, 91 U.S. 321 (1875).

¹⁹⁴See Shedd, *supra* note 192, at 47, 55.

¹⁹⁵See *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603 (1937).

¹⁹⁶See *Aywon Wire & Metal Corp.*, ASBCA No. 2869, 1963 B.C.A. (CCH) ¶ 3912.

¹⁹⁷28 U.S.C. §§ 516, 518(a) (1982 & Supp. III 1985). These sections provide in part:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

¹⁹⁸28 U.S.C. § 3132 (1982 & Supp. III 1985).

with similar functions and duties.¹⁹⁹ They were solely quasi-judicial tribunals: adjudicating bodies with no investigative, law enforcement, or rulemaking powers. The Supreme Court found that "their decisions constitute administrative adjudication in its purest sense."²⁰⁰ They continued to be creatures of executive fiat unrecognized formally by Congress. Several developments in the past twenty years clarified their status.

In 1972 the Commission on Government Procurement rendered its four-volume report to Congress on the state of the national procurement process.²⁰¹ It recommended several changes to the existing disputes process. Perhaps most important was the recommendation to give the boards jurisdiction over all claims relating to a contract, thus eliminating the distinction between breach of contract claims and disputes arising under the contract subject to a remedy granting contract clause. Legislation based on these recommendations was subsequently introduced and passed as the Contract Disputes Act of 1978 (CDA).²⁰² The CDA codified the adjudicatory role of the boards without changing their basic nature.²⁰³

Other statutes also influence the procurement process.²⁰⁴ Congress created the Office of Federal Procurement Policy (OFPP) in 1974 and significantly increased its powers with the passage of the Office of Federal Procurement Policy Act Amendments of 1983.²⁰⁵ Working within the Office of Management and Budget (OMB), the OFPP now

¹⁹⁹Currently there are 12 boards. The Armed Services Board of Contract Appeals (ASBCA), with 33 members, is by far the largest. J. Cibinic & R. Nash, *supra* note 155, at 952.

²⁰⁰*S & E Contractors, Inc. v. United States*, 406 U.S. 1, 17-18 (1972) (quoting S. Doc. No. 99, 89th Cong., 2d Sess. 21 (1966)).

The Commission on Government Procurement analyzed the board's workload and stated:

Although the boards can and do decide complex issues of law when required to do so, the same analysis showed that disputes brought before the boards were essentially factual. Specifications were involved in 30 percent of the disputes; contract changes in 26 percent; while default terminations accounted for 16 percent of the appeals. [footnote omitted] All of these are primarily factual disputes.

4 Report, *supra* note 107, at 15.

²⁰¹Report of the Commission on Government Procurement (1972).

²⁰²41 U.S.C. §§ 601-613 (1982 & Supp. III 1985).

²⁰³See *infra* section IV. C.

²⁰⁴The Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301-2316 (1982), and the Federal Property and Administrative Service Act of 1949, 41 U.S.C. §§ 251-259 (1982), are two major statutes governing federal acquisition of goods, services and construction, but do not govern the disputes process.

²⁰⁵41 U.S.C. §§ 403(4), 405(a) (1982 & Supp. III 1985).

exercises significant regulatory authority through issuance of Federal Acquisition Regulations (FARS). In effect, this agency assumed many of the rulemaking functions previously split among the major executive departments with large procurement business.²⁰⁶

The Federal Courts Improvement Act of 1982²⁰⁷ divided the Court of Claims into two separate appellate forums. The new Claims Court now shares equal status with the boards as an appellate forum from contracting officer final decisions. The Act also created the Court of Appeals for the Federal Circuit as an exclusive intermediate forum between the Claims Court and boards and the Supreme Court.

None of these statutes purported to alter the boards' jurisdiction for cases involving contractor fraud. The end result is a bifurcated system. Claims concerning contract disputes are submitted to a contracting officer for a final decision with a separate procedure for government prosecution of contractor fraud cases.

B. STATUTORY PROVISIONS AFFECTING THE DOCTRINE OF PRIMARY JURISDICTION

Primary jurisdiction analysis must inevitably focus on an agency's enabling statute to determine both the role of the agency, the scope of its power, and whether the court should defer initially, or at all, to it. The Contract Disputes Act is the enabling statute for the boards of contract appeals and defines their jurisdictional limits to adjudicate disputes.

Assuming a contractual relationship exists for authorized work with a proper government entity, a contractor must assert a claim arising under the contract to invoke a board's jurisdiction. The CDA does not define "claim", but does specify two requirements: it must be a written submission to the contracting officer,²⁰⁸ and it must be certified if over \$50,000.²⁰⁹ Jurisdiction of the boards or the Claims

²⁰⁶A significant amount of rulemaking still occurs in many executive departments. The Department of Defense (DOD) and Administrators of the General Services Administration (GSA) and National Aeronautics and Space Administration (NASA) exert major policy influence over their procurement systems by promulgating supplementing regulations to the FAR. The Office of Management and Budget (OMB) also issues government-wide circulars affecting government procurement. The Department of Labor (DOL) issues regulations concerning labor issues in federal contracting. A good discussion of the sources of procurement policy and statutory authority is found in J. Cibinic & R. Nash, *Administration of Government Contracts* 9-21 (2d ed. 1985). See also sources noted *supra* note 127.

²⁰⁷Pub. L. No. 97-164, 96 Stat. 25 (1982).

²⁰⁸41 U.S.C. § 605(a) (1982 & Supp. III 1985).

²⁰⁹41 U.S.C. § 605(c) (1982 & Supp. III 1985).

Court is further contingent on the issuance of a final decision by the contracting officer.²¹⁰ Thus, for a board or the Claims Court to exercise its appellate jurisdiction, the contracting officer normally must first act on a contractor's claim.²¹¹

In *General Dynamics*, the board had two initial reasons to refuse to hear the appeal: there was no claim because full payment had been made on the underlying DIVAD contract, and there was no contracting officer's final decision. A third reason was the presence of the fraud allegations. The CDA contains an explicit exception to its coverage of "all" disputes:²¹²

The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay or otherwise adjust any claim involving fraud.

In cases of suspected fraud, the contracting officer is limited to withholding payment,²¹³ initiating suspension or debarment proceedings,²¹⁴ cancelling the contract,²¹⁵ and referring the matter to the Department of Justice for investigation and possible prosecution.²¹⁶ The contracting officer and board can consider the nonfraudulent portion of the claim if it is severable.²¹⁷

²¹⁰ 41 U.S.C. § 607(d) (1982 & Supp. III 1985).

²¹¹ See *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 7 Cl. Ct. 549 (1985); cf. *McDonnell Douglas Corp. v. United States*, 754 F.2d 365 (Fed. Cir. 1985).

²¹² 41 U.S.C. § 605(a) (1982 & Supp. III 1985).

²¹³ See 44 Comp. Gen. 110 (1964); *Fidelity Construction Co.*, DOTCAB No. 1113, 80-2 B.C.A. (CCH) ¶ 14,819, *aff'd*, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983) (contracting officer has authority and responsibility to withhold payments deemed tainted by fraud); *Transport Tire Co.*, GSBCA No. 5650-S, 80-2 B.C.A. (CCH) ¶ 14,586 *gov't motion for reconsideration granted*, 80-2 B.C.A. (CCH) ¶ 14,769 (withholding prior to final decision proper to recover overcharges the subject of DOJ fraud investigation because CDA is not applicable to cases involving fraud).

²¹⁴ FAR § 1-1.605-1(a)(1) (suspension authorized for suspected fraud); FAR § 1-1.604(a)(5) (debarment authorized for fraud convictions and acts of serious and compelling nature affecting contractor's responsibility).

²¹⁵ DAR § 8-801(e); see *United States v. Acme Process Equipment Co.*, 171 Ct. Cl. 324, *rev'd*, 385 U.S. 138 (1966). *But see* *Medico Indus., Inc.*, ASBCA No. 22141, 80-2 B.C.A. (CCH) ¶ 14,498.

²¹⁶ Office of Fed. Procurement Policy Reg. 1432, 45 Fed. Reg. 41,035 (1980) provides:

Referral of Suspected Fraudulent Claims—If a contractor is unable to support any part of its claim and there is evidence that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, the contracting officer shall refer the matter to the designated Agency official responsible for investigating fraud.

²¹⁷ S. Rep. No. 118, 95th Cong., 2d Sess. 20, *reprinted in* 1978 U.S. Code, Cong. & Admin. News 5235.

The Federal Acquisition Regulations further provide:

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor the contracting officer shall refer the matter to the agency official responsible for investigating fraud.²¹⁸

Statutory provisions providing penalties for fraudulent claims are found within the CDA and in several other statutes. Chief among them are the False Statements Act,²¹⁹ the False Claims Act,²²⁰ the Antikickback Act,²²¹ and the general fraud statute concerning conspiracy,²²² all of which bear criminal sanctions.²²³ Civil remedies are provided for in the False Claims Act,²²⁴ section 604 of the Contract Disputes Act,²²⁵ and the Program Fraud Civil Remedies Act of 1986.²²⁶ The Department of Justice is responsible for litigation involving these statutes.²²⁷

The boards also do not possess statutory authority to give advisory opinions. Congress considered, but rejected, granting declaratory judgment power to the boards.²²⁸ The resulting legislation gave the boards only those powers possessed by the Court of Claims that did not have declaratory judgment power over contract performance disputes.²²⁹

²¹⁸ FAR § 33.009.

²¹⁹ 18 U.S.C. § 1001 (1982) (false and fraudulent statements and representations).

²²⁰ 18 U.S.C. § 287 (1982) (false, fictitious or fraudulent claims).

²²¹ 41 U.S.C. §§ 51-54 (1982), as amended by the Anti-kickback Act of 1986, Pub. L. No. 99-634, 100 Stat. 3523.

²²² 18 U.S.C. § 371 (1982) (conspiracy to commit any offense against the United States); 18 U.S.C. § 286 (1982) (conspiracy to defraud the United States with respect to claims); 18 U.S.C. § 1341 (1982) (mail fraud).

²²³ Violations are punishable by up to five years' imprisonment and fines up to \$10,000.

²²⁴ 31 U.S.C. §§ 3729-3731 (1982), as amended by the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 99 Stat. 689.

²²⁵ 41 U.S.C. § 604 (1982).

²²⁶ Pub. L. No. 99-509, 100 Stat. 1185 (1986).

²²⁷ After referral to the Department of Justice, DOD reviewing officials under the Program Fraud Civil Remedies Act may issue decisions assessing civil penalties for contract fraud that are not subject to judicial review.

²²⁸ Opposition to providing declaratory judgment and injunctive relief remedies to the boards came from the Department of Justice and the Court of Claims. See H.R. Rep. No. 1556, 95th Cong., 2d Sess. 29 (1978); 124 Cong. Rec. 36,267 (1978) (statement of Senator Robert C. Byrd). The Interstate Commerce Commission does have the power to issue declaratory judgments. 5 U.S.C. § 554(e) (1982); see *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106-07 (D.C. Cir. 1984).

²²⁹ See generally Phillips, *Declaratory Judgment Jurisdiction of the United States Claims Court and the Boards of Contract Appeals*, *The Army Lawyer*, Nov. 1986, at 21. *Contra* Kosarin, *Nonmonetary Contract Interpretation at the Boards of Contract Appeals*, *The Army Lawyer*, Sep. 1985, at 11.

C. THE LEGISLATIVE HISTORY

The legislative history of the CDA helps answer the question whether Congress intended to continue the pre-Act practice of removing fraud cases from the jurisdiction of the boards of contract appeals.²³⁰

The Commission on Government Procurement did not note the distinction when it made its general recommendation that boards be given jurisdiction over all disputes.²³¹ During hearings on the many bills introduced in the 95th Congress, the Department of Justice spokesman pointed out the problem and asserted the Department's position that it, not the procuring agencies, should have jurisdiction to litigate fraud cases.²³² The final act was then amended to reflect the present language in section 605(a). The Senate Report specifically addressed the issue:

Section 4(a) [41 U.S.C. sec. 605(a)] implements the recommendation No. 5 of the Procurement Commission and empowers contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States excluding cases of fraud.

. . . .

It is not the intent of this section to change the current procedures being used for 'compromising' claims as identified under 31 U.S.C. 952, or to authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud, including fraudulent misrepresentation of fact. The current laws pertaining to fraudulent claims are not affected by the act.²³³

²³⁰The legislative history of the CDA includes the following materials: H. Rep. No. 1556, 95th Cong., 2d Sess. (1978); S. Rep. No. 1118, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5235 [hereinafter Senate Report]; *Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787, S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) [hereinafter Hearings]; *Contract Disputes: Hearings on H.R. 664 and Related Bills Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); 124 Cong. Rec. 11,247 (1978) (Statement of Cong. Harris); 124 Cong. Rec. 31,641 (1978) (House debate); 124 Cong. Rec. 36,261 (1978) (Senate debate and amendments); 124 Cong. Rec. 37,075 (1978) (House amendments); 124 Cong. Rec. 37,956 (1978) (Statement of Sen. Packwood); Presidential Signing Statement, 14 Weekly Comp. Pres. Doc. 1922 (Nov. 1, 1978).

²³¹4 Report, *supra* note 107, at 22.

²³²Hearings, *supra* note 230, at 210 (Statement of Louis Jaffe, Deputy Assistant Attorney General, Department of Justice).

²³³Senate Report, *supra* note 230, at 19.

The report made the same point with respect to the new fraud provision in section 604.²³⁴

D. JUDICIAL INTERPRETATIONS

A significant Supreme Court pronouncement on the subject of procurement fraud came in a pre-Contract Disputes Act case, *S & E Contractors, Inc. v. United States*.²³⁵ That case involved a Department of Justice appeal of a final decision of the Atomic Energy Commission on a contractor's claim. The Court interpreted the contract's disputes clause to bar a government appeal from the decision unless it involved contractor fraud. The Court noted:

Congress has made elaborate provisions for dealing with fraudulent claims of contractors. . . . These statutory provisions show that, apart from the inherent power of courts to deal with fraud, the Department of Justice indubitably has standing to appear or intervene at any time in any appropriate court to restrain enforcement of contracts with the United States based on fraud.²³⁶

In light of the seemingly clear statutory language and legislative history concerning treatment of contract fraud, the courts and boards have steered clear of accepting jurisdiction over claims not severable from issues of fraud. In *Warren Beaves*,²³⁷ the Department of Transportation Board of Contract Appeals explained:

The Contract Disputes Act, viewed in its entirety, is an effort to set up a unified three-tier procedure for the litigation of contract disputes: final decision, Contract Appeals Board or Claims Court, and Court of Appeals for the Federal Circuit. By the above-quoted language [Senate Report 1118], it appears to us that Congress has manifested an intent to completely remove fraud litigation from the three-tiered procedure established by the Act, and place it in the general tribunal, the District Court, where a contractor would have all of the rights available in that Article III court.²³⁸

This refusal to hear cases tainted by fraud often does not mean a dismissal for want of jurisdiction, however. Instead, the board may

²³⁴*Id.* at 22.

²³⁵406 U.S. 1 (1972).

²³⁶*Id.* at 16-17.

²³⁷DOTCAB No. 1160, 83-1 B.C.A. (CCH) ¶ 16,232, *modified on other grounds*, 84-1 B.C.A. (CCH) ¶ 17,190.

²³⁸84-1 B.C.A. at 85,595.

suspend the proceedings pending resolution of the fraud issues. But, as noted in *Fidelity Construction Co.*,²³⁹ suspensions are not automatically granted. The impact of the fraud allegations on the claim is determined on a case-by-case basis.²⁴⁰ A board may exercise its discretion and refuse to suspend proceedings, even with a pending grand jury investigation, where there are overriding considerations of justice favoring the defendants,²⁴¹ or when a suspension would deny the contractor the right to a hearing and decision within a reasonable time.²⁴²

The ASBCA's decision in *M & M Services, Inc.*,²⁴³ indicates that government allegations of fraud, without some action imminent or pending in any tribunal, would not defeat the board's jurisdiction to determine if the government's refusal to pay the contractor was a breach of contract.

The Claims Court has employed a three-part test in deciding whether to suspend its proceedings: (1) the government must make a clear showing that the issues in the contractor's appeal are substantially similar or related to the issues in the criminal investigation, (2) the government must clearly show hardship or inequity if required to go forward with the appeal while the criminal investigation is pending, and (3) the duration of the requested stay must be moderate.²⁴⁴

Three nonfraud government contract decisions provide useful interpretations of the jurisdiction of the Armed Services Board of Contract Appeals under the Contract Disputes Act.

In *United States v. Medico Industries, Inc.*,²⁴⁵ the contracting officer on one contract allegedly prepared claims for the same contractor on another, subsequent, contract. A different contracting officer denied the claim and Medico appealed to the ASBCA. The government secured a stay while the second contracting officer canceled the contract because of an investigation into the first contracting officer's criminal conflict of interest violations.²⁴⁶ The board rejected the government's motion that it had no jurisdiction because there was no longer any

²³⁹ DOTCAB No. 1113, 80-2 B.C.A. (CCH) ¶ 14,819 modified on other grounds, 82-1 B.C.A. (CCH) ¶ 15,633, *aff'd sub nom. Fidelity Constr. Co. v. United States*, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983).

²⁴⁰ *Id.* at 73,141.

²⁴¹ *Mayfair Construction Co., NASA BCA No. 478-6, 80-1 B.C.A. (CCH) ¶ 14,261.*

²⁴² *Litton Sys., Inc., ASBCA No. 22645, 78-2 B.C.A. (CCH) ¶ 13,350.*

²⁴³ *ASBCA No. 28712, 84-2 B.C.A. (CCH) ¶ 17,405.*

²⁴⁴ *CG, Inc., No. 716-83C (Cl. Ct. filed July 30, 1984); see also Litton Sys., Inc. v. United States*, 215 Ct. Cl. 1056 (1978).

²⁴⁵ 685 F.2d 230 (7th Cir. 1982).

²⁴⁶ 18 U.S.C. § 207 (1982).

contract. It stated, "Just as we had neither authority nor duty to render a decision as to an allegation of fraud, the contracting officer in this appeal had no authority or duty to render a decision concerning violations of 18 U.S.C. section 207(a)."²⁴⁷

The government then sought a declaratory judgment in federal district court that the contracting officer's actions constituted an unlawful conflict of interest under section 207(a). The administrative proceedings were again stayed pending the court decision. Medico moved for dismissal on the ground that the matter was pending before the board. The district court granted this motion, holding that the board had primary jurisdiction to decide its own jurisdiction even if the issue involved criminal conduct.

The Seventh Circuit reversed. Because the conflict of interest question did not "arise under the contract", interpretation and application of the contract was not required. The board was without authority to decide questions not defined by contract clauses. The court emphasized the limits of the board's adjudication power:

The Board is a tribunal of limited authority and empowered to decide only very specific types of cases. It has no more power than that. Decisions regarding issues which are beyond its power are null and void. [citation omitted] Thus, however wise it may be to allow the Board the opportunity to decide the issue in the first instance, it cannot be permitted because the issue is beyond the scope of its power and authority. The Board's expertise in resolving contractual disputes is not implicated by the conflict of interest issue and the Board's authority is limited to those disputes where its expertise is implicated.²⁴⁸

No jurisdiction issue was reachable by the board because there could be no argument that the conflict of interest dispute arose from the contract.

In *Gary Aircraft Corp. v. United States*,²⁴⁹ a federal bankruptcy court had denied a government motion to stay and vacate bankruptcy proceedings on claims arising out of a contract between the Air Force and the contractor to overhaul airplane engines. Gary had claimed additional costs due to government changes. The contracting officer denied them and Gary appealed to the Armed Services Board of Contract Appeals. Before the hearing Gary filed for bankruptcy. The

²⁴⁷ 685 F.2d at 232.

²⁴⁸ *Id.* at 236.

²⁴⁹ 898 F.2d 775 (5th Cir.), cert. denied, 464 U.S. 820 (1983).

government filed its creditor claims in that court and moved to stay the proceeding until after the board hearing. The bankruptcy court refused to issue the stay and was upheld by the district court.

The Fifth Circuit reversed, holding that the lower courts should have deferred to the board on the issue of liquidation of claims arising from contract disputes. The circuit court rejected the government's position that the disputes clause²⁵⁰ was mandated by the Armed Service Procurement Act.²⁵¹ It also rejected Gary's argument that the disputes clause was a mere binding arbitration clause without official stature.

The court reviewed a trio of Supreme Court cases that had held that bankruptcy jurisdiction should yield to the expertise of an administrative body.²⁵² One principle derived from those cases makes deferral appropriate when Congress committed a type of decision to a specialized tribunal. This principle did not apply, however, because the disputes clause was not created by Congress. Instead, the court found a jurisdictional rule favoring liquidation of contract claims at the board of contract appeals based on the purposes of the two competing processes of bankruptcy and government contracts. The court relied on five factors: 1) deferral to a board would not impair the goals of the bankruptcy laws; 2) the complexity of government contract law; 3) the specialized expertise of the boards; 4) judicial economy; and 5) Congress had endorsed the boards in the Contract Disputes Act.²⁵³

Gary analyzed many of the concepts involved in the doctrine of primary jurisdiction without once mentioning the phrase. Both *Medico* and *Gary* demonstrate the courts' concern for determining the precise nature of the board's jurisdiction. Both indicate that merely labeling a case "criminal" or "bankruptcy" does not decide the issue of when courts should defer to the boards.

The third case involved interpretation of the jurisdictional provisions of the Contract Disputes Act. In *Newport News Shipbuilding & Dry Dock Co. v. United States*,²⁵⁴ the Claims Court faced the issue of whether a construction-differential subsidy (CDS) contract, entered into under the Merchant Marine Act,²⁵⁵ was a contract within the meaning of the Contract Disputes Act. The court held it was not: "[C]ontrary to plaintiff's assertion, the Contract Disputes Act does

²⁵⁰This clause was substantially similar to the clause cited *supra* note 91.

²⁵¹10 U.S.C. §§ 2301-2314 (1982).

²⁵²698 F.2d at 781.

²⁵³*Id.* at 783-84.

²⁵⁴7 Cl. Ct. 549 (1985).

²⁵⁵46 U.S.C. §§ 1101-1295 (1982).

not apply to all Government contract disputes.²⁵⁶ Section 4 of the CDA expressly excluded maritime contracts from its coverage.²⁵⁷ But the court went further and emphasized that even if the Act covered this kind of dispute, the lack of a certified claim and final decision of a contracting officer was fatal (at least for the moment).²⁵⁸

The court held further that the Merchant Marine Act specifically granted the power to decide CDS disputes in the first instance to the Commerce Department. The doctrine of primary jurisdiction was mentioned indirectly in reaching this decision.²⁵⁹

Thus, a contract disputes forum rejected a dispute because it had no jurisdiction of the subject matter, or of the case, due to plaintiff's failure to meet the jurisdictional requirements of the Contract Disputes Act.²⁶⁰ The primary jurisdiction issue was presented more directly in another case, though from a surprising party, to the Agriculture Board of Contract Appeals.

In *Fujii & Co.*,²⁶¹ the government argued that the board had primary jurisdiction of an appeal from a termination for default. The contractor had filed suit in district court alleging the government could not collect damages on a timber contract because the contract was void due to the absence of a timely environmental impact statement. The government argued that the board should initially decide the matter because the case presented factual issues requiring the exercise of special agency expertise and administrative discretion. The board, however, held that neither situation was present. The issues involved questions of law and statutory interpretation. The board's review would not aid the court or hinder it by its absence.²⁶²

These cases demonstrate a distinct judicial deference to the jurisdictional limits of the boards' adjudicatory powers. These limits were insufficiently considered by the district court in *General Dynamics*. The Ninth Circuit also avoided discussing the effect of these jurisdictional requirements on the application of the primary jurisdiction doctrine. Instead, it concentrated on the boards' adjudicatory role, as

²⁵⁶ 7 Cl. Ct. at 553-54.

²⁵⁷ 41 U.S.C. § 603 (1982 & Supp. III 1985).

²⁵⁸ 7 Cl. Ct. at 555.

²⁵⁹ *Id.* at 553.

²⁶⁰ In addition to fraud and maritime contracts, the boards also lack jurisdiction over labor disputes, wage classifications, Davis-Bacon Act withholding and equal opportunity complaints. See J. Cibinic & R. Nash, *supra* note 158, at 908 and cases cited therein.

²⁶¹ AGBCA 75-103, 75-2 B.C.A. (CCH) ¶ 11,589.

²⁶² *Id.*

opposed to a regulatory role.²⁶³ As the next section demonstrates, these criteria should be considered in any full assessment of the applicability of the primary jurisdiction doctrine to government contracts.

VI. PRIMARY JURISDICTION AND GOVERNMENT CONTRACT FRAUD

We return now to the *General Dynamics* decisions. As noted earlier the district court judge relied on a four-part test.²⁶⁴ The Ninth Circuit also developed a four-part test.²⁶⁵ Uniformity and expertise were principal elements of both tests.²⁶⁶ The unstated, though probably decisive, factor for the lower court, however, was "material aid".

A. A CRITICAL VIEW OF THE EFFICACY OF UNIFORMITY, EXPERTISE AND MATERIAL AID AS THE TOUCHSTONES OF PRIMARY JURISDICTION

The lower court decision in *General Dynamics* was based on flawed analysis. Reliance on the traditional principles of uniformity and expertise and the judicial construct of "material aid" made a distorted result inevitable. Statutory purpose was ignored in favor of superficial analysis using general criteria. That there is no fixed formula defining primary jurisdiction does not mean that any test is sufficient. There are limits to the primary jurisdiction doctrine and only proper consideration of all the relevant factors will suggest those limits.

²⁶³ *United States v. General Dynamics Corp.*, 825 F.2d 1356, 1365-66 (9th Cir. 1987).

²⁶⁴ See *supra* notes 172-174 and accompanying text; *infra* note 265.

²⁶⁵ The four principal factors for the district court were:

whether the question is within the conventional experience of judges, whether the question lies peculiarly within the agency's discretion or requires the exercise of the agency's expertise, whether there exists a danger of inconsistent rulings; and whether a prior application to the agency has been made.

644 F. Supp. at 1503. For the Court of Appeals the relevant factors were:

(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. [footnote omitted].

828 F.2d at 1362.

²⁶⁶ 828 F.2d at 1362-63.

The Ninth Circuit's opinion reached the correct result but framed an awkward test that may not survive the case and, in any event, continued to emphasize the importance of uniformity and expertise. It did, however, correctly promote consideration of congressional intent and statutory purpose and rejected the material aid test.²⁶⁷

The first consideration of primary jurisdiction analysis in the area of government contracts must be whether jurisdiction is shared or exclusive in either the agency or the courts. Unless jurisdiction is concurrent the primary jurisdiction doctrine should not apply, as it does not promote, and easily defeats, its intended purposes.²⁶⁸ Power is not allocated, responsibility divided, interference avoided, or conflicts resolved when the legislature has already decided that a court or agency has exclusive jurisdiction.

The difficulty in trying to promote uniformity in cost allocation issues is that it is not necessarily desirable in federal procurement, especially in the disputes area.²⁶⁹ Congress rejected a chance to consolidate all of the boards into a "superboard," thereby assuring greater uniformity, and also ignored the Commission on Government Procurement's recommendation to allow contractors direct access to district courts for all contract disputes.²⁷⁰ It is also difficult to see how deference to an adjudicatory body can enhance uniformity since a board of contract appeals has no power to revise cost principles and cost accounting standards aside from the precedential value of its decisions. On the other hand, uniformity in fraud prosecution is desirable, but that is precisely what is threatened by the *General Dynamics* decision.

The special expertise of the boards would largely be applied towards contract interpretation in this case. Instead of resolving policy issues of national importance, the board would merely be deciding the case in front of it, and only in an advisory manner. The Ninth Circuit aptly stated the correct function of agency expertise:

²⁶⁷*Id.* at 1363-64.

²⁶⁸See *supra* section II.C.

²⁶⁹See J. Gansler, *The Defense Industry* 11 (1980), where the author notes that the different historical evolutions of various sectors of the defense industry produced significant diversity in the sectors and the way they do business yet the "government continues to pursue (and Congress insist upon) 'uniform procurement practices' across all these sectors. The application of the same 'corrective actions' to sectors having different structural characteristics actually amplifies these differences." Uniformity per se is not desirable in the defense industry. The necessity for uniformity of cost allocation issues mandating ASBCA intervention has yet to be substantiated.

²⁷⁰4 Report, *supra* note 107, at 20.

While it is certainly true that the competence of an agency to pass on an issue is a necessary condition to the application of the doctrine, competence alone is not sufficient. The particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question. [footnote omitted]²⁷¹

The better view is that the primary jurisdiction doctrine is not applicable when the governing statutes and legislative history demonstrate clearly that a court or agency has exclusive responsibility to settle the issue. To begin and end the analysis in this area with the question of whether an agency's view would be helpful or simply produce more uniformity is a simplistic approach that threatens to distort—not promote—the court/agency relationship.²⁷²

B. A PROPOSED SOLUTION

Instead of relying on broad principles that offer little genuine guidance, a more factually oriented approach would better serve the purposes of the primary jurisdiction doctrine. The following eight questions seek to encompass the major components of primary jurisdiction analysis. They are:

(1) As a threshold issue, whether the court or agency has exclusive or concurrent statutory jurisdiction of the issues. If exclusive jurisdiction has been delegated to either body there is no need to invoke the primary jurisdiction doctrine. To do so would produce marginal benefit at the greater expense of frustrating congressional intent.²⁷³

(2) Whether the issue is one within traditional judicial competence such as a question of law, one of statutory interpretation not requiring agency expertise, or one that involves nontechnical factual questions.

²⁷¹*General Dynamics*, 828 F.2d at 1363.

²⁷²See *supra* section II.C.

²⁷³See, e.g., *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) (referral to the Federal Power Commission proper where "no federal policy or statute entrusts the decision to courts in the first instance"); *Locust Cartage Co. v. Transamerican Freight Lines Co.*, 430 F.2d 334 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970) (no reference to Interstate Commerce Commission necessary when the issue turns on questions of law that have not been committed to agency discretion); *Transkentucky Transp. R.R. v. Louisville & Nashville R.R.*, 581 F. Supp. 759 (E.D. Ky. 1983) (primary jurisdiction doctrine does not apply because the Interstate Commerce Commission lacks jurisdiction of issue and could not immunize defendants); *Jacksonville Maritime Ass'n v. City of Jacksonville*, 551 F. Supp. 1130 (M.D. Fla. 1982); see also *supra* text accompanying note 94.

If courts can decide the issue without outside assistance or without interfering with an agency's regulation, then they should do so.²⁷⁴

(3) Whether the administrative agency has the power to address the issue and provide a remedy. If the agency is without the necessary power to consider the issue, immunize the challenged conduct, or provide a remedy to the petitioner, then referral of the issue to agency is a wasted act.²⁷⁵

(4) Whether judicial resolution of the issue would interfere with administrative regulation. Here the oft-cited need for uniformity applies. If inconsistent judicial rulings threaten an agency's regulation, then deference to the agency, at least initially, may be justified.²⁷⁶

(5) Whether the specific factual situation involves antitrust, labor relations, criminal prosecutions, or some other unique setting where other considerations intrude. Additional concerns, such as the principle of federalism in labor relations cases, the presence of statutory exemptions and policies of regulation and competition in antitrust cases, and prudential considerations of delay and disruption in criminal cases, may warrant disparate judicial scrutiny.²⁷⁷

(6) Whether the issue involves determining the reasonableness of a challenged act or deciding simply whether a violation has occurred. An agency's expertise is best utilized if it is called on to decide issues such as whether a tariff it administers is reasonable. On the other

²⁷⁴See *Rohr Indus. v. Washington Metro. Area Transit Auth.*, 720 F.2d 1319 (D.C. Cir. 1983); *United States v. Elrod*, 627 F.2d 813 (7th Cir. 1980); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979) (facts involved in issue of whether plaintiff was an Indian tribe were not so technical as to be beyond understanding of judges and juries; case also affected only parties involved and would not establish binding precedent; *Civil Aeronautics Bd. v. Aeromatic Travel Corp.*, 489 F.2d 251 (2d Cir. 1974) (though issues involved difficult factual matters, that is business of courts; major issue was one of statutory interpretation); *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973) (high degree of specialized knowledge not required); *Civil Aeronautics Bd. v. Modern Air Transp.*, 179 F.2d 622 (2d Cir. 1950) (where issue involved determining whether air service violated clearly stated agency regulation, no expertise needed—no matter how complex).

²⁷⁵See *Rosado v. Wyman*, 409 U.S. 289 (1973); *supra* text accompanying notes 55–58.

