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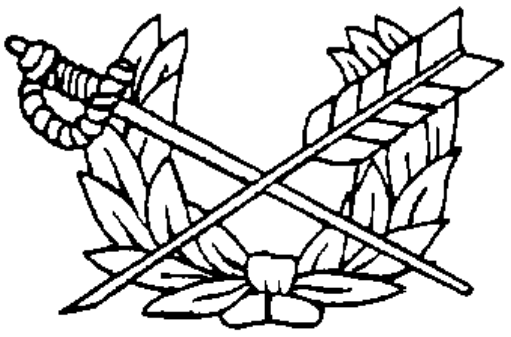

Military Law Review

GOVERNMENT OWNED-CONTRACTOR OPERATED MUNITIONS FACILITIES: ARE THEY APPROPRIATE IN THE AGE OF STRICT ENVIRONMENTAL COMPLIANCE AND LIABILITY?
Major Mark J. Connor

MILITARY POLICY TOWARD HOMOSEXUALS: SCIENTIFIC, HISTORICAL, AND LEGAL PERSPECTIVES
Major Jeffrey S. Davis

INEVITABLE DISCOVERY, THE EXCLUSIONARY RULE, AND MILITARY DUE PROCESS
John E. Fennelly

EQUAL BUT SEPARATE: CAN THE ARMY'S AFFIRMATIVE ACTION PROGRAM WITHSTAND JUDICIAL SCRUTINY AFTER *CROSON*?
Captain Donovan R. Bigelow

GUIDE TO THE RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES COURT OF MILITARY APPEALS
Eugene R. Fidell

BOOK REVIEWS

INDEX: VOLUMES 122-131

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

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MILITARY LAW REVIEW

TABLE OF CONTENTS

Title	*Page*
Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability? Major Mark J. Connor	1
Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives Major Jeffrey S. Davis	55
Inevitable Discovery, the Exclusionary Rule, and Military Due Process John E. Fennelly	109
Equal But Separate: Can the Army's Affirmative Action Program Withstand Judicial Scrutiny After *Croson*? Captain Donovan R. Bigelow	147
Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals Eugene R. Fidell	169
Book Reviews	335
Index for Volumes 122-131	343

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GOVERNMENT OWNED-CONTRACTOR OPERATED MUNITIONS FACILITIES: ARE THEY APPROPRIATE IN THE AGE OF STRICT ENVIRONMENTAL COMPLIANCE AND LIABILITY?

by Major Mark J. Connor*

I. INTRODUCTION

> [W]e find in these contracts [at GOCO munitions plants] a reflection of the fundamental policy of the government to refrain, as much as possible, from doing its own manufacturing and to use, as much as possible (in the production of munitions), the experience in mass production and genius for organization that had made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war production plants. . . . We relied upon that system as the foundation of the general industrial supremacy upon which ultimate victory [in World War II] might depend.[1]

Government owned-contractor operated (GOCO) munitions facilities have been the primary supplier of the nation's military munitions since shortly after the outbreak of World War II. Increasingly, however, this unique[2] partnership of government and private industry has come under attack.

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*Judge Advocate General's Corps, U.S. Army. Currently assigned as Instructor, Administrative and Civil Law Division, The Judge Advocate General's School, Charlottesville, Virginia, 1990 to present. Formerly assigned as a Trial Counsel, 2d Armored Division (Forward), 1983-1985; and as a Litigation Attorney, Department of the Army Environmental Law Division, 1986-1989. B.A., Westminster College, 1979; J.D., University of Missouri-Columbia, 1982; and LL.M., The Judge Advocate General's School, 1990. Member of the Missouri State Bar. This article is based upon a thesis submitted in partial satisfaction of the 38th Judge Advocate Officer Graduate Course.

[1]Powell v. United States Cartridge Co., 339 U.S. 497, 506 (1950).

[2]In United States Cartridge Co. v. Powell, 174 F.2d 718, 726 (8th Cir. 1949), the court noted the uniqueness of the GOCO concept, stating:

> The scheme, which is involved in the present situation, of producing munitions in government owned plants, "through the agency of selected qualified commercial manufacturers," on the basis of cost plus a fixed fee for carrying on the operations, with title to both the materials used [and] the products manufactured resting at all times in the United States, was admittedly a novel and revolutionary set-up in the field of American industrial life.

Perhaps the greatest challenge facing both the Army and private contractors involved in GOCO munitions production has resulted from the growth of the modern environmental movement, whose birth frequently is attributed to the 1962 publication of Rachel Carson's *Silent Spring*. In 1970, Congress reacted to the growing public demand for protection of the environment by passing two major pieces of environmental legislation: the amendments to the Clean Air Act (CAA)[3] and the National Environmental Policy Act (NEPA).[4] Since then, Congress has passed an additional thirty-seven major and minor pieces of environmental legislation[5] that have spawned an explosion of regulatory implementing guidance.[6]

Despite the plethora of laws and regulations, environmental cleanup has proven to be an elusive goal. Both the time and money necessary to achieve effective cleanups routinely have been underestimated, fueling a growing sense of frustration on the part of the public and the Congress.

Further feeding this sense of frustration has been the appearance that federal facilities—particularly those belonging to the Department of Defense (DOD) and the Department of Energy (DOE)—have used the principles of sovereign immunity and federalism as shields to protect them from federal and state environmental laws and regulations.

Moreover, many legislators and environmentalists are outraged that the contractors whose operations have caused the contamination found at GOCO facilities are not being held financially responsible for the costs of cleanup. This outrage has surfaced during congressional hearings on environmental cleanups at federal facilities:

> I'm from Muskogee, OK. Mr and Mrs. Smith live on 14th Street in Muskogee, OK. What they are going to read tomorrow about Tucson is this. They are going to read that Hughes Aircraft improperly disposed of hazardous waste [at the Air Force's GOCO Plant #44] that they [Hughes] were under contract to dispose of with the Air Force. But the Air Force has decided that they

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[3]42 U.S.C. §§ 7401-7642 (1982).

[4]*Id.* §§ 4321-4370a.

[5]*National Defense Authorization Act For Fiscal Years 1990-1991: Report of the House of Representatives Armed Services Committee on H.R. 2461*, 101st Cong., 1st Sess. 238 (1989) [hereinafter *Report on H.R. 2461*].

[6]*Id.* at 239. Between 1970 and 1987, the number of pages in the Code of Federal Regulations devoted to implementing regulations for federal environmental statutes increased from approximately 500 to approximately 9700.

> [the Air Force] is going to pay for it [the cost of the cleanup required as a result of Hughes' improper disposal]. Not only are they going to pay for it, they're going to pay them [Hughes] a profit for cleaning it up. And so, Hughes Aircraft is not [even] being slapped on the wrist, is not being held accountable like Mr. and Mrs. Smith on 14th Street may be if they dump something [hazardous] in their backyard. . . . And what am I going to tell them why there are two sets of standards, one for government contractors and one for the public? What am I going to tell them? What do you want me to tell them?[7]

This article examines whether the GOCO contractual arrangement is still appropriate at Army munitions plants in an era of strict environmental compliance given the strong currents of congressional and public frustration with the pace and cost of environmental compliance and cleanup.

First, the article examines the historical rationale behind the GOCO relationship. Next, the article analyzes the contractual structure of the GOCO relationship. The article continues by discussing the applicability of federal and state environmental statutes to the Army's munitions plants. Because of their broad impact on GOCO munitions facilities, particular attention will be given to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[8] and the Resource Conservation and Recovery Act (RCRA).[9] Finally, the article explores alternatives and modifications to the current GOCO contractual relationship and suggest amendments to existing environmental statutes and procurement regulations that apply to Army munitions facilities.

II. THE GOCO CONCEPT

A. HISTORY AND RATIONALE OF THE GOCO CONCEPT

At the outset of World War II, the notion that the United States would be the arsenal of democracy for munitions production was, at best, wishful thinking. During the 1930's, small arms ammunition

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[7] *Hearings on Hazardous Waste Problems at Department of Defense Facilities Before the Environment, Energy, and Natural Resources Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2nd Sess. 91 (1987) (statement of Rep. Mike Synar).

[8] 42 U.S.C. §§ 9601-9657 (1982 & Supp. V 1987).

[9] *Id.* §§ 6901-6991i.

manufacturing for the Department of War was conducted solely at Frankfurt Arsenal.[10] While a number of commercial firms in the United States manufactured sporting ammunition, no peacetime market existed for incendiary, tracer, or armor-piercing ammunition; therefore, civilian industry lacked even a basic understanding of how to mass-produce these military staples.[11] Moreover, deterioration of stockpiles from World War I production and shipments to Great Britain had depleted total reserves of small arms munitions to less than 400 million rounds.[12]

The situation for larger caliber munitions was even more distressing. On May 1, 1940, the nation's stockpile of large caliber ammunition included only 46,000 37mm anti-aircraft rounds; 75,000 37mm tank and anti-tank rounds; 11,928 five-hundred-pound bombs; and 4,336 one-thousand-pound bombs.[13] As Secretary of War Stinson was to remark in 1943, "We didn't have enough powder [for large caliber munitions in 1940] in the whole United States to last the men we now have overseas for anything like a day's fighting."[14] Because only Frankfurt and Picatinny Arsenals were capable of producing new artillery munitions, the situation was even more desperate.[15]

The cure to this highly unsatisfactory situation was the creation of a GOCO munitions industry. Under the GOCO concept, the government owned the production facilities and equipment, and a contractor managed and operated the production facility pursuant to one or more contracts with the government. In July 1940, the Ordnance Department signed its first GOCO contract with Dupont for the manufacture of smokeless powder at what later was called the Indiana Ordnance Works.[16] By 1944, seventy-two GOCO facilities were operating, twelve of which were devoted primarily to the manufacture of small arms ammunition.[17]

From these GOCO plants, a virtual avalanche of munitions flowed. By the close of the war, over forty-one billion rounds of small arms ammunition and one billion rounds of larger munitions were produced.[18]

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[10]H. Thomson & L. Mayo, U.S. Army in World War II: The Ordnance Department: Procurement and Supply 191 (1960).

[11]*Id.* at 190.

[12]*Id.*

[13]*Military Establishment Appropriations Bill for 1941: Hearings on H.R. 9209 Before the Subcomm. of the Senate Comm. on Appropriations*, 76th Cong., 3d Sess. 423 (1940).

[14]H. Thomson & L. Mayo, *supra* note 10, at 104.

[15]*Id.*

[16]*Id.* at 32.

[17]*Id.* at 105, 200.

[18]*Id.* at 105, 188.

After World War II, a debate raged in Congress over what to do with the GOCO facilities. In 1948, Congress finally passed legislation authorizing the military departments to maintain a reserve of industrial facilities for manufacturing wartime military requirements.[19] The decision to retain a substantial number of the GOCO facilities proved to be wise because a number of the plants were placed back in full production to support the armed forces in the Korean and Vietnam conflicts.

Currently, the Army has twenty-seven industrial facilities that are dedicated to munitions production.[20] Sixteen of the munitions facilities are considered to be in active production.[21] Of the active facilities, fourteen are operated as GOCOs.[22]

Most of the GOCO munitions facilities in use today originally were designed in the 1940's and were operated extensively through the 1960's. Because these periods pre-dated heightened sensitivity to environmental concerns, environmental problems abound at GOCO munitions facilities today.

Past disposal practices have left many of the GOCO facilities with serious soil and groundwater contamination problems. Contaminants found at the facilities include radiologic materials, volatile organic compounds, heavy metals, and explosive compounds. Some are known or suspected carcinogens.[23]

The National Priorities List (NPL) is a congressionally mandated listing of those sites nationwide that the Environmental Protection Agency (EPA) has determined present the greatest threat to the public health and welfare or to the environment.[24] Currently, the NPL contains nine Army GOCO munitions plants.[25] While no reliable

[19]National Industrial Reserve Act of 1948, Pub. L. No. 80-883, 62 Stat. 1225 (1948).

[20]U.S. Army Armament, Munitions and Chemical Command, Pam. 5-1, AMCCOM Facts, at 86-88 (1 Oct. 89) [hereinafter AMCCOM Pam. 5-1].

[21]*Id.* at 85. An "active plant" is one that has ongoing munitions production operations ordered by AMCCOM.

[22]*Id.*

[23]A compilation of environmental surveys conducted for all Army installations, including GOCO munitions facilities, included in the Army's Installation Restoration Program is available from the United States Army Toxic and Hazardous Materials Agency, Aberdeen Proving Grounds, Md.

[24]42 U.S.C. § 9605(a)(8)(B) (1982).

[25]*See* Oil and Hazardous Substance Pollution and Contingency Plan [hereinafter NCP], 40 C.F.R. Part 300, Appendix B (1989); National Priorities List for Uncontrolled Hazardous Waste Sites: Final Federal Facility Site Update, 54 Fed. Reg. 10512 (1989); National Priorities List for Uncontrolled Hazardous Waste Sites, 55 Fed. Reg. 6154 (1990). Eight GOCO facilities are listed on the NPL by name; Milan Army Ammunition Plant (AAP); Cornhusker AAP; Alabama AAP; Joliet AAP; Lake City AAP; Lone Star AAP; Riverbank AAP; and the Louisiana AAP. The Twin Cities AAP is part of the New Brighton-Arden Hills NPL site.

estimate for the ultimate cost is available, by the close of fiscal year 1989, over $130,000,000 had been spent by the Army in cleanup-related activities at these nine facilities.[26] This amount does not include any money spent on facility modernization necessary to achieve compliance with current environmental regulatory standards.

From its inception, the GOCO concept has provided a tradeoff for munitions plant contractor-operators. In return for a lower level of profit than otherwise might be expected, the contractors received virtual immunity from risks resulting from munitions manufacturing operations.[27] For example, the contract governing operation of the St. Louis Army Ammunition Plant (AAP) during World War II stated the following:

> It is the understanding of the parties hereto, and the intention of this contract, that all work. . . is to be performed at the expense and risk of the Government and that the Government shall indemnify and hold the Contractor harmless against any loss, expense, damage or liability of any kind whatsoever arising out of or in connection with the performance of the work under this [contract], except to the extent that such loss, expense, damage, or liability is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they would normally exercise in the conduct of the Contractor's business.[28]

The obvious risks associated with the manufacture of explosives in 1940—catastrophic fire and explosion—still exist today. In 1990, however, the Army and its contractors must confront the risks of liability for the costs of environmental compliance and cleanup. In addition, they can face huge potential damage awards resulting from toxic tort actions.

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[26]Department of Defense, Defense Environmental Restoration Program, Annual Report to Congress For Fiscal Year 1989 B-2 (February 1990) [hereinafter DERA FY 1989 Report].

[27]*See, e.g.*, Letter from S. Maynard Turk, Vice-President and General Counsel of Hercules Inc. to Brian Boyle, Assistant to the General Counsel, Department of the Army (Oct. 16, 1989) [hereinafter Turk Letter]. This letter set out Hercules Inc.'s position regarding the need for indemnification under PL 85-804 to cover its operation of the Radford AAP. In the letter, Mr. Turk stated, "Hercules does operate commercial propellant facilities similar to RAAP, and at those facilities accepts without insurance the risk of environmental releases. However, Hercules performs such operations at its own plants, *and does so at a far greater rate of return in exchange for the assumption of that risk.*" (emphasis added).

[28]United States v. United States Cartridge Co., 95 F. Supp. 389, 392 n.7 (E.D. Mo. 1950).

Between 1983 and March 1989, nine DOD contractors at GOCO facilities were assessed fines totaling in excess of $1,500,000 for violations of RCRA.[29] Moreover, during 1988, state agencies and the EPA had assessed penalties against private parties for violations at a single facility in amounts as high as $8,950,000.[30] In all likelihood, regulators increasingly will seek to fine contractors operating GOCO facilities as a means of compelling environmental compliance. Support for this conclusion is found in two EPA internal memoranda. The first, a January 25, 1988, memorandum from the EPA's Assistant Administrator, Office of Solid Waste and Emergency Response, urged the EPA regions to use all RCRA enforcement mechanisms—including penalty assessments—whenever the contractor is responsible for overall operations or hazardous waste management.[31] The second, a September 8, 1988, memorandum to all EPA regions from the EPA's Director, Office of Waste Programs Enforcement, commended two of the regions for recent initiatives in taking enforcement actions and assessing penalties against operating contractors at GOCO facilities.[32]

The risk of civil actions alleging that the United States and its GOCO facility contractor are liable for CERCLA response[33] costs, personal injury, and property damages is also very real. For example, in *Werlein v. United States*,[34] an action brought primarily under CERCLA and traditional tort theories, the plaintiffs alleged that response costs, personal injury, and property damage have resulted from exposure to toxic chemicals used and disposed of on the Twin Cities Army Ammunition Plant (TCAAP). Ninety-three individual plaintiffs and one municipality seek nearly $100,000,000 from the defendants, one of which is the TCAAP's operating contractor.[35]

Regardless of the outcome in *Werlein*, environmental litigation surrounding the TCAAP already has proven very expensive. In 1988,

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[29]United States General Accounting Office, Hazardous Waste - Contractors Should Be Accountable for Environmental Performance 18 (1989) [hereinafter GAO Report].

[30]*Hearings on H.R. 1056 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 96 (1989) [hereinafter *Hearings on H.R. 1056*].

[31]GAO Report, *supra* note 29, at 23.

[32]*Id.*

[33]42 U.S.C. § 9601(25) (Supp. V 1987) ("The term . . . 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement actions related thereto.")

[34]No. 3-84-996 (D. Minn. filed July 13, 1984).

[35]*Id.* In 1989, as a partial settlement in *Werlein*, the United States paid the Village of St. Anthony $3,000,000 in exchange for a release of the United States and the TCAAP's operating contractor, Federal-Hoffman, Inc.

to settle a companion case to *Werlein*,[36] the United States agreed to pay the City of New Brighton, Minnesota, over $9,000,000 for CERCLA response costs expended by the city.[37] In addition, the United States agreed to pay for the construction of a municipal water treatment system expected to cost over $4,000,000. The United States also agreed to pay for the operation of that system until its use no longer is required to meet federal and state regulatory safe drinking water standards.[38]

While the risks associated with the operation of GOCO munitions facilities have increased, the ability of the Army and its contractors to allocate or shift these risks has decreased. Insuring against the costs of fines never has been possible. Five years ago, however, a contractor could obtain insurance against the risks associated with environmental torts or cleanup costs, albeit in limited amounts and at rates from five to ten times in excess of the rates for policies without that coverage.[39] Moreover, the cost of this insurance was reimbursable by the government.[40]

Recently, however, contractors have found that the insurance for environmental tort or cleanup costs is unavailable at any price. As the operating contractor at the Army's Radford AAP noted, "[t]his lack of insurance is not limited to releases of materials that are toxic, nuclear, or hazardous, but extends to the environmental consequences of the releases of all chemicals, constituents, wastes, or materials."[41]

Environmental problems notwithstanding, GOCO munitions facilities remain a bulwark of the nation's defense. For example, one facility alone—the Lake City AAP—has produced an average of 800,000,000 rounds of small arms ammunition each year since 1984.[42]

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[36]New Brighton v. United States, No. 3-84-1110 (D. Minn. filed July 13, 1984).

[37]Litigation Settlement Agreement Between the United States and the City of New Brighton (August 8, 1988).

[38]*Id.*

[39]*See* Olin Corporation, Olin Proposal to Solicitation DAAA09-84-R-0120, Vol. IV, Part 2, 12-1 (Jan. 21, 1985). In its successful proposal for operation of the Lake City AAP, Olin stated it canvassed 18 leading insurance companies. The only company that would insure Olin against potential environmental liability quoted Olin a premium of $2,500,000 for coverage not to exceed $20,000,000 per occurrence, with a $5,000,000 per occurrence deductible.

[40]Fed. Acquisition Reg. 52.228-7(c) (1 Apr. 1984) [hereinafter FAR].

[41]Turk Letter, *supra* note 27.

[42]U.S. Army Armament, Munitions and Chemical Command, Installation Profile: Lake City AAP 8 (FY 1989).

B. GOCO CONTRACTUAL PROVISIONS

At active Army munitions plants, the GOCO arrangement is the product of two contractual instruments. The first is the facilities contract; the second is the production contract.

Both facilities and production contracts contain standard clauses affecting the scope of a contractor's liability for operating the facility. For the most part, the financial protection to the contractors provided under these standard contractual clauses does not extend to the costs of complying with federal and state environmental laws and regulations. Instead, these clauses are directed towards dealing with the issue of liability for torts, environmental and otherwise, with respect to third persons. To the extent that any of these clauses provide financial protection to the contractor, they are conditioned on the contractor not engaging in willful misconduct nor demonstrating a lack of good faith.[43]

1. The Facilities Contract

The Federal Acquisition Regulation (FAR)[44] recognizes three different types of facilities contracts.[45] The "facilities acquisition" contract contemplates the acquisition, construction, and installation of facilities. The "facilities use" contract provides for the use, maintenance, accountability, and disposition of government furnished property. The "consolidated facilities" contract is a combination of the two contracts described previously. Through the facilities contract, the government provides the contractor with facilities to be used in providing services or producing products under one or more production contracts. Sometimes the facilities are provided at no cost to the government, with the contractor being responsible for all maintenance. At other times, when a cost type contract is being used, the contractor is obligated to maintain the facility at the government's expense.

Standard clauses in facilities contracts deal specifically with environmental protection through pollution control or abatement relating to the Clean Air Act and Clean Water Act (CWA). These clauses, however, merely state a general governmental goal of improving the nation's environment and require the contractor to use its best efforts to meet CAA and CWA standards.[46]

[43]*See, e.g.*, FAR 52.228-7. Other FAR clauses that protect the contractor contain similar restrictions.

[44]48 C.F.R., ch. 1 (1988).

[45]*See* FAR 45.302.

[46]FAR 23.103, 52.223-1, 52.223-2, 52.233-2.

Several other standard FAR clauses, however, indirectly bear on the respective responsibility of the government and the facility contractor to meet applicable environmental regulatory standards. Under the FAR, the government does not warrant the condition or suitability of the facilities for the purposes of the contractor's use.[47] Instead, the contractor must inform the contracting officer, in writing, within thirty days of receipt of the facilities, of any defects that render the facilities unsuitable for the contractor's intended use.[48] The contracting officer then is supposed to direct the contractor to either repair, modify, or return the defective facility at government expense.[49]

No FAR provisions deal explicitly with facilities that become, in effect, defective after the initial thirty-day period as a result of changing environmental standards. Modifications of the plant, to include rearrangement of moveable equipment, to meet environmental standards requires the advance written permission of the contracting officer.[50] Moreover, if removal of these modifications would damage the facilities, the contractor cannot make the alterations, even at his own expense.[51] Thus, the contractor whose government-owned facility develops environmental compliance problems during the term of the facilities contract effectively is barred from modifying the facility to achieve compliance without the contracting officer's consent.

This lack of control used to be of only limited concern to government contractors because of the interplay between the "Liability for Facilities,"[52] "Insurance-Liability to Third Persons,"[53] and "Indemnification of the Government"[54] clauses. Prior to promulgation of the FAR in 1984, these three clauses were standard in virtually all facilities contracts.

The "Liability for Facilities" clause provides that the contractor "shall not be liable for any loss or destruction of, or damage to, the facilities or for expenses incidental to such loss, destruction, or damage."[55] It has remained basically unchanged for at least twenty years and remains a fixture of government facilities contracts.

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[47]FAR 52.245-7(l)(1), 52.245-10(h)(1), 52.245-11(j)(1).
[48]FAR 52.245-7(l)(2), 52.245-10(h)(2), 52.245-11(j)(2).
[49]*Id.*
[50]FAR 52.245-7(d)(6), 52.245-11(c)(3).
[51]FAR 52.245-7(d)(7), 52.245-11(c)(4).
[52]FAR 45.103, 52.245-8.
[53]FAR 52.228-7.
[54]*See* FAR 52.245-7, 52.245-10, 52.245-11. Which clause to use is determined by the type of facilities contract. *See supra* text accompanying note 45.
[55]FAR 52.245-8. Liabilities resulting from willful misconduct or bad faith are not covered. Neither are liabilities that are covered by insurance. *Id.*

Prior to 1984, the "Insurance-Liability to Third Persons" clause provided that the contractor "shall be reimbursed for certain liabilities to third person not compensated by insurance or otherwise without regard to and as an exception to the limitation of costs or limitation of funds clause in the contract."[56] With the promulgation of the FAR in 1984, this clause was amended to provide indemnification "subject to the availability of appropriated funds at the time the contingency occurs."[57] This amendment was necessary to comply with a 1982 Comptroller General decision, which held that the then-existing clause violated the Anti-Deficiency Act[58] and the Adequacy of Appropriations Act[59] because it purported to commit the government to an indefinite liability that could exceed available appropriations.[60] As amended, this clause also is found in all government facilities contracts.

Before the promulgation of the FAR, the "Indemnification of the Government" clause included language by which the contractor agreed to "indemnify the government and hold it harmless against claims or injury to persons or damage to property of the contractor or others arising from the contractor's possession of government facilities, except as provided in the Insurance-Liability to Third Persons Clause."[61] With the promulgation of the FAR, the language of the "Indemnification of the Government" clause has been merged into the "Government Property" clause, except that the language "as provided in the Insurance-Liability to Third Persons Clause" has been deleted.[62] The "Government Property" clause also is standard in government facilities contracts.

As a result of the changes in language, the current "Insurance-Liability to Third Persons" and "Government Property" clauses cannot be harmonized. In the "Insurance-Liability to Third Persons" clause, the contractor is indemnified by the government, subject to the availability of appropriated funds, as to "others" for bodily injury arising from performance of the contract. In the "Government Property" clause, the contractor purports to indemnify the government for liabilities to "others" arising from the contractor's use or possession of the facilities. While the indemnification in the "Govern-

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[56]*See, e.g.*, Defense Acquisition Regulation 7-203.22 (1980) [hereinafter DAR].
[57]FAR 52.228-7(d).
[58]31 U.S.C. § 1341 (1982).
[59]41 U.S.C. § 11 (1982).
[60]Assumption by Government of Contractor Liability to Third Persons, Comp. Gen. Dec. B-201072, May 2, 1982.
[61]DAR 7-702.20 (1976).
[62]FAR 52.245-11(i).

ment Property'' clause appears broader in scope than the indemnification in the ''Insurance-Liability to Third Persons'' clause, no clear rule exists as to which of the clauses has priority.

2. Production Contracts

Through the production contract, the government contracts for production of one or more types of goods at the facility. Generally, two major types of production contracts are used in government contracting: fixed price and cost-type.

At the Army's active GOCO munitions facilities, however, a fixed price production contract is simply too risky for the contractor. In large part this is because in a fixed price contract the contractor must factor the entire cost of environmental compliance into the bid. This is particularly true if the contractor is using facilities provided at no cost to the government. Under that scenario, a contractor using a fixed price contract can be ruined by factors beyond his control. For example, the passage of new federal statutes or regulations could result in increased costs for environmental compliance. The contractor would be barred from any additional recovery, however, by operation of the ''sovereign act doctrine.''[63]

As a result, the use of cost-reimbursement contracts, with provision for some type of award fee, is the norm at active Army GOCO munitions facilities. In cost-reimbursement production contracts, the contractor has two avenues for recovering the costs of environmental compliance. First, the contractor can seek to have the costs included in the overhead costs as an indirect cost of production. Alternatively, the contractor can seek to have the costs determined to be reasonable,[64] allowable,[65] and allocable[66] costs of performing the contract. Currently, however, none of the provisions in the FAR cost principles deal directly with the issue of allowability of environmental costs.

Significantly, the costs of fines and penalties for failure to comply with applicable laws and regulations are generally not allowable.[67] The exception to that rule occurs when the fine or penalty is incurred as a result of specific contractual provisions or written instructions

[63]*See* Horowitz v. United States, 267 U.S. 458 (1925); Overhead Electric Co., ASBCA No. 25656, 85-2 BCA ¶ 18026.
[64]FAR 31.201-3.
[65]FAR 31.205.
[66]FAR 31.201-4.
[67]FAR 31.205-15

from the contracting officer.[68] A contractor will be reimbursed for fines levied by environmental regulatory agencies only under unusual circumstances. Through March of 1989, for example, the EPA and the states assessed fines and penalties in nine cases against DOD contractors for violations of RCRA.[69] None of those fines or penalties paid by contractors, however, were reimbursed by DOD.[70]

Reimbursement for costs incurred as a result of regulatory agency mandated cleanup actions is yet another matter. Under CERCLA and RCRA, for example, a contractor can be ordered to engage in an environmental cleanup both on and off the government facility, without regard to whether or not the contractor violated any laws or regulations.[71] Whether these costs would be allocable and reasonable, particularly if the cleanup was being conducted off the government facility, is unclear.

III. APPLICABILITY OF ENVIRONMENTAL LAWS AND REGULATIONS TO GOCO FACILITIES

> I will insist that in the future federal facilities meet or exceed environmental standards. The government should live within the laws it imposes on others.[72]

In making this promise to force federal facilities to comply with environmental laws, then-presidential candidate George Bush summarized one of the fundamental goals of all environmental legislation passed by Congress since 1970. The Army and its contractors at GOCO munitions facilities clearly are subject to federal environmental law, although limited presidential exemptions exist.[73] Enforcement of these federal laws against the Army and other federal agencies, however, has proven to be problematic.

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[68]*Id.*

[69]GAO Report, *supra* note 29, at 18. As of March 1989, nine DOD contractors at GOCO facilities had been assessed fines. Out of the six cases resolved, contractors paid or agreed to pay fines totaling $913,000 dollars, with another $600,000 dollars to be paid if the contractors did not comply with the settlement agreements.

[70]*Id.*

[71]*See infra* text at Sections III.A. & III.B.

[72]Morrison, *Managing Military Waste*, Government Executive, Nov. 1989, at 30-31 (from a May 1988 campaign speech by then Vice President George Bush).

[73]*See infra* notes 303-05 and accompanying text.

To the extent Congress has waived the sovereign immunity[74] of the United States and no presidential exemption applies, the Army is also subject to state environmental law. Contrary to popular belief, enforcement of state environmental laws against contractors at GOCO facilities also may depend on a congressional waiver of sovereign immunity.[75]

The above described principles apply generally to all federal and state environmental laws. The impact that a waiver of sovereign immunity has on a federal agency varies significantly, depending in large part on the type of facilities the federal agency maintains and the nature of the particular environmental law. Neither CERCLA nor RCRA, for example, recognize the biblical precept that "[f]athers may not be put to death for their sons, nor sons for their fathers; each man is to be put to death for his own guilt."[76] Instead, under CERCLA and RCRA, current owners and operators are potentially liable, not only for releases or threatened releases occurring during their ownership and operation, but also for releases that occurred prior to their ownership or period of operation. Furthermore, an owner's or operator's exercise of due care and non-negligent behavior is of no importance.

Due to the severity of their regulatory schemes, and because they have the broadest impact on the Army's GOCO munitions facilities of all environmental laws, the provisions of RCRA and CERCLA are described in greater detail below.

A. THE STATUTORY SCHEME OF RCRA

The Resource Conservation and Recovery Act originally was enacted in 1976 as an amendment to the Solid Waste Disposal Act. RCRA established a comprehensive management system and imposed requirements for the generation, transportation, storage, treatment,

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[74]In all environmental statutes, Congress has, to varying degrees, actually waived both federal supremacy and sovereign immunity. The waiver of federal supremacy allows states to design their own environmental regulatory and enforcement schemes. The waiver of sovereign immunity allows states to apply and enforce their regulatory schemes against federal entities. Because of the close interrelationship of the concepts, and for simplicity's sake, references in this article to waivers of sovereign immunity also should be considered to include corresponding waivers of federal supremacy.

[75]*See infra* notes 225-28 and accompanying text.

[76]*Deuteronomy* 24:16

and disposal of hazardous wastes.[77] These requirements are detailed in regulations promulgated and administered by the EPA. States may administer their own RCRA programs if authorized to do so by the EPA.[78]

RCRA applies to generators[79] and transporters[80] of hazardous waste and to "owners and operators of hazardous waste, treatment, storage and disposal facilities."[81] A mandatory permitting system is used for regulation of owners and operators of the hazardous waste, treatment, storage, and disposal facilities.[82]

Significantly, RCRA does not define the term "operator."[83] Instead, as a matter of policy, the EPA has defined an operator at a GOCO facility as the person "responsible or partially responsible for the operation, management, or oversight of hazardous waste activities at the facility."[84] This policy recognizes that in some cases both the federal agency and the contractor will qualify as an "operator."[85] In addition, the policy states as a general rule that an agency's contractor at a GOCO facility will be an "operator" and should be required to sign the permit application.[86]

RCRA was amended most recently in 1984, when sections 3004(u) and 3004(v) were added.[87] Prior to these amendments, RCRA's regulatory scheme was directed primarily towards preventing pollution. The enactment of sections 3004(u) and 3004(v), however, moved

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[77]42 U.S.C. § 6903(5) (Supp. V 1987). Under RCRA, the term "hazardous waste" means:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id.

[78]*Id.* § 6926(b).

[79]*Id.* § 6922 (1982 & Supp. V 1987).

[80]*Id.* § 6923.

[81]*Id.* § 6924.

[82]*Id.* § 6925.

[83]On June 8, 1989, legislation was introduced to amend RCRA by adding § 6005. This amendment would require that contractors, who enter into or renew their contract to operate a government owned facility after the effective date of the legislation, be listed on all RCRA permits as the facility operator. *See* H.R. 2597, 101st Cong., 1st Sess., 135 Cong. Rec. H2467-02 (1990).

[84]Memorandum, Office of Solid Waste and Emergency Response, United States Environmental Protection Agency, 24 June 1987, subject: Determination of Operator at Government-Owned Contractor-Operated Facilities.

[85]*Id.*

[86]*Id.*

[87]42 U.S.C. §§ 6924(u), 6924(v) (Supp. V 1987).

RCRA into the area of environmental cleanup, which had been the exclusive domain of CERCLA since 1980.

Section 3004(u) requires the EPA or a state with an authorized program to include "corrective action" requirements in all RCRA permits issued after November 8, 1984. These corrective action requirements deal with the cleanup of "releases of hazardous waste or constituents from any solid waste[88] management unit at a treatment, storage, or disposal facility seeking a permit . . . , regardless of the time the waste was placed in the unit."[89] The term "facility" is not defined by RCRA. The EPA has interpreted it by administrative rule for 3004(u) purposes, however, to mean the treatment, storage, or disposal facility and surrounding contiguous geographic area under the ownership or control of the permit holder.[90] Therefore, a RCRA permit holder can be required to correct the results of prior hazardous waste operations anywhere within the contiguous boundaries of the facility, regardless of his or her lack of involvement in those operations. Because an Army GOCO munitions facility can consist of over 144,000 acres,[91] the potential liability assumed by a RCRA permit holder at a GOCO facility can be staggering.

Section 3004(v) also represents a significant expansion of RCRA. Under this section, the EPA can order owners and operators of landfills, surface impoundments, and waste piles in which liquids or hazardous wastes were placed to engage in corrective action beyond the facility boundary "where necessary to protect human health and the environment."[92]

Violation of RCRA requirements can result in a variety of actions being taken by the EPA or an authorized state in which the facility is located. An administrative civil penalty can be assessed and a civil suit can be filed against a violator to compel compliance through assessment of penalties and imposition of injunctive relief.[93] Criminal penalties can be imposed against "persons"[94] who engage in know-

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[88]RCRA defines solid waste to include "solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations." *See* 42 U.S.C. § 6903(27) (1982).

[89]*Id.*

[90]40 C.F.R. 260.10 (1989).

[91]Hawthorne AAP is comprised of 144,394 acres. The average for all 25 GOCO munitions facilities is 14,701 acres. AMCCOM PAM 5-1, *supra* note 20, at 47-70.

[92]42 U.S.C. § 6924(v) (Supp. V 1987).

[93]*Id.* § 6928(a).

[94]"The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 6903(15) (1982).

ing violations of substantive requirements.[95] Moreover, RCRA section 7003 permits civil suits to compel or restrain action regarding solid or hazardous wastes when "the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."[96] "[A]ny person . . .who has contributed or is contributing to such handling, storage, treatment, or disposal" of the solid or hazardous wastes is subject to these "imminent endangerment suits."[97] Section 7003 has been interpreted to impose strict liability on those who are subject to its provisions.[98]

In cases of imminent endangerment, the EPA Administrator also is empowered to issue administrative orders to the extent necessary to "protect human health and the environment."[99] Violations of these orders can result in judicially assessed fines of $5,000 per day.[100]

Individuals can seek to enforce RCRA through the mechanism of a "citizen suit."[101] As a result, when either the EPA or an authorized state fails to enforce violations of RCRA permits, standards, regulations, conditions, requirements, prohibitions, or orders by means of a civil or criminal action, an individual may seek enforcement through means of a civil suit.[102] The suit can seek injunctive relief, assessment of civil penalties, or both.[103] Prior to filing the suit, however, an individual is required to provide sixty days' notice to the violator, the EPA, and the state in which the violation is alleged to have occurred except when the violation alleged is of hazardous waste management standards.[104]

Even when no RCRA permit exists, individuals can file citizen suits against past and present transporters, generators, and owners or operators of hazardous or solid waste storage or disposal facilities when imminent and substantial endangerment is alleged.[105] Such suits are prohibited, however, if either the EPA or the state concerned

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[95]*Id.* § 6928(d) (Supp. V 1987).
[96]*Id.* § 6973(a).
[97]*Id.*
[98]*See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 737-42 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).
[99]42 U.S.C. § 6973(a) (Supp. V 1987).
[100]*Id.* § 6973(b) (1982).
[101]*Id.* § 6972 (1982 & Supp. V 1987).
[102]*Id.* § 6972(a)(1)(A) (Supp. V 1987).
[103]*Id.* § 6972(a).
[104]*Id.* § 6972(b)(1).
[105]*Id.* § 6972(1)(B).

is diligently pursuing judicial action to remedy the situation.[106] In addition, citizen suits are not allowed if either the EPA or state concerned has commenced a removal action or has incurred costs to initiate, and is diligently pursuing, a remedial investigation and feasibility study (RI/FS) pursuant to CERCLA section 104.[107]

B. THE STATUTORY SCHEME OF CERCLA

In late 1980, Congress passed CERCLA to meet the perceived threat to the country's environment resulting from an estimated 30,000-50,000 improperly managed hazardous waste sites that existed nationwide.[108]

Six years later, Congress passed the Superfund Amendments and Reauthorization Act (SARA),[109] which "provide[d] mandatory schedules for the completion of various phases of response activities, established detailed cleanup standards and generally strengthen[ed] existing authority to affect the Superfund sites."[110] Currently, money for the CERCLA cleanups conducted by the EPA comes from the Hazardous Substance Superfund (Superfund).[111] The Superfund consists primarily of general tax revenues and taxes imposed on the manufacture of chemicals and generators of hazardous wastes.[112] The fund is replenished with amounts recovered by the EPA from parties responsible for the release of hazardous wastes at sites where the Superfund is used to finance the cleanup.[113]

Where RCRA is commonly thought of as a "cradle to grave" mechanism for safely managing hazardous wastes from generation through disposal, CERCLA's focus is directed more narrowly towards cleaning up "releases"[114] of "hazardous substances, pollutants, or contaminants"[115] that already have occurred. Often these releases began decades ago.

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[106]*Id.* § 6972(b)(2)(B).

[107]*Id.* § 9604 (1982 & Supp. V 1987).

[108]United States v. Chem-Dyne Corp., 572 F. Supp. 802, 895 (S.D. Ohio 1983).

[109]Pub. L. No. 99-499, 100 Stat. 1614 (codified at 10 U.S.C. §§ 2701-2710 (Supp. V 1987) and 26 U.S.C. § 9507 (Supp. V 1987); amending and adding various provisions to 42 U.S.C. §§ 9601-9675 (Supp. V 1987)).

[110]United States Environmental Protection Agency, Office of Federal Activities, Federal Facilities Compliance Strategy Appendix A-18 (Nov. 1988) [hereinafter Strategy].

[111]26 U.S.C. § 9507 (Supp. V 1987).

[112]*Id.* §§ 9507(a)(1), 9507(b)(1).

[113]*Id.* § 9507(b)(2).

[114]"The term release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." 42 U.S.C. § 9601(22) (Supp. V 1987).

[115]*Id.* § 9601(14).

Under CERCLA, strict[116] joint and several[117] pecuniary liability can be imposed on four classes of persons[118] for recovery of response costs,[119] natural resource damages,[120] and the costs of any necessary health assessments or studies that are incurred as a result of a release or threatened release of hazardous substances. These classes consist of: 1) the owner and operator[121] of a vessel or facility; 2) any person who at the time of disposal of any hazardous substance owned or operated the facility where the hazardous substances were disposed of; 3) any person who by contract, agreement, or otherwise arranged for the disposal or treatment of hazardous substances; and 4) any person who accepts or accepted a hazardous substances for transport to disposal or treatment facilities.[122]

Through CERCLA, the EPA and the states can recover response costs from responsible persons if the costs were incurred in a manner not inconsistent with the National Contingency Plan (NCP).[123] Private parties also can recover "necessary" response costs from responsible persons so long as the costs incurred were consistent with the NCP.[124] Section 106 of CERCLA also allows the President[125] to issue administrative orders "as may be necessary to protect public health and welfare and the environment."[126] Violation of these "106 Orders" can result in judicially assessed fines of up to $25,000 per day of noncompliance.[127]

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[116]Under CERCLA, liability "shall be construed to be the standard of liability which obtains under section 1321 of Title 33 [Section 311 of the Clean Water Act of 1977, 33 U.S.C. § 1321 (1982)]. 42 U.S.C. § 9601(32) (Supp. V 1987). CWA section 311 consistently has been held by courts to impose strict liability. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

[117]Most courts have held that CERCLA liability is joint and several. *See, e.g.*, *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 732 n.3; *Chem-Dyne Corp.*, 572 F. Supp. at 808-10.

[118]42 U.S.C. § 9601(21) (Supp. V 1987). A "person" under CERCLA is defined identical to the definition of "person" found in RCRA. *See supra* note 94.

[119]*See supra* note 33.

[120]42 U.S.C. § 9601(16) (Supp. V 1987).

[121]Unlike RCRA, CERCLA defines the term "operator" at 42 U.S.C. § 9601(20)(A) (Supp. V 1987). That definition, "any person . . . operating such facility," is, however, of no practical assistance in defining the degree of operational control necessary to be considered an operator.

[122]*See* 42 U.S.C. § 9607(a) (Supp. V 1987).

[123]*Id.* § 9607(4)(A). The National Contingency Plan (NCP) is a reference to the Oil and Hazardous Substances Pollution and Contingency Plan, 40 C.F.R. Part 300 (1989). A revised NCP recently was promulgated by EPA. It took effect on April 9, 1990. *See* 55 Fed. Reg. 8666 (1990).

[124]42 U.S.C. § 9607(a)(4)(B) (Supp. V 1987).

[125]This authority has been delegated to the EPA Administrator. *See* Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987).

[126]42 U.S.C. § 9606(a) (1982).

[127]*Id.* § 9606(b)(1) (Supp. V 1987).

Unlike RCRA, CERCLA has no provision allowing delegation of CERCLA authority over federal facilities by the EPA to the states.[128] According to CERCLA section 120, only those federal facilities not on the NPL are subject to direct state regulation concerning response actions, to include enforcement.[129] Cleanups of federal facilities on the NPL, however, generally are required to be conducted in a manner satisfying those promulgated state standards that are "legally applicable or appropriate and relevant"[130] to the issues presented by each facility's cleanup.

Finally, CERCLA section 310 authorizes any person[131] to file a "citizen suit" in federal district court against any other person, including the United States, "who is alleged to be in violation of any [CERCLA] standard, regulation, condition, requirement, or order."[132] Such an action can seek injunctive relief and civil penalties.[133] Citizen suits cannot be commenced without giving the EPA, the state in which the alleged violation occurred, and the alleged violator sixty days' notice of the alleged violation.[134] Moreover, the action is prohibited if the EPA has commenced and is diligently prosecuting an action under CERCLA or RCRA that would, if successful, compel compliance and remedy the deficiency complained of in the citizen suit.[135]

C. THE CERCLA-RCRA OVERLAP

Since the passage of RCRA 3004(u), the potential for overlapping state and EPA authority in regulating the cleanup of a federal facility on the NPL has existed. Resolution of the issues resulting from this overlap is made particularly difficult by the language in CERCLA section 120(i), which states that "[n]othing in this section shall affect or impair the obligation of any department, agency, or instrumentality [of the federal government] to comply with any requirement of the Solid Waste Disposal Act [RCRA] . . . (including corrective action requirements)."[136] The issues that can result from the CERCLA-RCRA overlap are not merely of academic interest at a GOCO facility. Once the EPA has delegated 3004(u) corrective action authority,

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[128]As of June 1988, 18 states had CERCLA-style statutes that were distinctly separate from the state RCRA program (if any). *See* Clean Sites Inc., A Report On State Hazardous Waste Laws (1989).

[129]42 U.S.C. § 9620(a)(4) (Supp. V 1987). *But see id.* § 9620(i).

[130]*Id.* § 9621(d).

[131]CERCLA defines "person" to include states. *See id.* § 9601(21).

[132]*Id.* § 9659(a)(1).

[133]*Id.* § 9659(c).

[134]*Id.* § 9659(d)(1).

[135]*Id.* § 9659(d)(2).

[136]*Id.* § 9620(i).

states can seek to control directly the cleanup of federal facilities on the NPL outside the CERCLA section 120 process, and without the requirement that CERCLA cleanups be "cost effective."[137] Perhaps even worse, the Army and its contractor can be caught in the middle of a struggle between the EPA and a state over which regulating body—state or federal— will oversee the cleanup; each regulating body may have its own preference in selecting a remedial scheme.[138]

Currently, nine Army GOCO munitions facilities are on the NPL.[139] As of October 1, 1990, RCRA 3004(u) authority had been delegated by the EPA to seven states: Georgia,[140] Minnesota,[141] Colorado,[142] Utah,[143] Idaho,[144] Illinois,[145] and Texas.[146]

Recognizing the potential problem, the EPA has attempted to address the matter through administrative rulemaking. Citing language in CERCLA governing "inconsistent response actions,"[147] the EPA has attempted to preempt the exercise of state RCRA authority at facilities on the NPL where the RI/FS process under CERCLA has commenced.[148] While this approach ultimately may prevail, it has yet to be tested in the courts. At least one court has opined that RCRA and CERCLA are not mutually exclusive regulatory schemes, suggesting that the EPA's approach will encounter judicial resistance.[149]

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[137] *Id.* § 9620(a).

[138] *See* Colorado v. United States Dep't of the Army, 707 F. Supp. 1562 (D. Colo. 1988). In this case, Colorado successfully argued that its state RCRA requirements took precedence over EPA's CERCLA-based cleanup action for Basin F. At the time of the court's decision, Basin F was a non-NPL enclave and alleged RCRA regulated solid waste management unit at the Rocky Mountain Arsenal, a facility on the NPL. Less than a month after the court's decision, EPA added Basin F to the NPL. *See* 54 Fed. Reg. 10512 (1989).

[139] *See supra* note 24.

[140] *See* 51 Fed. Reg. 31,618 (1986).

[141] *See* 54 Fed. Reg. 16,361 (1989)

[142] *See* 54 Fed. Reg. 20,847 (1989).

[143] *See* 54 Fed. Reg. 7417 (1989).

[144] *See* 55 Fed. Reg. 11015 (1990).

[145] *See* 55 Fed. Reg. 7320 (1990).

[146] *See* 55 Fed. Reg. 21383 (1990).

[147] 42 U.S.C. § 9622(e)(6) provides, "When either the President or a potentially responsible party pursuant to an administrative order or consent decree under this Act has initiated a remedial investigation and feasibility study (RI/FS) for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." Under Exec. Ord. 12580, the President's authority has been delegated to the Administrator of EPA.

[148] 54 Fed. Reg. 10520 (1989).

[149] *See Colorado v. United States Dep't of the Army*, 707 F. Supp. at 1569 ("[n]othing in the cited statutes [CERCLA and RCRA] indicates that a CERCLA action should take precedence over a RCRA enforcement action. On the contrary, it appears that CERCLA was intended to operate independently of RCRA, and that the statutory schemes are not mutually exclusive.").

IV. ENFORCEMENT OF ENVIRONMENTAL LAWS AT FEDERAL GOCO FACILITIES

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.[150]

Absent voluntary compliance, the regulatory agencies' ability to enforce environmental laws and regulations against non-compliant parties is critical. While Congress has conferred an impressive array of enforcement mechanisms to the EPA, the states, and private citizens, attempts to use these mechanisms directly against non-complying federal agencies often have been frustrated by principles of federalism.

A. ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS

The EPA is the executive agency with overall responsibility for developing programs to implement federal environmental statutes. By law, however, enforcement of these statutes ultimately is the responsibility of the United States Department of Justice (DOJ).[151] This splitting of authority has, in some circumstances, frustrated the EPA's goal "that Federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities."[152]

The principal source of frustration for the EPA has been DOJ's "unitary executive doctrine."[153] In 1983 the DOJ notified Congress[154] that it was DOJ's policy that executive agencies must resolve their

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[150]The Federalist No. 15, at 159 (A. Hamilton) (B. Wright ed. 1962).

[151]28 U.S.C. § 516 (1982).

[152]Strategy, *supra* note 110. (The quote comes from the introduction to the Strategy written by former EPA Administrator Lee M. Thomas.)

[153]This doctrine's name apparently has been derived from language in Meyers v. United States, 272 U.S. 52 (1926). In *Meyers* the Court stated that the President must supervise his executive officers to ensure "*that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.*" *Id.* at 55 (emphasis added). This language from *Meyers* was cited in the Habicht testimony. *See Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 206-07 (1987). *Meyers* also was cited in the McConnell letter. *See infra* note 154.

[154]Letter from Robert A. McConnell, Assistant Attorney General for Legislative Affairs, to John Dingell, Chairman House Subcommittee on Oversight and Investigations (Oct. 11, 1983), *reprinted in* Strategy, *supra* note 110, at Appendix H.

disputes, including those involving RCRA and CERCLA, within the executive branch through use of Executive Order 12146.[155] DOJ amplified this position in 1985, informing Congress that no case "provides any support for the conclusion that a court may adjudicate a RCRA . . . enforcement action brought by EPA against the Department of Energy (or indeed against any other Executive Branch Agency, whose head serves at the pleasure of the President)."[156]

The doctrine's theory was fleshed out fully in 1987 congressional hearings. At that time, F. Henry Habicht II, Assistant Attorney General for DOJ's Lands and Natural Resources Division, testified that the EPA can neither sue nor unilaterally issue administrative orders to federal facilities because:

> [T]he president has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibilities under Article II, even though Executive Branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered to comply with an administrative order *without the prior opportunity to contest the order within the Executive Branch.*[157]

The EPA has responded to the unitary executive doctrine[158] by

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[155]Executive Order No. 12146, *reprinted at* 28 U.S.C. § 509 (1982). In relevant part, this order provides that:

> Whenever two or more Executive agencies whose heads serve at the head of the president are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General, prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

[156]Letter dated 20 December 1985 from Assistant Attorney General Bolton to Committee Chairman Dingel, *cited in Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 10 (1987).

[157]*Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 210 (1987) (emphasis in original).

[158]The continued vitality of the unitary executive doctrine is in some doubt. Detractors have noted that in a fairly recent case, one federal executive agency, the Department of Commerce (represented by DOJ) sued another, the Federal Energy Regulatory Agency (represented by its agency general counsel), to enforce provisions of an environmental law (NEPA). *See* Confederated Tribes and Bands v. Federal Energy Regulatory Comm'n, 746 F.2d 466 (9th Cir. 1984), *cited in Hearings Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works*, 100th Cong., 2nd Sess. 152 (1988). Even F. Henry Habicht II has acknowledged that he finds it conceivable that in the future EPA would take another federal agency to court for failure to comply with an administrative order. *See Hearings on the Nomination of F. Henry Habicht II to be Deputy Administrator of the Environmental Protection Agency Before the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess. 9 (1989).

establishing a Federal Facilities Dispute Resolution Process.[159] Basically, this dispute process offers federal agencies the opportunity to challenge the terms of an EPA proposed order through various levels of the EPA's regional and national bureaucracy.[160]

If the dispute cannot be resolved between the EPA and the concerned agency, the dispute process requires use of Executive Order 12088[161] for disputes revolving primarily around funding and scheduling issues.[162] The provisions of Executive Order 12146[163] are used if the dispute involves differing legal interpretations relating to environmental compliance.[164]

This dispute process applies generally to all administrative orders or compliance orders that the EPA could contemplate issuing to a federal agency. The only exception currently[165] existing is CERCLA section 106(a) orders, which can be issued by the EPA to other federal agencies with the concurrence of the DOJ.[166] This authority to issue CERCLA 106(a) orders to other federal agencies without consultation with those agencies was delegated to the EPA Administrator by Executive Order 12580.[167]

Even when the EPA is able to issue an administrative order to a federal agency, however, it lacks the ability to enforce the order. As a result of the unitary executive doctrine, the EPA cannot persuade the DOJ to prosecute civil judicial actions against federal agencies under any circumstance. Nor can the EPA currently[168] assess civil fines or penalties against federal agencies,[169] except to assess penalties

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[159]Strategy, *supra* note 110, at VI-10, VI-11.

[160]*Id.*

[161]Exec. Order No. 12088, 43 Fed. Reg. 47707 (1978). Under Executive Order 12088:

> The [EPA] Administrator shall make every effort to resolve conflicts regarding such violation [of pollution control standards] between Executive agencies. . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

[162]Strategy, *supra* note 110, at VI-11.

[163]Exec. Order No. 12146, *reprinted at* 28 U.S.C. § 509 (1982).

[164]Strategy, *supra* note 110, at VI-11.

[165]The House of Representatives has passed legislation that would allow the EPA unilaterally to impose RCRA administrative orders against federal agencies. *See* H.R. 1056, 101st Cong., 1st Sess., 135 Cong. Rec. H3893 (daily ed. July 19, 1989).

[166]Exec. Order 12580, 52 Fed. Reg. 2923 (1987).

[167]*Id.*

[168]The House of Representatives has passed legislation that would allow the EPA to assess administrative penalties against other federal agencies for violations of RCRA. *See* H.R. 1056, 101st Cong., 1st Sess., 135 Cong. Rec. H3893 (daily ed. July 19, 1989). Similar legislation is pending in the Senate. *See* S. 1140, 101st Cong. Rec., 135 Cong. Rec. S6330 (daily ed. May 31, 1989).

[169]Strategy, *supra* note 110, at xii.

for violations of Interagency Agreements (IAGs) reached under CERCLA section 120.[170] Thus, even when the EPA and a federal agency have negotiated a consent order or consent agreement to remedy an environmental noncompliance problem, the EPA lacks the ability to assess a fine or penalty to enforce the agreement. The EPA has responded to this enforceability problem at GOCO facilities with a two-part strategy.

First, it has looked to states and citizens to bring suits to enforce compliance agreements entered into by the subject agency and the EPA.[171] Congress has included "citizen suit" provisions in virtually all federal environmental statutes.[172] The scope of relief allowed under these provisions generally includes the assessment of civil penalties, injunctive relief and attorneys fees and costs.[173] With the exception of citizen suits brought under the "imminent endangerment provision" of RCRA,[174] however, penalties and fines cannot be assessed for violations rectified prior to suit.[175] Moreover, most private citizens lack the financial resources to take a noncomplying federal facility to court. As one state attorney general put it, "if a state feels like it's wrestling a 500-pound gorilla when it takes on one of these Federal facilities without the assistance of U.S. EPA, I would submit to you that there are very few citizens or citizen groups. . .that are going to come close to having the resources to do this type of thing."[176]

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[170]*Id.* Within 180 days of completion of the remedial investigation/feasibility study (RI/FS), CERCLA section 120(e)(2)(a) requires that EPA and the federal agency concerned enter into an IAG for the purpose of expediting the completion of any necessary remedial action at the subject federal facility. 42 U.S.C. § 9620(e)(2) (Supp. V 1987). EPA has pursued a policy, however, of attempting to negotiate IAGs with federal agency before the RI/FS is completed. An early agreement theoretically allows EPA to assess penalties from federal agencies for failure to meet RI/FS deadlines pursuant to CERCLA section 109(a)(1)(e). *Id.* § 9609(a)(1)(e). It also exposes federal agencies to the possibility of suit from states or private citizens seeking to enforce the deadlines pursuant to CERCLA section 310. *Id.* § 9659(a)(1).

[171]Strategy, *supra* note 110, at VII-3.

[172]*See* 42 U.S.C. § 9659 (Supp. V 1987) (CERCLA); *id.* § 6972 (RCRA); *id.* § 1365 (1982) (FWPCA); *id.* § 7604 (Supp. V 1987) (CAA); *id.* § 2619 (Toxic Substances Control Act).

[173]This assumes there has been a waiver of sovereign immunity by the United States. *See infra* section III. B.

[174]*See* 42 U.S.C. §§ 6972(a)(1)(B), 6972(a)(2) (Supp. V 1987). These provisions allow civil penalties to be assessed against the United States for "past and present" handling, storage, treatment, transportation of hazardous or solid waste that may present an "imminent and substantial endangerment" to health or to the environment. While the conduct complained of can have occurred in the past, the language of these sections clearly suggests that the imminent threat must be continuing.

[175]Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987).

[176]*Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 151 (1987) (statement of Ohio Attorney General Celebrezze).

The second part of the EPA's strategy is a "policy to pursue the full range of its enforcement authorities against the [GOCO facility's] contractor operator . . . in appropriate circumstances."[177] This policy, announced in November 1988, quickly was put in effect. By May 1989, the EPA had issued four RCRA section 3008(a)[178] compliance orders to government contractors at GOCO facilities in which the EPA alleged violation of various RCRA hazardous waste management provisions.[179]

From the regulator's viewpoint, this approach has merit. By proceeding against the contractor at a federal facility, the EPA avoids entanglement in the unitary executive doctrine, which fetters its enforcement efforts. Application of the policy, however, easily can run afoul of the contractor's agreement with the federal agency. This situation can occur if the EPA seeks to compel environmental compliance in a manner either specifically not allowed by or beyond the scope of the contract's terms.[180] That such problems are not merely theoretical is illustrated by two recent cases.

In 1987 the DOJ filed suit against General Dynamics Corporation, the operating contractor of the Air Force's GOCO Plant #4, based on the EPA's allegations that aircraft coating materials used by General Dynamics resulted in air emissions violating the Clean Air Act.[181] In a motion to dismiss the action, General Dynamics argued that the coating materials and the process used to apply them were required by the terms of its contract with the Air Force.[182] Significantly, the court recognized the possibility that the terms of the contract with the Air Force could have prevented General Dynamics from achieving air emission control requirements. The court's analysis on this point was cut short, however, because it found that the Air Force

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[177]Strategy, *supra* note 110, at VI-14. What constitutes "appropriate circumstances" is not defined. EPA is, however, in the process of developing a GOCO enforcement strategy, which is expected to provide that definition.

[178]42 U.S.C. § 6928(a) (Supp. V 1987). Through the use of 3008(a) orders, EPA can assess civil penalties for past or current violations of RCRA hazardous waste management requirements and can order compliance with those requirements, either immediately or within a specified time period.

[179]*Hearings Before the Environmental Restoration Panel of the House Armed Services Comm.*, 101st Cong., 1st Sess. 123 (1989) (statement of Bruce Diamond, Director of the EPA's Hazardous Waste Program Enforcement Office). The contractors involved were the operators of the Ravenna AAP, Air Force Plant #4, and DOE's Fernald facility. *Id.*

[180]*See generally supra* section II.B.1. (explanation of standard GOCO facilities FAR contract provisions).

[181]United States v. General Dynamics Corp., No. CA4 84 312K, 18 Envtl. L. Rep. (Envtl L. Inst.) 21297 (N.D. Tex. June 9, 1988) (order denying defendant's motion to dismiss).

[182]*Id.*

had allocated $2.3 million dollars under the contract for the purpose of installing air emission control equipment, which General Dynamics had declined to install.[183]

More recently, Rockwell International Corporation (Rockwell), the operating contractor for the DOE's GOCO Rocky Flats Plant, filed suit against the United States.[184] In that case, Rockwell sought declaratory and injunctive relief to prevent civil or criminal sanctions from being sought against Rockwell or its employees for actions taken in good faith pursuant to Rockwell's contract with the DOE.[185] Rockwell alleged that the performance of its contract with the DOE inevitably resulted in the violation of certain statutes and regulations relating to the treatment or disposal of certain types of purported waste materials. As a result, Rockwell was exposed to civil liability and criminal prosecution for operating the plant in violation of environmental standards. At the same time, however, Rockwell was subject to civil liability for breach of contract if it failed to operate the plant according to its contract.[186]

While the court recognized that Rockwell "appear[ed] to be exposed to a dilemma,"[187] it ultimately denied Rockwell's motion for relief. The court's denial seemed to be influenced heavily by its finding that Rockwell had failed to exhaust its remedies under the dispute resolution clause of the contract.[188]

B. ENFORCEMENT OF STATE ENVIRONMENTAL LAWS

While enforcement is sometimes problematic, it is at least clear that GOCO facilities are subject to federal environmental laws. In many instances, however, the status of such facilities under state law is somewhat unclear.