²⁷⁶See *Pennsylvania R.R. v. Fox & London*, 93 F.2d 669 (2d Cir.), *cert. denied*, 304 U.S. 566 (1938); see also *Writers Guild of America v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980) (in first amendment action challenging FCC's family viewing policy court deferred to FCC to further purpose of delicately balanced system of broadcast regulation); *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973) (judicial injunctions against open and obviously unlawful operations will not jeopardize uniform administration of ICC regulatory system); *Locust Cartage Co. v. Transamerican Freight Lines Co.*, 430 F.2d 334 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970) (broad issues of transportation policy require uniform ICC resolution because diametrically opposed rulings on the appropriate tariff are possible).

²⁷⁷See *McDonnell Douglas Corp. v. United States*, 754 F.2d 365 (Fed. Cir. 1985).

hand, if the agency is not a regulator and cannot reconcile national policy concerns with specific industry practice, and the issue is simply adjudicating whether a violation has occurred, little is gained by referral to the agency.²⁷⁸

(7) Whether the agency's views are already known or it is unalterably opposed to deciding the issue. Referral in the face of prior agency rejection of the case, or the presence of prior agency rulings on point, is futile. Agency opposition or the existence of established precedent reinforces the conclusion that there is little risk of interfering with a regulatory scheme.²⁷⁹

(8) Finally, whether a referral will produce litigation delays and expense that outweigh the need for referral. It is often assumed that the administrative process is faster than the judicial process, but this may not be the case for a variety of reasons. For example, shuttling plaintiffs back and forth between the agency and the courts inevitably lengthens the time necessary to resolve the case. It may also financially exhaust the litigants and should be done only when the need is great.²⁸⁰ Criminal cases may enjoy an expedited status in the federal courts that is unrecognized in administrative forums.

²⁷⁸ See *United States v. United States Steel Corp.*, 645 F.2d 1285 (8th Cir. 1981) (issue of tariff construction involved questions of transportation policy presenting need for uniform and expert administration of regulatory scheme); *Writers Guild of America v. American Broadcasting Co.*, 609 F.2d 335 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (facts on which dispute over definition of tribe turned were adjudicative facts not in the nature of legislative policy decisions); *M.C.I. Communications Corp. v. American Tel. & Tel. Co.*, 496 F.2d 214 (3d Cir. 1974) (matter involved technical or policy considerations that were beyond the court's ordinary competence and within the Federal Communication Commission's particular expertise); *In re Long Distance Telecommunications Litigation*, 647 F. Supp. 78 (E.D. Mich. 1986) (issue of reasonableness of tariffs must properly be determined by the Federal Communications Commission because it is the expert regulatory agency on affairs relating to the telecommunications carriers).

²⁷⁹ See *Transway Corp. v. Hawaiian Express Serv., Inc.*, 679 F.2d 1328 (9th Cir. 1982) (Interstate Commerce Commission had already applied its special expertise to the problem); *Interstate Commerce Comm'n. v. Maine Central R.R.*, 505 F.2d 580 (2d Cir. 1974) (primary jurisdiction did not apply where agency was the plaintiff because the very institution of the suit in the courts was an exercise of its special competence); *Locust Cartage Co. v. Transamerican Freight Lines Co.*, 430 F.2d 334 (1st Cir.) *cert. denied*, 400 U.S. 964 (1970) (agency already had enunciated its policy clearly); *Shew v. Southland Corp.*, 370 F.2d 376 (5th Cir. 1966).

²⁸⁰ See *Mashpee Tribe*, (delay against strong public interest in the prompt resolution of the case); *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973) (deferral would thwart congressional intent to provide speedy enforcement procedure and remedy for injured parties); *Civil Aeronautics Bd. v. Modern Air Transportation*, 179 F.2d 622 (2d Cir. 1950) (where plaintiff is the agency, referral would be mere "delaying formalism"); see also Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L.J. 495, 509 (1953).

The proposed solution involves balancing the last seven criteria. It incorporates the unique and varied considerations that can come into play in primary jurisdiction cases. It better serves the purpose of the doctrine by applying it only in cases where those purposes are promoted. It also avoids the necessarily inadequate analysis that results from elevating administrative expertise and concern for uniformity above more practical considerations. It rejects the material aid test in favor of more a specific, principled approach.

C. AN ARGUMENT FOR EXCLUSIVE JURISDICTION OF CONTRACTOR FRAUD CASES WITH JUDICIAL FORUMS

The first criterion of the proposed solution was essentially bypassed by the *General Dynamics* lower court. The district court assumed that because it characterized the referred matters as severable from the fraud case the board could decide the issue.²⁶¹ But the Ninth Circuit recognized that decisions made by the board on factual issues could be binding on the district court, thereby considerably influencing the criminal case.²⁶² For example, if the board decided that General Dynamic's construction of the contract was correct and its allocations to the B&P and IR&D accounts proper, the case would be over as far as the district court was concerned. Viewing severability in this light results in the conclusion that it is a way around the jurisdiction issue and not a straightforward attempt to resolve the issue.

The language of the Contract Disputes Act, its legislative history, and prior judicial and board rulings indicate that an elaborate system was established to decide contract disputes not involving fraud.²⁶³ This separation was strengthened by the requirement for a claim on a contract. Furthermore, the board has no jurisdiction unless a claim acted upon by a contracting officer is appealed. Congress intended to limit the boards of contract appeals to civil contract disputes, excluding criminal actions. Legislation was specifically changed to recognize this arrangement.²⁶⁴

In this case there was no claim nor any appealable final decision by a contracting officer. The board had no more intrinsic jurisdiction over the specific case than it did over the fraud issue involved in that case. The procedural jurisdictional requirements of the Contract Dis-

²⁶¹United States v. General Dynamics Corp., 644 F. Supp. 1497, 1506 (C.D. Cal. 1986).

²⁶²828 F.2d 1356, 1360-62 (9th Cir. 1987).

²⁶³See *supra* sections V,B,C.

²⁶⁴See *supra* notes 232, 233 and accompanying text.

putes Act and the specific routing of fraud issues through the Department of Justice and the federal courts conclusively demonstrate that the Armed Services Board of Contract Appeals has no power to consider the General Dynamics case.

Although a decision that the agency has no jurisdiction to address the proposed issue on referral should end primary jurisdiction analysis, for the purposes of this article the other seven questions are considered below.

The second criterion turns on the characterization of the major issues in the case. The district court determined that interpretation of the contract and applicable regulations was central to the case. It felt that these issues were what the board was designed to adjudicate.²⁸⁵ But contract interpretation and interpreting and applying regulations are also traditional functions of courts. Nothing in the applicable statutes or legislative history indicates that boards have exclusive jurisdiction over these matters absent a contract dispute. Furthermore, they are technical only in the sense that they involve accounting principles and multitudinous contract and regulatory provisions. The district court was perhaps more concerned with obtaining assistance than with a forthright determination of whether the issues were judicial or administrative in nature.

The third criterion was applied in simplistic fashion by the district court. The court admitted that boards do not operate in the same manner as the traditional administrative agencies, but found that it was central to the operation of defense procurement, performed traditional agency functions, was stocked with experts, and made decisions influential within the Department of Defense and the defense industry.²⁸⁶ The functions performed were not elaborated upon but as noted above,²⁸⁷ the board is not an agency with investigative, law enforcement or rulemaking powers. Rather, it is solely an adjudicatory tribunal. As the Ninth Circuit recognized, it does not regulate the defense industry, but resolves contract disputes arising during or after contract performance. Its judicial character is underscored by its essential equivalence to the Claims Court. Both function as appellate forums in adversary litigation. Neither exercises rulemaking or policy setting power beyond the effect of issuing ad hoc decisions. To equate either with a traditional agency proves too much. It is comparable to equating courts with agencies because they effect policy changes through case precedent.

²⁸⁵ 644 F. Supp. at 1504-05.

²⁸⁶ *Id.*

²⁸⁷ See *supra* sections V.A.B.

The danger of inconsistent rulings and desire for uniformity was the second major rationale relied upon in the referral. The district court declared that significant chaos could occur in the defense industry if differing judicial constructions of contracts and regulations were permitted. Admitting that some potential already exists for such chaos due to the presence of the Claims Court, the judge noted that its infrequent use and singular nature reduced the danger.²⁸⁸ But the judge did not consider the twelve other boards with their potential for disparity. Furthermore, the courts of appeals traditionally resolve district court inconsistencies and can do so in this area as well. Undue deference to agencies threaten the regulatory scheme now, in this area, in the same manner the district court judge was concerned about.

Uniformity means little in the context of interpreting the DIVAD contract, since that was an admittedly unique procurement.²⁸⁹ Board pronouncements already exist concerning cost allocation and allowability issues.²⁹⁰ The questionable amount of uniformity to be gained from board action in this area does not justify the radical restructuring of the contract disputes process the district court's decision would have required.

The district court correctly noted that the primary jurisdiction doctrine is available in both civil and criminal prosecutions. But the nature of a criminal case does frame issues and determine questions of jurisdiction differently than a civil case. A referral could remove key fact issues from the province of a jury. The government's case could be compromised by the broader discovery rules at the boards.²⁹¹ The criminal prosecution process would also be fragmented by sending the government from court to agency and back again.

The sixth criterion asks whether the issue involved concerns the reasonableness of a challenged contract provision or regulation, or simply whether a rule has been complied with. Matters of compliance do not need agency action unless the agency has enforcement powers. The Armed Services Board of Contract Appeals does not. Matters involving the reasonableness of administrative standards and regulations may involve underlying policy choices such as those the ICC

²⁸⁸ 644 F. Supp. at 1505 n.4.

²⁸⁹ *Id.* at 1507 ("it is doubtful that there will be a plethora of cases like this one") (Fernandez, J.).

²⁹⁰ See J. Cibinic & R. Nash, *supra* note 158, at 513-30 and cases cited therein.

²⁹¹ See *e.g.*, Jackson Lumber Co., AGBCA No. 80-160-1, 81-1 B.C.A. (CCH) ¶ 14,998 (contractor attempt to depose government witnesses involved in criminal case results in substantial injustice and conflict for government).

faces in rate reasonableness cases. But the board is not like the ICC. The policy reconciling functions are performed by other agencies.²⁹²

The agency's prior views on the issues and its desire to accept the referral are practical considerations that must be addressed. At the time of the district court's order, the board had already rejected jurisdiction once, yet the court felt that the board's objections could be cured.²⁹³ The board subsequently left no doubt that it was unalterably opposed to deciding the referred questions.²⁹⁴ In light of these events it is difficult to discern the utility in pressing for referral of these matters.

The last criterion was addressed hastily by the district court judge. The court felt that the uniqueness of the criminal prosecution, the importance of justice, and the judge's ability to monitor and possibly terminate the referral were decisive in this area.²⁹⁵ Nevertheless, such delays can be expensive for the government. In *General Dynamics*, seven months elapsed after the referral with no progress in the case. If the referral had been accepted, up to a year of delay could have been expected.²⁹⁶ As in any trial, witnesses' memories fade and costs mount during substantial periods of delay. Referrals also add to the agency's workload, with an attendant increase in delay for its other business. This expense, delay, and fragmentation hurts society's interest in developing a fraud-free marketplace.²⁹⁷ Only when the other balancing factors outweigh these prudential considerations should the primary jurisdiction doctrine be invoked.

VII. CONCLUSION

The primary jurisdiction doctrine should not apply to government contract fraud cases because little uniformity is achieved and contract interpretation issues do not require administrative expertise.

Most importantly, the courts have exclusive jurisdiction of criminal fraud cases by statute and by virtue of boards' sole status as dispute-resolving forums. As the Commission on Government Procurement concluded, "Justice and efficient operation of the contract disputes resolving system can be obtained best with a flexible system that provides alternative forums for the resolution of particular kinds of

²⁹² See *supra* text accompanying notes 127-32.

²⁹³ 644 F. Supp. at 1505.

²⁹⁴ *General Dynamics Corp.*, ASBCA No. 33633 (Feb. 2, 1987).

²⁹⁵ 644 F. Supp. at 1507.

²⁹⁶ *Id.* at 1505.

²⁹⁷ See *supra* section IV.A.

disputes.²⁹⁶ Applying the primary jurisdiction doctrine to government contracts harms the public interest of fighting procurement fraud because criminal prosecutions are excessively delayed and anti-fraud efforts are further fragmented.

There is no doubt that the doctrine of primary jurisdiction is a useful discretionary tool to accommodate courts and agencies when each share jurisdiction over a subject matter. But the vagueness of its principles has produced over-reliance on the deceptively attractive principles of uniformity and expertise. This ignores the major purpose of the doctrine—to promote statutory purpose and legislative intent. A true accommodation can be reached by considering all the factors discussed above. Applying this balancing test, the obvious conclusion is that there is no justification for use of the doctrine of primary jurisdiction involving the boards of contract appeals in the area of government contracts fraud.

²⁹⁶4 Report, *supra* note 107, at 20.

THE FAIR USE DOCTRINE IN COPYRIGHT: A GROWING CONCERN FOR JUDGE ADVOCATES

by Captain James M. Hohensee*

I. INTRODUCTION

To what extent may a writer at an Army school use previous works in writing a paper? If he quotes from another work will that prevent publication of the paper? If the officers' club is playing a local radio station over the speakers is it a copyright violation? Is it a violation to copy "the big game" on a videotape recorder while the troops are downrange and replay it in the club or the day room? Is a unit satellite dish at the barracks allowed? Isn't any use of copyrighted materials for teaching a fair use? The general saw a computer program demonstrated and wants us to design one that will do the same thing. Would that be a copyright violation?

Questions like these can strike fear into the hearts of administrative law attorneys. I know from personal experience. While working as an administrative law action officer in 1985 I was assigned a problem from the post youth activities. When the post theater cancelled Saturday afternoon children's matinees, the youth activities wanted to rent videotapes and show them for a small fee. Would this violate the copyrights on the films?

To answer the question I turned to the Administrative Law Handbook¹ and was surprised to find no guidance on copyright matters. I examined the Copyright Act² and the applicable Army copy-

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¹Dep't of Army, Pamphlet No. 27-21, Military Administrative Law (1 Oct. 1985).

²17 U.S.C. §§ 101-914 (1982).

right regulations.³ I also checked my answer with the Patents, Copyrights, and Trademarks Division of the United States Army Legal Services Agency. I concluded the plan would violate the copyrights.

That opinion was right, but it failed in two respects. It failed because I was reduced to hiding behind the language in the regulation to say no. I didn't understand the law that the regulation embodied. The second failure stemmed from the first. Because I didn't understand the law well enough, I was unable to devise an alternative course of action that might have achieved the mission.

Judge advocates need a better grasp of copyright principles to give complete advice and to devise ways to meet the mission. The current version of Army Regulation 215-2, for example, provides: "A clearance will be obtained prior to the public performance of any copyrighted sound or video recording. Installation commanders will determine whether such performances are 'public'."⁴ Without doubt, the installation commander will be looking to his or her local staff judge advocate for advice on that matter. Without an understanding of the applicable legal principles and exceptions, the lawyers in that office will give bad advice.

This article will focus on the fair use doctrine. It is only one aspect of the complicated law involved in resolving copyright questions. Fair use is frequently invoked to defend otherwise infringing activity. Also, it is frequently misunderstood or misinterpreted. As such, it deserves close attention.

II. COPYRIGHT: A GENERAL OVERVIEW

The Constitution authorizes copyright for the purpose of advancing "science and the useful arts."⁵ Copyright law seeks to achieve this goal by granting authors certain rights in their original works. The current Copyright Act is codified in Title 17, United States Code.⁶

³The regulation concerned was Dep't of Army, Reg. No. 215-2, *Morale, Welfare & Recreation: The Management & Operation of Army Morale, Welfare & Recreation Programs & Nonappropriated Fund Instrumentalities*, para. 6-67 (20 Feb. 1984) (C6, 26 Aug. 1985) (superseded 1986). Other regulations also address copyright matters. See, e.g., Dep't of Army, Reg. No. 310-1, *Military Publications: Publications, Blank Forms, and Printing Management*, paras. 2-35 to 2-41 (15 Feb. 1980); Dep't of Army, Reg. No. 108-2, *Audiovisual Services: Army Training & Audiovisual Support*, para. 7-7 (26 July 1976) (C2 1 Oct. 1978); Dep't of Army, Reg. No. 27-60, *Legal Services: Patents, Inventions, & Copyrights* (1 July 1974) (C2 15 July 1976).

⁴Dep't of Army, Reg. No. 215-2, *Morale, Welfare & Recreation: The Management of Army Morale, Welfare, & Recreation Programs & Nonappropriated Fund Instrumentalities*, para. 6-67 (31 Oct. 1986).

⁵U.S. Const. art. I, sec. 8, cl. 8.

⁶17 U.S.C. §§ 101-914 (1982).

Section 102 of the Copyright Act describes the types of works that may be protected.⁷ Military lawyers should note that copyright protection is not available for any work of the federal government.⁸ The rights accorded the copyright owners are set out in section 106 of the act.⁹ They give the copyright owner the right to:

1. make copies of the work;
2. make derivative works based on the original;
3. distribute copies of the original to the public;
4. perform or display the work in public.

To qualify for these protections, the works must be "fixed in any tangible medium of expression."¹⁰ That is, they must be recorded in some form that renders the work capable of perception or reproduction. A book, a tape, or a microchip are examples of such a medium of expression.

These rights are subject to certain limitations.¹¹ Most of the limitations apply to specific types of works or specific situations. An example is the exception that allows libraries and archives to reproduce works for purposes such as inter-library loan and archival preservation.¹² The limitation with the broadest application is the fair use exception codified in section 107.¹³

Certain of the limitations require the copyright owner to grant others rights to copy or use the works in exchange for a fixed royalty. This is called a compulsory license. An example of such a compulsory license arrangement for sound recordings is found in section 115.¹⁴

Copyright protection for works created or first published on or after 1 January 1978 lasts for the life of the author plus fifty years.¹⁵ If the work is made anonymously, under a pseudonym, or is made for hire, the protections will last the shorter of seventy-five years from first publication or one hundred years from the work's creation.¹⁶ Works created or published before 1 January 1978 are subject to

⁷ See *id.* § 102.

⁸ See *id.* § 105.

⁹ See *id.* § 106.

¹⁰ See *id.* § 102.

¹¹ 17 U.S.C. §§ 107-118 (1982).

¹² See *id.* § 108.

¹³ *Id.* § 107; see *infra* note 34.

¹⁴ 17 U.S.C. § 115 (1982).

¹⁵ See *id.* § 302(a).

¹⁶ See *id.* § 302(c).

transitional rules which generally afford a seventy-five year period of protection.¹⁷

Civil remedies for infringement include actual or statutory damages, recovery of profits made by the infringer, injunctions against further infringement, and costs and attorneys' fees.¹⁸ Criminal penalties are available in cases of willful infringement for profit.¹⁹

III. THE CHANGING FACE OF FAIR USE

In 1984 the Supreme Court announced its decision in *Sony Corp. v. Universal City Studios*.²⁰ The Court concluded that home videotape recording of television programs off the air was not a violation of the U.S. copyright laws. To reach this decision, the Court ruled that home recording fell within the "fair use" exception to copyright.²¹ In so holding, the Court generated more confusion in an area that has long been considered "the most troublesome in the whole of copyright."²²

The decision made significant changes in fair use principles by placing new emphasis on certain components of the fair use analysis. Read together with another recent fair use case, *Harper and Row v. Nation Enterprises*,²³ it can also be argued that the Court has re-fashioned the traditional and statutory factors used in fair use analysis, rejecting certain long-standing principles.

These changes in the doctrine are significant if the "Betamax" case is treated like other Supreme Court decisions on fair use. The changes become less significant, however, if the case is placed in the context of the times in which it arose. The decision in *Sony* represents a determination on the part of the Court not to interfere in technological advances. That job will be left to the legislature. *Sony* represents a change only to the extent it generates a technological fair-use exception. Read out of its technological context, however, *Sony* can lead unwary attorneys to mistakenly simplify the complex fair use doctrine.

IV. FAIR USE GENERALLY

Fair use is usually defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner

¹⁷ See *id.* § 304.

¹⁸ See *id.* §§ 502-505.

¹⁹ See *id.* § 506.

²⁰ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

²¹ 17 U.S.C. § 107 (1982).

²² *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

²³ 471 U.S. 539 (1985).

without his consent, not withstanding the monopoly granted to the owner."²⁴

The concept strikes a balance between competing ideals in copyright. The purpose of copyright is to advance "science and the useful arts."²⁵ The copyright owner's monopoly defeats this purpose to the extent it prevents one author from building on the work of another. Too strong a monopoly would actually hinder the progress of science and art.²⁶ "Courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."²⁷ The fair use doctrine strikes a balance between the copyright monopoly and these greater interests of society.

A. JUDICIAL ORIGIN OF FAIR USE

Fair use began as a judicially created doctrine. Its first appearance is generally ascribed to *Folsom v. Marsh*.²⁸ The case concerned the copyright of certain of George Washington's letters. These letters had been published as part of a twelve-volume series. A subsequent biographer included a number of these letters in his work on Washington. A suit for copyright infringement in the Circuit Court for the District of Massachusetts resulted. Justice Story decided that there was an infringement of the copyright on the original letters. In rejecting the claim of fair use, though, he set out an analytical framework that guided future judicial and legislative development of the doctrine. The analysis included consideration of:

1. the nature of the works involved,
2. the extent of the copying, and

²⁴*Rosemont Enter. v. Random House, Inc.*, 366 F.2d 303, 305 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (quoting H. Ball, *Copyright and Literary Property* 260 (1944)). *Rosemont* concerned a biography of Howard Hughes. Random House publishing prepared a biography on Hughes that incorporated material from certain 1954 *Look* magazine articles. Rosemont Enterprises, a Hughes corporation, bought the copyrights in the articles and brought suit for infringement. The Second Circuit held the quotations from the articles were a fair use.

²⁵U.S. Const. art. I, sec. 8, cl. 8.

²⁶For a thorough analysis of the competing interests underlying the fair-use doctrine see generally L. Seltzer, *Exemptions and Fair Use in Copyright* (1978). For a discussion of the possibility that the monopoly may not be necessary at all see Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281 (1970).

²⁷*Berlin v. E.C. Pubs.*, 329 F.2d 541, 544 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

²⁸*Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). The court in *Folsom* never actually used the term "fair use" although it established the principles.

3. the effect of the copy on the market value of the original work.²⁹

Since *Folsom*, copyright litigation, largely in the Second and Ninth Circuits, has developed the law in the area of fair use.³⁰ The courts have continued to use the *Folsom* factors in assessing claim of fair use.³¹

B. CODIFICATION

Despite its long judicial history, fair use was not codified until the 1976 revision of the copyright law.³² That revision codified the exclusive rights of a copyright owner, along with several exceptions.³³ Foremost among the exceptions is fair use.³⁴ In codifying the doctrine, Congress looked to the same factors that the courts traditionally have used:

1. The purpose and character of the use,
2. the nature of the protected work,
3. the amount and substantiality of the taking, and
4. the economic impact the taking has on the copyrighted work.

²⁹The extent of the copying and the substance of the material copied were crucial factors in the decision. "It is not a case, where abbreviated or select passages are taken from particular letters; but the entire letters are taken, and those of most interest and value to the public." *Id.* at 349.

³⁰The Second and Ninth Circuits, no doubt, receive the lion's share of copyright cases because of the high concentration of entertainment and publishing industries in those circuits.

³¹See, e.g., *Broadway Music Corp. v. F-R Publishing Corp.*, 31 F. Supp. 817 (S.D.N.Y. 1940).

³²17 U.S.C. §§ 101-914 (1982).

³³*Id.* § 108.

³⁴*Id.* § 107. Section 107 provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Congress also gave examples of purposes that it considered appropriate for fair use consideration: "[C]riticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."³⁵ The commercial or nonprofit nature of a use is also a matter for consideration.³⁶

The legislative history makes it clear that the codification was not intended to alter the doctrine of fair use. "Section 107 is intended to restate the present judicial doctrine of fair use, not change, narrow, or enlarge it in any way."³⁷ The changing, narrowing, enlarging, and confusing of the doctrine were left with the courts.

V. IDEA/EXPRESSION AND FAIR USE

Fair use principles have often been stretched and bent to apply to new or different situations. Likewise, they have often been confused through inappropriate application, inartful judicial language, or misunderstanding on the part of the courts.

A prime example of this confusion is found in the fair use factor that concerns the "substantiality" of the taking. Substantiality looks at the relative importance of the material copied to the entire original work. For example, in *Folsom* the court found that the letters taken were the most valuable letters in the original book.³⁸ Substantiality answers the question of whether the gist of the original work has been taken. Such a taking allows the infringing work to serve as a substitute for the original.

On the other hand, there is an important threshold question in analyzing any copyright question. Does copyright protect what has been taken? If the answer is no, analysis need go no further. This seems simple enough, but courts have often confused this question with the substantiality factor in fair use analysis. Because it is a source of confusion, the distinction merits examination.

Copyright law elevates form over substance. The substance is an author's ideas. Ideas cannot be copyrighted.³⁹ The form is the expres-

³⁵*Id.*

³⁶*Id.*

³⁷H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 66 (1976); see also S. Rep. No. 473, 94th Cong., 1st Sess. at 62 (1975).

³⁸See *supra* note 29.

³⁹17 U.S.C. § 102(b) (1982): "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." See also *Mazer v. Stein*, 347 U.S. 201 (1953).

sion of the ideas. Copyright protects an author's expression of ideas.⁴⁰ Separating the ideas from their expression can be difficult. At what point does an idea that is available for use by any author coalesce into the expression of a particular author? As Judge Learned Hand wrote: "Upon any work . . . a great number of patterns of increasing generality will fit equally well . . . but there is a point in this series of abstractions where they are no longer protected."⁴¹

A. THE IDEA OF SUPERMAN

Drawing this distinction is clearly a job for Superman! It is not surprising, then, to find him featured in the case law on the subject. In *Detective Comics Inc. v. Bruns Publications*,⁴² the publishers of the comic books featuring Superman claimed their copyright in Superman had been infringed by another comic book character known as Wonderman. Wonderman's publishers defended on the theory that Superman was no more than a collection of heroic ideals found throughout literature and mythology. The idea of such a heroic prototype could not be protected, they asserted. Absent protection, Wonderman could not be an infringement. The Second Circuit found otherwise. In upholding copyright protection for Superman, the court considered the particular manner in which he embodied the idea of a "benevolent Hercules."⁴³ His costume, particular powers and feats, environment, the manner in which he hid his abilities, and the descriptions accorded his strength and missions were all found to be part of a unique expression of the heroic ideal. The court held that his adventures and characterization involved an "original arrangement of incidents and a pictorial and literary form."⁴⁴ When Wonderman wore the same sort of costume, had the same abilities, hid those abilities in an everyday identity, and performed the same feats as Superman, an infringement occurred because the expression, not the idea, was copied.⁴⁵

⁴⁰*Baker v. Selden*, 101 U.S. 99 (1879).

⁴¹*Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931). *Nichols* involved two plays that concerned Jewish-Catholic interfaith marriage as their general idea. The court found that each play gave different expression to this idea.

⁴²111 F.2d 432 (2d Cir. 1940).

⁴³*Id.* at 433.

⁴⁴*Id.*

⁴⁵*Accord National Comics Pubs. v. Fawcett Pubs.*, 191 F.2d 594 (2d Cir. 1951). This case also involved infringement of Superman, this time by a character called Captain Marvel. The court reached the same conclusions as in *Bruns*. *But cf. Warner Bros. v. American Broadcasting Co.*, 720 F.2d 231 (2d Cir. 1983) (parody of Superman upheld as noninfringing).

B. A TWO-STEP ANALYSIS

The idea/expression distinction involves questions of whether a particular work may be copyrighted in the first place. The general definition of fair use requires a proper monopoly in a work before fair use becomes an issue. Fair use analysis should not be concerned with drawing the distinction between idea and expression. "Denial of proprietorship in ideas, whether copyrighted or not, is not grounded, strictly speaking upon any theory of 'fair use.'"⁴⁶

Confusion between the idea/expression distinctions and questions of fair use arise when courts analyze infringing works that are not verbatim copies of an original. Ideally, a court should first analyze the works involved to determine whether a properly copyrighted expression of an idea has been taken. *After* finding such an expression, the court should next move to a fair use analysis and examine the amount and substantiality of the taking, the effect on the market value of the original, and the other fair use factors.

C. PARODY

Examples of such a two-step approach occur in the area of parody and burlesque.⁴⁷ If one work is to parody another it must take something of the expression of the original work. This is so because the parody must "recall or conjure up the object of [the] satire."⁴⁸ There being no question of a taking of expression, a court's analysis then turns to the fair-use factors.

Most often in the area of parody, the courts look at the substantiality of the taking and the economic impact on the original. If the parodist takes more than is necessary to raise the spectre of the original, he runs the risk that his parody will become a substitute for the original and a claim of fair use will fail.

This is exactly the situation Jack Benny faced in his parody of the movie *Gaslight*.⁴⁹ With the permission of the copyright owner, Benny had parodied the movie starring Charles Boyer and Ingrid Bergman on his radio show. He later brought the parody to television and planned to produce a feature length film parody. These later efforts were done without the consent of the original copyright owners. The

⁴⁶Yankwich, *What is Fair Use?*, 22 U. Chi. L. Rev. 203, 207 (1957).

⁴⁷See generally Nimmer, *Reflections on Parody Infringement*, Copyright L. Symp. (ASCAP) Number 17, at 133 (1969).

⁴⁸Berlin v. E. C. Pubs., 329 F.2d 541, 545 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

⁴⁹Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958).

copyright owner sued to protect the copyright. Benny's claim of fair use for parody failed at both the trial and appellate levels.

The Ninth Circuit found that the parody took so much that, when the original story and dialogue of *Gaslight* were extracted from the parody, all that remained were "a few gags, and some disconnected and incoherent dialogue."⁵⁰ The Benny parody copied the original so closely that there was a danger it could substitute for the original dramatic work.

When *Mad* magazine parodied the songs of Irving Berlin, however, they took only enough to call the original works to mind.⁵¹ Reference was made only to the title of the original works and no actual music was included. The lyrics did not copy the originals and concerned different subjects. There was no danger that the parodies would become substitutes for Berlin's original works. The reference to the original works was upheld as fair use.

D. FAIR USE AND IDEA/EXPRESSION EQUATED

The parody cases demonstrate that an author's expression, though protected, is still subject to fair use. The idea/expression analysis concerns the separate issue of whether a work can be protected by copyright in the first place. Some courts, however have blurred these analyses into a single approach. This confusion appears to have begun in Judge Hand's Second Circuit decision in *Sheldon v. Metro-Goldwyn Pictures Corp.*⁵²

The plaintiffs in *Sheldon* owned the copyright in a play based on a celebrated murder trial in the 19th century. The defendant in the trial was a young Scotch woman charged with poisoning her lover. She was acquitted. The plaintiff's play, *Dishonored Lady*, dramatized the facts behind the murder and trial. Independently, an English author had written a novel called *Letty Lynton* that was also based on the murder and trial.

Metro-Goldwyn Pictures wanted to produce a picture based on the play. They met resistance from a motion picture association official who found the play obscene. Eventually they bought the rights to the

⁵⁰239 F.2d 532, 536 (9th Cir. 1956). Compare *Benny with Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955), in which Sid Caesar parodied the movie *From Here to Eternity*. The court held that Caesar took only what was necessary to parody the original.

⁵¹*Berlin v. E. C. Pubs.*, 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

⁵²*Sheldon v. Metro-Goldwyn Pictures*, 7 F. Supp. 837 (S.D.N.Y. 1934), rev'd, 81 F.2d 49 (2d Cir.), cert. denied, 298 U.S. 669 (1936).

novel and prepared a screenplay for the film. Many of the fictional elements of the play were included in the screenplay. Plaintiffs sued to enjoin the production of the film. Metro-Goldwyn prevailed in the district court. The Second Circuit reversed and granted the injunction.

The court of appeals held that the screenplay copied substantial amounts of the play's expression. The court rejected the defendant's claim that use of the play's material was fair use. In rejecting that defense, the Second Circuit equated fair use with the distinction between idea and expression. "[I]t is convenient to define [fair use] by saying that others may 'copy' the 'theme' or 'ideas,' or the like, of a work, though not its 'expression.'"⁵³

The parody cases demonstrate that this is not true. Fair use is invoked as a defense when expression is taken. Ideas are not protected at all. Nonetheless, this erroneous holding in *Sheldon* equating fair use to the idea/expression dichotomy has been followed elsewhere.⁵⁴

The copyright revision of 1976 may help in clearing up this confusion. Part of the statute provides that copyright protection does not extend to any idea.⁵⁵ This provision is quite distinct from the section codifying fair use. In a Second Circuit opinion written since the new enactment, the court does separate the analyses of the two aspects. Curiously enough, the case involves Superman.⁵⁶

E. UNITY OF IDEA AND EXPRESSION

Remaining is the difficult situation that might arise where an author adds so little to the original idea that idea and expression are indistinguishable. The Ninth Circuit addressed that issue in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*.⁵⁷ The case concerned an alleged infringement of plaintiff's jewelled pin, which was shaped like a bee. The defendants subsequently produced a jewelled bee pin. The district court found that the defendants had based their pin design on their own independent study of bees. The similarities, it concluded, resulted from the fact that both pins look like bees.

⁵³81 F.2d at 54.

⁵⁴*E.g.*, *Bradbury v. Columbia Broadcasting Sys.*, 287 F.2d 478, 485 (9th Cir.), cert. denied, 368 U.S. 801 (1961) (infringement of the novel *Fahrenheit 451*). "Fair use may permit copying of theme or ideas of copyrighted work but not its expression."

⁵⁵See *supra* note 39.

⁵⁶*Warner Bros. v. American Broadcasting Co.*, 720 F.2d 231 (2d Cir. 1983). The television program *The Greatest American Hero* was held a legitimate parody of Superman. The idea of a super powered hero found different expressions in the television hero and Superman. "In the genre of superheroes, Hinkley follows Superman as, in the genre of detectives, Inspector Clouseau follows Sherlock Holmes." *Id.* at 243.

⁵⁷*Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

On appeal, plaintiffs claimed that copyright on their jewelled bee pin precluded the manufacture of any pin that was substantially similar. In short, they claimed a copyright in the idea of a jewelled-bee pin because of their copyrighted expression of a jewelled-bee pin. The Ninth Circuit found that the idea and the expression were inseparable and refused to extend protection to the expression under such circumstances.⁵⁸

VI. FACTS/EXPRESSION AND FAIR USE

Facts are like ideas; they cannot themselves be copyrighted.⁵⁹ Particular expressions of facts are protected by copyright. *Chatauqua School of Nursing v. National School of Nursing*⁶⁰ demonstrates this. In that case, an Army major wrote and copyrighted lectures on certain medical procedures. He sold the right to publish those lectures to the defendants. In the lectures he included a description of hypodermic medication. The procedure was described in twelve steps and was accompanied by pictures of the major demonstrating those steps. The plaintiffs had previously published a pamphlet that described the same procedure in twelve steps and showed photographs demonstrating the operation.

In finding no infringement, the Second Circuit recognized that "all previous medical knowledge was common to any writer."⁶¹ The plaintiffs insisted they should be protected because they were the first to describe and illustrate the steps in the process. The court rejected this proposition, which would have given the plaintiffs a monopoly in describing a very common operation.

After reaching the conclusion that the fact of the medical procedure could not be protected, the court of appeals went on to analyze the text and the photos used by the parties. It concluded that there must of necessity be similarities of expression where two works describe the same set of facts. "From the nature of things there were certain to be considerable resemblances, just as there must be between the

⁵⁸ *Accord* *Sid & Marty Krofft Television v. McDonald's Corp.* 362 F.2d 1157, 1168 (9th Cir. 1977): "When idea and expression coincide, there will be protection against nothing other than identical copying of the work." The case involved an infringement of the plaintiff's television program for children by the defendant's "McDonald Land" commercials.

⁵⁹ *E.g.*, *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797 (7th Cir. 1921) (news of a new German submarine).

⁶⁰ 238 F. 151 (2d Cir. 1916).

⁶¹ *Id.* at 152.

work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips.⁶²

Generally, courts have not had the same problems with facts as they have had with ideas in separating their noncopyrightable nature from the fair use of their expression. Undoubtedly this is because ideas require a degree of originality that facts do not. There is no need with facts to apply patterns of generality to determine what is public domain and what is protectable.

A. UNITY OF FACT AND EXPRESSION: TIME, INC. v. BERNARD GEIS ASSOCIATES

As with ideas, situations can arise where the facts and their expression are so intertwined that to afford protection to the expression will extend the owner a monopoly in the facts. A prime example is the Zapruder film of the Kennedy assassination, the subject matter of *Time, Inc. v. Bernard Geis Associates*.⁶³

Abraham Zapruder set up his 8mm movie camera to record President Kennedy's visit to Dallas on 22 November 1963. By sheer chance the camera was located where it would record the President at the moment of his murder. No other film of the events existed. *Time* bought the film and copyrighted it. A copy was made available to police investigators and to the Warren Commission, which was appointed to investigate the murder. A copy was included in the Warren Commission's report. Certain frames of the film were placed in the National Archives.

Sometime later, Bernard Geis Associates sought permission to use frames of the film to illustrate a book expounding a conspiracy theory of the assassination. *Time* denied the request, but did allow the author to view a copy of the original film. The author also advised *Time* on an upcoming feature they were planning on the assassination. This allowed him further access to the film. During one of the viewings, the author photographed certain frames and had an artist render sketches of them. The author used the sketches in his book to illus-

⁶²*Id.* at 153. This also illustrates an important point in copyright law: a copyright protects the author's expression only from copying; it does not give the author a monopoly over the idea or the author's expression. Another person who independently creates a similar, or identical, product, *without copying*, has not violated the copyright laws.

⁶³239 F. Supp. 130 (S.D.N.Y. 1968).

trate his theories. *Time Inc. v. Bernard Geis Associates*⁶⁴ was the result.

The court recognized that a photograph could properly be copyrighted. It then moved to the defendant's contention that a news event may not be protected by copyright and that protection of the Zapruder film would give *Time* a monopoly in the events recorded on the film. The court dismissed this contention. "[Time] claims no copyright in the news element of the event but only in the particular form of record made by Zapruder."⁶⁵

The court reasoned that, because the film could be copyrighted, the sketches made from the film infringed that copyright unless the fair-use doctrine applied. The court then held that Bernard Geis' use was "fair." There was little, if any, economic harm to the copyright owner. The defendant did not sell the pictures or publish magazines, so there was no direct competition. That the sketches made the theories easier to understand also influenced the court's decision. The public interest in receiving information was critical to the result. "There is a public interest in having the fullest information available on the murder of President Kennedy."⁶⁶ The court held there was no copyright violation.

B. PHOTOS: FAIR USE OR FIRST AMENDMENT?

Professor Nimmer has suggested that a first amendment analysis is more appropriate to the situation of *Time Inc. v. Bernard Geis Associates*. He argues this position because of the court's rationale that the public interest was best served by having the most detailed information on the murder. Although his treatment of the subject does not draw a distinction between fact/expression and idea/expression, he does examine both areas under the idea/expression dichotomy. He has proposed a "news photograph" first amendment exception to copyright, with a compulsory license approach to such situations.⁶⁷ He limits, however, his proposed exception to a "news photograph" in which the "event depicted, as distinguished from the fact that the photograph was made, is the subject of news stories."⁶⁸ If the events

⁶⁴*Id.*

⁶⁵*Id.* at 143.

⁶⁶*Id.* at 146.

⁶⁷M. Nimmer, 1 *Nimmer on Copyright*, § 1.10 [C], at 1-84 (1985). A compulsory license requires a copyright owner to allow the use of his work upon the payment of a set royalty.

⁶⁸*Id.*

shown in the photo are the news, the photo could be used because the exception would apply. If the fact that the photo was made, and not what the photo depicts, is the item of news interest, then the exception would not apply and the photo could not be used. This approach recognizes that facts and their expression can become inextricably intertwined and seeks to resolve the problem without applying fair use.

Both Nimmer and the court in *Time* reach the same conclusion by different routes. The bottom line is that to deny the author the use of the film gives the copyright holder a *de facto* monopoly in historical events. To allow such a copyright is to grant a copyright in facts. Because Nimmer and the court do not deal with the problem as a threshold issue of copyrightability, they must invoke fair use or the first amendment.

C. MATHEWS CONVEYOR CO. v. PALMER BEE CO.

A sketch derived from a photo was also the subject of a charge of copyright infringement in *Mathews Conveyor Co. v. Palmer Bee Co.*⁶⁹ The photo appeared in a catalogue that the plaintiffs used to sell machine parts. The defendants had a sketch made from the photo and included it in their catalogue of machine parts.

In dismissing the claim of copyright infringement, the Sixth Circuit considered a great number of factors. These included the de minimus nature of any infringement (the photo was one of hundreds) and the insignificant impact of any infringement on the original's value. The court placed a strong emphasis on the fact that the photo and sketch both concerned a machine part that was in the public domain. Important to the court's decision was the value added by the defendant. "[D]efendant caused the exercise of a considerable degree of commercial art, and incurred a substantial expense in the production, in different media, of the sketches."⁷⁰

The court recognized that the photo was one form of expression of the machine part and was entitled to protection in that form of expression. It refused to extend protection so far as to allow the one form of expression to prevent all other expressions. This analysis recognizes the value of the efforts involved in expressing the same facts in a different way.

⁶⁹ 135 F.2d 73 (6th Cir. 1943).

⁷⁰ *Id.* at 85.

D. HISTORY AND BIOGRAPHY

History and biography pose the same type of problems. Two authors present the same facts in different treatments but must inevitably have similarities because the facts are the same. In *Greenbie v. Noble*,⁷² two authors wrote biographies of Civil War heroine Anna Ella Carroll. The second author had access to the first author's book. This did not disturb the District Court for the Southern District of New York, which recognized that fair use allows one author to build on another author's work. The court found this valid so long as the second author's "expression and treatment is distinctly his own and not merely the result of copying from the [original] book."⁷² In examining the facts of the case to determine whether the similarity of the two works was the result of such copying, the court held that: "The inference of copying does not exist, however, where the similarity between the two works arises because of the nature of the subject matter and the fact that both authors used materials available to all."⁷³

The court ultimately decided that the similarities between the two biographies resulted from the nature of the subject matter. "[The defendant] performed independent research and drew upon information and materials from the common sources available to all and in the public domain."⁷⁴

E. DIFFERENT "PERFORMANCES" FOR THE SAME FACTS

Common to both *Mathews Conveyor* and *Greenbie* is recognition that the underlying facts cannot be copyrighted. The two cases also recognize a need to protect particular expressions of those facts. Finally, both courts recognized that the defendants had by their own efforts placed a different expression on the facts.

I analogize the problem to one of dramatic or musical works that have become public domain. The copyright law will still protect individual performances of these works.⁷⁵ For example, the plays of

⁷¹151 F. Supp. 45 (S.D.N.Y. 1957).

⁷²*Id.* at 67.

⁷³*Id.* at 68.

⁷⁴*Id.*; see also *Eisenschiml v. Fawcett Pubs.*, 246 F.2d 598 (7th Cir.), cert. denied, 355 U.S. 907 (1957) (another example of alleged infringement because two histories dealt with the same facts. No infringement found.); cf. *Hoshling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), cert. denied, 449 U.S. 841 (1980) (no copyright protection for historical theories or scenes *a faire*.).

⁷⁵17 U.S.C. § 102 (1982). Such a performance might take the form of an audiovisual work, a sound recording, or a dramatic work. See M. Nimmer, *supra* note 67, § 2.10[A][2], for a discussion of rights in particular performances with regard to sound recordings.

Shakespeare are eligible for different performances, each of which may be protected from copying. Facts should be regarded the same way.

Applying this sort of approach to the situation presented in the *Time* case, we can reach the result that both Nimmer and the court reached. Most significantly, we can reach this result without the first amendment "news photo" exception or a fair-use test. The events of the Kennedy assassination are historical facts. They are in the public domain and are therefore not protected. The Zapruder film of the assassination records those events and is a particular expression of the events.

The sketches that the defendant had prepared based on the events depicted in the film are a different expression. Charcoal drawings are not a film or photo. The sketches reflect an investment of time and talent on the part of the defendants. The defendants could not use the actual photos from which the sketches were prepared in their book. Those are the Zapruder film's expression. On the other hand, the sketches, a dramatic reenactment of the events in the film, or a computer-generated recreation are all different "performances" of those events. They embody the facts that cannot be copyrighted in a new performance. They are outside the protection copyright should properly afford the film. Accordingly, there is no infringement and so no need for a first amendment "news photo" exception or a fair use analysis.

VII. COPYRIGHT AND FIRST AMENDMENT IN CONFLICT

Courts and commentators have recognized a tension between the copyright law, which protects author's works by granting exclusive rights of expression to the author, and the first amendment, which grants freedom of expression.⁷⁶ Professor Nimmer's first amendment analysis in the fact/expression arena highlights the overlap between fair use and first amendment issues. Evidence of this overlap is found in the actual language of section 107. The statute lists news reporting as one of the purposes for which fair use may apply.⁷⁷ Fair use questions cover the entire range of first amendment issues. Cases include

⁷⁶See, e.g., *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir.), cert. denied, 439 U.S. 1132 (1978): "There is of course some tension between the First Amendment and the Copyright Act."

⁷⁷See *supra* note 34.

issues of news reporting,⁷⁸ commercial free speech,⁷⁹ and pornographic expression.⁸⁰

A. IMPACT OF FIRST AMENDMENT ON FAIR USE

Changes in the interpretation of the first amendment have influenced the interpretation of the fair-use doctrine. *Consumers Union v. General Signal Corp.*⁸¹ for example, involved whether the use of a copyrighted work in commercial advertising could constitute fair use. The plaintiffs in the case published *Consumer Reports* magazine. Their evaluation of a particular vacuum manufactured by the defendants was being used to advertise the machine.

A long-standing decision by a district court in the Second Circuit held in similar circumstances that such purely commercial use was not fair use.⁸² Thereafter, the Supreme Court reached its decisions acknowledging a first amendment right of commercial free speech.⁸³ The court in *Consumers Union* relied on those decisions in deciding that the advertisements for the vacuums did make fair use of the evaluations.

B. FAIR USE AS A FIRST AMENDMENT SUBSTITUTE

Most courts have avoided the potential confusion between first amendment and fair use. They have done so by resolving the questions

⁷⁸ See, e.g., *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797 (7th Cir. 1921); see also *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978) (stock market news).

⁷⁹ E.g., *Henry Holt & Co. v. Liggett & Myers Tobacco Co.* 23 F. Supp. 302 (E.D. Pa. 1938); see also *Consumers Union of U.S. v. General Signal Corp.* 724 F.2d 1044 (2d Cir. 1983), cert. denied, 469 U.S. 823 (1984).

⁸⁰ E.g., *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). In *MCA*, the defendants wrote a song called the "Cunnilingus Champion of Company C" which was deliberately a close copy of the plaintiff's song "Boogie Woogie Bugle Boy of Company B." The court found the deliberate copying an infringement and rejected a claim of parody. "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *Id.* at 185; cf. *Dallas Cowboys v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (use of Dallas Cowboy cheerleader uniform in film *Debbie Does Dallas* held a trademark violation; first amendment and fair-use claims rejected).

⁸¹ *Consumers Union v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), cert. denied, 469 U.S. 823 (1984).

⁸² *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938). In this case, the court examined a medical treatise used in tobacco advertising under the fair use doctrine and found an infringement because of its purely commercial use.

⁸³ E.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

posed through fair-use analysis. "Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine"⁸⁴

A good example is found in the Fifth Circuit's decision in *Triangle Pubs. v. Knight-Ridder Newspapers*.⁸⁵ In that case, the *Miami Herald* newspaper had advertised its weekly television magazine by comparing it with *TV Guide* magazine. The comparison showed a cover of the Herald's magazine next to an actual cover of *TV Guide*. The covers of *TV Guide* are copyrighted and its publisher, Triangle Publications, sued for infringement of those copyrights.

The District Court for the Southern District of Florida held that the defense of fair use did not apply because of the commercial purpose involved.⁸⁶ It upheld the ads, however, based on the first amendment free speech rationale that the Second Circuit used to influence its fair use analysis in *Consumers Union*.⁸⁷ On appeal the Fifth Circuit Court of Appeals reversed on the fair use issue. It held that the commercial purpose of the use alone did not defeat the fair-use defense. Analyzing the remaining factors, the court found that fair use did apply. The court of appeals found it unnecessary to address the first amendment question because of its fair use holding.

Judge Brown objected to the court's refusal to address the first amendment issue. He subscribed to Professor Nimmer's suggestion that first amendment requirements are satisfied by the separation of idea and expression: "[I]t appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests."⁸⁸

In this analysis, the prohibition of copyright in ideas ensures the free exchange of ideas and information, preserves the democratic dialogue necessary to representative government and so meets the ends of the first amendment. On the other hand, the protection of particular expressions meets the copyright objective of advancing art and science. Fair use remains to cover those situations where expression is taken. The first amendment does not become involved in such cases. This avoids the potential conflict between the two principles: "The Copyright Act itself provides a safety valve—fair use—to minimize this potential tension."⁸⁹

⁸⁴Wainwright Sec. v. Wall Street Transcript Corp., 556 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978).

⁸⁵Triangle Pubs. v. Knight-Ridder Newspapers, 626 F.2d 1171 (5th Cir. 1980).

⁸⁶Triangle Pubs. v. Knight-Ridder Newspapers, 455 F. Supp. 875 (S.D. Fla. 1978).

⁸⁷See *supra* note 83.

⁸⁸M. Nimmer, *supra* note 67, § 1.10[B][2], at 1-76 (1965).

⁸⁹Triangle Pubs. v. Knight-Ridder Newspapers, 626 F.2d 1171, 1181 (5th Cir. 1980) (dissenting opinion).

In this area the potential for conflict has been defused. The questions concerning the line of distinction between first amendment and fair use appear to have been resolved in *Harper and Row v. Nation Enterprises*.⁹⁰ The Supreme Court has adopted the analysis proposed by Nimmer and endorsed by Judge Brown.

VIII. HARPER AND ROW v. NATION ENTERPRISES

A. THE FACTS

*Harper and Row v. Nation Enterprises*⁹¹ is the most recent Supreme Court decision in the fair use area. It involves many of the principles previously discussed. *Harper and Row* involves the memoirs of former President Gerald Ford. President Ford arranged with Harper and Row and *Reader's Digest* for the publication of his memoirs. Harper and Row held the copyright interests in the book form of the memoirs. The book was to be called *A Time to Heal*. Harper and Row contracted with *Time* to furnish them advance copies of the memoirs. *Time* planned to publish articles about the pardon of former President Nixon based on the memoirs. The excerpts were to be made available shortly before the book was published.

The Nation magazine obtained a stolen copy of Ford's manuscript before it was published in any form, shortly before the *Time* article was to have appeared. The editor who received the stolen copy worked quickly, using only the manuscript, to prepare an article about the forthcoming memoirs and the revelations made by their author. *The Nation's* editors were fully aware that Harper and Row held the copyright to the manuscript. They were also aware of the agreement between the publishing house and *Time*. Nevertheless, the magazine rushed its article into publication.

The Nation article highlighted the portions of the manuscript concerning President Ford's decision to pardon President Nixon for any involvement in the Watergate scandals. It also included certain of President Ford's perceptions of other national leaders and politicians. It included both direct quotations and paraphrasing from the manuscript. It was approximately 2,000 words long and included roughly 300 words directly quoted from the 200,000 word book.

As a result of this article, *Time* cancelled its contract with Harper and Row. The publishing house brought suit against *The Nation* for

⁹⁰557 F. Supp. 1067 (S.D.N.Y.), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

⁹¹*Id.*

copyright infringement. *The Nation* defended on the basis of fair use. The gist of the defense was that the copying was valid because it was used for news reporting. As an alternative theory, *The Nation* contended that the material taken concerned matters of historical fact, conversations of others, and government memoranda. As such, they could not be copyrighted.

B. THE DISTRICT COURT DECISION

The district court held in favor of Harper and Row.⁹² The court first examined the claim that the primary purpose of the article was news reporting. The article's author stated that the news value of the article was in the revelations made in the material relating to the pardon granted former President Nixon. The district court found that the material discussed in the book had been disclosed previously in a congressional inquiry in 1974. At that time the testimony of President Ford concerning the decision to pardon President Nixon had received widespread news coverage. The court held such old news was no news that allowed infringement. "[T]he 'revelations' of the Ford memoirs were not such news, 'hot' or otherwise, as to permit the use of author Ford's copyrighted material."⁹³

The court next gave a brief analysis of the fair use factors. It found that the article was done for profit, infringed a work that was not yet published, and diminished the value of the work by causing the cancellation of the *Time* contract. More importantly, the court, quoting *Folsom v. Marsh*,⁹⁴ held that *The Nation* had taken the "heart of the book."⁹⁵

The claim that the material could not be copyrighted also failed. The court acknowledged that facts, government memoranda, and conversations of others could not be protected per se. At the same time, it reasoned, Ford's expression concerning that information was what made the manuscript valuable as a work. That expression could be protected, even though it was tied to the facts. "The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected with Ford's reflections that made them of value. . . . [I]t is this same totality that is protected by the copyright laws."⁹⁶

⁹²557 F. Supp. 1067.

⁹³*Id.* at 1072.

⁹⁴*Folsom*, it should be remembered, involved the letters of the first President, George Washington. See *supra* note 28.

⁹⁵557 F. Supp. at 1072.

⁹⁶*Id.*

In short, the court found that the facts were used as an avenue to get the expression. It refused to sanction the theft of President Ford's "performance" of the facts in the form of his views and the impact of events on him under the guise of reporting facts.

C. THE COURT OF APPEALS DECISION

The Second Circuit reversed the district court's decision.⁹⁷ The court first addressed the issue of copyrightability. It held that the facts, government memoranda, and conversations of others could not be copyrighted. Protection was extended only to an author's arrangement and structure of such matters. This was the protected expression. "The paraphrasings concern the very essence of news and history. In such works, courts have carefully confined that troublesome concept 'expression' to its barest elements—the ordering and choice of the words themselves."⁹⁸

The court found that the paraphrased material did not take President Ford's expression. This was so because only disparate parts of the work were taken. "*The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic."⁹⁹

This disposed of the paraphrased parts of the work by deeming them incapable of copyright. The court still faced the direct quotations. The fair-use doctrine provided the analysis for those matters. Dismissing the district court's analysis that "old news is no news," the court of appeals found that the article concerned "a new book on the actions of the highest public officials."¹⁰⁰ This satisfied the judges that the article was either news or history. The court also rejected the dissent's position that legitimate news must include comment or an original contribution.¹⁰¹

The Second Circuit also held differently in analyzing the four fair use criteria. Admitting the commercial nature of the copying, the court did not find that matter controlling. Rather than the unpublished nature of the work, the court of appeals emphasized the factual

⁹⁷ 723 F.2d 195 (2d Cir. 1983).

⁹⁸ *Id.* at 204.

⁹⁹ *Id.* at 203.

¹⁰⁰ *Id.* at 206.

¹⁰¹ *See id.* at 212-17 (Meskill, J., dissenting). The dissent recognized that *The Nation's* article used nothing more than the original manuscript and added nothing to the work in the form of commentary or criticism. In short, the article merely condensed the original. Under the proposal I have made to treat the fact/expression dichotomy like performances of different works in the public domain, it is clear that the article is not a different "performance" of the facts. Rather, it is an edited version of President Ford's "performance" and is therefore an infringement.

nature of the work. It found a narrow protection afforded factual works. The appellate court rejected even the seemingly obvious economic harm to the original work. It held instead that the proof was inadequate that *Time's* cancellation was due to the copying of Ford's expression as opposed to the copying of the facts.

The court of appeals emphasized the amount and substantiality of the taking, and rejected the district court's finding that *The Nation's* article took the "heart of the book." It held that the true heart of the book was unprotected fact and not the former President's analysis or impressions. In the court's opinion, the amount actually taken served only to highlight and lend credence to significant factual material. That amount was so small that it was a fair use. "In sum, the quotations are informative and are neither superfluous or excessive for the article's purpose."¹⁰²

D. THE SUPREME COURT

The Supreme Court reversed the decision of the Second Circuit and found no fair use.¹⁰³ The Court began by acknowledging the difficulty the lower courts faced in resolving the question of copyrightability. The combination of fact and expression posed a difficult and unsettled area that the Justices found unnecessary to resolve. The majority was able to reach its opinion based on the specific language taken by the magazine. Addressing this language, the Court moved to a fair use assessment.

The key factor in the Court's approach was the fact that the manuscript was unpublished. In taking the specific language of the manuscript, the Court held *The Nation* had taken the right to first publication. Fair use would not ordinarily allow an appropriation of that right. "Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."¹⁰⁴

First publication rights are among the exclusive rights afforded copyright owners in section 106 of the statute. These exclusive rights are made subject to the fair use limitation in section 107.¹⁰⁵ The majority recognized that the right of first publication was different

¹⁰² 723 F.2d at 208.

¹⁰³ 471 U.S. 539 (1985).

¹⁰⁴ *Id.* at 555 (footnote omitted).

¹⁰⁵ 17 U.S.C. § 106 (1982). "Subject to sections 107 through 118 the owner of copyright under this title has the exclusive rights . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

from the other rights enumerated because "only one person can be the first publisher".¹⁰⁶ Therefore, any fair use would eliminate the right.

The Court next addressed the defendant's claim that the first amendment interest in news reporting transcended the copyright interests. *The Nation* asserted that the public interest in learning matters of such high public import as soon as possible outweighed the right of first publication. In resolving this question, the Court accepted the idea/expression line as the definitional balance point between first amendment and copyright interests. "[C]opyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression'".¹⁰⁷

The majority would not allow appropriation of *expression* on the basis of the first amendment merely because the author himself was a public figure or because his particular words were newsworthy. Verbatim copying, they ruled, must be analyzed according to traditional fair-use criteria.

In examining the purpose of the copying, the Court concurred with the Second Circuit's finding that the purpose of the copying was news reporting. The "old news as no news" estimation of the district court was rejected to avoid the spectre of courts passing on the newsworthiness of particular matters. The Court also recognized that the infringing work was one made for profit. That weighed against a finding of fair use. Finally, the Court found that the article deliberately took the rights of first publication. This deliberate appropriation of the author's rights weighed against fair use.

In assessing the nature of the copyrighted work, the Supreme Court emphasized that the manuscript was unpublished. The Court relied on its analysis that an unpublished work is specially protected and less available to fair uses. While the Court recognized the factual nature of the original manuscript, it held that *The Nation* took more than the isolated facts and phrases necessary to convey the facts. "[*The Nation*] excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression."¹⁰⁸

In assessing the amount and substantiality of the taking, the majority agreed with the Second Circuit that the amount taken was small. Nonetheless, the Court also agreed with the district court that

¹⁰⁶471 U.S. at 553.

¹⁰⁷*Id.* at 556 (quoting the court of appeals decision at 723 F.2d 195, 203).

¹⁰⁸*Id.* at 563.

the passages taken were the most powerful and interesting. This weighed against a finding of fair use.

Finally, the Court held that the evidence of actual damage from the taking was clear. The cancellation by *Time* presented sufficient evidence of damage to the market value of the work.

The dissent found no greater protections necessary in unpublished works. They agreed with the court of appeals that the taking by the magazine was so small as to be *de minimus*. The dissenters found it inconceivable that a little over 300 words could appropriate the expression of a book exceeding 200,000 words. They also agreed with the Second Circuit that the bulk of material taken was fact and idea, not expression.

E. IMPACT OF HARPER AND ROW

The decision in *Harper and Row* makes clear the dividing line between first amendment guarantees and the Copyright Act. It demonstrates that the two legal theories can coexist in American law. It leaves unresolved the division between fact and expression.

The decision also raises some new issues. The Court addressed the unpublished aspect of the manuscript in its analysis of the nature of the copyrighted work. That the Court chose to address the matter as an aspect of the nature of the work appears to give the decision a broader precedential value. By so addressing the issue, the Court extended to such works a broader protection. This could be true whether or not there is a concurrent impact on the economic value of first publication.

Yet the language of the decision places more emphasis on the unpublished nature of a work as an aspect of the effect of infringement on market value. In *Harper and Row*, the article took valuable economic rights away from the manuscript. The taking affected the ability to market the work later.

On the other hand, the Court recognized that common-law copyright had been "enlisted in the service of personal privacy."¹⁰⁹ Although speaking in economic terms, the Court's language invoked a privacy interest in the author to choose when and where to set out his expression, if at all. It spoke of the merits of "assuring authors the leisure to develop their ideas free from fear of expropriation."¹¹⁰

¹⁰⁹*Id.* at 554 (citation omitted); see also *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

¹¹⁰*Id.*

The tenor of such statements leads one to conclude that the Court intended broader protection for unpublished works. Harm to first publication economic rights is important but not the controlling factor. A subsequent court would err by treating the matter solely as an issue of economic harm.

IX. EQUITY ASPECTS OF FAIR USE

Harper and Row serves to illustrate another aspect of the fair use doctrine that makes it difficult to apply. The Court's assessment of the case included the dishonest methods used by *The Nation* in obtaining the manuscript. "Fair use presupposes good faith."¹¹¹ This is nothing less than equity at work. The very word "fair" suggests that fair use analysis includes elements of equity. In fact, the court in *Time, Inc. v. Bernard Geis Associates* declared fair use an "entirely equitable" doctrine.¹¹² This aspect of the doctrine has often been recognized by courts.¹¹³ Congress also recognized the equitable aspect of fair use when it codified the doctrine. "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible."¹¹⁴ "Clean hands" on the part of the infringer is an unwritten fifth factor in fair use analysis.

X. TECHNOLOGICAL CHALLENGES TO COPYRIGHT

Emerging technologies capable of infringing copyrights have presented new challenges to copyright law in general and to fair use in particular. The Supreme Court's fair use decision in *Sony Corp. v. Universal City Studios* can be understood only against the background of the technology/copyright cases that preceded it. Not all of the cases involve fair use. They all serve to establish principles significant to fair-use analysis. They all provide useful guidance in analyzing copyright questions facing today's judge advocates.

¹¹¹*Id.* at 562 (quoting *Time, Inc. v. Bernard Geis Assoc.*, 239 F. Supp. 130, 146 (S.D.N.Y. 1968)).

¹¹²*Time, Inc. v. Bernard Geis Assoc.*, 239 F. Supp. 130, 144 (S.D.N.Y. 1968).

¹¹³See, e.g., *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 385 U.S. 826 (1982) (bad faith use of Chaplin films after permission denied).

¹¹⁴S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

A. BUCK v. JEWELL-LASALLE REALTY CO.

In *Buck v. Jewell-LaSalle Realty Co.*¹¹⁵, the Supreme Court first addressed the issue of retransmission of broadcast signals as copyright infringement. The action was brought by the American Society of Composers, Authors and Publishers (ASCAP) and one of its members against the operators of a Kansas City hotel. The hotel offered what might be termed "cable radio." Radio shows were received at a master set. The hotel provided each room with headphones or speakers wired to the central set. This allowed the hotel guests to listen to the radio in the privacy of their rooms.

The plaintiffs owned a copyrighted song that was played a number of times by a radio show received on the hotel's master set. They claimed their copyright was infringed because the retransmission to other rooms constituted a public performance for profit. The public performance for profit of a copyrighted work was an exclusive right of the copyright owner under the 1909 Copyright Act, just as it is now.¹¹⁶

The hotel defended on several theories. It urged that the Copyright Act should not apply to one who only passively receives broadcasts. Such a recipient has no control over the works received. The selections are made elsewhere. They argued that any performance under these facts takes place at the broadcast studio; the mere retransmission of the signal was not a performance. Furthermore, they contended, the exclusive rights in a particular performance are exhausted by the initial broadcast. Once committed to the airwaves, the work became fair game for reproduction. The defendants also argued that the reception of the broadcast did not differ from listening to a distant performance of the work. As such it was not a reproduction. Finally, they urged there was no proof the set was operated for profit.

The Court rejected these defenses and held the retransmissions to the hotel rooms did constitute public performances. The Court also rejected the argument that the hotel was merely a passive recipient of the broadcast: "We are satisfied that the reception of a radio broad-

¹¹⁵283 U.S. 191 (1931).

¹¹⁶17 U.S.C. § 106(4) (1982). The present right is broader. There is no longer a for-profit requirement.

cast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction."¹¹⁷

The Court analogized the retransmission to the playing of a phonograph. In both cases, electric equipment effects a reproduction of a work. These reproductions are performances. The Court held the re-transmissions were infringements of the copyright in the song.

B. CABLE TELEVISION CHANGES THE RULES

1. Local Retransmission.

Thirty-eight years later the Supreme Court again faced issues of the retransmission of broadcast signals. In *Fortnightly Corp. v. United Artists Television, Inc.*,¹¹⁸ cable television was the technology accused of infringing copyright interests.