Fundamental principles of sovereign immunity provide that the United States can be sued only if it "consents to suit."[189] Thus, absent "specific congressional action" that makes that consent or waiver of immunity "clear and unambiguous," states cannot regulate

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[183]*Id.*
[184]Rockwell International Corp. v. United States, 723 F. Supp. 176 (D.D.C. 1989).
[185]*Id.* at 177.
[186]*Id.*
[187]*Id.*
[188]*Id.* at 178-79.
[189]Block v. North Dakota, 461 U.S. 273, 287 (1983).

federal facilities.[190] Not until the CAA Amendments of 1970 did Congress pass environmental legislation that contained a waiver of sovereign immunity.[191] Since then, however, each piece of environmental legislation passed by Congress has included a waiver of sovereign immunity.

After the Supreme Court's decision in *Hancock v. Train*,[192] amendments were passed to the Solid Waste Disposal Act (SWDA),[193] the CAA,[194] the CWA,[195] and the Safe Drinking Water Act (SDWA).[196] In reaction to the Court's "invitation"[197] in *Hancock* to clarify its intent, Congress included new and broader waivers of sovereign immunity in these amendments.

These amendments largely settled the issue of whether federal facilities are required to obtain permits under state laws implementing RCRA, CAA, CWA, and SDWA by expressly making federal agencies subject to state permit requirements.[198]

The liability of federal agencies for state fines and penalties resulting from the noncompliance of their facilities with state environmental regulatory requirements, however, has remained generally unclear. Only when the penalties have resulted from discharge of air pollutants at federal facilities in violation of state laws regulating air pollution have courts uniformly allowed states to assess penalties against federal agencies.[199] This is due in large part to the

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[190]Hancock v. Train, 426 U.S. 167, 179 (1976).

[191]CAA Amendments of 1970, Pub. L. No. 91-604, § 118, 84 Stat. 1678 (current version codified at 42 U.S.C. § 7418(a) (1982)).

[192]*Hancock*, 426 U.S. 167.

[193]Resource Conservation and Recovery Act, Pub. L. No. 94-580, § 2, 90 Stat. 2821 (1976) (codified as amended at 42 U.S.C. § 6961 (1982)).

[194]Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 118, 91 Stat. 711 (codified at 42 U.S.C. § 7418 (1982)).

[195]Federal Water Pollution Control Act Amendments of 1977, Pub. L. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598 (codified at 42 U.S.C. § 1323 (1982)).

[196]Safe Drinking Water Act Amendments of 1977, Pub. L. 95-190, § 8(a), 91 Stat. 1396, (codified at 42 U.S.C. § 300j-6(a) (1982)).

[197]"Should . . . [waiver] . . . be the desire of Congress, it need only amend the act to make its intention manifest." *Hancock*, 426 U.S. at 198.

[198]*See, e.g.*, 42 U.S.C. § 6961 (1982) ("Each . . . agency . . . shall be subject to, and comply with, all . . . State . . . requirements, both substantive and procedural (including any requirements for permits . . . .)").

[199]*See* Alabama v. Veterans Admin., 648 F. Supp. 1208 (M.D. Ala. 1986); Ohio v. Dep't of the Air Force, No. C-2-86-0179 (S.D. Ohio, Mar. 7, 1987).

waiver of sovereign immunity peculiar to the CAA.[200]

On the other hand, courts have been split on whether the waiver of sovereign immunity in the CWA[201] permits states to assess fines or penalties against federal agencies for violation of state water pollution control and abatement statutes.[202] Similarly, courts have been divided on whether the waiver of sovereign immunity in the RCRA[203] allows states to assess civil fines and penalties.[204]

Congress has taken note of this situation and has taken some action to clarify its intent regarding the applicability of state fines and penalties to federal facilities. Recently, it enacted the Medical Waste Tracking Act of 1988 (MWTA).[205] The language of the waiver of sovereign immunity in the MWTA is clear and unambiguous. In relevant part, it reads as follows:

> The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to all administrative orders, civil, criminal, and

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[200]42 U.S.C. § 7418(a) provides:

> Each . . . agency . . . of the federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants. . . shall be subject to and comply with, all Federal, State and interstate and local requirements, administrative authority, and *process and sanctions* respecting the control and abatement of air pollution in the same manner, and to the same extent as any other non-governmental entity (emphasis added).

[201]33 U.S.C. § 1323(a) (1982). The waiver of sovereign immunity in the CWA is in large part a mirror of the waiver contained in the CAA. *See supra* note 172. Unlike the CAA waiver, however, the CWA waiver also states that "the United States shall be liable only for those civil penalties arising under federal law or imposed by a state or local court to enforce an order or the process of such court."

[202]*See* California v. Dep't of the Navy, 845 F.2d 222 (9th Cir. 1988); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) (cases holding no waiver). *But see* Metropolitan Sanitary Dist. of Greater Chicago v. Dep't of the Navy, 722 F. Supp. 1565 (N.D. Ill. 1989); Ohio v. United States Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990) (CWA waiver does subject federal agencies to fines imposed under State law) (cases holding a waiver exists).

[203]*See* 42 U.S.C. § 6961. The section does not explicitly mention civil fines or penalties. It does mention sanctions, but only in the context of judicial contempt proceedings. "Each . . . Agency . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any . . . *provisions for injunctive relief and such sanctions as me be imposed by a court to enforce such relief*). . . ." *Id.* (emphasis added)

[204]*See* United States v. Washington, 872 F.2d 874 (9th Cir. 1988); Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986); *MESS*, 655 F. Supp. 601; Mitzelfelt v. Dep't of Air Force, 903 F.2d 1293 (10th Cir. 1990) (cases where no waiver of sovereign immunity was found). *But see* Ohio v. United States Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990) (RCRA).

[205]Pub. L. No. 100-582, 102 Stat. 2953 (1988) (to be codified at 42 U.S.C.A. § 6992 (West Supp. 1988)).

> administrative penalties and other sanctions, including injunctive relief, fines, and imprisonment. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such order, penalty, or other sanction. For purposes of enforcing any such substantive or procedural requirement . . . against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States.[206]

Recently, Congress also has considered various bills that would add to RCRA a clear and unambiguous waiver of sovereign immunity that would subject federal agencies to state fines and penalties.

The most recent congressional effort in this area is H.R. 1056, the Federal Facilities Compliance Act. Among other[207] changes, the bill would amend the waiver of sovereign immunity in RCRA so that states would be able to impose administrative and judicial civil sanctions against noncomplying federal agencies.[208] As one state's attorney general said with considerable understatement, "The bill [H.R. 1056] . . . goes a long way towards ensuring that Federal facilities will be treated in the same manner under RCRA as private facilities. . . ."[209]

H.R. 1056 was supported by the EPA[210] and by the attorneys general[211] of all fifty states. Its passage was opposed by DOJ, DOD,

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[206]42 U.S.C.A. § 6992e.(a) (West Supp. 1989).

[207]H.R. 1056 also would broaden significantly EPA's ability to enforce RCRA against other federal agencies. *See supra* notes 151-57 and accompanying text.

[208]DOJ noted that not only was a waiver subjecting federal agencies to state criminal prosecutions unprecedented, but also it was unnecessary (because individual federal employees were subject to criminal prosecution under RCRA and agencies were subject to injunctive relief) and unworkable (because you can hardly imprison a federal agency). *See Hearings on H.R. 1056*, *supra* note 29, at 115-16, (statement of DOJ's Donald Carr, Acting Assistant Attorney General, Lands and Natural Resources Division)

[209]*Id.* at 46. (statement of Colorado Attorney General Duanne Woodard)

[210]EPA's support was gained after the bill had been amended to make it clear that federal employees could not be held individually liable for civil fines and penalties under RCRA. *See* 135 Cong. Rec. H3894 (daily ed. July 19, 1989). Originally, EPA *officially* had opposed passage of H.R. 1056. That opposition was tepid, however. In congressional hearings on H.R. 1056, the EPA's Jonathan Z. Cannon, Acting Assistant Administrator, Office of Solid Waste and Emergency Response, testified that while the official position of EPA was to oppose passage, "[t]he position my office has taken in internal discussions within my agency and with other Federal agencies is that H.R. 1056 would offer useful provisions to improve or to encourage compliance on the part of Federal Facilities under RCRA." *Hearings on H.R. 1056*, *supra* note 29, at 130.

[211]*See* 135 Cong. Rec. H3895 (daily ed. July 19, 1989).

and DOE.[212] Ultimately, however, H.R. 1056 was passed by the House on July 19, 1989, by a vote of 380 to 39.[213]

On May 31, 1989, Senate Majority Leader Mitchell introduced S. 1140, which is companion legislation to H.R. 1056.[214] S. 1140 is virtually[215] identical to H.R. 1056 in its treatment of federal facilities. A final vote on S. 1140 is pending.

Should the provisions of H.R. 1056 or S. 1140 ultimately become law, states would have unprecedented power to apply state law to regulate operations involving hazardous wastes at all federal facilities. The effect on DOD facilities could be tremendous. As one critic noted:

> Ohio Representative Dennis Eckart's bill [H.R. 1056] would waive the federal sovereign immunity clause under the Solid Waste Disposal Act, thereby inviting every legal yahoo and politician in the country to sue the Defense Department for not instantly cleaning up waste sites. Fines and penalties will run into the tens of millions of dollars.[216]

Absent the enactment of H.R. 1056, S. 1140, or similar legislation, states likely will step up RCRA enforcement actions against contractors at GOCO facilities. Contractors at Army GOCO munitions facilities, however, stand a fair chance of avoiding this surrogate liability. They can argue that their activities are performed pursuant to contract with the Army in fulfillment of a federal function, thus shielding the contractors with sovereign immunity to the same extent that the Army is shielded.

Support for this theory is found in a series of cases stretching back to 1940, beginning with *Yearsley v. W.A. Ross Construction Co.*[217] In *Yearsley* the Supreme Court held that a public works contractor was not liable for the performance of its federal contract because it acted essentially as an agent of the government and was entitled to the same immunity available to the government.[218] While the holding in

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[212]*Hearings on H.R. 1056, supra* note 29.

[213]135 Cong. Rec. H3895 (daily ed. July 19, 1989).

[214]S. 1140 , 101st Cong. 1st Sess., 135 Cong. Rec. S6330 (daily ed. May 31, 1989).

[215]S. 1140 would allow the Administrator of EPA to take administrative enforcement actions against federal agencies. EPA could not issue administrative orders to federal agencies, however, until they had an opportunity to confer with the EPA Administrator, a requirement not found in H.R. 1056.

[216]*A Routine Outrage*, Wall St. J., July 19, 1989, at A-14, col. 1, *reprinted in* 135 Cong. Rec. H3890 (daily ed. July 19, 1989) (statement of Rep. Ray).

[217]Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940).

[218]*Id.* at 21-22.

Yearsley never has been adopted in a case involving a state enforcement action of an environmental statute, it did find application in at least one case involving nuisance, the common-law predecessor to modern environmental enforcement actions.

In *Green v. ICI America, Inc.*[219] the plaintiff sought to recover damages for the creation and maintenance of a nuisance. The defendant in the case, the operating contractor at the Army's Volunteer AAP, a GOCO munitions facility, admitted that normal operation of the plant required the emission of visible and odoriferous smoke and vapors.

The court found that the contractor was shielded by sovereign immunity. The court held that

> where the act, or failure to act, which causes an injury is one which the contractor was employed to do, and the injury results not from the negligent manner of doing the work but from the performance thereof or failure to perform it at all, the contractor is entitled to share the immunity from liability which the public enjoys.[220]

The only court directly addressing the issue of whether a contractor at a GOCO facility is shielded by sovereign immunity from fines imposed for violations of state environmental requirements has found, however, that the contractor was not protected. In *United States v. Pennsylvania Environmental Hearing Board*[221] the court considered whether the operating contractor of the Scranton AAP could be fined by the State of Pennsylvania for the discharge of 1.5 million gallons of untreated waste water into a tributary of the Lackawana River. Relying on the Supreme Court's rationale in *Powell v. United States Cartridge Co.*,[222] the court held that because the contractor was an independent contractor, it did not qualify as a "department, agency, or instrumentality" under section 313 of the

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[219]Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973). *Green* does not cite *Yearsley*. Other courts, however, have recognized that *Green* is simply a restatement of the holding in *Yearsley*. *See, e.g.*, Schrader v. Hercules, Inc., 489 F. Supp. 159 (W.D. Va. 1980).

[220]*Green*, 362 F. Supp. at 1265.

[221]United States v. Pennsylvania Envtl. Hearing Bd., 584 F.2d 1273 (3d Cir. 1978).

[222]Powell v. United States Cartridge Co., 339 U.S. 497 (1950). In *Powell* the issue before the Court was whether the United States Cartridge Company, the operating contractor of a GOCO munitions facility, was exempt from the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, since the law did not apply federal agencies or instrumentalities. The Court held that United States Cartridge was not a federal agent or instrumentality because it was an independent contractor.

CWA,[223] and was therefore not immune from the state's assessment of civil penalties.[224] The court did consider *Hancock v. Train*[225] in reaching its decision, ultimately deciding, however, that *Hancock* was only "marginally relevant" and "superceded by statute."[226]

Despite *Pennsylvania Environmental Hearing Board*, the Supreme Court's decision in *Goodyear Atomic Corp. v. Miller*[227] breathed new life into the argument that operating contractors at GOCO facilities can be shielded by sovereign immunity.

In *Goodyear Atomic* the issue was whether or not Ohio's workers compensation law applied to the activities of an operating contractor at a DOE GOCO nuclear facility. In sharp contrast to the *Pennsylvania Environmental Hearing Board*, the Court stated that "*Hancock* thus establishes that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is performed by a *private contractor*, unless Congress clearly authorizes such regulation."[228] As a result of *Goodyear Atomic*, the holding in *Pennsylvania Environmental Hearing Board* is of doubtful further significance. Future cases deciding whether or not a contractor is shielded by sovereign immunity likely will revolve not around the status of the contractor, but instead on the nature of the function performed by the contractor's activities. At least at those GOCO munitions facilities where all production is for the benefit of the government,[229] the operating con-

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[223]33 U.S.C. § 1323 (1982) (CWA's waiver of sovereign immunity provision).

[224]This decision illustrates the central weakness of *Yearsley*, which speaks in terms of contractors acting as the "agent" of the government. Currently, all of the Army's contracts for its GOCO munitions facilities state that the contractor *is* an independent contractor and *is not* an agent of the United States. As a result, courts understandably would be reluctant to use an agency rationale to cloak a contractor in sovereign immunity.

[225]*Hancock*, 426 U.S. 167. In *Hancock* one of the installations that was the subject of the decision was the Paducah Gaseous Diffusion Plant, a DOE GOCO nuclear production facility. In striking down a requirement by the State of Kentucky that the DOE facility obtain state air emissions program permit, the court stated that the "'federal function must be left free' of [state] regulation" absent clear congressional authorization to the contrary. *Id.* at 179 (quoting Mayo v. United States, 39 U.S. 441, 447 (1943)).

[226]*Pennsylvania Envtl. Hearing Bd.*, 584 F.2d at 1280 n.22.

[227]Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988).

[228]*Id.* at 181 (emphasis added).

[229]Some GOCO munitions facilities engage in various third-party DOD and export ventures. These activities generate additional profits for the contractor and also reduce total costs to the government through savings realized from increased equipment utilization rates and greater economies of scale. In 1986, for example, Olin Corporation, the operating contractor at the Lake City AAP, generated $1,650,000 in sales of products produced at Lake City to other DOD suppliers. *See* Olin Defense Systems Group, Lake City Army Ammunition Plant (1986) (contractor's information brochure).

tractors should have an excellent argument that their activities constitute the type of federal function to which *Goodyear Atomic* accords the protection of sovereign immunity.

Any success that contractors have in gaining protection through sovereign immunity, however, is likely to be short-lived. Congress clearly is in the mood to restrict the application of sovereign immunity in the environmental area. Should a significant number of contractors be afforded immunity from state enforcement actions, Congress almost certainly will take the hint given by the Court in *Hancock* and pass additional legislation to remove such protection clearly and unambiguously.[230]

V. METHODS OF DEALING WITH THE ENVIRONMENTAL CHALLENGE AT GOCO MUNITIONS FACILITIES

> The environmental movement is inescapably political, despite the scientific and technical nature of the solution to its policy problems. Its focus is on government action on many fronts; it involves conflicts and controversies over what should be done, how it should be done, and who should do it; it requires difficult choices as to both social ends and means; it deals with essential goals and purposes. And no easy calculus is available to tell us which choices to make.[231]

The era of strict environmental enforcement and liability clearly poses a stiff challenge to the continued vitality of the GOCO concept at Army munitions facilities. The Army can, however, choose to meet the challenge in a number of ways.

Options available include providing total indemnification for its GOCO contractors, privatizing munitions production by selling the munitions facilities to private industry, and convincing Congress that GOCO facilities should not be subject to broad waivers of sovereign immunity in environmental statutes.

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[230]On June 8, 1989, H.R. 2597 was introduced. The bill provides that contractors who enter into or renew contracts after enactment of the legislation would not enjoy any immunity applicable to the United States, or to officers, employees or agents of the United States. It also would require that contractors at GOCO facilities be the operators for RCRA permits issued by the EPA or states. *See* H.R. 2597, 101st Cong., 1st Sess., 135 Cong. Rec. H2467-02 (1990).

[231]N. Wengert, The Political Allocation of Benefits and Burdens: Economic Externalities and Due Process in Environmental Protection 1 (1976).

This section discusses each of those possible "fixes." Each is accompanied by distinct advantages and disadvantages. Ultimately, however, the feasibility of each option depends on Congress's willingness to make difficult decisions involving the often competing national priorities of protecting the environment and of providing a strong national defense at a reasonable price.

A. USE OF PUBLIC LAW 85-804

As previously discussed, a 1982 Comptroller General opinion severely limited the Army's ability to indemnify GOCO munitions plant contractor-operators.[232] The current FAR provision dealing with contractor indemnification, the "Insurance - Liability to Third Persons" clause, subjects the applicability of its coverage to "availability of appropriated funds" at the time the contingency occurs.[233] Moreover, the clause purports to cover only "property damage and personal injury" suffered by third parties.[234]

Fines assessed by the EPA and state agencies against a contractor are not covered by the clause. It is not clear, however, whether cleanup costs incurred as a result of a successful CERCLA response cost action against the contractor fall within the meaning of "damages to property" of third parties. The term "property," as it applies to third parties, is not defined by the FAR. Courts have been split on the issue of what constitutes "property" in insurance litigation involving environmental cleanups. For example, one court has gone so far as to find that property damages occur when "the environment has been adversely affected by the pollution to the extent of requiring governmental action or expenditure."[235] Another court, however, has characterized CERCLA response costs as economic losses instead of damage to tangible property.[236]

Of course, a contractor also can argue that fines and response costs are recoverable under its contract, assuming it is operating under a cost-type contract. As previously mentioned, however, DOD policy is that fines assessed against contractors are recoverable costs only in unusual circumstances.[237] Additionally, the contractor would have to demonstrate, among other requirements,[238] that the costs incurred

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[232]*See supra* note 60 and accompanying text.
[233]FAR 52.228-7.
[234]*Id.*
[235]Kipin Indus. Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, (1987).
[236]Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986).
[237]*See supra* notes 67-70 and accompanying text.
[238]They have to prove that the costs were "reasonable" and "allowable." *See* FAR 31.201-3, 31.205.

in performing a cleanup were allocable against the current contract.[239] Such a showing would be almost impossible to make if the cleanup was required to be undertaken off the facility[240] or if the actions that resulted in the need for the cleanup were performed prior to the contract period in which the claim for costs is made.[241] As a result of these uncertainties, and to provide contractors with protection from catastrophic financial harm and ensure their willingness to continue to operate GOCO munitions facilities, the Army has turned to the National Defense-Contracts Act (PL 85-804).[242]

In relevant part, PL 85-804 states:

> The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government to enter into contracts or into amendments of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modifications of contracts, whenever he deems that such action would facilitate the national defense.[243]

Thus, use of PL 85-804 allows the Army to provide indemnity[244] to its contractors without regard to the limitations imposed by the Anti-Deficiency Act.[245] Certain statutory prerequisites to the use of PL 85-804 exist. First, if use of PL 85-804 could obligate the United States

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[239]FAR 31.201-5.

[240]Because contamination can leach through the ground and enter groundwater, it is not unusual for the contamination to migrate off the facility. For example, volatile organic compounds (chlorinated solvents) disposed of on TCAAP have migrated through the groundwater and affected the water supplies of the City of New Brighton, Minnesota; and the Village of St. Anthony, Minnesota. These municipalities are located 2.5 and 4.5 miles downgradient from TCAAP, respectively. *See* DERA FY 1989 Report, *supra* note 25, at B-91.

[241]Potentially, a contractor could also make a claim against a previous contract if the fine or costs were allocable to it and final payment under the previous contract had not yet been made.

[242]50 U.S.C.A. § 1431-35 (West Supp. 1989).

[243]*Id.* § 1431.

[244]PL 85-804 never actually mentions indemnity. Legislative history, however, makes it clear that indemnification is one of the major reasons for the enactment of the legislation. *See* H.R. Rep. No. 2232, 85th Cong., 2d Sess. 4 (1958); *see also* S. Rep. No. 2281, 85th Cong., 2nd Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4043, 4045.

[245]*See* 31 U.S.C. § 1341(a)(1)(B) (1982) (providing that the prohibitions of contracting before or in excess of appropriations are not applicable if otherwise permitted by law).

to pay in excess of $50,000, the head of the agency or his deputy is required to make a determination that its use is necessary to facilitate the national defense.[246] Second, any use of the authority that could obligate the United States to pay more than $25,000,000 is not supposed to be exercised unless both the Senate and House Armed Services Committee have had an opportunity to veto use of the authority.[247] Third, PL 85-804 is effective only during periods of national emergency declared by Congress or the President and for six months following the termination of the period, or such shorter periods as designated by concurrent congressional resolution.[248] Finally, indemnification provided under PL 85-804 will not protect against nonsubrogated claims by the United States against the contractor that result from willful misconduct or lack of good faith on the part of the contractor's officers or directors.[249]

Executive Order 10789,[250] which implements[251] PL 85-804, also contains certain restrictions. The most important of these is that the amount of indemnification must be limited to amounts previously appropriated and authorized unless the claim or loss arises or results from risks defined by the contract as being unusually hazardous or nuclear in nature. Following the Comptroller General's 1982 decision, which effectively held that the indemnification purported to be provided by DAR 7-203.22 was of no effect,[252] the push to use PL 85-804 to indemnify GOCO munitions contractors gained momentum. Clearly, the munitions contracts facilitate the national defense. What constitutes "unusually hazardous" activities, however, has proven more difficult to define.

In 1984, Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management, testified before Congress that "unusual-

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[246]50 U.S.C.A. § 1431 (West Supp. 1989). Executive Order 10789 allows delegation of this authority to heads of the military departments.

[247]*Cf.* Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). Since *Chadha*, statutory provisions providing for a legislative veto are presumably ineffective. The Army, however, continues to have an obligation to notify Congress as to each use of authority under PL 85-804 that could subject the United States to obligate funds in excess of $50,000. *See* Exec. Order 10789, 23 Fed. Reg. 8897 (1958).

[248]50 U.S.C.A. § 1435 (West Supp. 1989). The state of emergency declared by President Truman on December 16, 1950, is still in effect with regard to exercise of authority under PL 85-804. *See* Proclamation No. 2914, 15 Fed. Reg. 9029 (1950); 50 U.S.C.A. § 1601 (West Supp. 1989).

[249]50 U.S.C. § 1431(l)(1A)(b)(2) (West Supp. 1989).

[250]*Reprinted in* 50 U.S.C.A. § 1431 App. at 215 (West Supp. 1989).

[251]*See also* FAR 50.403 (this section implements PL 85-804 by providing specific and detailed procedures to be used in processing requests for indemnification clauses in government contracts).

[252]*See supra* note 60 and accompanying text.

ly hazardous'' as used in indemnification agreements meant risks ''generally . . . associated with nuclear-powered vessels, nuclear-armed guided missiles, experimental work with nuclear energy, handling of explosives, or performance in hazardous areas.''[253] In essence, this definition assigned a common, everyday meaning to the term ''unusually hazardous.''

That definition, however, would not cover the activities by contractors at GOCO munitions facilities faced with the handling, storing, and disposing of materials such as chlorinated solvents. Many of these materials are hazardous within the meaning of environmental statutes, but are used routinely by industries with no connection to the national defense effort. As a result, the Army has expanded the definition of ''unusually hazardous'' in PL 85-804 determinations to cover contractor activities at GOCO munitions plants.

On May 31, 1985, the Secretary of the Army made PL 85-804 determinations to cover contractor activities at the Lake City and Newport AAPs.[254] In that action, the term ''unusually hazardous activities'' was defined to encompass both sudden and non-sudden environmental damages, including:

> exposure to toxic chemicals or other hazardous materials arising from the receiving, handling, storage, transportation, loading, assembling, packing, and testing of such chemicals or materials and thus damages arising out of the use, disposal, or spillage of such toxic chemicals and other hazardous materials are covered, including environmental damages.[255]

Under this clause, the contractor presumably is indemnified even if the environmental damage is the result of long-term (non-sudden) negligent practices of the contractor.

Moreover, the toxic chemicals and hazardous materials that cause the damage are not required for the purpose of assembling or manufacturing munitions for the United States under the contrac-

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[253]*Hearings on H.R. 4083, Government Contractors Product Liability Act of 1983 and H.R. 4199, Contractor Liability an Indemnification Act Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 98th Cong., 2d Sess. 45 (1984).

[254]Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include an Indemnification Clause In Contracts for Lake City and Newport Army Ammunition Plants, 31 May 1985.

[255]*Id.*

tor's production contract. In other words, to the extent that these hazardous and toxic materials might be used to support assembling or manufacturing items for third parties (i.e., foreign sales or other DOD contractors), the contractors at Lake City and Newport still were covered by the indemnification.[256]

In 1987 the Secretary of the Army extended indemnification through the PL 85-804 process to the contractor-operator of the Mississippi AAP.[257] This determination was different in two significant ways from the determinations that had been made previously for the Lake City and Newport AAPs.

First, it limited coverage for releases of toxic or hazardous materials to those used in production of munitions for the United States under a production contract.[258] Second, to the extent it provided indemnification in the case of a non-sudden release, the release could not be the result of the contractor's negligence.[259]

The scope of indemnification was refined further in 1988 with the determination to provide indemnification to the contractor-operator of the Iowa AAP.[260] Under the Iowa AAP determination, intentional acts of misconduct by the contractor that resulted in releases of hazardous or toxic materials explicitly were excluded in cases of non-sudden releases.[261] Additionally, for the first time, sudden and non-sudden releases were defined—the difference between the two being whether or not the release was repeated or continuous in nature.[262]

Finally, in 1989, the Secretary of the Army signed a PL 85-804 determination that provided indemnity for activities of the

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[256]In 1986, for example, the Olin Corporation used facilities at Lake City AAP to generate sales exceeding $1,650,000 to other DOD suppliers, including Aerojet, Honeywell, and Ford Aerospace. *See* Olin Defense Systems Group, Lake City Army Ammunition Plant (1986) (contractor's information brochure).

[257]Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include an Indemnification Clause in a Contract for Mississippi Army Ammunition Plant, 26 Oct. 1987.

[258]*Id.*

[259]*Id.*

[260]Memorandum of Decision, Office of the Secretary of the Army, subject: Authority Under Public Law 85-804 to Include an Indemnification Clause in a Contract for the Iowa Army Ammunition Plant, 1 Apr. 1988.

[261]*Id.*

[262]*Id.* ("In this clause, non-sudden release means a release [of toxic, nuclear, or hazardous chemicals or materials] which takes place over time and involves continuous or repeated exposure. Sudden release means a release which is not repeated or continuous in nature.")

contractor-operator of the Radford AAP.[263] The Radford determination is especially significant because it is intended to serve as the model for all PL 85-804 determinations for the remaining contractor-operated munitions plants. To this end, the United States Army Armament, Munitions and Chemical Command (AMCCOM) sent letters on January 9, 1990, to all remaining GOCO munitions plant contractors informing them of "the extent to which the Department of the Army is willing to indemnify contractor operators of the AAPs."[264]

Pursuant to the provisions of the Radford determination, contractors are indemnified for the risk of release of hazardous toxic materials used in connection with the manufacture or assembly of munitions under contract with the United States. They also can be indemnified when using the toxic or hazardous materials in performance of third-party contracts when written approval of the contracting officer is received.[265]

The Radford determination continues the practice of previous determinations in distinguishing between sudden and non-sudden releases. Generally, the "continuous and repeated" distinction between sudden and non-sudden releases first established in the Iowa AAP determination is preserved. In the Radford determination, however, "intentional and knowing" releases always will be considered non-sudden in nature.[266]

Significantly, the Radford determination provides for the first time that in the case of non-sudden releases:

> [T]he Contractor will not be indemnified if the government can demonstrate that said release was the result of non-compliance (with the intent or knowledge of the Contractor's principal officials) with environmental laws or regulations applicable at the time of the release, unless such compliance was caused by the design or condition of Government-furnished equipment or

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[263]Memorandum of Decision, Office of the Secretary of the Army, subject: Authority under 50 U.S.C. §§ 1431-1435 (Pub. L. 85-804) to Include an Indemnification Clause in a Contract With Hercules Incorporated, 30 Oct. 1989 [hereinafter Radford Determination].

[264]*See, e.g.*, Letter from Theodore Hornsby, Jr., Chief, GOCO Division, AMCCOM, to Lt. Gen Eugene T. Ambrosio (retired), President, Day and Zimmerman, Inc. (9 Jan. 1990) (discussing the possibility of the Army's providing indemnification pursuant to PL 85-804 to Day and Zimmerman, Inc., the contractor operator of the Kansas and Lone Star AAPs).

[265]Radford Determination, *supra* note 263, at 1.

[266]*Id.* at 2.

> facilities, or the result of the Contractor's compliance with specific terms and conditions of the contractor written instructions from the Contracting Officer.[267]

This language effectively broadens the scope of the indemnity provided in the Mississippi AAP determination by limiting exclusions to instances in which a non-sudden release is caused by the contractor's failure, with the knowledge or intent of the contractor's "principal officers,"[268] to comply with environmental laws or regulations. In the past, courts have interpreted similar clauses very narrowly and have refused to impute knowledge of lower-level employees to senior company officials, even when the contractor's conduct was alleged to be fraudulent.[269] Thus, absent a policy or high-level decision to engage knowingly in conduct that violates environmental regulatory requirements, the contractor probably would be protected by the terms of the Radford determination.[270]

The Radford determination is also the first to address the issue of the availability of indemnification to pay for fines or penalties assessed against a contractor. As signed by the Secretary of the Army, the determination provided that "[n]ot withstanding any other provision of this clause, the Government shall under no circumstance indemnify the Contractor against *criminal* fines or penalties, nor does the Government agree to indemnify the Contractor against the costs of defending, settling, or otherwise participating in any criminal actions."[271] While this language clearly settles the issue of contrac-

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[267]*Id.*

[268]The FAR does not use or define the term principal officer. For purposes of the Liability for the Facilities clause, however, it defines "contractor managerial personnel" to be:

> [T]he Contractors directors, officers, managers, superintendents or equivalent representatives who have supervision of -
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> (1) All or substantially all of the contractor's business;
>
> (2) All or substantially all of the contractor's operations at any one plant or a separate location in which the facilities are installed or located; or
>
> (3) A separate and complete major industrial operation in connection with which the facilities are used.

FAR 52.245-8.

[269]*See, e.g.*, United States v. United States Cartridge Co., 198 F.2d 456 (8th Cir. 1952), *cert. denied* 345 U.S. 910 (1952).

[270]Of course, contractors' conduct can run afoul of even this generous protection, as recently illustrated by General Dynamics at Air Force Plant #4. *See supra* notes 181-83 and accompanying text.

[271]Radford Determination, *supra* note 263 (emphasis added).

tor indemnification for criminal fines and penalties, the issue of contractor indemnification for civil fines and penalties is highlighted by omission.

Failure to address contractor indemnification for civil fines and penalties is particularly puzzling because of the contractor's position during the negotiations leading to the Radford determination that "civil fines and penalties for pollution abatement and environmental regulations are reimbursable."[272] While this remains a likely area of dispute in the future, the Army presumably will maintain the position that fines and penalties will be reimbursed only in unusual circumstances, consistent with the FAR's penalty provision.[273]

In sum, PL 85-804 has proven to be a valuable tool for apportioning some of the types of environmental liability the Army or its operating contractors reasonably might expect to incur. It is not, however, a cure-all.

From the contractor's perspective, PL 85-804 still leaves unanswered the question of payment of fines and penalties assessed by regulatory agencies, and the Army cannot entirely be satisfied. Current PL 85-804 determinations provide little incentive for contractors to ensure that lower-level employees, whose actions are most likely to result in a release of hazardous or toxic substances, comply with environmental laws and regulations, and exercise non-negligent conduct.

At present, the Army does not mandate that environmental compliance be an evaluation criterion for determining award-fees for GOCO facility contractors.[274] Even when the award-fee criteria do include consideration of environmental compliance, the evaluation standards used and the relative weights assigned to each criterion have not uniformly encouraged excellent environmental performance. One Army GOCO contractor, for example, recently was iden-

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[272]Turk Letter, *supra* note 27.

[273]*See supra* notes 67-70 and accompanying text.

[274]*See* Headquarters, Army Munitions & Chemical Command, Cost Plus Award Fee Evaluation Operation Manual (1984). At GOCO munitions facilities operated under cost-type contracts, a contractor's profit typically is composed of a base-fee and an award-fee. The base-fee represents a sort of guaranteed minimum profit that the contractor can expect to realize if the contract is not terminated prematurely. The award-fee represents additional profit that the contractor can realize if it performs the contract in a manner that satisfies the award-fee criteria.

tified as being eligible to collect ninety-one percent of the available award-fee, despite cited environmental management deficiencies and the EPA issuance of a compliance order with a proposed penalty of $86,500 against the contractor.[275] Moreover, the Army must be concerned by the extremes to which it has stretched the definition of "unusually hazardous" to include potential environmental liabilities within PL 85-804 determinations.

With the exception of certain explosive components of munitions (e.g., trinitrotoluene (TNT) and RDX) and munitions that require radioactive materials (such as depleted uranium), the vast majority of hazardous or toxic substances used by contractors at Army GOCO munitions facilities (e.g., solvents and heavy metals) are used throughout American industry. Given the mood of Congress and the country's fiscal problems, continued imaginative use of the term "unusually hazardous" likely will result in congressional action limiting DOD's use of PL 85-804 authority to indemnify contractors against the same environmental risks they encounter when producing items for consumers other than the Federal Government.

B. DIVESTITURE OF GOCO MUNITIONS FACILITIES

Since the early 1970's, DOD's policy has been to return government-owned industrial facilities to the private sector whenever possible, consistent with the interests of national defense.[276] Despite this policy encouraging divestiture, DOD's policy also has been to retain ownership of all industrial facilities that produce lethal munitions.[277] Congressional activity, however, may require DOD to rethink its position. In discussing the problem of environmental compliance at GOCO facilities, the House Armed Service Committee recently stated:

> Current environmental law does not provide for any consideration of industrial base or mobilization base requirements. . . . It is also well known that the existing defense industrial base is seriously underutilized and woefully undercapitalized. Environmental compliance requirements may provide the catalyst to develop a scaled down infrastructure that can meet environmental compliance requirements.[278]

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[275]GAO Report, *supra* note 29, at 32.

[276]*See* Memorandum, Office of the Under Secretary of Defense, 25 Nov. 1986, subject: Government Property in the Possession of Defense Contractors.

[277]Memorandum, Headquarters, U.S. Army Materiel Command, 18 Aug. 1989, subject: Retention/Disposition Data for Government-Owned Contractor-Operated (GOCO) Industrial Facilities.

[278]*See Report on H.R. 2461*, *supra* note 5, at 256.

The Army's divestiture of GOCO munitions facilities has the simplistic appeal of appearing to solve the thorny problems of accountability for current environmental compliance and environmental cleanup required by past operation and disposal activities. In reality, however, divestiture of the Army's GOCO munitions plants would solve only a portion of the problems facing the Army and its contractors. Moreover, it actually will exacerbate other problems.

Critics of divestiture have called the Air Force's efforts to divest its GOCO operations an attempt to "dodge" responsibility for environmental cleanups.[279] Contrary to these critics' belief, divestiture of GOCO facilities would not allow either the Air Force or the Army to escape financial responsibility for any environmental cleanup required at a divested facility.

Pursuant to CERCLA section 120(h), federal agencies transferring real property owned by the United States to third parties are required to include in the deed transferring the property a description of the type and quantity of the hazardous substances stored, released, or disposed of on the property, and also a description of what, if any, remedial action was taken.[280] In addition, the deed must contain a covenant warranting that all remedial action necessary to protect human health and the environment has been taken prior to the transfer, and that if additional remedial action is necessary, it will be conducted by the United States.[281] Therefore, as a result of CERCLA's requirements and the contaminated state of the GOCO munitions facilities,[282] divestiture of the Army's GOCO munitions plants could not be accomplished quickly.

In addition, sale of the munitions facilities would be quite expensive for the Army. Sale of the plants selected for divestiture must be accomplished by the General Services Administration (GSA).[283] Funds realized from the sale of this property currently[284] must be deposited in the General Treasury of the United States.[285] Although

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[279]*Air Force Pushes Military to Sell "GOCOS" to Dodge Environmental Cleanup*, Inside E.P.A. Weekly Report, Apr. 8, 1988, at 1.

[280]42 U.S.C. 9620(h)(3)(A) (Supp. V 1987).

[281]*Id.* § 9620(h)(3)(B).

[282]*See supra* note 23 and accompanying text.

[283]40 U.S.C. § 484 (1982).

[284]The Senate recently has passed legislation that would amend 40 U.S.C. § 485. The legislation would allow the Department of Defense (DOD) to retain the proceeds from the sale of excess DOD property to meet environmental restoration requirements or real property maintenance needs. *See* S. 2884, 101st Cong., 2d Sess., 136 Cong. Rec. S12606-12670 (1990).

[285]40 U.S.C. § 485(2) (1982).

the GSA can allow certain expenses to be deducted from the sales proceeds before the proceeds are deposited into the Treasury,[286] GSA regulations currently do not recognize environmental cleanup costs as deductible expenses.

Moreover, divestiture would not necessarily resolve the issue of responsibility for future environmental compliance, as illustrated by a recent court decision. In *United States v. Aceto Agricultural Chemicals Corp.* the United States and the State of Iowa sought to recover response costs incurred under CERCLA and RCRA in the cleanup of the Aidex Corporation's pesticide formulation facility in Mills County, Iowa.[287]

Because Aidex was bankrupt, the plaintiffs sought their response costs from eight pesticide manufactures who had hired Aidex to formulate their technical grade pesticides into commercial grade pesticides. The regulators sought to impose liability on the eight defendants based on allegations that the pesticide manufactures had "*contributed to*" the handling, storage, treatment, or disposal of hazardous waste within the meaning of RCRA section 7003,[288] and also had "*arranged for*" the disposal of hazardous substances within the meaning of CERCLA section 9607(a)(3).[289]

In seeking to have the case dismissed, the defendants argued that they had "contracted with Aidex for the processing of a valuable product, not the disposal of a waste, and that Aidex alone controlled the processes used in formulating their technical grade pesticides into commercial grade pesticides, as well as any waste disposal that resulted therefrom."[290]

Finding RCRA and CERCLA to be remedial statutes that should be "liberally construed,"[291] the court declined to grant the defendants' motion to dismiss. In so holding, the court identified several key factors that distinguished the case from others in which courts had not imposed liability when a useful hazardous substance had

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[286]*Id.* §§ 485(a), 485(c).
[287]United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989).
[288]42 U.S.C. § 6973 (Supp. V 1987).
[289]*Id.* § 9607(a)(3).
[290]*Aceto*, 872 F.2d at 1376.
[291]*Id.* at 1380.

been sold to another party who incorporated the substance into a product that later was disposed of.[292]

First, the court found that the defendants in *Aceto* retained title at all times to the pesticide that was reformulated at the Aidex facility.[293] Second, the court found that Aidex was manufacturing a product for the defendants and was not manufacturing a product for its own use.[294] Finally, the court found that generation of wastes is an inherent part of the pesticide manufacturing process, and that the wastes are disposed of contemporaneously with the manufacturing of the product that the defendants contracted for.[295]

Currently, many hazardous substances used in the production of munitions at the Army's GOCO facilities, ranging from heavy metals to high explosives and radiologic materials, are provided on occasion to the contractor by the government.[296] Pursuant to the FAR, title to these government furnished materials remains in the government.[297] Thus, even if divestiture of the GOCO munitions plants were to occur, the practice of providing government-owned materials could lead to continued government liability under the *Aceto* rationale for response costs incurred to clean up wastes generated by the contractor's manufacture of munitions for the Army. Moreover, because of CERCLA section 120(e)(1),[298] any attempts by the Army to contractually reapportion this possible liability for environmental cleanups effectively would be limited to the net worth of the contractor.

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[292]One of the cases cited by the court for this proposition is United States v. Westinghouse Elec. Corp., 22 Env't Rep. Cas. (BNA) 1230, 1231-32 (S.D. Ind. 1983). In that case, the court dismissed both RCRA and CERCLA third-party claims brought by Westinghouse against Monsanto. Monsanto had sold Westinghouse PCBs that Westinghouse used in the manufacture of electrical equipment. As a result of the manufacturing process, Westinghouse generated wastes containing hazardous materials that were disposed of. These disposed of materials later became the basis of the suit against Westinghouse by the United States. *See Aceto*, 872 F.2d at 1382 n.10.

[293]*Aceto*, 872 F.2d at 1382.

[294]*Id.* at 1384.

[295]*Id.* at 1383.

[296]There is no clear policy on when government owned property is provided to GOCO contractors for munitions production. Presumably, this practice allows the government to dispose of surplus materials acquired in other procurements and to maintain or broaden its mobilization industrial base by allowing other manufacturers to supply components and raw materials used in munitions manufacture.

[297]FAR 52.245-4.

[298]42 U.S.C. § 9607(e)(1) (Supp. V 1987). In relevant part, this section provides that:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility from any person who may be liable for a release or threat of release [of hazardous substances] . . . to any other person the liability imposed by this section.

In summation, under CERCLA, the Army is liable into the millennium for environmental problems resulting from past hazardous waste disposal practices at the GOCO munitions facilities. Pursuant to the rationale of *Aceto*, the Army also could be liable for future environmental problems resulting from the contractors use of materials provided by the Army even if the Army divests itself of the GOCO facilities.

As a result, divestiture clearly would be beneficial only to the extent it would define the party responsible for paying fines and penalties resulting from noncomplying operations at a munitions facility. The cost to the Army for this relatively slight benefit would be increased procurement costs, however, because contractors would make capital improvements and hire more experienced and competent operating personnel to maximize the ability of *their* facilities to comply with state and federal environmental requirements.[299] These capital and personnel costs, of course, ultimately would be charged to the Army as either direct costs or overhead in future production contracts.

C. NARROWING WAIVERS OF SOVEREIGN IMMUNITY FOR GOCO MUNITIONS FACILITIES

Even as a majority of Congress continues to vote to broaden the waivers of sovereign immunity found in environmental statutes,[300] concern is rising in some quarters that "[a]ttempting to treat a major military installation without considering its missions and mode of operation could result in [environmental] regulatory decisions that are not in the national interest."[301] One congressman recently summed up the situation facing the Army and its contractors at GOCO munitions facilities. He accurately noted that there are no truly national environmental standards or requirements, no prioritization of RCRA requirements in terms of their impact on human health and the environment, no prioritization among the requirements of the various environmental laws, and no sensitivity to cost and impact on the ability of the military to carry out its national security mission.[302]

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[299]*See House Report on H.R. 2461*, *supra* note 5, at 255.
[300]*See supra* text accompanying notes 173-83.
[301]*Report on H.R. 2461*, *supra* note 5, at 242.
[302]*Report on H.R. 1056*, *supra* note 30, at 171-72 (statement of Rep. Ray).

Of course, each environmental statute does provide that the President can exempt a federal agency's facilities from compliance with environmental statutes under certain circumstances. These exemptions can be granted if doing so would be in the "paramount interests of the United States,"[303] or when they are "necessary to protect the national security interests of the United States."[304] Alternatively, lack of appropriated funds to achieve compliance can be used as grounds for a presidential exemption, but only if "the President shall have specifically requested such an appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation."[305]

To date, however, only one federal facility has been granted a presidential exemption. Presidents Carter and Reagan found an exemption to be in the "paramount interests of the United States," and exempted federal agencies from compliance with portions of the CAA, the FWPCA, the Noise Control Act,[306] and RCRA at Fort Allen in Puerto Rico, to allow Haitian refugees to be housed on Fort Allen.[307]

Given the current political climate, and the fact that the sole exemption was granted only after protracted litigation,[308] further exemptions based on the "paramount interests of the United States" are likely to be granted in only the most extreme of circumstances. As one congressional committee recently noted, however, "extreme circumstances is not a workable or appropriate criterion" given the national security mission of DOD installations.[309]

Because of the way environmental activities at DOD installations are funded, it is even more unlikely that the President could cite a lack of appropriated funds as the rationale for granting an exemption. Currently, funding for environmental compliance and cleanup at Army installations comes from three sources: the Defense Environmental Restoration Account (DERA),[310] which serves as a sort of Superfund for DOD installations; the military construction ac-

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[303]*See, e.g.*, 42 U.S.C. § 7418 (1982).

[304]*See, e.g.*, *id.* § 9620(j) (Supp. V 1987).

[305]*See, e.g.*, *id.* § 6961.

[306]Noise Control Act of 1972, *id.* §§ 4901-4918 (1982).

[307]Exec. Order No. 12244, 45 Fed. Reg. 66443 (1980); Exec. Order No. 12327, 46 Fed. Reg. 48893 (1981).

[308]*See* Colon v. Carter, 507 F. Supp. 1026 (D. P.R. 1980); Puerto Rico v. Muskie, 507 F. Supp. 1035 (D. P.R. 1980).

[309]*Report on H.R. 2461*, *supra* note 5, at 242.

[310]*See* 10 U.S.C. § 2703 (Supp. V 1987).

count; and the operation and maintenance account. With the exception of DERA funds, whose use is limited to funding response and remedial activities taken pursuant to CERCLA under the Defense Environmental Restoration Program (DERP),[311] DOD has not clearly identified funds required to meet environmental compliance requirements.[312] As a result, the requirement to "specifically request appropriations" often cannot be satisfied, even though it was recently estimated that total unfunded requirements associated with DOD environmental compliance currently range from five to ten billion dollars.[313]

In light of the unlikeliness of receiving a presidential exemption, and recognizing that it faces increasing budgetary constraints, DOD has engaged in several initiatives to prioritize environmental cleanups of DOD facilities. The first is the development of the Defense Priority Model (DPM). Planned for implementation during fiscal year 1990, the DPM "is a waste site scoring system that evaluates relative risk based on information gathered during the Preliminary Assessment/ Site Inspection and the Remedial Investigation/Feasibility Study."[314] Through the use of risk assessment, DPM is intended to "help assure that sites are addressed on a 'worst first' basis nationwide with the funding available from the Defense Environmental Restoration Account."[315]

Of course, states seeking to enforce their own environmental compliance requirements on DOD installations are not bound by the priority that the DPM assigns to installations in their territory. To deal with this problem, DOD has offered states incentives for entering into a "DOD and State Memorandum of Agreement" (DSMOA).[316] In return for being guaranteed the greater of one percent of the money expected to be spent out of the DERP within their state or $50,000, states are required to agree that the DPM "is needed and provides a reasonable basis for allocating funds among sites in the interest of a national worst first cleanup program."[317] States also are required to "make every effort to abide by the priorities developed thereunder [the DPM]."[318]

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[311] *Id.* § 2701(a)(2) (Supp. V 1987).
[312] *See Report on H.R. 2461*, *supra* note 5, at 245.
[313] *Id.* at 246.
[314] 54 Fed. Reg. 43104 (1989).
[315] *Id.*
[316] *Id.* at 31358.
[317] *Id.*
[318] *Id.*

Unfortunately, the utility of the DPM and DSMOAs in dealing with the problems arising from environmental compliance at Army GOCO munitions facilities is limited in three significant ways. First, the DPM and DSMOAs are designed to deal primarily with CERCLA-style cleanups of hazardous waste sites that have resulted from historical operations. Neither the DPM nor the DSMOAs are designed to deal with current compliance problems. Thus, problems associated with responsibility for fines and penalties, resulting from environmental noncompliance, are not addressed.

Second, participation in DSMOA's, with the resulting acceptance of the DPM, is voluntary. As of October 1, 1990, only eleven states had executed DSMOAs.[319] Four states decided they would not sign DSMOAs.[320] Negotiations with the remaining thirty-five states are still ongoing.[321]

Finally, as currently formulated, DSMOAs are agreements between the states and DOD. They do not prevent a state from taking action against a GOCO contractor if the state is dissatisfied with the cleanup priority assigned to a particular facility's cleanup by DPM. Thus, while they represent steps in the right direction, use of the DPM and DSMOAs are only incomplete means of dealing with environmental compliance problems posed by too many competing priorities, not enough money at DOD facilities in general, and insufficient funding at GOCO facilities in particular.

Assuming that the Congress is not willing to provide the Army with a blank check to remedy existing hazardous waste problems and ensure that its GOCO munitions facilities are able to comply with current environmental requirements, congressional action is necessary. Two options are available to Congress. It can restrict the waivers of sovereign immunity in environmental statutes as they apply to federal agencies, or it can broaden the scope and alter the requirements for obtaining an exemption to the requirements of the statutes.

Restricting the waivers of sovereign immunity in environmental statutes as they apply to all, or even to a specified class, of a federal agency's facilities, is not good public policy. Absent compelling

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[319]Hazardous Waste Section, Office of the Assistant Secretary of Defense (Environment), DSMOA Status Report (1990) (Alaska, California, Delaware, Florida, Illinois, Mississippi, Nevada, New Mexico, Vermont, West Virginia, and Wyoming).

[320]*Id.* (Arkansas, Michigan, Nebraska and South Dakota).

[321]*Id.*

reasons to the contrary, all federal facilities, including GOCO facilities, should be required to comply with federal and state environmental requirements. In any event, trying to reassert sovereign immunity to avoid complying with environmental requirements would be difficult in the current political climate.

On the other hand, broadening the scope and adjusting the requirements of presidential exemptions from environmental statutory requirements does represent responsible public policy since exemptions would be applied on a case by case basis. Moreover, a sizeable element in Congress realizes that Congress must engage in some action that "prioritizes environmental requirements, is fiscally realistic, and takes into account national security considerations."[322] Otherwise, chaos will reign as each state pursues its own environmental compliance enforcement agenda against federal facilities within its territory.

VI. RECOMMENDATIONS

A. USE OF PL 85-804

The use of PL 85-804 to indemnify GOCO facility contractors serves a valid purpose and should be continued, albeit in a modified manner.

As currently written, the PL 85-804 determinations are overly broad in their definition of what constitutes an "unusually hazardous risk." Non-sudden releases of commonly used toxic or hazardous substances (e.g., chlorinated solvents) resulting from the negligent behavior of contractor's employees acting within the scope of their employment should not be covered by indemnification. The risks associated with these non-sudden events involving common industrial materials can be minimized through a contractor's effective training, supervision, and management of its personnel and the government's facility. Moreover, these same risks are borne every day by the contractor at its own facilities.

Use of PL 85-804 also must be coupled with incentives for contractors to prevent non-sudden or negligent releases of toxic, hazardous, or radioactive substances. To this end, the indemnity provided by PL 85-804 should include a deductible that the contractor would have to pay. This deductible, consisting of at least twenty-five

[322] *See Report on H.R. 2461*, *supra* note 5, at 260.

percent of the contractor's yearly base fee,[323] would give the contractor a substantial financial interest in stressing to its employees the importance of environmental compliance and non-negligent hazardous materials and wastes handling practices. In addition, the award-fee criteria of the Army's GOCO munitions facilities contracts should be modified so that at least twenty-five percent of the available award fee is based on compliance with environmental requirements.[324]

B. DIVESTITURE OF GOCO MUNITIONS PLANTS

While there may be other sound reasons for the Army's divestiture of GOCO munitions plants, divestiture should not be used as a means to deal with environmental compliance problems at these munitions facilities.

As a result of CERCLA, hazardous waste problems already existing at GOCO munitions facilities prior to divestiture will remain the responsibility of the Army forever. Moreover, to the extent that future hazardous waste problems can be attributed to government-owned materials provided to the contractor, courts still can hold the Army responsible for any required cleanup under the provisions of CERCLA and RCRA.

Finally, while divestiture clearly would shift the responsibility of everyday compliance, such as manifesting and labeling, to contractors, the Army's policy against reimbursing fines and penalties for environmental noncompliance effectively has already achieved this result. To the extent that future compliance requires capital improvements to the contractor's facility, the Army will wind up paying for the improvements anyway through direct or indirect procurement costs.

C. NARROWING WAIVERS OF SOVEREIGN IMMUNITY FOR GOCO MUNITIONS FACILITIES

The Army, together with the other services, should persuade DOD to propose legislation modifying the scope and requirements for gain-

[323] *See supra* note 274.

[324] *Id.* By way of contrast, the DOE recently announced that it was modifying its award fee criteria so that not less than 51% of the available award-fee would be based on compliance with environmental, safety, and health requirements. *See* GAO Report, *supra* note 30, at 27.

ing presidential exemptions from compliance with environmental statutes.

In the future, year-by-year exemptions should be granted based on the current "paramount interest of the United States" standard. Alternately, exemptions should be granted based on a determination by the Secretary of Defense that an exemption is necessary after comparing the amount of funds appropriated by Congress for the DERA with the priorities for environmental compliance and restoration established by the DPM.

Of course, for such legislation prioritizing environmental compliance and restoration to be effective, several other changes also would have to occur. First, all funding for both environmental compliance and restoration would have to be funneled through the DERA, instead of the current situation in which some money comes from DERA, some from military construction, and some from operation and maintenance.

In addition, the scope and use of the DPM should be expanded. DPM should be used not only to determine the relative risks to human health and the environment from existing hazardous contamination, but also to assess the relative risks associated with failure to implement changes in procedures or to make capital improvements required by new or existing environmental laws or regulations.

This risk-based assessment would be used to augment the already existing A-106 Pollution Abatement Planning Process[325] (A-106 process). The A-106 process requires federal agencies to submit an annual plan detailing the need for prevention, control, and abatement of pollution through the EPA to the Office of Management and Budget. Used together, an enhanced DPM and the A-106 process would allow projects to be assembled in a rank order of environmental merit. The resulting list then would be presented to Congress as part of DOD's annual budget submission. Congress could then examine this list and determine to what extent it is willing to provide funding. Projects or initiatives left unfunded would then be eligible for a presidential exemption.

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[325]Office of Management and Budget Circular No. A-106, subject: Reporting Requirements in Connection with the Prevention, Control and Abatement of Environmental Pollution at Existing Federal Facilities (December 31, 1974). The Army equivalent to the A-106 Report is the Form DD 1383, "Environmental Pollution Prevention, Control and Abatement at DOD Facilities Report."

VII. CONCLUSION

Because of ignorance of the past effects of waste disposal practices on the environment and years of insufficient capital investment in GOCO facilities, Army munitions plants entered the age of strict environmental compliance as environmental eyesores. Moreover, the historical culture of DOD encouraged an attitude that the national security mission obviated the need to comply with environmental laws and regulations.

While DOD recently has made strides in identifying and remedying environmental deficiencies, Congress and the states seem to have taken the view that DOD's efforts are, at best, too little too late. As a result, Congress has been increasingly willing to waive sovereign immunity in environmental statutes, thereby exposing federal agencies to state-imposed civil fines and penalties. In addition, both the EPA and the states increasingly have recognized that environmental statutes may permit enforcement of environmental requirements directly against the non-complying facility's operating contractor, regardless of whether the contractor has the contractual authority to remedy the violation.

Commenting implicitly on DOD's attitude of the past and explicitly on the current situation facing DOD, one congressman aptly noted:

> Sometimes you have to hit a mule across the head with a two-by-four to get its attention. . . . Once you have its attention, however, it is not very useful to keep hitting it with a two-by-four. Otherwise, the poor beast will not be able to do our bidding. This is important because this "mule" is charged with the defense of this nation and its vital interests. We are not going to have the luxury of worrying about generations unborn if we cannot protect the current generation and our way of life."[326]

The Army's GOCO munitions facilities continue to play a vital role in the nation's defense. To ensure the survival of this "unique partnership" of government and industry, however, the Army and its operating contractors must strive to adapt the GOCO contractual agreement to allocate the risks created by the age of strict environmental compliance fairly and effectively. In addition, Congress must ensure that environmental requirements are imposed on government facilities, including GOCO munitions facilities, only to the extent that sufficient funding is provided to meet those requirements.

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[326] *Report on H.R. 1056*, *supra* note 30, at 175-76 (statement of Rep. Ray).

MILITARY POLICY TOWARD HOMOSEXUALS: SCIENTIFIC, HISTORICAL, AND LEGAL PERSPECTIVES

by Major Jeffrey S. Davis*

I. INTRODUCTION

Department of Defense Directive 1332.14 states that homosexuality is incompatible with military service.[1] Accordingly, current policy prohibits homosexuals from entering military service.[2] If a homosexual manages to enter the service in spite of this prohibition, the service will separate that individual as soon as possible.[3] To facilitate this process, current policy allows separation based on homosexual tendencies alone, without requiring proof of any homosexual acts.[4] Many military homosexuals, however, have resisted their separations from the military by strenuously defending their positions at administrative elimination hearings and by vigorously litigating their causes.

These cases often involve a soldier, sailor, or airman who, but for being a homosexual, is outstanding in every respect.[5] Using the testimony of supervisors and co-workers, these service members try to demonstrate the inapplicability of each of the policy reasons the military uses to justify their exclusion.[6] The current policy, however, contains no exceptions.[7] Commanders have no discretion to retain homosexuals and are themselves derelict if they do not initiate separation action.[8] Should commanders have this discretion? Can the retention policy be altered without altering the accession policy?

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*Judge Advocate General's Corps. Currently assigned as the Officer-in-Charge, Butzbach Branch, Office of the Staff Judge Advocate, 3d Armored Division. Previously assigned as Chief of Legal Assistance, Trial Counsel, and Chief of Military Justice, Fort Sill, 1986-1989; Funded Legal Education Program, 1982-1985; Medical Service Corps Officer, 1977-1982. B.S., Texas A&M University, 1977; J.D., University of Texas Law School, 1985; and LL.M., The Judge Advocate General's School, 1990. This article is based upon a thesis submitted in partial satisfaction of the requirements of the 38th Judge Advocate Officer Graduate Course.

[1]Dep't of Defense Directive 1332.14, Enlisted Administrative Separations (Jan. 28, 1982) [hereinafter DOD Dir. 1332.14].

[2]*See, e.g.*, Army Reg. 601-210, Regular Army and Army Reserve Enlistment Program, para. 4-4 (1 Dec. 1988).

[3]DOD Dir. 1332.14.

[4]*Id.*

[5]*See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 702-04 (9th Cir. 1989) (en banc); Matlovich v. Secretary of the Air Force, 591 F.2d 852, 854 n.4, 856 (D.C. Cir. 1978).

[6]*See, e.g.*, cases cited *supra* note 5.

[7]DOD Dir. 1332.14. There is a limited exception. Enclosure 3, Standards and Procedures, para. H.3.g.(2) authorizes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned.

[8]Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1982) [hereinafter UCMJ].

Separating people from the military solely because of their sexual orientation or status may lead to a successful legal challenge under the fundamental rights prong of equal protection.[9] Although the Supreme Court recently declined to hear *Ben-Shalom v. Marsh*, a case raising a challenge under the suspect/quasi-suspect class prong of equal protection, the Court never has squarely addressed either prong of equal protection in a homosexuality case.[10]

The policy also may lead to problems if the Selective Service System is ever reactivated. The draft could be avoided by anyone claiming to be a homosexual. Should the military modify this policy, which is based on sexual orientation?