Fortnightly Corporation operated a cable television service in West Virginia. Because of mountains, television reception was poor. Some residents erected community antennae to improve reception. Most residents, however, used the cable service provided by Fortnightly. Stations from major metropolitan areas, all within 100 miles, were picked up by Fortnightly's mountaintop antennae. Cables from the antennae then carried the signals to the homes of subscribers.

United Artists owned the copyrights to certain movies. It licensed the rights to show the movies to the stations, whose broadcasts were retransmitted by Fortnightly's cable. The licenses did not provide for transmission by cable and in some cases specifically forbade it. United Artists sued Fortnightly for infringement.

The district court and the Second Circuit, relying on *Buck v. Jewell LaSalle Realty*, held the cable transmissions infringed the copyrights.¹¹⁹ The Supreme Court found otherwise. It limited *Buck v. Jewell-LaSalle* to its own facts.¹²⁰ The Court adopted as law the arguments it had rejected thirty-eight years earlier.

The Court drew a distinction between those who perform works and those who receive them. "Broadcasters perform. Viewers do not perform."¹²¹ The opinion noted that the television viewer provides his

¹¹⁷*Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. at 199-200.

¹¹⁸392 U.S. 390 (1968).

¹¹⁹*United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967).

¹²⁰*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397 n.18 (1968).

¹²¹*Id.* at 398.

own equipment which transforms the electric signals of the broadcaster into sights and sounds. The cable company, in the Court's analysis, did no more than enhance the capability of the viewer to achieve this result. In this analysis, the cable company provides equipment that assists in changing signals to sight and sound. If this is an infringing performance, then many other common-place activities would also violate copyright, including "[t]he apartment house owner who erects a common antenna for his tenants, . . . the shopkeeper who sells or rents television sets, and indeed, every television set manufacturer."¹²²

The Court found cable television was a viewer function, not a broadcasting function. As such it did not perform the copyrighted works and so did not infringe. "CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers."¹²³ The Court was forming a new notion that would affect fair-use analysis. Copyright owners who make works available to the public by broadcast must expect a lessened degree of control.

Justice Fortas's dissent adhered to the rules of *Buck v. Jewell-LaSalle*. He criticized the Court's assisting the development of cable television by abandoning precedent. He argued that the Court should preserve the existing law intact until Congress "legislates and relieves the embarrassment which we and the interested parties face."¹²⁴

2. Distant Signals.

Fortnightly was not the end of the matter. *Teleprompter Corp. v. Columbia Broadcasting System*¹²⁵ came before the Supreme Court six years later. It presented a variant of the earlier case. Like *Fortnightly*, the focus was on a cable television system that allegedly infringed copyright interests by performing the works through retransmission.

In *Teleprompter*, however, many of the locations that received the cable transmissions were over 100 miles from the broadcast's origination point. To carry the signals over these distances, Teleprompter Corporation used microwave transmitters instead of the cables and antennae used by *Fortnightly*. Teleprompter's service differed from *Fortnightly's* in two other respects. Teleprompter included original

¹²²*Id.* at 397.

¹²³*Id.* at 400.

¹²⁴*Id.* at 404 (Fortas, J., dissenting).

¹²⁵*Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 355 F. Supp. 618 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 476 F.2d 338 (2d Cir. 1973), *rev'd*, 415 U.S. 394 (1974).

programming in its package. It generated these shows; they were not part of the programming retransmitted from other sources. Additionally, Teleprompter sold advertising time.

The district court followed the precedent of *Fortnightly v. United Artists*. It held the services of Teleprompter were not performances.¹²⁶ The Second Circuit affirmed in part and reversed in part. The appellate court found that the retransmission of the signals beyond the range of normal antennae changed the role of the cable service from listener to broadcaster. It held that in three locations where the system operated, Teleprompter had carried such "distant" signals that it had become a broadcaster. That made the retransmission of the original signals a performance of the copyrighted works and, therefore, a copyright infringement.¹²⁷

The court of appeals had held the added features of program origination and sale of advertising were an aspect of competition. They were of no consequence in resolving the question of whether or not the copyrighted works of Columbia Broadcasting were performed by Teleprompter. The Supreme Court concurred with that analysis.

The Justices disagreed with the Second Circuit's analysis regarding the "distant" signals. The Court spelled out in very clear language their belief that distance from the origination point makes no difference. Receivers are receivers and not broadcasters:

When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so.¹²⁸

In both *Teleprompter* and *Fortnightly*, the Court emphasized that the signals had been turned loose in the public airwaves,¹²⁹ almost as if transmission abandons the copyright interest. "The electronic signals [cable television] received have already been 'released to the public' even though they may not be normally available to the specific segment of the public served by the CATV system."¹³⁰

¹²⁶355 F. Supp. 618 (S.D.N.Y. 1972).

¹²⁷476 F.2d 338 (2d Cir. 1973).

¹²⁸415 U.S. 394, 408 (1974).

¹²⁹See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400 (1968): "CATV systems receive programs that have been released to the public."

¹³⁰*Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.* 415 U.S. 394, 410 (1974).

Justice Blackmun dissented, indicating his support for Justice Fortas's opinion in *Fortnightly*. Justice Douglas also dissented, joined by the Chief Justice. They viewed the importation of the broadcast signals into new market areas as an act of broadcasting, not receiving.

C. BUCK REVISITED

The Court made sure there was little or no life left in *Buck v. Jewell-LaSalle* in *Twentieth Century Music Corp. v. Aiken*.¹³¹ George Aiken's carry-out chicken emporium in Pittsburgh had four speakers in the ceiling, wired to a central radio set. The radio was turned on at opening and played whatever radio station it was tuned to broadcast. Twentieth Century Music Corporation, a member of the American Society of Composers and Producers, owned the copyrights in certain songs broadcast in Pittsburgh and played over Aiken's speakers. They brought suit in the Western District of Pennsylvania.

The district court found the reception and amplification of the broadcasts constituted an infringing performance.¹³² The Third Circuit reversed, relying on the decisions in *Fortnightly* and *Teleprompter*.¹³³ The Supreme Court affirmed the judgment of the Third Circuit.

The Court continued to apply its analysis that those who broadcast perform, and those who receive do not. *Buck v. Jewell-LaSalle* was distinguishable because the original broadcasts in that case had been unlicensed. Once again, the earlier case was not specifically overruled. The Court merely limited it out of existence.

The decision in *Twentieth Century Music v. Aiken* also presented some new considerations that the Court used to reach its conclusions. The Court was concerned that, if it held Aiken's actions to be an infringing performance, it would create a copyright interest that could never be enforced:

The practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises . . . to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.¹³⁴

¹³¹356 F. Supp. 271 (W.D. Pa. 1973), *rev'd*, 500 F.2d 127, (3d Cir. 1974), *aff'd*, 422 U.S. 151 (1975).

¹³²356 F. Supp. 271 (W.D. Pa. 1973).

¹³³500 F.2d 127 (3d Cir. 1974).

¹³⁴422 U.S. 151, 162 (1975).

The Justices also expressed concern that holding Aiken's reception a performance would authorize "the sale of an untold number of licenses for what is basically a single rendition of a copyrighted work."¹³⁶

D. PHOTOCOPYING

Broadcasting electronics was not the only technology making significant strides at the time. The growth of the photocopy industry and the increasing availability of sound and video tape recording brought a challenge to an old fair-use concept. Tape recordings and photocopies are exact duplicates of the originals. It was long held, however, that "extensive verbatim copying or paraphrasing of material set down by another cannot satisfy . . . [the fair use] standard."¹³⁶ Photocopy technology challenged this principle in *Williams and Wilkins Co. v. United States*.¹³⁷

The case concerns the photocopying activities of the National Institute of Health and the National Library of Medicine. Both entities subscribed to copyrighted medical journals published by the plaintiff, Williams and Wilkins Co. Both agencies provided researchers with photocopies of articles in those journals. Within certain self-imposed limits, such photocopying was done routinely by the two organizations. Examples of the limits include a limit on the number of pages, a limit of one copy per request, and a limit of one article per journal. These limits were often waived as long as much less than an entire journal was copied. The copies of plaintiff's articles, which were the subject of the infringement action, were given to researchers at the Institute, and in one case, to an Army medical officer stationed in Japan. In all instances the copies were used in connection with the recipient's work.

The Court of Claims held the copying of an entire work could be fair use. It rejected the precedents that had held extensive copying precluded fair use:

[T]his is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice. The handwritten or typed copy of an article for personal use, is

¹³⁵*Id.* at 163.

¹³⁶*Rosemont Enter. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); see also *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983) ("[W]holesale copying of copyrighted material precludes application of the fair use doctrine."); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950); *Leon v. Pacific Tel. and Tel. Co.*, 91 F.2d 484 (9th Cir. 1937).

¹³⁷487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

one illustration, let alone the thousands of copies of poems, songs, or such items which have long been made by individuals and sometimes given to lovers and others.¹³⁵

The court also found that photocopying was practiced by libraries for many years without objection. The court interpreted this lack of objection to mean the practice had been accepted as fair use. Objection came now because copying had become easier and more widespread. The court refused to hold that this fair practice had become unfair because of an increase in the volume of copying.

Other facts in the case to which the court gave particular emphasis included the nonprofit nature of the copying. The nonprofit and personal nature of the use for scientific research also weighed in favor of fair use. The court viewed favorably the self-imposed restraint by the agencies.

Finally, the court found that the publishers had failed to show any evidence of real harm caused by the practices of the agencies. On the other hand, there might be a real harm to the advance of knowledge in science and medicine if the practices were halted. "There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped."¹³⁹

Throughout its decision, the court called for a legislative solution to the problems of photocopying. Ultimately this happened,¹⁴⁰ but not until several years later. In the meantime, *Williams and Wilkins Co. v. United States* was affirmed by an equally-divided Supreme Court and represented the state of the law. With the demise of *Buck v. Jewell-LaSalle*, technology was "on a roll" at the Supreme Court. This did not mean that there were no setbacks elsewhere.

E. INFRINGEMENTS BY NEW TECHNOLOGY

1. Audio Tape Duplication

In *Elektra Records Co. v. Gem Electronic Distributors, Inc.*¹⁴¹ an injunction issued against a coin operated machine that duplicated audio tape cassettes. The defendants sold blank tapes to customers and provided the "Make-A-Tape" machine on the premises. Customers selected prerecorded tapes from a stock maintained by de-

¹³⁵487 F.2d at 1353.

¹³⁶*Id.* at 1356.

¹⁴⁰17 U.S.C. § 108 (1982).

¹⁴¹360 F. Supp. 821 (E.D.N.Y. 1973).

fendants for purposes of duplication. For fifty cents, the customers were able to make exact duplicates of the prerecorded tapes. Prerecorded tapes would have cost six dollars.

The District Court for the Eastern District of New York rejected the defendant's argument that their operation was no different from a photocopier in a public library. Defendant's commercial purpose distinguished it from a library. In the court's opinion, the copies were different from photocopies. It noted that a photocopier would rarely be used to duplicate an entire book. The tape duplicator reproduced the entire recording. Also, the court held a photocopy is a different and less desirable form of the work. The duplicated tape, when compared with the original, was "essentially identical and equally desirable."¹⁴²

Defendants also defended on a theory that this practice was nothing more than home copying done on store premises. This defense was premised on an interim revision of the copyright laws. The legislative history had made it clear that home recording of recorded performances for private noncommercial use was not prohibited.¹⁴³ Since the defendants operated for profit, this situation did not apply.

2. Video Tape Duplication

Technology also lost in *Encyclopaedia Britannica Educational Corp. v. Crooks*.¹⁴⁴ In that case, a nonprofit corporation, the Board of Cooperative Educational Services (BOCES) of Erie County, New York, videotaped copyrighted educational films from broadcasts for later use in schools. The plaintiffs owned the copyrights in the films and sought a preliminary injunction. BOCES defended on a theory of fair use, relying on the holding in *Williams and Wilkins*.

Chief Judge Curtin's opinion found similarities between the photocopying case and the case at hand. He acknowledged the similarities of purpose in the two cases. The copying in both cases was noncommercial and fostered "two traditionally favored areas of endeavor: science and education."¹⁴⁵

¹⁴²*Id.* at 824.

¹⁴³ Specifically, it is not the intention of the committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

H.R. Rep. 487, 92d Cong., 2d Sess. 7 (1971).

¹⁴⁴447 F. Supp. 243 (W.D.N.Y. 1978).

¹⁴⁵*Id.* at 251.

On the other hand, there were sufficient differences to warrant a different result. The court drew a distinction between the videotaping of an entire work and the photocopying of one article from a journal. The court found that by reproducing the entire work, the copy could become "interchangeable with the original."¹⁴⁶ This would have a greater adverse impact on the copyright owner's potential market.

The court also assumed that the practice would have an effect on the plaintiff's market for their copyrighted works. Proof of such an impact was lacking in *Williams and Wilkins*, where the decision followed a full trial. *Encyclopaedia Britannica* was a motion for preliminary injunction. In a copyright matter, a presumption of irreparable injury inures to the plaintiffs when a preliminary injunction is sought.¹⁴⁷ Proliferation of the work will reduce or destroy the market for the original work making this a valid presumption.

The court noted one last distinguishing factor. In the photocopying case there was a fear of irreparable harm to the medical profession if the practices were prohibited. In this case, there were no such fears of harm to education. The court found that BOCES could enter into a licensing agreement with the plaintiffs and avoid any detrimental effects of the ruling.¹⁴⁸

As many judges had done before, Chief Judge Curtin lamented the fact that the resolution of conflicts between technology and copyright had been abandoned to the courts. "The problem of accommodating the competing interests of both educators and film producers raises major policy questions which the legislature is better equipped to resolve."¹⁴⁹

XI. SONY CORP. V. UNIVERSAL CITY STUDIOS

A. THE FACTS

After the decision in *Encyclopaedia Britannica v. Crooks*, Congress did not act. Videotape technology grew exponentially. Home videotape recorders became affordable for many Americans. Movie and

¹⁴⁶*Id.*

¹⁴⁷*E.g.*, *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986) (Injunction granted to prevent LEXIS' use of West's case reporter page numbers); *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978).

¹⁴⁸A similar arrangement was proposed by the journal publishers in *Williams and Wilkins*. The Court of Claims rejected the proposal because it refused to judicially legislate such a licensing arrangement.

¹⁴⁹*Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 248 (W.D.N.Y. 1978).

television studios were fearful that home video would destroy their industries. The inevitable trial came when Universal City Studios sought to enjoin sales of Sony Corporation's Betamax videotape machine.¹⁵⁰ The Betamax was a home video recorder that could play prerecorded video cassettes on television sets. It could also record television signals from off the air for playback at a later time. This latter use was known as time-shifting. The machine had a pause control that allowed a viewer to edit commercials out of the tape if he watched during the recording. It also had a fast-forward control that allowed the viewer to speed through portions of the tape he didn't want to see.

Named as a defendant with Sony was the advertising firm that devised the campaign for the machine. The ads invited owners to time shift programs and to build libraries of their favorite shows and films.

The machine was sold in various retail stores. The stores demonstrated the machines by recording brief segments of programs from off the air. Four of these retailers were also named as defendants.

The last defendant was Mr. William Griffiths, a client of the plaintiff's law firm, who used his Betamax to record plaintiffs' shows and movies as they were broadcast on television. He planned to build a library of tapes but found it too expensive. He used the machine primarily for time-shifting.

The plaintiffs were Universal City Studios and Walt Disney Productions. The theory of their case was contributory infringement. Sony, the advertising firm, and the retailers had all encouraged and brought about copyright infringement by Betamax owners like Mr. Griffiths. Plaintiffs sought money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of the Betamax.¹⁵¹

B. THE DISTRICT COURT DECISION

The district court limited its opinion to the use of the video recorder for private time-shifting.¹⁵² The court did not consider other uses, such as tape duplication or recording outside the home.

The court recognized that the plaintiffs' claims hinged on whether or not there was an infringement. In resolving that question, the

¹⁵⁰Universal City Studios v. Sony Corp., 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

¹⁵¹Universal City Studios did not seek relief from Griffiths.

¹⁵²Universal City Studios v. Sony Corp., 480 F. Supp. 429 (C.D. Cal. 1979).

court examined the legislative history of sound recording.¹⁵³ It concluded that Congress intended the privacy interest of the home to take precedence over copyright protections.

The analysis did not stop there, however. The court analyzed home recording in the fair-use context. Its analysis brought together the many principles espoused in the preceding cases dealing with technology.

Like the court in *Williams and Wilkins*, the court in *Sony* found little or no proof of actual harm from the practice involved. In large part this was because the copyright holders in the video works received payments from the television broadcasters and not from the home consumers. Plaintiffs insisted that the potential harm was great nonetheless. They saw a threat to the commercial value of the reruns. They also perceived a threat to original run value because of the difficulty of assessing ratings when video recorders were used. Finally, they argued that the recorders reduced the competitive value of the films because the recorders allowed viewers to watch one show and record another that was run simultaneously.

The court dismissed these concerns, noting that the effect of the recorder was to require a change in the marketing strategy of the producers if they were to maintain the same level of profit. To the court, a change of marketing strategy was different from actual harm. "Copyright law, however, does not protect authors from change or new considerations in the marketing of their products."¹⁵⁴

The court next examined the nature of the copyrighted works. It recognized that the works were not profound scientific or educational productions. Nonetheless, the court refused to draw a line between works that transmitted ideas and those that were only for entertainment.¹⁵⁵

The court found the fact that the works were freely broadcast over the airwaves without charge to the consumer was an important aspect of their nature. Thus, the decision picked up the theme set out in *Fortnightly* and *Teleprompter*. The works were paid for by advertisers and not by the consuming public. This aspect of the nature of the work made harm from time shifting less likely.

¹⁵³See *supra* note 143.

¹⁵⁴460 F. Supp. at 452.

¹⁵⁵In doing so, the court followed the lead of the Supreme Court in *Stanley v. Georgia*, 394 U.S. 557 (1969) (privacy interest in pornography at home). The Second Circuit also refused to draw a line for fair use purposes between productive works and popular entertainment. *Rosemont Enter. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

In assessing the purpose of the use, the court noted that the copies are used for exactly the same purposes as the original. This was not held determinative. Instead, the court focused on the noncommercial, home aspect of the use. Taking a cue from *Twentieth Century Music*, the court noted that this private use made enforcement virtually impossible, and weighed in favor of a fair use. "Because the use occurs within private homes, enforcement of a prohibition would be highly intrusive and practically impossible. Such intrusion is particularly unwarranted when plaintiffs themselves choose to beam their programs into these homes."¹⁵⁶

The fact that the entire work was taken did not influence the court's decision. The court read all of the factors of fair use together. It found that the taking of the entire work did not reduce the market for the original work.

Assessing all the factors, the court found home video recording for time-shifting a fair use. It also held the recording by the stores for purposes of demonstration was fair use.

Demonstration copying and playback do not compete in any way with plaintiffs' products. The stores do not record and playback entire shows. The testimony does not show any librarying by the retail stores or any intent to use or profit from the copyrighted works. The only intent is to demonstrate the machine.¹⁵⁷

Finally, the court refused to hold the defendants liable as contributory infringers because the video machine could be used in a non-infringing manner. This sufficiently distinguished the case from *Elektra*, where the entire purpose of the machine was infringement.

Selling a staple article of commerce—*e.g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.¹⁵⁸

C. THE COURT OF APPEALS' DECISION

The Court of Appeals for the Ninth Circuit reversed the decision and held the defendants liable for contributory infringement.¹⁵⁹ The

¹⁵⁶480 F. Supp. at 454.

¹⁵⁷*Id.* at 457.

¹⁵⁸*Id.* at 461.

¹⁵⁹*Universal City Studios v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

appellate court accepted the lower court's findings of fact, but it rejected virtually every conclusion of law.

The Ninth Circuit began by rejecting the lower court's assessment that the legislative history of the sound recording amendment affected home video recording. The appellate court noted that the copyright revision of 1976 offered audiovisual works a treatment different from sound recordings. It held an analogy between sound and video recordings was not possible.

The court then began its own fair-use analysis. Unlike the district court, the Ninth Circuit drew a line between entertainment and other uses for purposes of fair-use analysis. The court found that fair use traditionally involved a "productive use"¹⁶⁰ of the copyrighted material. In this back-to-basics approach, the court found no advancement of science and art that outweighed the copyright interest. "In this case, there is no corresponding countervailing societal benefit to 'weigh' against the copyright interests of the author."¹⁶¹

The court refused to follow the holding in *Williams and Wilkins*, finding it "created doctrinal confusion."¹⁶² A copying that served the same intrinsic purpose as the original was beyond fair use. Nevertheless, the court analyzed the four fair-use factors set out in the statute.

As the use of the copyrighted material was not "productive," the court found that it weighed against a finding of fair use. It rejected the argument that the noncommercial private nature of the use weighed in favor of fair use. "The suggestion that First Amendment concerns support the purpose of Betamax users to increase the access to copyrighted materials is wholly without merit."¹⁶³

In analyzing the nature of the copyrighted work, the court found the scope of fair use narrower for creative works. Because the television shows were entertainment, the narrower scope applied. The court ignored the lessons of the cable television cases and found no significance in the fact that the works had been publicly broadcast.

In the amount and substantiality analysis, the Ninth Circuit also returned to basics. The court held that excessive copying could not be fair use. It found the district court's rationale that this rule would apply only when the copy produced actual harm "completely wrong."¹⁶⁴

¹⁶⁰*Id.* at 970 (quoting Note, *Universal City Studios, Inc. v. Sony Corp.*: "Fair Use" Looks Different on Videotape, 66 Va. L. Rev. 1005, 1012-1014 (1980)).

¹⁶¹*Id.* at 971.

¹⁶²*Id.*

¹⁶³*Id.* at 972.

¹⁶⁴*Id.* at 973; see *supra* note 136 for cases discussing the traditional rule that excessive copying precludes fair use.

With regard to the effect of the infringement on the market value of the original work, the appellate court found such harm evident. The district court had noted that changes in marketing would result from the use of the machine. Because the copyright holders would be changing to compete with the appropriated versions of their own works, the impact was evident.

Finally, the court held that contributory infringement did exist on the facts of the case. The court held that video recorders were capable only of infringing uses. "Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material."¹⁶⁵

The court of appeals returned the case to the district court to fashion an appropriate remedy. The Supreme Court granted certiorari.¹⁶⁶

D. THE SUPREME COURT DECISION

The Supreme Court agreed with the district court and struck down the Ninth Circuit's ruling in a 5-4 decision.¹⁶⁷ Like the district court, the Supreme Court held that contributory infringement did not exist if the copying equipment was capable of noninfringing use. The Court found the Betamax was capable of such uses. It so held because it found some copyright holders did not object to the use of Betamax.¹⁶⁸ It also found that time shifting with a Betamax was a fair use.

In its fair-use analysis, the Court emphasized the nonprofit private nature of the use. "If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair."¹⁶⁹ Because the use of the Betamax for time shifting was nonprofit, the Court applied the opposite presumption. The nonprofit use was presumed to be fair use.

The Court treated the questions of the nature of the copyrighted work and the amount and substantiality of the taking in one fell swoop:

Moreover, when one considers the nature of a televised audiovisual work . . . and that time shifting merely enables a

¹⁶⁵659 F.2d at 975.

¹⁶⁶Sony Corp. v. Universal City Studios, 457 U.S. 1226 (1982).

¹⁶⁷Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

¹⁶⁸See *id.* at 445 for the discussion of Fred Rogers' testimony. Rogers is the owner of the copyright in the *Mr. Rogers' Neighborhood* television show. He had no objections to time shifting.

¹⁶⁹464 U.S. at 449.

viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.¹⁷⁰

The Court also agreed with the district court's finding that the copyright holders had failed to demonstrate harm from time-shifting. This harm was especially important because of the nonprofit use. "A challenge to a noncommercial use . . . requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."¹⁷¹

Finally, the Court found a benefit to society was derived from the increased "public access to freely broadcast television programs"¹⁷² provided by time shifting.

Because the Betamax could be used for noninfringing purposes, the manufacturers, advertisers, and sellers of the product were not liable.

E. IMPACT OF THE DECISION IN SONY

1. Is Amount of Copying Still a Valid Factor?

Sony seems to put to rest the idea that extensive copying can't be fair use. As noted above, this is a major change in traditional fair use thinking. In *Sony* a perfect duplicate is considered a fair use.

This raises questions whether the amount of taking is still a genuine consideration in fair-use analysis. The statute lists it as one of the guides for fair-use analysis. If an entire work can be perfectly duplicated and still be a fair use how can the amount of taking still be a valid consideration?

In its next term, the Court in *Harper and Row* held 300 words from a 200,000 word book was not a fair use. Of course, there are obvious differences in the cases from an equity standpoint. The different outcomes are certainly due, in part, to the unwritten equity factor in fair-use analysis. Also, the economic harm factor weighed strongly against fair use in *Harper and Row*. Nevertheless, the bottom line in the two cases is all is fair, small isn't. *Harper and Row* leaves the question open and may compound it; can the amount of the work taken be a valid consideration after the *Sony* decision?

¹⁷⁰*Id.* at 449-450.

¹⁷¹*Id.* at 451.

¹⁷²*Id.* at 454.

The Ninth Circuit faced this question in *Hustler Magazine, Inc. v. Moral Majority Inc.*¹⁷³ Jerry Falwell claimed that an advertisement parody printed in *Hustler* magazine had defamed him. Falwell copied the parody and used it to raise money for a defamation suit against the magazine. The magazine sued Falwell for infringement. Falwell claimed fair use.

The court of appeals recognized that *Sony* had changed the rule on amount of copying. "*Sony Corp.* teaches us that the copying of an entire work does not preclude fair use *per se*."¹⁷⁴ The court nevertheless held that the extent of Falwell's copying was still relevant to the fair-use analysis. The court reasoned that complete copying is not necessary if the user pursues a different purpose. In effect, the court found that, unless the purpose of the use is to be an exact duplicate and serve as a substitute for the original, the old rule applies; extensive copying weighs against fair use. This is nothing more than a restatement of the status of the law before *Sony*. The Ninth Circuit appears to have found its way to limit the impact *Sony* has on the amount of the taking. It limits the decision to its facts.

2. Can Commercial Use Still Be Fair Use?

The increased emphasis on commercial versus noncommercial copying is also a change wrought by *Sony*. In *Pacific and Southern Co. v. Duncan*,¹⁷⁵ the commercial nature of a videotape copy was a determining factor in infringement. Duncan operated a business called TV News Clips. He recorded the local news from station WXIA and sold videotapes of the news to interested people. WXIA also sold copies of its news program. It only kept the tapes of the shows for 7 days. News Clips kept them for 30 days. WXIA sued for copyright infringement. The Eleventh Circuit struck down Duncan's defense of fair use in large part because of the commercial nature of the copying:

The purpose and character of TV News Clips' use of WXIA's work heavily influences our decision in this case. TV News Clips copies and distributes the broadcast for unabashedly commercial reasons despite the fact that its customers buy the tapes for personal use.¹⁷⁶

The case is interesting because the News Clips copy was used by WXIA to register the copyright. The WXIA version had passed into

¹⁷³796 F.2d 1146 (9th Cir. 1986).

¹⁷⁴*Id.* at 1155. The court upheld Falwell's fair-use claim after balancing all four of the factors listed in 17 U.S.C. § 107 (1982).

¹⁷⁵744 F.2d 1490 (11th Cir. 1984).

¹⁷⁶*Id.* at 1496.

oblivion. As the show was more than seven days old, WXIA would not have had a copy of the tape if they hadn't obtained the News Clips copy.

News Clips' copying could be seen to serve a societal interest by preserving local history on video for a longer time than the copyright holder. Although argued by the defense, the court never analyzed that aspect of the case. It was blinded by the commercial nature of the copying.

Courts must be careful in applying the presumption that commercial use is unfair. Commercial uses may still serve to advance the interests of society to a greater extent than an overprotective copyright monopoly. Likewise, nonprofit use must not become a per se exception to copyright. The balance of interests that created fair use is threatened by too much reliance either way. There is danger to the interests of art and science in either direction.

The Supreme Court's holding that noncommercial use carries with it a presumption of fair use does not change the fact that other factors will weigh in the analysis. Remember, too, that the presumption is rebuttable. A neat rule that held any nonprofit, educational, governmental, or military use a fair use might be desirable. No such rule exists, however.

3. *Is There A Private Use Exception?*

A danger exists that *Sony* could be overbroadly interpreted. It could be read as a private, home-use exception to copyright. In *Aiken*, the Court implied that copyright interests that could not be generally enforced would not receive judicial protection. Reading *Aiken* together with the first amendment privacy interests in receiving information and the decision in *Sony* could lead to a conclusion that such a "private use" exception exists.

Consider, too, the traditional uses of copyrighted material. If I have a book and lend it to my friend to read, I have not infringed the copyright under traditional uses afforded copyrighted material. Is there any difference if I time shift a television program, watch it, then lend it to my friend who didn't see it? Wasn't that show broadcast over the airwaves and available for him to see just as much as for me to see?¹⁷⁷

¹⁷⁷ See Rosenfield, *Customary Use as "Fair Use" in Copyright Law*, 25 Buffalo L. Rev. 119 (1975). Rosenfield makes the argument that there is a division between commercial and noncommercial uses of copyrighted material, the noncommercial including education, research, and private study. These noncommercial uses he describes as "cus-

Such a "private fair use" result was not the intent of the Court. It must be remembered that the decision was limited to time shifting, and not other private forms of videotape copying. If private use is fair use, such a limitation would have been unnecessary.

XII. CONCLUSION

A. TECHNOLOGICAL FAIR USE

Sony is a continuation of the winning streak for technology at the Supreme Court. *Sony* doesn't really change fair use, but simply sets out a "technological fair use" exception to copyright. This exception began as an aspect of public performance in the cable television cases and emerges as a fair use exception in *Sony*.

The court decisions involving new technology have repeatedly called for Congress to draw the boundaries. Chief Judge Curtin's plea for congressional action to resolve the conflict between technology and copyright is an example. Such language can be found in all the cases where technology and copyright come head to head. "The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme."¹⁷⁸

The Supreme Court refuses to be the "heavy." It will not tie up technological advance to protect copyright interests. It made this clear in the *Sony* decision:

The Court of Appeals' holding that respondents are entitled to enjoin the distribution of VCRs, to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection.¹⁷⁹

When Congress fails to act, the new technology will win in the courts. This is why it's technology five, copyright nothing since *Fortnightly* put limits on the analysis in *Buck*. This is the real lesson the Betamax case teaches. Any attempt to read the broad fair-use language of *Sony* as precedent must recognize the technological context of the decision.

tomary uses," which should be allowed without the application of the four fair-use criteria. He contends that such customary fair-use interests should not be reduced simply because new technology affords better means of copying. He points out that protection of copyright has not been abolished or reduced as printing methods have improved. Why reduce customary rights of consumers?

¹⁷⁸*Sony Corp. v. Universal City Studios*, 464 U.S. 417, 431 (1984).

¹⁷⁹*Id.* at 421.

The return to a more customary amount and substantiality approach in *Harper and Row* is further evidence that the *Betamax* case is different because of the technology involved. *Sony* had to allow substantial copying because the technology involved allowed substantial copying.

B. PREREQUISITE TO TECHNOLOGICAL FAIR USE

There appears to be one prerequisite to a holding of technological fair use. The copyright owner must derive some profit from his copyright. In the commercial television industry this happens when the copyright owner sells to the network and the network sells commercial time to the sponsors. This was noted in the cable television cases.¹⁸⁰ Likewise, in *Williams and Wilkins*, library photocopying necessarily required a sale to the library. This requirement explains why *Buck v. Jewell-LaSalle* has never been overruled completely. It is the one Supreme Court case where technology lost to copyright and it is the one case where the copyright owner did not receive a profit. The original broadcast was not licensed.

In truth, this "technological fair use" is not necessarily a bad idea. It serves the same end as traditional fair use. It limits the copyright holders' interests, if not for the sake of art, certainly for the sake of science. To the extent it advances science, it advances society and so ultimately achieves the same end for which copyright was devised.

C. MILITARY CONSIDERATIONS

At the beginning of this article, a hypothetical general wanted a computer program that would do the same job a previous program had done. Would that be an infringement? The idea/expression dichotomy offers an analysis for such questions. What the program does is the idea. A program designed to do the same thing will not infringe if it doesn't take the expression of the original. Copying parts of the original program or copying the graphics will copy the expression and run the risk of infringing.¹⁸¹

Many works prepared at military schools and published in military journals benefit from the fact/expression dichotomy. Authors will write about the Vietnam conflict, for example. The historical and biographical nature of such works will make them similar to previous works.

¹⁸⁰ See, e.g., *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394, 411 (1974): "[H]olders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material."