Sodomy, whether heterosexual or homosexual, is against the law for members of the armed services.[11] The Supreme Court has determined that sodomy statutes are constitutional.[12] Nevertheless, is sodomy the real problem, or is the problem sexual activity in general? Should the Uniform Code of Military Justice continue to prohibit sodomy?

Some people do not realize they have homosexual tendencies until after they have enlisted or have been commissioned.[13] Should they be treated differently than people who lie about their sexual orientation to enter military service?

This article contends that current policy on accession of homosexuals should be altered so that homosexuality becomes a waivable disqualification. As to separation, Service Secretaries and commanders should have the discretion to retain homosexuals who meet certain criteria. Finally, the military should not separate personnel based solely on statements of sexual orientation, but should require evidence of prejudice to good order and discipline.

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[9]*See infra* text accompanying notes 232-38.

[10]*See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990) [hereinafter Ben-Shalom III]. Ben-Shalom II involved procedural issues not relevant to this article. Ben-Shalom v. Secretary of the Army, 826 F.2d 722 (7th Cir. 1987) [hereinafter Ben-Shalom II]. Ben-Shalom I was a 1980 case in which the Eastern District of Wisconsin determined that the homosexual regulation violated the first amendment. Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980) [hereinafter Ben-Shalom I].

[11]UCMJ art. 125.

[12]Bowers v. Hardwick, 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986).

[13]Harry, *Homosexual Men and Women Who Have Served Their Country*, 10 J. Homosexuality 117, 121 (1984).

A multidisciplinary approach is used to reach these conclusions. Part II relies on science to explain why homosexuals exist, in what numbers, and the relationship of homosexuality to concerns other than sexual orientation. Part III is a history of the treatment of homosexuals in the Armed Forces, with emphasis on treatment in the United States Army. National and international trends also are addressed. Part IV is an analysis of the legal arguments that have been made for and against allowing homosexuals to serve in the Armed Forces. Emphasis is placed on equal protection analysis, as the fundamental rights prong of that analysis seems to be the homosexuals' best remaining argument. Part V is a critical appraisal of current policy, with suggestions for improvement.

II. SCIENTIFIC PERSPECTIVES

A. HOMOSEXUALITY DEFINED AND THEORIES ON CAUSATION

The military has its own definitions for "homosexual," "bisexual," and "homosexual act." A homosexual is defined as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." A bisexual is defined as "a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts." A homosexual act is defined as "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires."[14]

Homosexuality is a topic that often leads to heated discussion of divergent views. Science lends objectivity to the discussion. A great deal of scientific research has been conducted on the possible causes and effects of homosexuality.

1. The Kinsey Model

In 1948, Dr. Alfred C. Kinsey and two research associates at Indiana University published a nine-year case history study on human sexual behavior.[15] Their sample, intended to represent a cross section of the population of the United States, consisted of about 5300 white males from across the country.[16]

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[14]DOD Dir. 1332.14.

[15]A. Kinsey, W. Pomeroy, and C. Martin, Sexual Behavior in the Human Male (1948) [hereinafter A. Kinsey].

[16]*Id.* at 3-9.

Kinsey did not adopt the common practice of labeling people as heterosexuals, homosexuals, or bisexuals. He developed a seven-point continuum based on psychologic reactions (specific arousal by same or opposite sex stimuli) and overt heterosexual and homosexual experience. The scale ranges from exclusively heterosexual (rate 0) to exclusively homosexual (rate 6). The middle (rate 3) is equally heterosexual and homosexual. Individuals can be assigned a different position on the scale for each age period of their lives.[17]

Kinsey used the term homosexual in connection with human behavior to mean sexual relations, either overt or psychic, between persons of the same sex.[18] He did not attempt to demonstrate what caused homosexuality. He believed that questions generated from data that he had gathered should be addressed by those scientists attempting to discover biologic, psychologic, social, or hereditary bases of homosexuality.[19]

2. Causation

Causation is of interest because it relates to the notion of fault, which relates to conscious choices. "Many homosexuals claim that their sexual orientation is the result of biological forces over which they have no control or choice."[20]

Sexual orientation refers to a consistent preference or ambivalence in regard to the gender of a sexual partner. Heterosexuals consistently prefer the opposite sex, homosexuals consistently prefer the same sex, and bisexuals have varying degrees of ambivalence.[21] The question is: What factor or combination of factors causes or leads to sexual preference?

Throughout the twentieth century, scientists have attempted to discover what causes sexual orientation. Most have taken heterosexuality as the norm and tried to explain why a minority of people deviate from it.[22] Some scientists have focused on personal ex-

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[17]*Id.* at 636-47. The other rates are: 1) predominantly heterosexual, only incidentally homosexual; 2) predominantly heterosexual, but more than incidentally homosexual; 3) predominantly homosexual, but more than incidentally heterosexual; and 4) predominantly homosexual, but incidentally heterosexual.

[18]*Id.* at 612.

[19]*Id.* at 660-66.

[20]W. Masters, V. Johnson, and R. Kolodny, Masters and Johnson on Sex and Human Loving 349 (1986).

[21]Ellis & Ames, *Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality*, 101 Psychological Bull. 233 (1987).

[22]*Id.*

perience and environment, while others have considered genetic and physiological explanations.[23]

Researchers recently have proposed a theory of how the entire spectrum of human sexual orientation is determined.[24] The theory is that hormonal and neurological variables operating during gestation are the main determinants of sexual orientation. Activation of the sexual orientation does not occur until puberty and may not stabilize until early adulthood. Personal experience and environment may be involved in sexual orientation, but it would be very unusual for such variables to overcome a strong predisposition to either heterosexuality or homosexuality.

a. Normal Development

From conception, females have two of the same sex chromosomes (XX), while males have two different sex chromosomes (XY). A fetus naturally will develop into a female unless certain events occur. Soon after conception of a male, genes in the Y chromosome trigger the production of biochemicals, such as testosterone, that cause male sex organs to appear. Other cells (called sertoli cells) also form and prevent the formation of structures that would otherwise become the uterus and fallopian tubes of a female.[25]

For fetuses being masculinized, testosterone creates hormone receptor sites within cells. During puberty, testosterone is produced in large quantities and bonds to the receptor sites formed during gestation.[26]

Separate areas of the brain control masculine and feminine behavior, and the masculine areas normally develop at the expense of the feminine areas. For example, the preoptic anterior nucleus of the hypothalamus generally is over twice as large in men as it is in women. This area appears to regulate the masculine sexual orientation tendency to mount in response to various feminine cues. Neurological organization for this area occurs during the third and fourth months of gestation.[27]

The norm is for males and females to develop a heterosexual orientation after a complex series of biochemical reactions that occur dur-

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[23] *Id.*
[24] *Id.*
[25] *Id.* at 236-37.
[26] *Id.* at 237-38.
[27] *Id.* at 239.

ing gestation. A bisexual or homosexual orientation may result if these reactions are modified because of genetic variations, biochemicals produced in response to stressful situations, drugs taken by the pregnant mother, or other variables.[28]

b. Deviations From the Norm

Scientists have modified the above-described variables in laboratory experiments. Male rats with testes removed and female rats that have received testosterone injections, both prior to completion of neuro-organization, have been induced to display homosexual behavior. Similar work has been done with rhesus monkeys.[29]

Drugs called antiandrogens block the effects of testosterone and other sex hormones. Administration of antiandrogens to a pregnant rat often will result in homosexual behavior among the offspring after they reach puberty. Barbiturates, marijuana, and other drugs also can partially divert or block masculinization of the nervous system during neuro-organization.[30] Alcohol has been found to have both demasculinizing and defeminizing effects on the brains of both sexes of rats.[31]

Severe stress to a mother during neuro-organization of a fetus can lead to bisexual and homosexual male offspring. Stress causes depressed testosterone production in many species of mammals. The stress hormones such as adrenalin appear to inhibit production of testosterone. The hormones from the mother then pass through the placenta and affect the fetus.[32]

The only behavioral variable found to induce homosexual activity is total sexual segregation. Rhesus monkeys in this situation have displayed homosexual behavior. When later integrated with members of the opposite sex, however, most monkeys have displayed heterosexual behavior.[33]

Though scientists cannot conduct sexual orientation experiments on humans, evidence exists that many of the methods used to in-

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[28]*Id.* at 243-48.

[29]*Id.* at 240-41.

[30]*Id.* at 241. Other drugs include chlorimipramine, diazepam, diethylstilbesterol (DES), pargyline, and reserpine.

[31]*Id.* at 242.

[32]*Id.*

[33]*Id.* at 243.

duce homosexual behavior in lab animals would have similar effects on humans.[34]

Four types of genetic mutations have been identified as probably causing homosexual or bisexual traits in humans. They all seem to involve chromosomes other than the sex chromosomes. Only one of the four types affects genetic females (XX).[35] These are not situations in which a person simply has a different sexual orientation. Depending on the type of mutation, a genetic male may have the physical appearance of a female, or a genetic female may have male genitalia.

A drug used to lessen the risk of miscarriage, the synthetic estrogen diethylstilbesterol (DES), has been linked to lesbian daughters of mothers who took the drug during pregnancy. One study found lesbianism to be more common among women whose mothers had taken DES than among women whose mothers had not.[36]

Stress on the mother also has been linked to homosexuals and bisexuals. A study of males born in Germany between 1934 and 1953 indicated an unusually high proportion of homosexuals were born during and immediately after World War II (from 1941 to 1946).[37] Another study involved asking mothers to recall any stressful episodes they experienced during pregnancy, such as deaths of close relatives, divorces, separations, traumatic financial or sexual experiences, or feelings of severe anxiety. The mothers who could recall such episodes included nearly two-thirds of the mothers of male homosexuals, one-third of the mothers of bisexuals, and less than ten percent of the mothers of heterosexuals.[38]

Several hypotheses follow from the prenatal neurohormone theory, and many have been tested. For example, homosexuality primarily should be a male phenomenon.[39] This is because mammals are fundamentally female and become male only when all the genetic and biochemical reactions associated with the addition of the Y chromosome work in the normal manner. Natural selection also would tend to favor fewer deviations in females, because only females can gestate

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[34]*Id.*

[35]*Id.* at 244-47. The four types are alphareductase deficiency, androgen insensitivity syndrome, faulty testosterone synthesis, and congenital adrenal hyperplasia syndrome (which affects females).

[36]*Id.* at 247.

[37]*Id.*

[38]*Id.*

[39]*Id.* at 249.

offspring. Evidence from humans worldwide and from all other mammals studied supports the idea that homosexuality is more common among males than among females.[40]

Another hypothesis is that homosexuality should be an inherited trait, because there are likely to be many genetic factors that increase the chance of a deviation from the biochemical norm. "Support for this deduction can be found in studies reporting considerably higher concordance rates for homosexuality among identical twins than among fraternal twins. . . [S]everal studies have found that close relatives of homosexuals have higher incidences of homosexuality than the general population."[41] One study, for example, found "that nearly one-quarter of all brothers of male homosexuals also were homosexuals, a much higher rate than the 3-7% typically reported among human males generally."[42]

The prenatal hormone theory also "implies that efforts to change sexual orientation should be essentially confined to modifying where, when, and how sexual orientation is expressed; the orientation itself should not change."[43] This is because

> sexual orientation appears to be largely determined by hypothalamic-limbic system brain functioning, and most conditioning procedures, and certainly all counseling methods, gear their corrective efforts at neocortical functioning ("rational thought"). Although the neocortex's ability to learn ways to override and circumvent lower brain functioning should never be underestimated, basically a homosexual's neocortex would have to learn how to prevent hypothalamic-limbic areas of the brain from functioning as they were organized to function.[44]

The vast majority of homosexuals never seek treatment.[45] Of those who have, there have been some reports of successfully changing homosexuals into heterosexuals, but the criteria for success often have been "either vague or considerably less than exclusive heterosexual behavior."[46] The best predictor of whether a homosexu-

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[40]*Id.*
[41]*Id.* at 250.
[42]*Id.*
[43]*Id.* at 251.
[44]*Id.*
[45]Sultan, Elsner & Smith, *Ego-Dystonic Homosexuality and Treatment Alternatives*, in Male and Female Homosexuality: Psychological Approaches 192 (L. Diamant, ed. 1987).
[46]Ellis and Ames, *supra* note 21, at 251.

al will respond to treatment is the amount of heterosexual experience the individual had prior to treatment.[47] Those who seek treatment are thus more likely to be bisexuals than homosexuals. At any rate, the reports on treatment of homosexuality seem consistent with the hypothesis that efforts to change sexual orientation should be minimally effective.[48]

The prenatal neurohormone theory, if correct, would indicate that those homosexuals who attribute their sexual orientation to biological forces beyond their control are right. Many social scientists, however, do not share this view. For example, many behavioral scientists favor experiential explanations for sexual orientation,[49] and some psychoanalysts maintain that homosexuality is a neurosis that can be cured.[50] Still, the prevailing view among psychologists is that "the diversity among sexual orientations is likely to be understood from a combination of sociological, cultural, and biological factors."[51] The prenatal hormone theory combines these factors and makes sense.

B. THE INCIDENCE OF HOMOSEXUALITY

1. Homosexuals in Society

The sexual histories of the 5300 subjects in the Kinsey study revealed a surprising incidence of homosexual experience in the general population.[52] For the purpose of reporting incidence, Kinsey defined a homosexual experience as physical contact to the point of orgasm with another male.[53] Kinsey's data indicated that:

> [A]t least 37% of the male population has some homosexual experience between the beginning of adolescence and old age. . . . Some of these persons have but a single experience, and some of them have much more or even a lifetime of experience; but all of them have at least some experience to the point of orgasm.[54]

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Fine, *Psychoanalytic Theory*, in Male and Female Homosexuality: Psychological Approaches 86-87 (L. Diamant, ed. 1987).
[51] Gladue, *Psychobiological Contributions*, in Male and Female Homosexuality: Psychological Approaches 130 (L. Diamant, ed. 1987).
[52] A. Kinsey, *supra* note 15, at 625.
[53] *Id.* at 623.
[54] *Id.*

Kinsey made generalizations from his data with his seven-point heterosexual/homosexual scale.[55] The generalizations all pertained to white males after the onset of adolescence up to age fifty-five, and included the following: sixty-three percent never have an overt homosexual experience to the point of orgasm; approximately thirteen percent react erotically to other males without having overt homosexual contacts; twenty-five percent have more than incidental homosexual experience or reactions (rates 2-6) for at least three years; eighteen percent have at least as much homosexual as heterosexual in their histories (rates 3-6) for at least three years; thirteen percent have more of the homosexual than the heterosexual (rates 4-6) for at least three years, ten percent are more or less exclusively homosexual (rates 5 or 6) for at least three years, eight percent are exclusively homosexual (rate 6) for at least three years, and four percent are exclusively homosexual throughout their lives.[56]

> Since only 50 per cent of the population is exclusively heterosexual throughout its adult life, and since only 4 per cent of the population is exclusively homosexual throughout its life, it appears that nearly half (46%) of the population engages in both heterosexual and homosexual activities, or reacts to persons of both sexes, in the course of their adult lives.[57]

Kinsey was looking at American white males in the 1940's. Worldwide, as of the 1980's, the incidence of exclusively homosexual males was estimated at three to five percent, regardless of varying degrees of social tolerance, intolerance, or repression.[58]

The incidence of "feminized males" or "queens," who are often caricatured, is estimated at about ten percent of the male homosexual population.[59] Evidence also exists that homosexuality is more common among males than among females, both in humans worldwide and in all other mammals that have been studied.[60] Kinsey found that only two or three percent of women were mostly or exclusively homosexual on a lifelong basis.[61]

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[55]*See supra* text accompanying notes 15-19.
[56]A. Kinsey, *supra* note 15, at 650-51.
[57]*Id.* at 656.
[58]T. Sarbin & K. Karols, Nonconforming Sexual Orientations and Military Suitability 8-9 (1988) (draft study of the Defense Personnel Security Research and Education Center).
[59]*Id.* at 26.
[60]Ellis & Ames, *supra* note 21, at 249.
[61]W. Masters, V. Johnson & R. Kolodny, *supra* note 20, at 345.

2. Homosexuals in the Military

If the incidence of homosexuals in the military is the same as the incidence in the general population, about three to five percent of the military is exclusively homosexual. Data that impact upon incidence include separations for homosexuality and studies of known homosexuals who report military service in their histories.

There were few discharges for homosexuality during World War II.[62] Data for separations because of homosexuality in the post-war 1940's through the 1950's can only be estimated because of the nature of military recordkeeping during those periods.[63] The Army, for example, did not record the number of enlisted personnel separated for homosexuality until mid-1960.[64] Nevertheless, data reviewed by Williams and Weinberg (1971) suggest that about 2000 persons per year, or one out of every 1500 servicemen (.066%), were separated from the Armed Forces for homosexuality between the late forties and mid-fifties.[65]

Even in the 1960's, the services did not have uniform data collection on homosexual separations. The Army separated 6139 enlisted soldiers for homosexuality during a seven and one-half year period from 1960-1967 (averaging 818 per year).[66] From 1957 to 1965, the Army allowed an average of thirty officers per year to resign in lieu of administrative elimination action for homosexuality.[67] From 1950 to 1965, the Navy separated a total of 17,392 enlisted men for homosexuality for an average of 1087 per year.[68] No statistics are available for naval officers during this period.[69]

When similar data for the Marine Corps and Air Force are considered, the average estimate of personnel separated from all Armed Forces for homosexuality from the mid-fifties through the sixties is between 2000 and 3000 per year.[70] The Navy accounted for the highest percentage of separations, and in 1961 the Navy stated that

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[62]W. Menninger, Psychiatry in a Troubled World: Yesterday's War and Today's Challenge 225 (1948) (of 20,620 soldiers diagnosed as constitutional psychopaths by the Army in 1943, 1625 were of the homosexual type).
[63]C. Williams & M. Weinberg, Homosexuals and the Military 45-46 (1971).
[64]*Id.* at 47.
[65]*Id.* at 46-47.
[66]*Id.* at 47-48.
[67]*Id.* at 48.
[68]*Id.* at 49.
[69]*Id.*
[70]*Id.* at 53.

homosexuality and other sexual abnormalities accounted for approximately forty percent of all its Undesirable Discharges.[71]

More recent and complete data of administrative separations for homosexuality for all services are available for fiscal years 1985 to 1987.[72] The reported categories include enlisted and officer personnel by gender.

The Army had 1197 separations, which included 829 enlisted males (.05%, or 5 in 10,000), 354 enlisted women (.17%), 11 male officers (.004%), and 3 female officers (.007%). The Navy had 2241, which included 1825 enlisted males (.13%), 382 enlisted females (.27%), 30 male officers (.02%), and 4 female officers (.02%). Two of the Navy personnel were separated judicially rather than administratively. The Marine Corps had 309 separations, which included 213 enlisted males (.04%), 90 enlisted females (.33%), 6 male officers (.01%), and no female officers. The Air Force had 912, which included 644 enlisted males (.043%), 220 enlisted females (.1%), 41 male officers (.01%), and 7 female officers (.02%).

The data from fiscal years 1985 to 1987 show that all of the services except the Navy were separating about 4 or 5 enlisted men per 10,000 for homosexuality, while the Navy was separating 13 enlisted men per 10,000. Naval officers of both sexes also have higher separation rates than are found in the other services. The Marine Corps has the highest rate of separations for enlisted women at 33 per 10,000, followed by the Navy at 27 per 10,000.

The important finding is the relatively small number of separations for homosexuality in all services (from 1:10,000 to 33:10,000) in relation to the incidence of exclusive homosexual orientation in the general population (from 300:10,000 to 500:10,000).[73] This raises the question of how many homosexuals serve in the military without ever being identified.

One study from the World War II era addresses this question.[74] It traced 183 men known to be homosexual prior to entering the military. Of these, 51 were rejected at induction, and 14 were ad-

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[71] *Military Justice: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 1006 (1966), *quoted in* Williams and Weinberg, *supra* note 63, at 50.

[72] T. Sarbin & K. Karols, *supra* note 58, at 21, app. B.

[73] *Id.* at 22.

[74] W. Menninger, *supra* note 62, at 227, *quoted in* C. Williams & M. Weinberg, *supra* note 63, at 60 (interim report by C. Fry and E. Rostow reported by W. Menninger).

mitted but later discharged. The remaining 118 served from 1 to 5 years, and 68 of them served as officers. Two studies with results similar to the World War II study were reported in 1967.[75] In one, 550 white homosexual males who had served in the military indicated that 80% experienced no difficulties. The other study included 214 male homosexuals who had served, with 77% receiving honorable discharges. In 1971, Williams and Weinberg reported that 76% of the 136 homosexuals in their study received honorable discharges.[76]

Dr. Joseph Harry, in a study of 1456 men and women interviewed in 1969 and 1970, found that homosexual and heterosexual men seemed equally likely to have served in the military, while lesbians were more likely than heterosexual women to have served.[77] Sexual orientation was determined using the Kinsey heterosexual-homosexual rating scale, with homosexuals being defined at those scoring four or higher.[78] No findings explained why higher numbers of lesbians entered the service.[79]

Harry reported that one-third of the homosexual males who did not serve in the military avoided service by declaring their homosexuality. This figure represented fourteen percent of all homosexuals (those who did not serve and those who did serve), and raised the question of why more homosexuals did not declare their homosexuality.[80] One explanation was that many did not know they were homosexuals at the time they volunteered or were drafted.

Harry found that the median age of fully realizing one's homosexuality and becoming socially and sexually active was approximately nineteen or twenty, and that most men realize their homosexuality by their mid-twenties.[81] Kinsey earlier had found homosexual behavior patterns in males to be "largely established" by age sixteen, with only a small portion of men materially modifying their sexual behavior patterns upon entering military service.[82] Harry found:

> Those who defined themselves as homosexual at later ages were more likely to have had military service. Similarly, those who became socially active homosexuals after the age of 22 were

[75]C. Williams & M. Weinberg, *supra* note 63, at 60.
[76]*Id.*
[77]Harry, *supra* note 13, at 119.
[78]*Id.*; *see supra* note 17 and accompanying text.
[79]Harry, *supra* note 13, at 119.
[80]*Id.* at 121.
[81]*Id.* at 121, 124.
[82]A. Kinsey, *supra* note 15, at 416.

> a good deal more likely to have served in the military. Those who came to an early realization of their homosexuality, and those who came out earlier, are more likely to have declared their homosexuality to the military.[83]

Some support for Harry's findings comes from a study of homosexuals living in the Chicago area conducted by the Institute for Sex Research in 1967. Of those with prior military service, twenty-seven of eighty, or thirty-four percent, reported that they did not consider themselves homosexual before induction.[84]

From this data it appears that the incidence of homosexual men in the general population may approximate the incidence of homosexual men in the military, and the incidence of homosexual women may be greater in the military than in the general population. It appears that seventy-five percent or more of the homosexuals who serve in the military are never identified, and a significant percentage may not realize they have a homosexual orientation until after entering the military.

Homosexuals are identified by the military in three main ways: discovery through another person (sometimes related to jealousy, a lovers' argument, or blackmail); voluntary admissions (usually for the purpose of getting out of the military); and the homosexual's own indiscretion.[85] Variables related to detection include frequency of homosexual behavior prior to entering the military, sexual behavior in the military, and status of partner (military or nonmilitary).[86]

The following conclusions result from the Williams and Weinberg study: Those engaging in more frequent homosexual activity prior to entering the military are more likely to be identified, as are those who do the same while in the military. Homosexuals who have a military as opposed to a nonmilitary sex partner also are more likely to be detected. Even more interesting, however, is that those who engage in more frequent sex prior to entering the military and use nonmilitary partners are the least likely to be identified. Those who engage in sex more frequently upon entering the military are more likely to come to the attention of the military voluntarily, whereas those who engage in sex less frequently upon entry are more likely to be discovered through their own indiscretion.[87]

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[83]Harry, *supra* note 13, at 122.
[84]C. Williams & M. Weinberg, *supra* note 63, at 92.
[85]*Id.* at 88-91.
[86]*Id.* at 91-99.
[87]*Id.*

Still, it appears that the great majority of homosexuals who serve in the military are never detected at all.

C. NONSEXUAL DIFFERENCES BETWEEN HOMOSEXUALS AND HETEROSEXUALS

"The vast majority of homosexual men and women never consult with a mental health professional of any sort."[88] In 1973 the American Psychiatric Association voted to stop classifying homosexuality as a mental disorder.[89] Nevertheless, some homosexuals still seek the assistance of psychiatrists because they do not want to be homosexual.[90] Homosexuality unwanted by a patient is called ego dystonic homosexuality.[91] These patients range from those wishing to increase their heterosexual responsiveness to those with low self-esteem who want to adjust to a homosexual orientation.[92] Either way, the psychological baggage carried by ego dystonic homosexuals sets them apart from heterosexuals and most homosexuals.

The important question is whether the majority of homosexuals have more emotional and psychological problems than heterosexuals. The bottom line is that they do not.

> For the last fifteen years, many research studies have evaluated the performance of homosexuals and heterosexuals on a variety of psychological tests. A recent review of data from dozens of these studies concluded that there are no psychological tests that can distinguish between homosexuals and heterosexuals and there is no evidence of higher rates of emotional instability or psychiatric illness among homosexuals than among heterosexuals.[93]

The two problem areas in which homosexuals are over-represented are alcohol abuse[94] and the acquired immune deficiency syndrome (AIDS).[95] In a 1980 report of problems surfaced by homosexuals during contacts with family physicians, alcoholism was found to be slight-

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[88]Sultan, Elsner & Smith, *supra* note 45, at 192.
[89]L. Diamant, Male and Female Homosexuality: Psychological Approaches 13 (1987).
[90]*Id.*
[91]*Id.*
[92]Sultan, Elsner & Smith, *supra* note 45, at 195.
[93]W. Masters, V. Johnson & R. Kolodny, *supra* note 20, at 354.
[94]Diamant & Simono, *The Relationship of Homosexuality to Mental Disorders*, in Male and Female Homosexuality: Psychological Approaches 174-78 (L. Diamant, ed. 1987).
[95]W. Masters, V. Johnson & R. Kolodny, *supra* note 20, at 543.

ly more prevalent in the homosexual population.[96] A study of the lifetime drinking histories of homosexual and heterosexual women interviewed in the late 1960's suggested significantly more problem drinking in the lesbian sample.[97]

A 1978 study of four urban areas in the Midwest reported that about one-third of male homosexuals surveyed were alcoholics.[98] More recently, in a study comparing the preservice adjustment of homosexual and heterosexual military accessions tested in 1983, homosexuals who had been discovered and discharged did as well or better than heterosexuals in most tested areas, except in preservice drug and alcohol use.[99]

The acquired immune deficiency syndrome (AIDS) is a fatal disease with no known cure. The virus that causes the disease, the human immunodeficiency virus (HIV), is transmitted by body fluids such as blood and semen. By February 1990, sixty percent of the 119,590 known cases of AIDS in the United States were homosexual or bisexual men, twenty-one percent were female and heterosexual male intravenous drug users, seven percent were homosexual or bisexual men who were also intravenous drug users, and five percent were attributed to heterosexual contacts.[100]

Anyone can get AIDS. Homosexual and bisexual men are particularly susceptible because often they have multiple sex partners, thereby increasing the risk of contact with an infected person, and because anal sodomy lends itself to transmission of the disease. The military has an active program to screen personnel and potential accessions for HIV.[101] This screening program probably keeps some homosexuals out of the military. Ironically, it also makes the military one of the safest places to engage in sodomy—at least medically speaking.

III. HISTORICAL PERSPECTIVES

Don't talk to me about naval tradition. It's nothing but rum, sodomy, and the lash.

—Winston Churchill

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[96]Diamant & Simono, *supra* note 94, at 175.

[97]*Id.* at 176.

[98]*Id.* at 177.

[99]M. McDaniel, Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability (1989) (draft study PERS-TR-89-004 of the Defense Personnel Security Research and Education Center).

[100]Centers for Disease Control, HIV/AIDS Surveillance Report, February 1990, at 8.

[101]*See, e.g.*, Army Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV), para. 1-14 (11 Mar. 1988).

A. HISTORICAL ANTECEDENTS

Homosexuality and bisexuality are nothing new. Forms of each were accepted widely in ancient Greece.[102] The poet Sappho lived circa 600 B.C. on the Isle of Lesbos, from which the term lesbian is derived.[103]

Plato lived from about 427-347 B.C.[104] His *Symposium* praised the virtues of male homosexuality and suggested that pairs of homosexual lovers would make the best soldiers.[105] One Greek bisexual known to have done well was Alexander the Great, who lived from 356-323 B.C. and conquered an empire that stretched from present-day Yugoslavia to the Himalayas.[106]

Jewish homosexuals presumably were not doing so well. The Old Testament has some of the earliest writings on the subject, such as Leviticus 20:13: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."[107] Most historians have written that Christianity embraced the persecution and condemnation of homosexuals from its beginnings as well, but there is also evidence that Catholic Europe more or less tolerated homosexuality until the Middle Ages.[108]

> The primary ammunition for the Church's position against homosexuality came from the writings of Saints Augustine and Thomas Aquinas, who both suggested that any sexual acts that could not lead to conception were unnatural and therefor sinful. Using this line of reasoning, the Church became a potent force in the regulation (and punishment) of sexual behavior. While some homosexuals were mildly rebuked and given prayer as penitence, others were tortured or burned at the stake.[109]

In England, the ecclesiastical law against buggery (anal intercourse) became established as the criminal law of the state in 1563.[110] What had been one of the sins against nature became one of the "crimes

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[102]W. Masters, V. Johnson & R. Kolodny, *supra* note 20, at 346.
[103]L. Diamant, *supra* note 89, at 4.
[104]T. Cowan, Gay Men & Women Who Enriched the World 17 (1988).
[105]W. Masters, V. Johnson & R. Kolodny, *supra* note 20, at 346.
[106]T. Cowan, *supra* note 104, at 11-16.
[107]L. Diamant, *supra* note 89, at 5. Other Biblical references to homosexual conduct include Genesis 9, Genesis 19, and Romans 1:26, 27.
[108]W. Masters, V. Johnson & R. Kolodny, *supra* note 20, at 346.
[109]*Id.* at 347.
[110]Sarbin & Karols, *supra* note 58, at 14.

against nature." This terminology still is used to describe sodomy in many jurisdictions.[111]

Ecclesiastical law served as the basis for punishing homosexual behavior in Europe until the nineteenth century, when the Napoleonic Code led to a liberalization of attitudes.[112] The nineteenth century also saw homosexuality take on the status of a sickness to be treated by the medical community.[113]

The history of anti-sodomy laws in America was stated succinctly in *Bowers v. Hardwick*, the Supreme Court case holding anti-sodomy statutes constitutional:

> Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.[114]

B. MILITARY LAW

Military law, as applied to homosexuals and homosexual acts, can be divided into statutes used to prosecute and regulations used to exclude or remove homosexuals from the service. Both have evolved over the years.

1. Sodomy Statutes

The Articles of War of 1916 became effective March 1, 1917, and were the first complete revision of military law since the Articles of War of 1806.[115] The ninety-third article of this revision, which addressed "miscellaneous crimes and offenses," proscribed assault with intent to commit any felony, including assault with intent to commit sodomy.[116] This was the first mention of sodomy in military law. It did not proscribe sodomy—only assault with intent to commit

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[111]*Id.*

[112]L. Diamant, *supra* note 89, at 6.

[113]*Id.* at 15.

[114]*Bowers*, 478 U.S. at 192-94.

[115]W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice 14 (1955).

[116]Manual for Courts-Martial, United States, 1917, para. 443 [hereinafter MCM, 1917].

sodomy. The Manual for Courts-Martial, 1917, provided the following guidance:

> Sodomy consists in sexual connection with any brute animal, or in sexual connection, per anum, by a man with any man or woman. (Wharton, vol. 2, p. 538.) Penetration of the mouth of the person does not constitute this offense. Both parties are liable as principals if each is adult and consents; but if either be a boy of tender age the adult alone is liable, and although the boy consent the act is still by force. Penetration alone is sufficient. An assault with intent to commit this offense consists of an assault on a human being with intent to penetrate his or her person per anum.[117]

This rather narrowly drafted statute, proscribing only assault with the intent to commit anal sodomy, did not last long. Following World War I, Congress enacted new Articles of War in 1920.[118] For the first time, sodomy was included as a separate offense among the "miscellaneous crimes and offenses."[119] The definition was expanded to include oral sodomy; it read, "Penetration of the mouth of the person also constitutes this offense."[120] Curiously, though, assault with intent to commit sodomy was still limited to assault "with intent to penetrate his or her person per anum."[121] This remained the law through World War II. The sodomy statute did not change again until 1951, with the adoption of article 125 of the Uniform Code of Military Justice.[122] Article 125 states: "Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense."[123] The Manual for Courts-Martial, 1951, provided the following discussion:

> It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal.[124]

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[117]*Id.*
[118]Act of June 4, 1920, ch. II, 41 Stat. 787.
[119]Manual for Courts-Martial, United States, 1921, para. 443 [hereinafter MCM, 1921].
[120]*Id.*
[121]*Id.*
[122]UCMJ art. 125 (1951).
[123]*Id.*
[124]MCM, 1951, para. 204.

Assault with intent to commit sodomy became part of article 134, UCMJ, and was not limited to any particular variety of sodomy.[125] These laws have remained substantially unchanged except for altering the maximum punishments for certain forms of the offenses.[126]

The courts-martial cases tend to have aggravating factors such as assaultive conduct, coercion, involvement of a minor, or abuse of rank. Though a court-martial offense since 1920, consensual sodomy without aggravating factors, when detected, historically has led to administrative separation.[127]

2. Regulations

Regulations pertaining to homosexuality or homosexual acts are generally of three interrelated varieties: accession, reenlistment, and separation. The rules for officers are the same as the rules for enlisted personnel, although they are found in different regulations. The different services have substantially similar regulations, because they are all derived from the same Department of Defense directives.[128]

Both the Army and the Navy announced at the beginning of World War II that they intended to exclude all persons with homosexual histories.[129] The social climate being as it was, however, "few men with any common sense would admit their homosexual experience to draft boards or to psychiatrists at induction centers or in the services."[130]

From 1922 to 1945, Army enlisted personnel suspected or charged with homosexual attempts or acts faced the prospect of a "Section VIII" discharge.[131] The general heading for Section VIII was "inaptness or undesirable habits or traits of character." Specific traits, such as homosexual behavior, were not listed. Most soldiers discharged

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[125]UCMJ art. 134.

[126]For example, the Manual for Courts-Martial, 1984, increased the maximum punishment for forcible sodomy to dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

[127]*See generally* C. Williams & M. Weinberg, *supra* note 63, at 33, 38-53 (explaining that few homosexuals receive punitive discharges from courts-martial; most are separated administratively).

[128]DOD Dir. 1332.14; Dep't of Defense Directive 1332.30, Separation of Regular Commissioned Officers for Cause (Feb. 12, 1986).

[129]A. Kinsey, *supra* note 15, at 621.

[130]*Id.* at 622.

[131]Army Reg. 615-360, Enlisted Men, Discharge; Release From Active Duty, para. 51-56 (26 Nov. 1942); para. 51-56 (4 Apr. 1935); para. 49-54 (14 Sep. 1927); para. 49-54 (6 Dec. 1922).

under Section VIII received an honorable discharge. In cases of psychopathic behavior, chronic alcoholism, or sexual perversion including homosexuality, the discharge was without honor.[132]

In 1945 War Department policy concerning homosexuals was either to court-martial them or to hospitalize those deemed to be "reclaimable." Hospitalization was to be followed by return to duty, separation, or court-martial. Mere confession of homosexual tendencies to a psychiatrist was not sufficient cause for discharge. Hospitalization was required, to be followed by return to duty or separation.[133]

The postwar homosexual policy reached its most liberal point on March 23, 1946, with the publication of War Department Circular No. 85.

> This order made it clear that enlisted personnel who were to be discharged because of homosexual tendencies, yet had not committed any sexual offense while in the service, could be discharged honorably. For officers in this category, it was further provided that they be permitted to resign under honorable conditions.[134]

The pendulum began to swing the other way in 1948. The provision for honorable discharge was deleted. Homosexuals were to be tried by court-martial or separated as unfit with an undesirable discharge. The category of those "unfit" at this time included criminals, pathological liars, homosexuals, drug addicts, individuals committing misconduct, and sexual perverts. In those cases in which there had been a long period of good service, however, a homosexual could be separated as "unsuitable" (with a general discharge) rather than as unfit.[135]

In 1949 the newly created Department of Defense issued a directive outlining a harsher policy on homosexuality for all branches of the service.[136] The 1950 Army Regulation implementing this policy divided homosexuals into three classes.

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[132]Honorable discharges were characterized as "white" and discharges without honor were characterized as "blue." L. West & A. Glass, Sexual Behavior and the Military Law 252 (R. Slovenko, ed. 1965); *see also* Note, *Homosexuals in the Military*, 37 Fordham L. Rev. 465 (1969).

[133]Army Reg. 615-368, Enlisted Men, Discharge, Undesirable Habits or Traits of Character, para. 2.b. (7 Mar. 1945) (C1, 10 Apr. 1945) [hereinafter AR 615-368].

[134]C. Williams & M. Weinberg, *supra* note 63, at 27. This policy later was published in AR 615-368, para. 3 (14 May 1947).

[135]AR 615-368, para. 2 (27 Oct. 1948).

[136]C. Williams & M. Weinberg, *supra* note 63, at 27.

Class I homosexuals were those whose homosexual offenses involved assault or coercion as characterized by force, fraud, intimidation, or the seduction of a minor (regardless of the minor's cooperation). A general court-martial was mandatory for this category. Class II homosexuals were those who either engaged in or attempted to engage in homosexual acts. Preferral of court-martial charges was mandatory, but a resignation in lieu of court-martial could be accepted from officers, or a statement accepting a dishonorable discharge could be accepted from enlisted soldiers. Class III homosexuals were personnel who exhibited, professed, or admitted homosexual tendencies, but who had not committed any provable acts or offenses. Class III also included personnel who committed homosexual acts outside military jurisdiction. Class III homosexuals could receive either an honorable or a general discharge.[137]

In 1955 a Class III homosexual could get an honorable discharge if he or she had admitted to homosexual tendencies at induction but was inducted anyway, or if there was "heroic service" indicated in the soldier's record. Provisions were made to retain personnel who became involved in homosexual acts but were not "true, confirmed, or habitual" homosexuals.[138] By 1958 an honorable discharge was mandatory for Class III homosexuals. Convening authorities also could approve an honorable or general discharge for Class II homosexuals if it would be in the best interests of the service and if the individual concerned disclosed his or her homosexual tendencies upon entering the service, had performed outstanding or heroic service, or had performed service over an extended period.[139]

In 1966 the Army required a psychiatric examination prior to separation for homosexuality.[140] In 1970 the homosexuality regulation was superseded and was integrated into regulations that covered all types of unfitness and unsuitability discharges.[141] Unsuitability could be demonstrated by evidence of homosexual "tendencies, desires, or interests" (language later found to be unconstitutional).[142]

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[137]Army Regulation 600-443, Personnel, Separation of Homosexuals, para. 3 (12 Jan. 1950) [hereinafter AR 600-443].

[138]Army Regulation 635-89, Personnel Separations, Homosexuals, para. 3 (21 Jan. 1955) [hereinafter AR 635-89].

[139]AR 635-89, para. 3 (8 Sep. 1955).

[140]AR 635-89, para. 5 (15 Jul. 1966).

[141]Army Reg. 635-212, Personnel Separations, Discharge, Unfitness and Unsuitability, para. 6 (15 Jul. 1966) (C8, 21 Jan. 1970); Army Reg. 635-100, Personnel Separations, Officer Personnel, para. 5-5 (19 Feb. 1969)(C4, 21 Jan. 1970) [hereinafter AR 635-100].

[142]*Ben-Shalom*, 489 F. Supp. 964.

In 1972 the unfitness and unsuitability provisions for enlisted personnel became chapters 14 and 13 of Army Regulation 635-200 (AR 635-200), the regulation pertaining to all types of enlisted personnel separations.[143]

This regulatory scheme was significant because separation boards convened pursuant to AR 635-200 generally had the authority to recommend retention of soldiers being processed for elimination, and commanders could disapprove a board's recommendation to separate. This provided two loopholes for some homosexuals, even though the Army policy was that homosexuality is incompatible with military service. A similar situation developed with officer separations, because the officer elimination regulation implied that separation was discretionary.[144] Indeed, prior to February 1977, the Army's litigation posture was that there was discretion to retain homosexuals.[145]

Meanwhile, the Air Force and the Navy were suffering some setbacks with their homosexuality regulations. The Navy regulation on homosexuality, dated July 31, 1972, did not provide any terms of exception to the general policy of separating homosexuals.[146] In litigation in 1974, however, the Navy argued that the regulation did not require mandatory discharge of homosexuals.[147]

The application of the Navy regulation became an issue in *Berg v. Claytor*, a case involving a homosexual officer.[148] The separation board deciding Ensign Berg's case was instructed that it had discretion to recommend retention. The court reviewing the case on appeal could not find in the record any indication of "the actual considerations which went into the Navy's ultimate decision not to retain Berg."[149] The court remanded the case to the Secretary of the Navy for a fuller articulation of the Navy policy on retention of homosexuals. Subsequent case history does not indicate whether such matters ever were presented.

In *Matlovich v. Secretary of the Air Force*,[150] a companion case to *Berg v. Claytor*, application of the Air Force regulation on discharge

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[143]Army Reg. 635-200, Personnel Separations, Enlisted Personnel, paras. 13, 14 (15 Jul. 1966) (C39, 23 Nov. 1972) [hereinafter AR 635-200].
[144]AR 635-100, para. 5.
[145]DAJA-AL 1978/4168, 2 Jan. 1979.
[146]SECNAV INSTR. 1900.9A (31 Jul. 1972).
[147]Champagne v. Schlesinger, 506 F.2d 979, 983-84, (7th Cir. 1974).
[148]Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978).
[149]*Id.* at 851.
[150]Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

of homosexuals was at issue.[151] Technical Sergeant Matlovich, after twelve years of service, applied in 1975 for an exception to the policy of discharging homosexuals. The Air Force regulation expressly provided for exceptions when "the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised," and added that "an exception is not warranted simply because the airman has extensive service."[152]

Matlovich's request was denied, and discharge proceedings were initiated. During judicial review following his discharge, the Air Force stipulated that other homosexuals had been retained in the past.[153] Despite Matlovich's outstanding record, the Air Force said his case lacked the "unusual circumstances" that existed in some other cases. The Air Force did not articulate what constituted "unusual circumstances." The court remanded the case for the Air Force to clarify its policy on retention of homosexuals.[154] Subsequent case history does not indicate whether such matters ever were presented.

In *Ben-Shalom v. Secretary of Army* (*Ben-Shalom I*),[155] the Army in 1980 was told that the language it had been using since 1970 to define unsuitability because of homosexual "tendencies, desires, and interests" was unconstitutional. The court held that the language violated the first amendment and the constitutional right to privacy.[156] The Army had been using this language in several different regulations concerning active duty and reserve officer and enlisted accessions, reenlistments, and separations.[157] The definition was changed after *Ben-Shalom I* so that discharge for homosexual tendencies included those "admitted homosexuals, but as to whom there is no evidence that they engaged in homosexual acts either before or during military service. A homosexual is an individual, regardless of sex, who desires bodily contact . . . ."[158]

In 1981 the Army revised the enlisted separations regulation, AR 635-200, to create a separate chapter for separations due to homosexuality.[159] The policy made it clear that all personnel fitting the defini-

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[151]*Id.* at 855. The regulation was Air Force Manual 39-12, para. 2-103 (C4, 21 Oct. 1970).

[152]*Id.*

[153]*Id.* at 854.

[154]*Id.*

[155]*Ben-Shalom*, 489 F. Supp. 964.

[156]*Id.* at 972-77.

[157]DAJA-AL 1980-2213 (7 Jul. 1980) (enclosing proposed changes to AR 135-178, AR 635-100, AR 635-200, AR 140-111, and AR 601- 210).

[158]AR 635-200, para. 13 (21 Nov. 1977) (IO2, 28 Nov. 1980).

[159]AR 635-200, para. 15 (21 Nov. 1977) (C4, 10 Mar. 1981).

tion of a homosexual were to be separated, with no exceptions. In the area of homosexual acts, an exception could be made if a soldier met five criteria that essentially meant the soldier was not really a homosexual.[160] The Department of Defense issued a directive in 1982 that made this total exclusion policy uniform throughout all the services.[161] There have been no major changes to regulations that address homosexuality since 1982.

C. NATIONAL AND INTERNATIONAL TRENDS

During the 1950's, the American Law Institute recommended that states adopt a Model Penal Code that decriminalized all non-violent consensual sexual activity between adults in private, but retained a prohibition on public solicitation to engage in deviate sexual activity.[162] As of 1987, twenty-four states either had adopted the Model Penal Code or had otherwise removed criminal penalties for consensual sodomy.[163] Attempts to get other states to repeal sodomy statutes have not been successful since the June 1986 *Bowers v. Hardwick* decision.[164]

Internationally, the status of laws concerning homosexual behavior as of 1988 was:

> In 5 countries (and in some parts of the USA, Canada, and Australia) the law protects gays and lesbians against discrimination. In 64 countries homosexual behavior is not illegal (although different ages of consent for homo- and heterosexual behavior may exist), but there is no protection against discrimination on the basis of sexual orientation. In 55 countries homosexual behavior is illegal (in most cases between men,

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[160]A soldier will be separated. . .unless there are approved further findings that (1) Such conduct is a departure from the soldier's usual and customary behavior; and (2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and (3) Such conduct was not accomplished by use of force, coercion, or intimidation by the soldier during a period of military service; and (4) Under the particular circumstances of the case, the soldier's continued presence in the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and (5) The soldier does not desire to engage in or intend to engage in homosexual acts.

[161]DOD Dir. 1332.14.

[162]*See* American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962), *noted in* Leonard, *The Legal Position of Lesbians and Gay Men in the United States*, in Second ILGA Pink Book 104 (1988).

[163]Leonard, *supra* note 162, at 104.

[164]*Id.* at 105.

> but that doesn't mean that the situation of lesbians is any better), and in 58 countries no information is yet available. Legally speaking, the situation is . . . worst in Africa and rather better in Europe.[165]

A number of countries have tackled the issue of whether homosexuals should be allowed in the military. Many countries do not allow homosexuals to serve, in spite of the fact that they consider homosexual acts between consenting adults to be legal. These countries include Canada, Peru, Venezuela, New Zealand, Italy, Great Britain, and Northern Ireland.[166]

Some countries proscribe homosexual acts without addressing homosexual status. Brazil does not outlaw homosexual acts outside the military, but criminalizes "indecent acts, homosexual or not" between soldiers.[167] In Spain, homosexual acts have not been illegal since 1978, but sexual acts between soldiers on duty inside barracks are illegal.[168]

At least five countries in addition to Brazil and Spain allow homosexuals in the military. In Israel, homosexuality has not been a reason for dismissal from the Armed Forces since 1988, but homosexuals are not allowed to have security-related jobs.[169] It has been legal for homosexuals to serve in the Armed Forces of Denmark since 1979.[170] Homosexuals were permitted to serve in the Armed Forces of the Federal Republic of Germany, but they were not considered to be suitable for senior positions.[171] In the Netherlands, the Dutch have allowed homosexuals to serve since 1974.[172] Sweden has allowed homosexuals in the Armed Forces since 1979.[173]

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[165]Tielman and de Jonge, *Country-by-Country Survey*, in Second ILGA Pink Book 186 (1988).
[166]*Id.* at 188-242.
[167]*Id.* at 199.
[168]*Id.* at 240.
[169]*Id.* at 213.
[170]*Id.* at 228.
[171]*Id.* at 230.
[172]*Id.* at 237.
[173]*Id.* at 240.

IV. LEGAL PERSPECTIVES

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[174]

—O.W. Holmes

For a number of years, most of the litigation in this area involved former military personnel who had been discharged for homosexuality suing to get their records amended because they were not really homosexuals.[175] These attacks proceeded mostly on procedural grounds, and many involved claims that the military did not follow its own regulations.[176] In the 1970's the focus changed, and more of the litigation was from homosexuals who admitted their homosexuality, but were attacking military policy and regulations on constitutional grounds.[177] Some of the cases were decided on the constitutional issues. Others never got that far. This section reviews some of the legal theories advocated for and against these efforts.

A. SODOMY STATUTES

The statutory proscription of sodomy provides the moral bedrock on which the military builds its policy against homosexuals. The military statute, article 125, UCMJ, proscribes both homosexual and heterosexual sodomy. In *Hatheway v. Secretary of the Army*[178] Lieutenant Hatheway claimed that selective prosecution of homosexual sodomy under article 125 violated equal protection and that article 125 was unconstitutional as to private heterosexual acts. He also claimed that article 125 violated the first amendment prohibition respecting establishment of religion and that article 125 unconstitutionally violated his right to personal autonomy.

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[174]Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897), *quoted in Bowers*, 478 U.S. at 199.

[175]*See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexuals in the United States*, 30 Hastings L.J. 799, 841 (1979).

[176]*Id.*

[177]*Id.*

[178]Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981).

Hatheway lost. The Ninth Circuit Court of Appeals held that the convening authority selectively could prosecute those cases most likely to undermine military order and discipline, that Hatheway lacked standing as to private heterosexual acts, that article 125 has a legitimate secular purpose and effect, and that Hatheway's personal autonomy argument carried less weight than the government interests, especially because Hatheway's acts with a subordinate enlisted soldier had been viewed in a barracks by other enlisted soldiers.

The Supreme Court squarely addressed the constitutionality of a state's sodomy statute in 1986 in *Bowers v. Hardwick*. Framing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time," the Court held that it did not.[179] Hardwick had challenged the Georgia sodomy statute, which prohibited all sodomy—both homosexual and heterosexual[180]—and which had been the law in Georgia since 1816.[181]

The Eleventh Circuit had held "that the Georgia statute violated Hardwick's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."[182]

Had the Supreme Court agreed to recognize a fundamental right to engage in sodomy, any law affecting the exercise of that right would have to be supported by a compelling government interest.[183] In deciding against Hardwick, the Court stated that there should be great resistance to expanding the substantive reach of the due process clause, particularly if it required redefining the category of fundamental rights.[184] Although Hardwick did not defend at the Supreme Court on the basis of the ninth amendment, the equal protection clause, or the eighth amendment, a four-justice dissent observed that those theories should have been considered anyway.[185]

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[179]*Bowers*, 478 U.S. at 190, 196.

[180]*Id.* at 188 n.1.

[181]*Id.* at 197.

[182]*Id.* at 189. The Eleventh Circuit had relied on decisions in Roe v. Wade, 410 U.S. 113 (1973) (abortion case); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception case); Stanley v. Georgia, 394 U.S. 557 (1969) (obscene material in privacy of home); and Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception case).

[183]*See* cases cited *infra* note 200 and accompanying text.

[184]*Bowers*, 478 U.S. at 195.

[185]*Id.* at 197 n.8, 201-03.

B. LITIGATION ISSUES CONCERNING HOMOSEXUALITY REGULATIONS

1. Judicial Review of Military Discharge Determinations

Some litigation has involved homosexuals trying to get back into the military, and some has involved those trying legally to prevent their separation. In the latter category, personnel have sought declaratory and injunctive relief to preclude their discharge. Two such cases were *Berg v. Claytor*[186] and *Matlovich v. Secretary of the Air Force*.[187] Berg and Matlovich each raised the issue of whether private consensual homosexual activity between adults is protected constitutionally, but that issue was never resolved.

Judicial review of discretionary military administrative determinations generally is limited to ensuring that the action complained of is supported by substantial evidence and that it is not arbitrary, capricious, or unlawful.[188] The military enjoys a long history of judicial deference to military affairs.[189] One area in which the military is scrutinized closely is the application of its own regulations. The government lost both *Berg* and *Matlovich* because neither the Navy nor the Air Force could explain what criteria were used to determine whether to retain homosexual personnel. The court took the position that it could not provide review of either case until the services provided standards on which to base the review.[190]

Matlovich and *Berg* are the exceptions. The government ultimately has prevailed in most requests by homosexuals to preclude discharge.[191] *Rich v. Secretary of the Army*[192] illustrates the dilemma homosexuals sometimes face. In *Rich* an Army medical specialist challenged his involuntary discharge for fraudulent enlistment. The Army had determined that Rich falsely represented that he was not a homosexual on his reenlistment documents.

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[186]591 F.2d 849 (D.C. Cir. 1978).

[187]*Matlovich*, 591 F.2d 852; *see supra* text accompanying notes 150-58.

[188]*See, e.g.*, Miller v. Lehman, 801 F.2d 492, 496 (D.C. Cir. 1986) (decision of Board of Correction of Naval Records to deny relief); Smith v. Marsh, 787 F.2d 510, 512 (10th Cir. 1986) (decision of Army Board for Correction of Military Records to deny relief).

[189]*See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986); Brown v. Glines, 444 U.S. 348 (1980); Orloff v. Willoughby, 345 U.S. 83 (1953).

[190]Berg v. Claytor, 591 F.2d at 851, 857; *see also* Martinez v. Brown, 449 F. Supp. 207, 211 (N.D.Cal. 1978) (district court seeking articulation of factors used by Navy to retain homosexuals).

[191]*See, e.g.*, Beller v. Middendorf, 632 F.2d 788, 792, 798-99 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1980) (plaintiff Beller), 454 U.S. 855 (1981) (plaintiff Miller) (three cases consolidated).

[192]Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

After noting that "the composition and qualifications of the armed forces is a matter for Congress and the military," the court held that "concealing or failing to disclose homosexuality in the enlistment process is material, and one doing so may be discharged for fraudulent enlistment."[193] Even though Rich claimed that he was not sure of his homosexuality until after he reenlisted, the court found enough evidence from a number of Rich's admissions to conclude that the Army's conclusions were not arbitrary, capricious, or unsupported by substantial evidence.

2. Fighting a War of Attrition: Exhaustion of Administrative Remedies as a Government Defense

Sometimes the constitutional issues never are reached because the homosexual plaintiff fails to exhaust administrative remedies, which usually means review by one of the various boards for correction of military or naval records.[194] Although that process can take from months to years,[195] it is favored because it gives the administrative agency an opportunity to correct the problem, possibly eliminating the need for judicial action, and because it develops a factual record upon which a court later can rely. An incidental benefit to the government is that during this process plaintiffs sometimes fail to pursue their claims and never are heard from again.

Courts will not require exhaustion of administrative remedies if the plaintiff can demonstrate that exhaustion would be a futile exercise. Elimination of the exhaustion requirement sometimes is seen in the homosexual cases, such as when a known homosexual faces an absolute prohibition against reenlisting.[196]

3. Constitutional Issues

a. Due Process

Homosexual litigants have raised a number of issues in their attempts to remain in the military. Two issues of historical interest are

[193] *Id.* at 1224 n.1, 1225.

[194] *E.g.*, Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984) (district court ordered plaintiff to seek review of discharge order from Board of Correction of Naval records, which granted plaintiff's request for relief); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980) (female enlistee discharged after marrying a transsexual); Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974) (two Navy enlisted women appealing discharge for homosexuality); Krugler v. United States Army, 594 F. Supp. 565 (N.D. Ill. 1984) (dismissed for failure to exhaust).

[195] *E.g.*, *Von Hoffburg*, 615 F.2d at 642 n.17 (expressing concern that plaintiff's case had been pending before the ABCMR for two years).

[196] *E.g.*, *Beller*, 632 F.2d at 801.

fifth amendment procedural and substantive due process. Both of these issues were raised in *Beller v. Middendorf*,[197] a consolidation of three Navy cases.

The procedural due process issue requires inquiry into whether military discharge procedures deprive homosexuals of property or liberty interests without due process.[198] The property interest is the expectation of continued employment. In *Beller* all three plaintiffs had committed homosexual acts, which provided cause for dismissal under the Navy regulations. Once cause for dismissal existed, there could be no expectation of continued employment. "Therefore, unless the Navy as a substantive matter may not discharge all homosexuals, or unless it must consider factors in addition to homosexuality in its decision . . . we see no basis for inferring any expectation of continued service sufficient to constitute a constitutional property interest."[199]

Deprivation of a liberty interest could occur if military charges of homosexuality were false, made public, and followed by discharge. These actions might damage standing and associations within the community. They also might impose a stigma or disability affecting employment opportunities.[200] The *Beller* court found that liberty interests were protected by the military practice of conducting predischarge hearings at which respondents could present evidence to support their arguments that they should be retained.[201]

Substantive due process requires that laws be at least rationally related to some legitimate government interest. If the law in question impacts on what the Supreme Court has described as fundamental rights—such as procreation, choice of a marriage partner, or family planning—the law is given heightened scrutiny.[202] In these cases, the law must further a compelling state interest and provide the least restrictive way to meet that interest. Prior to *Bowers v. Hardwick*, homosexuals often argued that private, consensual, adult homosexual activity should be protected as an aspect of the fundamental right of privacy.

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[197] *Id.*

[198] *Id.* at 805 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).

[199] *Id.*

[200] *Id.* at 806 (citing *Roth*, 408 U.S. at 573).

[201] *Id.*

[202] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptive statute infringed on fundamental right of privacy); Loving v. Virginia, 388 U.S. 1 (1967) (miscegenation statute infringed on fundamental right to marry); Roe v. Wade, 410 U.S. 113 (1973) (concerning abortion statute); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to unmarried persons infringed on fundamental right of privacy).

The *Beller* court avoided the issue of whether consensual private homosexual conduct was a fundamental right, and instead focused on whether the military regulation violated due process. In doing so, the court abandoned the rational basis and compelling state interest tests used in equal protection analysis. It chose instead a "case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals."[203]

In this balance, the court was more impressed with the weight of the Navy arguments. The Navy provided several reasons for its policy.

> The Navy "perceive[s] that homosexuality adversely impacts on the effective and efficient performance of the mission . . . in several particulars." The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on occasion be in confined situations for long periods.[204]

The court concluded that the regulation was a reasonable effort to accommodate the needs of the government with the interests of the individual.[205] The court also noted that "[t]he due process clause does not require the Government to show with particularity that the reasons for the general policy of discharging homosexuals from the Navy exist in a particular case before discharge is permitted," and that discharge of the plaintiffs "would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational."[206]

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[203] *Beller*, 632 F.2d at 807.
[204] *Id.* at 811.
[205] *Id.* at 812.
[206] *Id.* at 808 n.20.

b. The First Amendment

The government has not won all of the homosexuality cases. In *Ben-Shalom v. Secretary of the Army*, a case involving a homosexual Army reservist, Army regulations promulgated in the 1970's were held to be unconstitutional insofar as they allowed discharge for homosexual tendencies, desire, or interest.[207] The issue had been framed as "whether petitioner can be discharged from the Army (even if the discharge is 'honorable') simply because she is a homosexual, although there is no showing that her sexual preferences interfered with her abilities as a soldier or adversely affected other members of the Service."[208]

All prior military homosexual litigation had involved homosexual acts. Miriam Ben-Shalom admitted she was a homosexual, but the Army had no proof that she had engaged in homosexual acts or had made homosexual advances. After being discharged as unsuitable because of her homosexuality, Ben-Shalom brought a mandamus action to compel her reinstatement.

The problematic word in the regulation was "interest." The court found the regulation to be overbroad because it substantially impinged upon the first amendment rights of every soldier to free association, expression, and speech.[209]

> The Army's interests in protecting the national defense, maintaining discipline and upholding the law of obedience under the "peculiar" conditions of military life, are time-honored and given great respect by all courts, including this one. They are, however, substantially outweighed by the "chill" imposed on the First Amendment liberties of its soldiers by this regulation. The court can see no detrimental effect on any legitimate military interest caused by a soldier who merely "evidences" a "tendency, desire, or interest" in most anything, including homosexuality.[210]

The court found violations of the constitutionally protected right of personal privacy at two different levels. On one level, the regulation chilled the right of soldiers to associate freely with known or

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[207]*Ben-Shalom*, 489 F. Supp. 964; *see supra* text accompanying notes 155-58.
[208]*Ben-Shalom*, 489 F. Supp. at 969.
[209]*Id.* at 973-74.
[210]*Id.* at 974.

suspected homosexuals (the court having found the right of association in the penumbral zone of privacy created by the first amendment).[211] On a different level, the regulation was defective insofar as personnel could be discharged for having a homosexual personality.