¹⁸¹ See *Whelan Assoc. v. Jaslow Dental Lab.*, 797 F.2d 1222 (3d Cir. 1986) (infringement of computer program for managing dental office).

That similarity is not infringement because of the fact/expression dichotomy. If those military authors copy from the previous works, fair use requires only that they do so within reasonable limits necessary for scholarship.

When the officers' club plays the local "easy listening" station over the speakers, George Aiken's chicken comes to mind. When a pre-recorded or time shifted tape is played over the same system, however, a new analysis is required. Has the club crossed the line between listener/private consumer and broadcaster/infringer? The answer will depend to large extent on how "private" the club is. The more open the club, the greater the number of people available to hear the performance. The more public the performance the greater the likelihood of infringement. The privacy and enforceability aspects of the Supreme Court's analysis in copyright decisions offers guidance in the analysis.

There is also the barracks. As the soldier's home, it implicates many of the same privacy interests as the individual apartment or house. The soldier lives there with his military "family" and friends. Signals broadcast by radio and television are as free to the soldier in his barracks as they are to any other citizen. The rationales allowing private time-shifting should apply with equal force to the dayroom. A dish antenna for the barracks only serves to enhance the ability of the soldiers to receive the freely broadcast signals in their military home. It would not make the unit a broadcaster. The cable television cases make this quite clear.

Judge advocates must be alert to the temptation to oversimplify the complex nature of the fair-use doctrine. We look for simple standards such as those holding excessive copying cannot be fair use. The *Sony* decision makes nonprofit use presumptively a fair use. If we advise that all educational or military uses are fair uses because they are nonprofit we tread dangerous ground. The *Encyclopaedia Britannica* case provides a good example of an educational use that violated copyright interests and was not held a fair use. There are others.¹⁸²

A better understanding of the law in this area will allow judge advocates to better recognize the important issues and the fine distinctions involved in copyright problems. That can only mean better advice to the command.

¹⁸²*E.g.*, *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983). The plaintiff in *Marcus* wrote and copyrighted a booklet about cake decorating. She gave the booklets to students in her adult education course in cake decorating. The defendant took the course and bought a copy of the booklet. She copied nearly half of the booklet, and used it to teach a home economics class in a local school. The defendant gave copies of the booklet to her students at no charge. The Ninth Circuit rejected the defendant's fair-use defense.

THE VALUE OF A SECRET: COMPENSATION FOR IMPOSITION OF SECRECY ORDERS UNDER THE INVENTION SECRECY ACT

By Captain Gary L. Hausken*

I. INTRODUCTION

The defense policy of the United States presumes that the nation's advantage in technology can be used to offset the numerical superiority of potential adversaries. To be effective, the policy must meet two objectives: it must encourage development of new technology relating to national security, and maintain secrecy over that new technology. In an attempt to meet those objectives, Congress created the Invention Secrecy Act¹ in 1952.

The main feature of the Act is the secrecy order.² This order, imposed by the Patent and Trademark Office, requires the inventor to refrain from publishing or disclosing the invention.³ It may also limit the right to file for patent rights in foreign countries.⁴

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¹35 U.S.C. §§ 181-188 (1982).

²35 U.S.C. § 181 (1982).

³35 U.S.C. §§ 182, 185 (1982).

⁴35 U.S.C. §§ 181, 182, 184 (1982). Recently, the Patent and Trademark Office implemented two variations on the statutory secrecy order. 51 Fed. Reg. 32,938 (1986). Both variations include permits that previously were issued separately, and both variations only apply to secrecy orders requested by agencies of the Department of Defense.

The first variation contains a permit to file patent applications in certain foreign countries. The order applies to inventions whose export is controlled under 10 U.S.C. § 140(c) (1982); the Commodity Control List, 15 C.F.R. §§ 399.1 (1986) (hereinafter CCL); and the International Traffic In Arms Regulations, 22 C.F.R. §§ 120.1-130.17 (1986) (hereinafter ITAR).

The second variation applies to government contractors whose patent applications contain classifiable information under Executive Order 12,356, 3 C.F.R. 166 (1983) (National Security Information). The order conforms the handling of the classified data in the patent application to the general contractual requirements. Dept of Defense, Manual No. 5220 22-M, Industrial Security Manual (ISM).

The Invention Secrecy Act is phrased in terms of controlling access to the patent application. In reality, it accomplishes much more. The imposition of the secrecy order effectively controls access to not only the application, but to the ideas and technology contained within it.⁵ When combined with other forms of information control,⁶ the secrecy order provides the government with a monopoly to exploit the invention contained within the application. As efforts to modernize the armed forces have increased in recent years, so has the use of the secrecy order.⁷

From 1952 until 1979, the number of secrecy orders remained relatively constant.⁸ Since 1979,⁹ however, the number of active secrecy orders has increased.¹⁰ Statistically, a greater percentage of the orders imposed every year apply to inventions from inventors who are not government sponsored, either as employees or contractors.¹¹ This trend is likely to continue. With this increased use of the secrecy order, the

⁵Interview with Mr. John Raubitchek, Patents, Copyrights, and Trademarks Division, Office of the Judge Advocate General, Department of the Army (Feb. 26, 1987) [hereinafter Raubitchek Interview].

⁶The regulations include: Executive Order No. 12,356, 3 C.F.R. 166 (1983) (providing for the classification of information for national security purposes); the Commodity Control List, *supra* note 2, which controls the export of militarily critical technology; and ITAR, *supra* note 2, controlling export of technical data and manufactured goods that have a military use.

⁷Raubitchek Interview, *supra* note 5.

⁸From the enactment of the Invention Secrecy Act in 1952 until September 1978, a declared national emergency existed. *The Government's Classification of Private Ideas: Hearings Before a Subcomm. of the House of Representatives Comm. on Government Operations*, 96th Cong., 2d Sess. 5 (1980) [hereinafter *Private Ideas Hearings*] (Statement of Rene D. Tegtmeyer, Asst. Commissioner of Patents). As a result, an annual review of all secrecy orders was not required. 35 U.S.C. § 181 (1982). During this period the number of orders in effect at any given time ranged between 4,100 and 5,100. H.R. Rep. No. 1540, 96th Cong., 2d Sess. 1-2 (1980).

⁹Beginning March 14, 1979, annual review was required as a result of the termination of the national emergency. The National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

¹⁰Statistics for years 1979 and after:

<i>Fiscal Year</i>	<i>No. patent applications</i>	<i>No. of new orders issued</i>	<i>Total orders in effect</i>
1979	92,266	293	3513
1980	115,993	279	3439
1981	95,089	253	3302
1982	144,038	350	3654
1983	108,219	424	3913
1984	115,455	535	4686
1985	126,443	329	4516
1986	125,118	446	4685

Interview with Mr. Kenneth L. Cage, Director, Special Laws Administration Group (Group 220), Patent and Trademark Office, Department of Commerce (Mar. 31, 1987).

¹¹Raubitchek Interview, *supra* note 5. These orders are referred to as "John/Jane Doe orders."

defense agencies expect increases in the number of claims for compensation, and a corresponding rise in judicial activity.¹²

The trend has already started, as the Invention Secrecy Act has received increased attention by commentators,¹³ Congress,¹⁴ and the courts.¹⁵ Early in 1980, the House Committee on Government Operations held hearings¹⁶ into the conduct of invention secrecy and other forms of control of private ideas during peacetime. A major concern of the committee, as expressed in their report,¹⁷ was that inventors¹⁸ receive compensation to the extent that Congress had intended. In the end, the committee's conclusion merely noted that the question, whether the Act is an exercise of the power of eminent domain, must be resolved.¹⁹

About that same time, the Court of Claims decided *Constant v. United States*.²⁰ The holding was limited to denying the government's motion for dismissal or, alternatively, for summary judgment. Of greater importance were the issues raised, but not decided, in the decision. The court discussed, in passing, whether the Act constitutes a taking within the fifth amendment.²¹ In the end, the court concluded that determining the taking issue was not necessary to the holding.

Although the Invention Secrecy Act has been in existence for roughly thirty-five years, defining what constitutes "just compensation" under the statute has proved elusive. At the heart of this determination is whether the Act constitutes a compensable "taking" within the meaning of the fifth amendment.²² Few cases have approached this ques-

¹²*Id.*

¹³Cage, *Foreign Filing License Procedures—The Invention Secrecy Act of 1951*, 66 J. Pat. Off. Soc'y 497 (1984); Gilbert, *Patent Secrecy Orders: The Unconstitutionality of Interference in Civilian Cryptography Under Present Procedures*, 22 Santa Clara L. Rev. 325 (1982).

¹⁴*Private Ideas Hearings*, *supra* note 8; H.R. Rep. No. 1540, 96th Cong., 2d Sess. (1980).

¹⁵*See, e.g.*, *Constant v. United States*, 617 F.2d 239 (Ct. Cl. 1980).

¹⁶*Private Ideas Hearings*, *supra* note 8.

¹⁷H.R. Rep. No. 1540, 96th Cong., 2d Sess. 6-7 (1980).

¹⁸The term "inventor" includes the inventor (who is applying for the patent), any co-inventor, and all other interests in the invention other than those of the United States Government. The Invention Secrecy Act does not differentiate between the inventor and others who have gained rights through him. Both the benefits and penalties of the Act apply equally to the applicant and any other person who has an interest through the applicant, with the exception of the government. Other interests include: successors, assignees, legal representatives, and anyone in privity with the inventor or other person having an interest in the invention.

¹⁹H.R. Rep. No. 1540, 96th Cong., 2d Sess. 8 (1980).

²⁰617 F.2d 239 (Ct. Cl. 1980).

²¹*Id.* at 242.

²²U.S. Const. amend. V.

tion,²³ and none have thoroughly analyzed whether imposition of a secrecy order may result in a taking.

This article will analyze the issues involved in determining what constitutes "just compensation," within the meaning of the Invention Secrecy Act, for use of the invention by the government and for damage caused by imposition of the secrecy order. The article will focus on the historical development of the statute, whether the imposition of a secrecy order constitutes a fifth amendment taking, and issues involved in determining what constitutes a compensable injury under the Invention Secrecy Act.²⁴

II. HISTORY

Efforts to limit the patenting of inventions for reasons of national security first arose during World War I. At the time it was aptly noted that "those inventions which are of most use to the Government during a time of war are also those which would, if known, convey useful information to the enemy."²⁵

A. THE VOLUNTARY TENDER ACT²⁶

Under the Voluntary Tender Act the Commissioner of Patents could order an invention to be kept secret and withhold the granting of a

²³Constant v. United States, 617 F.2d 239 (Ct. Cl. 1980); Farrand Optical Co. v. United States, 325 F.2d 328 (2d Cir. 1963), *modifying* 197 F. Supp. 756 (S.D.N.Y. 1961).

²⁴This article will not discuss related questions as to whether the Act is an unconstitutional limitation on the right to freedom of speech and whether the Act provides adequate due process protection for inventors. U.S. Const. amends. I & V; see Gilbert, *supra* note 13.

²⁵S. Rep. No. 119, 65th Cong., 1st Sess. 1 (1917).

²⁶Voluntary Tender Act, ch. 95, 40 Stat. 394 (1917), *repealed by* Invention Secrecy Act of 1951, ch. 4, 66 Stat. 3 (1952) (codified as amended at 35 U.S.C. §§ 181-188 (1982)). Although not officially titled, the Act became known as the Voluntary Tender Act or the Secrecy Act. See Fulmer v. United States, 83 F. Supp. 137, 144 (Ct. Cl. 1949). The term Voluntary Tender Act is used to clearly differentiate this early act from the later Invention Secrecy Act.

The Voluntary Tender Act was one of 33 acts enacted on October 6, 1917, most of which relate to preparation for the entry of the United States into World War I. The Voluntary Tender Act read as follows:

[Whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established . . . that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives,

patent on such invention until the end of the World War I,²⁷ which was then in progress. The Act further provided that, should the inventor violate the Commissioner's order by publishing the invention or by applying for a patent in a foreign country without the consent of the Commissioner, the application covered by the order would be deemed abandoned.²⁸

If the inventor obeyed the order, he was not automatically compensated; the Act allowed no compensation for damages caused by imposition of the order alone. The statute only contemplated payment for actual use of the invention by the government.²⁹ To recover for the use of the invention, the inventor was required to "tender" his invention to the government.³⁰

In essence, the requirement for tender of the invention to government resulted in the formation of a contract, either express or implied, between the inventor and the government.³¹ As a result, the Court of Claims would apply normal contract principles in determining damages. Resulting court opinions interpreting the Voluntary Tender Act

without the consent or approval of the Commissioner of Patents or under a license of the Secretary of Commerce

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to compensation to begin from the date of the first use of the invention by the government.

²⁷Voluntary Tender Act, ch. 95, §1, 40 Stat. 394 (1917) (repealed 1952).

²⁸*Id.*

²⁹*Id.* §2.

³⁰*Id.* By its terms the statute allowed the inventor to keep the invention secret by not tendering the invention to the government for use during the period when the secrecy order was in effect. An inventor could effectively deny use of the invention to both the United States and foreign powers. To rectify this situation, Franklin D. Roosevelt, then Acting Secretary of the Navy, recommended allowing the Commissioner of Patents to transmit the invention to the head of the appropriate military department, and paying the inventor for any use of the invention by the United States after the transmittal. Congress did not accept his recommendation. S. Rep. No. 119, 65th Cong., 1st Sess. 3 (1917).

³¹*Zeidler v. United States*, 61 Ct. Cl. 537, *cert. denied*, 273 U.S. 724 (1926). The court noted that the Act did not change the state of the law regarding the rights of inventors to sue for compensation based upon express or implied contractual use of their inventions by the government. *Id.* at 553. See generally *United States v. Berdan Fire-Arms Co.*, 156 U.S. 552, 566 (1895) (the Court implied a contract because the United States had not yet waived sovereign immunity for torts, and patent infringement was considered an action in the nature of tort rather than contract); *United States v. Societe Anonyme des Anciens Etablissements Cail*, 224 U.S. 309, 311 (1912) (the Court reiterated the accepted rule that when the United States uses an invention without claim of right and without repudiating the rights of the inventor, an implied contract will be held to exist).

required strict adherence to the terms of the statute.³² Courts were particularly adamant regarding the "tender" requirement, which was held to be a condition precedent to recovery under the statute.³³

Following termination of the war, the Knowland Act³⁴ provided inventors with backdated priority. This eliminated any damage due to inability to file in foreign countries, a potentially large source of damage resulting from secrecy orders.³⁵

B. EFFECTS OF WORLD WAR II

In 1940, as war raged in Europe, Congress began what would become a series of amendments to the Voluntary Tender Act. In the first of these amendments³⁶ Congress essentially republished the entire act.

Unlike 1917, the United States was not at war in 1940.³⁷ Conse-

³²*Ordnance Engineering Corp. v. United States*, 68 Ct. Cl. 301 (1929). The court noted: "The act of October 6, 1917, is special legislation covering unusual conditions and effective only when complied with." *Id.* at 359; see also *Kessenich v. United States*, 135 F. Supp. 528, 531 (Ct. Cl. 1955) (contract for assignment of patent rights to the government, which recited the recovery provisions of the Voluntary Tender Act as partial consideration, was not the same as imposition of a secrecy order and did not constitute tendering the invention); *Martin v. United States*, 84 Ct. Cl. 41, 53 (1936) (no recovery for government's use of the tendered invention where the inventor did not pay required fee and, therefore, his patent was not issued, even though the inventor later received a patent on the invention by reapplying); *Ziedler v. United States*, 61 Ct. Cl. 537, 554-55 (1926) (government inspector's conclusion that the plaintiff's less costly mechanism could be substituted for mechanism specified in the government contract that plaintiff was performing did not constitute a tender and use within the meaning of the Act).

³³*Ziedler v. United States*, 61 Ct. Cl. 537, 553 (1926).

³⁴Ch. 126, 41 Stat. 1313 (1921).

³⁵*Patent Disclosure: Hearings on H.R. 4687 Before Subcommittee No. 3, Committee on the Judiciary of the House of Representatives* 82d Cong., 1st Sess. 25, 26 (1951) [hereinafter *Patent Disclosure Hearings*] (Comments by Dr. M. O. Hayes, Patent Counsel, Dep't of Naval Research, Dep't of Defense, and Mr. Paul A. Rose, representing the American Patent Law Association).

³⁶Act of July 1, 1940, ch. 501, 54 Stat. 710 (1940).

³⁷See generally A. Millett & P. Maslowski, For the Common Defense 395-400 (1984). American involvement in World War II is traditionally dated from the American declaration of war against Japan on December 8, 1941, and the declaration of war by Germany and Italy against the United States on December 11, 1941. The process, however, was not nearly so sudden.

With the German occupation of France, the Low Countries, Denmark, and Norway in early 1940, President Roosevelt requested that Congress pass new legislation allowing the British to buy war material from the United States. In September 1940, the President agreed to give Great Britain fifty destroyers in return for the right to lease bases in the British possessions of North and South America.

American neutrality was effectively abandoned early in 1941 with passage of the Lend Lease Act, ch. 11, 55 Stat. 31 (1941). By early 1941, the United States was in an undeclared war with Germany on the seas, with American ships escorting transports and "protecting" the Danish colonies of Iceland and Greenland.

quently, revisions made the act effective for a period of two years, rather than for the period of the war. During the two-year duration of the statute, the Commissioner of Patents could withhold a patent and order the inventor not to disclose the content of the invention. All references to assisting the enemy and prosecution of the war were deleted.³⁸ The revisions also strengthened the sanctions against inventors by providing that the application could be held abandoned if the inventor disclosed the invention.³⁹

These first revisions also provided a new mechanism for settling claims for use of inventions. The original act required that the inventor sue in the Court of Claims to recover for use of his invention.⁴⁰ The revisions provided authority for an administrative settlement by the head of the appropriate agency.⁴¹ The settlement was discretionary with the agency; no provision was made for the filing of a claim by the inventor during the term of the secrecy order. The inventor was left to the charity of the head of the agency or to suit in the Court of Claims upon termination of the secrecy order.

Slightly more than a year after the first amendments, Congress again revised the Voluntary Tender Act.⁴² The second revision established a licensing system, under which the Commissioner of Patents could authorize the inventor to file his application in foreign countries;⁴³ rewrote the proscription against foreign filing to comply with the licensing system;⁴⁴ added criminal penalties for violation of the prohibitions stated in the Act;⁴⁵ and exempted officers and employees of the United States from the prohibitions and penalties, when acting in their official capacity.⁴⁶

The final war-time modification occurred in 1942. This act⁴⁷ kept the provisions of the revised Voluntary Tender Act in force "during the time the United States is at war."⁴⁸ With the modifications of 1942, the Voluntary Tender Act had most of the basic characteristics,

³⁸ Act of July 1, 1940, ch. 501, 54 Stat. 710 (1940).

³⁹ *Id.* Previously, the Commissioner of Patents could hold the application abandoned only where the invention was published or an application was made in a foreign country. Voluntary Tender Act, ch. 95, § 1, 40 Stat. 394 (repealed 1952).

⁴⁰ See *supra* notes 26-33 and accompanying text.

⁴¹ Act of July 1, 1940, ch. 501, 54 Stat. 710 (1940).

⁴² Act of August 21, 1941, ch. 393, 55 Stat. 857 (1941).

⁴³ *Id.* § 3.

⁴⁴ *Id.* § 4.

⁴⁵ *Id.* § 5.

⁴⁶ *Id.* § 8.

⁴⁷ Act of June 16, 1942, ch. 415, 56 Stat. 370 (1942).

⁴⁸ *Id.*

with the notable exception of the damage remedies, of the Invention Secrecy Act.⁴⁹

During World War II the damage provisions remained much the same. In particular, the requirement that the inventor tender his invention for use by the government continued. The only compensation available to the inventor was through government use of his invention. Recovery continued to be based upon either an express or implied contract for use of the invention.

In 1949, *Fulmer v. United States*⁵⁰ presented the issue of whether a putative inventor, who had never received a patent, could obtain compensation for use of his invention.⁵¹ In concluding that the plaintiff was not entitled to recover, the court held that, absent a contract or specific statute, an inventor was not entitled to compensation because he had no exclusive property right.⁵² The plaintiff also claimed damages under the Voluntary Tender Act. In dismissing the claim, the court noted that obtaining a patent was a condition precedent to recovery under the Act.⁵³

C. THE POST-WAR PERIOD

In the period immediately following the termination of hostilities⁵⁴ and the surrender of Japan,⁵⁵ the military departments sought to establish a permanent system of maintaining the secrecy of inventions needed for the national defense.⁵⁶

The Voluntary Tender Act, as amended after 1942, remained in effect only for duration of the war;⁵⁷ however, approximately 3,000

⁴⁹The major additions to the Invention Secrecy Act that were not in the revised Voluntary Tender Act include: (a) provision for periodic review of secrecy orders in peacetime; (b) provision for sealing certain applications where examination would jeopardize national security; (c) right of appeal to the Secretary of Commerce upon imposition of a secrecy order; (d) allowing the government agency with a property interest to determine whether a secrecy order is required; and (e) provision for damage claims while the secrecy order is in effect. All of these later additions reflect the change from a short-term emergency provision to a permanent system of control.

⁵⁰83 F. Supp. 137 (N.D. Ala. 1949).

⁵¹*Id.* at 149-50.

⁵²*Id.* ("absent a contract there is no obligation . . . to pay compensation for the . . . use of an invention prior to the granting of a patent therefor principally because the inventor has no exclusive property right (except such right as may be conferred by the Air Corps and Secrecy Acts).").

⁵³*Id.* at 144.

⁵⁴Generally dated from the cease-fire on August 15, 1945.

⁵⁵Consumated on September 2, 1945.

⁵⁶*Patent Disclosure Hearings*, *supra* note 35, at 7 (testimony of Dr. Hayes, Office of Naval Research); see also H.R. Rep. No. 1028, 82d Cong., 1st Sess. 6 (1951) ("the necessity of enacting the existing law in permanent form is considered extremely important to the Department of Defense.").

⁵⁷See *supra* text accompanying notes 47 & 48.

inventions were under secrecy orders as late as 1951.⁵⁸ Continuation of the war-time powers was the result of differing interpretation as to what constituted "duration of the war."

Although hostilities⁵⁹ had ceased and surrenders were signed, the government asserted that the war was not over until ended by a formal declaration.⁶⁰ The national emergency, declared in preparation for World War II, was finally terminated on April 28, 1952.⁶¹

During the war a number of patent owners gave the United States royalty-free licenses to use the patents for the term of the war and six months thereafter.⁶² In 1950, Congress enacted legislation⁶³ to allow patent holders who had granted such licenses to apply for cancellation of the license. In at least one instance,⁶⁴ use of the royalty-free license was continuing in 1951.

In 1954, the Court of Claims decided that the phrase "duration of the war" was not meant to extend beyond the time in which the enemies of the United States formally surrendered.⁶⁵ As a result, the licenses for government use effectively terminated in 1946. The court held that government use between 1946 and 1952 constituted a taking of property within the meaning of the fifth amendment.⁶⁶

Although the decision involved a claim that the United States had continued to use patents after the termination of a royalty-free license, the case has been applied in the invention secrecy arena as well.⁶⁷

⁵⁸*Patent Disclosure Hearings*, *supra* note 35, at 31 (Statement of P. J. Federico, representing the U.S. Patent Office.).

⁵⁹The President formally declared the end of hostilities as of noon, Dec. 31, 1946. Proclamation No. 2714, 3 C.F.R. 99 (1943-48), *reprinted* in 61 Stat. 1048 (1946).

⁶⁰*See Patent Disclosure Hearings*, *supra* note 35, at 7 (Statement of Dr. Hayes, Office of Naval Research) ("[I]n view of the possible termination of the war with Germany and a treaty of peace with Japan. . .") and at 35 (Statement of Lt. Col. Willard J. Hodges, Office of the Judge Advocate General, Department of the Army) ("[I]n view of the anticipated enactment of House Joint Resolution 289 . . . which will terminate World War II with Germany, and of the adoption and ratification of a peace treaty with Japan.").

⁶¹Proclamation No. 2974, 3 C.F.R. 158 (1949-53), *reprinted* in 66 Stat. c31 (1952).

⁶²*Patent Extension: Hearings on H.R. 323 and H.R. 4054 Before Subcomm. No. 3 of the Comm. of the Judiciary of the House of Representatives*, 82d Cong., 1st Sess. 72 (June 20 and 22, 1951) (hereinafter *Patent Extension Hearings*) (Comment by Rep. Joseph Bryson, Chairman).

⁶³Act of August 16, 1950, ch. 716, 64 Stat. 448 (1950).

⁶⁴*Patent Extension Hearings*, *supra* note 62, at 60-83 (testimony of J. E. Hooper, Vice President of William Hooper & Sons Co.) (use of patent for treatment of cotton duck, which made the fabric resistant to mildew, fire, and water).

⁶⁵*Breeze Burners, Inc. v. United States*, 121 F. Supp. 530 (Ct. Cl. 1954).

⁶⁶*Id.*

⁶⁷*Farrand Optical Co. v. United States*, 175 F. Supp. 230, 238 (S.D.N.Y. 1959); *see infra* notes 247-63 and accompanying text for a complete discussion of this case.

D. LEGISLATIVE HISTORY

The legislative history of the Invention Secrecy Act is relatively brief. Subcommittee hearings in the House of Representatives required one day, or less.⁶⁸ Only two witnesses,⁶⁹ other than representatives from the interested agencies,⁷⁰ testified.

Two issues consumed the committee's attention. First, the Defense Department representatives sought to reduce the administrative burden of mandatory periodic reviews during peacetime.⁷¹ The second involved the extent of damages that could be recovered and the burden of proof necessary to recover those damages. Neither part of the damages question was clearly answered in the committee's report.⁷²

At the core of the damages discussion was the realization that the new provisions created a novel situation. The Act proposed to compensate inventors for inventions they had never marketed, even though the very existence of damages was speculative. The following comments illustrate the predicament:

[W]hat else is it but speculation? He has not had anything; he has not had any order[s]; he has not had any salesman; he does not know if he could have sold something in those 5 or 10 years. That is something in the speculative realm of damages. I think we have got to do something, but we would certainly be opening it up to a novel case to prove damages there.⁷³

and:

The act says nothing—we are dealing with a very novel situation, where you are denying the man a real right to exploit his own invention.

⁶⁸*Patent Disclosure Hearings*, *supra* note 35. These subcommittee hearings are the only published hearings known.

⁶⁹Only Mr. Rose, representing the American Patent Law Association, and Mr. Haertel, representing the Aeronautical Industry Association, testified. *Id.* at 10-28, 34-35.

⁷⁰Dr. Hayes, Office of Naval Research, presented the position of the Defense Department. *Id.* at 7-10. Lieutenant Colonel Hodges, Department of the Army, Mr. Koontz, Department of the Air Force, and Mr. Harris, Department of Defense Munitions Board, presented concurring testimony. *Id.* at 35-39. Mr. Anderson presented comments on behalf of the Atomic Energy Commission. *Id.* at 33-34. Representatives of the Patent Office and the Justice Department deferred to the judgment of the Defense Department. *Id.* at 28-33.

⁷¹*Id.* at 8 (testimony of Dr. Hayes). Dr. Hayes suggested two remedies: extending the review period from one to two (or more) years; or leaving the burden to the inventor to seek review of the secrecy order, rather than requiring mandatory yearly review. In the end, the period remained the same. 35 U.S.C. § 181 (1982).

⁷²H.R. Rep. No. 1028, 82d Cong., 1st Sess. (1951).

⁷³*Patent Disclosure Hearings*, *supra* note 35, at 22 (statement of Rep. Willis).

Therefore I do not believe that you can spell out this situation in which damages may be awarded; you just have to provide for damages. . . .⁷⁴

Neither the committee members nor the witnesses agreed as to the meaning of "damages caused by the order." Possible definitions range from "compensation for the hardship"⁷⁵ to compensation for reduction in the time in which the invention could be used.⁷⁶

The committee firmly intended, however, that the act not permit the recovery of damages of a speculative nature.⁷⁷ Two hypothetical situations presented during the hearings illustrate what the members and witnesses saw as compensable and noncompensable damages.

Mr. Rose of the American Patent Law Association advanced both examples.⁷⁸ In the first hypothetical, an inventor, because of a secrecy order, is delayed in filing foreign patent applications. Upon termination of the secrecy order, the inventor files an application in a foreign country. Due to the delay caused by the secrecy order the inventor may have lost the right to claim his United States filing date as his effective filing date for the foreign patent. Therefore, another inventor could, while the secrecy order is in effect, develop a similar item, which would deny a valid patent for that country to the U.S. inventor. The U.S. inventor could then make a claim for damages for loss of the patent rights in that foreign country. The committee report tacitly recognized such potential damages:

Although this may prevent a person who first applies for a patent in the United States from availing himself of the 12-month priority period afforded by article 4 of the International Convention for the Protection of Industrial Property with respect to inventions kept secret under the order of the

⁷⁴*Id.* (testimony of Mr. Rose).

⁷⁵*Patent Disclosure Hearings, supra* note 35, at 17 (comment by Rep. Willis, comm. member).

⁷⁶*Id.* at 32 (testimony of Mr. Federico, Patent Office). Apparently, Mr. Federico's theory was that the inventor is damaged by having invention under secrecy order, thereby decreasing the time to market the invention before new technology makes it obsolete. As an example: an invention is placed under secrecy order in year zero; the order is lifted in year seven and commercial marketing begins immediately; but, the invention becomes obsolete in year ten due to new technology. The inventor only profits from the invention for three of the ten years before it became obsolete. The inventor could then sue the United States for the lost profits during the seven years that the secrecy order was in force.

⁷⁷"[B]y reason of the very nature of the situation the claimant . . . would have to get around the speculative features." *Id.* at 17 (statement of Rep. Bryson, chairman). See also *id.* at 22, 28, and 32; *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980); *Lear-Siegler, Inc. v. United States*, 535 Ct. Cl. 663, 665 (1981).

⁷⁸*Patent Disclosure Hearings, supra* note 35, at 18-21.

Secretary of Commerce, the executive department favors this bill because of its importance to national defense and because the bill is believed to attain its objective in a reasonable manner.⁷⁹

Applying this hypothetical, the inventor can demonstrate some damage because he is incapable of obtaining the foreign patent rights that he would have enjoyed had the order not been imposed and he had immediately filed for the foreign patent rights. By common agreement, the witness and committee would require the inventor to establish the amount of the monetary loss.⁸⁰

Carrying this hypothetical a step further, the committee members and Mr. Rose seemed to agree that a mere assertion by an inventor that he *would have filed* in a foreign country, but for the secrecy order, would not be sufficient to give rise to damages.⁸¹ They recognized, however, that such a claim was theoretically within the limits of the statutory language.⁸²

In the second example, an inventor may have actually built a factory and hired salesmen to exploit the invention.⁸³ Then, at some time after he has expended money to develop the market, the secrecy order is imposed. Representative Willis, a committee member, had little trouble accepting the scenario as a valid basis for collecting damages.⁸⁴

With both of the examples, the determination that the claimant has been damaged may be speculative even where the claimant can demonstrate loss of foreign rights or money expended to promote the invention. Underlying each of the examples is a presumption that a valid patent would lead to profitable commercial production of the item or process subject to the patent. This presumption is, in itself, speculation.

Commercial success is not guaranteed by the granting of a patent. Indeed, the converse may be true. By placing the invention under

⁷⁹H.R. Rep. No. 1028, 82d Cong., 1st Sess. 7 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 4 (1951), reprinted in 1952 U.S. Code Cong. & Admin. News 1321, 1324.

⁸⁰Patent Disclosure Hearings, *supra* note 35, at 20.

⁸¹*Id.* at 21. Some confusion seemed to persist, however. See *id.* at 23 (discussion between Rep. Rogers, Rep. Ramsay, and Mr. Rose relating to suit based upon the inventor's intentions).

⁸²*Id.* at 22.

⁸³*Id.*

⁸⁴*Id.*

secrecy, the government may actually be saving the inventor from greater losses by not allowing production of an item that is headed for economic failure.

For all the concern that the Act should not be read so as to allow an inventor to recover speculative damages, the committee did not express this concern in their report.⁸⁵ The committee may well have accepted the recommendation, set forth during the hearings, that the question be left to "the wise administration of the act by the agency concerned, or by the courts."⁸⁶

Whether by design or default, the determination of what is meant by "compensation for the damage caused by the order" is in the hands of the courts.

E. SUBSEQUENT DEVELOPMENTS

Since its passage in 1952, the Invention Secrecy Act has undergone little change. The only modifications have been in the nature of technical corrections. Shortly after its passage, the entire act was re-enacted as part of a recodification of Title 35 of the United States Code.⁸⁷ Through two reorganizations the functions of the Atomic Energy Commission have passed to the Secretary of Energy.⁸⁸ Finally, under the Federal Courts Improvement Act,⁸⁹ the jurisdiction of the Court of Claims was divided between the Claims Court, replacing the trial division, and the Court of Appeals for the Federal Circuit.

F. THE 1980 HEARINGS

The 1980 hearings⁹⁰ before a subcommittee the House Government Operations Committee provided the most comprehensive collection of materials regarding the Invention Secrecy Act. During the hearings,

⁸⁵H.R. Rep. No. 1028, 82d Cong., 1st Sess. (1951).

⁸⁶*Patent Disclosure Hearings*, *supra* note 35, at 22 (testimony of Mr. Rose).

⁸⁷Ch. 950, 66 Stat. 792 (1952).

⁸⁸In 1974, the functions of the Atomic Energy Commission were transferred to the Administrator, Energy Research and Development Administration. Energy Reorganization Act of 1974, Pub. L. 93-438, § 104, 88 Stat. 1233, 1237 (1974) (codified as amended at 42 U.S.C. § 5814 (1982)). In 1980, the Energy Research and Development Administration merged into the Department of Energy, with functions of the Administrator passing to the Secretary of Energy. Department of Energy Act, Pub. L. 95-91, § 301, 91 Stat. 565, 577 (1977) (codified at 42 U.S.C. § 7151(a) (1982)), Executive Order No. 12,038, 3 C.F.R. 136 (1979).

⁸⁹Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

⁹⁰*Private Ideas Hearings*, *supra* note 8.

the committee heard from representatives of the government⁹¹ and the public.⁹²

The committee focused on three primary aspects of government control—use of the Invention Secrecy Act to control release of cryptography technology, the "born classified" concept⁹³ of atomic energy restricted data, and first amendment considerations under both the Invention Secrecy Act and the "born classified" concept.

With regard to the Invention Secrecy Act, the committee expressed concern that inventors were not receiving adequate compensation and that the compensation remedies were "more illusory than real."⁹⁴ During the hearings, one witness testified that the Act had not been challenged on constitutional grounds.⁹⁵ Reasons given for the lack of challenges included the continued ability of the inventor to sell to the government, which is the only market for most inventions under secrecy order;⁹⁶ moreover, the inventor increases the duration of his exclusive right to the invention in that he is paid for the government's use during the period of secrecy and still receives the entire period of the patent after the order is lifted.⁹⁷

After reciting examples of settled claims, the committee's report states:

The Fifth Amendment question posed by the Invention Secrecy Act is whether the Government was granted eminent

⁹¹Mr. Rene Tegtmeyer, Assistant Commissioner of Patents, presented testimony on behalf of the patent office. Mr. Richard Sciascia, who was then in charge of the Armed Services Patent Advisory Board, headed a delegation representing the Department of Defense. Mr. Duane Sewell represented the Department of Energy, and Mr. Miles Foy represented the Department of Justice. *Private Ideas Hearings*, *supra* note 8, *passim*.

⁹²The members of the public appearing before the committee were Dr. George Davida, Mr. David Kahn, and Mr. David Moore. Dr. Davida testified regarding his experience with a cryptographic device that he claimed was improperly placed under secrecy order. *Private Ideas Hearings*, *supra* note 8, at 397; H.R. Rep. No. 1540, 96th Cong., 2d Sess. 21-24 (1980). Mr. Kahn was an author who had published an article describing Dr. Davida's attempts to have the secrecy order rescinded. *Private Ideas Hearings*, *supra* note 8, at 406; see also Kahn, *Cryptology Goes Public*, 58 *Foreign Affairs* 141 (1979). Mr. Moore had a lawsuit pending against the United States relating to a secrecy order on an invention. He testified through his attorney, Mr. Meikeljohn. *Private Ideas Hearings*, *supra* note 8, at 188; H.R. Rep. No. 1540, 96th Cong., 2d Sess. 20-21 (1980).

⁹³In essence, the "born classified" concept is a product of the Atomic Energy Commission's authority to classify information relating to nuclear energy. It assumes that there is some information that, by its very nature, is classified at the time of conception, without ever undergoing formal classification review. H.R. Rep. No. 1540, 96th Cong., 2d Sess. 173-87 (1980).

⁹⁴*Id.* at 6, 28.

⁹⁵*Private Ideas Hearings*, *supra* note 8, at 477 (testimony of Lieutenant Colonel Hougen, Intellectual Property Div., Office of the Army Judge Advocate General).

⁹⁶*Id.*

⁹⁷*Id.* at 477 (statement of Mr. Ingram, Comm. Staff Director).

domain or police powers over all the ideas within its jurisdiction, and whether patent applicants truly receive just compensation for the taking. These issues are central to peacetime invention secrecy and must be resolved.⁹⁸

The committee did not suggest how this issue should be resolved, nor has Congress enacted any further legislation to clarify the issue.

III. OPERATION OF THE INVENTION SECRECY ACT

The Invention Secrecy Act provides a comprehensive scheme for maintaining the secrecy of inventions in the interest of national defense.⁹⁹ The statute provides incentives encouraging inventors to continue working in fields related to the national security and penalties to insure compliance with the secret order. The incentive is provided by the compensation provisions¹⁰⁰ and the retention of the seventeen-year exclusive right to manufacture and use the invention after the secrecy order is rescinded.¹⁰¹ The penalties include criminal penalties for disclosure¹⁰² and provision for abandonment of the application for unauthorized disclosure.¹⁰³

The secrecy order may be applied to any patent application meeting the statutory criteria,¹⁰⁴ but not all inventors are eligible for compensation. The scope of the compensation provision is limited by the status of the inventor, the determination whether a patentable invention exists, and the statutory scheme for recovery.¹⁰⁵

A. THE SECRECY ORDER

The Invention Secrecy Act contemplates two separate procedures: one for patents in which a government agency has property interest, the other where no government agency has a property interest.

Where a government agency has a property interest,¹⁰⁶ the head

⁹⁸H.R. Rep. No. 1540, 96th Cong., 2d Sess. 7-8 (1980); see also *id.* at 24-25, 28-29.

⁹⁹*Robinson v. United States*, 236 F.2d 24, 27 (2d Cir. 1956).

¹⁰⁰35 U.S.C. § 183 (1982).

¹⁰¹35 U.S.C. § 181 (1982).

¹⁰²35 U.S.C. § 186 (1982).

¹⁰³35 U.S.C. § 182 (1982).

¹⁰⁴"Whenever publication or disclosure of an invention by the granting of a patent . . . might . . . be detrimental to the national security. . . ." 35 U.S.C. § 181 (1982).

¹⁰⁵*Id.*

¹⁰⁶*Id.* The Committee reports define "property interest" as follows:

The phrase "property interest" is intended to include the ownership of all rights in the invention or to a lesser interest therein such as, for example, cases where the foreign rights are retained by the inventor, or where the

of the agency may direct¹⁰⁷ the Commissioner of Patents to keep the invention secret.¹⁰⁸ In cases where no government agency has a property interest,¹⁰⁹ the Patent and Trademark Office will inspect the application. The application may then be made available¹¹⁰ to the appropriate defense agency¹¹¹ for examination.¹¹² The defense agency can then direct that the application be placed under secrecy order.

Where the agency believes that even the examination of the application may "jeopardize the national interest,"¹¹³ the Act provides that the application will be sealed and the applicant notified of the

Government is entitled only to the interest of one or more joint inventors, and not to the interest of all joint inventors. This group will consist in the main of inventions made by Government employees or Government contractors.

H.R. Rep. No. 1028, 82d Cong., 1st Sess. 4 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 2 (1951), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1321, 1322.

¹⁰⁷The Invention Secrecy Act avoids using the word "direct" or words of similar import: "[T]he Atomic Energy Commission, the Secretary of a Defense Department, or such other chief officer shall notify the Commissioner and the Commissioner shall order the invention kept secret. . . ." 35 U.S.C. § 181 (1982). The intent of Congress was clear: "If the Government has a property interest, issuance of the secrecy order requires only a recommendation to the Commissioner of Patents by the head of the department or agency involved." H.R. Rep. No. 1028, 82d Cong., 1st Sess. 4 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 2 (1951), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1321, 1322.

¹⁰⁸35 U.S.C. § 181 (1982).

¹⁰⁹"This group consists for the most part of inventions made by persons not in contact with the Government. It is necessary for the Secretary of Commerce to call the attention of the defense agency to the particular application, since they would otherwise have no knowledge of such application." H.R. Rep. No. 1028, 82d Cong., 1st Sess. 4 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 2 (1951), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1321, 1322.

¹¹⁰Pursuant to regulations promulgated under the Secretary of Commerce's authority, "[o]nly applications obviously relating to national security, and applications within fields indicated to the Patent and Trademark Office by the defense agencies as so related, are made available." 37 C.F.R. § 5.1 (1986).

¹¹¹Defense agencies include the Department of Energy, as successor to the Atomic Energy Commission (See 42 U.S.C. §§ 5814, 7151(a), 7293 (1982)); the Department of Defense and its subordinate agencies and departments: The National Security Council; and the National Aeronautics and Space Administration. 42 U.S.C. § 2457(1) (1982). Additionally, the Act allows the President to designate any other agency as a "defense agency." 35 U.S.C. § 181 (1982). Under this authority, the Department of Justice has been designated. Exec. Ord. No. 10,457, 3 C.F.R. 945 (1949-53).

¹¹²The Invention Secrecy Act does not establish any criteria for imposing secrecy orders. For inventions in which the government does not have a property right, the Department of the Army generally imposes a secrecy order only if the invention falls within the criteria in the classified version of the Militarily Critical Technologies List, 50 U.S.C. App. § 2404(d) (1982). Interview with Mr. John Raubichek, Patent, Copyrights, and Trademarks Division, Office of the Judge Advocate General, Department of the Army (Mar. 16, 1987).

¹¹³35 U.S.C. § 181 (1982).

sealing.¹¹⁴ Congress anticipated that this provision would apply to a limited number of cases, mostly involving highly-classified government contracts.¹¹⁵

In all cases except where the application has been sealed, action on and prosecution of the application continues until a hearing or public disclosure would ordinarily be required.¹¹⁶ If the application is then in condition for allowance, the applicant is notified and further action is suspended until the secrecy order is removed.¹¹⁷ Interferences¹¹⁸ are not declared while the application is under secrecy,¹¹⁹ nor are appeals heard if the application comes to final rejection.¹²⁰ With either interference or appeal from rejection, prosecution of the application may be suspended until the secrecy order is lifted, and then proceed in regular fashion to completion. Applications for international patent rights are processed, but no records are mailed to international agencies or the applicants.¹²¹

The applicant has the right to appeal the determination to impose a secrecy order to the Secretary of Commerce.¹²² No other appeal is authorized. As a safeguard against unwarranted continuation of se-

¹¹⁴*Id.*

¹¹⁵The committee noted:

The armed services procurement application provides that they might prohibit the filing of a patent application when it discloses matter which has been classified as secret. . . . [T]his act is effective for compensation purposes only after the filing of an application. If the contractor is not permitted to file, he cannot obtain any benefits under the act. It is believed that the authority to seal the application by the Secretary of Commerce would reduce the necessity to prohibit the filing of a classified application.

H.R. Rep. No. 1028, 82d Cong., 1st Sess. 5 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 2 (1951), reprinted in 1952 U.S. Code Cong. & Admin. News 1321, 1322; see also H.R. Rep. No. 1540, 96th Cong., 2d Sess. 11 (1980) (as of 1980, the Department of Defense had only two cases under seal); *Private Ideas Hearings*, supra note 8, at 472 (testimony of Mr. Donald Singer, Patents Division, Office of The Judge Advocate General of the Air Force).

¹¹⁶37 C.F.R. § 5.3 (1986).

¹¹⁷37 C.F.R. § 5.3 (c) (1986).

¹¹⁸An interference is a patent office proceeding designed to determine priority of invention between two or more parties claiming the same subject matter. Black's Law Dictionary 730 (5th ed. 1979).

¹¹⁹37 C.F.R. § 5.3 (b) (1986).

¹²⁰37 C.F.R. § 5.3 (a) (1986). Once notified of the final rejection, the inventor still must file his appeal or risk abandonment of the application. *Id.* The appeal generally will not be set for a hearing until the commissioner removes the secrecy order. *Id.*

¹²¹37 C.F.R. § 5.3 (d) (1986).

¹²²35 U.S.C. § 181 (1982). Under rules prescribed by the Secretary of Commerce, the applicant must first petition for rescission of the secrecy order. 37 C.F.R. §§ 5.4, 5.8 (1986). Within 60 days from denial of the petition the applicant must appeal to the Secretary. 37 C.F.R. § 5.8 (1986).

crecy orders, the order extends for a period of only one year, except during a war or national emergency.¹²³ If secrecy is desired for a longer period, the agency must review the application annually and affirmatively request that the secrecy order be extended.¹²⁴

If the applicant fails to abide by the terms of the order, the application may be held abandoned¹²⁵ and, if the violation is willful, criminal penalties may be imposed.¹²⁶ Abandonment can also be ordered if a person other than the applicant violates the secrecy order.¹²⁷ The statute specifies that "abandonment shall constitute forfeiture by the applicant . . . or anyone in privity with him . . . of all claims against the United States based upon such invention."¹²⁸

If the inventor obeys the secrecy order, and his invention is patentable, he may receive his patent upon termination of the order. With the issuance of the patent he receives the exclusive right to manufacture, use, and sell the invention that the patent provides.¹²⁹ Under the Invention Secrecy Act, he may also make a claim against the United States for damages caused by the order and for government use of the invention.¹³⁰

B. LICENSE FOR FOREIGN FILING

If the inventor wishes to preserve foreign patent rights in the invention, he may seek a license from the Commissioner of Patents to file for a foreign patent.¹³¹ If the inventor fails to obtain the license

¹²³During periods of war or national emergency, the secrecy order lasts until six months following the termination of the war or national emergency. 35 U.S.C. § 181 (1982). As a result of continuous states of war or national emergency between 1940 and 1978, no review was required until March 1979.

¹²⁴35 U.S.C. § 181 (1982).

¹²⁵35 U.S.C. § 182 (1982). The Act also provides for invalidation of previously granted patents, and denial of pending applications, where the inventor has violated the requirements to obtain a license for foreign filing when such license is required. 35 U.S.C. §§ 184 & 185 (1982).

Courts have held that certain disclosures are inherently permitted by the statute. Disclosure to an attorney for purposes of filing a claim or suit is permitted. *Constant v. United States*, 617 F.2d 239, 244-45 (Ct. Cl. 1980); *Farrand Optical Co. v. United States*, 175 F. Supp. 230, 249 (S.D.N.Y. 1959), *aff'd*, 325 F.2d 328 (2d Cir. 1963).

¹²⁶35 U.S.C. § 186 (1982). The maximum penalty is two years' confinement and a \$10,000 fine. *Id.*

¹²⁷35 U.S.C. § 182 (1982) (only when the person violating the order is in privity with the applicant).

¹²⁸*Id.*

¹²⁹35 U.S.C. §§ 154, 173 (1982).

¹³⁰35 U.S.C. § 183 (1982).

¹³¹35 U.S.C. § 184 (1982); see also *Cage*, *supra* note 13, at 497.

prior to filing in a foreign country, he may be barred from later receiving a patent on the invention.¹³²

Under rules promulgated by the Office of Patents and Trademarks,¹³³ some secrecy orders issued at the request of the Department of Defense include an automatic license to file in certain foreign countries.¹³⁴ A separate license would still be required to file in countries other than those specifically listed.

The relevance of the licensing scheme to the question of damages cannot be overlooked. To prove damages through loss of foreign patent rights, the inventor must demonstrate that, if the secrecy order had not been imposed, he would have sought and received¹³⁵ foreign patent rights. By failing to avail himself of the opportunity to seek a license, the inventor has failed to protect his property. If, at some later time, he then loses the foreign rights to his invention, the damage is not due to the imposition of the secrecy order but to his failure to act.

The converse is equally true. The inventor who requests foreign filing licenses, or uses the automatic license of the proposed secrecy order, establishes his intention to protect the value of his invention. If he is granted the license, he is not damaged by the secrecy order. If the license is denied, and subsequently he is denied a patent due to the delay in foreign filing, he has established liability on the part of the government. He must then establish the value of his damages.¹³⁶

¹³²35 U.S.C. § 185 (1982). If the failure to procure the necessary license was inadvertent and a secrecy order would not have been appropriate, the Commissioner of Patents may grant a license retroactively. 35 U.S.C. § 184 (1982).

¹³³Notice of Revision of the Scope of the Secrecy Order for Defense Agency Use, 51 Fed. Reg. 32,938 (1986).

¹³⁴*Id.* at 32,939. The countries are: Australia, Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Turkey, and the United Kingdom. The intent of the new secrecy order is to conform the order to the guidelines relating to the export of technical data with military or space applications. 10 U.S.C. § 140 (1982); 32 C.F.R. §§ 250.1-250.9 (1986) (Withholding of Unclassified Technical Data from Public Disclosure); the Militarily Critical Technologies List, 50 U.S.C. App. § 2404 (1982); Commodity Control List, *supra* note 2; ITAR, *supra* note 2.

¹³⁵Clearly, if the subject matter of the invention is not patentable in other countries, or if a foreign patent is otherwise barred at the time the invention is made, then the inventor has lost nothing.

¹³⁶*See Attinello v. United States*, 197 Ct. Cl. 1040 (1972). In *Attinello*, the claimant was barred from recovery under 35 U.S.C. § 183 because he had been a government employee at the time of his invention and the government held a royalty-free license to use the invention in the United States. The inventor had made a timely request to modify the secrecy order, so he could seek a patent in Great Britain. The government conceded that the Department of Navy was dilatory in processing the request. As a result of the Navy's "unjustified and unexcusable delay" the claimant was barred from obtaining a British patent. 197 Ct. Cl. at 1047. Through private legislation, the inventor received \$100,000 as a matter of equity. Priv. L. No. 92-131, 86 Stat. 1554 (1972).

C. STATUS OF THE INVENTOR

Inventors are divided into two categories for purposes of compensation: those who are in the full-time employment or service of the United States, and those who are not.¹³⁷ Those inventors who are not in the full-time employment or service of the United States may claim compensation for damages caused by the secrecy order and for use of the invention by the government. But those inventors who are full-time employees or in the service of the United States are not entitled to any recovery under the Act.¹³⁸ The basis for such a distinction is one of practical differentiation rather than logical deduction.

Using employment status as the determining factor provides a clear standard by which to judge whether an inventor is entitled to compensation. This standard avoids the necessity of looking back at the process that led to the invention to determine what part, if any, government resources, information, or assistance may have played in developing the invention.

Denying government employees the right to recover under the statute theoretically protects the government from paying for the same invention twice.¹³⁹ Assuming that an inventor could move quickly, a government employee could terminate his government employment and then claim that, since the time he quit, he had developed a new idea.

The use of an arbitrary standard may produce illogical results. Thus, a full-time government employee tinkering with an idea unrelated to his government employment may not recover, although a government contractor or "part-time" employee could recover, even if the invention were based, in part, upon information or knowledge gained in government employment.¹⁴⁰

D. QUALIFYING INVENTION

To recover under the Invention Secrecy Act, the invention must be patentable. If the invention cannot be patented upon the termination of the secrecy order, no compensation is due.¹⁴¹ To be patentable, the

¹³⁷35 U.S.C. § 183 (1982).

¹³⁸*Id.*

¹³⁹See *Farrand Optical Co. v. United States*, 325 F.2d 328, 334 (2d Cir. 1963).

¹⁴⁰Presumably, the contract would define the rights of the contractor *vis a vis* those of the government. See, e.g., 35 U.S.C. §§ 200-211 (1982); Federal Acquisition Reg. subpart 27.4 (June 1, 1987). Questions may still arise over ownership rights in material that defense contractors produce. See generally Maizel, *Trade Secrets and Technical Data Rights in Government Contracts*, 114 Mil. L. Rev. 225 (1986).

¹⁴¹*Piet v. United States*, 176 F. Supp. 376 (S.D. Cal. 1959), *aff'd*, 283 F.2d 693 (9th Cir. 1960).

invention must meet the statutory requirements of utility,¹⁴² novelty,¹⁴³ and nonobviousness.¹⁴⁴

The act or process of invention is generally broken down into two factual components: conception and reduction to practice.¹⁴⁵ Conception deals with the mental act of creating a complete and operative invention.¹⁴⁶ Reduction to practice is the application of the idea generated in conception.¹⁴⁷ During conception and reduction to practice all three statutory requirements must be met.

Reduction to practice may be either "actual" or "constructive." In actual reduction to practice, the inventor shows the usefulness of the invention by making it perform in a manner, and under the conditions, that indicate the invention will actually perform its intended function. As the name implies, it is demonstration through a series of physical acts.

Constructive reduction to practice does not require that the invention ever be physically manufactured or made to operate. Instead, the reduction to practice is accomplished by filing a patent application.¹⁴⁸ The patent may then issue without the invention ever physically existing.

Constructive reduction to practice results in what has come to be known as a "paper patent."¹⁴⁹ Courts disfavor paper patents and construe them narrowly.¹⁵⁰ To do otherwise would not further the public policy of encouraging invention and disclosure.¹⁵¹ A patent received

¹⁴²35 U.S.C. § 101 (1982).

¹⁴³35 U.S.C. § 102 (1982).

¹⁴⁴35 U.S.C. § 103 (1982).

¹⁴⁵See generally *Boyce v. Anderson*, 451 F.2d 818 (9th Cir. 1971).

¹⁴⁶*Id.* at 820.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹Courts have used the term "paper patent" to define two types of patents. The term has been used to describe patents for inventions never physically constructed or manufactured. *In re Application of Holladay*, 584 F.2d 384, 386 (C.C.P.A. 1978); *Barnett v. United States*, 6 Cl. Ct. 631, 666 (1984). Alternatively, courts have used "paper patent" to mean a patent for an invention that has never been commercially produced or utilized. *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1266 (6th Cir. 1983), *aff'd after remand*, 789 F.2d 895 (Fed. Cir.), *cert. denied*, 107 S. Ct. 183 (1986); *American Cyanamid Co. v. Hercules, Inc.*, 260 F. Supp. 368, 374 (D. Del. 1966); *UMC Electronics Co. v. United States*, 8 Cl. Ct. 604, 623 (1985). For purposes of this article, "paper patent" will be restricted to the first definition.

¹⁵⁰*American Cyanamid Co. v. Hercules Corp.*, 260 F. Supp. 368, 377 (D. Del. 1966) ("[A]n established line of patent cases . . . holds that paper patents should not be permitted to blanket an industry, forcing the manufacturer of a commercially successful product to pay tribute."); see also *In re Application of Holladay*, 584 F.2d 384, 386-87 (C.C.P.A. 1978).

¹⁵¹*Universal Oil Products Co. v. Globe Oil & Ref. Co.*, 322 U.S. 471, 484 (1944).

after constructive reduction to practice, however, can be as effective as one accomplished by actual reduction to practice. The policy of narrow construction limits the scope of the invention, but does not deny that a patentable invention exists.

The Invention Secrecy Act does not differentiate between actual and constructive reduction to practice. At least in theory, a patent received by either method is equally capable of supporting an award of damages. Because of its speculative nature, the paper patent presents the outer limit to which the United States is obligated to pay damages for the effects of a secrecy order. Resolving the extent to which damages may be collected for such a patent, in essence, establishes the limits of government liability under more concrete circumstances.

E. RECOVERY PROCEDURE

The Invention Secrecy Act provides two separate procedures for recovery: (1) the inventor may file an administrative claim with the agency requesting the secrecy order while the order is in effect, and resort to the Claims Court or a federal district court if the award is not deemed adequate; or (2) he may wait until the secrecy order terminates and sue in the Claims Court, without first filing an administrative claim.¹⁵²

The two remedies are not mutually exclusive, but overlapping. The inventor may seek relief in the Claims Court either after filing an administrative claim or by waiting until after the patent has issued. He may only seek relief in district court if he has first submitted an administrative claim. But the administrative claim may be filed either before or after the patent has issued.¹⁵³

1. Administrative Claim.

The right to file an administrative claim arises at the time that the inventor is notified that the claims in the patent application are "in condition for allowance."¹⁵⁴ This will not necessarily be the same as the date that the secrecy order is issued, nor will it coincide with the first use, if any, of the invention by the government. Although the statute provides that the right to compensation for use of the invention begins with the first use of the invention by the government, the statute is silent as to when the right to damages caused by the secrecy order accrues.¹⁵⁵

¹⁵²35 U.S.C. § 183 (1962).

¹⁵³The inventor may file a claim up to six years after the patent issues. *Id.*

¹⁵⁴*Id.*

¹⁵⁵See *infra* text accompanying notes 278-82.

Once the claim is filed, the head of the agency that requested the secrecy order may enter into a settlement agreement with the inventor to resolve all claims for damages and for government use of the invention. A settlement agreement is "conclusive for all purposes."¹⁵⁸ If the parties cannot agree, the department or agency head may decide what constitutes "just compensation" and award the inventor up to seventy-five per cent of that amount. The inventor may then sue in the district court or in the Claims Court for any additional compensation he or she believes is due.¹⁵⁷

2. Administrative Finality.

Once the inventor has made an administrative claim, he must await the agency's award determination before seeking further relief in court. This, however, does not give the government an absolute license to delay.

The plaintiff in *Farrand Optical Co. v. United States*¹⁵⁸ filed suit in district court after the parties had failed to agree on the compensation amount for over six years. The court determined, based upon comparison with other similar statutes,¹⁵⁹ that the act did not require administrative exhaustion in the normal meaning of that term. Instead, the claimant was free to seek judicial relief if the government acted unreasonably in delaying the determination.¹⁶⁰

What may constitute an "unreasonable delay" will always be open to debate. Clearly, under circumstances similar to *Farrand Optical*, where the parties failed to reach a negotiated settlement, the claimant will be free to file suit. Most cases will depend upon the trial court's view as to the reasonableness of the agency's actions. If the agency delay appears unreasonable, the claimant will be allowed to proceed. Conversely, where the claimant rushes to court, making the administrative claim a mere formality, trial would be inappropriate.

¹⁵⁶Although the Act is silent, presumably the settlement agreement could include future use, as well as past use. If the agreement could not compensate the inventor for future use, "full settlement" would seldom be accomplished. The language of the statute would appear to preclude future claims based upon additional use.

¹⁵⁷35 U.S.C. § 183 (1982).

¹⁵⁸133 F. Supp. 555 (S.D.N.Y. 1955), *aff'd on rehearing en banc by an equally divided court*, 317 F.2d 875 (2d Cir. 1962) (On appeal, a panel of the Second Circuit initially found that the district court had no jurisdiction on grounds that the Invention Secrecy Act did not apply as the claim sought contractual relief and, therefore, was cognizable only in the Court of Claims).

¹⁵⁹*Id.* (referring to the Merchant Marine Act, 46 U.S.C. § 1242 (1952) and *Latvian State Cargo and Passenger St. Line v. United States*, 88 F. Supp. 290 (Ct. Cl. 1950)).

¹⁶⁰*Farrand Optical Co. v. United States*, 133 F. Supp. at 559. *But see American Tel. and Tel. Co. v. United States*, 685 F.2d 1361, 1365 n.8 (Ct. Cl. 1982) ("[W]e do not think that Congress intended that the administrative route be treated as a mere formality.").

3. Claims Court Suit after Termination of the Order

As a separate remedy from the administrative claim during the pendency of the secrecy order, Congress permits the inventor to wait until the government terminates the secrecy order and then seek damages in the Claims Court.¹⁶¹ Since *Farrand Optical*,¹⁶² it is clear that an inventor need not exhaust the administrative remedy prior to seeking relief before the Claims Court.¹⁶³

This principle was reinforced in *American Telephone and Telegraph Co. v. United States [AT&T I]*.¹⁶⁴ The court was presented with a patent application that had been under secrecy for over twenty-six years. Twenty-two years had elapsed since the patent office had found the claims to be in condition for allowance.¹⁶⁵ The company filed directly in the Court of Claims; at no time did the company file an administrative claim.¹⁶⁶

The government argued that the six-year statute of limitations, which is stated in terms of when an administrative claim may be filed,¹⁶⁷ was meant to limit stale claims and that the company should only be allowed to collect damages for the six years preceding the filing of suit. In rebutting this argument, the court noted that such a reading of the statute would imply that the administrative claim was

¹⁶¹Suit in the Court of Claims after termination of the order was the original remedy in the Voluntary Tender Act. See *supra* text accompanying notes 26-33. The slight discrepancies in language between the administrative remedy and direct suit provision (e.g., use of the term "compensation" in the former provision, whereas the latter refers to "just compensation"; administrative remedies require that "patent be withheld," while judicial remedy has no such limitation) are more likely the result of the piecemeal construction of the statute over several years rather than an intentional act by Congress to create a separate standard of proof. *But cf.* *Constant v. United States*, 617 F.2d 239, 243 (Ct. Cl. 1980) (court applied the literal language of the statute, seeing "no substantial basis" for determining why Congress made such distinctions).

¹⁶²133 F. Supp. 555, 558 (S.D.N.Y. 1955).

¹⁶³The Claims Court has assumed the jurisdiction of the trial division of the former Court of Claims. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 105, 139, 167, 96 Stat. 25, 26, 42, 50 (codified at 28 U.S.C. § 1491).

¹⁶⁴685 F.2d 1361 (Ct. Cl. 1982) [hereinafter AT&T I].

¹⁶⁵The patent application was filed on December 24, 1948. The notice of the secrecy order was mailed on May 18, 1949. The notice of allowance of claims was filed on April 28, 1954. From that time on the company had the right to submit an administrative claim, but chose not to do so. On June 13, 1975, the secrecy order terminated, and a patent issued on November 9, 1976. *Id.* at 1362.

¹⁶⁶*Id.* at 1363.

¹⁶⁷"An applicant . . . whose patent has been withheld . . . shall have the right, beginning at the date the applicant is notified that . . . his application is otherwise in condition for allowance . . . and ending six years after a patent is issued thereon . . ." 35 U.S.C. § 183 (1982).

the preferred remedy and the only method to guarantee that the claimant received full compensation. Based upon the legislative history and the clear reading of the statute the court concluded that neither remedy was to be preferred over the other.¹⁶⁸ It held that Congress intended to preclude claims that became stale after the patent issues, but claims that were unresolved due to the pendency of the secrecy order cannot become stale until six years after the patent issues.¹⁶⁹

4. *Choice of Forum.*

The route to recovery the inventor chooses may play a role in determining the amount of damages he will receive. The decision as to forum is difficult to assess in the abstract and there are insufficient cases applying the Invention Secrecy Act to clearly establish any trends.

One factor that must be considered is the financial standing of the inventor. AT&T can easily hold out for 26 years; an individual inventor is less likely to be able to sustain such a burden. AT&T has the economic resources to find any government use of its inventions. It also has the capability to meet the government's requirements for the invention. As a result, it can profit by contracting to provide the government's needs rather than strictly relying on the remedies under the Act.

A second factor may be the location of the inventor. If the inventor is located at some distance from the District of Columbia, it may be less costly, in terms of time, effort, and money to seek administrative settlement and, if that fails, to file suit in the local district court. This ability to file in the district court would be particularly important during time of war.¹⁷⁰

Third, the inventor may wish to consider filing the administrative claim because it offers more procedural options. The claim may be settled in a timely manner, at little expense to the claimant. If not he has a choice of forums—Claims Court or district court—and may file the lawsuit either before or after issuance of the patent. If he files directly in the Claims Court, he forgoes the administrative claim and

¹⁶⁸AT&T I, 685 F.2d at 1363-65.

¹⁶⁹*Id.* at 1367.

¹⁷⁰See *Robinson v. United States*, 236 F.2d 24, 28 (2d Cir. 1956) (citing Senator McCarren, 97 Cong. Rec. 13,670 (1951)). Congress wrote the provision in light of the conditions experienced during World War II. The rationing of critical supplies, such as fuel, would leave the individual inventor and his attorney at a severe disadvantage if they were required to present a case before the Court of Claims.

must wait until after the patent issues. The statute provides the same six years following issuance of the patent to commence his action.¹⁷¹

Finally, the inventor may wish to consider possible developments after the secrecy is lifted. If the only use of the invention is for military or national defense purposes, little is served by waiting until a future date. But, where the invention has potentially successful commercial application, waiting until after the termination of the secrecy order may allow the claimant to solidify facts and limit the speculative nature of the damages caused by the order.¹⁷² Conversely, if the inventor senses that the invention will be a commercial disaster, he may have a tactical advantage, at least during the administrative claim, in seeking greater compensation because the agency faces potentially greater claims if the invention proves commercially successful.