> Certainly, the "peculiar" nature of military life and the need for discipline gives the Army substantial leeway in exercising control over the sexual conduct of its soldiers, at least while on duty and at the barracks. This court, however, will not defer to the Army's attempt to control a soldier's sexual preferences, absent a showing of actual deviant conduct and absent proof of a nexus between the sexual preference and the soldier's military capabilities.[212]

The writ of mandamus was issued, the Army did not appeal, and the Army changed its regulations.[213] Soon after, the Department of Defense directed all the services to implement new regulations.[214] The issue of the homosexual personality, however, keeps coming back.

Consider Reverend (former Captain) Dusty Pruitt.[215] The Army had no evidence that she had committed any homosexual acts, but learned of her homosexual status after the Los Angeles Times article, *Pastor Resolves Gay, God Conflict*, described her as a lesbian.[216] Captain Pruitt admitted to her commander that she was a homosexual, and she was discharged. She claimed that the regulation under which she was discharged from the Army reserve violated the first amendment because it called for punishment solely on the basis of her assertion of homosexual status.[217]

The court did not question the constitutionality of the Army policy. Nor did it find the regulation to be overly broad. It noted that the Army "understandably would be apprehensive of the prospect that desire would ripen into attempt or actual performance."[218]

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[211]*Id.* at 975-76 (citing *Griswold*, 381 U.S. at 484-85).
[212]*Id.* at 976.
[213]*See supra* text accompanying notes 155-58.
[214]*Id.*
[215]Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987), *appeal filed*, No. 83-2035 (9th Cir. 1989).
[216]*Id.* at 627.
[217]*Id.*
[218]*Id.*

Miriam Ben-Shalom raised the issue again in 1988 after the Army refused to reenlist her into the Army reserve under its new policy.[219] She argued "that the new regulation had the effect of chilling her freedom of expression as she would no longer be able to make statements regarding her sexual orientation, statements that she would otherwise be free to make."[220] The district court agreed, but the Seventh Circuit Court of Appeals did not.

> Ben-Shalom is free under the regulation to say anything she pleases *about* homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What Ben-Shalom cannot do, and remain in the Army, is to declare herself to *be* a homosexual.[221]

Exclusion based on being a homosexual, as opposed to talking about homosexuality or committing homosexual acts, raises the issue of equal protection.

c. Equal Protection

The equal protection clause requires that all persons similarly situated be treated alike.[222] The Supreme Court has found an implied equal protection component in the fifth amendment due process clause,[223] and the Court has treated federal equal protection claims under the fifth amendment the same as state equal protection claims under the fourteenth amendment.[224]

1. Levels of Scrutiny Under Equal Protection Analysis

The highest level of equal protection scrutiny is strict scrutiny. At this level, legislation (and, by extension, regulations) burdening a class unequally will be sustained only if tailored to serve a compelling governmental interest. Two categories of legislation are subject to strict scrutiny: statutes that classify by race, alienage, or national origin (often called suspect classes); and statutes that impinge on personal rights protected by the Constitution.[225]

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[219]*Ben-Shalom*, 881 F.2d 454.
[220]*Id.* at 457.
[221]*Id.* at 462.
[222]Plyler v. Doe, 457 U.S. 202, 216 (1982).
[223]*See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
[224]*See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).
[225]*Id.*

The Supreme Court also has recognized a middle area of somewhat heightened scrutiny when legislation burdening a class unequally fails unless it is substantially related to a sufficiently important governmental interest. Classifications based on gender and illegitimacy (often called quasi-suspect classes) are given such review.[226] The Court has not extended suspect or quasi-suspect class status beyond the categories mentioned.[227]

If legislation does not qualify for strict or heightened scrutiny, it must pass the rational basis test.

> The general rule is that legislation is presumed valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[228]

Under this deferential standard of scrutiny, it does not matter if an individual member of the burdened class is an exception.[229] Therefore, if regulations pertaining to homosexual service members need only meet the rational basis test, the fact that a homosexual service member might be outstanding in every respect is irrelevant. The inquiry is directed at the regulation, not the service member.

2. The Two Prongs of Equal Protection

As Justice Brennan once wrote, "discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis."[230] The prongs, which require different analysis, are whether the regulation burdening a class unequally does so by 1) impinging on a fundamental right protected by the Constitution, or 2) affecting a class entitled to heightened scrutiny or suspect class status.[231]

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[226]*Id.* at 440-41.

[227]The suspect class cases include: Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); and Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin). The quasi-suspect class cases include: Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy).

[228]City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1984).

[229]Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 310-11 (1976).

[230]Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.).

[231]*See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

a. Fundamental Rights

The "fundamental rights" prong of equal protection easily is confused with substantive due process fundamental rights analysis, but it involves a different inquiry. *Bowers v. Hardwick* illustrates this.[232] The Supreme Court held that there is no fundamental right to engage in sodomy. Applying substantive due process analysis, the Court refused to invalidate a longstanding law that presumably reflected the will of the Georgia citizenry. It is tempting to leap to the conclusion that because homosexuals traditionally have been defined by their acts (engaging in sodomy), and because those acts are not protected, then there cannot be a fundamental right to be a homosexual.

The equal protection focus should not be on whether a homosexual has the fundamental right to engage in sodomy; it should be on whether a homosexual has the fundamental right to be a homosexual. Clearly, since *Bowers v. Hardwick*, there is no constitutional right to engage in homosexual sodomy. Still, a person can have a homosexual orientation without engaging in proscribed homosexual acts, just as a person can have a heterosexual orientation without engaging in proscribed heterosexual acts.

The question of whether a person has a fundamental right to have the sexual orientation that he or she develops through forces beyond personal control is far different from the question of whether there is a right to commit sodomy. Laws and regulations can and do change. While anyone can refrain from doing an act proscribed by law or regulation, however, no one can refrain from being who he or she is.

Bowers v. Hardwick did not foreclose either branch of the equal protection analysis as to homosexual orientation.[233] It was a due process case, and the Court explicitly did not decide it on the basis of the equal protection clause.[234] The only reference to equal protection analysis was in a footnote of the dissent. Justice Blackmun, after referring to the possible equal protection issue of discriminatory enforcement of gender-neutral sodomy statutes, said "a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class."[235]

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[232]*Bowers*, 478 U.S. 186.

[233]*Contra* Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (holding that homosexuality could not be a suspect classification because conduct that defines the class is not constitutionally protected).

[234]478 U.S. at 196 n.8.

[235]*Id.* at 202 n.2.

Under the fundamental rights prong of equal protection, regulations that burden a particular class by impinging on a fundamental right must meet strict scrutiny. To the extent that homosexuality regulations impinge upon the right to be homosexual, as opposed to the commission of an illegal act, these regulations should be required to meet a compelling state interest. Future litigation should focus on this prong.[236]

But, given the Court's disinclination to take a more expansive view of its authority to discover new fundamental rights imbedded in the due process clause, it seems unlikely that the Court will be inclined to discover new fundamental rights based on equal protection.[237] That is unfortunate for homosexuals because, regardless of the Constitution, their homosexual orientation is a fundamental aspect of their lives. The remaining inquiry, raised by *Watkins v. United States Army*, is whether the other prong of equal protection analysis applies.[238]

b. Suspect/Quasi-Suspect Class

The Supreme Court has identified a number of factors for deciding whether a statute burdens a suspect or quasi-suspect class. These include the following: whether the class in question has suffered a history of purposeful discrimination;[239] whether it is defined by a trait that frequently bears no relation to ability to perform or contribute to society;[240] whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes;[241] whether the trait defining the class is immutable;[242] and whether the class has the political power necessary to obtain redress from the political branches of government.[243]

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[236]*But see* Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (homosexuality classification not suspect, but valid even under heightened scrutiny in light of Army's demonstration of a compelling government interest).

[237]*See* 478 U.S. at 194.

[238]Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc).

[239]*See, e.g., Cleburne*, 473 U.S. at 441; *Murgia*, 427 U.S. at 307; San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[240]Mathews v. Lucas, 427 U.S. 495, 505 (1976) (illegitimacy); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (gender).

[241]*See Cleburne*, 473 U.S. at 440-41.

[242]*See Plyler*, 457 U.S. at 216 n.14, 219 n.19, 220, 223; *Frontiero*, 411 U.S. at 685-87. *But see Cleburne*, 473 U.S. at 440-41 (defining characteristics of suspect classes without mentioning immutability); *Murgia*, 427 U.S. at 313 (same); *Rodriguez*, 411 U.S. at 28 (same).

[243]*See, e.g., Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 216 n.14; *Rodriguez*, 411 U.S. at 28.

Judge Norris, concurring in *Watkins*, found all of these factors applicable to homosexuals. Nevertheless, there is room for disagreement with some of his conclusions.[244] There is no doubt that homosexuals have suffered a history of purposeful discrimination. In *Watkins*, the Army conceded this point.[245] Likewise, the trait of homosexual orientation does not correlate with ability to perform or contribute to society. Not only is history replete with accounts of homosexuals who have contributed a great deal to society,[246] but aside from sexual orientation, researchers cannot distinguish between homosexuals and heterosexuals.[247]

The question of whether homosexuals have been saddled with unique disabilities because of prejudice or inaccurate stereotypes is more difficult. Asking the question begs the issue. The criminalization of some of the behavior that identifies a homosexual as such is a unique disability, but it is also constitutional. In the military context, the unique disability is not being allowed to serve, which also has been upheld as constitutional. The law often is based on notions of morality that may be prejudicial and based on inaccurate stereotypes. Judge Norris suggests that the "irrelevance of sexual orientation to the quality of a person's contribution to society also suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes."[248]

Homosexual orientation is immutable. While it is not a visible manifestation like skin color or gender, as Justice Blackmun wrote in *Bowers v. Hardwick*, "neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality."[249] If homosexual orientation is mutable, it is only so with great difficulty, and the likelihood of it truly being changed is very low.[250]

The final factor is whether the class has the political power necessary to obtain redress from the political branches of government. About half the states have repealed their sodomy laws, and as of 1990 there were two openly homosexual members of Con-

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[244] *Watkins*, 875 F.2d at 724-28.
[245] *Id.* at 724.
[246] *See, e.g.*, T. Cowan, *supra* note 104.
[247] *See supra* text accompanying note 93.
[248] 875 F.2d at 725.
[249] *Bowers*, 478 U.S. at 202 n.2. *Contra* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (homosexuality not immutable because primarily behavioral in nature).
[250] *See supra* text accompanying notes 43-44.

gress.[251] California and Wisconsin have passed statutes prohibiting discrimination against homosexuals.[252] The Civil Service Reform Act of 1978 has been interpreted to mean that homosexuality by itself is not a disqualification for federal employment.[253] The most significant display of homosexual political power has been in the cities:

> In many major cities with significant gay populations, political organization of the gay community has advanced far enough to secure the enactment of local ordinances prohibiting such [anti-gay] discrimination. Since the early 1970s, more than fifty cities or other political subdivisions (counties or districts) have passed such ordinances, including most of the major centers of gay life in America, such as Boston, New York, Los Angeles, San Francisco, Atlanta, the District of Columbia (Washington, D.C.) and Philadelphia.[254]

Judge Norris noted that the relevant political level for seeking protection from military discrimination is the national level, "where homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination."[255] He stated that "homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches."[256] There is much evidence to the contrary, however, and it is unlikely that the Supreme Court would hold that homosexuals are such a politically powerless group.

Homosexuals should not get suspect class status under this prong of equal protection analysis because they are not politically powerless. Because they have suffered purposeful discrimination and are defined by an immutable trait unrelated to their contributions to society, homosexuals may yet achieve quasi-suspect status. Without this status, regulations impinging upon homosexuals need only be rationally related to a legitimate government interest.

3. Equal Protection Applied to Homosexuality Regulations

The fifth amendment equal protection issue, as framed in *Ben-Shalom III*, is "whether homosexuals, defined by the status of hav-

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[251] A. Leonard, *supra* note 162, at 103-04.
[252] *Watkins*, 875 F.2d at 727 n.30.
[253] A. Leonard, *supra* note 162, at 102.
[254] *Id.* at 106.
[255] *Watkins*, 875 F.2d at 727 n.30.
[256] *Id.* at 727.

ing a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect or quasi-suspect class.''[257] The same issue was raised in *Watkins*.[258]

The appellate courts in both *Watkins* and *Ben-Shalom III* declined to extend suspect or quasi-suspect class status to homosexuals. These cases were not argued on the basis of the fundamental rights prong of equal protection. In *Watkins* a panel of the Ninth Circuit found that homosexuals were a suspect class and that the Army failed to provide a compelling reason for its homosexuality regulations.[259] The Ninth Circuit, en banc, then decided the case in favor of Watkins on an estoppel theory, and withdrew the earlier *Watkins* opinion.[260] The equal protection issues were addressed only in the en banc concurring opinion of Judge Norris, joined by Judge Canby.

The *Ben-Shalom III* court reasoned that if ''homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.''[261] The court applied rational basis scrutiny and found that the Army met that standard without difficulty.[262]

The Supreme Court declined to hear *Ben-Shalom III* without comment. A denial of certiorari does not carry the weight of an affirmance, nor does it mean that the Supreme Court agreed with the decision of the Court of Appeals.[263] Nevertheless, it does signal that the Court is not likely to hear similar cases any time soon unless a split develops among the circuits.

Judge Norris, concurring in *Watkins*, evaluated the equal protection claim with a three-stage inquiry.[264] First, do the regulations actually discriminate based on sexual orientation? Second, which level of judicial scrutiny applies? Third, do the regulations survive the applicable level of scrutiny?

a. Do Regulations Discriminate Based on Homosexual Orientation?

Equal protection requires that people be treated equally. If a

[257] *Ben-Shalom*, 881 F.2d at 463.
[258] *Watkins*, 875 F.2d at 699.
[259] Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988).
[260] *Watkins*, 875 F.2d at 711.
[261] *Ben-Shalom*, 881 F.2d at 464.
[262] *Id.*
[263] 36 C.J.S. *Federal Courts* § 204 (1960).
[264] *Watkins*, 875 F.2d at 712.

regulation affects everyone equally, there should be no equal protection problem. Everyone in the military is capable of committing homosexual acts, and there is little disagreement that the military lawfully can proscribe these acts by its personnel. Everyone in the military does not have a homosexual orientation, however, and there is much disagreement over regulating what a person is, as opposed to what a person does. To the extent that a regulation affects or burdens only one class of the population—those with the homosexual orientation—the threshold inquiry is met.

Military homosexuality regulations since 1982 uniformly have emphasized the unsuitability for military purposes of people with homosexual orientations.[265] In contrast, the military has exceptions allowing accession and retention of people who have committed homosexual acts, but they only apply to people who do not have a homosexual orientation. There are no exceptions for people with homosexual orientations.

Judge Wood, writing for the *Ben-Shalom III* court, resolved the issue by finding that homosexuals are likely to commit prohibited homosexual acts. He found that the regulation classified upon reasonable inferences of probable conduct in the past and in the future. "The Army need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here."[266]

Whether the military decides to go sleuthing after the class most likely to commit the proscribed acts, the inquiry still is whether the regulations affect or burden everyone equally. The answer is that they do not. At least as far as this threshold question is concerned, Judge Norris provided the correct analysis in his concurring opinion in *Watkins*.[267]

> On their face, these regulations discriminate against homosexuals on the basis of their sexual orientation. Under the regulations any homosexual act or statement of homosexuality gives rise to a presumption of homosexual orientation, and anyone who fails to rebut that presumption is conclusively barred from Army service. In other words, the regulations target homosex-

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[265] *See* sources cited *supra* notes 14, 158-61.
[266] *Ben-Shalom*, 881 F.2d at 464.
[267] *Watkins*, 875 F.2d at 712-16.

> ual orientation itself. The homosexual acts and statements are merely relevant, and rebuttable, indicators of that orientation.[268]

b. Which Level of Judicial Scrutiny Applies?

The question of whether a regulation affecting homosexuals as a class should be given strict scrutiny, heightened scrutiny, or rational basis scrutiny depends on whether the regulation is more like one affecting the following: 1) race, alienage, or national origin; 2) gender or legitimacy; or 3) a legitimate government interest.

Almost all courts that have considered this issue have applied rational basis scrutiny. Those not applying rational basis scrutiny have been overruled.[269] Judge Norris, concurring in *Watkins*, supported strict scrutiny,[270] but he believed homosexuals are a politically powerless group. Homosexual regulations may one day be judged with heightened scrutiny because homosexuals have several of the characteristics of a suspect class.[271]

c. Do the Regulations Survive the Applicable Level of Scrutiny?

If the strict scrutiny standard applied, the homosexuality regulations would have to be tailored to meet a compelling government interest. Even under a standard of review deferential to the military, it is unlikely that the current regulations could withstand this scrutiny. The government has won only one compelling state interest case—the World War II era national origin case of *Korematsu v. United States*.[272] A review of homosexuality regulations is not likely to succeed under the equal protection suspect class theory, but it could with a fundamental rights theory.

If heightened scrutiny applied, the regulation would have to be substantially related to a sufficiently important government interest. The government interest is articulated in Department of Defense Directive 1332.14:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demon-

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[268] *Id.* at 714.
[269] *See, e.g.*, *Ben-Shalom*, 881 F.2d at 454; *Watkins*, 875 F.2d at 699.
[270] *Watkins*, 875 F.2d at 724-28.
[271] *See supra* text accompanying notes 240-57.
[272] Korematsu v. United States, 323 U.S. 214 (1944).

> strate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.[273]

The military mission is an important government interest. The question is whether the military policy of excluding all homosexuals is substantially related to accomplishment of the mission. This inquiry first requires an examination of whether the presence of homosexuals prevents or hinders the military from accomplishing the mission. During this examination, the military gets deferential treatment. In military affairs, a court should not substitute its views for the "considered professional judgment" of the military.[274]

Because there always have been and probably always will be homosexuals in the military, it cannot tenably be argued that homosexuals prevent the military from accomplishing its mission. Nevertheless, any disruption to military affairs arguably hinders the military mission. Given the deference normally accorded the military, an assault on the regulations under heightened scrutiny probably would be resolved in the military's favor.

The remaining question is similar to the one raised by Justice Brennan in *Rowland*:

> Finally, even if adverse state action based on homosexual *conduct* were held valid under application of traditional equal protection principles, such approval would not answer the question, posed here, whether the mere nondisruptive *expression* of homosexual preference can pass muster even under a minimum rationality standard as the basis for discharge from public employment.[275]

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[273]DOD Dir. 1332.14.

[274]Goldman v. Weinberger, 475 U.S. 503, 508 (1986); Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981); Orloff v. Willoughby, 345 U.S. 83, 93, 94 (1953).

[275]Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1016 (1985) (Brennan, J., dissenting from denial of cert.).

Is there such thing as "nondisruptive expression of homosexual preference" in the military setting? The minimum rationality standard requires only that the classification drawn by the government regulation rationally further some legitimate, articulated governmental purpose.[276]

The first question is whether the purpose of military homosexuality policy constitutes a legitimate governmental purpose. The stated purpose is preventing the impairment of the military mission. It would be difficult to attack such a broad statement of purpose. The government clearly has an interest in the accomplishment of the military mission.

The second question is whether the regulation rationally furthers the stated purpose. To the extent that homosexual activity is regulated, it does. In the military environment, any sexual activity tends to be disruptive. To the extent that homosexual orientation is regulated, it does not. A person's sexual orientation has nothing to do with the military mission. With the issues commingled, the regulation has so far passed minimum scrutiny.[277]

The fact that military homosexuality regulations have survived legal attacks does not mean that they cannot or should not be improved. It means only that the courts are not going to make it happen. It is up to the military to come up with the best policy without court intervention.

V. POLICY PERSPECTIVES

In January 1982 the Department of Defense issued new guidelines stating that homosexual offenses did not actually have to be committed to separate military personnel from the service; intent was what mattered.[278]

A. BASIS FOR CURRENT POLICY

"Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment

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[276]McGinnis v. Royster, 410 U.S. 268, 270 (1973).

[277]*E.g.*, *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076; Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

[278]DOD Dir. 1332.14.

of the military mission."[279] These opening sentences of the policy refer to both conduct and speech that seriously impair the mission.

A person, whether homosexual or heterosexual, engaging in sexual conduct in a military environment, may well distract or detract from the mission. There are also situations in which the statements of a person with homosexual tendencies could create a problem for the mission, such as if a homosexual soldier were to solicit another soldier to engage in homosexual acts. Presumably, this is what the drafters of the policy had in mind. What is not clear is how missions are impaired by statements not involving solicitation, but which still demonstrate a propensity to engage in homosexual conduct.

"The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale . . . ."[280] There is little argument as to personnel who commit homosexual acts in barracks, aircraft, on board ship, or on duty. Similar problems would be expected with personnel who commit heterosexual acts in such places or situations. Even with homosexual acts, though, it becomes difficult to see how these discipline problems occur when the acts are off government property with nonmilitary personnel. These cases often involve an act of sodomy, which, if discovered, can be prosecuted or dealt with administratively. The real effect on discipline is negligible. Outside those with an official need to know, few military personnel even will be aware of these acts until the military initiates adverse action.

It also is difficult to see how the presence of personnel who admit to a homosexual orientation adversely affects the maintenance of good order. About seventy-five percent of the homosexual personnel never are discovered at all, so they are not causing these problems.[281] Of course, neither are they talking about the fact of their homosexual orientation. If they had the freedom to discuss it openly, it is doubtful that they would choose to do so in a hostile environment. If such a person does cause a problem with order, morale, or discipline, and it can be articulated and proven, then he or she should be separated. Conversely, if a real problem cannot be articulated or proven, there should be no separation.

"The presence of such members adversely affects the ability of the Military Services to. . . foster mutual trust and confidence among

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[279] *Id.*

[280] *Id.*

[281] *See supra* text accompanying notes 73-85.

servicemembers. . . .''[282] Here the military position is that the great majority of service members ''despise/detest homosexuality.''[283] Even if that is so, it does not necessarily follow that the great majority despise homosexuals. Personnel who work hard and make an effort to get along foster mutual trust and confidence. Those who do not tend to be despised and detested and are bid good riddance if they can be separated for any reason.

There also have been times when the ''great majority'' was not too keen on the idea of allowing minorities and women in the military. ''The peculiar nature of Army life has always required the melding together of disparate personalities. For much of our history, the military's fear of racial tension kept black soldiers segregated from whites. Fear of sexual tensions, until very recently, kept the participation of female soldiers to a minimum.''[284]

The military should not allow the fear of prejudice to drive its personnel policy. Even if the basic homosexuality policy does not change, the supporting rationale should be purged of arguments based on prejudice.

''The presence of such members adversely affects the ability of the Military Services to. . .ensure the integrity of the system of rank and command. . .''[285] The fear is that openly homosexual supervisors could not command respect.[286] This problem, however, is solved best by leadership training and by rating supervisors on their leadership abilities. Cases such as those of Technical Sergeant Leonard Matlovich and Staff Sergeant Perry Watkins—homosexual personnel who received outstanding ratings in all aspects of performance—demonstrate that even openly homosexual supervisors can do well in the military.[287] Perhaps the ability to command respect is more a function of leadership than sexual orientation. ''The presence of such members adversely affects the ability of the Military Services to. . .facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy. . . .''[288] Even in a sexually integrated military, men and women do not share showers and close living

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[282]DOD Dir. 1332.14.
[283]*See, e.g.*, *Watkins*, 875 F.2d at 728; *Beller*, 632 F.2d at 811 n.22.
[284]*Ben-Shalom*, 489 F. Supp. at 976.
[285]DOD Dir. 1332.14.
[286]*See, e.g.*, *Watkins*, 875 F.2d at 729; *Beller*, 632 F.2d at 811 n.22.
[287]*Matlovich*, 591 F.2d at 854; *Watkins*, 875 F.2d at 704.
[288]DOD Dir. 1332.14.

quarters because of basic privacy considerations. These privacy considerations are just as applicable to heterosexuals and homosexuals of the same gender. Nevertheless, that appears to be a unit level management problem, not an "assignment and worldwide deployment problem."

"The presence of such members adversely affects the ability of the Military Services to. . . recruit and retain members of the Military Services. . . ."[289] As the American military historically has excluded homosexuals, it is difficult to understand what leads to this conclusion other than conjecture. It is just as easy to surmise that a more limited policy to exclude or punish personnel who commit homosexual acts in barracks or on ship would be sufficient to meet these concerns.

"The presence of such members adversely affects the ability of the Military Services to. . . maintain the public acceptability of military service. . . ."[290] There always will be some people for whom military service will not be acceptable under any policies or circumstances. Assuming the fears are legitimate, they arguably could be assuaged with a focus on acts rather than orientation.

"The presence of such members adversely affects the ability of the Military Services to. . . prevent breaches of security."[291] A breach of security could occur if a homosexual or bisexual with access to classified information was blackmailed with the threat of disclosure to his family or superiors. Judge Norris addressed this issue in *Watkins*.

> It is evident, however, that homosexuality poses a special risk of blackmail only if a homosexual is secretive about his or her sexual orientation. The Army's regulations do nothing to lessen this problem. Quite the opposite, the regulations ban homosexuals only after they have declared their homosexuality or have engaged in known homosexual acts. The Army's concern about security risks among gays could be addressed in a more sensible and less restrictive manner by adopting a regulation banning only those gays who had lied about or failed to admit their sexual orientation. In that way the Army would *encourage*, rather than discourage, declarations of homosexuality, thereby reducing the number of closet homosexuals who might indeed pose a security risk.[292]

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[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Watkins*, 875 F.2d at 731.

Or, as stated by Representative Gerry Studds in 1989: "The question is not whether gay men and women will serve. The only question is will they be compelled by Defense Department policy to hide."[293]

B. PROBLEMS WITH CURRENT POLICY

Is the current policy in need of adjustment? Yes. The military views a person who admits to a homosexual orientation as a crime waiting to happen who should be expelled immediately.

A policy that deprives people of opportunity because of what they are, as opposed to what they do, is contrary to American ideals. The letter of the law may not be violated, but the spirit is. In equating admissions of homosexual orientation with illegal homosexual conduct, military policy turns the presumption of innocence on its head.

Does the policy work? It is taken as a given that people with a homosexual orientation simply are incompatible with military service. Yet, the incidence of homosexual men is about the same in the military as it is in the general population, and the incidence of homosexual women is greater in the military than in the general population.[294] While seventy-five percent never are detected, a portion of the twenty-five percent who are detected simply turn themselves in when they decide they want to get out.[295] The system is not broken; it never worked to begin with.

People who know they have a homosexual orientation and who want to serve in the military are faced with a dilemma: disclose and be excluded, or lie and hide. The policy excludes those who are truthful, while accepting those who choose to lie. Personnel who do not discover their orientation until after they are on active duty face a similar dilemma. If they are troubled by their discovery, they cannot seek help without being separated. The people needing help the most, therefore, are discouraged from seeking it, but they still will be operating our multi-million dollar weapon systems while they try to sort out their sexuality.

None of this is to say that personnel who are disruptive should be admitted or retained on active duty. Some homosexual personnel are and will be disruptive, just as some heterosexual personnel are and

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[293] *Rethinking DOD Policy on Gays*, The Washington Post, Nov. 6, 1989, at A 11, col. 1.
[294] *See supra* text accompanying notes 73-85.
[295] *See supra* text accompanying notes 88-96.

will be disruptive. Policy should be crafted to allow the exclusion of disruptive personnel, but it should be crafted so it does not create as many problems as it solves.

C. PROPOSALS FOR MODIFICATION

1. Statutory

The military sodomy statute, article 125, UCMJ, is overbroad.[296] The real problem for the military is not the service member who engages in sexual activity on his or her own time, away from the military installation or vessel. The problem is the service member who disrupts the military mission through an inappropriate choice of the place or partner for the sexual activity. Sexual intercourse, whether of the homosexual or heterosexual variety, should be prohibited on duty, in the barracks, on board ships or aircraft, or in situations that would create the appearance or prospect of favoritism within a chain of command.

2. Regulatory

a. Accessions

Homosexuality currently is a nonwaivable disqualification for service in the military.[297] It should be a waivable disqualification. To qualify for a waiver, an applicant should be required to sign a statement that explains the sodomy statute and the fact that violations may lead to either an adverse administrative separation or a court-martial. Personnel with a homosexual orientation would know the rules, and those who gain entry after disclosing their orientation would be less likely to become security risks. A waiver provision also would help in the event that the Selective Service System has to be used for national mobilization.

b. Separations

The current separation policy includes a list of questionable conclusions about how the presence of homosexuals adversely affects the military.[298] The policy is not all bad, it just says too much. The military has a legitimate interest in keeping disruptive activity to

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[296]UCMJ art. 125.

[297]*See, e.g.*, Army Reg. 601-210, Regular Army and Army Reserve Enlistment Program, para. 4-4 (1 Dec. 1988).

[298]DOD Dir. 1332.14.

a minimum. The basis for separation should be homosexual activity, not homosexual orientation. Sexual activity on duty, in barracks, on ship or aircraft, or between members of the same chain of command can be disruptive, whether it is homosexual or heterosexual.

The administrative proscription of homosexual acts also is justified to the extent that these acts are illegal when they involve sodomy.[299] Even if Congress repeals the military sodomy statute—which does not appear likely anytime soon—sodomy still will be illegal for military personnel in about half of the fifty states via the Assimilated Crimes Act.[300] The basis for the policy should say this, and should refrain from using a laundry list that easily is assailed as reminiscent of old arguments used to exclude minorities from the military.[301]

The bases for separation of homosexuals may include preservice, prior service, or current service conduct or statements.[302] This goes too far only in the situation of personnel who acknowledge a homosexual orientation, but for whom there is no evidence of any proscribed homosexual activity. Personnel who lie by failing to disclose prior homosexual acts or a known homosexual orientation should face separation for fraudulent entry. Personnel who commit homosexual acts that are prejudicial to good order and discipline should face separation for that conduct. Nevertheless, personnel who admit their homosexual orientation and for whom there is no evidence of homosexual activity should not be separated without proof of real prejudice to good order and discipline.

Commanders and Service Secretaries should have the discretion to retain homosexuals. Commanders are in the best position to judge whether a person has value to the military. This discretion existed once before, but it was taken away when the current policy was promulgated in 1982.[303] For example, Staff Sergeant Perry Watkins was retained in 1975 (as a Specialist Five) after a board of officers unanimously recommended "that SP5 Perry J. Watkins be retained in the military service because there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance."[304]

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[299]UCMJ art. 125.
[300]18 U.S.C. § 13 (1982).
[301]*E.g.*, *Watkins*, 875 F.2d at 729.
[302]DOD Dir. 1332.14.
[303]*See supra* text accompanying notes 139-45.
[304]*Watkins*, 875 F.2d at 702.

If the discretion to retain homosexuals is returned to commanders and Service Secretaries, homosexual personnel should be retained only if they meet standards consistent with military interests. Retention should be authorized for anyone with a homosexual orientation who has not engaged in homosexual acts that are prejudicial to good order and discipline. Retention should be authorized for personnel who commit homosexual acts, as long as they do not occur on duty, in the barracks, on board ship or aircraft, in a situation that would create the appearance or prospect of favoritism within a chain of command, or in a situation that otherwise causes actual prejudice to good order and discipline.

VI. CONCLUSION

A policy must be legally sound, but it also should reflect an understanding of historical and scientific facts. There are going to be personnel with homosexual orientations in the military regardless of the policy. Some will come in knowing that they are homosexual, and some will not discover their sexual orientation until after they are on active duty. The policy should reflect that reality.

People who identify themselves as heterosexuals, bisexuals, and homosexuals exist on all points of the continuum of human sexual behavior. While the majority is exclusively heterosexual, a significant segment is exclusively homosexual, and even more could be considered bisexual during different periods of adult life.

There seem to be a number of causes for the continuum of sexual orientation, almost all of which occur prior to birth. People do not choose their place on the continuum of sexual preference, but they can choose whether, when, and how they are going to act. It is logical to assume that most are going to act in accordance with their preference.

One of the acts associated with the homosexual and bisexual preference is sodomy, which is illegal in the military. Other homosexual acts, while not illegal, provide a basis for administrative separation from the military.

Other than sexual preference, there are no discernible differences between those who are exclusively heterosexual and everyone else. In terms of behavior, a small percentage of homosexual men will exhibit effeminate characteristics. There is some evidence that homosexuals as a class may be more prone to alcoholism than the general population, but that could be because more of them may have reason

to drink. People who engage in anal sodomy also are at greater risk of acquiring AIDS than any other group.

As homosexuals have become politically organized, many states and countries have become more tolerant and have repealed many anti-sodomy laws. Some countries, such as Great Britain and Canada, have legalized homosexual acts between consenting adults, but still prohibit homosexuals from serving in the military. A number of countries, such as Israel and Spain, now allow homosexuals to serve in the military.

American homosexual military personnel have advanced a number of legal arguments to stay in the military. They have won a few battles, but for the most part, they have lost the war. Since *Bowers v. Hardwick* was decided in 1986—establishing conclusively that there is no fundamental right to engage in sodomy—homosexuals have had an uphill battle on all fronts.

The equal protection theory is the best remaining argument for homosexuals attempting to remain in the military. Though the suspect class prong of equal protection appears to be a lost cause because the Supreme Court declined to issue a writ of certiorari in *Ben-Shalom v. Marsh*, the fundamental rights prong still may prove to be successful. To succeed, a homosexual litigant will have to prevail on the issue of whether there is a fundamental right to be a homosexual. Even the Supreme Court would have a difficult time trying to decree homosexuals out of existence.

If the right case gets before the Court under the fundamental rights prong of equal protection, homosexuality legislation and regulations could be subject to strict scrutiny, even without a fundamental right to engage in sodomy. If that happens with the current regulations, the military almost certainly will lose the challenge. In the meantime, the rational basis test is the appropriate level of scrutiny, and the current regulations pass such scrutiny. The fact that the current policy is constitutional, however, does not mean that it works, that it is wise, or that the military cannot improve upon it.

The policy should advance and protect true military interests. It should not be crafted so that entry is denied those who are truthful, while granted for those who are untruthful. It should not discourage those in need of help from seeking it. The current policy is easy to administer, but it is ineffective at keeping homosexuals out of the military. It creates a number of problems that could be avoided by

a few modifications. If homosexuals are going to be in the military regardless of all efforts to keep them out—a point reinforced by history—the military should adjust to that reality.

Current policy on accession of homosexuals should be altered so that homosexuality becomes a waivable disqualification. Service Secretaries and commanders should have the discretion to retain homosexuals who meet certain criteria. Finally, the military should not separate personnel based on statements of sexual orientation alone, but should require evidence of prejudice to good order and discipline.

INEVITABLE DISCOVERY, THE EXCLUSIONARY RULE, AND MILITARY DUE PROCESS

by John E. Fennelly*

I. INTRODUCTION

The Supreme Court should modify the inevitable discovery doctrine it formulated in *Nix v. Williams*.[1] The doctrine presently allows admission of illegally obtained evidence if the prosecution can demonstrate by a preponderance of the evidence that the evidence would have been obtained by other lawful means. Under the present doctrine, admission of this evidence is permitted even if police misconduct is willful. The central theme of this article is that the doctrine as presently formulated is flawed because it fails to address the constitutional questions that led courts initially to develop the exclusionary rule. This article will survey the development of the exclusionary rule in both state and federal courts. The survey will demonstrate that the courts initially approved the exclusionary rule because of constitutional mandates. The constitutional approach in the early phase sought to vindicate fundamental notions of due process of law, judicial review, and the rule of law. This original constitutional basis for the rule was supplanted, and in its stead, deterrence of police misconduct became the only recognized basis for the exclusionary rule. This shift led directly to the present formulation of inevitable discovery. The article will discuss the relationship between inevitable discovery and the constitutional issues previously mentioned.

The article will demonstrate that constitutional values require that the doctrine be reexamined and refined. For the doctrine to be consistent with constitutional values, a good-faith requirement must be added to the inevitable discovery doctrine. Deterrence of unlawful police conduct, while desirable, is not the basis for the exclusionary rule. The basis for exclusion is and was the Constitution—a constitution that demands adherence to the rule of law and requires that the government act lawfully. These values—and not deterrence—form the basis for exclusion.

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*Major, Judge Advocate General's Corps (USAR). Circuit Judge, Nineteenth Judicial Circuit, Florida. Individual Mobilization Augmentee, United States Army Trial Judiciary. The author wishes to thank Mr. John C. Lynch, University of Virginia School of Law, class of 1992, for his invaluable assistance in the preparation of this article. This article originally was prepared in partial fulfillment of the requirements for the Master of Judicial Studies degree at the University of Nevada, Reno.

[1]467 U.S. 431 (1984).

The article will include an examination of how inevitable discovery has evolved in military law and a discussion of the role of military due process as a basis for the exclusionary rule in military courts. The discussion will demonstrate that the present debate in the United States Court of Military Appeals concerning the proper balance between constitutional values and the demands of military service represents the correct approach to the questions raised in this article. The article concludes that because of the stricter standards of military due process, a good-faith requirement for inevitable discovery is necessary in military law.

II. THE ORIGINAL BASIS FOR EXCLUSION

The Supreme Court, in the 1914 case of *Weeks v. United States*,[2] mandated exclusion of evidence obtained as a result of illegal searches and seizures. The facts of the case reveal that both state and federal officers conducted illegal warrantless searches of Weeks' residence and obtained evidence that later was used to convict him of federal lottery violations. Exclusion of evidence resulting from illegal search and seizure was advanced on three grounds. First, all entrusted with the enforcement of laws had the obligation to give effect to limitations imposed by the fourth amendment and to ensure that illegal searches or seizures "find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[3]

The opinion next shifted to what might be called a necessity rationale:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[4]

The opinion finally shifted into what might be called a rule of law analysis. In the court's view, admission of illegally obtained evidence would be "to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for

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[2]232 U.S. 383 (1914).
[3]*Id.* at 392.
[4]*Id.* at 393.

the protection of the people against such unauthorized action."[5] As promulgated, the exclusionary rule rested on the imperatives of judicial integrity, necessity, and the rule of law.

Significantly, some state courts, construing state constitutional provisions similar to the fourth amendment, followed *Weeks* and excluded evidence obtained through illegal police search and seizure.

In *State v. Height*,[6] a pre-*Weeks* case, the Iowa Supreme Court fashioned an exclusionary remedy on state constitutional grounds. Height, charged with statutory rape, was examined forcibly by physicians for venereal disease at the direction of the prosecution. The court held that the examination was both self-incriminating and an illegal search. The Iowa court, relying on the Iowa Constitution's due process clause, held that this illegally obtained evidence should be excluded. At that time, Iowa's Constitution contained no provision similar to the fourth or fifth amendment.

Subsequently, a 1919 Michigan case, *People v. Marxhausen*,[7] relied on both *Height* and *Weeks* in ordering the exclusion of evidence. In *Marxhausen* officers entered the defendant's home without a search warrant and discovered contraband. The contraband was ordered returned to him and the state appealed. The Michigan Supreme Court initially observed that the officers "had no search warrant of any kind. They entered the home of the defendant by command of no court. They searched his premises by virtue of no process."[8] The court went on to describe their actions as "an unauthorized trespass and an invasion of the constitutional rights of the defendant."[9]

The Michigan court, citing *Weeks* and the state constitution, approved the exclusion of illegally obtained evidence. In the Michigan court's view:

> [R]ights of the individual in his person and property should be held sacred and any attempt to fritter them away under the guise of enforcing drastic sumptuary legislation (no matter how beneficial to the people it may be claimed to be) must meet with the clear and earnest disapproval of the courts.[10]

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[5]*Id.* at 394.
[6]91 N.W. 935 (Iowa 1902).
[7]171 N.W. 557 (Mich. 1919).
[8]*Id.* at 559.
[9]*Id.*
[10]*Id.*

Youman v. Commonwealth[11] also involved a warrantless search of a residence. Citing article 10 of the Kentucky Constitution, the court described the officers' conduct as a "flagrant violation."[12] The court decried what it termed the officers' tendency "to disregard the law upon the assumption that the end sought to be accomplished will justify the means."[13] The court then turned to the question of exclusion. The Kentucky court, relying on *Weeks* and *Marxhausen*, embraced exclusion, citing a court's duty to "protect[ ] the citizen in the civil rights guaranteed to him by the Constitution."[14]

Youman is interesting because of its reference to a deterrence rationale for exclusion. The court expressed concern that by failing to exclude illegally obtained evidence, the courts would encourage officers to violate the law.[15]

Florida also approved the exclusionary rule in the 1922 case of *ATZ v. Andrews*,[16] and they based their decision on due process of law. Relying on both state and federal due process considerations, the court held that the use of illegally obtained evidence "strikes at the very foundation of the administration of justice, and where such practices prevail, make[s] law enforcement a mockery."[17] Judicial responsibility, in the court's view, involved a duty "not [to] sanction law-breaking and constitutional violation in order to obtain testimony against another law breaker."[18]

Illinois, relying on what might be called a rule of law basis, framed an exclusionary remedy in the 1923 case of *People v. Brocamp*.[19] To the Illinois court, it was "very clear that the defendant's constitutional rights were ruthlessly and unlawfully violated."[20] Failure to exclude evidence obtained in that manner would, in the Illinois court's view, reduce both the state and federal constitutional guarantees to a "mere nullity" and "vain boastings."[21] Exclusion was mandated by the court's obligation to support the constitution, casting upon judges a positive obligation to inquire into the manner in which evidence was obtained.[22]

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[11]224 S.W. 860 (Ky. 1920).
[12]*Id.* at 861.
[13]*Id.*
[14]*Id.* at 866.
[15]*Id.*
[16]94 So. 329 (Fla. 1922).
[17]*Id.* at 332.
[18]*Id.*
[19]138 N.E. 729 (Ill. 1923).
[20]*Id.* at 730.
[21]*Id.* at 731.
[22]*Id.* at 732.

In 1924, Missouri invoked exclusion in *State v. Owens.*[23] The court did this based upon three separate rationales: due process, rule of law, and what arguably might be characterized as a deterrence basis. The Missouri court, citing *Weeks*, the Missouri Constitution, and the United States Constitution, advanced three separate arguments for exclusion. First, the court argued the only remedy was a "preventative one."[24] In the court's view, other than exclusion, "there is no remedy, no method by which the citizen can receive the protection of the Constitution."[25] The second basis for exclusion was implicit in a failure to exclude illegally obtained evidence. "To admit the evidence is to approve his unlawful act—is for the State to become a party to the violation of its own Constitution."[26] Finally, the Missouri court argued that it is "for the courts, where their offices are invoked, to temper excess by enforcing the restraints which the law imposes for the peaceful orderly conduct of affairs."[27]

California, in the celebrated 1955 case of *People v. Cahan*,[28] mandated exclusion of illegally obtained evidence on a rationale other than deterrence. Justice Roger Traynor, writing for the majority, advanced both judicial integrity and rule of law rationales for exclusion. To Traynor, courts, out of regard for their own "dignity as an agency of justice and custodian of liberty, should not have a hand in such dirty business."[29] Traynor also advanced the view that the rule of law required that government itself obey the law while enforcing it. In this he echoed the famous Brandeis notion of the government as the omnipresent teacher.[30] Traynor also alluded to what might be termed a judicial duty to enforce constitutional guarantees. He observed, "If the Constitutional guarantees against unreasonable searches and seizures are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal constitutions they must be willing to aid in their enforcement."[31]

Cahan also raised deterrence as a possible rationale for the exclusionary rule. The California court may have been aware of *Wolf v. Colorado*,[32] authored by Justice Frankfurter, which presented a very

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[23]259 S.W. 100 (Mo. 1924).
[24]*Id.* at 108.
[25]*Id.*
[26]*Id.*
[27]*Id.* at 109.
[28]P.282d 905 (Cal. 1955).
[29]*Id.* at 912.
[30]Olmstead v. United States, 277 U.S. 436 (1927).
[31]*Cahan*, 282 P.2d at 913.
[32]338 U.S. 25 (1948); *see infra* text accompanying notes 35-50.

similar argument. Justice Traynor advanced a deterrence rationale throughout the opinion. He seemingly accepted the notion that, although exclusion

> will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves, since not to do so will jeopardize their objectives.[33]

Courts respecting constitutional provisions by refusing to sanction their violation would command "the respect of law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless law enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways."[34]

The development of the deterrence rationale for exclusion will be the subject of further discussion. From a historical perspective, however, the primary basis for the development of the exclusionary rule was not the deterrence of unlawful police activity. State and federal courts, on the contrary, believed the Constitution mandated the remedy on normative grounds. The prevailing theme of these early decisions appears to be either a concern for the rule of law, the vindication of constitutional rights guaranteed to the individual citizen, or due process notions of essential fairness in the administration of criminal justice. With a few exceptions, pre-*Wolf* and *Cahan* decisions were not concerned with their effect on law enforcement practices and procedures. Other than passing references to law enforcement, the majority of decisions centered on ethical analyses of judicial duty respecting the vindication of constitutional guarantees.

III. THE SHIFT TO DETERRENCE

The emergence of the deterrence rationale for the exclusionary rule can be traced to the 1948 case of *Wolf v. Colorado*. Justice Frankfurter, for the majority, held that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the fourth amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the

[33]*Cahan*, 282 P.2d at 913.
[34]*Id.* at 914.

states through the due process clause."[35] Frankfurter, however, viewed exclusion differently. Exclusion, he wrote, was a "remedy which directly serves only to protect those upon whose person or premises something incriminating has been found."[36] Failure of a state to use such a remedy (exclusion) would not, therefore, offend "basic standards."[37] To Frankfurter, exclusion, which "in practice. . .may be an effective way of deterring unreasonable searches,"[38] was not mandated by due process concepts, and a state's reliance on other methods of enforcement would be equally "effective."[39]

Justice Murphy, in dissent, dismissed other remedies as illusory. Exclusion, Murphy argued, succeeded in modifying police conduct. Exclusion was, in his view "an area in which judicial action has a positive effect upon the branch of law; and that without judicial action there are simply no effective sanctions presently available."[40]

Justice Rutledge, also in dissent, viewed exclusion as constitutionally mandated. Rutledge, citing *Weeks*, maintained that "Congress and this court are in my judgment powerless to permit the admission in federal courts of evidence seized in defiance of the fourth amendment."[41] If the states were subject to the amendment, exclusion would be mandated on constitutional grounds. Taken as a whole, *Wolf* began the fundamental shift that altered the basis for the exclusionary rule. The Murphy-Frankfurter debate was primarily utilitarian, while earlier decisions centered on constitutional values that transcended mere pragmatism.

To one commentator, the source of the Frankfurter approach was an outgrowth of Frankfurter's view of federalism. That view produced a "strong limiting influence on the Supreme Court's role in criminal cases during the years before the Warren tenure."[42] Professor Yale Kamisar, a critic of *Wolf*, argued that during the thirty-five year interval between *Weeks* and *Wolf*, the Supreme Court had "little to say about the rationale of the exclusionary rule and absolutely nothing to say about the relative merits of the exclusionary rule and

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[35]338 U.S. at 27-28.
[36]*Id.* at 31.
[37]*Id.*
[38]*Id.*
[39]*Id.*
[40]*Id.* at 46 (Murphy, J., dissenting).
[41]*Id.* at 48 (Rutledge, J., dissenting).
[42]Allen, *The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases*, 1975 U. Ill. L.F. 518, 526-27 (1975).

alternative methods to enforce the fourth amendment."[43] Kamisar traced the emergence of deterrence to what he characterized as "the seductive quality of the *Wolf* opinion."[44] Frankfurter, in Kamisar's view, motivated by his view of the federal system, drove "a wedge between [the protection against unreasonable search and seizure] and the exclusionary rule."[45] To Kamisar, this was unjustified and unfortunate. Unfortunate, because by

> "injecting the instrumental rationale of deterrence of police misconduct into [the Court's] discussion of the exclusionary rule" and "using the empirically-based consequationalist rationale of deterrence as support for [the Court's] refusal to apply the exclusionary rule to the states," the *Wolf* opinion not only made the result reached in the case more palatable, but it planted the seeds of destruction for the exclusionary rule—in federal as well as state cases.[46]

The deterrence rationale next played a prominent role in the landmark 1961 decision of *Mapp v. Ohio*,[47] which overruled *Wolf* and extended the exclusionary rule to the states. Justice Clark, writing for the majority, stated that the purpose of the rule was "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."[48] To Clark, a state allowing admission of illegally obtained evidence "encouraged disobedience to the Federal Constitution it is bound to uphold."[49] Citing the experience of California and other states, Clark dismissed any other remedy as "worthless and futile."[50]

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[43]Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 Creighton L. Rev. 565, 601 (1983).

[44]*Id.* at 606.

[45]*Id.* at 616.

[46]*Id.* (quoting Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365, 380 (1981)). Kamisar also traces the emergence of deterrence to the earlier case of United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949). But in his view, the Court was speaking to exploitation of illegality; that is, the fruit of the poisonous tree doctrine rather than the primary rationale for exclusion as expressed in *Weeks*. Kamisar, *supra* note 43, at 598-99 n.210.

[47]367 U.S 643 (1961).

[48]*Id.* at 656. Elkins v. United States, 364 U.S. 206 (1960), which Justice Clark quotes in *Mapp*, also contains a deterrence rational. The opinion also relies on judicial integrity as a basis for exclusion.

[49]*Id.* at 657.

[50]*Id.* at 652. Kamisar, *supra* note 43, at 622-23, argues that Clark, in *Mapp*, was trying to cover all the bases. Thus, he marshalled several arguments for exclusion—judicial integrity, due process, rule of law, and deterrence among them. To Kamisar, subsequent cases have misread *Mapp*.

The shift to a deterrence rationale continued in cases decided subsequent to *Mapp*. In a 1965 case, the Court observed:

> *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.[51]

In *United States v. Calandra*,[52] a 1974 case, Justice Powell said the exclusionary rule's "prime purpose is to deter future unlawful police conduct. . . . [It] is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ."[53] In a 1976 case, *United States v. Janis*,[54] the Court once again reiterated the deterrence rationale by observing "[i]f . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."[55] As one commentator noted:

> The Court's statement in *Janis* indicates that the "judicial integrity" consideration has been collapsed into the consideration of "deterrence." This interpretation completes the transformation of the exclusionary rule from a doctrine derived, albeit inadequately, from constitutional principle, to a rule based on the judges' assessment of the rule as a deterrent.[56]

To summarize, in the period beginning with *Wolf* in 1948, the Supreme Court shifted the basis of the exclusionary rule from normative constitutional principles to a utilitarian ethic. Simply put, the rule now will be used only if it has a deterrent effect on police conduct. This shift occurred at the same time that the doctrine of inevitable discovery began to develop in state and federal courts. Given the shift in analysis that was occurring, the early decisions approving the doctrine relied almost exclusively on the new utilitarian basis.

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[51]Linkletter v. Walker, 381 U.S. 618, 636 (1965).
[52]414 U.S. 338 (1974).
[53]*Id.* at 347.
[54]428 U.S. 433 (1976).
[55]*Id.* at 454. The reliance on deterrence as a basis for exclusion has continued unabated. *See, e.g.*, James v. Illinois, 110 S. Ct. 648 (1990), wherein the court cast its discussion of exclusion exclusively in terms of deterrence.
[56]Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. Crim. L. & Criminology, 141, 148 (1978).

IV. INEVITABLE DISCOVERY EMERGES—1963 to 1984

A 1963 case, *Wayne v. United States*,[57] involved a police investigation of an abortion-induced death. The police learned the location of the decedent's body and made a warrantless entry into the defendant's apartment. The victim's body was discovered, and routine forensic procedures were followed. At trial the defendant unsuccessfully sought exclusion of the following: 1) evidence derived from the body; 2) medical testimony on the condition of the body; and 3) medical evidence concerning the cause of death. The District of Columbia Circuit, affirming Wayne's conviction, found that the "necessary causal relation between the illegal activity and the evidence sought to be excluded is lacking in this case."[58] In the court's view, the police knew of the death and the location of the body.[59]

People v. Fitzpatrick,[60] a 1973 New York Court of Appeals case, involved the application of the inevitable discovery doctrine to an unlawful interrogation. Fitzpatrick was convicted of the first-degree murder of a police officer. He argued on appeal that the murder weapon was obtained as a direct result of an involuntary statement given to police at the time of his arrest. The facts indicated that Fitzpatrick was arrested at his home while hiding in a closet. The police forcibly removed him from the closet, moved him a few feet, and obtained an admission from him that the murder weapon was in the closet. The trial court suppressed the statement, but admitted the weapon as being obtained from the defendant incident to his lawful arrest. The Court of Appeals, in affirming the trial court, held that "evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, have inevitably led to such evidence."[61] The court noted that the interrogation occurred in close temporal and spatial proximity to the arrest. The court also found that the search itself was delayed for the brief interrogation. A search of that closet, incident to the defendant's arrest, was therefore inevitable because of the previously mentioned factors and the nature of the offense—murder with a firearm.

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[57]318 F.2d 205 (D.C. Cir. 1963).

[58]*Id.* at 209.

[59]Armed with this information the court held that "even had the police not entered appellant's apartment at the time and in the manner they did, the coroner would sooner or later have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post mortem prescribed by law." *Id.*

[60]300 N.E.2d 139 (N.Y. 1973).

[61]*Id.* at 141.

United States v. Seohnlein,[62] a 1970 case from the Fourth Circuit, further illustrated the trend toward appellate recognition of the inevitable discovery doctrine. Seohnlein appealed his conviction for bank robbery, alleging that evidence introduced at trial was obtained in an illegal search of his person. The defendant and an accomplice, Rutkowski, fled to St. Louis after robbing a bank in Baltimore. St. Louis police became suspicious of them and effected what arguably might be termed a pretextual arrest for a minor traffic offense. The defendant at the time of his arrest gave the name of Henry Thomas. Rutkowski gave his true name.

The police conducted a search of the defendant's wallet incident to his arrest and found documents in his true name— Charles W. Seohnlein. When Seohnlein arrived at the station, police queried the FBI about the defendant and Rutkowski. The FBI notified the St. Louis authorities that both were wanted for the Baltimore bank robbery. Both were arrested on the charge. FBI agents arrived and determined that the currency seized from Seohnlein when he was arrested came from the Baltimore robbery.

Seohnlein, when confronted by agents, admitted his true identity, confessed to the robbery, and consented to a search of his motel room. This search produced more of the currency taken in the robbery.

At trial, the court suppressed the identification found in his wallet and a false exculpatory statement made by the defendant when he was arrested by the St. Louis police. The court, basing its decision on an inevitable discovery rationale, admitted the currency and the confession given to FBI agents.

The unlawfully obtained suppressed evidence, in the Fourth Circuit's view, did not lead to any information. Rather, it merely accelerated a lawful arrest that would have been made based on information obtained from the co-defendant, Rutkowski.

As indicated by the foregoing survey, inevitable discovery had gained acceptance in state and federal appellate courts prior to

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[62]423 F.2d 1051 (4th Cir. 1970), *cert. denied*, 399 U.S. 913 (1970); *see also* United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980); United States v. Schmidt, 573 F.2d 1057 (10th Cir. 1978); Owens v. Twoomey, 508 F.2d (7th Cir. 1974); Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1971); Commonwealth v. White, 311 N.E.2d 550 (Mass. 1974); Oregon v. Miller, 67 Or. App. 637 (1984). A review of the above pre-*Williams* cases demonstrates that the doctrine as it evolved was centered on the new deterrence rationale for the exclusionary rule.

Williams. These decisions reflect the shift to a deterrence rationale for the exclusionary rule that began with *Wolf* and accelerated in subsequent years and decisions. Noticeably absent from these decisions is any discussion of any other basis for exclusion. Indeed, in most instances, the constitutional basis of the exclusionary rule simply is not discussed, nor is any reference made to the nature and purposefulness of law enforcement violations of constitutional norms. This is, of course, not surprising given the tenor of post *Wolf-Mapp* Supreme Court decisions.

Courts that accepted inevitable discovery prior to *Nix* relied on language contained in *Wong Sun v. United States*[63] and *Silverthorne v. United States*.[64] These cases, along with the post-*Wolf* shift to deterrence, played a central role in the development of the inevitable discovery doctrine; therefore, they merit further discussion.

Silverthorne initially extended the reach of the exclusionary rule to derivative evidence obtained from the use or exploitation of unlawfully obtained evidence. The *Silverthorne* court also hedged its bet. Derivative evidence, as noted, was not "sacred and inaccessible."[65] The government's ability to demonstrate an independent source for derivative evidence would allow its admission.[66]

Wong Sun reaffirmed and expanded the *Silverthorne* caveat, while adding a further dimension to the exclusion question. Not all evidence, the court held,

> is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[67]

Inevitable discovery, to the pre-*Williams* courts, was invariably the "sufficiently distinguishable means" used to support admission of evidence obtained in conjunction with police misconduct. One might view the deterrence rationale for exclusion and *Wong Sun*'s "suffi-

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[63]371 U.S. 471 (1963).
[64]251 U.S. 385 (1920).
[65]*Id.* at 392.
[66]*Id.*
[67]*Wong Sun*, 371 U.S. at 488 (quoting Maguire, Evidence of Guilt 221 (1959)).

ciently distinguishable means'' test as disparate streams in post-*Mapp* decisions. These streams were destined to meet and merge when the *Williams* case began its protracted odyssey through state and federal courts. At journey's end, it appeared that the Supreme Court would be unconcerned with even willful violations of the Constitution. Deterrence would be in sole and total ascendancy.

V. THE FULL-BLOWN DOCTRINE

Williams, charged with first-degree murder, was tried and convicted twice in Iowa state courts. The central issue in his first trial was the admission of his statement to Des Moines police officers. Williams, before surrendering to police in Davenport, retained an attorney, Henry McKnight. McKnight, in turn, contacted Des Moines police and agreed to surrender his client. Although the matter is not free from dispute, it appears that the police agreed not to interrogate Williams while he was being transported from Davenport to Des Moines. Before leaving Davenport, Williams was arraigned on the murder charge. Prior to riding with the Des Moines officers, two significant constitutional events took place: 1) arraignment, and 2) exercise of Williams' right to counsel. The judicial, as opposed to the investigative, process clearly was underway.

Shortly after leaving Davenport, Captain Leaming, the lead investigator, made his now famous ''Christian burial speech.''[68] Williams, after hearing the speech, led officers to the body. He was not interrogated further and never did confess to the actual killing. Williams, not surprisingly, was convicted in Iowa courts.

The Supreme Court, in affirming the lower federal courts, determined that the speech was ''tantamount to interrogation.''[69] Because Williams had been arraigned and was represented by counsel, this surreptitious interrogation was violative of his sixth amendment right to counsel. More significant, for purposes of this discussion, the court made the following cryptic comment in a footnote:

> While neither Williams' incriminating statements themselves nor any testimony describing his having led police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.[70]

[68]Brewer v. Williams, 430 U.S. 387, 392 (1977).
[69]*Id.* at 399 n.6.
[70]*Id.* at 407 n.12.

Williams was retried. The state trial court admitted evidence of the condition of the victim's body, postmortem chemical and medical tests, and photographic evidence of her clothing. In admitting the evidence, the court found by a preponderance of the evidence that, in light of the massive systematic search that was undertaken, the scene would have been discovered even without the proscribed interrogation. The Iowa Supreme Court affirmed Williams' second conviction and recognized inevitable discovery as an exception to the exclusionary rule. The Iowa court, while accepting the doctrine, required two elements: 1) good faith by police, and 2) a demonstration that the evidence would have been discovered by lawful means; both had to be demonstrated by a preponderance of the evidence.[71]

As to good faith, the Iowa court observed that

> the issue of the propriety of police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.[72]

The court then found that the evidence would have been found by lawful activity of the search party. To the Iowa court, legal uncertainty or novelty was prima facie good faith.

On appeal, the Eighth Circuit found that legal uncertainty was not necessarily good faith. To the Eighth Circuit, the detective's actions were not "the actions of a man who believed he was doing the right thing, only to be confounded later on by a close vote on a question of law."[73] They were, rather, "[a] design to obtain incriminating evidence by mental coercion"[74] that constituted "a design to violate the Constitution."[75]

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[71]State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979).

[72]*Id.* at 260-61.

[73]Williams v. Nix, 700 F.2d 1164, 1173 (8th Cir. 1984).

[74]*Id.*

[75]*Id.* Professor Phillip E. Johnson takes issue with the Eighth Circuit's broadside attack on the detective. In an article entitled *Return of the "Christian Burial Speech" Case*, 32 Emory L.J. 349 (1983), Johnson notes the opinion is "particularly vulnerable on this subject [bad-faith]." *Id.* at 369. This view also was shared by three judges of the court who dissented from a denial of a motion for rehearing *en banc*. Judge Fagg, writing for the dissenters, observed "I cannot satisfy myself that the issue of the officer's good faith or bad faith has *ever* been the subject of an evidentiary hearing. If I am correct, then our panel is not in a position comfortably to find as a matter of law that Officer Leaming acted in bad faith." 700 F.2d at 1176 (Fagg, J., dissenting). Johnson further noted:

Iowa sought and obtained certiorari, and the stage was set for the Supreme Court to answer the question it had posed in *Williams I*. The question was to be answered in an opinion authored by none other than Chief Justice Warren Burger, the author of *Wayne v. United States*, one of the earliest inevitable discovery cases.