5. *Limitations on Discovery and Trial.*

The right to file suit prior to termination of the secrecy order does not guarantee that the inventor will receive a speedy trial. Resort to district court or the Claims Court during the pendency of the secrecy order, or even the after the order is terminated, carries an inherent danger of disclosing the very secrets that the secrecy order is designed to protect.

In *Halpern v. United States*,¹⁷³ the government successfully argued to the district court that the case should be stayed until the secrecy order was lifted because disclosure of the details necessary to conduct the trial would be detrimental to national security. On appeal, however, the Second Circuit held that the statute was clearly intended to allow for trial during the pendency of the secrecy order. The appellate court further held that trial in camera was implicitly authorized, if necessary, to protect the government's interest in secrecy of the invention.¹⁷⁴ The use of in camera proceedings, however, is only appropriate where the trial court has determined that the in camera trial would not present a serious risk of divulging military

¹⁷¹If read literally, the Act actually allows greater time to the claimant who files with the agency than one who directly files suit in the Claims Court. The statute only requires that a claimant file his administrative claim within six years, and does not limit when the claimant must seek redress in the courts. *But see* H.R. Rep. No. 1028, 82d Cong., 1st Sess. 6 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 3 (1951), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1321, 1323 ("The 6-year statute of limitations is incorporated to preclude the collection of old claims from the Government, and conforms with the statute of limitations on suits in the Court of Claims."). *See also Patent Disclosure Hearings*, *supra* note 35, at 18 (Testimony of Mr. Rose).

¹⁷²*See supra* notes 73-86 and accompanying text.

¹⁷³151 F. Supp. 183 (S.D.N.Y. 1957), *rev'd*, 258 F.2d 36 (2d Cir. 1958).

¹⁷⁴*Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958).

secrets.¹⁷⁵ The court did not elaborate as to what circumstances would constitute a serious risk, precluding both a public trial and in camera proceedings.

One case where in camera proceedings would appear to be inappropriate was *American Telephone & Telegraph Co. v. United States [AT&T II]*.¹⁷⁶ In 1948, Bell Telephone Laboratories applied for a patent for a "pulse code modulation communication system" that would allow encryption of the information transmitted. The Commissioner of Patents issued a secrecy order, which remained in effect until 1975. The patent issued in 1976, and plaintiff filed an action for compensation in the Court of Claims in 1981. To fix damages, AT&T requested discovery of information about government use of the invention. The government refused to permit discovery, and claimed that the existence, number, and types of cryptographic devices it used were "state secrets."¹⁷⁷ At the time, AT&T was a party to several classified contracts, it had approved facilities capable of storing the requested documents, and it had employees with the security clearances necessary to examine the documents.¹⁷⁸ Nevertheless, the court granted a government motion to bar discovery. This left AT&T unable to fix the extent of damages for government use, because all procurements involving the patented invention were kept secret.¹⁷⁹

In *AT&T II*, the Court of Claims determined that the appropriate remedy for the lack of discovery was dismissal of the case without prejudice. The court did not venture to no guess what result this would have on the plaintiff as the six-year statute of limitations expired.¹⁸⁰ Because the period in which the requested documents may remain a state secret is indefinite, the stay in proceedings suggested in *Halpern*¹⁸¹ may be a more appropriate remedy. Otherwise, the state-secret privilege could prevent a trial well beyond the sixth year after the patent has issued.

¹⁷⁵*Id.* at 44. See also *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979); *American Tel. and Tel. Co. v. United States* [hereinafter *AT&T II*], 4 Cl. Ct. 157 (1983).

¹⁷⁶4 Cl. Ct. 157 (1983) (order granting request for protective order).

¹⁷⁷See *United States v. Reynolds*, 345 U.S. 1 (1953). The state-secret privilege allows the government to resist discovery when disclosure of information would be a threat to the nation's military or diplomatic interests. *AT&T II*, 4 Cl. Ct. at 159-60. Only the head of the government department having control over the matter may claim the privilege, and then only after personal consideration of the claim. *Reynolds*, 345 U.S. at 7-8. The department head's decision is subject to judicial review, although under a deferential standard. *Id.* at 9-10; *AT&T II*, 4 Cl. Ct. at 160-61.

¹⁷⁸*AT&T II*, 4 Cl. Ct. at 159.

¹⁷⁹*Id.*

¹⁸⁰In this case AT&T waited four years, ten months, and twenty days prior to instituting the suit. *AT&T I*, 685 F.2d at 1361-62.

¹⁸¹258 F.2d 36, 38 (2d Cir. 1958) (alternative motion by the government).

If the government may claim that discovery should be barred under the state-secret privilege, then in camera trial would seem inappropriate as well. Information that is so sensitive that it cannot be released to the plaintiff in preparation for trial, would be no less sensitive during the trial. Thus, where the application has been sealed because examination of the application would pose a threat to national security, trial of any kind would be inappropriate until after the secrecy order has been rescinded or the seal has been removed.

The government may also claim the state-secret privilege where a plaintiff is incapable of obtaining a security clearance because he poses a security risk. In *United States v. Clift*,¹⁸² the court, in dicta, took note of plaintiff's lack of a security clearance in determining that in camera discovery would be futile because the plaintiff did not have the necessary security clearance to obtain the results.¹⁸³

IV. APPLICABILITY OF THE FIFTH AMENDMENT

To discuss the nature and amount of compensation due under the statute, it is first necessary to determine whether a fifth amendment "taking"¹⁸⁴ is involved. If the government action is deemed to be a taking of property, then it must pay "just compensation."¹⁸⁵ This includes "delay compensation," usually in the form of prejudgment

¹⁸²597 F.2d 826 (2d Cir. 1979). In *Clift*, the plaintiff appeared pro se. While the Second Circuit upheld the government's claim of privilege, it noted that plaintiff had no counsel, and reversed the district court's dismissal of the action. The court admonished the government to be as forthcoming as possible on remand: "[T]he government, in obedience to the desires of Congress, should be as forthcoming as it can be without risk to the national interest." *Id.* at 830.

¹⁸³*Clift* presents a close case. The opinion indicates that Mr. Clift had a security clearance at one time. *Id.* at 829. The information he sought to discover, government contracts for production of cryptographic equipment, had been the subject of newspaper and magazine articles, at least to the extent of exposing general information. A clearer case for allowing the government to maintain secrecy would be present if the inventor were unaware of the military significance of his invention or the government could clearly articulate that the inventor was a security risk because of a criminal record or similar disqualification.

¹⁸⁴U.S. Const. amend. V: "No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation."

This article does not discuss the due process clause. For a discussion of due process under the Invention Secrecy Act, see Gilbert, *supra* note 13, at 358.

¹⁸⁵The compensation provision, 35 U.S.C. § 183 (1982), requires payment of "just compensation" where the inventor files directly in the Claims Court. This is not determinative as to whether a "taking" within the fifth amendment has occurred. *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 589-90 (1947).

interest, to compensate the property owner for the delay between the taking and the judgment.¹⁸⁶

The right to delay compensation is not merely an issue of money, but also of concept. Delay compensation is a judicial exception to the general rule that interest is not paid by the United States absent a statute or contract authorizing payment.¹⁸⁷ It is based upon an intent to make the owner whole for the loss incurred by governmental action. As such, the courts are not bound by the limitations of statutory construction in determining what constitutes "just compensation."¹⁸⁸ The object is to compensate the individual for his loss based upon principles of fairness and equity, rather than statutory interpretation.¹⁸⁹

A. EMINENT DOMAIN WITHIN THE FIFTH AMENDMENT

Not every taking of property for public use invokes the fifth amendment right to payment. The taking clause has been defined as a limitation on the government's inherent power of eminent domain.¹⁹⁰ Thus, other forms of taking for public use, such as fines and taxes, are not covered.¹⁹¹ To constitute a compensable taking, (1) "property" must be taken, (2) for a public use, and (3) the taking must be accomplished by government action.¹⁹²

1. Patents as Property.

The Constitution grants Congress the power "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁹³ To implement this constitutional provision the patent laws grant inventors the exclusive right to manufacture and use the invention for a limited time¹⁹⁴ in return for making their

¹⁸⁶*Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923); *Pitcairn v. United States*, 547 F.2d 1106 (Ct. Cl. 1977).

¹⁸⁷*Seaboard*, 261 U.S. at 304.

¹⁸⁸*Id.*

¹⁸⁹*Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973).

¹⁹⁰*United States v. Jones*, 109 U.S. 513, 518 (1883).

¹⁹¹*Franco-Italian Packing Co. v. United States*, 128 F. Supp. 408, 414 (Ct. Cl. 1955).

¹⁹²See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); J. Sackman, 1A *Nichols on Eminent Domain* § 3.4 (Rev. 3d ed. 1985).

¹⁹³U.S. Const. art. I § 8, cl. 8.

¹⁹⁴The period is limited to 17 years for most patents, 35 U.S.C. § 154 (1982), and 14 years for design patents. 35 U.S.C. § 173 (1982).

inventions public.¹⁹⁵ There is no *per se* right to a patent. Denial of a patent does not constitute a taking of property of the inventor.¹⁹⁶ Additionally, Congress may determine, as it has in the area of atomic weapons technology, that no patents will be granted.¹⁹⁷

An inventor's property rights prior to the granting of a patent are inchoate, and only mature after the patent issues.¹⁹⁸ After issuance, the property right continues only as long as the patent is enforceable.¹⁹⁹ It is the exclusive nature of the patent that creates the property right in a patent.

In the 1800's, courts viewed government infringement of a patent as a tort.²⁰⁰ The patent owner generally received no compensation because the Federal Government had not waived sovereign immunity with respect to the torts of its employees.²⁰¹ To avoid the harsh effect of this rule, courts would find an implied contract wherever the United States used a patent "with the consent and express permission of the owner and it did not . . . repudiate the title of the owner."²⁰²

The policy changed in 1910 with passage of a statute²⁰³ allowing suit in the Court of Claims for government infringement. In *Crozier v. Fried. Krupp Aktiengesellschaft*,²⁰⁴ the Supreme Court determined that, under the 1910 statute, government use of a patented invention amounted to the appropriation of a license to use the patent, for which the government was obligated to compensate the owner.²⁰⁵ The "reasonable and entire compensation" granted by the statute was held to include the award of interest on the damages.²⁰⁶

¹⁹⁵35 U.S.C. §§ 261, 271, 281 (1982).

¹⁹⁶*Private Ideas Hearings*, *supra* note 8, at 258 (statement of Mr. Miles Foy, Dep't of Justice).

¹⁹⁷42 U.S.C. § 2181 (1982). For application of the compensation provisions of this statute, see generally *Fletcher v. United States Atomic Energy Comm.*, 192 F.2d 29 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 914 (1952); *Consolidated Eng. Corp. v. United States*, 127 F. Supp. 558 (Ct. Cl.), *cert. denied*, 349 U.S. 939 (1955).

¹⁹⁸*Mullin Mfg. Co. v. Booth*, 125 F.2d 660, 664 (6th Cir. 1942); *Fulmer v. United States*, 83 F. Supp. 137, 149-50 (N.D. Ala. 1949).

¹⁹⁹35 U.S.C. § 261 (1982) (patents have the attributes of personal property); *N.V. Phillips' Gloelampenfabrieken v. Atomic Energy Comm'n*, 316 F.2d 401, 410 (D.C. Cir. 1963) (rights in patent terminated when Congress abolished patents regarding nuclear weapons technology).

²⁰⁰*United States v. Berdan Fire-Arms Co.*, 156 U.S. 552, 566 (1895). See also *Student Papers, Eminent Domain Aspects of 28 U.S.C. 1498*, 4 Pat., Trademark, Copyright J. of Res. & Educ. 257, 260 (1960) (authored by James Denny).

²⁰¹*United States v. Berdan Fire-Arms Co.*, 156 U.S. at 566.

²⁰²*United States v. Societe Anonyme des Anciens Etablissements Cail*, 224 U.S. 309, 321 (1912); see also *United States v. Bethlehem Steel Co.*, 314 U.S. 321, 327 (1922).

²⁰³Act of June 25, 1910, ch. 423, 36 Stat. 851 (1910).

²⁰⁴224 U.S. 290 (1911).

²⁰⁵*Id.* at 305.

²⁰⁶*Waite v. United States*, 262 U.S. 508 (1923).

The current version of the 1910 statute covers not only infringement by the government, but by government contractors as well.²⁰⁷ Section 1498, the successor to the 1910 statute, has been held to be an eminent domain power "taking," which requires compensation under the fifth amendment.²⁰⁸ Courts have advanced two theories for supporting the conclusion that a taking occurs. First, the government use, absent the statutory compensation, diminishes the value of the patent in that the use precludes the owner from collecting normal royalties from the government or its contractors.²⁰⁹ Second, the statute destroys the right of the patent owner to sue government contractors for infringement of the patent.²¹⁰ In effect, the statute takes part of the patent owner's exclusive right by denying the owner the right to sue the contractor for infringement.²¹¹

2. Trade Secrets as Property.

Until publicly disclosed, either by publication or issuance of a patent, a patentable invention falls within the more general category of a trade secret.²¹² Trade secrets are generally defined as: "[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an advantage over competitors who do not know or use it."²¹³

The traditional protection granted trade secrets extends only to protection of the secret against disclosure by improper means or in violation of a contract or other agreement.²¹⁴ Improper means include theft, industrial espionage, and similar disreputable activity.²¹⁵ Conversely, fair means, such as accidental disclosure and reverse engineering, are not prohibited.²¹⁶

Trade secrets are protected by state law, either common law or statute. In *Kewanee Oil Co. v. Bicron Corp.*,²¹⁷ the Supreme Court concluded that "traditional" trade secret law did not violate the su-

²⁰⁷ 28 U.S.C. § 1498 (1982).

²⁰⁸ *Pitcairn v. United States*, 547 F.2d 1106, 1114 (Ct. Cl. 1977).

²⁰⁹ *Calhoun v. United States*, 453 F.2d 1385, 1391 (Ct. Cl. 1972).

²¹⁰ *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 345 (1928) (interpreting the Act of July 1, 1918, ch. 114, 40 Stat. 704 (1918), an earlier version of the current statute).

²¹¹ *Id.*

²¹² *R. Milgrim, Milgrim on Trade Secrets* § 8.02[2] (1986).

²¹³ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-75 (1974) (quoting Restatement of Torts § 757, comment b (1939)).

²¹⁴ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. at 475.

²¹⁵ *Id.* at 476.

²¹⁶ *Id.*

²¹⁷ 416 U.S. 470 (1974).

premacry clause of the Constitution,²¹⁸ thereby allowing states to continue trade secret protection.

Until recently, this limited right to protect the trade secret from unfair discovery did not create a property right in the trade secret.²¹⁹ In *Radioptics, Inc. v. United States*,²²⁰ for example the plaintiff claimed that its proprietary data and trade secrets, which had been submitted to the Atomic Energy Commission in confidence, were taken by the agency's use and release of the data. As one basis for denying relief the Court of Claims concluded that the trade secrets did not constitute "property."²²¹

A recent Supreme Court case rejects this contention, however. *Ruckelshaus v. Monsanto Co.*²²² presented a situation similar to that posed under the Invention Secrecy Act. The company sought approval from the Environmental Protection Agency to market a new pesticide. Applicable law required the company to furnish data regarding the product's safety, as well as its effect on health and the environment. Under some circumstances, the statute authorized the Environmental Protection Agency to use portions of the data to evaluate other products from competing manufacturers. In addition, the agency could publicly disclose some health and safety data. The company claimed that the disclosure and the use of the data by the Environmental Protection Agency constituted a taking of the company's trade secrets in test and analytical data.

The Court concluded that the company did have a property right, based on state law, in the trade secret data, which was protected against seizure by the fifth amendment.²²³ This ruling, if applied to inventions as well as test data, would undermine the traditional distinction between patents and trade secrets.

²¹⁸U.S. Const. art. VI. cl. 2.

²¹⁹*R. Milgrim, supra* note 212, § 8.03 (citing *Belt v. Hamilton Bank*, 108 F. Supp. 689 (D.D.C. 1952), *aff'd*, 210 F.2d 706 (D.C. Cir. 1953) and *Downey v. General Foods, Inc.*, 31 N.Y.2d 56, 334 N.Y.S.2d 874 (1972), as the only cases finding a property right in trade secrets); see also Libbot, *Round the Prickly Pear: The Idea—Expression Fallacy in a Mass Communications World*, 14 U.C.L.A. L. Rev. 735, 758 (1967) (*Belt* is not followed; courts have consistently refused to recognize a property right in noncopy-rightable subject matter).

²²⁰621 F.2d 1113 (Ct. Cl. 1980).

²²¹*Id.* at 1129. The primary basis for denying plaintiff's claim, was that, even if trade secrets were property, a "taking" did not occur where the Commission maintained a security classification on Radioptic's proposal while declassifying a patent application containing the same information. *Id.* at 1126-27.

²²²467 U.S. 986 (1984).

²²³*Id.* at 1003.

The court limited its holding, though, by narrowly construing when a "taking" would occur. The Court concluded that an eminent domain taking would occur only if the federal law created an expectation that the agency would keep the data confidential.²²⁴

The Court went on to find that, as a general rule, submissions to a government regulatory agency do not constitute a taking within the fifth amendment. The Court stated:

[A]s long as [the applicant] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.²²⁵

The result would be more consistent with the existing patent-trade secret dichotomy had the Court concluded that federal statute granted a limited property right in the data by creating an expectation of secrecy in the reports submitted to the agency. In this manner, the property right is limited to submissions required by the statute. Instead, the Court found a more extensive property right in trade secrets, based upon the state law.

3. *The Taking Requirement and the Invention Secrecy Act.*

What constitutes a "taking" within the terms of the fifth amendment is problematic. Whether a taking of property has occurred depends upon the circumstances of each case.²²⁶ As a result, courts refuse to establish rigid rules for determining when a taking occurs.²²⁷

²²⁴*Monsanto*, 467 U.S. at 1013. During the period from October 22, 1972, through September 30, 1978, the law provided a specific method whereby the submitter could require the agency to maintain confidentiality over the submitted data. Both prior to and after that date no such guarantee existed. *Id.* at 1008.

²²⁵*Id.* at 1007-08.

²²⁶*United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (World War II order that had the effect of closing some gold mines where closing was incidental to governmental purpose of maximizing scarce manpower in wartime economy). See also Annotation, *Supreme Court's View as to What Constitutes "Taking," Within Meaning of Fifth Amendment's Command that Private Property Not be Taken for Public Use Without Just Compensation*, 57 L. Ed. 2d 1254 (1978) (analyzing representative Supreme Court cases by the subject matter of the "taking").

²²⁷*United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 156 (1952) (seizure and destruction of Manila oil refinery by U.S. Army just prior to Japanese occupation of the city in 1941 did not entitle owner to compensation under the fifth amendment).

Two general considerations have developed to determine when government action is a "taking": economic impact and physical possession. *Penn Central Trans. Co. v. New York*, 438 U.S. 104, 123-31 (1978); see also Annotation, *supra* note 226. Economic impact views the difference in values before and after the government action. Goldblatt

When a government regulatory scheme is involved, a taking may be found where the regulation diminishes or destroys the value of property, but not every regulation that limits the use of property constitutes a taking.²²⁸ As noted in *Monsanto*,²²⁹ however, the mere submission of trade secrets for the purpose of gaining the benefits of a government license is not sufficient to create a taking.

The patent process poses a similar situation. If the inventor desires to do so, he may keep the invention secret and never request a patent.²³⁰ In doing so he would forgo the greater protection the patent statutes provide, but the limited protection he does enjoy lasts until the secrecy is destroyed.²³¹ Only when the inventor wishes to seek the economic advantage that accompanies the granting of a patent does the invention become subject to government regulation.

4. Government Action.

In regulatory schemes, the government action is apparent. The statute or regulation establishes some form of government involvement. But the actions taken by the government official must be based, either expressly or by implication, upon a valid enactment of Congress.²³² The nature and scope of the action is equally as important. Only injury directly attributable to the taking is compensable; incidental effects of lawful government activity are not.²³³

v. *Town of Hempsted*, 369 U.S. 590, 594 (1962) (economic impact on individual did not overcome constitutionality). The physical possession test, usually used in real property cases, looks at the degree of actual or physical possession by the government. Compare *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (taking found where seizure of a coal mine was accomplished by having the mine management act as agents of the government and posting signs to effect that mine was government property), with *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (regulation having effect of closing mine did not cause taking).

²²⁸ Compare *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (artificially maintaining a river at normal high water mark was a taking where effect was to destroy the value of farm land) with *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. 592 (1941) (artificially raising river for benefit of navigation did not result in a taking of property between the high and low watermarks).

²²⁹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); see also text accompanying notes 222-25.

²³⁰ *United States v. Dubilier Condenser Corp.*, 269 U.S. 176 (1933).

²³¹ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 490 (1974).

²³² *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl.), cert. denied, 396 U.S. 950 (1978).

²³³ *Basin, Inc. v. Federal Energy Admin.*, 552 F.2d 931 (Temp. Emer. Ct. App. 1977) (petroleum industry regulation that prohibited company from making a profit in resales of domestic petroleum was incidental).

B. "POLICE POWER" IN THE NATIONAL SECURITY ARENA.

The term "police power" in a narrow, traditional sense is used to describe the power of the state to act for the public benefit where "essential to the public safety, health, and morals, and to justify the destruction or abatement . . . of whatever may be regarded as a public nuisance."²³⁴ This power is reserved to the states by the Constitution.²³⁵

The Federal Government exercises a second, limited, form of police power based on the "necessary and proper" clause.²³⁶ This limited power is the basis for carrying out virtually all duties of the Federal Government. One of its primary duties is to provide for the common defense.²³⁷ The duty to provide for national security applies both in time of war and peace.²³⁸

The dividing line between eminent domain and application of police power is subtle:

The distinguishing characteristic between eminent domain and the police power is that the former involves the *taking* of property because of its need for the public good while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest.²³⁹

Unlike the power of eminent domain, the exercise of police power does not require compensation for impairment of the property.²⁴⁰ While the value of the property may be diminished, no "taking" has occurred.²⁴¹ In cases involving federal regulation, the regulation must

²³⁴ *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

²³⁵ U.S. Const. amend. X; see also *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

²³⁶ *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155 (1919); see U.S. Const. art I, § 8, cl. 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

²³⁷ U.S. Const. preamble, and art I § 8, cl. 1. *Private Ideas Hearings*, *supra* note 8, at 242 (testimony of Mr. Miles Foy, Dep't of Justice).

²³⁸ *Kentucky Distilleries*, 251 U.S. at 158-59.

²³⁹ *J. Sackman, 1 Nichols on Eminent Domain* § 1.42 (Rev. 8d ed. 1985).

²⁴⁰ *Penn Central Transp. Co. v. New York City*, 348 U.S. 104 (1978); *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1978).

²⁴¹ *Kentucky Distilleries & Warehouse Co.*, 251 U.S. at 155.

be a rational exercise of the power granted by Congress.²⁴² The law is presumed to be constitutional.²⁴³

Where regulation of activity under the police power unreasonably or arbitrarily restricts the use of the property, a taking occurs.²⁴⁴ The regulation must result in a substantial interference with the use of the property.²⁴⁵ A substantial interference has been compared to the creation of a servitude between private landowners.²⁴⁶

C. FARRAND OPTICAL AND EMINENT DOMAIN

Shortly after passage of the Invention Secrecy Act, litigation began in *Farrand Optical Co. v. United States*.²⁴⁷ At issue was the development of a bombsight during World War II.

Development of the sight was initiated after a Army Air Corps employee explained the problem to an employee of Farrand Optical, by the name of Tripp, in 1949.²⁴⁸ Subsequently, Tripp developed a

²⁴²*Condor Operating Co. v. Sawhill*, 514 F.2d 351 (Temp. Emer. Ct. App.), cert. denied, 421 U.S. 976 (1975).

²⁴³*Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (statute is presumed valid and reasonable); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (statute will be upheld if facts known or reasonably assumed support it).

²⁴⁴See *Nollan v. Cal. Coastal Comm'n*, 107 S. Ct. 3141 (1987) (conditioning building permit upon owner's acceptance of public easement over beachfront property amounted to a "taking"); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Sun Oil Co. v. United States*, 572 F.2d 786, 816 (Ct. Cl.), cert. denied, 396 U.S. 950 (1978). The classic statement of the rule is found in *Lawton v. Steele*, 152 U.S. 133, 137 (1894):

To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

²⁴⁵*Penn Central Transp. Co. v. New York City*, 348 U.S. 104, 130-31 (1978) (historic landmark status which prohibited aesthetic changes to Grand Central Station); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Finks v. United States*, 395 F.2d 999, 1003 (Ct. Cl. 1968), cert. denied, 393 U.S. 960 (1968) (impounding of foreign service officer's car to prevent illegal blackmarketing of car in Brazil was not a taking where government agreed to dispose of car in any lawful manner requested by the owner).

²⁴⁶*Penn Central Transp. Co. v. New York City*, 438 U.S. at 130 n.27.

²⁴⁷133 F. Supp. 555 (S.D.N.Y. 1955), aff'd on rehearing en banc by an equally divided court, 317 F.2d 875 (2d Cir. 1962) (motion to dismiss for lack of jurisdiction denied; see also *Farrand Optical Co. v. United States*, 175 F. Supp. 230 (S.D.N.Y. 1959) (liability); *Farrand Optical Co. v. United States*, 325 F.2d 328 (2d Cir. 1963), modifying 197 F. Supp. 756 (S.D.N.Y. 1961) (valuation of use).

²⁴⁸*Farrand Optical Co. v. United States*, 175 F. Supp. 230, 232-242 (S.D.N.Y. 1959), aff'd on rehearing by an equally divided court, 317 F.2d 875 (2d Cir. 1962). This is the most complete recitation of the facts found by the district court.

crude mock-up, which was contained in a wooden box. After presenting the mock-up to various Air Corps officials during 1943, Farrand Optical received a contract to develop the sight.

In part, the contract provided that the government was to have a royalty-free license to make and use the invention for the "duration of hostilities . . . plus six months thereafter."²⁴⁹ During 1946, Farrand Optical participated in discussions to develop Eastman Kodak Company as second source of supply. In 1949, the government learned that Tripp had applied for a patent on the bombsight; Farrand Optical cooperated in obtaining a secrecy order on the Tripp invention by sending a letter to the patent office. The secrecy order issued in 1949, and immediately thereafter Farrand Optical made a claim for compensation under the Voluntary Tender Act.

The secrecy order was removed in 1954, and the patent issued. Shortly before the patent issued, Farrand Optical filed suit in district court under the Invention Secrecy Act's resolution of administrative claim provision.²⁵⁰

The court determined that the war had terminated on September 2, 1945.²⁵¹ The license, therefore, terminated on March 2, 1946, and the Farrand Optical was entitled to receive royalties as compensation for use of the invention from that date until the patent issued.²⁵² The court also found that an implied contract existed between the government and Farrand Optical, based upon the continued, nontortious use after expiration of the license.²⁵³ The court determined that the plaintiff had the option of proceeding under the Invention Secrecy Act in district court, or under the contract in the Court of Claims.²⁵⁴

In assessing damages the court reached an incongruous result. After calculating what it considered a reasonable royalty for the period, the court added an additional award "not as interest but as part of the entire just compensation."²⁵⁵ This implies that the government

²⁴⁹*Id.* at 238.

²⁵⁰See *supra* notes 156-58 and accompanying text regarding whether a plaintiff could sue in district court when the agency had totally denied the administrative claim.

²⁵¹*Farrand Optical Co. v. United States*, 175 F. Supp. at 238; *cf. supra* text accompanying note 65.

²⁵²*Farrand Optical Co. v. United States*, 175 F. Supp. at 250.

²⁵³*Id.* at 247-48. The court cited *United States v. Bethlehem Steel Co.*, 314 U.S. 321 (1922), in support of its finding an implied contract. The court also noted the plaintiff's assistance in the negotiations with Eastman Kodak as demonstrating a factual basis for an implied contract.

²⁵⁴*Farrand Optical Co. v. United States*, 175 F. Supp. 230, 248 (S.D.N.Y. 1959), *aff'd on rehearing by an equally divided court*, 317 F. 2d 875 (2d Cir. 1962).

²⁵⁵*Farrand Optical Co. v. United States*, 197 F. Supp. 756, 773 (S.D.N.Y. 1961), *modified*, 325 F.2d 328 (2d Cir. 1963) (citing *Marconi Wireless Telegraph Co. of Am. v. United States*, 99 Ct. Cl. 1 (1943)).

was taking the property by eminent domain in contrast to the earlier determination that an implied contract existed.

The court of appeals was equally uncertain as to the law. In a two-to-one opinion, a three-judge panel of the court concluded initially that Farrand Optical had a claim based upon an implied contract.²⁵⁶ The court noted that the Invention Secrecy Act preserved the government's right to raise all defenses that it would have if the government was being sued for infringing a patent.²⁵⁷ One such defense is that the government has an implied license to use the invention.²⁵⁸ As a factual basis for this conclusion, the court noted that the discussions with Eastman Kodak negated any argument that a tortious taking occurred.

As a second, related basis for its holding, the court concluded that the use of the invention by the government must be the direct result of the secrecy order.²⁵⁹ The government's use of Tripp's invention predated the imposition of the secrecy order by roughly three years.

On rehearing en banc, the court was evenly divided.²⁶⁰ As this result affirmed the decision of the district court, the case was then returned to the original three-judge panel for determination of the remaining issues.

The panel's decision on liability and damages has had a lasting impact on invention secrecy. The court again determined that Farrand Optical's claim was based on contract.²⁶¹ Then the court noted:

In this situation, as where the Government expressly agrees to pay a fixed royalty rate, no interest can be assessed on the recovery. The fact that the Government had the power, if no agreement were reached, to exercise its power of emi-

²⁵⁶Farrand Optical Co. v. United States, 317 F.2d 875, 876-85 (2d Cir. 1962), *withdrawn*, 317 F.2d at 885.

²⁵⁷*Id.* at 881; see also 28 U.S.C. § 1498 (1982); 35 U.S.C. § 183 (1982).

²⁵⁸Farrand Optical Co. v. United States, 317 F.2d at 881; De Forrest Radio Tel. Co. v. United States, 278 U.S. 236 (1927) (the Court found an implied license to use a patent where an agreement between the government and a licensee of the plaintiff provided that the licensee would not enjoin the government, or sue for damages, if the government had the invention made by others during the duration of World War II).

²⁵⁹Farrand Optical Co. v. United States, 317 F.2d at 880.

²⁶⁰*Id.* at 886.

²⁶¹The court's decision, as well as the decision of the district court, has been criticized as wrongly interpreting when "reduction to practice" has occurred. Nemerovski, *Reduction to Practice: The Farrand Optical Illusion*, 43 J. Pat. Off. Soc'y 99 (1961) (concluding that no reduction to practice occurred prior to the contracting with the Air Corps).

ment domain to take the invention does not convert the arrangement into a Fifth Amendment taking.²⁶²

How the court arrived at the conclusion that the government could take the invention by eminent domain is unclear. The opinion discusses the development of eminent domain law relating to issued patents,²⁶³ but does not apply that law to the patent application under secrecy order.

D. CONSTANT ADDS TO THE CONFUSION

Eighteen years after *Farrand Optical* ended, the Court of Claims approached the fifth amendment issue in *Constant v. United States*.²⁶⁴ The secrecy order lasted only fifteen months. Issuance of the patent was not delayed, because the secrecy order was rescinded before the patent claims were found to be in condition for allowance.²⁶⁵ The inventor sued in the Court of Claims for damages under the Invention Secrecy Act and for compensation under the fifth amendment. The fifth amendment claim was dismissed early in the proceedings.²⁶⁶

The government then moved to dismiss the claim for damages under the Act or, alternatively, for summary judgement. As one basis for its motion, the government claimed the court lacked jurisdiction because the compensation provision of the Act only applied where a taking within fifth amendment had occurred. The government contended the imposition of the secrecy order, without use of the invention, constituted only police power action and not an eminent domain taking.²⁶⁷

The court, citing *Farrand Optical*, concluded damages could be recovered regardless of whether the government action was characterized as a fifth amendment taking.²⁶⁸ The court found that further discussion of the issue unnecessary to the government's motion.²⁶⁹ As a result, *Constant* continued the perception that the Invention Secrecy Act included eminent domain takings.

²⁶²*Farrand Optical Co. v. United States*, 325 F.2d 328, 337 (2d Cir. 1963), *modifying* 197 F. Supp. 756 (S.D.N.Y. 1961) (citing *United States v. North Am. Transp. & Trading Co.*, 259 U.S. 330 (1920)).