The Chief Justice began his analysis by reaffirming the continuing validity of the fruit of the poisonous tree doctrine. He stated that "deterrence" is the core rationale for the "drastic and socially costly"[76] remedy of exclusion. The derivative evidence question then becomes one of not putting the prosecution "in a *worse* position simply because of some earlier police error or misconduct."[77] The Chief Justice likened inevitable discovery to the independent source doctrine, which was, in his view, a functionally similar doctrine. Adoption of inevitable discovery would be wholly consistent with the core rationale of independent source.[78]

To exclude derivative evidence that would have been discovered inevitably would, in the Chief Justice's view, put the prosecution in a worse position. There could, therefore, be no deterrent purpose served by exclusion. Put another way,

> [i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience and common sense.[79]

> [I]t is equally plain that Leaming meant to learn where the body was hidden through means that he thought, however, mistakenly, to be constitutional. If he had been truly reckless of constitutional standards, he would not have been so careful to restrict himself to the indirect means he in fact employed. Not only did he carefully refrain from "questioning," but he seems to have made no effort to persuade Williams to confess to the killing. Perhaps it is fair to say that he took a crabbed and legalistic approach to the word "interrogation," but then so did the four Supreme Court Justices who agreed with him, and the six Justices who voted to affirm a conviction on similar facts in *Rhode Island v. Innis*. Were they all acting in bad faith?

Johnson, *supra*, at 368.

[76]*Nix*, 467 U.S. at 442-43.

[77]*Id.* at 443.

[78]*Id.* at 444.

[79]*Id.*

The Chief Justice disagreed with the good-faith requirement, even though both the Iowa Supreme Court and the Eighth Circuit viewed a good-faith requirement as a necessary prerequisite. The Chief Justice, however, saw such a requirement as one that "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity."[80] Good faith also was rejected because officers

> faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. . . . On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice.[81]

Returning to a familiar and almost omnipresent theme, the Chief Justice argued that "[s]uppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice."[82]

The dissenters, Brennan and Marshall, accepted the majority position with regard to the constitutionality of the inevitable discovery doctrine. Their reservations, however, concerned the burden of proof imposed on the prosecution as a predicate for use of the doctrine in trial courts. In their view, a clear and convincing standard, rather than a preponderance of the evidence standard, was appropriate. The higher standard was necessary and appropriate because of the hypothetical nature of the doctrine. Inevitable discovery, they argued, "differs in one key respect from its next of kin [independent source]: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed."[83]

Inevitable discovery as finally defined by the Supreme Court reflects the shift to a deterrence rationale for the exclusionary rule that had developed since *Wolf*. Even the Chief Justice's analysis and rejection of a good-faith requirement is cast in terms of deterrent

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[80]*Id.* at 445.
[81]*Id.* at 445-46.
[82]*Id.* at 447.
[83]*Id.* at 459 (Brennan & Marshall, JJ., dissenting).

impact. The Court appeared unconcerned with the gravity, willfulness, or purposefulness of constitutional violations by law enforcement authorities. The government merely must demonstrate by a preponderance of the evidence a hypothetical scenario that would lead law enforcement to derivative evidence.

VI. INEVITABLE DISCOVERY AND ITS CRITICS

Inevitable discovery has been the subject of severe criticism. The most interesting facet of the debate is the critics' almost universal adherence to the deterrence question. The Supreme Court has redefined the terms of the debate over the exclusionary rule and has silenced all nondeterrence issues.

Thus, Stephen Grossman argued that the "more flagrant and purposeful the police [mis]conduct is, the less likely it is that the impact of the conduct upon the defendant would be weakened."[84] This primarily is a causation argument directed to attenuation of taint. In essence, Grossman argued that attenuation sufficient to permit admission is less likely when police misconduct is flagrant.

Turning to a deterrence argument, Grossman argued that courts' failure to address the level of police misconduct "impacts directly and significantly on the deterrent purpose of the exclusionary rule."[85] The exclusionary rule best serves its purpose when applied to bad-faith misconduct by police.[86]

> The more purposeful the misconduct, the greater the need to deter and the more effective is the lesson for those contemplating future illegalities. Conversely, allowing the use of evidence which is discovered through a deliberate violation of the law communicates to the police the possibility, if not the likelihood, of benefitting from their own purposeful wrongdoing.[87]

Another writer also expressed concern with the lack of inquiry into the nature of police misconduct. Distressed by the hypothetical nature of the exception, the writer distinguished it from the independent source doctrine. His primary concern was that

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[84]Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 Dick. L. Rev. 313, 329 (1988).

[85]*Id.*

[86]*Id.* at 333.

[87]*Id.* at 333-34.

> it is very difficult to hypothesize what the police response would be to a given situation because "it is extremely rare to find a normal, lawful police procedure which is regularly followed and inevitably would have produced the same exact information." Just as there is a danger that sophisticated legal argument will be used to show a causal connection between the initial illegal conduct and discovery of derivative evidence, the same "sophisticated argument" aided by hindsight can be used to show what the police would have done in a given situation."[88]

Therefore, he argued,

> There are only a few situations where courts can apply the inevitable discovery limitation consistently with the deterrence goals of the exclusionary rule. When evidence would have been revealed to the police by operation of law or by clearly defined police procedures which are regularly followed, and the police officers have not acted in bad faith to accelerate the discovery, the doctrine can be applied satisfactorily.[89]

Other critics of the inevitable discovery exception have echoed the concern of the dissenters in *Williams*. Their prime concern has centered on the evidentiary standard adopted to support application of the doctrine—preponderance of the evidence. James Fishkin advanced a two-pronged argument for imposition of the higher, clear and convincing standard. First he argued, "the inevitable discovery exception cannot be directly related to the independent source exception if the standard of proof leaves open the risk that the evidence may not have been found through legal means."[90] Fishkin next took issue with "the Court's paradoxical statement that whether evidence would inevitably have been found 'involves no speculative elements' and can easily be based on the facts which had already occurred."[91] To Fishkin, "precisely because of a constitutional violation, courts will never know if the police investigatory procedures actually would have discovered the evidence. This inherently speculative nature of the inevitable discovery inquiry demands a higher standard of proof."[92] Thus, "because inevitable discovery requires a hypothetical

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[88]Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 Hofstra L. Rev. 137, 155 (quoting Ditler *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Cal. L. Rev. 579, 629 (1968); Nardone v. United States, 308 U.S. 338, 341 (1969)).

[89]*Id.* at 160.

[90]Fishkin, *Nix v. Williams: An Analysis of the Preponderance Standard for the Inevitable Discovery Exception*, 70 Iowa L. Rev. 1369, 1378 (1985).

[91]*Id.* at 1379 (quoting *Nix*, 467 U.S. at 445 n.5).

[92]*Id.*

finding whereas the independent source exception can be proved by a factual finding," the higher standard should be required.[93]

Another critic took a different tack. He advanced an inquiry focusing on "instances in which an investigation was prompted in part, or in whole, by illegally secured information"[94] to determine whether the evidence procured by that investigation would have been discovered in the absence of official misconduct.

> If the illegality was critical in initiating or determining the direction and form of the investigation, regardless of the legal sufficiency of the untainted evidence, the defendant's rights were clearly impaired because of the misconduct and the resultant evidence must be excluded. But if in the absence of the illegality an investigation would have occurred and proceeded in a manner that would inevitably have led to discovery of the questioned evidence, the police derived no actual benefit from that misconduct, no substantial infringement of the defendant's constitutional rights took place, and the evidence can justifiably be admitted.[95]

Finally, one writer argued for the doctrine's limitation to derivative evidence—as opposed to primary evidence—because of the speculative nature of the exception.[96] From this premise the author compared the independent source doctrine and inevitable discovery, and came to the conclusion that, because of the functional similarity of the two doctrines, primary evidence should be excluded. This final step is based on the Supreme Court's refusal to admit primary evidence under an independent source rationale. To this writer, such a refusal is "consistent with the Court's precedent to refuse to extend the inevitable discovery exception to primary evidence."[97] This is necessary to avoid the potential for using inevitable discovery to obviate the warrant requirement of the fourth amendment.

These articles reflect the ascendance of the deterrence rationale and the eclipse of any other constitutional rationale for the exclu-

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[93]*Id.* at 1381.

[94]Note, *The Inequitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 Colum. L. Rev. 88, 102 (1974).

[95]*Id.* This article antedated adoption of the inevitable discovery rule by the Supreme Court. The doctrine evolved in state and federal appellate courts and was the subject of scholarly discussion before it was recognized. It is somewhat perplexing to note that the *Nix* decision gave little or no examination to the issues raised in the articles.

[96]Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 Fordham L. Rev. 1221, 1237 (1987).

[97]*Id.*

sionary rule. They also reflect the effect of the Supreme Court's post-*Wolf* decisions on the purpose of the exclusionary rule.

VII. FURTHER RAMIFICATIONS OF DETERRENCE

The ascendance of deterrence has unleashed a barrage of statistical attacks and counterattacks on the continued viability of the exclusionary rule. These attacks emphasize the utilitarian rationale to the exclusion of constitutional questions.

Dallin Oaks, in a landmark study,[98] sought to measure the deterrent effect of the exclusionary rule on police violations of constitutional norms. The study measured the rule's effect on police behavior in New York, Chicago, Cincinnati, and the District of Columbia. Oaks concluded:

> As a device for directly deterring illegal searches and seizures by police, the exclusionary rule is a failure. . . .
>
> The use of the exclusionary rule imposes excessive costs on the criminal justice system. . . . It creates the occasion and the incentive for large-scale lying by law enforcement officers. It diverts the focus. . . from the guilt or innocence of the defendant to a trial of the police.[99]

Oaks argued for abolition of the exclusionary rule and for a tort remedy in its stead.[100]

A National Institute of Justice study conducted in 1982 measured the impact of the exclusionary rule on prosecutions.[101] The study reached the conclusion that the exclusionary rule overdeterred. The report found that "[f]or most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a longer criminal career."[102]

Supporters of the rule, also accepting the utilitarian ethos, marshalled statistical studies attacking both the Oaks and the National

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[98]Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

[99]*Id.* at 755.

[100]*Id.* at 756.

[101]National Institute of Justice, Criminal Justice Report - The Effects of the Exclusionary Rule: A Study in California (1982).

[102]*Id.* at 2.

Institute studies. Nardulli, an ardent supporter of the exclusionary rule, conducted a study in 1983.[103] Accepting the deterrence rationale, he concluded that the costs of the rule—lost arrests and convictions—resulted in the release of only a few marginal offenders. This "minuscule" effect is more than outweighed by the rule's deterrent effect.[104] Thomas Davies, in another American Bar Foundation study, concluded that the exclusionary rule was a minor factor in explaining the disposition of felony arrests.[105]

The inevitable discovery doctrine, as it is formulated presently, rests on the deterrence rationale for the exclusionary rule. The logic of deterrence precludes inquiry into anything other than the pragmatic and utilitarian dimension. To the courts, the only question is whether a given police action will be discouraged; if not, then the rule is not applicable. This logic is flawed because it fails to answer a much more fundamental question: What is the constitutional source of the exclusionary rule? Or put another way, is exclusion, in some instances, constitutionally mandated? The answer calls into question the continuing validity of both the deterrence rationale and the inevitable discovery doctrine as presently formulated.

In reality, deterrence and inevitable discovery, in a historical context, are really the latest battles in a war that has raged since the exclusionary rule's birth. No other doctrine in American criminal jurisprudence has generated more controversy or possessed such determined critics and supporters.

Cardozo's oft-quoted volley, "the criminal is to go free because the constable has blundered,"[106] might be viewed as the American legal equivalent of the shot heard 'round the world. No less an authority than Wigmore criticized the rule's soundness.[107] Contemporary critics also abound. What follows are the consistent themes expressed by critics of the exclusionary rule.

Judge Malcolm Wilkey listed eleven flaws in the rule:[108] 1) "[o]nly the undeniably guilty benefit from the exclusionary rule, while in-

[103]Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Res. J. 585 (1983).

[104]*Id.* at 607-09.

[105]Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule*, 1983 Am. B. Found. Res. J. 611 (1983).

[106]People v. Defore, 150 N.E. 585, 587 (1926), *cert. denied*, 270 U.S. 657 (1926).

[107]"The admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922).

[108]Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L.J. 530, 532-33 (1982).

nocent victims of illegal searches have neither protection nor remedy";[109] 2) "[t]he exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies";[110] 3) the rule is "an unnecessary and intolerable burden on the court system";[111] 4) the rule "forces the Judiciary to perform" an executive function; i.e., disciplining the police;[112] 5) "[t]he misplaced burden on the Judiciary deprives innocent defendants of due process";[113] 6) "[t]he exclusionary rule encourages perjury by the police";[114] 7) the rule "makes hypocrites out of judges";[115] 8) "[t]he high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens";[116] 9) "[t]he exclusionary rule is applied with no sense of proportion to the crime of the accused";[117] 10) "[t]he exclusionary remedy is applied with no sense of proportion to the misconduct of the officer";[118] and 11) it diminishes "respect for the judicial process among lawyers and laymen alike."[119]

Frank Carrington, another critic, argued that police compliance with the law is impossible because "[o]ur courts from the Supreme Court on down have created such an arcane and incomprehensible body of law in this area (search and seizure) that the policeman on the street can't know whether his actions are lawful or not."[120] John Kaplan, like Wilkey, pointed to "the disparity in particular cases between the error committed by the police officer and the windfall given by the rule to the criminal" as an "affront to popular ideas of justice."[121]

Lowell Jensen and Rosemary Hart pointed to confusion in the area of search and seizure law created by the appellate courts that results in "[p]roper police conduct" being "falsely labeled as illegal."[122]

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[109] *Id.* at 532.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 533.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 38 (1982).
[121] Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1036 (1974).
[122] Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. Crim. L. & Criminology 916, 924 (1982). Perhaps Professor Charles Allen Wright's pithy comment sums up this view of the exclusionary rule's deterrence rationale best. "A police officer will not be deterred from an illegal search if he does not know that it is illegal." Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex. L. Rev. 736, 740 (1972).

Wilkey, citing Justice Powell, also characterized the rule as irrational in that it essentially perverts the truth-seeking process. Justice should be "a truth-seeking process. The court has a duty to the accused to see that he receives a fair trial; the court also has a duty to society to see that all the truth is brought out; only if all the truth is brought out can there be a fair trial."[123]

The shift to a deterrence rationale and the resulting heavy contemporary criticism of the exclusionary rule has produced a profound change in the debate concerning the constitutional basis of the rule. Supporters have revived the ethical dimension and have sought to delineate clearly a constitutional basis for the exclusionary rule.

VIII. THE ETHICAL COUNTERATTACK

Professor Kamisar, an avid defender of the rule, characterized it as simply another form of judicial review. The courts have a duty not to close their eyes to violations of constitutional commands. The exclusionary rule is judicial review of executive action and is necessary to ensure that the fourth amendment's prohibition against unreasonable search and seizure is a reality. The exclusionary rule is a "defensive use of constitutional review."[124]

Thomas Schrock and Robert Welsh, in a thorough historical/doctrinal examination of the constitutional basis for the exclusionary rule, perceived a criminal trial as a unitary government action from arrest to trial. In their view, "[t]he court and the marshal are not viewed as moral strangers, but as parts of the same government and parties to the same governmental course of conduct."[125] Therefore, concern about the judicial use of the fruits of fourth amendment violations is built into the amendment itself.[126]

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[123]Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 215, 222 (1978).

[124]Kamisar, *supra* note 43, at 592 (quoting Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W.Va. L. Rev. 249 (1967)). Kamisar further argues that "[t]he Bill of Rights, especially the fourth amendment, 'reflects experience with police excesses.'" *Id.* at 593 (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)). "A basic purpose of the Bill of Rights, especially the fourth amendment is 'subordinat[ing] police action to legal restraints.'" *Id.* (quoting United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurther, J., dissenting)). "In enforcing the fourth amendment, courts *must* police the police." *Id.* (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 410 (1974)).

[125]Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 300 (1974).

[126]They argue that the evidentiary transaction—determining admission versus non-admission—"deliberately exposes the court, as a direct addressee of the fourth amendment, to concerns about the constitutionality of its *own* participation in the transaction." *Id.* at 306.

Schrock and Welsh viewed exclusion as a right that is personal to the defendant. Exclusion is "not just an impersonal proscription of the use of unreasonably seized evidence," but "an exclusionary *right* in the defendant, a right that is conceptually and morally part and parcel with the right to be free from unreasonable searches and seizures."[127]

Viewed in this context, Schrock, Welsh, and Kamisar maintained that the Constitution compels the courts to invoke the doctrine of judicial review to vindicate the personal right violated by unlawful government action. Failure to do so renders them derelict in their duty to review executive conduct and when appropriate, exclude evidence. The remedy—exclusion—is an inseparable part of the right to be free from unreasonable search and seizure.[128]

Cannon advanced a philosophical basis rooted in Locke and Jefferson's contract theory of government. To Cannon, "[t]he exclusionary rule embodies values that are or certainly should be dominant ones in a democratic society. Inherent in the rule are respect for privacy, individual autonomy, and the rule of law— that is, the law serving as a constraint on the governors as well as those governed and ensuring fair treatment in the relationship between government and citizen."[129] These concepts are central because government commands respect from the people only by observance of the law.[130]

Lane Sunderland approached the exclusionary rule from a historical perspective. To Sunderland, the *Weeks* opinion stands for one fundamental proposition: The judiciary "must enforce the law as written."[131] From this premise Sunderland moved to an examination of the fourth and fifth amendments. The very words of the due process clause, whatever technical, procedural, or substantive meaning may be attached to them, surely mean at least this: The only condition under which one may be deprived of life, liberty, or property is if that deprivation be in accordance with due process of law.

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[127]*Id.* at 301.

[128]"Correctly understood, the exclusionary rule in search and seizure cases is rather the right to a fair *prosecution*, which means at a minimum constitutional behavior throughout the whole course of governmental conduct, which in turn means, for example, observance of the fourth amendment by the executive and review of executive conduct in light of that amendment at trial." *Id.* at 342.

[129]Cannon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. Tex. L.J. 559, 578-80 (1982).

[130]*Id.* at 581.

[131]Sunderland, *supra* note 56, at 143.

Due process in this sense equates with the rule of law. Simply put, the government must itself obey the law. This is an entirely different issue than mere deterrence. To Sunderland, due process is a value; deterrence is a result. Exclusion, therefore, is a constitutional right inherent in the due process clause.[132]

Deterrence alone simply fails to answer these arguments in support of a constitutionally-rooted exclusionary rule. The Supreme Court's slide into deterrence has been accomplished with almost no examination. Rather, the Court, almost by fiat, has enthroned deterrence and ignored any other basis for the exclusionary rule. Deterrence, a utilitarian ethic, is by definition unconcerned with any value beyond the pragmatic. Inevitable discovery, the progeny of deterrence, also is unconcerned with constitutional values that lie beyond the pragmatic.

Therefore, from a historical and analytical standpoint, the answer is clear. The exclusionary rule was not conceived historically as a deterrent. Rather, the early cases viewed exclusion of illegally obtained evidence as flowing from both state and the United States constitutions. The previously cited cases uniformly support this view. Exclusion is not merely a judicially created nonconstitutional evidentiary concept; it is inherent in both judicial review and due process considerations.

The doctrine of inevitable discovery as presently formulated fails to address the issues of due process, judicial integrity, and judicial review when willful violations of the law are committed by law enforcement authorities. As presently formulated, willful, conscious violations of the Constitution are no barrier to admission of derivative

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[132]*See also* Sunderland, *Liberals, Conservatives and the Exclusionary Rule*, 71 J. Crim. L. & Criminology 343, 370-72 (1980). Sunderland traces the history of the concept of due process from its seminal source, the Magna Carta's language forbidding penalties except by "lawful judgment of his peers by the law of the land." *Id.* at 327 (quoting Constitution of the United States of America: Analysis and Interpretation 1138 n.3 (L. Jayson ed. 1973)). To Sunderland, due process can be paraphrased to say that any deprivation of life, liberty or property must be in accordance with the law of the land—the Constitution. Indeed, elementary principles of judicial construction in this light would require the instrument to be read and construed as a whole. The judicial goal should be to give effort to all clauses. If a judge in determining testamentary intent looks at the whole instrument, the judge should read the fourth amendment's prohibition of unreasonable searches and seizures together with the fifth amendment's guarantee that no citizen shall be deprived of life, liberty, or property without due process of law. It would be reasonable that when read together, the constitutional basis for the exclusionary rule is self-evident. Due process requires that the judiciary review actions of the executive branch to ensure that the executive branch obeys the law.

evidence if the prosecution can satisfy by only a preponderance of the evidence that discovery hypothetically is inevitable.

The very nature of the exception—a hypothetical scenario—is fraught with potential for abuse. Judges are not, as in the independent source scenario, dealing with an established fact; a hypothetical basis is all that is required. In addition, the low standard of proof involved easily could result in serious errors. This potential for error is almost certain when the doctrine is applied to a situation involving reckless or intentional violations of constitutional protections. The exception, as formulated, requires further refinement to satisfy fundamental concepts set forth by Sunderland and other critics.

Refinement also is mandated by the imperative of the judicial duty to uphold the Constitution as the supreme law of the land. The judiciary has the duty to assess executive as well as legislative actions in the constitutional balance.

How should the doctrine of inevitable discovery be refined? Before the doctrine can be invoked, the prosecution should be required to demonstrate by a preponderance of the evidence that law enforcement officers acted in an objective good-faith belief that their actions were lawful. This requirement represents a "middle ground," for it accommodates both deterrence and constitutional due process requirements.

Imposition of a good-faith requirement permits the present evidentiary standard—preponderance—to be retained. Good faith, in the inevitable discovery context, essentially is a legal issue for the court. Thus, if the court finds the police were acting in good faith, no violence is done to due process considerations. The balance of the test—that the evidence ultimately would have been discovered—can be made safely on a preponderance of the evidence basis. The redefined test, from an evidentiary standpoint, can be described as a mixed question of law and fact. Good faith, in the context of inevitable discovery, would satisfy objections of critics of both the exclusionary rule and the inevitable discovery exception.

Critics of the exclusionary rule decry what is perceived as its "meat-ax" approach, in which honest mistakes are treated in the same way as flagrant violations of the fourth amendment.[133] The com-

[133]In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1970), the Chief Justice argued that "society has at least as much right to expect rationally graded responses from judges in place of the universal capital punishment we inflict on all evidence when police error is shown. . . ." *Id.* at 419 (Burger, C.J., dissenting).

plex and dynamic body of law that governs search, seizure, and confessions requires subtle adjustments from time to time. Law enforcement should not be required, at the peril of exclusion, to anticipate those changes. The question should be: Was there a good faith attempt to comply with the law, uncertain as it is? If the answer is "yes," then due process is satisfied.

Sunderland argued that exclusion is not required in the face of minor or nonwillful violations of constitutional requirements. In his view, faithful adherence to notions of due process should not always lead to exclusion. Good faith, in the context of inevitable discovery, satisfies due process and permits the exclusionary rule to operate when willful police misconduct is present.[134]

Critics of the exclusionary rule decry the confounding body of law surrounding application of the rule. No reasonable commentator can deny that this area of law is both complex and dynamic—the criminal law's version of the rule against perpetuities. Its ability to adapt principle to changing conditions in society is a particular strength of the common law. In criminal law this dynamism creates understandable uncertainty for even the most conscientious officer. The content of the law, is, for purposes of this discussion, what is or is not constitutionally permissible.

To illustrate, for many years the law with regard to the search of vehicles and their contents was, to say the least, confusing. But the Supreme Court, on a case-by-case basis, has reduced uncertainty in that area. A police officer, in this unsettled area, can be acting in complete good faith and yet be wrong. Use of inevitable discovery in this situation does not offend due process. To return to *Williams* again, the "functional equivalent of interrogation" was a change in the law of custodial interrogation. The police, in such a situation, can be wrong, even when acting completely in good faith. The officer was wrong, but not a conscious wrongdoer. To allow use of inevitable discovery makes good sense and good law. This is, in reality, a criticism of the content of the law, not the exclusionary rule.

Two cases involving radically different police activity also point out the need for a good-faith requirement. In *Rochin v. California*[135] officers, without probable cause, arrested the defendant in his hotel room, took him to a hospital, and forcibly had his stomach pumped to obtain drugs. Justice Frankfurter, speaking for the Supreme Court, found that

[134]Sunderland, *supra* note 56, at 150-51.
[135]342 U.S. 165 (1951).

> the proceedings by which this conviction were obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents —this course of proceeding by agents of the Government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit constitutional differentiation.[136]

Justice Frankfurter added that "[r]egard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings. . . .' "[137] "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . .are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[138] A scenario that involves willful violations of constitutional guarantees without an objective good-faith belief in their legality should preclude application of the inevitable discovery doctrine.

United States v. Leon[139] provides a second example that also may be helpful to the present discussion. The *Leon* good-faith exception to the exclusionary rule requires that officers act in objective good faith when they rely on a warrant issued by a magistrate, even though the magistrate mistakenly determined that probable cause existed. Good faith in this sense requires that the officer, in obtaining the warrant, not mislead the magistrate with information known to be false. All the actors, both judicial and law enforcement, are mistaken but blameless. This is a common sense approach that encourages adherence to the law and vindicates constitutional values. *Leon*'s good-faith requirement recognizes the dynamic and complex content of search and seizure law. It also is consistent with society's need for effective law enforcement. Finally, although cast in a deterrence rationale, it protects against police misconduct and untruthfulness and is inimical to constitutional notions of due process and judicial integrity. Good faith, in the context of inevitable discovery, is necessary to prevent use of the doctrine in *Rochin*-like situations.

Recent Florida appellate decisions demonstrate that the danger of *Rochin*-like violations is not fanciful or speculative. In *Craig v.*

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[136] *Id.* at 172.
[137] *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1944)).
[138] *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)).
[139] 468 U.S. 897 (1984).

State,[140] a capital murder case, the State of Florida conceded on appeal that the defendant's confession was obtained as a result of the following: 1) an unlawful warrantless forcible entry into the defendant's home; 2) the absence of a knowing and intelligent waiver of his right to remain silent; 3) actual threats and coercion; and 4) continued deceptive and unlawful sequestration of the defendant while counsel was attempting to reach him.[141] Craig's confession contained the location of the bodies and, of course, valuable derivative evidence. Based on law enforcement testimony that sink holes in the area "would have been closely examined" and a co-defendant's "limited authorization" to inform police the bodies had been disposed of in "deep water," the Florida Supreme Court applied the inevitable discovery doctrine and upheld admission of all the evidence.[142] Noticeably absent from the discussion is any concern for the admittedly willful and illegal conduct of the police. In contrast to *Nix*, the police actions in *Craig* were willful, systematic, and encompassed fourth, fifth, and sixth amendment violations.

In *Hayes v. State* [143] the defendant's exemplar fingerprints were obtained as a result of an illegal arrest. The exemplar prints then were matched to latent prints found at the crime scene. In the face of admittedly illegal police actions, the court found that the defendant's fingerprints properly were admitted "because the record before us shows that Mr. Hayes' inked fingerprints, for comparison purposes, were and are available from independent sources; i.e., his military record."[144]

In both cases, the Florida court made a willing suspension of disbelief. In *Craig* the only lawful admission given by the defendant referred to "deep water." The record is silent as to how this cryptic reference could have led inevitably to the specific location where the bodies were found.[145] If discovery was as inevitable as the opinion posits, then why did law enforcement authorities need to resort to threats and intimidation? Even more important, if the reference to deep water and normal investigative techniques were sufficient,

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[140]510 So. 2d 857 (Fla. 1987).

[141]*Id.* at 862.

[142]*Id.* at 862-63.

[143]488 So. 2d 77 (Fla. App. 1986).

[144]*Id.* at 81. The appellate court's conclusion concerning the inevitability of obtained military records is at best unconvincing. Nowhere in the opinion does the court indicate where or how law enforcement knew he was a veteran of military service. Indeed, in the first appellate go-round, Hayes v. State, 439 So. 2d 896 (Fla. App. 1983), no mention is made of any knowledge of his military service.

[145]The area in question, Lake County, Florida, is a heavy phosphate mining area and is honeycombed with sink holes of varying depth.

then why did the police need the defendant to direct them to the location?[146]

The use of inevitable discovery in such *Rochin*-like situations satisfies neither considerations of due process nor deterrence. A good-faith requirement, as previously discussed, would ensure that constitutional requirements that are inherent in the exclusionary rule are satisfied. Objective good faith, in turn, is defined as either an unsettled area of law, such as permissible scope of warrantless automobile searches, or refinements of existing law, such as the functional equivalent of interrogation.

A good-faith requirement also is necessary because of the hypothetical nature of the exception. Commentators have expressed concern with the failure of the present rationale for inevitable discovery to address the flagrancy or purposefulness of police misconduct. These are legitimate concerns that require that police actions be undertaken in objective good faith. This is, in essence, a policy question that has not been addressed. *Leon* is cast exclusively in terms of deterrence. In approving "good faith," the Supreme Court did not devote discussion to the concerns raised in this article. This is unfortunate.

It also is unfortunate that the slide into a deterrence rationale has been accomplished with little or no discussion of constitutional issues. As the earliest cases approving exclusion as a remedy clearly indicate, deterrence simply was not an issue. This failure has contributed to the creation of inevitable discovery without adequate attention to other policy reasons that could mandate exclusion of evidence even if the prosecution satisfies the present threshold test.

The controversy surrounding inevitable discovery is only a segment of a much larger, more fundamental debate. That debate is concerned with the exclusionary rule itself and the constitutional basis for the exclusionary rule. The shift to deterrence has been unfortunate because it has obscured or ignored constitutional values and focused on pragmatic notions of deterrence.

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[146]510 So. 2d at 861.

IX. INEVITABLE DISCOVERY: THE MILITARY EXPERIENCE

The Court of Military Appeals recognized the inevitable discovery exception in the 1982 case of *United States v. Kozak*.[147] In *Kozak* a reliable informant supplied information to a commander that the accused and an individual named Murphy had a quantity of drugs in a locker in a German train station. Based on the foregoing, the commander instructed a Criminal Investigation Command (CID) agent to "go to the bahnhof [train station], observe the locker and to attempt to apprehend Private Kozak and pick up drugs that—if possible, that he was supposed to have received there from that locker."[148] Before the accused arrived at the train station, CID agents and German police began searching the lockers. Eleven plates of hashish were found in the third and fourth lockers; all but one were removed by German police. When Kozak arrived, he opened the locker, examined its contents, and slammed the door shut. The CID agents apprehended Kozak. The trial court suppressed the ten plates removed by the Germans, but admitted the plate found in the locker following the accused's apprehension.

Writing for a unanimous court, Judge Cook first held that the apprehension of the accused was based on probable cause. Second, the authorization given was "quite specific and reasonable in scope in relation to the information provided to [the commander]."[149] Finally, the court was of the view that the trial court was correct in suppressing the ten plates initially seized in excess of the authorization given by the commander. The precise issue then became the legality of the seizure of the hashish following the accused's apprehension.

In determining that issue, the court first engaged in an extended discussion of the evolution of the exclusionary rule as applied to both direct and derivative evidence obtained in violation of constitutional standards. The court discussed the logical underpinning of the inevitable discovery rule. "[T]he inevitable discovery theory is closely related to both the attenuation and independent source exceptions except to the extent that it permits the prosecution to prove that the evidence *would* have been discovered through legitimate means in the absence of official misconduct."[150] The court found that there was "no doubt that the accused would have been arrested

[147]12 M.J. 389 (C.M.A. 1982).
[148]*Id.* at 390.
[149]*Id.*
[150]*Id.* at 392 n.7 (emphasis in original).

when he arrived at the train station and opened the locker."[151] Thus, the hashish inevitably would have been discovered incident to his lawful apprehension.

The court delineated a clear predicate for application of the doctrine. The prosecution must demonstrate by a preponderance of the evidence that "government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred."[152]

United States v. Carrubba,[153] decided by the Army Court of Military Review, is a rather straightforward application of the doctrine. Carrubba, while intoxicated, told two fellow military policemen that his personal vehicle contained marijuana and a sawed-off shotgun and then inexplicably showed the contraband in his locked trunk to the officers. In due course, Carrubba was apprehended and refused a requested consent search. After a CID agent left to obtain a search authorization, Carrubba, in response to improper police importunings, agreed to a search of his vehicle. The Army court approved the search. It found that the government had established by a preponderance of the evidence that the government possessed sufficient evidence that inevitably would have led to the contraband. The actions of the accused, in the court's view, only hastened the inevitable search that would have occurred pursuant to consent or search authorization.

The Court of Military Appeals revisited this issue in *United States v. Portt*.[154] Portt was convicted of possession, distribution, use, and introduction of marijuana. He appealed, alleging error in the denial of his motion to suppress physical evidence and statements.

Two airmen assigned to clean a security police guardmount room discovered drug paraphernalia in a locker. The locker was unlocked and did not have a name on it. The airmen reported the discovery and a subsequent search of the locker revealed a vaccination record containing Portt's name. In affirming the conviction, the court determined that the accused had not exhibited a reasonable expectation of privacy in the locker and that the search was proper. Additional-

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[151] *Id.* at 393.
[152] *Id.* at 394.
[153] 19 M.J. 896 (A.C.M.R. 1985).
[154] 21 M.J. 333 (C.M.A. 1986).

ly, the court said that the first search of the locker by airmen cleaning the squad room was a private, not a law enforcement, action. In the court's view, the information obtained from this first examination inevitably would have led to the accused.[155]

Kozak, the seminal military case recognizing the doctrine of inevitable discovery, was decided prior to *Williams II*. *Kozak* and *Portt* embrace the deterrence rationale for exclusion and do not address any other constitutional bases, such as due process or judicial review, for the exclusionary rule. Given the decision shifts in the Supreme Court since *Wolf*, this deterrence-only rationale is not surprising. Indeed, as reflected in the earlier discussion, most appellate courts, state and federal, also had adopted inevitable discovery by using the "failure to deter police misconduct" test. Thus, the failure of the Court of Military Appeals to use any other analytical approach is neither surprising nor unusual. The balance of this discussion, therefore, will be directed to an examination of the concept of military due process as distinguished from civilian due process and how military due process considerations interact with the exclusionary rule in military law and practice.

Military due process, from a conceptual standpoint, surfaced shortly after enactment of the Uniform Code of Military Justice (Code) and the establishment of the Court of Military Appeals. In *United States v. Clay*[156] the court, in reversing the accused's conviction, found the basis for military due process in the Code itself. Failure to observe the rights accorded by the Code to a military accused would be a basis for reversal. In the court's view, that approach was necessary because of the "importance attached to a benefit given by Congress."[157] Moreover, "the importance should not be diluted by an assumption that doubtful cases call for its protection but those appearing certain permit it to be discarded."[158]

In addition, service members enjoy broader rights in a criminal prosecution than do their civilian counterparts. Thus, under article 31 of the Uniform Code of Military Justice (UCMJ), a service member suspected of an offense must be advised of his right to remain silent. A civilian need only be advised when subjected to custodial inter-

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[155]*Id.* at 335.
[156]1 C.M.R. 75 (C.M.A. 1951).
[157]*Id.* at 82.
[158]*Id.*; *see* Chute, *Due Process and Unavailable Evidence*, 118 Mil. L. Rev. 93, 118 (1987) (tracing the development of even stricter standards of due process for a military accused).

rogation. Service members enjoy the right to counsel provided by the government regardless of indigency. An article 32, UCMJ, investigation commonly is labeled as the military version of a grand jury. The article 32 permits an accused broad rights of cross-examination and participation that has no counterpart in civilian proceedings. Finally, the accused in the military setting enjoys far greater discovery than do most civilian defendants.[159]

Thus, in the military context, an argument can be made that willful violations of codal provisions by the government should result in more drastic sanctions than in the civilian sector. Given the hypothetical nature of the exception and the higher standard of due process in military law, the government should be required to demonstrate good faith as a predicate to use of the good-faith exception. This approach would be consistent with the due process analysis advanced by Sunderland.

Given the broader contours of due process in military law, good faith also would ensure that the impact of willful or flagrant government misconduct would not be present. Simply put, *Rochin*-like scenarios should preclude application of the inevitable discovery doctrine. Previously demonstrated willful misconduct more clearly calls for a strong judicial response. Also, the deterrence rationale simply fails to address and answer heightened military due process considerations—considerations that, due to the evolution of military law under the Code, are more stringent and demanding than in the civilian context. The lack of a good-faith requirement puts at risk a basic military due process standard historically defined by the Court of Military Appeals. That standard, simply put, is that the government adhere to the law. As noted earlier, given the dynamic nature of search and seizure law, Sunderland's analysis would permit use of evidence under an inevitable discovery rationale if good faith were present. It is one thing for military courts to recognize that law enforcement officials can make inadvertent errors that do not, under an inevitable discovery basis, warrant exclusion of evidence. It is quite another thing for military courts to permit willful violations of the law to be unpoisoned by a hypothetical preponderance.[160]

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[159]*See* Gilligan, *The Bill of Rights and Service Members*, The Army Lawyer, Dec. 1987, at 3-10 (comprehensive description of the rights enjoyed by service members in the court-martial context).

[160]*See* Cooke v. Orser, 12 M.J. 335, 338 (C.M.A. 1982) ("Courts-martial as courts of limited jurisdiction are empowered and responsible for protecting a service member's constitutional rights, including due process."); *see also* United States v. Milburn, 8 M.J. 110, 114 (C.M.A. 1979) (court found that judicial inaction, in the face of due process violations, "drastically undermines his authority and responsibility as a military judge to ensure a military accused a fair court martial, and cannot be condoned").

The present debate in the Court of Military Appeals illustrates the distinction that should be made between the content of the law and the exclusionary rule itself. The content of the law is subject to adjustment in response to changed conditions or needs. The other, fidelity to law and the Constitution, cannot be compromised. The nature and content of the debate has been delineated clearly in significant decisions of the Court of Military Appeals.

In *United States v. Moore*[161] the accused's convictions for housebreaking, larceny, and other unrelated crimes were reversed when the court found that the searches were illegal and that evidence obtained should have been suppressed. Judge Cox's concurrence in Moore illustrated the emerging debate in the court. Judge Cox, in light of previous court approvals of random urinalyses, perimeter searches, and health and welfare inspections, was critical of what he termed "the implicit assumption . . . that servicemembers generally have legally enforceable expectations of privacy *vis-a-vis* their commanders, in barracks rooms."[162] To Cox, the right to search for no reason necessarily included the right to search for a specific reason. Cox, based on the foregoing, argued for a modification of the earlier case of *United States v. Roberts*,[163] which held that service members had a legitimate expectation of privacy in barracks rooms. Judge Cox believes that because of the nature of military life there is no such reasonable expectation of privacy and therefore no fourth amendment remedy of suppression for barracks searches.

In *United States v. Battles*[164] Judge Sullivan, speaking for a unanimous court, found that an accused convicted of narcotics possession had no reasonable expectation of privacy in a berthing area of a ship. Sullivan found that "operational realities and common sense dictate . . . [the] appellant had no reasonable expectation of privacy in the common spaces of such a berthing area."[165]

The boundaries were drawn even more clearly in *United States v. Morris*.[166] Chief Judge Everett, relying on constitutional, codal, and Manual grounds, rejected Judge Cox's call to overrule "the well-established precedents of this Court."[167] The Chief Judge found it

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[161]23 M.J. 295 (C.M.A. 1987).
[162]*Id.* at 300.
[163]2 M.J. 31 (C.M.A. 1976).
[164]25 M.J. 58 (C.M.A. 1987).
[165]*Id.* at 60.
[166]28 M.J. 8 (C.M.A. 1989).
[167]*Id.* at 11.

inconceivable that members of the all-volunteer force "enlisted with the belief that their persons or belongings could be searched whenever their commander chose."[168] In Chief Judge Everett's view, the court has been responsive to "the exigencies of military necessity and unique conditions that may exist within the military society,"[169] but must require that when a different rule of search and seizure is advanced for the military, "some burden exists to show the need for such a variation."[170] In *Morris* the Chief Judge recognized the military as "a special society" that may well require different expectations of privacy, but expressed concern that excessive zeal by commanders may lead to actions that are "oppressive or unfair."[171]

Judge Cox, in response to Chief Judge Everett, expressed his "grave concern with the development of search and seizure law in the military."[172] His opinion's major premise is cast in terms of the lessened reasonable expectation of privacy in the military by virtue of its different traditions, mission, and imperatives.

In *United States v. Fagan*[173] Judge Cox reiterated his viewpoint. Fagan alleged trial court error in the admission of fingerprints that were obtained when Fagan, along with other soldiers, was ordered to report to police investigators. Judge Cox authored the opinion affirming the conviction. Returning to a familiar theme, Cox discussed the unique nature of military service. This service encompasses restrictions on liberty and privacy unknown in civilian life. These restrictions, backed with criminal sanctions, simply do not equate with civilian experience. Thus, to equate civilian standards of arrest or restriction into a military setting would be unrealistic. This conceptual analysis, coupled with the fact that a service member has

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[168] *Id.*

[169] *Id.* at 10.

[170] *Id.*

[171] *Id.* Judge Everett also rejected the government argument that the good faith exception was applicable to command-authorized searches. To Judge Everett, court precedents have not equated a military commander to a magistrate. *Id.* at 12. This argument is weakened considerably by his earlier contention that the commander, to authorize a search, must be impartial. Judge Everett goes on to point out that if actively engaged in an investigation, the commander would be disqualified from search authorizations. These statements appear to be contradictory. If a commander must be impartial for a probable cause search, which is by definition legal, how does he suddenly become "not impartial" for *Leon*'s good faith purposes? This position would appear to introduce an uncertainty into military law that simply is unwarranted.

[172] *Id.* at 14. Judge Sullivan, although concurring in the result, rejected Judge Cox's "expansive view." *Battles*, noted previously, was authored by Judge Sullivan and appeared to evidence a willingness to examine search and seizure cases in light of "operational realities." 25 M.J. at 60.

[173] 28 M.J. 64 (C.M.A. 1989).

no right to withhold his fingerprints to military authorities, was determinative. In Judge Cox's view, soldiers are not free to mill around the area or come and go as they please. Therefore, the order to report to CID, in the military context, did not equate to what would be an illegal apprehension in the civilian community.[174]

Judge Cox's approach properly returns the focus of the exclusionary debate to the content of search and seizure law as a matter of public policy that seeks to address fundamental value questions. He asks questions that seek—indeed challenge—the court to define the limits of both government power and the rights of service members. This is a debate over values, not mere pragmatism. In the military context he asks: What is a reasonable expectation of privacy? Should the nature of military and operational reality determine what is a reasonable expectation of privacy? Does the service member, in view of the commander's authority and mission responsibility, have a reasonable expectation of privacy in the barracks?

The tenor of the present debate in the Court of Military Appeals is much more likely to result in a clearer exposition of fundamental legal values. The debate essentially is constitutional, not pragmatic. Regrettably, this type of inquiry is not addressed in the decisions rendered in civilian jurisdictions. This absence is the most unfortunate outgrowth of the previously outlined shift to a completely utilitarian, pragmatic basis for the exclusionary rule. The Constitution and the Bill of Rights are statements of ethical philosophy that address the relationship between the government and the governed, the proper limits of political power, and the rights and duties of citizens. The Court of Military Appeals is performing a difficult and demanding task in a manner that should be emulated by civilian appellate courts.

Quite another issue is presented by willful violations of the law once it is defined judicially. Simply put, the law as defined must be obeyed. The government also must obey the law— that is the essence of due process of law. Due process of law then represents a constitutional value that is separate from and superior to deterrence. Deterrence is a desirable result, but it is not the purpose of the exclusionary rule. Inevitable discovery, as defined presently, does not reflect adequate concern for constitutional values.

In conclusion, the Court of Military Appeals should reexamine the doctrine of inevitable discovery. The doctrine, as formulated present-

[174] *Id.* at 69.

ly, permits the introduction of evidence in courts-martial obtained in willful violation of constitutional norms. This is inconsistent with broader notions of military due process as defined historically. A good-faith predicate would require that the area of law in question be either unclear or changing, as in searches of the contents of vehicles or actions that are the "functional equivalent" of interrogation.

At the same time, the court should continue its present debate over the content of the law along the lines suggested by Judge Cox. As Holmes observed many years ago, "The life of the law has not been logic: it has been experience."[175] The present debate in the Court of Military Appeals heeds this admonition and should enable the court to balance constitutional values and the unique demands of military service.

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[175]O. Holmes, The Common Law 1 (1881).

EQUAL BUT SEPARATE: CAN THE ARMY'S AFFIRMATIVE ACTION PROGRAM WITHSTAND JUDICIAL SCRUTINY AFTER *CROSON*?

by Captain Donovan R. Bigelow*

I. INTRODUCTION

For the first time in the relatively short history of affirmative action jurisprudence,[1] the Supreme Court has issued an opinion in which a majority of its members joined.[2] In *City of Richmond v. J.A. Croson Co.*[3] the Court clarified the scope of judicial review in affirmative action cases and provided additional guidance for analyzing the compatibility of those programs with the constitutional requirement[4] that all citizens be treated equally under the law.

This article examines the Army's affirmative action program for promotions in light of *Croson*. It briefly reviews the flow of case law prior to and since the seminal case of *Regents of the University of California v. Bakke*, examines the analytical structure endorsed by the Court in *Croson*, and analyzes the Army's promotion system in terms of its consistency with the *Croson* standards.

II. AFFIRMATIVE ACTION: *BAKKE* TO *CROSON*

Obviously, equal protection analysis does not begin with the *Bakke* case. The law has followed an evolutionary path that began with the

*Judge Advocate General's Corps, United States Army. Currently assigned as Senior Defense Counsel, Fort Carson, Colorado. Previously assigned as Chief, Criminal Law Branch, Trial Counsel, and Defense Counsel at Fort Stewart, Georgia, 1985-1989; Funded Legal Education Program Officer, 1982-1985; and as a Military Intelligence Officer, 1979-1982. J.D., Cornell Law School, 1985; and LL.M., The Judge Advocate General's School, 1990. This article is based upon a research paper submitted in partial satisfaction of the requirements of the 38th Judge Advocate Officer Graduate Course.

[1]The first direct holding on the constitutionality of an affirmative action program was in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[2]Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 Mich L. Rev. 1729 n.2 (June 1989).

[3]109 S. Ct. 706 (1989).

[4]U.S. Const. amends. V, XIV. Because of Bolling v. Sharpe, 347 U.S. 497 (1954), the standards of equal protection analysis under the fourteenth amendment are virtually identical to the fifth amendment. Federal legislation is now subject to the same level of judicial scrutiny in terms of equal protection as is state action. E. Corwin, The Constitution and What it Means Today 389-90 (1978). While the Court in *Croson* distinguishes some aspects of the analysis that might apply differently to congressional action, the thrust of the Court's decision puts a similar burden on both the federal and state governments.

passage of the fourteenth amendment[5] and continued on through *Plessy v. Ferguson*,[6] *Korematsu v. United States*,[7] *Brown v. Board of Education*,[8] and Title VII of the Civil Rights Act of 1964. The stage was set for the *Bakke* decision by the Supreme Court's refusal to grant certiorari in *DeFunis v. Odegaard*,[9] wherein Justice Douglas—in an impassioned dissent reminiscent of Justice Harlan's dissent in *Plessy* and foreshadowing *Croson* twenty-five years later—argued that "there is no constitutional right for any race to be preferred."[10]

Between 1978 and 1980, the Supreme Court decided *Bakke* and three additional cases on the subject of affirmative action.[11] In those cases, the Court attempted to provide the conceptual framework for analyzing affirmative action programs in terms of the equal protection requirements of the fifth and fourteenth amendments.[12] Unfortunately, due to the divisiveness of the issues and the inability of the Court to reach a majority decision, no consistent and readily applicable principles existed to guide lower courts and legislatures.[13]

Between 1986 and 1987, the Supreme Court issued five additional decisions dealing with various aspects of affirmative action.[14] As with the first generation of decisions, however, unity was decidedly lacking, with the justices dividing generally along "conservative" and "liberal" lines, and swing votes being shared by Justices Powell and O'Connor. Deciphering usable guidance from these cases is extremely problematic given the number of separate opinions and the frequency with which the justices concurred or dissented from various parts of the decisions.[15]

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[5]U.S. Const. amend. XIV.

[6]163 U.S. 537 (1896) (law providing for separate railway carriages for white and colored races found constitutional).

[7]323 U.S. 214 (1944) (internment of Japanese Americans in camps along the west coast during World War II held to be constitutional).

[8]347 U.S. 483 (1954) (petitioner sought to overturn laws permitting racial segregation in public schools; legalized segregation held to have denied petitioner equal protection guaranteed by the fourteenth amendment).

[9]416 U.S. 312 (1974) (petitioner Defunis, a white male, brought suit after being denied admission to the University of Washington Law School; ultimately, the Supreme Court dismissed the action as moot because Defunis, having had his admission ordered by the trial court, was due to graduate before the Supreme Court could reach the merits).

[10]*Id.* at 336.

[11]United Steelworkers v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

[12]*See supra* note 4.

[13]Sadurski, *The Second Generation of American Affirmative-Action Decisions*, 12 Sydney L. Rev. 159 n.2 (1989).

[14]Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Local 28, Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421 (1986); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986); United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442 (1987).

[15]Sadurski, *supra* note 13, at 160.

That was the status of the law when Richmond, Virginia, mandated a thirty percent minority set-aside program for city-sponsored construction projects.

III. *CROSON* AND THE NEW AFFIRMATIVE ACTION ANALYSIS

In its disposition of *Croson*, the Court resolved much of the confusion surrounding affirmative action. Although the decision contained three concurring opinions, six of the justices supported the basic analytical structure of Justice O'Connor's opinion. Justice Stevens simply added more reasons in support of it;[16] Justice Kennedy argued that the Federal Government should be subject, under virtually all circumstances, to the same level of scrutiny as the states;[17] while Justice Scalia demanded a color-blind constitution.[18] These concurring opinions did not provide any support to proponents of affirmative action programs; the opinions all support the strict scrutiny required by Justice O'Connor. To the extent that a concurring opinion indicates disagreement, a close reading of the positions of the concurring justices shows that they either would demand an even higher standard or would erect an almost per se rule against racial classifications.

With its decision in *Croson*, the Court virtually swept away the last twelve years of affirmative action case law. It rejected not only the arguments of both parties and the supporting *amici*, but also found the lower courts' holdings to be insufficient:

> The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant* [476 U.S. 267 (1986)], appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* [448 U.S. 448 (1980)] is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.[19]

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[16] *Croson*, 109 S. Ct. at 730.
[17] *Id.* at 734.
[18] *Id.* at 735.
[19] *Id.* at 717.

The Court left no doubt that any race-based classification would be subjected to the strictest judicial scrutiny.[20] "[T]he standard of review under the Equal Protection Clause is not dependent on the

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[20]A possible exception to the otherwise strict scrutiny of racially-based affirmative action programs is found in Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990). The issue was the constitutionality of two minority preference policies adopted by the Federal Communications Commission (FCC).

In accordance with the Communications Act of 1934, the FCC adopted two minority preference policies in the transfer or sale of radio or television licenses. Non-minority applicants challenged the validity of these policies, which caused the FCC to begin an inquiry into their validity. That inquiry was terminated when Congress enacted the FCC appropriations legislation for fiscal year 1988. That legislation prohibited any examination or alteration of the minority policies by prohibiting the use of appropriated funds for that purpose.

In a five to four decision, with Justice Stevens providing the swing vote, the Supreme Court held that in equal protection analysis of policies mandated by specific congressional acts the Court need not apply the strict scrutiny mandated in the review of other governmental bodies. Such congressionally-mandated policies and programs need only serve an important governmental objective and be substantially related to the achievement of that objective.

The majority distinguished these cases and the different test applied in them from the guidance given in the *Croson* case. "It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated — by Congress." *Id.* at 3008. Additionally, the Court noted that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Id.* at 3009.

In analyzing the applicability of the *Metro* case to the Army's affirmative action program for promotions, two considerations should control. First, in *Croson*, the Court left open the possibility of a congressional exception. Analyzing the applicability of the *Fullilove* case, the Court in *Croson* recognized that Congress, "unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719. "[O]ther governmental entities might have to show more than Congress before undertaking race-conscious measures." *Id.*

The clear implication in both the *Croson* and the *Metro* cases is that only Congress will be accorded the lesser standard of review in equal protection analysis. Even then, only to the extent that Congress specifically approves particular race-conscious remedial measures will the Court grant deference to a coordinate branch's own constitutional mandate. The cases cannot be read to infer a broad federal license to engage in affirmative action. Language such as "governmental unit" and "governmental entity" strongly implies that the various federal agencies will be held to the same strict standard as local and state agencies, barring specific congressional mandates covering a particular federal agency's actions.

Second, the balance of the Court is likely to shift in favor of reducing even further the scope of affirmative action programs. With Justice Souter replacing Justice Brennan, the Court's direction is clear. Although no justice's position in a particular case can be predicted with certainty, a strong indication of Justice Souter's position on affirmative action was revealed in a speech he gave in 1976. When he was the New Hampshire Attorney General, Souter attacked affirmative action as "affirmative discrimination." USA Today, July 26, 1990, at 6a.

The narrow language of the *Metro* decision provides no comfort for the proponents of affirmative action. Only to the extent that specific congressional language can be found to support a particular program will the lesser test be applied. Given the probable direction of the Court, even that narrow exception may be short-lived.

race of those burdened or benefited by a particular classification."[21] This approach is attributable directly to the justices' belief that the rights at issue were individual rights and that the concept of "group" rights is inimical to a just society.[22] Consequently, the Court has changed the focus of its analysis in these cases from broad consideration of social or class issues to an emphasis on the individual. Citing Justice Powell in *Bakke*, the Court expressed support for the proposition that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[23]

Given this strict scrutiny standard of review,[24] two questions remain. First, what governmental interests, if any, are compelling enough to justify the use of racial classifications? Second, how must a particular classification be tailored to avoid being rejected as overbroad?

A. WHEN WILL RACE-BASED CLASSIFICATIONS BE UPHELD?

A classification based on race can be justified only as a remedy for present discrimination. "Classifications based on race carry a danger of stigmatic harm. Unless they are reserved strictly for remedial settings, they may actually promote notions of racial inferiority and lead to a politics of racial hostility."[25] Under *Croson*, the discrimination must be shown to originate in the governmental unit presently attempting to remedy existing racial prejudice. "It is essential that state and local agencies establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions."[26]

In addition, a strong nexus must be shown between the identified discrimination and the injury alleged. Any program granting advantages to one racial group over another can be justified only to the

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[21]*Croson*, 109 S. Ct. at 721.

[22]*Id.* at 721, 735.

[23]*Id.* at 721.

[24]"Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.*

[25]*Id.*

[26]*Id.* at 727.

extent that the "reasons for any such classification [are] clearly identified and unquestionably legitimate."[27] Clearly, the Court will subject any classification based on race to the strictest scrutiny possible.

B. HOW MUST AN AFFIRMATIVE ACTION PROGRAM BE TAILORED?

Assuming the existence of individual discrimination, at what factors will the Court look to determine whether a particular classification is overbroad? The Court specifically has rejected the proposition that race-based classification can be justified by the existence of generalized historical discrimination. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[28]

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . . . Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[29]

Justice Scalia showed an "unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system."[30] He observed that once the discrimination is stopped, there is "no further obligation to use racial reassignments to eliminate the continuing effects" of past discrimination.[31] It is unclear whether the justices believed that the existence of societal discrimination was insufficient, per se, to justify a racial classification or whether it was simply too amorphous a concept to fulfill the requirement of specific harm. The Court recognized the "sorry history" of discrimination, but, without more, it would not uphold a race-based classification.

In addition, an attempt to raise the number of minority participants in a given field is no longer an acceptable justification for a racial

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[27] *Id.*
[28] *Id.* at 723.
[29] *Id.* at 724.
[30] *Id.* at 738.
[31] *Id.*

classification when the source of the disparity is alleged to be the historical disadvantages labored under by the targeted beneficiaries. Citing *Bakke*, the Court said, "Among the justifications offered in support of the plan were the desire to 'reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession' and the need to 'counter the effect[s] of societal discrimination.'"[32] Attempting to raise the number of minority participants in a given field, absent a showing of present discrimination, now is condemned as "discrimination for its own sake," which is "forbidden by the Constitution."[33]

Critical to the Court's handling of the historical discrimination issue was its observation that, while gross statistical disparities may show discrimination, "it is equally clear that '[w]hen special qualifications are required to fill particular jobs, comparisons to the general population [rather than to the smaller group of individuals who possess the necessary qualifications] may have little probative value.'"[34]

The requirement that statistical evidence of discrimination be limited to the professional group to which the individual belongs, rather than to the larger racial group, has enormous potential impact. When a class of minority members establishes itself in a profession, the argument may be inescapable that, by definition, they have not been the victims of discrimination to a sufficient degree to warrant remedial affirmative action.

Because the focus is now on remedying "wrongs worked by specific instances of racial discrimination,"[35] claims of societal discrimination may fail either to raise the necessary factual predicate of presently existing prejudice or to allow for a remedy that can be tailored narrowly.

The *Croson* Court also found wanting the theory that minority participation must be increased because minority children are in need of "'role models' to alleviate the effects of prior discrimination in society."[36] The Court flatly denied that statistical differences in numbers or percentages were probative of employment discrimination. The Court also noted that those differences, because they had

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[32]*Id.* at 722 (quoting *Bakke*, 438 U.S. at 270).
[33]*Id.*
[34]*Id.* at 725 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).
[35]*Id.* at 723.
[36]*Id.*

"no relation to some basis for believing a constitutional or statutory violation had occurred," would be the basis for "race-based decision making essentially limitless in scope and duration."[37]

Apparently, for the sake of analytical clarity and consistency, the Court simply was drawing a bright line between past and present discrimination. The Court's conclusion that numerical disparity had *no* probative value in determining the existence of present discrimination was counterintuitive, but absolutely necessary to the Court's position. If the Court were to admit that historical discrimination could be the basis for present race-based classifications, it would be impossible to draw a meaningful line between the burdens that could be placed on affected individuals and the amount of assistance needed by minorities to overcome past obstacles.

Similarly, the Court found unpersuasive the claim that when discrimination pervades a particular industry, discrimination could be extrapolated from that fact to an assumption that a particular individual in the industry was a victim of discrimination. "Like the 'role model' theory. . .a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'"[38] The Court's analysis was influenced by the twin concerns of finding sufficient discrimination to establish a causal link to a specific harm and the difficulty of constructing a narrow remedy.

The Court now requires strong evidence of particularized discrimination before a prima facie case for a remedy can be made. How much weight should be given to the proponent's stated objectives for a particular affirmative action plan? If a plan must remedy a present discriminatory practice, how much weight should be given to the planner's own belief concerning the nature and scope of the problem?

The Court was emphatic that the traditional judicial deference towards the fact-finding processes of legislative bodies has no role to play in the review of equal protection cases.[39]

> [M]ere recitation of a 'benign' or legitimate purpose for a racial classification. is entitled to little or no weight. . . . Racial classifications are suspect, and that means that simple legisla-

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 724-25.

> tive assurances of good intention cannot suffice. . . . [W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals.[40]

In concluding its analysis of the scope of judicial review, the Court used its strongest language to justify the strict scrutiny of racial classifications: "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."[41] Citing *Korematsu v. United States*[42] for this last proposition, the Court was reinforcing its position as the final arbiter of the scope of constitutional protections, and all but challenging the other branches of government by referencing their most notable failure to protect all individuals equally.

The Court recognized the difficulty it was imposing on bureaucracies by mandating an individualized approach to solving racial discrimination cases. The justices, however, were wholly unsympathetic to complaints concerning those burdens:

> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.[43]

Tailoring a proposed remedy must involve mechanisms that preclude beneficiaries who have not been the victims of particularized discrimination. As the Court observed, if a "successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race," the program is not tailored sufficiently to pass judicial muster.[44]

Additionally, tailoring as to duration now will be required. Any plan must have, as part of its implementation procedures, some recognizable stopping point to assure "all citizens that the deviation from

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[40]*Id.*
[41]*Id.* at 725.
[42]323 U.S. 214 (1944).
[43]*Croson*, 109 S. Ct. at 729.
[44]*Id.*

the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[45] The Court's point was that once the problem is corrected, unequal intervention by government must stop. Having focused on individual discriminatory effects, the government is presumed to have ascertained an appropriate stop-point for its efforts.

Geographic tailoring or tailoring by governmental unit is also necessary under *Croson*. The Court disputed the notion that "findings of discrimination may be 'shared' from jurisdiction to jurisdiction . . . .We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."[46]

This is another aspect of the Court's initial determination that historical discrimination is no longer a relevant factor. If the emphasis now is on identifiable victims of present discrimination, evidence of general or historical discrimination would have no more relevance than general crime statistics to a particular criminal trial.

Additionally, no affirmative action program should be upheld by the Court unless a detailed and documented effort has been made to consider the use of a race-neutral means to ameliorate the problem. "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies."[47] If the governmental unit involved can devise a remedial program involving additional training and education or the development of independently funded programs to assist minorities, the Court will require those measures rather than allow the use of set-aside as part of existing programs.

The analysis of race-neutral solutions specifically should include consideration of the potential race-neutral causes of the disparity in numbers that a particular affirmative action program is designed to remedy. The Court likely will strike down set-asides when reliable evidence exists that the source of the disparity is not discrimination.[48]

In his concurring opinion, Justice Scalia strongly condemned the use of numerical quotas. Quoting Professor Bickel, he stated:

[A] racial quota derogates the human dignity and individuality

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[45]*Id.* at 730.
[46]*Id.* at 727.
[47]*Id.* at 728.
[48]*Id.* at 728-30

> of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.[49]

Justice Scalia believed those words to be both "true and increasingly prophetic," and he stressed the importance of "not losing sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race."[50]

A majority of the Court now seems to view any numerical quota as a per se violation of the requirement to tailor carefully racial classifications. Underlying a quota is the assumption that some statistical correlation should exist between the number of minorities in the general population and the number in the targeted activity. The Court found this entirely unpersuasive. A quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[51] Any affirmative action program with fixed percentages or quotas is unlikely to withstand the exacting judicial scrutiny now extended to this class of cases. Merely calling a quota a "goal" or "target" will not control. The Court will look carefully at the factual basis for the set-aside with little deference to the judgment of the particular governmental unit.[52]

IV. THE ARMY'S AFFIRMATIVE ACTION PROGRAM

The starting point for analyzing the Army's affirmative action program is Department of Defense Directive 1350.2.[53] One of the several policies implemented by this directive requires that "the Military Ser-

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[49]*Id.* at 739.

[50]*Id.*

[51]*Id.* at 728.

[52]"The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers. . . ." *Id.* at 719.

[53]Dep't of Defense Directive 1350.2, The Department of Defense Military Equal Opportunity Program (Dec. 23, 1988).

vices. . . maintain military EO and affirmative action programs. Discrimination that adversely affects persons or groups based on race, color, religion, gender, age, or national origin, and that is not supported legally, is contrary to good order and discipline, and is counterproductive to combat readiness and mission accomplishment. . . ."[54]

Under this guidance, the Assistant Secretary of Defense for Force Management and Personnel is required to "[e]stablish categories and monitor specific goals to be included in the affirmative action programs and annual military EO assessments of each DOD Component."[55] The Heads of DOD Components are responsible for the establishment of "[a]ffirmative action programs that identify and resolve EO problems through formulating, maintaining, and reviewing affirmative action plans (AAPs) with established objectives and milestones and including accountability in personnel management . . . ."[56]

The directive establishes racial and ethnic categories that are to be the basis of the department's affirmative action programs and the monitoring process.[57] The categories include American Indian or Alaskan native, Asian or Pacific Islander, Black (not of Hispanic origin), Hispanic, and white.

Each DOD component must submit an annual Military Equal Opportunity Assessment (MEOA), which is to include an overall assessment of each component's Affirmative Action Plans (AAPs) and EO programs generally.[58] The MEOA should include an analysis, including detailed quantitative data, concerning ten areas of concern divided both by racial category and gender.[59] "Promotions" is one of the categories.

Department of Defense Instruction 1350.3[60] supplements the above directive and "emphasizes the use of standardized procedures that support longitudinal analysis throughout the Department of Defense."[61] The instruction provides additional guidance on the AAP developed by the service or component. AAPs may contain "initia-

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[54]*Id.* at 2.
[55]*Id.* at 3.
[56]*Id.* at 4.
[57]*Id.* at 2-1; 2-2.
[58]*Id.* at 3-1.
[59]*Id.*
[60]Dep't of Defense Instruction 1350.3, Affirmative Action Planning and Assessment Process (Feb. 29, 1988).
[61]*Id.* at 1.

tives, processes, systems, activities, objectives, goals, and milestones that have been established to achieve the objectives of the equal opportunity program."[62]

The Army uses Army Regulation 600-20, Army Command Policy, to pass this and other guidance to commanders at all levels. Paragraph 6-13 specifies the scope and content of the Army's AAP:

> Affirmative action plans will be comprised of planned, achievable steps to eliminate practices that deny equal opportunity to soldiers and their families. These steps are as follows:
>
> > a. AAP's will be developed and implemented by heads of Army Staff agencies and their Field operating agencies and by each MACOM . . . , installation, separate unit, agency, and activity down to and including brigade or equivalent level. Plans will include conditions requiring affirmative action, remedial action steps (with goals and milestones as necessary), and a description of the end-condition sought for each condition included. AAP's will be reviewed at least annually to access [sic] the effectiveness of action steps [sic], to initiate new actions, and to sustain goals already achieved.

Paragraph 6-16, AR 600-20, requires an annual report from all major commands (MACOMs) and the heads of designated Army staff agencies or directorates. The report must outline "the progress made in achieving the established EO Goals as reflected in the AAP for the organization. It will assess achievements and shortfalls and include plans or actions programmed to correct problems or conditions that currently exist." Subparagraph c requires the commander to list the affirmative actions taken during the reporting period, the goals achieved, goals not achieved and why, and the actions planned to achieve and/or modify the goals.

Finally, Department of the Army Pamphlet 600-26, Department of the Army Affirmative Action Plan, establishes specific affirmative actions and responsibilities for personnel management within the Army.[63] Chapter 2 contains specific affirmative action goals and objectives. These "[g]oals are intended to be realistic and achievable, with measurable prospects of attainment. Goals are not ceilings, nor are

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[62]*Id.* at 1-1.

[63]Dep't of the Army, Pam. 600-26, Department of the Army Affirmative Action Plan (23 May 1990).

they base figures that are to be reached at the expense of requisite qualifications and standards. *In affirmative action efforts, goals are not quotas.*"[64]

Paragraph 2-5, DA Pam 600-26, requires, among other things, that results of promotion selections be maintained for review, that instructions to selection boards contain guidance on equal opportunity, and that significant variances from the goals be brought to the board's attention prior to adjournment. The board must explain the variances in its after action report.

The Army's entire affirmative action program for promotions is summarized in paragraph 2-5(4): "Selection rates for all categories should not be less than the overall selection rate for the total population considered. . . ."

This method for calculating the affirmative action goals for minority and female officers is explained in paragraph 3-4. The Army has developed the concept of a "Representation Index" (RI) to assist in determining the percentage of minority officers that should be maintained in the force structure.

> The result of a hypothetical selection board, illustrates how the RI is used. The RI can be computed by following the procedure outlines [sic] below:
>
> (a) Total number eligible (considered) equal 1000.
>
> (b) Number of "group 1" that are eligible (considered) equal 160.
>
> (c) Expected percentage equal 160/1000 equal 16 percent.
>
> (d) Total number selected equal 500.
>
> (e) Expected number equal .16 times 500 equal 80.
>
> (f) Actual number of "group 1" selected equal 60.
>
> (g) Representation Index equal (60/80 times 100) minus 100 equal negative 25 percent.
>
> (h) The resultant percentage means that "group 1s" are

[64]DA Pam 600-26, para. 2-1 (emphasis added).

> under-represented in this selection board by 25 percent. The percentage does not say anything about what caused the difference. The long term goals are to arrive at the point where the RI's approach zero.

The concept of the "expected number" apparently was derived from Department of the Army Pamphlet 600-43, Measuring Changes in Institutional Racial Discrimination in the Army, April 1977. The assumption underlying the concept is that "[i]f skin color is not related in any way to type of assignment, then one would expect to find white and black officers assigned to command positions *in proportion to their total numbers in the Army.*"[65] "The meaning of such an indicator can thus be read directly. If the indicator is zero or close to it, this means there is no evidence of racial discrimination on that dimension."[66]

The Army has concluded that, to the extent the percentage of minorities and women are "under-represented," as calculated by the difference between the "expected number" and the actual percentage of minority members or women represented in the general pool, there is evidence of discrimination that is the appropriate subject for affirmative action "goals." The affirmative action program is designed to achieve and to maintain this percentage representation indefinitely.

V. THE ARMY'S PROMOTION SYSTEM

When a promotion board is convened, the members are given very detailed instructions concerning both the procedures to be followed in the selection process and the policy guidance underlying their choices. While minor variations in this guidance exist among the boards for the various ranks and specialty branches, the procedures followed and the guidance given are virtually identical for all Army promotion boards.[67]

Guidance is given in the form of a detailed written memorandum and an oral briefing given by the Director of Military Personnel Management (DMPM)—usually a major general. This oral briefing, among other things, specifically highlights the importance of the af-

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[65]Dep't of the Army, Pam. 600-43, Measuring Changes in Institutional Racial Discrimination in the Army, para. 2-4 (April 1977) (emphasis in the original).

[66]*Id.* para. 2-5.

[67]Information from Officer Sustainment and Development Branch, Officer Division, Director of Military Personnel Management, Pentagon. Conversation with LTC Chaffee and LTC Rangel, 9 February 1990 [hereinafter Information].

firmative action goals to be met for the various minority groups and women, and addresses the procedures for reporting potential failure to meet them prior to adjournment. The board will not be released until its reasons for failure to meet the goals are sufficiently explained to the DMPM. The board may be directed to revise its findings based on the affirmative action goals.[68]

Phase I of the process requires that all eligible files be reviewed and rank ordered from highest to lowest. This ranking from the most deserving to the least desirable officer is known as the Order of Merit List (OML). Those officers then are divided into two categories. Those considered "fully qualified" for promotion are the files that reflect the belief that if the available promotion slots were unlimited, all of these "fully qualified" officers would be promoted. The remaining files are listed as "not fully qualified" and are set aside for later review. A determination by the board that an officer is "not fully qualified" removes any realistic possibility for promotion. The vast majority of eligible officers are considered fully qualified.[69]

Phase II is a review of the files for potential below-the-zone promotions. The maximum number of below-the-zone promotions is limited by the initial guidance given to the board. A similar OML is created for the potential below-the-zone promotion candidates and this list then is integrated into the original OML containing all of the fully qualified officers. This second list represents the board's best judgment concerning the relative quality of all of the selected officers.[70]

Phase III uses the OML finalized in Phase II to identify those officers "best qualified" for promotion. This entails simply drawing a line at that point on the OML that equals the number of authorized promotions. At this point, the board must consider the Army's policy concerning affirmative action and equal opportunity. The guidance is clear:

> The Army is firmly committed to providing equal opportunity for minority and female officers in all facets of their career development, utilization, and progression. In evaluating the records of minority and female officers, the board should be

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[68]*Id.*

[69]*Id.*

[70]Memorandum from U.S. Total Army Personnel Command, 10 January 1990, Subject: Promotion Lists to Lieutenant Colonel, Judge Advocate General's Corps (JA) and Dental Corps (DC) Competitive Categories, Enclosure 1 [hereinafter Memorandum].

> aware that past personal and institutional discrimination may have operated to the disadvantage of minority and female officers. Such discrimination may have manifested itself in disproportionately lower evaluation reports, assignments of lesser importance or responsibility, etc. These factors shall be taken into consideration in evaluating these officers' potential to make continued significant contributions to the Army. The goal for this board is to achieve a percentage of minority and female selections from the promotion zone not less than the selection rate for the total number of officers in the promotion zone (first-time considered category).[71]

The reasons given for the importance of meeting the stated goals are that "to the extent that each board achieves it, there will be a clear perception of equal opportunity to the Army at large and selectees will be afforded future opportunities for career progression to the benefit of the Army."[72] The OML, as it exists at the beginning of Phase III, represents the board's considered belief that the officers are listed, top to bottom, in order of quality and potential for future service. The "best qualified" line represents the number of officers authorized for promotion. For example, if one hundred officers are in the zone and only fifty promotions are authorized, the best qualified line will be drawn under the name of the fiftieth officer on the OML. If, after drawing the best qualified line, the goals for minority or women officers are not met, the "lowest" nonminority above the best qualified line will be replaced with the "highest" minority under the line. This process will continue until all the various categories of minority and women officers are filled or the board determines that the goals should not be met in a particular case. This is possible if insufficient numbers of minority or women officers exist to choose from or if the quality of the remaining officers is so low that it would not be in the Army's best interests to select them over the best qualified nonminority officers.

Over approximately the last twelve-month period, thirty-four officer promotion boards have been held Armywide. Only one board has failed to meet the goals given it for minority and women officers.[73] Currently, the Army's policy is that the OML created at the beginning of Phase III of the promotion process be destroyed prior to release of the OML that has been "adjusted" for consistency with the minority and female goals. No official records are kept of which

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[71] *Id.* at enclosure 2, p. 5.
[72] *Id.*
[73] *See* Information, *supra* note 67.

nonminority officers were "bumped" from the OML to promote minority officers.[74] The mere fact that a particular number or percentage of minority officers were promoted, by itself, may not be evidence of reverse discrimination. Nevertheless, the fact that the only hard evidence is destroyed intentionally could lead to the conclusion that some changes were made.

Before May 1988, a slightly different system was used. Instead of a goal for minority and female officers identical to the "expected number," a window or range was used to identify that minimum or maximum percentage variation from the expected number that would be considered satisfactory. The purpose was to help minority officers overcome the perceived institutional or personal discrimination to which they may have been subjected. A review of the variations from the expected number resulted in the then Assistant Secretary of the Army for Manpower and Reserve Affairs concluding that these variations were too great. The present system was developed specifically to produce a more exact match between promotions and the percentage of minority and women officers in the general pool.[75]

VI. ARMY AFFIRMATIVE ACTION STRICTLY SCRUTINIZED

If the affirmative action aspect of the Army's promotion system is challenged, a federal court likely would find it unacceptable in light of *Croson*. The Army has failed to articulate compelling government interests justifying such a system and has not sufficiently tailored the program to avoid over-inclusiveness.

A. WHAT GOVERNMENT INTERESTS DOES THE ARMY CITE IN SUPPORT OF ITS EXTENSIVE AFFIRMATIVE ACTION/ EQUAL OPPORTUNITY PROGRAMS? [76]

First, DOD Directive 1350.2 states that discrimination is contrary to good order and discipline and is counterproductive to combat

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[74] *Id.*

[75] *Id.*

[76] While this article has focused on the Army's promotion system in its analysis of the *Croson* case, the Army has numerous affirmative action programs in areas such as accessions and selections for military schooling. All such programs now must be reviewed for compliance with the new standards of *Croson*. To the extent they do not meet the requirements the Army faces the prospect of virtually continuous litigation.

readiness. Second, the guidance given to the board members places importance on these concerns because, if appropriately addressed, the general population will have a perception of equal opportunity within the Army. Related to this last factor is the apparent assumption that selectees will be afforded opportunities for career progression that would not otherwise exist.[77]

These and other expressed reasons within the DOD Directive do not rise to the level of urgency required by the Court in *Croson*. Under that holding, a specific showing of present discrimination must be made to justify unequal protection.[78] The Army's reliance on the possibility of past institutional discrimination is insufficient. The key rationale in the quoted guidance from the Memorandum given to the promotion boards is that "personal and institutional discrimination *may* have operated to the disadvantage of minority and female officers. Such discrimination *may* have manifested itself in *disproportionately* lower evaluation reports, assignments of lessor importance or responsibility, etc. . . ."[79] The Army is basing its affirmative action program on the apparently unsupported assumption that discrimination might have affected some unspecified minority officers' careers adversely.

Additionally, no evidence exists that the Army's affirmative action plan is attempting to remedy presently existing discrimination in the Army. The *Croson* Court emphasized that one government unit no longer can extrapolate discrimination from the society in general or from some other institution as a justification for unequal treatment.[80]

Moreover, there is no showing anywhere in the documents comprising the Army affirmative action policy that there is a nexus between any past discrimination and the disparity between the "expected number" and the actual percentage of minority or women officers promoted. The *Croson* Court has held that the mere recitation of percentages is insufficient and may itself be unconstitutional discrimination.[81] The Army's complete and unquestioning reliance on the concept of the "expected number" puts the program on untenable legal ground.

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[77]*See* Memorandum, *supra* note 70, at Enclosure 2.
[78]*Croson*, 109 S. Ct. at 721.
[79]*See* Memorandum, *supra* note 70, at 6.
[80]*Croson*, 109 S. Ct. at 723.
[81]*Id.* at 722.

B. HAS THE ARMY ADEQUATELY TAILORED ITS AFFIRMATIVE ACTION PROGRAM?

The *Croson* Court held that once discrimination has been remedied there is no longer a justification for unequal treatment. The Army focuses on maintaining a fixed percentage of minority and women officers instead of concentrating on the existence of individual discrimination. As a result, it is impossible to say when the problem has been corrected. Because the Army is committed to a percentage that may be affected by many influences beyond discrimination, and because the Army's emphasis is as much on maintaining as it is on achieving the expected number, the program has no foreseeable end.[82]

Croson raised the issue of discrimination against sectors of the workforce possessing special qualifications.[83] The Army assumes that minority members are fungible in terms of discrimination and that discrimination is pervasive across geographic as well as economic lines. The question the Army must now address is how to demonstrate that an individual currently is suffering discrimination in the Medical Corps, the Dental Corps, or the Judge Advocate General's Corps. It will be problematic, at best, to show how a senior field grade officer possessing certain professional skills has been the victim of past discrimination, much less ongoing prejudice.

The Army cannot argue that such individual scrutiny is too time-consuming, inconvenient, or expensive. The Court has shown little sympathy for bureaucratic burdens when balancing the requirements for equal protection.[84]

Similarly, the various minority categories that the Army has singled out for special treatment are overbroad. Clearly, there are minorities and women who have not been the victims of discrimination either by society or the Army. The Court will require that affirmative action programs be tailored sufficiently to avoid creating beneficiaries who have not themselves been victims of discrimination.[85] Also, the Army program is tailored insufficiently because there is no evidence supporting the Army's policy of using the "expected number" across the board for all minority groups and women. Some attempt must be made in affirmative action programs to distinguish the need for relief and the scope of the problem.

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[82]DA Pam 600-26, para. 3-4(b)(3)(h).
[83]*Croson*, 109 S. Ct. at 725.
[84]*Id.* at 729.
[85]*Id.* at 728.

Additionally, the Army has at its disposal a series of race-neutral alternatives that the Court will require it to use before authorizing unequal treatment.[86] A victim of discrimination may now petition for relief through several Army channels.[87]

Finally, the rigid percentage goal embodied in the concept of the expected number cannot fairly be characterized as anything other than a quota. Every level of command guidance emphasizes the importance of meeting and maintaining these goals. The fact that they have been adhered to rigidly by virtually every board over the last twelve months belies the claim that these percentages are mere guidelines or one of several factors that board members may or may not consider at their option. No practical distinction exists between the percentage set-aside in the *Croson* case and the Army's attempt to set aside a percentage of promotion slots for virtually the same minority groups. Given the powerful language used by the Court in condemning quotas in any form, it seems unlikely that the Army's policy could be seen as anything but a quota. A reviewing court likely would ignore the Army's characterization of this system to the contrary.

VII. CONCLUSION

Ironically, the Army's success in overcoming both institutional and personal discrimination has made affirmative action programs superfluous. As we approach the 100th anniversary of Justice Harlan's great dissent in *Plessy v. Ferguson*, perhaps it is time to recognize that, while we do not yet have a color-blind constitution, it is time for a color-blind Army. This will not be a politically easy issue to resolve, but the current guidance from the Supreme Court is clear. The Army immediately should review the existing affirmative action programs in light of *Croson* and dismantle those aspects of these programs that cannot be justified on the basis of presently existing, individual discrimination. And we should do so with something much greater than all deliberate speed.

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[86] *Id.* at 729.

[87] *E.g.*, Uniform Code of Military Justice art. 138, 10 U.S.C. § 838 (1982); Army Board for Correction of Military Records (ABCMR), 10 U.S.C § 1552 (1982).

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SECOND EDITION

by EUGENE R. FIDELL

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TABLE OF CONTENTS

Introduction 173
The Annotated Rules 179

GENERAL

Rule
1 Name 179
2 Seal 181
3 Oath of Judges 181
3A Senior Judges 181
4 Jurisdiction 183
5 Scope of Review 193
6 Quorum 196
7 Process 199
8 Parties 200

CLERK'S OFFICE

9 Clerk 205
10 Docket 209
11 Calendar 212
12 Cases Involving Classified Information 214

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*Eugene R. Fidell is a partner in the Washington, D.C., law firm of Feldesman, Tucker, Leifer, Fidell & Bank. Mr. Fidell is a graduate of Queens College and Harvard Law School, and is admitted to practice in the District of Columbia, Maryland, New York, and Massachusetts. From 1969 to 1972, he served on active duty as a law specialist in the United States Coast Guard. Since then, in addition to participating in a general civil litigation practice, he has represented members of each of the Armed Forces and has appeared regularly before the United States Court of Military Appeals. A member of the Court's Rules Advisory Committee since its inception, Mr. Fidell has written extensively on military justice. The author wishes to thank his partners and the judges and staff of the United States Court of Military Appeals. Special thanks are due to Thomas F. Granahan, Clerk of the Court of Military Appeals, and Colonel William S. Fulton, Jr., Clerk of Court, U.S. Army Judiciary, for their helpful suggestions, and to Thomas P. Alder, President of the Public Law Education Institute, and Lawrence M. Baskir, Editor-in-Chief of the *Military Law Reporter*, for their friendship and encouragement over many years.

ATTORNEYS

13 Qualifications to Practice 216
14 Honorary Membership 219
15 Disciplinary Action 220
16 Entry of Appearance and Withdrawal by Counsel 225
17 Assignment of Counsel 227

APPEALS

18 Methods of Appeal 230
19 Time Limits 232
20 Form of Petition for Grant of Review 249
21 Supplement to Petition for Grant of Review 253
22 Certificate for Review 265
23 Mandatory Review Case 268

BRIEFS

24 Form and Content, Page Limitations, Style, and Classified Information 270
25 When Briefs are Required 276
26 Amicus Curiae Briefs 278

EXTRAORDINARY RELIEF

27 Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply 281
28 Form of Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply 285

PETITIONS FOR NEW TRIAL

29 Filing, Notice, and Briefs 289

MOTIONS

30 Motions 291

RECONSIDERATION

31 Petition for Reconsideration 293
32 Form of Petition for Reconsideration 296

PRACTICE BEFORE THE COURT

33 Suspension of Rules 297
34 Computation of Time 300
35 Filing of Record 301
36 Filing of Pleadings 301
37 Copies 302
38 Signatures 302
39 Service of Pleadings 303

HEARINGS

40 Hearings 305
41 Photographing, Televising, or Broadcasting of Hearings 310

OPINIONS

42 Filing, Reproduction, and Distribution 312
43 Issuance of Mandates 314

JUDICIAL CONFERENCE

44 Judicial Conference 315

REVISION OF RULES

45 Rules Advisory Committee 316

Appendix 322

Information Questionnaire to Supplement Mail Inquiries 322

Code Provisions 326

GUIDE TO THE RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES COURT OF MILITARY APPEALS

INTRODUCTION

Article 144 of the Uniform Code of Military Justice authorizes the United States Court of Military Appeals to "prescribe its own rules of procedure and determine the number of judges required to constitute a quorum." 10 U.S.C.A. § 944 (West Supp. 1990). As a court established by Congress (under Article I of the Constitution), the Court also has power to make "rules for the conduct of [its] business." 28 U.S.C.A. § 2071(a) (West Supp. 1990), *as amended by* Judicial Improvements and Access to Justice Act, § 403(a)(1), Pub. L. No. 100-702, 102 Stat. 4642, 4650. Specific power to make rules for the use and conduct of senior judges was conferred on the Court in 1989. UCMJ art. 142(e)(5), 10 U.S.C.A. § 942(e)(5) (West Supp. 1990).

The Court's first rules were issued on July 11, 1951. 16 Fed. Reg. 7279 (1951); *see* 1961 C.M.A. Ann. Rep. 50 (1962); *see also* 16 Fed. Reg. 10159 (1951). These were revised on March 1, 1952, 17 Fed. Reg. 2046 (1952); December 1, 1952, 17 Fed. Reg. 11195 (1952); May 31, 1953, 1 U.S.C.M.A. xix, 18 Fed. Reg. 3534 (1953); January 1, 1959; January 1, 1962, 1962 C.M.A. Ann. Rep. 67 (1963), 40 C.M.R. xvii; August 11, 1975, 3 MLR 2586 (1975); November 3, 1975, 3 MLR 2687; November 18, 1975, 3 MLR 2688; May 18, 1977, 3 M.J. 185, 5 MLR 4501; June 27, 1977, 3 M.J. XCIII, 4 MLR 4501; *see* FY1977 C.M.A. Ann. Rep. 3 (1978); February 27, 1980, 8 M.J. 274, 8 MLR 1013; September 23, 1981, 12 M.J. 72; January 29, 1982, 12 M.J. 411; December 20, 1982, 15 M.J. 79; July 1, 1983, 15 M.J. CXV, 10 U.S.C.A. foll. § 867 (West 1983); July 19, 1984; October 1, 1987; July 16, 1990, effective August 15, 1990, and September 29, 1990, effective October 1, 1990. The 1983 changes are, at this writing, the latest comprehensive revision of the rules.

The Court publishes its rules in pamphlet form from time to time. These are available free of charge from the Clerk. In addition, changes to the rules are published in the *Military Justice Reporter*. In 1959 the Court stopped publishing its rules in the *Federal Register*, 24 Fed. Reg. 474 (1959) (deleting chapter from 32 C.F.R.), although it has published notice of recent proposed rules changes in that medium. 55 Fed. Reg. 34048 (1990); 54 Fed. Reg. 20631 (1989). The Judge Advocates General's joint rules for the Courts of Military

Review continue to appear in the Code of Federal Regulations. 32 C.F.R. Pt. 150 (1990).

Despite—or perhaps because of—the fact that the rules have been part of the legal scenery for nearly forty years, they have received remarkably little attention in the professional literature on military justice. Useful sources such as H. Moyer, *Justice and the Military* (1972); W. Aycock & S. Wurfel, *Military Law Under the Uniform Code of Military Justice* (1972 reprint); L. Tillotson, *Index-Digest and Annotations to the Uniform Code of Military Justice* (4th ed. 1956); R. Tedrow, *Annotated and Digested Opinions of the United States Court of Military Appeals* (1967) (which had numerous references to unreported actions); R. Everett, *Military Justice in the Armed Forces of the United States* (1956); and B. Feld, *A Manual of Courts-Martial Practice and Appeal* (1957), included valuable material on the appellate process, but are now quite dated. The excellent and otherwise thorough newer treatises, such as D. Schlueter, *Military Criminal Justice: Practice and Procedure* (2d ed. 1987 & Cum. Supp. 1990), give short shrift to this dimension of the military justice system. This in itself is neither surprising nor inappropriate. After all, procedural rulings are not where one ordinarily looks to learn either the "nuts and bolts" of trial practice or the jurisprudence—the great themes that shape the law.

In the case of the Court of Military Appeals, however, the resolution of procedural issues can be an unexpectedly useful prism through which to examine the pertinent institutional relationships. Those relationships are of special interest because of the Court's unique responsibilities, not merely as a dispenser of appellate justice, but also as an embodiment of civilian control of the military. If there are themes to be discerned from a study of the Court's rules and manner of conducting its business, they can be distilled into the following broad propositions:

First, questions about the availability of review will be resolved in favor of finding, exercising, and preserving the Court's jurisdiction, if fairly arguable. This principle is apparent in the Court's expansive approach to its power under the All Writs Act, 28 U.S.C. § 1651(a) (1988), as well as in a variety of other jurisdictional and procedural rulings. The overall effect of these rulings has been the creation of an elaborate network of avenues—not all of equally firm statutory pedigree—by which its jurisdiction may be invoked. Other federal courts labor under a presumption against jurisdiction; subject matter jurisdiction affirmatively must be shown. *E.g.*, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10 (1799); *C.F.T.C. v.*

Nahas, 738 F.2d 487, 492 & n.9 (D.C. Cir. 1984). Animated by the goal of maximizing civilian review, the Court of Military Appeals has at times seemed to indulge nearly the opposite presumption. This first principle also is reflected in the steps the Court has taken to ensure that access to it is not thwarted by actions of military commanders and subordinate tribunals that reduce sentences below the statutory jurisdictional threshold and in the Court's hostility to pretrial agreements that preclude appellate review.

Second, doubts as to whether an accused desires to invoke the Court's jurisdiction will be resolved in the accused's favor. This policy is manifest in the Court's unwillingness to treat time limits as jurisdictional or to reject petitions for grant of review for errors of form or even for compliance with what one would have thought was the congressional demand that the petitioner identify errors showing good cause for a grant of review under Article 67(a)(3). The foundation for this policy is the view that, unlike appellate review of other federal criminal convictions, review of courts-martial by the Court of Military Appeals vindicates the distinct constitutional objective of providing civilian oversight of the military. This may explain procedural rulings such as those which require the abatement of proceedings and the dismissal of charges whenever an accused has, by dying before final disposition of a case or expiration of the time for seeking review, not had the benefit of review by the Court.

Third, the Court will, subject to statutory limits, err on the side of generosity in its efforts to achieve substantial justice and protect the accused from potential lapses on the part of military or civilian defense counsel, even where pursuit of these goals has the effect of setting the Court apart from the approach of other appellate courts. This theme is apparent in a reluctance to invoke the doctrine of waiver and in the proposition that the Court's power of review will not be confined to the issues framed by the parties. More than any other aspect of its procedural tradition, the practice of specifying issues not asserted by either party under circumstances that cannot fairly be considered an exercise of the power to correct plain error, sets it apart from other federal courts of appeals. The specification of issues not assigned by an appellant or certified by a Judge Advocate General subordinates the conventional doctrine of waiver to the interest in treating like cases in like fashion by affording "trailer" case litigants the benefit of rulings in lead cases, even if they have not raised the issue in question.

Fourth, the Court encourages the personal involvement of the accused in the pursuit of appellate remedies, in an effort to overcome

the practical difficulties arising from its worldwide territorial jurisdiction and the fact that appellate defense counsel are unlikely ever to meet their clients. Appellate defense counsel necessarily consult by mail and telephone with their clients, but face-to-face meetings are rare. An example of the Court's desire to encourage personal involvement of the accused is its insistence that counsel at least identify issues the accused believes may be meritorious and not withdraw untimely petitions for review without the client's consent. Similarly, in the limited category of cases with respect to which the Court exercised its power to establish a procedure for constructive service of Court of Military Review decisions, it made it clear that constructive notice was to be employed only as a last resort, and even then it required three separate methods for achieving constructive notice.

Fifth, the Court makes a special effort to involve the private bar and other interests outside the military community in order to temper the tendency to insularity that is inherent in the institutional setting in which the Court performs its functions. This is apparent in its reliance on a Rules Advisory Committee that includes civilian and military members, its use of a civilian Court Committee for longer-range institutional assessments, its hospitable attitude toward *amici curiae*, and its recent conduct of hearings at civilian law schools away from Washington as part of a public awareness project known as Project Outreach.

Themes such as these manifest themselves from time to time in cases decided on full opinion, but to a considerable extent they can be discerned only through study of the memorandum orders reported in the Court's *Daily Journal* or other sources such as the Court's annual reports or congressional testimony. The task of understanding the Court's institutional philosophy is aided when its decisions refer *in haec verba* to the rules. But even the relatively few express references are typically conclusory. As was observed in the first edition of this Guide over a decade ago, the rules, citations to which are collected in Shepard's *Military Justice Citations*, rarely have been determinative of the outcome of a case. Still, they are likely to play an increasing role in the appellate process.

The military justice system has long since come of age. As Judge Kenneth F. Ripple has observed, "A new maturity has come to military law." Ripple, *Foreword*, D. Schlueter, *supra*, at xxiii. After forty years it is not surprising that a good deal of lore has grown up around the highest court of the jurisdiction. This body of accumulated learning represents a substantial gloss on the black letter rules. Numerous other courts and those who study them have

concluded that the judicial process is served by organizing this kind of lore and serving it up in a fashion that makes it more useful to the practitioner than relying solely on the skeletal provisions of procedural rules. *E.g.*, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986); U.S. Claims Court Bar Ass'n, *The United States Claims Court: A Deskbook for Practitioners* (D. Cohen ed. 1987); D.C. Cir., *Handbook of Practice and Internal Procedures* (1987); Fed. Cir., *Rules of Practice Before the U.S. Court of Appeals for the Federal Circuit* (1990) (including Practice Notes and Guide for Pro Se Petitioners and Appellants); *Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit* (1984); *Practitioner's Guide to the U.S. Court of Appeals for the Tenth Circuit* (2d ed. 1981); D.D.C., *Supplement to the Local Civil Rules: A Practical Guide to Civil Operations in the Clerk's Office* (Aug. 1989); *cf.* 28 U.S.C. § 2077(a) (1988) (requiring courts of appeals to publish rules for the conduct of business, including operating procedures). So too, the cause of appellate military justice will be benefited if, rather than being the special preserve of a select few, this gloss can be organized and made available to a somewhat larger, if still limited, audience in a user-friendly way.

Doing so will serve three purposes. First, it will reduce the loss of continuity of procedural learning, which is a perpetual danger given the turnover of personnel in the appellate government and defense divisions of the Offices of the Judge Advocates General, and the fact that appellate procedural issues often do not lend themselves to conventional research using West's *Military Justice Digest* because the memorandum actions in which such issues typically figure are not digested. Both counsel and the Court will be aided if counsel can avoid procedural missteps.

Second, it will aid military practitioners in the field in framing trial strategies and extraordinary writ efforts by providing them with a firmer understanding of the rules of the road at the highest court. Many trial practitioners in the military justice system may assume that their need for specialized learning in the ways of the Court of Military Appeals is quite limited. The Court's expansive view of its extraordinary writ powers, however, means that trial-level counsel—either prosecution or defense—cannot permit themselves to remain unfamiliar with the intricacies of the appellate process. When the need arises for an Article 62 appeal or an extraordinary writ, time may not permit a "crash" course from fellow officers assigned to the appellate division.

Third, it will facilitate effective participation by civilian counsel

both at trial and on appeal, because such counsel are unlikely to have the kind of personal experience with the appellate military justice process that a uniformed lawyer can expect to have as a result of normal career opportunities. By reducing the impression that the system is fundamentally arcane and inaccessible, this Guide will, it is hoped, increase the frequency of civilian practitioner involvement in courts-martial and thereby perhaps encourage the free flow of ideas and innovation between the military and civilian systems of criminal law. Both systems can benefit from such interaction. *See generally* Fidell, *"If a Tree Falls in the Forest. . .": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1 (1982).

In early 1989, the Court Committee referred to above claimed that "[b]oth the Court and the system are now recognized as legitimate and vital elements of American jurisprudence by the civilian bench and bar." *Presentation of Court Committee Report*, 28 M.J. 99, 100 (1989). Regrettably, it must be said that that encouraging appraisal is premature; the work is far advanced but not yet done. Many in the civilian bench and bar remain unimpressed by the Court and the system over which it presides. "Unfortunately, neither the legal profession nor the general public seem to have much understanding of the military justice system or awareness of the role of the Court of Military Appeals." Everett, *The United States Court of Military Appeals: New Issues, New Initiatives*, 36 Fed. B. News & J. 182, 184 (1989). For many, military justice remains "a well-hidden cul-de-sac of American law." Bruton, *Book Review*, 123 U. Pa. L. Rev. 1482, 1506 (1975).

This condition is likely to persist, despite the progress made to date and continuing outreach efforts, so long as only a microscopic fraction of the American legal community has any current personal involvement with military justice. May this Guide help to hasten the day when the Court Committee's assessment commands universal agreement.

Such are the goals of this second edition. Periodic revisions are contemplated in order to maintain the Guide's usefulness. Relatively little has been retained intact from the first edition and the 1980 supplement. Matters of purely historical or essentially academic interest have been kept to a minimum. The effort throughout is to meet the practical needs of counsel and others who work with the rules, while remaining alert to major themes and areas of potential improvement. Suggestions from readers will be received gratefully. Suggestions for

changes in the rules should be addressed to the Clerk of the Court in accordance with Rule 45.

This edition reflects developments through October 31, 1990.

THE ANNOTATED RULES

The official text of the rules appears in **bold** type. Comments prepared by the Court's Rules Advisory Committee in connection with the proposed version of the 1983 comprehensive revision and other changes are headed "Rules Advisory Committee Comment." The Committee's commentary, which is reproduced here with the Court's permission, is not approved by the judges, and accordingly does not necessarily represent the views of the Court. Minor changes have been made to the commentary to reflect changes between the rules as proposed and as approved by the Court. Portions of the commentary that relate to matters that do not appear in the promulgated text of rules changes have been omitted. The final numbering of most of the 1983 rules was different from that employed in the commentary and in a few instances statutory cross-references have been rendered obsolete by subsequent legislation. Corrected and updated references have been inserted. Notes by the author are headed "Discussion." They have no official sanction.

GENERAL

Rule 1. Name

Section 941 of Title 10, United States Code, provides that the name of the Court is the "United States Court of Military Appeals."

RULES ADVISORY COMMITTEE COMMENT

This rule is unchanged from that contained in the Rules of Practice and Procedure effective July 1, 1977 defining the name of the Court in accordance with 10 U.S.C. § 941.

DISCUSSION

The Court was styled simply the "Court of Military Appeals" when the Code was enacted. It helped itself to the fuller title by rule, *see* 1962 Rule 1, and in 1968 Congress followed suit by adding the words "United States." Pub. L. No. 90-340, § 1, 82 Stat. 178 (1968). The more formal name underscores the fact that the Court is an independent judicial tribunal, *see* S. Rep. No. 98-53, 98th Cong., 1st Sess. 9

(1983), rather than merely an administrative appendage of the Department of Defense. A second sentence, stating that the Court "is a separate judicial entity," had been adopted by the Court in a 1977 rules change. The language was superfluous, *cf.* Shakespeare, *Hamlet*, act III, sc. 2, line 243, and was removed six years later. Congress expressly provided that the Court is a court of record in 1989, UCMJ Art. 141, 10 U.S.C.A. § 941 (West Supp. 1990), although this was previously understood to be the case in any event. For example, the judges occasionally solemnized marriages which, under the District of Columbia Code, requires a judge to be a judge of a court of record. D.C. Code § 30-106(b) (1981 ed.). *See* Discussion of Rule 6.

The Court is by statute located in the Department of Defense for administrative purposes only, UCMJ Art. 141, 10 U.S.C.A. § 941 (West Supp. 1990), and Congress has repeatedly made it clear that it intends the Court to be free from "control and influence" of the Department. S. Rep. No. 95-1264, 95th Cong., 2d Sess. 112-13 (1978); *see also* H.R. Conf. Rep. No. 101-331, 101st Cong., 1st Sess. 657 (1989); S. Rep. 101-81, 101st Cong., 1st Sess. 171 (1989); S. Rep. 100-326, 100th Cong., 2d Sess. 137 (1988); S. Rep. 98-53, 98th Cong., 1st Sess. 9 (1983); H.R. Rep. 98-549, 98th Cong., 1st Sess. 16 (1983); *Mundy v. Weinberger*, 554 F. Supp. 811, 820-24 (D.D.C. 1982). The relationship between the Court and the Department was explored by the Court of Military Appeals' "Court Committee," reestablishment of which was announced at 25 M.J. 154 (C.M.A. 1987). *See also* 25 M.J. xcix (C.M.A. 1987); 2 C.M.A. Ann. Rep. 16 (1954) (noting initial appointment of committee); 1961 C.M.A. Ann. Rep. 53 (1962) (committee meetings suspended after 1956 due, *inter alia*, to congressional failure to act on earlier recommendations). The Court Committee's January 27, 1989 report recommended that the Code be amended "to effect a greater logistical and administrative separation between the Department of Defense and the Court." *Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989); *see also* 17 MLR 1024-25. For a general summary of the evolution of the Court's institutional role *see* Everett, *Justice in Uniform*, 26 Judges' J., No. 4, 29 (1987). A useful history appears in Hanlon, *Ten-Year Chronology of the U.S. Court of Military Appeals*, 1961 C.M.A. Ann. Rep. 47 (1962).

"Through its decisions, the Court has a significant impact on the state of discipline in the armed forces, military readiness, and the rights of servicemembers. The Court plays an indispensable role in promoting public confidence in the military justice system." S. Rep. No. 101-81, 101st Cong., 1st Sess. 171 (1989).

Rule 2. Seal

The official seal of the Court is as follows:

In front of a silver sword, point up, a gold and silver balance supporting a pair of silver scales, encircled by an open wreath of oak leaves, green with gold acorns; all on a grey-blue background and within a dark blue band edged in gold and inscribed "UNITED STATES COURT OF MILITARY APPEALS" in gold letters. (E.O. 10295, September 28, 1951, 16 Fed. Reg. 10011; 3 CFR Supp.)

RULES ADVISORY COMMITTEE COMMENT

The rule prescribing the seal of the Court established by Executive Order 10295, September 28, 1951, is unchanged.

DISCUSSION

President Truman's Executive Order approved a design that the judges had themselves recommended. Exec. Order No. 10295, 16 Fed. Reg. 10011 (1951), 3 C.F.R., 1949-53 Comp., 825 (1); *see also* 16 Fed. Reg. 10159 (1951) (C.M.A.R. 2).

Rule 3. Oath of Judges

Before undertaking the performance of the duties of his office, each Judge appointed to this Court shall take the oath or affirmation prescribed in Section 453 of Title 28, United States Code.

RULES ADVISORY COMMITTEE COMMENT

Rule 3 was added as part of the 1983 revision.

Rule 3A. Senior Judges

(a) With the Senior Judge's consent, and at the request of the Chief Judge, a Senior Judge may perform judicial duties with the Court if an active Judge of the Court is disabled or has recused himself or if there is a vacancy in any active judgeship on the Court. For the periods of time when performing judicial duties with the Court, a Senior Judge shall receive the same pay, per diem, and travel allowances as an active Judge; and the receipt of pay shall be in lieu of receipt of retired pay or annui-

ty with respect to these same periods. The periods of performance of judicial duties by a Senior Judge shall be certified by the Chief Judge and recorded by the Clerk of Court. The Clerk of Court shall notify the appropriate official to make timely payments of pay and allowances with respect to periods of time when a Senior Judge is performing judicial duties with the Court and shall notify the Department of Defense Military Retirement Fund to make appropriate adjustments in the Senior Judge's retired pay or annuity. *See* Article 142(e)(2), Uniform Code of Military Justice, 10 USC § 942(e)(2).

(b) In addition to the performance of judicial duties with the Court, a Senior Judge may, at the request of the Chief Judge and with the Senior Judge's consent, perform such other duties as the Chief Judge may request or the Court may direct. Such other duties may include, but are not limited to, service as a special master or as an adviser on Court operations, administration, and rules; representation of the Court at conferences, seminars, committee meetings or other official or professional functions; coordination of or assistance with conferences being conducted by the Court; and assistance in compilation of history or achieves of the Court. A senior Judge shall not receive pay for the performance of such other duties with the Court but may be paid per diem and travel allowance to reimburse expenses incurred by the Senior Judge while performing such duties.

(c) Whether in the performance of judicial duties or other duties, a Senior Judge shall be provided such administrative and secretarial assistance, office space, and access to the Courthouse, other public buildings, court files, and related information, as the Chief Judge considers appropriate for the performance of those duties by the Senior Judge.

(d) The title of Senior Judge may not be used in any way for personal gain or in connection with any business activity, advertisement, or solicitation of funds. However, the title of a Senior Judge may be referred to in any professional biography or listing and may be used in connection with any judicial or other duties that the Chief Judge requests the Senior Judge to perform.

(e) No Senior Judge of the Court may engage in the practice of law in connection with any matter that involves an investigation or trial for any matter arising under the Uniform Code of Military Justice or appellate review of any court-martial pro-

ceeding by a Court of Military Review, the United States Court of Military Appeals, or the Supreme Court of the United States.

(f) These rules shall apply to "senior judges" as defined by Article 142(e)(1), UCMJ, 10 U.S.C. § 942(e)(1), and are promulgated pursuant to Article 142(e)(5), UCMJ, 10 USC § 942(e)(5).

DISCUSSION

Before Congress made it official in 1989, *see* UCMJ Art. 142(e)(5), 10 U.S.C.A. § 945(e)(5) (West Supp. 1990), the Court never exercised the power it had long claimed to have to provide by rule for the use of senior judges, H.R. Rep. No. 1480, 90th Cong., 2d Sess. 5 (1968) (statement of Kilday, J., also suggesting that the chief judge could take such action "under his responsibility for the administration of the court"), although the absence of formal rules had not prevented it from relying on senior judges where necessary. Rules were finally proposed after Congress acted, 55 Fed. Reg. 34048 (1990), and promulgated as Rule 3A in time for the retirement of Chief Judge Everett, who immediately commenced service as a senior judge, since neither his seat nor the two seats that had been added as of October 1, 1990 had been filled. No adverse comments were received in response to the Court's *Federal Register* notice. The "other duties" authorized by Rule 3A(b) are not reflected in Article 142(e)(2), which refers only to the performance of "judicial" duties. It is presumably for this reason that time spent on such duties is compensated, under the last sentence of Rule 3A(b), only through per diem and reimbursement of expenses, rather than statutory pay. Article 142(e)(3) also authorizes office space and staff assistance only in respect of "judicial" duties, but Rule 3A(c) covers both "judicial" and "other" duties.

Rule 4. Jurisdiction

(a) The jurisdiction of the Court is as follows:

(1) *Death sentences*. Cases in which the sentence, as affirmed by a Court of Military Review, extends to death. *See* Rule 18(a)(3);

(2) *Certified by a Judge Advocate General*. Cases reviewed by a Court of Military Review, including decisions on appeal by the United States under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §862, or on application for extraordinary relief filed therein, which a Judge Advocate General forwards by certificate for review to the Court. *See* Rule 18(a)(2);

(3) *Petitions by the accused.* Cases reviewed by a Court of Military Review, including decisions on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, in which, upon petition of the accused and on good cause shown, the Court has granted review. *See* Rule 18(a)(1).

(b) *Extraordinary Writs.*

(1) The Court may, in its discretion, entertain petitions for extraordinary relief including, but not limited to, writs of mandamus, writs of prohibition, writs of habeas corpus, and writs of error coram nobis. *See* 28 U.S.C. §1651(a) and Rules 18(b), 27(a), and 28.

(2) The Court may also, in its discretion, entertain a writ appeal petition to review a decision of a Court of Military Review on a petition for extraordinary relief. *See* Rules 18(a)(4), 27(b), and 28.

(c) *Rules Not to Affect Jurisdiction.*

These Rules shall not be construed to extend or to limit the jurisdiction of the United States Court of Military Appeals as established by law.

RULES ADVISORY COMMITTEE COMMENT

Rule 4(a)(2) was revised to recognize the authority of the Court to consider cases certified by a Judge Advocate General of a Court of Military Review decision on an application for extraordinary relief. Thus, it provides procedurally for the jurisdiction recognized by the Court in *United States v. Redding*, 11 M.J. 100, 9 MLR 2502 (C.M.A. 1981).

Rule 4(b)(2) has been revised to authorize the Court to entertain a petition filed not only by or on behalf of an accused, but by other persons subject to the Uniform Code or by the United States or its agencies. The revision of the rule provides for situations such as that in *United States v. Caprio*, 12 M.J. 30, 9 MLR 2821 (C.M.A. 1981), where a person, other than the accused or the United States, may have a legitimate claim for review of a Court of Military Review decision on a petition for extraordinary relief.

DISCUSSION

Rule 4(a)(1) was amended effective August 1, 1984 by deleting reference to cases affecting general or flag officers, as Congress repealed the special review provision for such officers in the Military Justice Act of 1983. Pub. L. No. 98- 209, § 7(d), 97 Stat. 1402. The first paragraph of the form set out in Rule 23(a) was similarly modified. Rule changes that took effect on October 1, 1987 modified Rule 4(a)(2)-(3) to include the references to decisions on appeal by the United States under Article 62, 10 U.S.C. § 862 (1988).

The Court has jurisdiction only if the Court of Military Review has acted finally with respect to both the findings and the sentence. *E.g., United States v. Young*, 14 M.J. 233 (C.M.A. 1982) (mem.); *United States v. Leffew*, 4 U.S.C.M.A. 585, 16 C.M.R. 159 (1954); *United States v. Best*, 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954); *see also* Discussion of Rule 19 (noting dismissal of premature petitions). If it is unclear whether the lower court has determined the factual sufficiency of the evidence as well as its legal sufficiency, the case is remanded. *United States v. Turner*, 25 M.J. 324, 325, 16 MLR 2093 (C.M.A. 1987).

The Court's jurisdiction in petition cases depends on the sentence approved by the convening authority, not the sentence as acted on by the Court of Military Review. Thus, a Court of Military Review cannot thwart Court of Military Appeals review by reducing the sentence below the statutory jurisdictional threshold. *United States v. Bullington*, 13 M.J. 184, 10 MLR 2562 (C.M.A. 1982); *United States v. Reid*, 12 U.S.C.M.A. 497, 31 C.M.R. 83, 86-87 (1961); *cf. Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968) (extraordinary relief granted where illegal commutation of bad conduct discharge thwarted appellate review). Similarly, a subjurisdictional result on remand from a Court of Military Review does not prevent the case from returning to that court rather than simply being reviewed in the Office of the Judge Advocate General under Article 69. *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 17 MLR 2348 (C.M.A. 1989); *cf. United States v. Wilson*, 20 M.J. 335, 13 MLR 2551 (C.M.A. 1985) (per curiam).

Access to the Court also cannot be precluded by means of a pretrial agreement. *United States v. Darring*, 9 U.S.C.M.A. 651, 26 C.M.R. 431 (1958), *noted in* H. Moyer, *Justice and the Military* § 2-456, at 449 (1972); D. Schlueter, *Military Criminal Justice: Practice and Procedure* § 9-2(B)(2), at 239 & n.53 (2d ed. 1987); *see also* R.C.M. 705(c)(1)(B); *United States v. Jones*, 23 M.J. 305, 308, 15 MLR 2088, 2090 (C.M.A. 1987) (Cox, J., concurring in the result); *United States*

v. Mills, 12 M.J. 1, 9 MLR 2866 (C.M.A. 1981); *United States v. Partin*, 7 M.J. 409, 7 MLR 2450 (C.M.A. 1979).

Execution of a punitive discharge "does not deprive the Court of jurisdiction to grant a petition for review." *United States v. Engle*, 28 M.J. 299 (C.M.A. 1989) (per curiam); *see also United States v. Campbell*, 29 M.J. 464, 465 n.* (C.M.A. 1989) (mem.) (erroneous order to execute discharge). The Court's jurisdiction is also unimpaired by the fact that the accused has been released from active duty, *e.g., United States v. Woods*, 26 M.J. 372, 16 MLR 2464 (C.M.A. 1988); *United States v. Zlotkouski*, 15 M.J. 320 & n.* (C.M.A. 1983) (mem.) (Cook, J., dissenting); *United States v. Jackson*, 3 M.J. 153, 5 MLR 2118 (C.M.A. 1977); *United States v. Entner*, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *United States v. Green*, 10 U.S.C.M.A. 561, 28 C.M.R. 127 (1959); *United States v. Sippel*, 4 U.S.C.M.A. 50, 52-54, 15 C.M.R. 50, 52-54 (1954) (C.M.A. jurisdiction unaffected by expiration of officer's commission); *United States v. Speller*, 8 U.S.C.M.A. 363, 368, 24 C.M.R. 173, 178 (1957), that the sentence has been served, *United States v. Benson*, 3 U.S.C.M.A. 351, 12 C.M.R. 107, 110 (1953); *see also Sibron v. New York*, 392 U.S. 40 (1968); *cf. United States v. Pately*, 17 M.J. 409 (C.M.A. 1984) (mem.) (2-1) (granting administrative credit for pretrial confinement even though sentence had already been served); *United States v. Allen*, 17 M.J. 126, 12 MLR 2117 (C.M.A. 1984) (2-1), *reconsideration denied*, 17 M.J. 360, 12 MLR 2257 (C.M.A. 1984) (mem.) (2-1) (refusing to direct alternative sentence relief where administrative credit for pretrial confinement was moot because sentence to confinement had been served), or even, in some circumstances, that the charges have been withdrawn. *United States v. Browers*, 20 M.J. 356, 13 MLR 2554 (C.M.A. 1985) (Art. 62 appeal).

Where, however, an accused is sentenced to confinement if a fine remains unpaid, payment of the fine will moot a certified question. *United States v. Carmichael*, 29 M.J. 271 (C.M.A. 1989) (mem.); *United States v. Arnold*, 28 M.J. 338 (C.M.A. 1989) (mem.). Similarly, release of a habeas corpus petitioner will moot the extraordinary writ proceeding. *E.g., Ussery v. United States*, 17 M.J. 338 (C.M.A. 1984) (mem.); *but see Ceraolo v. Snyder*, 5 M.J. 1095 (C.M.A. 1976) (mem.) (charges withdrawn and petitioner administratively separated; *held*, motion to dismiss extraordinary writ petition denied, and extraordinary writ petition itself denied); *see also United States v. Wholley*, 14 M.J. 284 (C.M.A. 1982) (mem.) (remanding with instructions to dismiss as moot).

Cases decided by a Court of Military Review, including those arising under Article 62, *United States v. Tucker*, 20 M.J. 52, 13 MLR

2362 (C.M.A. 1986), on appeal from the denial of a petition for new trial, *United States v. Chadd*, 13 U.S.C.M.A. 438, 32 C.M.R. 438 (1963), or on petition for certificate of innocence under 28 U.S.C. § 2513 (1988), *see Forrest v. United States*, 3 M.J. 173, 5 MLR 2123 (C.M.A. 1977); *cf. McMurray v. United States*, 12 M.J. 26 (C.M.A. 1981) (mem.) (denying original petition for certificate of innocence), *petition forwarded to C.M.R.*, 14 M.J. 216 (C.M.A. 1982) (mem.), are subject to review on petition for grant of review.

The Court's jurisdiction over "nonreviewable" (subjurisdictional) courts-martial (*i.e.*, general and special courts-martial in which there is no punitive discharge and no confinement for 1 year or more, and summary courts-martial) changed dramatically in 1989. Now, any such case that is referred to a Court of Military Review may thereafter be certified to the Court of Military Appeals. UCMJ Art. 69(d), 10 U.S.C.A. § 869(d) (West Supp. 1990). For many years, only subjurisdictional general courts-martial could be referred to a Court of Military Review under the former text of Article 69(a), 10 U.S.C. § 869(a) (1988). Very few were so referred, Fidell, *Military Rights of Appeal*, 8 Dist. Lawy., No. 6, 42, 43-44 (July-Aug. 1984); *e.g.*, *United States v. Beckermann*, 27 M.J. 334, 17 MLR 2114 (C.M.A. 1989); *United States v. Moorehead*, 20 U.S.C.M.A. 574, 44 C.M.R. 4 (1971); *see also Unger v. Ziemniak*, 27 M.J. 349, 351 & n.1, 17 MLR 2120 (C.M.A. 1989), and not all of those were further certified to the higher court. In addition, the accused could not seek review of a Court of Military Review decision in such a case unless it was further certified by the Judge Advocate General. *Monett v. United States*, 16 U.S.C.M.A. 179, 36 C.M.R. 335 (1966); *see also United States v. Spencer*, 8 M.J. 30 (C.M.A. 1979) (mem.) (subjurisdictional sentence in general court-martial; petition dismissed); R.C.M. 1201(b) (Discussion). The accused could, however, file a cross-petition for grant of review, which the Court would consider even if it declined to answer the certified questions. *United States v. Kelly*, 14 M.J. 196, 200-01, 11 MLR 2004 (C.M.A. 1982), *partially overruling, by implication, United States v. Hardy*, 17 U.S.C.M.A. 100, 101, 37 C.M.R. 364, 365 (1967) (noting dismissal of petition for grant of review). *See also, e.g.*, *United States v. Wehner*, 18 M.J. 12 (C.M.A. 1984) (mem.).

Section 1302 of the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1302(a), 103 Stat. 1576, greatly altered this arrangement. First, it repealed the sentence of Article 69(a) which had permitted subjurisdictional general courts-martial to be reviewed by the Court of Military Appeals only pursuant to a second certification. Second, it provided that non-bad-conduct-discharge special courts-martial and summary courts-martial

can also be referred to a Court of Military Review. UCMJ Arts. 69(b), (d), 10 U.S.C.A. §§ 869(b), (d) (West Supp. 1990). Such cases are therefore now also potentially subject to review by the Court of Military Appeals either by certificate for review or on petition by the accused. Congress's view in enacting this legislation was that "[t]he purposes of the [Code] would be better served if such review were conducted under a jurisdictional statute as opposed to the ad hoc procedures of the All Writs Act." S. Rep. No. 101-81, 101st Cong., 1st Sess. 173 (1989).

Ordinarily, where a case is not certified, rulings adverse to the government constitute the law of the case and bind the parties. *United States v. Sales*, 22 M.J. 305, 307, 14 MLR 2435 (C.M.A. 1986). However, a new and potentially disturbing wrinkle was added to the Court's jurisprudence in *United States v. Hoff*, 27 M.J. 70, 16 MLR 2584 (C.M.A. 1988). Over an able partial dissent by Chief Judge Everett, the Court—by reinstating a finding that had been disapproved below—seemed to leave a petitioner worse off than he had been under the decision of the Court of Military Review, even though the case came on for review solely on petition of the accused. Opinions may differ as to whether Hoff himself actually was worse off, but if the decision is extended to other contexts, it could, as the Chief Judge cautioned, 27 M.J. at 75, have a chilling effect on the submission of petitions for grant of review.

Currently pending before the Court is a proposed rule based on the Uniform Certification of Questions of Law Act/Rule which in turn was issued in 1967 by the National Conference of Commissioners on Uniform State Laws. Similar rules for the transmission of certified questions have been adopted by the Second and Seventh Circuits. 2d Cir. R. § 0.27; 7th Cir. R. 52. The first edition of this Guide had suggested creation of a mechanism for the receipt of questions of military law, rather than for the transmission of questions of state law. The Court eventually referred the matter to the Rules Advisory Committee, which, in February 1989, opined that receipt of certified questions would require an Act of Congress but reported out favorably the provision for outgoing certifications. The judges invited public comment on both outgoing and incoming certifications. 54 Fed. Reg. 20631 (1989). The Committee thereupon advised that it believes legislation is necessary to permit the receipt of incoming certifications. That being the case, it was suggested that the entire subject be deferred until Congress considers the more controversial question of incoming certifications. Letter from Col. Walter L. Lewis, USAF (Ret.), Chairman, Rules Advisory Comm., to Chief Judge Everett, Sept. 26, 1990.

It is unlikely that a certification mechanism would be used frequently in either direction. The first attempt at certification preceded issuance of the rule, and was addressed to the New Mexico Supreme Court in an Article 134 case involving a charge of contributing to the delinquency of a minor in violation of state law. The state law issue had been specified by the Court of Military Appeals, rather than raised by the parties. *United States v. Sadler*, 29 M.J. 272 (C.M.A. 1989) (mem.). The New Mexico court declined, without explanation, to entertain the certification, and the Court resolved the state law issue itself. 29 M.J. 370, 376 (C.M.A. 1990).

Simply because a state law issue might be framed scarcely compels certification. For example, the outcome may not turn on the state law issue, or the state law may be unclear, *e.g., United States v. Browning*, 29 M.J. 174, 17 MLR 2659 (C.M.A. 1989), or the state in question may have no mechanism for the receipt of certified questions. *See United States v. Bolden*, 28 M.J. 127, 129 n.3, 17 MLR 2347 (C.M.A. 1989).

The first edition of this Guide observed that "[u]nless and until the Supreme Court's jurisdiction is extended to provide direct review of decisions of the Court of Military Appeals, a certification rule can also be of assistance in avoiding the possible unseemliness of divergent results between the Article III courts and the Court of Military Appeals." Experience gained since enactment of 28 U.S.C. § 1259 (1988) teaches, however, either that such divergent results rarely arise or that they present less of an institutional embarrassment than the author feared, since the Supreme Court has shown little interest in reviewing military cases under its new authority. *See generally* Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 MLR 6001, 6005 (1988).