²⁶³*Id.* at 336-37.

²⁶⁴617 F.2d 239 (Ct. Cl. 1980).

²⁶⁵*Id.* at 240.

²⁶⁶*Id.* at 240 n.4.

²⁶⁷*Id.* at 241-42.

²⁶⁸*Id.* at 242.

²⁶⁹*Id.* 241-44.

E. THE FIFTH AMENDMENT AND INVENTION SECRECY

The *Farrand Optical-Constant* rationale fails to support the conclusion that an eminent domain taking can occur as the result of the imposition of a secrecy order. *Farrand Optical's* comparison of the Invention Secrecy Act to takings under § 1498 fails to recognize the differences between a patent and a pending application. The decision is similarly insupportable because of the nature of the government action.

For a fifth amendment taking to occur, there must be "property." A patent, by operation of statute, has the attributes of property; the application does not.

Theoretically, the possibility exists that a given invention could so affect the national security that a secrecy order would be required forever. Congress could have foreclosed patents on such highly sensitive technology, as it did with nuclear weapons technology.²⁷⁰ The Invention Secrecy Act accomplishes the same result, without need for additional legislation, by annually renewing secrecy orders where the continued need exists. Even then, no property is lost because none existed.

Extending the attributes of property to the patent application, or the underlying trade secret being disclosed, defeats the purpose of the patent statutes. An inventor has no reason to publicly disclose an invention if it constitutes property that may be protected from seizure as a trade secret.²⁷¹

Even if the property right found in *Monsanto* extends to an invention under a secrecy order, an eminent domain taking does not arise. *Monsanto*, by its terms, does not extend protection over trade secrets to voluntary disclosure to federal agencies for the purpose of gaining the benefits of government licenses, unless an express guarantee of confidentiality exists.

The Invention Secrecy Act grants no such guarantee. By applying for a patent, the inventor agrees to disclose his invention to the public

²⁷⁰See *supra* note 197 and accompanying text. Special legislation was required in that instance because private patents already existed on technology within the field that was being foreclosed from future patents.

²⁷¹It is equally illogical to assert that any property right in the invention applies only against the government. To do so creates greater rights in the invention placed under secrecy than inventions that do not relate to national security. No reason exists for limiting government use of an invention that the general public can use with impunity.

in return for the exclusive right to market the product. This is nothing less than an exclusive license from the government. The Act clearly alerts the patent applicant that his invention is subject to use by the government, in any manner it chooses, until such time as a patent actually issues. Nothing in the Act or its history would indicate that the "government use" implies strictly internal government use. Such an implication, in fact, would be contrary to the common knowledge of how the Federal Government produces required goods and services.

In addition, before concluding that a "taking" occurs, it is necessary to evaluate the character of the government action. Here, as well, no eminent domain taking can be found; only a legitimate exercise of police powers occurs. To reach this conclusion it is necessary to analyze separately the component parts of the government activity: imposition of the secrecy order, and use of the invention by the government.

Imposition of the secrecy order is the result of the government performing one of its primary responsibilities—providing for the common defense through national security. As such, it is acting as sovereign and not in a proprietary nature. When viewed with the presumption of constitutionality, the method of regulation provided in the Act is neither unreasonable nor arbitrary.²⁷²

Without use of the invention, the governmental action is purely regulatory. The inventor retains the full period of the exclusive right to manufacture and use the invention when, and if, a patent issues. The secrecy order merely prevents exploitation of the invention in a manner harmful to the public good, and forces the inventor to maintain the status of his invention as a trade secret until it is deemed appropriate to release the information to the public.

That use of the invention by the government does not constitute a taking is equally defensible, using either the physical taking or economic impact considerations.

Using the economic impact theory, the government activity must substantially diminish the value of the property. The Invention Secrecy Act does not, since the inventor retains the entire term of the limited monopoly. In some cases, it may actually enhance the value of the invention through sales to the government during the term of the order, while retaining the exclusive right to manufacture and use

²⁷²See *Penn Central Transp. Co. v. New York City*, 436 U.S. 104, 132-34 (1978); *Condor Operating Co. v. Sawhill*, 514 F.2d 351, 361-62 (Temp. Emer. Ct. App.), cert. denied, 421 U.S. 976 (1978); *Bassin, Inc. v. Federal Energy Admin.*, 552 F.2d 931, 936-38 (Temp. Emer. Ct. App. 1977).

the invention, provided by the patent, after rescission of the secrecy order.

If viewed on a case-by-case basis, not all inventors will profit from imposition of a secrecy order. Some will lose at least a part of their potential market. But this alone does not constitute a taking where the burden is not substantial.²⁷³ Any discussion that attempts to compare potential profits on an individual invention based on whether a secrecy order was imposed will be highly speculative. The very imposition of the secrecy order precludes establishing whether a market exists for the invention. Therefore, the only method, and not a wholly satisfactory one, is to compare the inventor's benefits before and after the secrecy order is imposed.

After removal of the secrecy order, the inventor receives exactly what he would have received if no secrecy order was imposed—an exclusive right to manufacture and sell the invention for a limited time. With or without the secrecy order, his success in the commercial market is a gamble.

During the period of the secrecy order the inventor can profit by marketing the invention to the government. This additional right offsets whatever damage he may encounter in the commercial marketplace, through obsolescence, and is properly considered in determining the amount of damages.²⁷⁴ The truly successful inventor may actually profit from the imposition of the order by capitalizing on both sales to the government and later commercial activity.

When viewed from the physical taking perspective, the degree to which the government takes control of the invention is important. When the secrecy order is imposed the government does not take all rights to the invention. The government interest is limited in time and also in scope. Depending upon the desires of the inventor, he may seek and receive a permit to patent the invention in certain foreign countries.²⁷⁵ With the notable exception of Japan, this list includes most of the "industrialized nations" where an inventor would seek patent rights.

Additionally, the owner also retains the right to collect compensation for the use of the invention. The right of the inventor to compensation for use of the invention is antithetical to the concept of an eminent domain taking. If the government were taking the invention,

²⁷³ See *Penn Central Transp. Co. v. New York City*, 438 U.S. at 133-34.

²⁷⁴ See *id.* at 136-37.

²⁷⁵ See *supra* notes 131-36 and accompanying text.

then the inventor should be entitled to a lump-sum payment for purchase, not continued payments for use.

Finally, the classification of the Act as police power regulation is consistent with the apparent intent of Congress in creating the Act.²⁷⁶ In particular, the Act makes no provision for compensating government employees, regardless of whether the invention was conceived and reduced to practice in the course of employment or not, or whether the government has claimed any right to the patent.²⁷⁷ If an eminent domain taking were intended, presumably Congress would have provided for government employees as well.

V. COMPENSABLE DAMAGES

A. THE COMPENSATION "WINDOW"

To successfully claim compensation, the inventor must demonstrate use or damage within the period covered by the Act. The time period within which the compensable claims may arise depends upon whether compensation is sought for use or for "damage cause by imposition of the order." For use, the statute specifies that the right to compensation begins with the first use by the government.²⁷⁸

Section 183 is less clear in determining when the right to recover for damages begins. The only reference to accrual of this type of damages is in the administrative claim provision: "An applicant . . . whose patent is withheld as herein provided, shall have the right . . . beginning at the date the applicant is notified that . . . his application is otherwise in condition for allowance . . . to apply . . . for compensation. . . ."²⁷⁹ This provision is capable of two interpretations: (1) that only damages occurring on or after the date of the notice are compensable, or (2) damages occurring prior to the date of the notice are compensable, but the claimant may not file the claim until receiving notice.

²⁷⁶ While congressional intent is not controlling, it is relevant in determining whether a taking of property was contemplated. See *Sun Oil Co. v. United States*, 572 F.2d 786, 819 (Ct. Cl.), *cert. denied*, 396 U.S. 950 (1978).

²⁷⁷ See, e.g., 35 U.S.C. § 1498 (1982) (government employees may claim compensation except where the government could claim an interest in the patent based upon supplying material and other support, where the employee held a job involving research and development, or where the employee exercised supervisory authority to direct that the invention be used).

²⁷⁸ Both the administrative claim and Claims Court suit provisions provide: "The right to compensation for use shall begin on the date of the first use of the invention by the Government." 35 U.S.C. § 183 (1982).

²⁷⁹ *Id.*

The legislative history clearly indicates congressional intent to pay only for patentable inventions.²⁸⁰ Logically, the prohibition on filing an administrative claim prior to notice that "the claims are in condition for allowance" precludes claims on items that are not capable of being patented.

This should not bar claims for damages arising prior to receipt of the notice. The secrecy order may interrupt the normal process of developing markets for a new invention. No damages are allowable prior to the issuance of the secrecy order, however, because the Act requires that the damage be "caused by the secrecy order."²⁸¹

Issuance of the patent terminates the period in which a compensable claim may arise. Although not directly stated, that date is implied by the statute's use of the patent's issuance as the reference date in the statute of limitations provisions.

Such a reading is also consistent with the purpose of providing compensation to inventors. The only other logical cut-off is the date on which the secrecy order is rescinded. Using the rescission date, however, would deny the inventor the ability to make claims against the government for use of his invention from the rescission of the secrecy order until the patent issues.²⁸²

B. COMPONENTS OF "JUST COMPENSATION"

In determining what constitutes "just compensation" required by the statute, it is helpful to separate the topic into three distinct categories: use of the invention, damages caused by the order, and interest. The allowance of attorney fees and related costs is controlled by a separate statute.²⁸³

1. Use of the Invention.

Use is the most clearly defined of the damage categories. The government may manifest the intent to use the invention by directly contracting for its production, as in *Farrand Optical*. The government may also use the invention where government employees, who have had access to the application, employ the innovative aspects of the application in subsequent government designs.

²⁸⁰ See *supra* note 141 and accompanying text.

²⁸¹ 35 U.S.C. § 183 (1982).

²⁸² 28 U.S.C. § 1498 (1982). This section provides the appropriate remedy for use after the patent is issued. Since § 1498 has been interpreted as causing an eminent domain taking, there is no purpose served by continuing the protection of the Invention Secrecy Act after issuance of the patent.

²⁸³ 28 U.S.C. § 2412 (1982).

Congress contemplated compensation based upon either type of use. The Act requires that all persons having access to the application while it is under a secrecy order must sign and date an acknowledgement, which is maintained as a permanent part of the file.²⁸⁴ Congressional intent regarding this requirement demonstrates the desire to assist the inventor in tracing government use.²⁸⁵

2. Damages Caused by the Order.

The Act allows compensation for damages caused by the order; neither the Act nor the legislative history, however, further describe what is contemplated by damages.²⁸⁶ The burden of proving the existence of damages is on the inventor.²⁸⁷

In *United States v. Constant*,²⁸⁸ the court held that the plaintiff had pleaded sufficient injury to avoid a motion to dismiss. The plaintiff claimed that he had been denied loans to finance further development because of the secrecy order; that he could not submit the invention to prospective customers and, therefore, lost markets to other technology; that he had expended personal funds to develop the invention; and that he had expended personal funds in attempts to gain rescission of the secrecy order. Of these claims, only the second and third provided sufficient bases to conclude that the inventor had been damaged by the order.

Neither the inability to incur debt nor the expenditure of funds to rescind the secrecy order provides a proper showing of damage. Inability to obtain a loan because of the secrecy order is not compensable damages. The inventor has suffered no harm in any actual form. Theoretically, the damages may be found in his subsequent inability to develop the invention. But such damages are highly speculative, as they presume that the development of a marketable product can be completed within the amount of the loan.

Allowing the costs of attempting to rescind the secrecy order is not in the public interest, and should not be allowed. If attorney fees or other costs were allowed as damages, the well-financed inventor could accrue exorbitant costs. His money would be recouped either through profits from sales, if the order were rescinded, or by direct payment

²⁸⁴ 35 U.S.C. § 181 (1982).

²⁸⁵ H.R. Rep. No. 1028, 82d Cong., 1st Sess. 5 (1951); S. Rep. No. 1001, 82d Cong., 1st Sess. 3 (1951), reprinted in 1952 U.S. Code Cong. & Admin. News 1321, 1323, *Patent Disclosure Hearings*, supra note 35, at 14.

²⁸⁶ See supra notes 73-77 and accompanying text.

²⁸⁷ *McDonnell Douglas Corp. v. United States*, 670 F.2d 156 (Ct. Cl. 1982); *Lear-Siegler, Inc. v. United States*, 225 Ct. Cl. 663, 665 (1981); *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980).

²⁸⁸ 617 F.2d 239, 244 (Ct. Cl. 1980).

from the government, if the order remained. If the inventor was not well-financed, he could not afford such short-term costs and would face an economic disadvantage.

The loss of markets for inability to promote the invention is similar to the second hypothetical presented by Mr. Rose.²⁸⁹ The injury is real, although determining the damages may prove an impossible undertaking. The inventor must demonstrate more than just existence of a potential market. He must also prove that the secrecy order prevented prospective buyers from using his invention. Otherwise, the loss of the market is only speculative.

The injury is equally real where the inventor has expended personal funds to develop the invention with the idea of marketing his invention to the public, and incurs damages when the secrecy order causes loss of the market. The inventor has expended his funds gambling that he can produce a commercially successful product and profit from his invention. The secrecy order diminishes or destroys the opportunity for that profit. It is this change in the probabilities of success that causes the injury, since it is reasonable to assume that the inventor would not have expended the funds had he known that the market would not exist. This rationale is only applicable where the public market is a significant factor in determining whether to develop the invention.

Where the primary focus of the inventor is on creating a product for military use, damages would not accrue.²⁹⁰ Inventions designed for the military can only be marketed to the Federal Government, or through it to other countries.²⁹¹ Imposition of the secrecy order does not limit the inventor from developing and marketing the invention to the government.

The suggestion of Mr. Rose,²⁹² that damage can be proven where foreign patent rights are lost, is only applicable to the extent that the invention is capable of being marketed outside the United States. Where the government would preclude foreign sales for reasons other than the secrecy order, no damage occurs under the Act. For example, an inventor is not damaged because he cannot get a permit to patent his invention in foreign country *X*, if he would be prohibited from transferring the same technology to country *X* under the Interna-

²⁸⁹ *Patent Disclosure Hearings*, *supra* note 35, at 22; see also *supra* text accompanying notes 83-84.

²⁹⁰ In *McDonnell Douglas*, the court held that the damage caused by the order had to be for a commercial, nongovernmental use of the invention. 670 F.2d at 163-64.

²⁹¹ Military sales to other countries are strictly limited under the International Traffic in Arms Regulation (ITAR), and related regulations. See *supra* note 4.

²⁹² See *supra* note 78 and accompanying text.

tional Traffic in Arms Regulations,²⁹³ even if no secrecy order was imposed.

3. Interest and Delay Damages.

The United States is normally liable to pay interest only after judgment.²⁹⁴ Two exceptions exist: where a statute or contract specifically allows prejudgment interest, and in eminent domain cases.²⁹⁵ The first exception is inapplicable. Neither the Invention Secrecy Act, nor any other statute, specifically provides for prejudgment interest under these circumstances. Where a contract is involved, it will control over the compensation provisions of the Act.

In light of *Farrand Optical*, it is necessary to discuss the eminent-domain-taking exception. The payment is known as delay damages because the purpose is to compensate the plaintiff for the delay in payment.²⁹⁶ The normal method of calculating delay damages is to multiply the damage award by an annual percentage rate for every year between the taking and the judgment.²⁹⁷ The interest has traditionally been calculated as simple interest.²⁹⁸ In *Tektronix, Inc. v. United States*,²⁹⁹ the Court of Claims sanctioned the use of long-term corporate bond rates as the preferred method of calculating the interest rate for delay damages.

C. VALUATION OF THE DAMAGE

As with the entitlement to compensation, the inventor has the burden of proof in establishing the amount of the injury.³⁰⁰

²⁹³ See *supra* note 4.

²⁹⁴ 28 U.S.C. § 1961 (1982). This provision has been interpreted as not providing a waiver of sovereign immunity for the award of interest against the United States in district court. See, e.g., *Thompson v. Kennickell*, 797 F.2d 1015, (D.C. Cir. 1986).

²⁹⁵ *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947).

²⁹⁶ *Pitcairn v. United States*, 547 F.2d 1106, 1120 (Ct. Cl. 1977).

²⁹⁷ *Pitcairn*, a government infringement case under § 1498, involved government use for the entire term of the patent. 547 F.2d at 1110-11. Judgment was awarded to the plaintiff approximately 22 years after the first infringement. The court averaged the rate on long-term corporate bonds over five-year periods to establish a set annual interest rate for each period. In doing so the court specifically rejected two alternative methods: fixing the interest rate according to the actual interest rate charged to the plaintiff during the same time period, and setting the rate according to hypothetical government bonds. *Id.* at 1120-24. Using this method, the delay damages exceeded the actual damages awarded by the time of judgment.

²⁹⁸ *Dynamics Corp. of Am. v. United States*, 766 F.2d 518, 519 (Fed. Cir. 1985), *aff'd in part* 5 Cl. Ct. 591, 619 (1984). The court noted the traditional rule, but concluded that the "reasonable and entire compensation" in § 1498 would allow for compound interest as part of delay damages, if appropriate, based upon the facts of the case.

²⁹⁹ 552 F.2d 343, 352, *modified*, 557 F.2d 265 (Ct. Cl. 1977), *aff'd after remand*, 575 F.2d 832 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978).

³⁰⁰ *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980); see *Lear-Siegler, Inc. v. United States*, 225 Ct. Cl. 663, 665 (1981).

1. Use of the Invention.

This discussion is only concerned with use of the invention in products made by persons other than the inventor. Where the inventor produces a product for the government, which contains the invention, the profit for use of the invention is included in the cost of the product to the government.

Where the government does not contract with the inventor, past experience³⁰¹ has demonstrated that the government must establish the quantity of items it has produced that used the invention. The inventor must establish the infringing nature of the use and the amount of compensation due. To this limited extent the plaintiff must be relieved of the burden of proof for the remedy to be effective. For the inventor to bear the burden of demonstrating the existence of government contracts would be too burdensome. If accurate records are not available a reasonable approximation may be used.³⁰²

Once the amount of use is established, the burden is still on the plaintiff to demonstrate the value of the use. As *Farrand Optical*³⁰³ suggests, the most logical method of determining the value is by multiplying the number of items made by a reasonable royalty rate.

The Court of Claims evaluated several methods of calculating compensation for use in *Tektronix*.³⁰⁴ The most popular method is to use an established commercial royalty rate.³⁰⁵ While this is preferable, it is not feasible when the invention is under secrecy and no commercial market exists. If the inventor can afford to wait, he may be successful in establishing a favorable royalty rate after the order has been rescinded. In doing so he risks the possibility that the invention will not be commercially successful, at a minimum causing him to have delayed obtaining compensation.

³⁰¹In the past, the government has successfully precluded plaintiffs from discovering whether the government has used the invention and, if so, the extent of government use. *AT&T II*, 4 Cl. Ct. 157 (1983) (barring discovery based upon state-secret privilege); *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (barring discovery based upon plaintiff's lack of security clearance).

³⁰²*Calhoun v. United States*, 453 F.2d 1385, 1390 (Ct. Cl. 1972).

³⁰³*Farrand Optical Co. v. United States*, 197 F. Supp. 756, 773 (S.D.N.Y. 1961), modified, 325 F.2d 328 (2d Cir. 1963).

³⁰⁴*Tektronix, Inc. v. United States*, 552 F.2d 343, 347-49, modified, 557 F.2d 265 (Ct. Cl. 1977), *aff'd after remand*, 575 F.2d 932 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978). Other methods, which had previously been used by the court, were not discussed. These included adjusted royalty rate, settlement rate, other contracts between the parties, and savings realized by the defendant.

³⁰⁵*Pitcairn v. United States*, 547 F.2d 1106, 1119 (Ct. Cl. 1977); *Calhoun v. United States*, 453 F.2d 1385, 1394 (Ct. Cl. 1972).

A second method is to evaluate royalties on a comparable invention where a licensee has contracted for the use of the item. This method, however, is totally unsatisfactory. As the court noted in *Tektronix*,³⁰⁶ a comparable market is difficult to establish. Additionally, the theoretical open market existing in the hypothetical is the antithesis of the government monopoly created by the secrecy order. This hypothetical, therefore, bears no relation to the actual situation; the result is too speculative to be of any value.

The method adopted in *Tektronix* involves creating a hypothetical willing buyer/willing seller market at the time of first government use.³⁰⁷ In this method the parties hypothetically negotiate a contract for use of the invention. The reasonable price is established by taking the selling price, from which is subtracted the cost of production and a reasonable profit. The remainder is considered a fair royalty for the item.

In the invention secrecy arena, this method may not accurately reflect the proper royalty either. The only market for the secret invention is the government. As a result, the hypothetical contract must also include a hypothetical open market price. Here again, the correlation between the hypothetical and the actual becomes very tenuous.

A final method the court reviewed was to attempt to establish the lost profits of the inventor through government use of the invention. This method had been used where a royalty rate is not established. The basic formula is to first determine the profit on the contract. A calculation is then made of the smallest separable unit purchased by the government to determine what percentage of the unit consists of the invention. The profit attributable to the separate unit is then multiplied by the percentage to arrive at a profit, per unit, attributable to the invention. Finally, the per unit profit from the invention is multiplied by the number of units purchased; the result is the reasonable compensation for the use of the invention.

This calculation is the best for situations where the invention is under secrecy order and has no commercial market, but it also is not completely satisfactory. The theoretical basis of formula is that the inventor is ready, willing, and able to supply the government's needs.³⁰⁸

³⁰⁶*Tektronix, Inc. v. United States*, 552 F.2d at 348.

³⁰⁷*Id.* at 349-50; see also *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075 (Fed. Cir. 1983); *Georgia-Pacific Corp. v. International Plywood-Champion Papers, Inc.* 448 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971).

³⁰⁸*Tektronix, Inc. v. United States*, 552 F.2d at 348-49.

Where this is not true, the calculation is inaccurate to the extent it does not reflect actual costs for facilities and supplies. Additionally, the profit margin on the item, when sold publicly, may be so high as to constitute excessive compensation.³⁰⁹

2. Damages Resulting from the Order.

In *Lear-Siegler*, the Court of Claims repeated the language of the committee hearings that the standard should be "real concrete evidence of damages," "actual damages," or "a greater proof or ability to pay damages."³¹⁰ The court then found that the proper standard was that the "plaintiff must adduce concrete evidence of damages."³¹¹

The committee hearings demonstrate an intent that the damages remedy was to be a very limited one.³¹² Requiring the inventor to prove actual damages is a substantial burden; what greater proof could be required is uncertain. In most cases, establishing any monetary damages will probably be a considerable burden.

Because any claim for damages caused by the order will be very fact-specific, it is difficult to establish any set rules or criteria other than the general admonition that the damages be actual and not speculative. Some general tendencies can be predicted however.

Compensable damages can be divided into two categories: those costs associated with the termination of efforts to market the invention, and those associated with loss of future markets.

The first area, where the secrecy order causes the inventor to halt efforts to market the invention, is a well-defined area. Proving actual damages should not be difficult as expenditures have been made, costs incurred, and the cost of terminating the activity can be predicted.

The second area is less defined. How can the size and duration of a market be predicted when the inventor has not been allowed to establish whether the market exists? To some degree, the value can be established through expert testimony in market analysis. The degree of accuracy of such a study will depend largely on the amount of information available. Where, for example, an American market is established, the lost foreign market should be capable of accurate assessment by comparison. But, where the entire commercial market

³⁰⁹ *Id.*

³¹⁰ *Lear-Siegler, Inc. v. United States*, 225 Ct. Cl. 663, 665 (1981); *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980). Both cases cite to the *Patent Disclosure Hearings*, *supra* note 35, at 21, 28, 32.

³¹¹ *Lear-Siegler, Inc. v. United States*, 225 Ct. Cl. at 667.

³¹² See *supra* text accompanying notes 72-74.

has been foreclosed, expert testimony as to the size of the lost market borders on speculation.

D. THE "PAPER PATENT"

In theory, the owner of a "paper patent" has an equal right to compensation as the owner of a patent that has undergone actual reduction to practice. The reality is somewhat different. If the invention has never been produced, its usefulness, and even its existence, is only hypothetical. Thus, the damage suffered by imposition of a secrecy order must be based on future developments as well as conditions existing at the time the order is imposed.³¹³

By its very nature the "paper patent" requires the existence of a future event to be commercially successful—the invention must be physically made to perform the function that establishes its utility. If that event occurs, and the invention is subsequently used by the government, there will be little problem.

Where activity to further develop the patent is halted by imposition of the secrecy order the question of injury arises. Under such circumstances, whether the invention can successfully be produced in commercial quantities and at a competitive price is speculative. Imposition of the secrecy order denies the inventor the right to engage in this gamble. It prevents him from profiting, but equally protects him from losing money. Under these circumstances, no compensation is due; whether damages exists is a matter of speculation.

E. GOVERNMENT DEFENSES

Section 183 provides that "the United States may avail itself of all defenses it may plead in an action under section 1498 of title 28."³¹⁴ Section 1498 provides three specific defenses³¹⁵—license, lawful right, and government employee—and raises, by implication, several others.

³¹³In theory, damage could be shown by demonstrating that the imposition of the secrecy order halted further development, thus precluding the successful commercial production until after termination of the order. Inherent in such a theory is proof of commercial production after the secrecy order is lifted. The question then becomes a matter of how rapidly the commercial production would have occurred without imposition of the secrecy order, given technology available at the time the order was imposed.

Alternatively, a claimant could establish damage by showing that commercial production was prohibited by the order, and subsequent advances in technology made the invention commercially obsolete before the secrecy order was removed. Resolving this question requires hypothetically gauging the development time of the later invention, had the now-obsolete invention not been kept secret.

³¹⁴35 U.S.C. § 183 (1982).

³¹⁵28 U.S.C. § 1498 (1982).

Where the government has a license to use the invention, the terms of the license control over the provisions of the statute.³¹⁶ "Other lawful right," as provided by section 1498, include contractual rights,³¹⁷ "shop rights,"³¹⁸ and partial ownership.³¹⁹ Government employees are specifically precluded from receiving compensation under the Invention Secrecy Act.³²⁰

A prerequisite to recovery under section 1498 is that the invention be covered by a valid United States patent. Therefore, any defense that would destroy the validity of the patent would preclude recovery under section 1498. The Invention Secrecy Act provides for recovery prior to issuance of the patent; the right to compensation, however, arises only after the claims have been found to be in condition for allowance.

Any defense that would attack the validity of the patent under section 1498 may also attack the determination that the claims are in condition for allowance under section 183. Defenses that may arise include lack of the statutory requirements of novelty, utility, and unobviousness.³²¹

All of these defenses, as well as the statute of limitations,³²² constitute complete defenses, and relieve the government from any obligation to pay compensation.

³¹⁶DeForrest Radio Tel. Co. v. United States, 273 U.S. 236, 241 (1926).

³¹⁷McDonnell Douglas Corp. v. United States, 670 F.2d 156, 163 (Ct. Cl. 1982) (the government had a right to use the antitank missile system based on a development contract, and, therefore, neither § 1498 nor § 183 was applicable).

³¹⁸Farrand Optical Co. v. United States, 175 F. Supp. 230, 248 (S.D.N.Y. 1959), *aff'd on rehearing by an equally divided court*, 317 F.2d 675 (2d Cir. 1962). A shop right is the right of the employer to the nonexclusive use of a patented invention. The employer is entitled to a shop right when an employee creates or develops an invention during the course of his employment. The employer may also obtain a shop right where the employee uses materials or equipment provided by the employer. The patent owner retains the right to exclude all others from using the invention. *Id.*

The shop right, in the traditional sense, does not exist in this case, because a patent has not yet issued. A similar situation does exist, however. Where a shop right would exist if the patent issued, the government has the right to use the invention. Under traditional trade secret law, the government would have the right to use the information that it received through legitimate means. See *supra* notes 212-14 and accompanying text.

³¹⁹35 U.S.C. § 183 (1982). Compensation is specifically precluded where the government has a property interest.

³²⁰See *supra* text accompanying note 138. The provisions of § 183 are more expansive than the limited defense provided by § 1498.

³²¹See, e.g., *Piet v. United States*, 176 F. Supp. 576, 586 (S.D. Cal. 1959) (prior sales in excess of one year prior to application for patent, which destroyed novelty under 35 U.S.C. § 102 (1982), was also effective to deny recovery under 35 U.S.C. § 183 (1982)).

³²²See text accompanying notes 167-69.

VI. CONCLUSION

Compensation under the Invention Secrecy Act remains a somewhat ill-defined concept. Section 183 is often confusing and contradictory. Efforts to look behind the statute meet with similar results.

With its enactment in 1952, the Invention Secrecy Act significantly changed several aspects of prior law. Among the major changes were the abolition of the "tender" requirement and adoption of an administrative remedy while the secrecy order was in effect. Yet the legislative history provides little insight into these revisions, concentrating instead on admonitions against "speculative damages."

In *Farrand Optical*, the Act was interpreted as an exercise of the Federal Government's power of eminent domain, which results in a "taking" under the fifth amendment. The court's decision focused on a comparison between the Invention Secrecy Act and 28 U.S.C. § 1498. This comparison ignores the substantial differences between a patent application and the issued patent. While the patent has the attributes of personal property, the information contained in the application is merely a trade secret, receiving a considerably narrower scope of protection. The application, as inchoate property, cannot be the subject of a "taking" within the fifth amendment.

To attribute property rights to trade secrets destroys the purpose behind the existence of patents—providing a limited period of economic advantage in return for public disclosure. If trade secrets are property, which can be protected without obtaining a patent, then the inventor has little or no incentive to make his invention public. By not seeking a patent, he has exclusive right to his invention in perpetuity, while a patent terminates his property rights at seventeen years.

An exception that applies only to applications under secrecy order is likewise untenable. If an application is property, the taking of which must be compensated, then the inventor receives greater rights than he would without the secrecy order. Not only does he retain the normal seventeen-year patent period, but he gains an additional indeterminate period of time during which he may sell the invention to the government. What the inventor gains, the public loses. In effect, the public pays twice for the inventor's exclusive right—once when the government pays for the imposition of the secrecy order, and again, through the purchase of products after the patent has issued.

The Invention Secrecy Act is more appropriately viewed as police power regulation than an eminent domain taking. The application and its contents do not constitute "property." The action of the gov-

ernment is not the taking of an interest in the application, but of temporarily suspending the inventor's application where the needs of national security require. The inventor has no claim under the fifth amendment, and is entitled only to the compensation Congress has determined is appropriate.

Once the nature of the government activity is established, the remainder of the issues surrounding compensation revolve around a series of fixed rules and the unpredictable world of evidentiary proof. The inventor has the burden to demonstrate both the entitlement to compensation and the value, or quantum, of the injury.

Compensation for use of the invention provides developed rules by which to determine the value of the injury. By comparison to 28 U.S.C. § 1498, the inventor has accepted methods of demonstrating the value of his invention. Where an established commercial royalty exists, it provides the preferred method of calculating compensation. In the more likely case, where no royalty is established, the value of the injury may be established through the lost profits of the inventor.

Determining damages caused by the order is more problematic. The damages caused must be actual, result from the imposition of the order, and relate to loss of a commercial market rather than loss of defense sales. Valuation of the damages will be essentially an *ad hoc* determination based upon the nature of the injury and the evidence presented.

VII. RECOMMENDATION

Farrand Optical's conclusion that the Invention Secrecy Act takes property by eminent domain should be abandoned. Instead, the Act should be viewed as a condition precedent to the issuance of a patent. Treating the Act in this manner eliminates the need to draw artificial distinctions between patent applications under secrecy order and those not subject to a secrecy order. The condition created by the Act may be stated: A patent will be issued only when public disclosure of the invention by a patent is not detrimental to national security. When viewed as a condition precedent it applies to all applications, although the effect will differ based upon the contents of the application.

The Invention Secrecy Act results from the collision of two constitutional mandates—the duty to provide for the common defense and the power to “promote the progress of science.” In determining whether to promote science or the arts, Congress must determine that the progress is beneficial to the nation. Promoting science by granting patents that are harmful to the nation is inherently contradictory to the purpose of the Federal Government.

The Act relieves this conflict by compelling the inventor to maintain the secrecy of his invention until the needs of national security can allow public disclosure. The provisions for government use of the invention allows the inventor to ameliorate the burden caused by the secrecy order in a manner consistent with the national defense.

1988]

INVENTION SECURITY ACT

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

R. L. DILWORTH
Brigadier General, United States Army
The Adjutant General

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