For illustrations of how other federal courts may be called upon to resolve questions of military law *see, e.g., Cochran v. United States*, 1 Cl. Ct. 759, 11 MLR 2614 (1983), *aff'd mem.*, 732 F.2d 168 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 853, 12 MLR 2570 (1984) (nonjudicial punishment); *Krzeminski v. United States*, 13 Cl. Ct. 430, 16 MLR 2069 (1987) (failure to pay just debts); *see generally* Fidell, *"If a Tree Falls in the Forest. . .": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1, 3-4 & nn.12-14 (1982).

At present, the Court's jurisdiction remains a hodge-podge of mandatory reviews, certificates from the Judge Advocates General (in-

cluding extraordinary writ cases, for which the certification clause of the statute makes no provision, *see United States v. Redding*, 11 M.J. 100, 113, 9 MLR 2502 (C.M.A. 1981) (Fletcher, J., dissenting)), review on petition of the accused, review on petition of the prosecution (for which the petition clause of Article 67 also makes no provision, *see United States v. Caprio*, 12 M.J. 30, 33, 9 MLR 2821 (C.M.A. 1981) (Fletcher, J., dissenting)), petitions for extraordinary relief, new trial petitions and writ appeal petitions.

The addition of Article 62 appeals was necessary, but only made things worse in terms of the complexity of the Court's legislative charter. These diverse jurisdictional bases overlap in ways that can needlessly complicate matters. The potential for complexity is illustrated by *Frage v. Moriarty*, 27 M.J. 341, 17 MLR 2118 (C.M.A. 1988), where the Court was faced with (1) an extraordinary writ petition filed by an accused, (2) a writ appeal petition filed by the United States, and (3) a certificate for review.

While the 1989 legislation discussed above certainly improve matters by exposing all courts-martial to at least the possibility of review by the military appellate tribunals, the Court of Military Appeals' tangled jurisdictional grant should be further rationalized by providing a single form of appellate review available at the request of either the prosecution or the defense, with respect to all final decisions of the Courts of Military Review. *See* Discussion of Rule 19. This will reduce the time spent by the Court on double reviews: once to decide whether to take the case, and again on the merits. The Court could act summarily on many cases, particularly those in which no errors were assigned. The mandatory jurisdiction in death cases should be retained. Happily, it involves very few cases. The power of the Judge Advocates General to certify cases should be abrogated because it is no longer necessary, particularly since the Court has held that it can entertain government petitions for grant of review.

Plainly, there should also be extraordinary writ jurisdiction similar to that exercised by the other courts of appeals under the All Writs Act, 28 U.S.C. § 1651(a) (1988), but reflecting the special role of the Court in ensuring compliance with the provisions of the Code. *See generally The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Sen. Comm. on Armed Services*, 97th Cong., 2d Sess. 226-28 (1982) (statement of the author on behalf of American Civil Liberties Union). It is not necessary that Congress confirm that the Court has All Writs Act authority, as the Court Committee recommended in 1989. *Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989). That pro-

position has, after all, long been beyond dispute. *Noyd v. Bond*, 393 U.S. 683, 695 n.7 (1969); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306, 308 (1966).

In addition to the practical problems of employing extraordinary writs as a substitute for direct appellate review, *see* S. Rep. No. 98-53, 98th Cong., 1st Sess. 31-32 (1983) (limits on direct review "led the accused to rely on the extraordinary writ powers of these courts, a vehicle which may be ill suited to the particular circumstances of the case"), the writs case law was for many years too shifting and uncertain to provide the needed guidance to the military community. *E.g., Unger v. Ziemniak*, 27 M.J. 349, 17 MLR 2120 (C.M.A. 1989) (All Writs Act jurisdiction exists even though officer's special court-martial case "cannot qualify for [direct] review" either by C.M.R. or C.M.A.); *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 16 MLR 2443 (C.M.A. 1988) (All Writs Act jurisdiction exists even though underlying C.M.R. decision could not reach C.M.A. on direct review); *Jones v. Commander, Naval Air Force*, 18 M.J. 198, 12 MLR 2459 (C.M.A. 1984) (asserting but refusing to exercise extraordinary writ power over nonjudicial punishment); *Dobzynski v. Green*, 16 M.J. 84, 11 MLR 2666 (C.M.A. 1983) (asserting jurisdiction over nonjudicial punishments); *Alvarez v. United States*, 9 M.J. 14 (C.M.A. 1980) (mem.) (petition for writ of *error coram nobis* regarding summary court-martial dismissed as moot, no suggestion of lack of subject matter jurisdiction); *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978) (mem.) (dismissing challenge to diversion of non-service connected offense from special court-martial to captain's mast); *McPhail v. United States*, 24 U.S.C.M.A. 304, 1 M.J. 457, 4 MLR 2477 (C.M.A. 1976) (C.M.A. has All Writs Act power following conviction by subjurisdictional special court-martial); *Olsson v. Flynn*, 23 U.S.C.M.A. 229, 49 C.M.R. 179, 2 MLR 2609 (1974) (habeas refused where special court-martial sentence was subjurisdictional); *Ex parte Gooden*, 5 M.J. 1087 (C.M.A. 1976) (mem.) (*coram nobis* denied as to summary court-martial conviction); *Thomas v. United States*, 19 U.S.C.M.A. 639 (1970) (no All Writs Act jurisdiction over summary court-martial); *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969) (no All Writs Act jurisdiction over non-bad conduct discharge special court-martial). *See generally* Note, *Building a System of Military Justice Through the All Writs Act*, 52 Ind. L.J. 188 (1976); *see also* Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief under the All Writs Act from the United States Court of Military Appeals*, 10 Harv. Civ. Rights-Civ. Lib. L. Rev. 33 (1975).

This nettlesome area was much narrowed by the 1989 amendment

to Article 69, discussed above. By subjecting subjurisdictional courts-martial to the prospect of referral to a Court of Military Review, Congress brought them within the Court of Military Appeals' potential appellate jurisdiction and hence seemingly within its reach under the All Writs Act, *see FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966), although the language quoted above from the Senate Report suggests that expansion of access to the Courts of Military Review and Court of Military Appeals was intended to reduce reliance on the extraordinary writ process. S. Rep. No. 101-81, 101st Cong., 1st Sess. 173 (1989).

Extraordinary writ jurisdiction—whatever its parameters— is exercised sparingly. A showing of compelling need or a recurring issue of concern to all of the services is typically required. *Unger v. Ziemniak*, *supra*, at 355-56; *Murray v. Haldeman*, 16 M.J. 74, 76-77, 11 MLR 2662 (C.M.A. 1983). "Any party may petition the Court of Military Appeals for extraordinary relief. However, in the interest of judicial economy, such petitions usually should be filed with and adjudicated before the appropriate Court of Military Review prior to submission to the Court of Military Appeals." R.C.M. 1204(a) (Discussion); *see Dettinger v. United States*, 7 M.J. 216, 7 MLR 2290 (C.M.A. 1979) (C.M.R.'s have All Writs Act power). Resort to the lower court in the first instance is consonant with civilian practice. *See* Fed. R. App. P. 22(a); *cf.* UCMJ Art. 36(a), 10 U.S.C. § 836(a) (1988). Since it remains true that relief "in most instances. . . is more to be expected from the Court of Military Appeals." Durbin, *Book Review* 30 JAG J. 229, 230 (1978), many writ petitioners nonetheless have chosen to begin their efforts there. It is not clear whether exhaustion of administrative remedies is required. *Compare* D. Schlueter, *supra*, § 16-19 & n.9 (exhaustion not required), *with Keys v. Cole*, 31 M.J. 228, 230 (C.M.A. 1990) (noting petitioner's "earnest" efforts and likely futility of recourse to further administrative procedures), *and* H. Moyer, *supra*, § 2-837, at 651- 52 (collecting cases).

In any event, All Writs Act relief has been refused with respect to military administrative matters such as pay, *Keys v. Cole*, 31 M.J. 228, 234 & n.3 (C.M.A. 1990) (encouraging petitioner to seek relief in Claims Court, "which has special expertise in this field"), administrative discharge board proceedings, *Zanella v. Ehrie*, 30 M.J. 171 (C.M.A. 1990) (mem.), conscientious objector discharges, *Parisi v. Davidson*, 405 U.S. 34 (1972), certification of judges, *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961), and 13 M.J. 204 (C.M.A. 1982) (mem.), the return of seized property, *Garcia v. Emerson*, 5 M.J. 1075 (C.M.A. 1976) (mem.), or the award of decorations. *Herrod v. Convening Authority*, 19 U.S.C.M.A. 574, 42 C.M.R. 176 (1970) (mem.).

See also Hamilton v. United States, 18 M.J. 119 (C.M.A. 1984) (mem.) (dismissing without prejudice to right to apply for relief from board for correction of military records).

For a perceptive brief summary of the law on extraordinary writs *see* Dep't of the Army Pam 27-173, *Legal Services, Trial Procedure* ch. 30 (1990).

Subsection (d), which was added in 1977, restates hornbook law that rules of practice and procedure may not alter a court's lawful jurisdiction. *Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924); *see also* Fed. R. App. P. 1(b).

Rule 5. Scope of Review

The Court acts only with respect to the findings and sentence as approved by reviewing authorities, and as affirmed or set aside as incorrect in law by a Court of Military Review, except insofar as it may take action on a certificate for review or a petition for review of a decision by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, or to grant extraordinary relief in aid of its jurisdiction, including the exercise of its supervisory powers over the administration of the Uniform Code of Military Justice. The Court may specify or act on any issue concerning a matter of law which materially affects the rights of the parties.

RULES ADVISORY COMMITTEE COMMENT

This rule has not been changed from the [former] rule.

DISCUSSION

The Court is bound by factual determinations of the Courts of Military Review under Article 66(c), 10 U.S.C. § 866(c) (1988), that are favorable to the accused. *United States v. Johnson*, 23 M.J. 209, 211, 15 MLR 2081 (C.M.A. 1987) (per curiam); *see generally* H. Moyer, *Justice and the Military* § 2-801, at 637 (1972) (collecting cases). It is also bound by factual determinations adverse to the accused unless the evidence is insufficient as a matter of law. *See United States v. Marks*, 29 M.J. 1, 17 MLR 2627 (C.M.A. 1989) (evidence sufficient as matter of law for rational trier of fact to find appellant guilty). Where a case turns on the exercise of discretion by a military judge, the Court reviews for abuse of discretion. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

In addition, the Court has no power to determine sentence appropriateness. *United States v. Stene*, 7 U.S.C.M.A. 277, 22 C.M.R. 67 (1956) (2-1); *United States v. Keith*, 1 U.S.C.M.A. 442, 4 C.M.R. 34, 43 (1952). It may, however, review sentences for lawfulness, *e.g.*, *United States v. Fair*, 26 M.J. 49, 16 MLR 2218 (C.M.A. 1988) (mem.) (reversing pre-discharge forfeitures in excess of two-thirds pay); *United States v. Warner*, 25 M.J. 64, 15 MLR 2527 (C.M.A. 1987) (2-1) (same); *United States v. Matthews*, 16 M.J. 354, 11 MLR 2819 (C.M.A. 1983) (invalidating death penalty), and may set aside portions of a sentence in order, for example, to give effect to a pretrial agreement. *E.g.*, *United States v. Olson*, 25 M.J. 293, 16 MLR 2012 (C.M.A. 1987). In a proper case, moreover, the judges are not above alerting service authorities where a lawful sentence seems to be inappropriate. *E.g.*, *United States v. Conforti*, 28 M.J. 363 (C.M.A. 1989) (mem.) (Everett, C.J., concurring in denial of petition for grant of review). Where a question exists as to whether a remand for further consideration of sentence appropriateness has been properly effected, a second remand may be ordered. *United States v. Baker*, 29 M.J. 126 (C.M.A. 1989) (per curiam); *see also United States v. Peoples*, 29 M.J. 426, 18 MLR 2107 (C.M.A. 1990) (remanding with instructions either to disapprove discharge or to order rehearing on sentence); *Waller v. Swift*, 30 M.J. 139, 145, 18 MLR 2292 (C.M.A. 1990) (commutation of bad-conduct discharge to 12 months' confinement *held* improper; reinstatement of discharge barred because of time already spent in confinement).

The Court has occasionally exercised the power to dismiss in the interests of justice. *E.g.*, *United States v. Bruton*, 18 M.J. 156, 12 MLR 2455 (C.M.A. 1984) (lengthy unexplained delay in post-trial processing; prejudice in access to civilian employment); *United States v. King*, 5 M.J. 1040 (C.M.A. 1976) (mem.) (charges dismissed based on "circumstances of the record, from which, among other things, it appears that the normal term of the accused's enlistment has ended"); *United States v. Fjermestad*, 17 U.S.C.M.A. 481, 38 C.M.R. 278 (1968) (per curiam) (sentence served; case already reviewed twice; minor offenses); *United States v. Dixon*, 17 U.S.C.M.A. 423, 38 C.M.R. 221, 225 (1966); *United States v. Sheeks*, 16 U.S.C.M.A. 430, 37 C.M.R. 50, 56 (1966); H. Moyer, *supra*, § 2-802, at 638 (collecting cases).

It has also at times evinced a willingness to concern itself with sentencing issues under the rubric of policing the reassessment of sentences infected by procedural error. *United States v. Sales*, 22 M.J. 305, 14 MLR 2435 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985), *noted in* D. Schlueter, *Military Criminal Justice: Practice and Procedure* § 16-16(c), at 515 n.19 (2d ed. 1987); *com-*

pare United States v. Johns, 16 M.J. 140 (C.M.A. 1983) (mem.) (2-1), *with United States v. Dukes*, 5 M.J. 71, 6 MLR 2179 (C.M.A. 1978) (2-1). For cases in which the Court has "acted in a sentencing capacity" *see* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 Mil. L. Rev. 39, 88 n.265 (1972).

There are times when virtually any court will require briefing of issues not assigned by the parties. *E.g.*, *United States v. Munoz-Flores*, 110 S. Ct. 1964, 1967 & n.22 (1990), *citing* 110 S. Ct. 48 (1989) (mem.). The Court's power to "specify" such issues has been addressed at length elsewhere. Everett, *Specified Issues in the United States Court of Military Appeals: A Rationale*, 123 Mil. L. Rev. 1 (1989); Early, Longstreet & Richardson, *USCMA and the Specified Issue: The Current Practice*, 123 Mil. L. Rev. 9 (1989); Fidell & Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117 (1988); Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99 (1980). Excessive use of that power was faulted by the Court Committee in its January 27, 1989 report, *Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989), and it is to be hoped that the incidence of specified issues will continue to decline as a result. The Courts of Military Review also specify issues, *e.g.*, *United States v. Denney*, 28 M.J. 521, 17 MLR 2251 (A.C.M.R. 1989), but do so less frequently than the Court of Military Appeals. Early, Longstreet & Richardson, *supra*, at 27 n.54 (in FY88, A.C.M.R. specified issues in 18 cases, A.F.C.M.R. specified issues in 40 cases).

The power to recast or go beyond the issues framed by the parties has been exercised or asserted in every category of case the Court can hear. *E.g.*, *United States v. Kelly*, 14 M.J. 196, 200-01, 11 MLR 2004 (C.M.A. 1982) (claiming discretion to specify issues in cases reviewed by C.M.R. under Art. 69 and then certified to C.M.A.); *United States v. Redmond*, 5 M.J. 1024 (C.M.A. 1976) (mem.), *recasting issue certified at* 5 M.J. 1008 (C.M.A. 1976) (mem.); *United States v. Simone*, 6 U.S.C.M.A. 146, 19 C.M.R. 272 (1955) (certified case; issues enlarged at request of accused); *United States v. Herndon*, 1 U.S.C.M.A. 461, 4 C.M.R. 53, 54 (1952) (C.M.A. not confined to certified issues in case certified by Judge Advocate General); *United States v. Schultz*, 1 U.S.C.M.A. 512, 531, 4 C.M.R. 104, 123 (1952) (examination of whole record in certified case); *United States v. Banks*, 7 M.J. 92, 93 n.3, 7 MLR 2178 (C.M.A. 1979) (issue specified in certificate case); *United States v. Breseman*, 24 M.J. 326 (C.M.A. 1987) (mem.) (specifying issue in petition case); *United States v. Bowling*, 5 M.J. 1027 (C.M.A. 1976) (mem.) (issue "enlarged" in petition

case); *Butler v. Kilcline*, 5 M.J. 1048 (C.M.A. 1976) (mem.) (issue specified in extraordinary writ case); *United States v. South*, 25 M.J. 226 (C.M.A. 1987) (mem.) (issue specified on petition for new trial); *United States v. Thomas*, 8 M.J. 138, 8 MLR 2012 (C.M.A. 1979) (same); *United States v. Hessler*, 5 M.J. 277 (C.M.A. 1978) (mem.) (issue specified on petition for reconsideration).

The Court typically specifies issues at the time it grants review. *See* Rule 21(d). It can, however, grant a petition and announce that an issue will be specified at a later date, *e.g., United States v. Rousey*, 11 M.J. 295 (C.M.A. 1981) (mem.), or grant, specify an issue and summarily remand to the Court of Military Review for briefing and decision. *E.g., United States v. Jefferson*, 18 M.J. 411 (C.M.A. 1984) (mem.). It can also specify an issue after granting review but prior to oral argument, *e.g., United States v. Caraballo*, 23 M.J. 421 (C.M.A. 1987) (mem.); *United States v. Elliott*, 19 M.J. 258 (C.M.A. 1984) (mem.); *United States v. Ledbetter*, 2 M.J. 37, 41, 4 MLR 2557, 2559 (C.M.A. 1976), at oral argument, *e.g., United States v. Hughes*, 28 M.J. 138 (C.M.A. 1989) (mem.); *United States v. Lawless*, 18 M.J. 255, 257 n.2, 12 MLR 2481 (C.M.A. 1984); *United States v. Strangstalien*, 7 M.J. 225, 227, 7 MLR 2294 (C.M.A. 1979); *United States v. Kelly*, 14 M.J. 196, 199, 11 MLR 2004 (C.M.A. 1982) (*semble*), or afterwards. *E.g., United States v. Miller*, 31 M.J. 247, 248 (C.M.A. 1990); *United States v. Castillo*, 27 M.J. 480 (C.M.A. 1988) (mem.); *United States v. Talavera*, 8 M.J. 14, 15, 7 MLR 2483 (C.M.A. 1979). *Cf. United States v. Westmoreland*, 31 M.J. 160, 161 n.1 (C.M.A. 1990) (noting expansion of granted issue after oral argument, on unopposed motion by appellant).

If the specified issue is unclear, a motion for clarification can be made. *E.g., United States v. Ellis*, 29 M.J. 467 (C.M.A. 1989) (mem.); *United States v. Bradford*, 28 M.J. 90 (C.M.A. 1989) (mem.); *United States v. Joines*, 28 M.J. 86 (C.M.A. 1989) (mem.); *United States v. Sears*, 17 M.J. 281 (C.M.A. 1984) (mem.); *United States v. Van Hullum*, 13 M.J. 230 (C.M.A. 1982) (mem.). By the same token, a motion will lie to clarify a granted issue (*i.e.*, one raised by the petitioner). *E.g., United States v. Lago*, 16 M.J. 441 (C.M.A. 1983) (mem.).

Rule 6. Quorum

(a) Two judges shall constitute a quorum. The concurrence of two judges shall be required for a final resolution of any matter before the Court, subject to subsections (b) and (c)

(b) A single judge may, provided such action does not finally

dispose of a petition or a case pending before the Court, act upon any request for relief; may direct the issuance of an order to show cause; and may order oral argument with respect to any request for relief. *See* Rules 15(f) and 37(a)(4).

(c) If no judge is present, the Clerk may adjourn the Court from day to day. *See* Rule 9(d).

RULES ADVISORY COMMITTEE COMMENT

The basic requirements of Rule 6(a) requiring two judges to constitute a quorum have not been changed. However, the rule has been modified to reflect the fact that the concurrence of two judges is required for final decision and only for the allowance of petitions for review, writ appeal petitions, petitions for new trial or for extraordinary relief. The [former] rule requiring the concurrence of two judges for both the allowance or denial of petitions presents the possibility of a deadlock in disposition of a petition in any situation where only two judges vote.

Rule 6(b) has been modified to authorize a single judge to issue a show cause order.

DISCUSSION

In enlarging the Court to five judges, Congress observed that "[a]s under current law, the Court will sit as a whole for all its actions, rather than in panels, to ensure clarity and uniformity in the application of military law." S. Rep. No. 101-81, 101st Cong., 1st Sess. 172 (1989); H.R. Conf. Rep. No. 101-331, 101st Cong., 1st Sess. 657 (1989).

A single judge may issue a stay, *e.g.*, *United States v. Redding*, 11 M.J. 100, 121, 9 MLR 2502 (C.M.A. 1981) (Fletcher, J., dissenting) (noting stay granted by Cook, J., as acting C.J.), allow papers to be removed from the courthouse, Rule 9(c), and solemnize marriages. *In re Hoots & Al-Salami* (C.M.A. Aug. 2, 1990) (Everett, C.J.); *In re Muschamp & Scudder*, 27 M.J. 183 (C.M.A. 1988) (Everett, C.J.); *In re Cramer & Armao*, 9 M.J. 246 (C.M.A. 1980) (Cook, J.).

For rulings that are outcome determinative, the Court has prescribed a two-vote requirement. However, it also "follow[s] the practice that if for some reason only two judges are available to vote on a petition—*e.g.*, in the event of a disqualification, protracted absence, or vacancy on the Court— then, upon vote of either judge, a petition for review will be granted . . . ." *The Military Justice Act of 1982:*

Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Sen. Comm. on Armed Services, 97th Cong., 2d Sess. 147 (1982) (response of Everett, C.J., to committee question); *e.g.*, 1980 C.M.A. Ann. Rep. 4 (1981) (describing practice during 7-month interval between departure of Perry, J. and elevation of Everett, C.J.).

Congress declined to impose a minority-grant procedure (like the Supreme Court's informal but well-established "rule of four") in the Military Justice Act of 1983, *see id.* at 213-17 (statement of the author on behalf of American Civil Liberties Union), but the Senate Report did urge the Court of Military Appeals to "examine its current rules and procedures, *such as the number of votes required to grant a petition for review*, and other procedures, such as summary dispositions, in light of" the fact that a denial of review has the effect of precluding even a chance for direct review by the Supreme Court. S. Rep. No. 98- 53, 98th Cong., 1st Sess. 34 (1983) (emphasis supplied). No change has ensued in the Court's practice of requiring two votes for a grant of review, and it is to be hoped that the Court will—by continuing to apply that standard—in effect move to a minority grant rule as the 1990 vacancies are filled. The Rules Advisory Committee so recommended to the Judges. The Committee also recommended that the Court raise the number required for a quorum to three.

The vast bulk of the Court's judicial decision making is done by a quorum. Decisions on whether to grant a petition for review are reportedly taken by notation vote, *i.e.*, without a conference such as those at which the Supreme Court decides on certiorari petitions. Conferences on the disposition of cases on the Master Docket, *see* Rule 10, at which the judges take tentative votes, are conducted on Friday mornings. H. Nufer, *American Servicemembers' Supreme Court: Impact of the U.S. Court of Military Appeals on Military Justice* 52 (1981).

Early decisions referred to the principle that "a judge who is not present at oral argument is not permitted to participate in the decision." *United States v. Jewson*, 1 U.S.C.M.A. 652, 659, 5 C.M.R. 80, 87 (1952); *United States v. Stewart*, 1 U.S.C.M.A. 648, 652, 5 C.M.R. 76, 80 (1952); *United States v. Keith*, 1 U.S.C.M.A. 493, 496, 4 C.M.R. 85, 88 (1952). More recently, in *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 16 MLR 2443 (C.M.A. 1988), a judge who was not present for the argument was furnished a tape recording, *see* Discussion of Rule 40, and participated in the decision.

Where only two judges participate and they are unable to agree on the answer to a certificate for review, the Court declines to answer

and dismisses the certificate. *United States v. Keith*, 21 M.J. 407 (C.M.A. 1986) (mem.). The Court has also held cases in which two judges were unable to agree until such time as a third judge was appointed and a new oral argument could be scheduled. *United States v. Cole*, 21 M.J. 382 (C.M.A. 1985) (mem.). The difference in approach is not readily explained except to the extent that the Court either may feel more of an obligation to give the individual his or her "day in court," or may indulge "some basic distaste. . . for the underlying statutory provision which compels the court to answer questions certified to it by the Judge Advocate General, but allows it to exercise discretion whether to review an accused's petition." Everett, *Foreword*, C.M.A. Guide viii (1978). In the Courts of Military Review, in contrast, an evenly-divided court on questions of law requires affirmance; as to cases involving those courts' power to weigh evidence, judge credibility and determine issues of fact, the effect of an equal division remains undecided. *United States v. Ohrt*, 28 M.J. 301, 303 (C.M.A. 1989).

Senior judges of the Court, *see* Rule 3A, have sat at various times during the Court's history, but the power to designate a judge of another court was not exercised until 1990. In *United States v. Rushatz*, No. 64,410, with a recusal by Judge Sullivan, Chief Judge Everett certified that there was a necessity for the designation and assignment of an Article III judge to sit in accordance with Article 142(f). With the concurrence of Chief Judge Patricia M. Wald of the District of Columbia Circuit, Chief Justice Rehnquist on August 17, 1990 designated Judge David B. Sentelle to hear and decide the case.

Rule 7. Process

All process of the Court, except mandates, shall be in the name of the United States and shall contain the names and the military rank or civilian office, if any, of the parties.

DISCUSSION

This rule is, for all practical purposes, identical with the prior version. It had been suggested that it be revised to require process to contain service numbers of the parties and the military command or civilian office of parties who are agents or officers of the United States acting in their official capacities. The latter should be included, but there is usually little need for process to include service or social security account numbers.

Officials who are named as respondents and then succeeded in of-

fice should be dropped as parties, and their successors added. *E.g.*, *Huckey v. Commander, U.S. Army Retraining Brigade*, 3 M.J. 388 (C.M.A. 1977) (mem.) (granting motion to substitute respondent); *cf.* Fed. R. App. P. 43(c); Fed. R. Civ. P. 25(d)(1); *see also* Discussion of Rule 8. One way to avoid substitution issues is to identify respondents in extraordinary writ litigation by title rather than by name.

Rule 8. Parties

(a) The title of any case filed with the Court shall contain the name, military rank and service number of an accused and, where appropriate, the official military or civilian title of any named party who is an agent or officer of the United States acting in such official capacity.

(b) The party petitioning for grant of review of a decision of a Court of Military Review, whether from a decision on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, or from a decision affecting the findings or sentence or both of a court-martial, or from a decision on application for extraordinary relief, will be deemed to be the appellant. Other named parties will be deemed to be appellees.

(c) When a certificate for review is filed by a Judge Advocate General, the party prevailing below on the certified issues will be deemed to be the appellee. The other party will be deemed to be the appellant.

(d) When a mandatory review case is filed, the accused therein will be deemed to be the appellant. The other party will be deemed to be the appellee.

(e) If a petition for grant of review or a certificate for review is filed after an action has been docketed in the same case, the party on whose behalf relief is sought in the second action will be deemed to be the appellant or cross-appellant, depending on whether such party has been deemed to be the appellant or appellee in the first action. The other party in the second action will be deemed to be the appellee or cross-appellee in a similar manner.

(f) The party or parties filing a petition for extraordinary relief with the Court will be deemed to be the petitioner or petitioners, and other parties named in such petition will be deemed to be the respondents. When an accused has not been named as a par-

ty to an action involving a petition for extraordinary relief, such accused shall be identified by the petitioner and shall be designated as the real party in interest.

RULES ADVISORY COMMITTEE COMMENT

The designation of the parties to actions before the Court has been substantially revised. Rule 8(a) will now provide that a party petitioning for a grant of review of the decision of a Court of Military Review, whether from a decision affecting the findings or sentence of a court-martial, or from a decision on application for extraordinary relief, will be deemed to be the appellant; other named parties will be deemed to be appellees. Use of the term "accused" in pleadings to identify a party is discontinued.

Rule 8(b) provides that when a certificate for review is filed by the Judge Advocate General, the party prevailing below on the certified issues will be deemed to be the appellee. The other party will be deemed to be the appellant.

Rule 8(c) provides that where a petition for grant of review or certificate for review is filed after an action has been docketed in the same case, the party on whose behalf relief is sought in the second action will be deemed to be the appellant or cross-appellant, depending on [the] status of such party in the initial action. The other party in the second action will be designated as the appellee or cross-appellee in a similar manner.

Rule 8(d) requires the party or parties filing a petition for extraordinary relief with the Court to be deemed the petitioner or petitioners. Other parties named in such petition will be deemed the respondents.

The purpose of these revisions is to clarify the position of the parties in proceedings before the Court and to make uniform the designation of the parties in each case based on their actual position in the proceedings rather than on the circumstance by which they come to seek the exercise of the Court's jurisdiction. The revision also recognizes the existence of cases in which none of the parties before the Court is an accused.

DISCUSSION

It has been held that the Court has no jurisdiction to entertain class actions. *United States v. Tommins*, 23 U.S.C.M.A. 410, 50 C.M.R. 292,

1 M.J. 33 (1975); *In re Watson*, 19 U.S.C.M.A. 401, 42 C.M.R. 3 (1970) (mem.). Subsequent cases suggest that that principle has been eroded. For example, the Court can consolidate cases, *e.g.*, *Cox v. Ziemniak*, 23 M.J. 259 (C.M.A. 1986) (mem.); *United States v. Jette*, 23 M.J. 246 (C.M.A. 1986) (mem.) (consolidating for purposes for oral argument), or treat multiple petitioners as a group for practical purposes. *E.g.*, *Fletcher v. Commanding Officer*, 2 M.J. 226 (C.M.A. 1977) (mem.). It entertained a group's extraordinary writ petition in *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 16 MLR 2443 (C.M.A. 1988), and *Artis v. Commandant, U.S. Disciplinary Barracks*, 18 M.J. 436 (C.M.A. 1984) (mem.); *see also In re D'Arcangelo*, 5 M.J. 1111 (C.M.A. 1976) (mem.). It has both refused intervention, *Bishop v. Johnson*, 3 M.J. 58 (C.M.A. 1977) (mem.), and permitted it, *Kane v. Berry*, 5 M.J. 1120 (C.M.A. 1976) (mem.), without explaining the difference in treatment. In *Rowland v. Arledge*, 5 M.J. 988 (C.M.A. 1976) (mem.), extraordinary relief was denied to three joint petitioners, but the order raised no question as to the propriety of the joint petition, and the denial was based on mootness. These important aspects of practice before the Court are overdue for clarification.

The names of the parties must ordinarily be stated. To avoid confusion, the Court has noted the fact that an appellant has no first name or middle initial. *United States v. Valance*, 30 M.J. 125 (C.M.A. 1990) (mem.). In another unusual case, it allowed a caption that described a writ petitioner only as a Navy judge advocate, in order to avoid potential reputational injury. *Navy Judge Advocate v. Cedarburg*, 12 M.J. 315 (C.M.A. 1981) (mem.).

The Court retains authority to add parties in the interest of expeditious resolution of extraordinary writ cases. *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 342, 16 MLR 2443 (C.M.A. 1988) (Judge Advocate General of Navy added as party despite fact that Secretary of Defense, who represents interests of Judge Advocate General, was named respondent); *Adams v. Johnson*, 12 M.J. 324 (C.M.A. 1981) (mem.). Conversely, inappropriate respondents will be dropped. *McPherson v. McLaughlin*, 5 M.J. 994 (C.M.A. 1976) (mem.).

In writ cases initiated by the prosecution, the accused will be joined as the real party in interest if not named initially. *E.g.*, *United States v. Labella*, 14 M.J. 436 (C.M.A. 1982) (mem.); *United States v. Wholley*, 14 M.J. 284 (C.M.A. 1982) (mem.). Where the accused is the petitioner, the United States will be added as a respondent if not named in the petition. *E.g.*, *McPherson*, *supra*; *Gaulden v. Alexander*, 2 M.J. 231

(C.M.A. 1977) (mem.). Where appropriate—as where it treats a petition for extraordinary relief as a writ appeal petition—the Court will redesignate the parties. *E.g., Ellis v. Jacob*, 26 M.J. 90, 91 n.2, 16 MLR 2317 (C.M.A. 1988). Where a respondent is a public official, and the named individual is replaced, the new incumbent will be substituted. *E.g., U.S. Navy-Marine Corps Court of Military Review v. Cheney*, 28 M.J. 244 (C.M.A. 1989) (mem.), *report accepted and filed*, 30 M.J. 29, 30 (1990) (mem.); *see* Fed. R. App. P. 43(c)(1); Fed. R. Civ. P. 25(d)(1).

Notwithstanding the designation of parties for purposes of the appellate process, a certificate for review should refer to "the accused" in stating the issue, and the Court may order it changed to so read. *United States v. Bailey*, 18 M.J. 431 (C.M.A. 1984) (mem.).

If a petitioner is on unauthorized absence, the petition will be dismissed. *E.g., United States v. Schreck*, 10 M.J. 226, 9 MLR 2162 (C.M.A.), *supplemented* 10 M.J. 374, 9 MLR 2305 (C.M.A. 1981), *following remand*, 13 M.J. 856, 10 MLR 2458 (N.M.C.M.R. 1982). The Court allows absentees 30 days in which to return. *E.g., United States v. Holmes*, 19 M.J. 83 (C.M.A.) (mem.), *pet. dismissed*, 19 M.J. 120 (C.M.A. 1984) (mem.); *United States v. Patterson*, 17 M.J. 338 (C.M.A. 1984) (mem.); *United States v. Campbell*, 17 M.J. 338 (C.M.A. 1984) (mem.). If the petitioner's status as a fugitive is unclear, the petition may be held in abeyance while further information is obtained. *United States v. Sigala*, 22 U.S.C.M.A. 264, 46 C.M.R. 264, 1 MLR 2306 (1973). Given the Court's pattern of generosity in dealing with petitioners, it is to be assumed that it would not dismiss in those "very unusual cases" where equities relating to the absence, escape, recapture or the merits of the appeal so dictated. *See United States v. Puzzanghera*, 820 F.2d 25, 27 (1st Cir.), *cert. denied*, 108 S. Ct. 237 (1987).

If a petitioner dies while a petition is pending or while the period in which to petition for review is running, the proceedings are abated, the findings and sentence are set aside, the charges are dismissed and all rights, privileges and property of which he or she was deprived are ordered restored. Such cases are surprisingly numerous. *E.g., United States v. Jarvis*, 23 M.J. 359 (C.M.A. 1987) (mem.); *United States v. Anderson*, 19 M.J. 295 (C.M.A. 1985) (mem.) (death prior to expiration of time for filing petition for grant of review); *United States v. Lange*, 18 M.J. 162, 12 MLR 2455 (C.M.A. 1984) (per curiam); *United States v. Roettger*, 17 M.J. 453, 12 MLR 2350 (C.M.A. 1984); *United States v. Wright*, 17 M.J. 188 (C.M.A. 1983) (mem.) (2-1); *United States v. Kuskie*, 11 M.J. 253, 9 MLR 2700 (C.M.A. 1981) (2-1)

(petition denied, 10 M.J. 179 (C.M.A. 1980) (mem.), after petitioner died but before C.M.A. learned of death; *held*, findings and sentence set aside); *see also United States v. McKenzie*, 23 M.J. 797, 798 (C.G.C.M.R. 1987) (allowing untimely petition for reconsideration where accused died one day after expiration of period for seeking reconsideration but before expiration of period for seeking C.M.A. review; *held*, findings and sentence set aside, charges dismissed) (collecting cases).

This rule is different from that followed in the Supreme Court. *Dove v. United States*, 423 U.S. 325 (1976) (per curiam) (dismissing certiorari petition), and rests on the Court of Military Appeals' view that its role is so central to the congressional plan for military justice that convictions over which it has only discretionary appellate jurisdiction cannot be considered final unless and until that jurisdiction has been exercised or the time for invoking it has expired.

If review has been completed before the petitioner dies, the final decision stands. *United States v. Dupree*, 17 M.J. 113 (C.M.A. 1983) (mem.).

"A petition [for new trial] may not be submitted after the death of the accused." R.C.M. 1210(a).

Where a question is raised on appeal as to an appellant's sanity, the usual course is to remand. *Compare, e.g., United States v. McGhee*, 18 M.J. 418 (C.M.A. 1984) (mem.) (remanding for sanity board), *with United States v. Johnson*, 19 M.J. 281 (C.M.A. 1985) (mem.) (leaving sanity board decision to C.M.R.), *and United States v. Washington*, 6 U.S.C.M.A. 114, 19 C.M.R. 240 (1955) (petitioner became insane during appellate process; case struck from docket). The accused is entitled to present post-trial evidence of insanity to a court-martial unless the appellate court is convinced beyond a reasonable doubt that a different result would not obtain if the trier of fact had had the new evidence before it. *United States v. Dock*, 28 M.J. 117, 120, 17 MLR 2345 (C.M.A. 1989). In one case, the Court directed the government to produce psychiatric records. *United States v. Curtis*, 30 M.J. 22 (C.M.A. 1990) (mem.).

If the interests of the parties will be unaffected by the outcome of a certificate for review, the Court will decline to answer the question. *E.g., United States v. Hartsock*, 15 M.J. 77 (C.M.A. 1982) (mem.); *United States v. Kelly*, 14 M.J. 196, 200 & n.5, 11 MLR 2004 (C.M.A. 1982); *United States v. Bryant*, 12 M.J. 307 (C.M.A. 1981) (mem.); *United States v. McAnally*, 10 M.J. 270, 9 MLR 2176 (C.M.A. 1981)

(per curiam); *United States v. Clay*, 10 M.J. 269, 9 MLR 2176 (C.M.A. 1981) (per curiam); *but see United States v. Kuehl*, 11 M.J. 126, 127, 9 MLR 2513 (C.M.A. 1981) (Fletcher, C.J., concurring in part and dissenting in part); *United States v. Gutierrez*, 11 M.J. 122, 123, 9 MLR 2512 (C.M.A. 1981) (question answered, noting split among services). The Court may decline to answer a certified question that is overly broad. *United States v. Brabant*, 29 M.J. 259, 265 n.*, 17 MLR 2682 (C.M.A. 1989).

It will also dismiss certified cases that are moot, *e.g.*, *United States v. Arnold*, 28 M.J. 338 (C.M.A. 1989) (mem.); *United States v. Silvernail*, 5 M.J. 1128 (C.M.A. 1976) (mem.); *United States v. McIvor*, 21 U.S.C.M.A. 156, 44 C.M.R. 210 (1972); *United States v. Gilley*, 14 U.S.C.M.A. 226, 34 C.M.R. 6 (1963), or academic. *United States v. Aletky*, 16 U.S.C.M.A. 536, 37 C.M.R. 156 (1967).

Rule 8(e) governs the treatment of cases in which a cross-petition or cross-certificate has been filed. Since the period for filing a petition for grant of review is longer than that for filing a certificate for review, *see* Rule 19(a)-(b), and since most—but not all, *e.g.*, *United States v. Roettger*, 17 M.J. 453, 12 MLR 2350 (C.M.A. 1984)—certificates are filed when the accused has prevailed in the Court of Military Review, *United States v. Redding*, 11 M.J. 100, 114 & n.1, 9 MLR 2502 (C.M.A. 1981) (Fletcher, J., dissenting), cross-petitions are far more likely to occur than cross-certificates.

CLERK'S OFFICE

Rule 9. Clerk

(a) *Location of office*. The Clerk's office shall be located in the courthouse at 450 E Street, Northwest, Washington, D.C. 20442.

(b) *Oath of office*. Before entering upon the execution of his office, the Clerk shall take the oath or affirmation prescribed in Section 951 of Title 28, United States Code.

(c) *Custodian of records*. The Clerk shall serve as custodian of the records of the Court and shall not permit any documents relative to a case to be taken from the courthouse except by order of a judge of the Court. However, after final action on a case in which documents containing classified information have been filed with the Court under Rule 24(d), the Clerk shall, as Court Security Officer, consult with the originating armed service to

determine the appropriate disposition of such documents. *See* Rule 12.

(d) *Disposition of procedural matters.* Notwithstanding the provisions of Rule 6, the Clerk, on behalf of the Court, may entertain and act on any motion seeking an enlargement of time not to exceed 20 days, leave to withdraw as counsel, or permission to file citations, pleadings, or other papers relative to a matter pending before the Court, provided such motion is not opposed and such action does not substantially affect the rights of the parties or the ultimate decision in the case. The order of the Clerk shall be deemed the order of the Court.

(e) *Hours.* The Clerk's office shall be open for the filing of pleadings and other papers from 9:00 a.m. to 5:00 p.m. every day except Saturdays, Sundays, and legal holidays, or as otherwise ordered by the Court. *See* Rule 36(a).

RULES ADVISORY COMMITTEE COMMENT

The provisions of Rule 9(a) relating to the office of the Clerk are unchanged. The requirement is retained in Rule 9(b) that the Clerk take the oath prescribed in 28 U.S.C. § 951, but the text of the oath has been deleted. The Clerk's authority as custodian of Court records (Rule 9(c), is unchanged. However, a provision has been added to provide for final disposition of documents containing classified information filed under new Rule 24(d).

Rule 9(d) on disposition of procedural matters has been modified to permit the Clerk to act on motions seeking an enlargement of time of not more than 15 days for filing of documents with the Court. This is an increase from the enlargement of time up to 10 days authorized by the [former] rule. Recent experience of the Clerk's office reflects that the increase in time provided by the new provision will allow the Clerk to resolve most requests for enlargement of time without requiring action by the Court.

Rule 9(e) prescribes the hours in which the Office of the Clerk shall be open for the filing of pleadings and other papers. The times described therein are unchanged from those in the [former] rule, but the wording of the rule has been modified to avoid any implication that the rule prescribes the administrative schedule for work by employees of the Clerk's office or staff members of the Court.

DISCUSSION

The full zip code is 20442-0001.

Since October 31, 1952, the Court has occupied its own building, which was designed by Elliott Woods (1865-1923) (with the assistance of W.D. Kneesi and August Eccard, Works Progress Admin., Federal Writers' Project, *Washington City and Capital* 1074 (1937)) as a "fireproof addition" to the District of Columbia courthouse to house the United States Court of Appeals for the District of Columbia Circuit. The dignified, if bland, architecture dates from 1910, 1961 C.M.A. Ann. Rep. 55 (1962); *see* Act of May 30, 1908, § 29, 35 Stat. 520, 544 (authorizing $200,000 for construction); Act of Mar. 4, 1909, 35 Stat. 907, 928 (appropriating $29,600 to furnish building), and blends with that of adjacent buildings occupied by units of the Superior Court of the District of Columbia and the Public Defender Service. Of note inside the building are a number of portraits and the particularly handsome skylight, gilded reredos and bench. The woodwork may be seen in an arresting sequence of old photographs of the judges of the District of Columbia Circuit on display in the attorneys' waiting room outside that court's present courtroom in the United States Courthouse two blocks to the south.

The courthouse, which was placed on the National Register of Historic Places in 1974, 39 Fed. Reg. 8358 (1974), has been variously described as "a faintly seedy edifice," Waltz, *The Court of Military Appeals: An Experiment in Judicial Revolution*, 45 A.B.A.J. 1185 (1959), and as "a particularly fine and remarkably early example of revived (20th century) Greek Revival architecture, . . .designed with great sensitivity to respect the adjacent former Washington City Hall of 1820." H. Nufer, *American Servicemembers' Supreme Court: Impact of the U.S. Court of Military Appeals on Military Justice* 50 & n.5 (1981) (quoting nomination for National Register of Historic Places). "There is in Woods' building no false note of pomposity or meretricious display. A judicious restraint and fine sense of balance mark this judicial structure, one of the handsomest of its period among Government buildings." U.S. Dep't of the Interior, Nat'l Park Service, National Register of Historic Places, Nomination Form for Federal Properties § 8 (1974). Many a court would be pleased to have its work described in similar terms.

The courthouse is open to the public during business hours, and is convenient to the Judiciary Square subway station of the Washington Metropolitan Area Transit Authority. Parking in the vicinity is limited. The building is within easy walking distance of

the National Gallery of Art, National Archives, Hirshhorn Museum and Sculpture Gallery, Ford's Theatre, Air and Space Museum and other popular tourist attractions. Numerous good restaurants are found in the nearby Chinatown district.

The Court has long published a brochure describing its history and functions. 1965 C.M.A. Ann. Rep. 14 (1966). This is available free of charge from the Clerk's office. A 1987 videotape describing the Court is also available. Everett, *The United States Court of Military Appeals: New Issues, New Initiatives*, 36 Fed. B. News & J. 182, 184 (1989).

Key telephone numbers at the Court are as follows:

General	(202) 272-1448
Docket Room	(202) 272-1452
Counsel for Extraordinary Writs and Motions	(202) 272-1453
Reporter of Decisions	(202) 272-1448
Central Legal Staff Director	(202) 272-1454
Library	(202) 272-1466

The Court's automatic voice network (AUTOVON) telephone number uses prefix 285 followed by the last four digits of the commercial number.

When seeking case information by telephone, it is desirable to have the docket number available. Docket Room staff will assist in obtaining the docket number if necessary.

In an emergency, the Court has made special arrangements for the receipt of pleadings outside of normal business hours. *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 27 M.J. 10 (C.M.A. 1988) (mem.). Unlike the practice of some other courts, there is no standing arrangement for after-hours filings or for the receipt of submissions by security force personnel. "Pleadings delivered after business hours are considered as being filed on the next business day. Delivery to a member of the Court's staff after business hours does not constitute filing on the day of delivery. Notice of intent to deliver a pleading does not render timely a pleading which is delivered after business hours." *United States v. Morgan*, 30 M.J. 39 (C.M.A. 1990) (mem.). If a pleading is not ready until after the close of business, it may be filed by mail and will still be deemed timely if it is actually deposited in the United States mails. Rule 36(a); *e.g.*, *United States*

v. King, 30 M.J. 40 n.* (C.M.A. 1990) (mem.). Deposit in an office mail system is insufficient for this purpose.

On occasion, the Court transacts business on Saturday. For example, at the end of the Term, special efforts are made to wrap up pending cases or other matters. Thus, Rule 3A was promulgated on Saturday, September 29, 1990.

Rule 10. Docket

(a) *Maintenance of docket*. The Clerk shall maintain:

(1) a regular docket for cases subject to mandatory review, petitions to review convictions or sentences affirmed by a Court of Military Review, and certificates for review of final decisions in a Court of Military Review;

(2) a miscellaneous docket for petitions for grant of review and certificates for review of decisions by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, petitions for extraordinary relief, writ appeal petitions, and certificates for review of decisions on application for extraordinary relief in a Court of Military Review; and

(3) a special docket of the matters arising under Rule 15 concerning complaints of unprofessional conduct against a member of the Bar of this Court.

The receipt of all pleadings or other papers filed, and any action by the Court relative to a case, will be entered in the appropriate docket. Entries in each docket will show the date, the nature of each pleading or other paper filed, and the substance of any action by the Court. From time to time, the Clerk shall, under the general direction of the Court, determine the appropriate manner for keeping and preserving the dockets.

(b) *Docket number*. In a mandatory review case, a docket number will be assigned upon receipt of the record from the Judge Advocate General. In all other cases, a docket number will be assigned upon receipt of the initial pleading. All pleadings or other papers subsequently filed in the case will bear the assigned docket number.

(c) *Notice of docketing.* The Clerk shall notify the appropriate Judge Advocate General and all parties of the receipt and docketing of a case and the docket number assigned. In the case of a petition for extraordinary relief, the Clerk shall also notify all named respondents of the petition's receipt and docketing.

(d) *Entry of final decision.* The Clerk shall prepare, sign, and enter the final decision following receipt of the opinion of the Court. If a final decision is rendered without opinion, the Clerk shall prepare, sign, and enter the final order following the instructions of the Court. The Clerk shall, on the date a final decision is entered, distribute to all parties and the Judge Advocate General a copy of the opinion, if any, or of the final order if no opinion was written, and notice of the date of entry thereof.

RULES ADVISORY COMMITTEE COMMENT

Rule 10(a) has been substantially rewritten. It requires the Clerk to maintain three separate dockets.

A "regular docket" is provided for 1) cases on mandatory review, 2) petitions for review of convictions or sentences affirmed by a Court of Military Review, and 3) cases certified by a Judge Advocate General for review of a final decision of a Court of Military Review, except in cases involving applications for extraordinary relief.

A "miscellaneous docket" is provided for petitions for extraordinary relief and also for writ appeal petitions and certificates for review in cases involving applications for extraordinary relief before a Court of Military Review.

A "special docket" is established for matters arising under [Rule 15] concerning complaints of unprofessional conduct against a member of the Court's Bar.

Each docket is required to have an entry for the receipt of all pleadings and other papers filed and for entry of any action by the Court relative to a particular case. The Clerk is authorized to determine the appropriate manner for keeping and preserving the dockets.

Rule 10(b) makes no changes in the procedure for assignment of docket numbers and noting this number in subsequent pleadings in the case.

Rule 10(c) has been revised to require the Clerk to notify the ap-

propriate Judge Advocate General and the accused or his counsel of the receipt and docketing of a case and the docket number assigned. Appropriate procedures are established for docketing of a petition for extraordinary relief and notification of other parties. The substance of [former] Rule 9(c) has not been changed, but the rule has been modified editorially to put the more common type of case at the beginning of the rule provision.

The title of Rule 10(d) has been changed to "Entry of Final Decision" to reflect more accurately the action taken. The terminology has been changed from "Final Judgment" to "Final Decision" to conform to the current practice in the Court.

DISCUSSION

Under the Court's Management Information System, docket information has been computerized since FY82. FY82 C.M.A. Ann. Rep. 6 (1983). Actual docketing practices seem to be slightly different, at least as far as labeling is concerned, from what the text of the rule suggests. The annual reports refer to master, petition and miscellaneous dockets, but not to the special docket. *E.g.*, FY87 C.M.A. Ann. Rep. 20-21 (1988). Cases move from the petition docket to the master docket upon a grant of review. Omission of the special docket from the Court's published data is presumably in deference to Rule 15(h), although there would seem to be no basis for objecting to publication of statistics relating to that docket. The miscellaneous docket was instituted on January 1, 1967. 1967 C.M.A. Ann. Rep. 5 (1968).

Cases on the regular docket are consecutively numbered from the beginning of the Court's history, and do not refer to the year or Term. With *United States v. Watkins*, 4 M.J. 326 (C.M.A. 1978) (mem.) (No. 36001/AR), the Court began to add a virgule followed by an indication of the branch of service (AR, NA, MC, AF, CG) after the docket number in some orders. This practice was expanded to all *Daily Journal* entries as of October 1, 1981, at the same time that the use of commas was discontinued in the five-digit docket numbers. *United States v. Coronado*, 12 M.J. 82 (C.M.A. 1981) (mem.) (No. 41140/AF). As of this writing, docket numbers shown on published opinions continue to use commas and to omit the branch-of-service suffix. In 1990, the Court also modified its practice by showing the date of argument in cases decided by full opinion. *United States v. Dellarosa*, 30 M.J. 255 (C.M.A. 1990).

Miscellaneous docket numbers start anew as of October 1 each year and include a branch-of-service suffix.

Rules 12 and 15(h) are the only provisions that expressly contemplate limiting public access to the records of the Court. The Court's general case files are ordinarily open to public inspection, although on rare occasions a pleading may be docketed under seal. *E.g., In re U.S. Navy-Marine Corps Court of Military Review*, 27 M.J. 8 (C.M.A. 1988) (mem.). The sealing in that case was based on the fact that the underlying Inspector General's investigation had not been made public. Baum & Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 Fed. B. News & J. 242, 243 (1989). *See also Navy Judge Advocate v. Cedarburg*, 12 M.J. 315 (C.M.A. 1981) (mem.) (generic term substituted for petitioner's name).

In exceptional circumstances, the Court may strike a case from the docket. *United States v. Washington*, 6 U.S.C.M.A. 114, 19 C.M.R. 240 (1955) (petitioner became insane during appellate process; divergent rationales for result reached).

"The regular practice of the Clerk's Office is to send the [Rule 10(c)] notice [of docketing] to the appellate divisions on the date of the notice." *United States v. Shewmake*, 29 M.J. 435 (C.M.A. 1989) (mem.).

Rule 11. Calendar

(a) The Clerk shall prepare a calendar, consisting of the cases that have become or will be available for hearing, which shall be arranged in the first instance in the chronological order in which petitions for grant of review have been granted or certified questions and mandatory appeals have been filed with the Court. The arrangement of cases on the calendar shall be subject to modification light of the availability of pleadings, extensions of time to file briefs, and orders to advance or specially set cases for hearing.

(b) The Clerk shall periodically publish hearing lists in advance of each Court session for the convenience of counsel and the information of the public.

(c) The Clerk shall advise counsel when they are required to be present in Court. *See* Rule 40(b)(1).

(d) Cases may be advanced or postponed by order of the Court, upon motion duly made showing good cause therefor, or on the Court's own motion. *See* Rule 40(b).

(e) Two or more cases involving the same question may, on the Court's own order or by special permission, be heard together as one case or on such terms as may be prescribed.

RULES ADVISORY COMMITTEE COMMENT

The substance of this rule has not been changed, but minor editorial revisions have been made in the language of the rule and cross-references to other rules have been changed to conform to the new numbers resulting from the [1983] revisions and additions to the Court's rules.

DISCUSSION

The only cases that are afforded an explicit calendar preference are those arising under Article 62. *See* UCMJ Art. 62(b), 10 U.S.C. § 862(b) (1988); Rule 19(a)(7); *see also* C.M.R.R. 21(e). Perhaps to ensure that they are not inadvertently lost amid the great mass of "regular" Article 67(a)(3) petitions, Article 62 petitions are identified as such when their filing is recorded in the *Daily Journal*. *E.g.*, *United States v. Woods*, 28 M.J. 103 & n.* (C.M.A. 1989) (mem.).

The Court may make special arrangements for expedited argument in other cases where circumstances warrant. *E.g.*, *Unger v. Ziemniak*, 27 M.J. 449 (C.M.A. 1989) (mem.); *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 16 MLR 2443 (C.M.A. 1988). While the Court has granted stays on an emergency basis in a variety of cases, there can be no guaranty that interim relief will be granted in time to prevent a threatened harm. As Justice Rehnquist said of the Supreme Court in *Conforte v. Commissioner of Internal Revenue*, 459 U.S. 1309, 1311 (Rehnquist, Circuit Justice 1983), "[e]xcept in extreme circumstances the Court generally is unable to provide same-day service." *See* Discussion of Rule 40 (collecting cases).

If the scheduled hearing date creates an irreconcilable conflict with another important obligation, a motion to reschedule should be filed, *e.g.*, *United States v. Stroup*, 28 M.J. 79 (C.M.A. 1989) (mem.) (lead civilian appellate defense counsel scheduled to be outside United States); *Murray v. Haldeman*, 15 M.J. 377 (C.M.A. 1983) (mem.) (civilian counsel for *amicus* allowed to argue at separate session), but the Court may simply respond, as it did in *United States v. Dillon*, 16 M.J. 414 (C.M.A. 1983) (mem.), that any counsel of record may argue the cause.

On September 30, 1988, anticipating a recommendation of the Court Committee, *see Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989), the Court entered an order establishing a Term of Court to commence each October 1. *In re Establishment of Term of Court*, 27 M.J. 412 (C.M.A. 1988). The purpose of the order, which reinstates a system that had fallen into desuetude some thirteen years earlier, Early, Longstreet & Richardson, *USCMA and the Specified Issue: The Current Practice*, 123 Mil. L. Rev. 9, 10 & n.6 (1989); *cf.* 1977 Rule 41 (oral argument term to run from September through November and January through June), is to facilitate the "prompt and timely disposition of those cases in which plenary consideration is warranted and which have been placed on the Master Docket." *See* Discussion of Rule 10. The Clerk is to announce on the last day of each Term "a list of those cases which are then pending on the Master Docket and which shall be carried over for final disposition to the next Term of Court." The order was accompanied by a summary of the Court's caseload for FY88 and a list of cases carried over to the October 1988 Term for briefing, argument, summary disposition or final action. 27 M.J. at 413-14.

The Term of Court arrangement of course does not guarantee that cases will move any more swiftly than in the past, but it does demonstrate the judges' determination to remedy the problem of appellate delay that has occasionally plagued the system. *See United States v. Dunbar*, 31 M.J. 70, 75 (C.M.A. 1990) (Cox, J., concurring in the result); *see also* S. Rep. No. 101-384, 101st Cong., 2d Sess. 147 (1990) (noting "potential for serious delays in case processing that the Court encountered in recent years").

While Rule 11(b) contemplates the periodic publication of hearing lists, the Court has not yet implemented a suggestion that it publish a calendar of arguments and conference dates. *Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989).

Rule 12. Cases Involving Classified Information

(a) *Court Security Officer*. The Clerk shall serve as the Court Security Officer for the purposes of providing for the protection of classified information, and may designate such assistants as are appropriate for such purposes.

(b) *Classified documents* Documents containing classified information will be stored and safeguarded by the Court Security Officer in accordance with the Department of Defense Informa-

tion Security Program Regulation (DOD Regulation 5200.1-R) or the Security Procedures Established by the Chief Justice of the United States pursuant to Pub. L. 96-456, 94 Stat. 2025, as appropriate. *See* Rules 9(c) and 34(d).

(c) *Security clearances*. Security clearances for personnel on the staff of the Court will be obtained by the Court Security Officer in accordance with the Department of Defense Information Security Program Regulation.

RULES ADVISORY COMMITTEE COMMENT

The Court, dealing as it does with cases arising in the military services, has had a number of cases in which the record contained classified matter or was itself classified. Other cases have required the use of classified material to resolve the issues presented. Congress has, by statute (Public Law 96-456, 94 Stat. 2025), required the Chief Justice of the United States (in consultation with the Secretary of Defense and the Director of Central Intelligence) to establish procedures for protecting classified information in cases in the Federal civilian judiciary. It is appropriate that the Court's Rules likewise provide procedures for processing cases and documents which involve such information. New Rule 12 and related rules establish these procedures. *See* Rules 9(c), 24(d) and 30(c).

Rule 12(a) designates the Clerk as the Court Security Officer responsible for the protection of classified information. The term "Court Security Officer" is adopted from the Procedures Established by the Chief Justice pursuant to Public Law 96-456.

Rule 12(b) adopts the DOD Information Security Program Regulation and the Security Procedures Established by the Chief Justice, as appropriate, for storing and safeguarding classified documents. Adoption of the DOD Regulation insures conformity with procedures already used by the military services and conforms the processing of classified documents by the Court and within other elements of the Department of Defense. Adopting the Procedures Established by the Chief Justice assures that the protection of classified documents during judicial proceedings of this Court will be consistent with those used in Federal civilian courts.

Note that the Procedures Established by the Chief Justice expressly provide that no security clearance need be obtained for a justice or judge. Rule 12(c) provides for the Clerk as Court Security Officer to obtain (not grant) security clearances for staff personnel of the Court.

To facilitate compliance with Rule 12, Rule 24(d) provides procedures for filing with the Court documents which contain classified information and limits the number of copies of classified documents filed with the Court. Rule 30(c) authorizes the Court to hold closed hearings in a case involving classified information and prescribes the protection required for records of such a proceeding.

DISCUSSION

The Classified Information Procedures Act is reproduced at 18 U.S.C.A. App. (West 1985). The Chief Justice's rules may be found following § 9 of the Act. The Court received classified documents in *Cooke v. Ellis*, 12 M.J. 17, 18 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting). *See also id.* at 11-14.

ATTORNEYS

Rule 13. Qualifications to Practice

(a) No attorney shall practice before this Court unless the attorney has been admitted to the Bar of this Court or is appearing *pro hac vice* by leave of the Court. *See* Rule 38(b).

(b) It shall be a requisite to the admission of attorneys to the Bar of this Court that they be a member of the Bar of a Federal court or of the highest court of a State, Territory, Commonwealth, or Possession, and that their private and professional character shall appear to be good.

(c) Each applicant shall file with the Clerk an application for admission on the form prescribed by the Court, together with a certificate from the presiding judge, clerk, or other appropriate officer of a court specified in (b) above, or from any other appropriate official from the Bar of such court, that the applicant is a member of the Bar in good standing and that such applicant's private and professional character appear to be good. The certificate of good standing must be an original and must be dated within one year of the date of the application.

(d) If the documents submitted demonstrate that the applicant possesses the necessary qualifications, the Clerk shall so notify the applicant and he or she may be admitted without appearing in Court by subscribing a written oath or affirmation. However, if the applicant so elects, the admission may be on oral motion by a member of the Bar of this Court in open court. Upon ad-

mission, the Clerk shall issue a wallet-size admission card to the attorney. In addition, if the attorney desires a large certificate of admission suitable for framing, a fee of $25 will be required and may accompany the application papers.

(e) Each applicant shall take or subscribe the following oath or affirmation:

> **"I * * *, do solemnly swear (or affirm) that I will support the Constitution of the United States, and that I will conduct myself, as an attorney and counselor of this Court, uprightly and according to law. So help me God."**

(f) Admissions will be granted on motion of the Court or upon oral motion by a person admitted to practice before the Court. Special admissions may be held by order of the Court.

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 11(a) and (b) have not been changed.

Rule 13(c) revised [former] Rule 11(c) to require that application for admission to the Bar of the Court be on a form which will include a notarized certificate from the applicant that he or she is a member in good standing of a Bar of a Federal court or the highest court of a state, territory, or possession. The requirement for. . . payment of an admission fee [has] been omitted in the revised rule.

Provisions for admission upon subscribing a written oath or affirmation or upon oral motion in open court are retained in Rule [13](d). In addition, an attorney who desires a formal certificate of admission may obtain one upon payment of a $10 [now $25] fee to the Clerk. The provision in [former] Rule 12(e) with respect to taking a prescribed oath has been revised to change the word "demean" to "conduct."

New Rule 13(f) continues the practice of admitting attorneys to the Bar of the Court at special hearings held at locations outside of Washington. Minor changes have been made in the language of the rule.

DISCUSSION

The bar of the Court is not officially organized, although the Judge

Advocates Association, founded in 1943 (before the Court was created) and now affiliated with the American Bar Association, functions as the Court's bar in some respects. *See generally* Everett & Early, *The United States Court of Military Appeals and the Judge Advocates Association: An Historical Relationship*, 1 Mil. Advocate No. 5, at 1 (Summer 1990). Membership in the Court's bar is not a prerequisite to practice before courts-martial or the courts of military review. *Cf.* C.M.A. Guide 15 (1978) (noting abortive staff proposal).

If counsel is not admitted to the Court's bar, a motion to appear *pro hac vice*, rather than a motion to be admitted *pro hac vice* is appropriate. *See United States v. Berg*, 29 M.J. 437 (C.M.A. 1989) (mem.). "Filing of a pleading should *not* be delayed because counsel is applying for membership in the Bar of the Court." *United States v. Evans*, 30 M.J. 24 n.2 (C.M.A. 1990) (mem.); *see* Rule 38(b).

Given the ease with which an attorney can gain admission to the Court's bar, there is little reason to proceed *pro hac vice*. It does, however, occur from time to time, typically when appellate defense counsel or *amicus curiae* counsel are civilian practitioners. *E.g.*, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 28 M.J. 84 (C.M.A. 1989) (mem.); *United States v. Dicupe*, 19 M.J. 151 (C.M.A. 1984) (mem.) (oral motion in open court to present argument *pro hac vice*); *United States v. Simpkins*, 19 M.J. 83 (C.M.A. 1984) (mem.) (pending admission to C.M.A. bar). For a rare case of appearance *pro hac vice* by government counsel see *United States v. Dean*, 29 M.J. 452 (C.M.A. 1989) (mem.).

The Court has refused to permit a nonlawyer appellant to appear *pro se*. *United States v. Wattenbarger*, 18 M.J. 448 (C.M.A. 1984) (mem.); *see also United States v. Evans*, 25 M.J. 699 (A.C.M.R. 1987), *aff'd*, 27 M.J. 447 (C.M.A. 1988) (mem.), *cert. denied*, 109 S. Ct. 2434 (1989).

The Court—like the Supreme Court—admits far more attorneys to its bar than will ever conceivably appear before it. After 10 years, the Court had admitted 9,091 lawyers to its bar. 1961 C.M.A. Ann. Rep. 58 (1962). The 10,000th admission— that of Sen. Sam J. Ervin— occurred in 1963. 1963 C.M.A. Ann. Rep. 51 (1964). Through FY87, when the Court's cumulative docket of cases had just passed the 60,000-case mark, it had admitted 26,284 attorneys to its bar. FY87 C.M.A. Ann. Rep. 6 (1988). In 1981, the Court authorized waiver of its admission fee where appropriate "because of the official position or official duties of the applicant for admission." 12 M.J. 72 (C.M.A. 1981). Most newly admitted attorneys request the optional

certificate of admission, which is among the most impressive and handsome examples of an otherwise dull genre. The cost of the optional certificate rose to $25 in 1990.

In 1983, the judges rejected a proposal to substitute self-certification for the customary official certificate of good standing. They also declined to promulgate a rule permitting appearances by law students. The proposal, which was advanced initially by the National Military Discharge Review Project, C.M.A. Guide 15 (1978), received mixed reviews. One argument in opposition was the fact that the Court is a criminal court of last resort for the military, and that student responsibility for cases was inappropriate in such a context. In *United States v. Strangstalien*, 3 M.J. 204 (C.M.A. 1977) (mem.), the Court denied a motion for the special admission of legal interns to present oral argument, in the absence of evidence that the appellant had consented—a position to which it adhered even after the appellant requested such representation. 3 M.J. 208 (C.M.A. 1977) (mem.); *but see id.*, 7 M.J. 225, 226 (C.M.A. 1979) (noting role of legal interns on brief).

The Court encourages student involvement through the submission of *amicus* briefs by law school appellate advocacy programs. *E.g., United States v. Jacobs*, 31 M.J. 138, 145 n.1 (C.M.A. 1990) (Everett, C.J., dissenting); *United States v. Avila*, 26 M.J. 72 (C.M.A. 1988) (mem.); *Cooke v. Orser*, 12 M.J. 299 (C.M.A. 1981) (mem.). Notwithstanding *Strangstalien*, in *United States v. Jefferson*, 22 M.J. 87, 112 (C.M.A. 1986) (mem.), it allowed a third-year law student (certified under a state rule for the practical training of law students) to argue as an *amicus*. *See also* Everett, *State of the Court* 2-3, 15th Ann. Homer Ferguson Conf. (May 4, 1990) (rules waived to permit students in appellate litigation clinics to present oral argument as *amici*); *United States v. Jacobs*, *supra*. It has also allowed student interns to appear *pro hac vice* in connection with the filing of pleadings. *United States v. Rousseau*, 22 M.J. 413 (C.M.A. 1986) (mem.).

Rule 14. Honorary Membership

Honorary membership in the Bar of the Court may be granted from time to time to distinguished members of the legal profession of other nations who are knowledgeable in the fields of military justice or the law of war. A candidate for honorary membership will be presented at the Bar in person after the nomination has previously been approved by the Court. A cer-

tificate of honorary membership in the Bar will be presented to the person so honored.

RULES ADVISORY COMMITTEE COMMENT

This is a new provision authorizing the Court to extend honorary membership to distinguished members of the bar of other nations who are knowledgeable in the fields of military justice or the law of war. Nomination for honorary membership may be made by a Judge of the Court, a Judge Advocate General, or other member of the Bar of the Court. Candidates for honorary membership will be presented at the Bar in person and a certificate of honorary membership will be presented to the person so admitted. This provision will permit the Court to extend the recognition of honorary membership in its Bar in acknowledgment of extraordinary service to the legal profession and significant achievement in the fields of military justice or the law of war.

DISCUSSION

Rule 14, which has been used from time to time, recognized a practice that had grown up over the years without specific provision having been made for it. Foreign lawyers had occasionally been admitted to the Court's bar and others had been admitted on an honorary basis. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 7 n.30. During the Court's first ten years, honorary membership was granted to 25 attorneys from eight foreign countries. 1961 C.M.A. Ann. Rep. 58 (1962). The practice continued at an accelerating rate thereafter. *E.g.*, 1967 C.M.A. Ann. Rep. 7 (1968) (cumulative total of 66); 1966 C.M.A. Ann. Rep. 6 (1967) (eight honorary admittees); 1970 C.M.A. Ann. Rep. 8 (1971) (14 honorary admittees); 1973 C.M.A. Ann. Rep. 7 (1974) (eight honorary admittees); *Israeli Ambassador Admitted as Honorary Member of Bar (In re Rosenne)*, 23 M.J. 234 (C.M.A. 1986). The rule should be rescinded. Hospitality can be extended to distinguished foreign visitors in other ways without involving—even on an honorary basis—the bar admission process. *See, e.g.*, 1965 C.M.A. Ann. Rep. 14 (1966) (noting visits by foreign dignitaries); 1966 C.M.A. Ann. Rep. 7 (1967) (same); 1967 C.M.A. Ann. Rep. 7 (1968) (same); 1969 C.M.A. Ann. Rep. 9-11 (1970) (same); FY78 C.M.A. Ann. Rep. 6-7 (1979) (same).

Rule 15. Disciplinary Action

(a) The Model Rules of Professional Conduct of the American

Bar Association are hereby adopted as the rules of conduct for members of the Bar of this Court. After notice, investigation, and hearing as provided in this rule, the Court may take any disciplinary action it deems appropriate for failure to comply with the Model Rules of Professional Conduct.

(b) For purposes of this rule, the Court shall appoint an Investigations Committee consisting of five members of the Bar of this Court who shall be appointed for a period of three years. The Investigations Committee shall consider such complaints as may be referred to it for investigation, including the taking of evidence, and shall submit a report of such investigation to the Court.

(c) Upon receipt and docketing of a written complaint under oath of unprofessional conduct against a member of its Bar, the Court will cause a copy thereof to be served by certified mail, return receipt requested, on the attorney thus accused. The Clerk will, in addition, acknowledge by letter, to the person filing such complaint, the receipt thereof. The accused attorney will answer the complaint by filing a formal pleading responsive to each allegation of misconduct within 30 days of receipt of the complaint, but extensions of time may be granted by order of the Court on the accused attorney's application. A complaint will be docketed only if the Court makes a preliminary determination that it is not frivolous.

(d) On consideration of the complaint and answer, and if it believes a substantial basis exists for the complaint, the Court will refer the matter to its Investigations Committee for consideration under subsection (b). Otherwise, the Court will dismiss the complaint. Any such investigation will be held privately, unless the accused attorney requests that it be opened to the public.

(e) On receiving the report of the Investigations Committee, the Court may dismiss the complaint or order the matter set down for hearing, giving due notice to the accused attorney. At the hearing, the accused attorney will be given opportunity to present such matters relevant to the complaint as he or she deems appropriate and to examine any witnesses against such attorney. All documents received in connection with a complaint under this rule shall be furnished to the accused attorney. A majority vote of the Court is necessary to find an attorney guilty of unprofessional conduct and to fix any penalty.

(f) When it is shown to the Court that any member of its Bar has been disbarred or suspended from practice by any court, such member shall be forthwith called upon to show cause within 30 days why similar action should not be taken by this Court. Upon the filing of the member's answer to an order to show cause, or upon the expiration of 30 days if no answer is filed, the Court will enter an appropriate order; but no order of disbarment or suspension will be entered except with the concurrence of a majority of the judges participating.

(g) Penalties for unprofessional conduct may extend to reprimand, suspension, or disbarment.

(h) Except for an order of reprimand, suspension or disbarment, no papers, pleadings or other information relative to a complaint in a disciplinary proceeding will be published or released to the public without prior approval of the Court. The docket of matters arising under this rule shall not be available to the public.

RULES ADVISORY COMMITTEE COMMENT

This rule covers areas addressed in Rule 12 of the [1977] rules of the Court. The provisions of [former] Rule 12(a) have been retained in Rule 15(a).

Rule 15(b) has been revised to require that on receipt and docketing of a written complaint, under oath, of unprofessional conduct against a member of the Bar, the Court will have a copy served on the attorney so accused by certified or registered mail. The Clerk will acknowledge by letter to the person filing such complaint its receipt in the Court. The accused attorney will file a formal pleading responsive to each allegation of the complaint within 30 days after he receives the complaint or within any extension of such time as may be granted. A complaint will be docketed in the Court only if the Court makes a preliminary determination that it is not frivolous.

Rule 15(c) provides that after consideration of the complaint and the answer, if the Court finds that a substantial basis exists for the complaint, it will refer the matter to a committee of members of its Bar for investigation, including the taking of evidence and for submission of a report of that investigation to the Court. Otherwise, the complaint will be dismissed. Any investigation will be held privately, unless the accused attorney requests that it be open to the public.

When the Court receives the report of the committee, Rule 15(d) permits it to order the matter set down for hearing, giving due notice to the accused attorney, or to dismiss the complaint. At the hearing, the accused attorney will be given an opportunity to present such matters as he deems appropriate and to examine witnesses against him. He will also be furnished a copy of any documents received in connection with the complaint against him. A majority vote of the Court is required to find an accused attorney guilty of professional misconduct and to fix any penalty.

The [former] provisions of Rule 12(e) providing for disbarment upon a showing that a member of the Bar has been disbarred or suspended from practice in any other court are retained in Rule 15(e), but the time for filing an answer to a show cause order is reduced from 40 to 30 days.

The penalties for unprofessional conduct provided in Rule 15(f) remain the same as those in [former] Rule 12(f).

Rule 15(g) provides that, except for a court order of reprimand, suspension or disbarment, documents relating to a complaint and disciplinary proceeding will not be published or released to the public without the prior approval of the Court, and the docket of matters arising under this rule will not be available for public use.

DISCUSSION

In 1983, the American Bar Association's Code of Professional Responsibility was superseded by Model Rules of Professional Conduct. In 1990, the Court modified Rule 15 to recognize this change. In accordance with R.C.M. 109(a), the Model Rules had already been adopted by the Army and Navy in 1987, Dep't of the Army Pam 27-26, *Rules of Professional Conduct for Lawyers* (1987), *discussed in* Ingold, *Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 Mil. L. Rev. 1 (1989); Navy JAG Inst. 5803.1, *Professional Conduct for Judge Advocates* (1987), *discussed in* Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 Fed. B. News & J. 334 (1988), and by the Air Force in 1989, *see* Myers, *Rules of Professional Responsibility for Air Force Lawyers*, 37 Fed. B. News & J. 312 (1990), although the services were unable to agree as to certain provisions. The Court's adoption of the Model Rules reduces the potential for a Tower of Babel in the key area of defining standards of professional conduct, and presumably will stimulate the services to continue to work for complete agreement on the remaining issues.

The power of the Judge Advocates General to make rules under R.C.M. 109(a) extends to "professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by" the UCMJ and *Manual for Courts-Martial*. The disciplinary reach of such rules, however, is confined to "practice in courts-martial and in the Courts of Military Review." R.C.M. 109(a). Hence, the drafters of R.C.M. 109(a) apparently chose not to intrude on the Court of Military Appeals' authority to govern practice before it. The official analysis notes that the "previous rule was limited to conduct of counsel in courts-martial." MCM, 1984, at A21-7. The Court and the Judge Advocates General should clearly reach agreement on a single set of professional standards that would govern every lawyer in every phase of the military justice process in each armed force. The fact that this has not been achieved suggests a breakdown in the collegial process contemplated by the congressional provision for a Code Committee under Article 146, 10 U.S.C.A. § 946 (West Supp. 1990). Perhaps this is an area in which the organized bar can play a leadership role to help bring about uniformity. Failing this, congressional intervention may be necessary.

The Court has occasionally exercised reciprocal discipline under Rule 15(f), but there has been very few original disbarments in its history. *In re DeFina*, No. 13,600A (C.M.A. Feb. 17, 1960); *see also DeFina v. Latimer*, 79 F.R.D. 5 (E.D.N.Y. 1977); 1961 C.M.A. Ann. Rep. 57-58 (1962) (noting appointment of grievance committee and procedures in *DeFina*). Disciplinary proceedings were instituted in *In re Trimper*, Spec. Dkt. No. 89-04, *noted in United States v. McKinney*, 29 M.J. 297 (C.M.A. 1989) (mem.). Trimper, who had been convicted of drug use in an Air Force general court-martial, *United States v. Trimper*, 28 M.J. 460, 17 MLR 2627 (C.M.A.), *cert. denied*, 110 S. Ct. 409, 17 MLR 2721 (1989), was ordered to show cause why he should not be disbarred.

In another case, the Court declined to discipline an attorney who wrote an article that the judges felt "reflect[ed] conduct unbecoming a member of its bar." Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 29 n.126. Rather than take formal disciplinary action where briefs submitted to it contain inappropriate language, the Court has confined itself to striking the inappropriate matter. *E.g.*, *United States v. Hosie*, 7 M.J. 208 (C.M.A. 1979) (mem.). Given the historical paucity of disciplinary cases, it is not surprising that there is no standing Investigations Committee at present.

Rule 16. Entry of Appearance and Withdrawal by Counsel

(a) Counsel shall enter an appearance in writing before participating in the representation of a party to an action before the Court; however, the filing of any pleading or other paper relative to a case which contains the signature of counsel shall constitute such an entry of appearance. *See* Rules 13(a) and 38.

(b) Leave to withdraw by any counsel who has entered an appearance under subsection (a) must be requested by motion in accordance with Rule 30. A motion by an appellate defense counsel must indicate the reasons for the withdrawal and the provisions which have been made for continued representation of the accused. A copy of a motion filed by an appellate defense counsel shall be delivered or mailed to the accused by the moving counsel.

RULES ADVISORY COMMITTEE COMMENT

This rule supersedes Rule 13 of the [former] rules of the Court.

Rule 16(b) revises [former] Rule 13(b) to require that leave to withdraw by appellate defense counsel be requested by motion in accordance with new Rule 31. The motion must indicate the reasons for the withdrawal, describe the provisions which have been made for the continued representation of the accused and state whether the accused has consented to counsel's withdrawal. Further, a copy of the motion to withdraw must be provided to the accused by the moving counsel.

DISCUSSION

This rule is necessitated by the continuing problem of personnel turbulence in the appellate divisions of the Offices of the Judge Advocates General. The *Military Law Reporter* annually publishes a table of all appellate military counsel. *E.g.*, 18 MLR 7000D (1990).

Appellate counsel are assigned by the Judge Advocates General or their designees, UCMJ Art. 70(a), 10 U.S.C. § 870(a) (1988), and the Court has recognized the services' broad powers in this regard. *E.g., United States v. Herrera*, 22 U.S.C.M.A. 163, 46 C.M.R. 163, 1 MLR 2094 (1973) (2-1); *United States v. Patterson*, 22 U.S.C.M.A. 157, 46 C.M.R. 157, 1 MLR 2103 (1973) (mem.). "The accused has no right

to select appellate defense counsel. Under some circumstances, however, he may be entitled to request that detailed appellate defense counsel be replaced by another appellate defense counsel. *Discussion*, Rule for Courts-Martial 1202, Manual for Courts-Martial, United States, 1984. *See United States v. Bell*, 11 U.S.C.M.A. 306, 29 C.M.R. 122 (1960). A conflict of interest could be such a circumstance." *Martindale v. Campbell*, 25 M.J. 755, 757, 16 MLR 2042 (N.M.C.M.R. 1987).

The Code does not provide for continuity in representation by military counsel from the trial through the appellate process. Where there is such continuity, the party so represented is likely to have an advantage. *E.g., United States v. Sutton*, 31 M.J. 11, 13 n.1 (C.M.A. 1990) (appellate government counsel had also been trial counsel).

If an accused refuses to be represented by appellate defense counsel who is not burdened with a conflict of interest, he or she may proceed *pro se* or employ civilian counsel at no expense to the government. *Id.* at 758 n.3. The Court prefers that litigants before it be represented by counsel, and has gone so far as to direct appointment of appellate defense counsel where appellants have expressly requested that no such counsel be appointed. *E.g., United States v. Frankenberger*, 7 M.J. 136 (C.M.A. 1979) (2-1) (mem.); *United States v. Prosper*, 7 M.J. 136 (C.M.A. 1979) (mem.); *United States v. Lawson*, 4 M.J. 201 (C.M.A. 1978) (mem.). Counsel who are the subject of pending disciplinary proceedings will not be allowed to represent clients before the Court. *United States v. McKinney*, 29 M.J. 297 (C.M.A. 1989) (mem.); *United States v. Gafford*, 29 M.J. 297 (C.M.A. 1989) (mem.). Where a case may be delayed because civilian counsel requires medical attention, the Court has required military appellate defense counsel to ascertain the client's wishes and to determine the availability of other counsel from civilian counsel's law firm. *United States v. Thomas*, 30 M.J. 47 (C.M.A. 1990) (mem.)

The Court has allowed appellate defense counsel to withdraw when it is impossible for them to continue to represent the client effectively, provided substitute counsel has been assigned. *E.g., United States v. Boyd*, 12 M.J. 408 (C.M.A. 1982) (mem.); *United States v. Grostefon*, 11 M.J. 470 (C.M.A. 1981) (mem.); *see also* Early, Longstreet & Richardson, *USCMA and the Specified Issue: The Current Practice*, 123 Mil. L. Rev. 9, 23 n.50 (1989), *discussing United States v. Knight*, 15 M.J. 202, 203-04, 11 MLR 2324 (C.M.A. 1983) (withdrawal of appellate defense counsel who submitted case on merits despite listing of issues in accused's request for appellate representation).

"The signature block of the counsel who withdraws must be included" on a Rule 16(b) motion. *United States v. McQuaig*, 22 M.J. 186 n.* (C.M.A. 1986) (mem.); *United States v. Moye*, 22 M.J. 184 n.* (C.M.A. 1986) (mem.). Failure to comply with this process can create needless complications and embarrassment later on. *See United States v. Curry*, 28 M.J. 139 n.* (C.M.A. 1989) (mem.); *United States v. Adames*, 22 M.J. 234 (C.M.A. 1986) (mem.).

Where it is unclear who will represent a party, the case may be held in abeyance. *United States v. Colvin*, 19 M.J. 206 (C.M.A. 1984) (mem.); *cf. United States v. McKinney*, *supra* (military appellate defense counsel directed to advise Court if appellant wishes to delay review until completion of civilian appellate defense counsel's pending disciplinary proceeding); *United States v. Gafford*, *supra* (same). This may occur if the respective responsibilities of civilian and military appellate defense counsel have not been clearly allocated at the outset, or if, as unfortunately happens from time to time, personalities clash, coordination is deficient or counsel have divergent, or, worse yet, irreconcilable theories as to how best to advance the client's interest. In addition to the danger of prejudice to the accused, these situations can be a source of professional embarrassment and a needless distraction to the Court.

Typically, when an accused has civilian counsel on appeal, that attorney will serve as lead counsel. *Cf.* UCMJ Art. 38(b)(4), 10 U.S.C. § 838(b)(4) (1988). This, however, is entirely up to the party and counsel. *See United States v. Coppedge*, 14 M.J. 286 (C.M.A. 1982) (mem.). Civilian counsel may also be asked to serve as associate appellate defense counsel or "of counsel" on the briefs. At times, all the client (or the client's family) wants, needs or can afford is the comfort of a "second opinion" from a nonuniformed lawyer.

Rule 17. Assignment of Counsel

Upon receipt of a notice of the docketing of a case issued under Rule 10(c), the appropriate Judge Advocate General shall designate appellate military counsel to represent the parties, unless such counsel have previously been designated. In a case involving a petition for extraordinary relief wherein an accused has been denominated as the real party in interest by a filing party or has been so designated by the Court, the Judge Advocate General shall also designate appellate military counsel to represent such accused.

RULES ADVISORY COMMITTEE COMMENT

This rule covers matters controlled by Rule 14 of the 1977 Rules. The substantive provisions of Rule 14 of the 1977 Rules have not been changed. However, the material relating to the designation of counsel for indigent parties has been omitted as not appropriate in the operation of the military justice system.

DISCUSSION

If counsel believes representation of particular parties may give rise to a conflict of interest, the matter can be explored within appropriate bar or military professional responsibility channels. A ruling may evidently also be sought from the Court. *E.g., United States v. Brauchler*, 17 M.J. 277 (C.M.A. 1983) (mem.).

In *United States v. Foster*, 25 M.J. 302 (C.M.A.) (mem.), *motion denied*, 25 M.J. 389 (C.M.A. 1987) (mem.), an Army case, the Court denied a motion by civilian appellate defense counsel for assignment of associate military appellate defense counsel from another armed service.

Former Rule 14 had provided for the appointment by the Court of a member of the bar to represent indigent parties. The provision was "without precedent in the court's annals," C.M.A. Guide 21 (1978), had never been used in the years since its promulgation, and was deleted in the 1983 revision. When it was promulgated, the author commented that "[a] particular case could conceivably engender sufficient hostility within a particular service as to render it unlikely that satisfactory legal assistance would be forthcoming from within that armed force, *e.g.*, if the case involved serious issues going to the powers, organization or management of a judge advocate general's department, or allegations of pervasive command influence." *Id.* at 22 & n.84.

Such considerations were at work in *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 27 M.J. 11, 12 (C.M.A. 1988) (mem.), *protective order granted*, 26 M.J. 328, 329, 16 MLR 2443 (C.M.A. 1988), where the Court appointed civilian counsel (a former General Counsel of the Department of Defense) for the Court of Military Review, which "had asserted that it was unable to obtain counsel for itself." The case is presumably *sui generis*, but it shows that there may well be times when participation by counsel outside the military community, and not simply as *amici*, may be appropriate. The respondents in that case were eventually represented by attorneys from the Civil Division of the Department of Justice.

After prevailing in efforts to obtain an extraordinary writ, counsel for the Navy Court applied to the Court of Military Appeals for a substantial award of attorney fees under the Equal Access to Justice Act. 28 U.S.C. § 2412 (1988). The application was stoutly resisted by the Department of Defense and dismissed by the Court on the ground that the proceeding was not a civil action for purposes of that statute. *U.S. Navy-Marine Corps Court of Military Review v. Cheney*, 29 M.J. 98, 17 MLR 2638 (C.M.A. 1989). The episode brings to mind a 1980 bar association suggestion that the Court "be empowered to appoint a civilian attorney or bar association to participate in an appeal as *amicus curiae*, and that compensation for such service be available pursuant to the standards set forth in 18 U.S.C. § 3006A." Letter from Steven S. Honigman, Chairman, Subcomm. on the Uniform Code of Military Justice, Ass'n of the Bar of the City of New York, to Rep. Richard C. White, Chairman, Subcomm. on Military Personnel, H. Comm. on Armed Services, Feb. 7, 1980, *Hearings on H.R. 6406 and H.R. 6298, Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process, Before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, 96th Cong., 2d Sess. 92, 93-94 (1980). The proposal sank without a trace.

The Court denied a request for costs in *United States v. Longhofer*, 27 M.J. 285 (C.M.A. 1988) (mem.). More recently, in a capital case, it directed the Judge Advocate General of the Navy to take appropriate action to ensure the availability of $15,000 to appellate defense counsel "for such expenses as are determined by [counsel] to be reasonable and necessary in furtherance of the defense of the appellant in this appellate proceeding, subject to such procedures as are in effect within the Department of the Navy for the proper disbursement of public funds. . . the determination of such reasonable and necessary expenditures [to] be subject to review only by th[e] Court." *United States v. Curtis*, No. 63,044/MC (C.M.A. May 10, 1990) (mem.). The funds had been sought in order to secure, among other things, expert assistance, travel, continuing legal education, and counsel qualified under the capital case guidelines of the American Bar Association.

There is no right to be represented by appellate defense counsel at a limited rehearing. *United States v. Torres*, 5 M.J. 86 (C.M.A. 1978) (mem.); *United States v. Kelker*, 4 M.J. 323, 6 MLR 2084 (C.M.A. 1978).

APPEALS

Rule 18. Methods of Appeal

(a) The Court will entertain the following appeals:

(1) *Cases under Article 67(a)(3).* Cases under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3), including decisions by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, may be appealed by the filing of a petition for grant of review by an appellant or by counsel on behalf of an appellant substantially in the form provided in Rule 20(a) or (b).

(2) *Cases under Article 67(a)(2).* Cases under Article 67(a)(2), UCMJ, 10 U.S.C. §867(a)(2), including decisions by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, which are forwarded by a Judge Advocate General by a certificate for review must be substantially in the form provided in Rule 22(a).

(3) *Cases under Article 67(a)(1).* Cases under Article 67(a)(1), UCMJ, 10 U.S.C. §867(a)(1), will be forwarded by a Judge Advocate General by the filing of the record with the Court, together with the form prescribed by Rule 23(a).

(4) *Cases under Rule 4(b)(2).* Decisions by a Court of Military Review on petitions for extraordinary relief by filing a writ appeal petition and accompanying brief in accordance with Rules 24, 27(b), and 28.

(b) In addition, the Court may, in its discretion, entertain petitions for extraordinary relief including, but not limited to, writs of mandamus, writs of prohibition, writs of habeas corpus, and writs of error coram nobis. *See* Rules 4(b)(1), 27(a), and 28.

RULES ADVISORY COMMITTEE COMMENT

This rule deals with matter contained in Rule 15 of the 1977 Rules.

Rule 18(a) lists the kinds of appeals which will be entertained by the Court. These include cases in which the accused or his counsel file a petition for grant of review under Article 67(a)(3), UCMJ; cases forwarded by a Judge Advocate General by a certificate for review under Article 67(a)(2), UCMJ; cases requiring review by the Court under Article 67(a)(1), UCMJ; and appeals from decisions of a Court of Military Review on petitions for extraordinary relief as provided by new Rule 4(b)(2). Cases arising under Article 67(a)(1) (mandatory review) are required to be accompanied by an assignment of errors presented by appellate counsel.

Rule 18(b) provides for cases seeking exercise of the Court's original jurisdiction to grant extraordinary relief.

DISCUSSION

The denial of a petition for grant of review "is of *no precedential* value and should not be cited, except as a matter of appellate history, or relied upon as authority." *United States v. Mahan*, 24 U.S.C.M.A. 109, 1 M.J. 303, 307 n.9, 4 MLR 2065 (1976) (emphasis in original); *see* Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99, 103 n.26 (1980). "[T]he fact of a grant of review does not constitute authority either for or against the issue granted . . . ." *United States v. Gardner*, 27 C.M.R. 941, 944 (A.F.B.R. 1958); *see also United States v. Mabra*, 35 C.M.R. 823, 825 (A.F.B.R.), *pet. denied*, 15 U.S.C.M.A. 683, 35 C.M.R. 478 (1965).

Where a Court of Military Review has denied a petition for extraordinary relief before sentencing, review should ordinarily be sought by writ appeal petition under Rule 18(a)(4) rather than by instituting a new original action for an extraordinary writ in the Court of Military Appeals. *Ellis v. Jacob*, 26 M.J. 90, 91 n.2, 16 MLR 2317 (C.M.A. 1988); *see, e.g., Crites v. Commanding Officer*, 30 M.J. 113 (C.M.A. 1990) (mem.). If a petition for grant of review is filed following action by a Court of Military Review on a petition for extraordinary relief, the Court of Military Appeals will treat the petition for grant of review as a writ appeal petition, and docket it as such. *E.g., Vanover v. Clark*, 27 M.J. 453 (C.M.A. 1988) (mem.); *Unger v. Ziemniak*, 27 M.J. 449 (C.M.A. 1988) (mem.); *Smithee v. United States*, 25 M.J. 433 (C.M.A. 1987) (mem.).

Five of the commoner types of extraordinary writs are described in Dep't of the Army Pam 27-173, *Legal Services, Trial Procedure* ¶ 36-1*b* (1990), but the rule does not so limit the types of writ the Court may grant. For example, in *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 16 MLR 2443 (C.M.A. 1988), the Court, having previously entered a temporary restraining order, 27 M.J. 11, 12 (C.M.A. 1988) (mem.), issued a protective order. 26 M.J. at 342.

In *Saunders v. U.S. Army Court of Military Review*, 25 M.J. 234 (C.M.A. 1987) (mem.), the Court denied a petition for a writ of *procedendo ad judicium* seeking to compel the lower court to proceed to adjudicate a matter. *Cf. Higdon v. Bailey*, 5 M.J. 951 (C.M.A. 1976) (mem.) (dismissing writ petition seeking relief from C.M.R. delay); *Maust v. Carne*, 5 M.J. 1099 (C.M.A. 1976) (mem.) (denying writ petition seeking order that C.M.R. reconsider case and decide remaining substantive issues).

Other cases have involved requests for stays, *Murphy v. Garrett*, 30 M.J. 51 (C.M.A. 1990) (mem.) (10-day stay of order to active duty), *extended*, 30 M.J. 109 (1990) (mem.), stay granted pending peti-

tion for writ of certiorari, 30 M.J. 114 (1990) (mem.), *extended*, 30 M.J. 115 (1990) (mem.), *stay denied*, No. A89-562 (U.S. Feb. 9, 1990) (Brennan, J.); *Woodrick v. Divich*, 24 M.J. 147 (C.M.A. 1987) (mem.), temporary restraining orders and injunctions, *MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970), habeas corpus, *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990) (2-1); *Gragg v. United States*, 10 M.J. 286 (C.M.A. 1981) (mem.) (2-1); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967), mandamus, *Cooke v. Orser*, 12 M.J. 335, 10 MLR 2215 (C.M.A. 1982); *United States v. Caprio*, 12 M.J. 30, 9 MLR 2821 (C.M.A. 1982); *United States v. Redding*, 11 M.J. 100, 9 MLR 2502 (C.M.A. 1981), prohibition, *Murray v. Haldeman*, 16 M.J. 74, 11 MLR 2662 (C.M.A. 1983); *Fleiner v. Koch*, 19 U.S.C.M.A. 630 (1969), certiorari, *Ansari v. Judges of U.S. Navy-Marine Corps Court of Military Review*, 16 M.J. 303 (C.M.A. 1983) (mem.); *United States v. Board of Review Nos. 2, 1, 4*, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967), *error coram nobis*, *Martin v. U.S. Air Force Court of Military Review*, 22 M.J. 13 (C.M.A. 1986) (mem.), and *error coram vobis*. *Thorton v. Bruton*, 18 M.J. 412 (C.M.A. 1984) (mem.). A showing of irreparable harm is required for a stay. *Murphy v. Garrett*, *supra*.

Rule 28(a) calls upon the petitioner to identify the type of writ sought, but the particular writ applied for is not critical, and petitioners often frame their requests in the alternative. H. Moyer, *Justice and the Military* § 2-832, at 645 (1972). The Court's decisions suggest that the judges look to the underlying substance rather than the labeling in any event. *E.g.*, *Crites v. Commanding Officer*, 30 M.J. 113 (C.M.A. 1990) (mem.) (petition for habeas corpus construed as writ appeal petition); *United States v. Garcia*, 18 U.S.C.M.A. 5 n.1, 39 C.M.R. 5 n.1 (1968) (petition for *coram nobis* or habeas corpus; "[i]n substance, however, it amounts to a petition for reconsideration"); *cf. United States v. Ramsey*, 28 M.J. 370, 373 n.6, 17 MLR 2482 (C.M.A. 1989) ("no difference whether the action of the United States is characterized as a government appeal under Article 62(a) or as an extraordinary writ").

The Court has no filing fees.

Rule 19. Time Limits

(a) *Petition for grant of review/supplement/answer/reply.*

(1) A petition for grant of review shall be filed no later than 60 days from the earlier of:

(A) the date on which the appellant is notified of the decision of the Court of Military Review; or

(B) the date on which a copy of the decision of the Court of Military Review, after being served on appellate counsel of record for the appellant (if any), is deposited in the United States mails for delivery by first-class certified mail to the appellant at an address provided by the appellant or, if no such address has been provided by the appellant, at the latest address listed for the appellant in his official service record. Under circumstances where certified mail is not available, registered mail may be used. *See* Article 67(c), UCMJ, 10 U.S.C. §867(c).

(2) A certificate of notification shall be placed in the appellant's record of trial setting forth the manner and date that the appellant was notified of the decision of the Court of Military Review or the date that a copy of such decision was mailed to the appellant after service of a copy of such decision on appellate defense counsel of record.

(3) For purposes of this rule, a petition for grant of review will be deemed to have been filed on the date when the petition has been mailed or delivered by an appellant or by counsel on behalf of an appellant directly to the Court.

(4) Any petition for grant of review received from an appellant or counsel on behalf of an appellant shall, upon receipt, be accepted and docketed by the Clerk. If it appears that such petition is not in accord with Article 67, UCMJ, 10 U.S.C. §867, or with the Court's Rules, the United States may move to dismiss such petition.

(5)(A) Article 62, UCMJ, appeals. In cases involving a decision by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, a supplement to the petition establishing good cause in accordance with Rule 21 shall be filed no later than 20 days after the issuance by the Clerk of a notice of docketing of such petition for grant of review. *See* Rule 10(c). An appellee's answer to the supplement to the petition for grant of review shall be filed no later than 10 days after the filing of such supplement. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

(B) Other appeals. In all other appeal cases, a supplement to the petition establishing good cause in accordance with Rule 21 shall be filed no later than 30 days after the issuance by the Clerk of a notice of docketing of a petition for grant of review.

See Rule 10(c). An appellee's answer to the supplement to the petition for grant of review may be filed no later than 30 days after the filing of such supplement. *See* Rule 21(e). A reply may be filed by the appellant no later than 10 days after the filing of the appellee's answer.

(6) The Court shall act promptly on a petition for grant of review. *See* Article 67(c), UCMJ, 10 U.S.C. §867(c).

(7) Granted petitions. (A) Article 62, UCMJ, appeals. Where a petition has been granted in a case involving a decision by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, no further pleadings will be filed and the Court will, whenever practicable, give priority to such cases.

(B) Other appeals. Where a petition has been granted in all other appeal cases and briefs have been ordered, an appellant's brief shall be filed in accordance with Rule 24 no later than 30 days after the date of the order granting the petition. An appellee's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed by the appellant no later than 10 days after the filing of the appellee's answer.

(b) *Certificate for review/brief/answer/reply*. (1) Article 62, UCMJ, cases. In cases involving a decision by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, a certificate for review, together with a supporting brief in accordance with Rule 24 on behalf of the appellant, shall be filed with the Court by the Judge Advocate General no later than 30 days after the date of the decision of the Court of Military Review. *See* Rules 22 and 34(a). An appellee's answer shall be filed no later than 10 days after the filing of such certificate for review and supporting brief. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

(2) Extraordinary relief cases. In cases involving a decision by a Court of Military Review on application for extraordinary relief filed therein, a certificate for review, together with a supporting brief in accordance with Rule 24 on behalf of the appellant, shall be filed with the Court by the Judge Advocate General no later than 30 days after the date of the decision of the Court of Military Review. *See* Rules 22 and 34(a). An appellee's answer shall be filed no later than 10 days after the fil-

ing of such certificate for review and supporting brief. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

(3) Other cases. In all other cases involving a decision by a Court of Military Review, a certificate for review filed by the Judge Advocate General shall be filed no later than 30 days after the date of the decision of the Court of Military Review. *See* Rules 22 and 34(a). An appellant's brief shall be filed in accordance with Rule 24 no later than 30 days after the issuance by the Clerk of a notice of docketing of the certificate for review. An appellee's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed by the appellant no later than 10 days after the filing of the appellee's answer.

(c) *Mandatory review case*. The record in a mandatory review case shall be filed with the Court by the Judge Advocate General, together with the form prescribed by Rule 23(a), upon the expiration of the time for filing a petition for reconsideration of the decision of the Court of Military Review or, in the event of the filing of such petition, upon the final disposition thereof. A brief setting forth assigned errors shall be filed by the appellant in accordance with Rule 24 no later than 60 days after the issuance by the Clerk of a notice of docketing of the case. An appellee's answer shall be filed no later than 60 days after the filing of the appellant's brief. A reply may be filed by the appellant no later than 20 days after the filing of the appellee's answer.

(d) *Petition for extraordinary relief*. A petition for extraordinary relief under Rule 4(b)(1) shall be filed, with a supporting brief and any available record, as soon as possible but, in any event, no later than 20 days after the petitioner learns of the action complained of. However, a petition for a writ of habeas corpus may be filed at any time. *See* Rules 27(a) and 28.

(e) *Writ appeal petition* A writ appeal petition under Rule 4(b)(2) for review of a decision by a Court of Military Review acting on a petition for extraordinary relief shall be filed, together with any available record, no later than 20 days after the date the decision of the Court of Military Review is served on the appellant or appellant's counsel. Unless it is filed *in propria persona*, such writ appeal petition shall be accompanied by a supporting brief. An appellee's answer shall be filed no later

than 10 days after the filing of an appellant's brief. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer. *See* Rules 27(b) and 28.

(f) *Petition for new trial*. When a petition for new trial has been filed with the Court in a case pending before the Court, a brief in support thereof, unless expressly incorporated in the petition, shall be filed no later than 30 days after the issuance by the Clerk of a notice of the filing of the petition. An appellee's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed no later than 10 days after the filing of the appellee's answer. *See* Rule 29.

RULES ADVISORY COMMITTEE COMMENT

This rule addresses matters covered in Rule 16 of the 1977 Rules.

Rule 19(a). *Petition for Grant of Review*. This Rule requires that a petition for grant of review be filed no later than 60 days after the appellant has been notified of the final decision of the Court of Military Review or no later than 60 days after a copy of the Court of Military Review decision, having previously been served on appellate defense counsel, is deposited in the United States mails for delivery by first class certified mail to the accused at an address which the accused has provided or, if he has failed to furnish such, at the latest address listed in his official military record. These provisions conform with the 1981 Code amendment prescribing new time limits for petitions to the Court. . . .

Rule 19(a)[(5)(B)]. A "Supplement [to] Petition" establishing good cause in accordance with Rule 21 must be filed not later than 30 days after the filing of a petition for grant of review. This provision increases the existing 20-day filing period to 30 days for filing a supplement [to] petition without any accompanying brief under a new supplement [to] petition procedure established in new Rule 21. An answer to the supplement [to] petition may be filed not later than 30 days after the supplement [to] petition is filed. *See* Rule 21[(c)(2)]. This answer time has also been enlarged from the present 20-day answer period. The appellant may thereafter file a reply to this answer within 10 days after the filing of the answer. This 10-day reply period is the same as that allowed under the present rule.

Rule 19(a)[(6)]. . . . This provision. . . implements the requirements of Public Law 97-81, 95 Stat. 1085, requiring the Court to act upon petitions promptly in accordance with the rules of Court.

Rule 19(a)[(7)(B)] extends the filing periods for a final brief and answer from 20 to 30 days.

Rule 19(b)[(3)]. *Certificates for Review.* Certificates for review [in Article 67(a)(2) cases] are required to be filed within [30] days of the date of the decision of the Court of Military Review and the appellant must file a brief not later than 30 days (increased from 20 days) after the filing of the certificate for review. This provision for filing of appellant's brief clarifies the [former] provisions of Rule 16(b) which do not identify the party required to file the initial brief. Within 30 days (increased from 20 days) after filing of appellant's brief the appellee must file an answer. A reply to this answer may be filed within 10 days thereafter.

Rule 19(c). *Mandatory Review Cases.* In cases where review by the Court is mandated by Article 67(a)(1), UCMJ, an assignment of errors and accompanying brief are required to be filed not later than [60] days after service of the Court of Military Review decision on the appellant or his counsel. The appellee shall file an answer no later than [60] days (increased from 20 days) after the filing of the assignment of errors and brief. A reply may be filed by the appellant not later than [20] days after the filing of the answer.

Rule 19(d). *Petition for Extraordinary Relief.* Petitions for extraordinary relief seeking exercise of the Court's original jurisdiction in such matters should be filed as soon as possible but no later than 20 days after [the petitioner learns of] the action complained of. An "escape clause" is provided which permits the filing of a petition for a writ of habeas corpus at any time.

Rule 19(e). *Writ Appeal Petitions.* "Writ appeal petition" is a new term adapted to describe pleadings for appealing decisions by a Court of Military Review acting on a petition for extraordinary relief. *See* Rule 27(b) and related commentary. This term is intended to apply to pleadings seeking exercise of the Court's discretionary power to review final decisions of a Court of Military Review on petition by the appellant. Writ appeal petitions are required to be filed with a supporting brief no later than 20 days after the date the Court of Military Review decision has been served on the appellant or his counsel. An answer may be filed by the appellee not later than 10 days after filing of the appellant's brief. The appellant thereafter has 5 days in which to file a reply. Rule 19(d) and 19(e) establish provisions to deal separately with petitions for extraordinary relief in the exercise of the Court's original jurisdiction and the processing of discretionary appeals from action on a petition for extraordinary relief in a Court of Military Review.

Rule 19(f). *Petition for New Trial.* This is a new provision which has been adopted from [former] Rule 22(a) relating to the filing of briefs where a petition for new trial is received in a case pending before the Court. A supporting brief, unless expressly incorporated in the petition, shall be filed no later than 30 days after [issuance of the Clerk's notice of] the filing of the petition. The appellee may file an answer no later than 30 days after the filing of the appellant's brief. A reply may be filed no later than 10 days after the filing of the answer.

DISCUSSION

Time limits prescribed in Rule 19 may be enlarged on a proper showing. *See* Rule 33. This is in keeping with the Court's view that "Congress did not wish to have an accused's effort to appeal thwarted by the omissions, indifference, or ineptitude of the military counsel provided to him." *United States v. Ortiz*, 24 M.J. 323, 324, 15 MLR 2414 (C.M.A. 1987); *see also United States v. Morgan*, 30 M.J. 39 (C.M.A. 1990) (mem.) (accepting pleadings delivered after business hours at end of extension of time, so as not to penalize accused); *United States v. Engle*, 28 M.J. 299, 300 (C.M.A. 1989) (per curiam) (disapproving appellate defense counsel's effort to dismiss untimely petitions for review; *held* petitions dismissed *sua sponte*). The standard is the ill-defined (and probably indefinable) one of "good cause." *See* Rule 33. Nonetheless, "[a] missed filing date may keep your client out of court." Morgan, *Appellate Practice Rules*, 27 A.F. L. Rev. 229, 231 & n.5 (1987), *citing United States v. Mathews*, 22 M.J. 101 (C.M.A. 1986) (mem.).

The possibility of misunderstanding of the rules, *United States v. Morris*, 16 M.J. 101 (C.M.A. 1983) (mem.), confusion in light of recent legislation, *United States v. Landers*, 14 M.J. 150 (C.M.A. 1982) (mem.), delay due to actions of military or civilian confinement facility personnel, *United States v. Bruins*, 12 M.J. 330 (C.M.A. 1981) (mem.) (military prison regulations); *United States v. Turner*, 12 M.J. 87 (C.M.A. 1981) (mem.) (nonfeasance by trusty in civilian jail), or doubts about whether adequate instructions were furnished to an accused concerning the filing of a petition for grant of review, *e.g.*, *United States v. Mills*, 12 M.J. 225, 10 MLR 2183 (C.M.A. 1982) (2-1); *United States v. Sanchez*, 12 M.J. 89 (C.M.A. 1981) (mem.); *United States v. Hazel*, 8 M.J. 248 n.2 (C.M.A. 1980) (mem.), will be resolved in the accused's favor. *See also United States v. Knabe*, 14 M.J. 105 (C.M.A. 1982) (mem.) (granting motion to file petition for grant of review out of time). In *United States v. Streit*, 12 M.J. 110 (C.M.A.

1981) (mem.) (2-1), a late petition was allowed where the petitioner took steps within the appeal period to employ a civilian attorney with military experience. The attorney was on vacation until, at best, the day the petition was due. For other illustrations of "good cause" for late petitions see C.M.A. Guide 58 n.201 (1978 & Supp. 1980) (collecting cases).

Most of the cases relaxing filing deadlines have involved petitions for grant of review, *e.g.*, *United States v. Dowd*, 30 M.J. 104 (C.M.A. 1990) (mem.), but other types of proceedings may also be filed out of time. *E.g.*, *Silcio v. United States*, 24 M.J. 48 (C.M.A. 1987) (mem.) (extraordinary relief).

The deadline for filing certificates for review is judge-made, and has been criticized as an unfounded curtailment of the right of the Judge Advocates General to obtain review in the Court. *See* Mummey, *Judicial Limitations Upon a Statutory Right: The Power of the Judge Advocate General to Certify Under Article 67(b)(2)*, 12 Mil. L. Rev. 193 (1961); B. Feld, *A Manual of Courts-Martial Practice and Appeal* 141 (1957). In *United States v. Lowe*, 11 U.S.C.M.A. 515, 29 C.M.R. 331, 333 (1960), the Court allowed the late filing of a certificate for review on a showing of excusable neglect. *See also United States v. Cowles*, 14 M.J. 105 (C.M.A. 1982) (mem.); *but see United States v. Velasco*, 14 M.J. 169 (C.M.A. 1982) (mem.); *United States v. Young*, 14 M.J. 169 (C.M.A. 1982) (mem.). Leave to file untimely certificates has been denied very infrequently. *See* C.M.A. Guide 27 n.107 (1978 & Supp. 1980). Where the timeliness of a certificate for review is subject to question, the Court may issue a show cause order, as in petition cases. *United States v. Richardson*, 7 M.J. 215 (C.M.A. 1979) (mem.).

Whether the Court's power to allow untimely filings extends to the statutory deadline for submission of a petition for new trial appears never to have been decided by the Court. The matter is not free from doubt, and pits textual inferences against legislative history. Thus, in another provision of the Code, Congress made express allowance for tardy filings if the accused "establishes good cause for failure to file within" the statutory two-year period. *See* UCMJ Art. 69(b), 10 U.S.C. § 869(b) (1988).

The argument that Congress must therefore have intended the new trial petition period to be jurisdictional is not necessarily persuasive, however. For one thing, it can be argued that Congress must, at this late date, surely be deemed to have ratified the Court's willingness to entertain untimely petitions under Article 67(a)(3), despite the

absence of an explicit escape clause for justified tardiness. Moreover, the legislative history of the 1983 enlargement of the Article 69 application period to two years specifically analogized to Article 73. *See Hearing on H.R. 4689 to Amend the Uniform Code of Military Justice Before the Military Personnel and Compensation Subcomm. of the H. Comm. on Armed Services*, 97th Cong., 1st Sess. 49 (1981) (testimony of Maj. Gen. Hugh J. Clausen, Judge Advocate General of the Army); *id.* at 87 (Dep't of Defense memorandum), 97 (letter from Everett, C.J.). The 1983 amendment of Article 69 can thus be viewed as implicitly contemplating a similar flexibility in administration of the deadline for new trial petitions.

If the question were ever squarely presented, one would expect the Court to be strongly tempted to apply the same philosophy as it does in the case of a request for leave to file an out-of-time petition for grant of review, the deadline for which is also congressionally-mandated.

The Court has made no secret of its growing exasperation over late filings in the context of supplements to petitions for grant of review, even going so far as to admonish counsel that sanctions such as suspension or disbarment may be imposed in cases of flagrant or repeated disregard of the rules. *United States v. Ortiz*, 24 M.J. 323, 15 MLR 2414 (C.M.A. 1987); *see also United States v. Smith*, 30 M.J. 28 (C.M.A. 1990) (mem.). In *United States v. Sumpter*, 22 M.J. 33, 34, 14 MLR 2221 (C.M.A. 1986), it ruled that a late petition for grant of review must show good cause for the lateness *and* state errors—the latter being a requirement not otherwise imposed. *See* Discussion of Rules 21 and 33; *see, e.g., United States v. Bradshaw*, 24 M.J. 201 & n.* (C.M.A. 1987) (mem.) (*pro forma* petition and no adequate explanation for tardy supplement; *held*, leave to file denied and petition denied); *see also United States v. Foreman*, 22 M.J. 7 (C.M.A. 1986) (mem.) (Cox, J., concurring in the result); *United States v. Aho*, 23 M.J. 171 (C.M.A. 1986) (mem.) (2-1); *United States v. Randolph*, 23 M.J. 171 (C.M.A. 1986) (mem.) (2-1).

In two situations, filing prior to the formal deadline is preferred. These include petitions for extraordinary relief, Rule 19(d); *e.g., Myers v. United States*, 5 M.J. 960 (C.M.A. 1976) (mem.), and petitions for grant of review with respect to Article 62 appeals. In the latter category, the Court has stated that, in determining whether good cause has been demonstrated, it will consider "whether an appellant proceeded expeditiously in filing his petition." *United States v. Tucker*, 20 M.J. 52, 54, 13 MLR 2362 (C.M.A. 1986); *see also* Discussion of Rule 30.

A petition filed before the triggering event, however, will be dismissed without prejudice, as premature. *E.g., United States v. Smith*, 10 M.J. 84 (C.M.A. 1980) (mem.); *United States v. Harville*, 9 M.J. 64 (C.M.A. 1980) (mem.); *United States v. Brinson*, 5 M.J. 250 (C.M.A. 1978) (mem.) (no final C.M.R. decision on findings and sentence); *United States v. Seberg*, 5 M.J. 250 (C.M.A. 1978) (mem.) (C.M.R. ordered limited evidentiary hearing; *held*, petition was premature); *see also United States v. Hinkel*, 15 M.J. 67 (C.M.A. 1982) (mem.) (new trial petition prematurely referred to C.M.A.); *compare United States v. Boudreaux*, 23 U.S.C.M.A. 728 (1975) (mem.), *with Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 182 n.2, 17 MLR 2348 (C.M.A. 1989); *cf. Stewart v. Stevens*, 4 M.J. 176 (C.M.A. 1977) (mem.) (denying petition for extraordinary relief pending action on appeal from captain's mast). In *United States v. Graham*, 21 M.J. 97 n.* (C.M.A. 1985) (mem.), the Court asserted that it had discretion to entertain a premature petition, but decided not to do so in the circumstances presented.

A timely petition for reconsideration at the Court of Military Review tolls the period in which to seek review by the Court of Military Appeals. *United States v. Smith*, 5 U.S.C.M.A. 460, 18 C.M.R. 84 (1955); *United States v. Sparks*, 5 U.S.C.M.A. 453, 18 C.M.R. 77 (1955). A petition for grant of review filed while a motion for reconsideration is pending below is therefore premature and a nullity. *Stone v. U.S. Army Court of Military Review*, 21 M.J. 152, 153 (C.M.A. 1985) (mem.), *quoting United States v. Weeden*, 3 U.S.C.M.A. 404, 407, 12 C.M.R. 160, 163 (1953). "Where a timely petition for reconsideration is filed with the Court of Military Review after a petition for grant of review is filed . . ., it would be necessary to remand the record to the Court of Military Review in order for it to act further in the case. Remand is appropriate only where the petition for grant of review is properly filed in [the] Court [of Military Appeals]. A premature petition is not properly filed." *Stone, supra*, at 153 n.*.

Submission of a new trial petition also affects the deadline for seeking review by the Court of Military Appeals. If a new trial is sought after service of the decision of the Court of Military Review but before a petition for grant of review has been filed or the expiration of the period for filing such a petition, the appeal period will run from the date the accused is served with notice of the ruling on the new trial petition. *United States v. Owen*, 6 U.S.C.M.A. 466, 20 C.M.R. 182 (1955). *See generally* Rule 29.

The Court was originally required by Congress to act on petitions for grant of review within 30 days. Even though the rule was substan-

tially relaxed by counting the 30 days from the last pleading filed, rather than from receipt of the petition, it still proved difficult to meet the deadline and the Court frequently had to enter orders enlarging the period. *E.g., In re Extension of Time Under Rule 19(a)(4)*, 16 M.J. 131 (C.M.A. 1983) (mem.). In 1981, Congress amended Article 67 to require merely that the Court act promptly on petitions in accordance with its rules. UCMJ Art. 67(c), 10 U.S.C. § 867(c) (1988), *as amended by* Pub. L. No. 97-51, § 5, 95 Stat. 1088. (The provision now appears in Article 67(b). 10 U.S.C.A. § 867(b) (West Supp. 1990).) The 1981 legislation extended the period for seeking review from 30 to 60 days and included provision for constructive service of Court of Military Review decisions in order to prevent cases from falling into prolonged appellate "limbo" because an accused is an unauthorized absentee or, if on appellate leave, has left no forwarding address. *See* H.R. Rep. No. 97-306, 97th Cong., 1st Sess. 7-8 (1981); S. Rep. No. 97-146, 97th Cong., 1st Sess. 34-36 (1981); *cf. United States v. Davis*, 28 M.J. 456 (C.M.A. 1989) (mem.) (appellant served in civilian prison 8 years after C.M.R. decision; government directed to explain circumstances of service and efforts to locate appellant); *see also United States v. Campbell*, 29 M.J. 464 (C.M.A. 1989) (mem.) (2-1) (remanding for explanation of 12-year delay). Where the inadequacy of the government's effort to serve the court of military review decision is clear, a remand for further explanation serves no purpose. *United States v. White*, 30 M.J. 120, 121 (C.M.A. 1990) (Cox, J., dissenting).

Before the 1981 legislation, the rule had been that the appeal period ran from the time the accused had actual knowledge of the decision of the Court of Military Review. *United States v. Larneard*, 3 M.J. 76, 5 MLR 2098 (C.M.A. 1977). In *United States v. Myers*, 28 M.J. 191, 17 MLR 2350 (C.M.A. 1989), the Court ultimately authorized a constructive service method for pre-1981 cases in which efforts to effect personal service had proven ineffective. *Myers* permits the appeal period to run only after notice is (a) published in a newspaper of general circulation in the appellant's home-of-record community, (b) placed in the service record, and (c) published in the *Federal Register*. The Judge Advocate General of the Navy thereupon published a notice in the *Federal Register* with respect to 144 old cases in which the Court of Military Review's decision had not been otherwise served. 55 Fed. Reg. 7769 (1990).

Where a petition for grant of review has been granted, plenary review is not as automatic as Rule 19(a)(7)(B) might be thought to imply. The Court may, for example, dispense with plenary briefs, *see* Rule 25, or upon reflection, it may vacate the grant as improvident.

E.g., United States v. Hendon, 4 M.J. 256 (C.M.A. 1978) (mem.), 6 M.J. 171, 172, 7 MLR 2006 (C.M.A. 1979); *United States v. Vick*, 4 M.J. 235, 236 (C.M.A. 1978) (mem.); *United States v. Kennedy*, 13 M.J. 465 (C.M.A. 1982) (mem.); *United States v. Chesney*, 21 U.S.C.M.A. 358, 45 C.M.R. 132, 133 (1972); *see also* Fidell & Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117, 129 & n.63 (1988) (collecting cases).

Denial of a petition for review precludes Supreme Court review on writ of certiorari. UCMJ Art. 67a(a), 10 U.S.C.A. § 867a(a) (West Supp. 1990); 28 U.S.C. § 1259(3) (1988); *e.g., In re Ayers*, 469 U.S. 1104 (1985) (mem.), *denying mandamus to review United States v. Ayers*, 19 M.J. 7 (C.M.A. 1984) (mem.).

Unlike cases in the other federal courts of appeals, moreover, Congress has not provided for review on petition for certiorari prior to judgment by the Court of Military Appeals. *Compare* 28 U.S.C. § 1254(a)(1) (1988) *with* 28 U.S.C. § 1259 (1988). Had Congress included the Court of Military Appeals in § 1254, certiorari prior to judgment could presumably be sought as soon as the Court granted a petition for grant of review. *See generally The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Sen. Comm. on Armed Services*, 97th Cong., 2d Sess. 137 (1982) (Everett, C.J., *dubitante*).

Once a petition for grant of review is granted, the entire case (including issues that were not granted) becomes eligible for review on petition for certiorari. Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 MLR 6001, 6002 & nn.11-12 (1988); Pottorff, *The Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?*, The Army Lawyer, May 1985, at 1, 14 & nn.96-100.

The government may confess error, and a letter should suffice where this is the case. *See* Rule 21(c)(2). As the Court is not bound by a confession of error, *e.g., United States v. McNamara*, 7 U.S.C.M.A. 575, 23 C.M.R. 39, 42 (1957), prudence may dictate a more formal submission. *Cf.* Rule 21(d)-(e). In any event, the confession of error should do more than merely state a conclusion. Where the government confesses error, the Court makes its own examination of the record. *E.g., United States v. Cook*, 24 M.J. 407 (C.M.A. 1987) (mem.); *United States v. Chasteen*, 24 M.J. 62 (C.M.A. 1987) (mem.);

see generally Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, *supra* at 118-19.

Just as a confession of error does not bind the Court, so too, a motion to dismiss may be denied even where appellate defense counsel offers no resistance. *United States v. Haskins*, 17 M.J. 64 (C.M.A. 1983) (mem.) (Cook, J., dissenting). Such action may be a vestige of the Court's traditional paternalism in ensuring that the right to civilian review is not thwarted. *See also United States v. Engle*, 28 M.J. 299, 17 MLR 2472 (C.M.A. 1989).

The "writ appeal petition" provision was added in 1983. The term is cumbersome, but the underlying concept is not. In essence, the Court has asserted authority to review, on the same discretionary "good cause" basis as it reviews final Court of Military Review decisions under Article 67(a)(3), decisions of those courts in cases in which their extraordinary writ powers have been invoked. The addition of this category of cases suggests that the time has come for Congress to overhaul the Court's jurisdiction. One model that could profitably be considered would be to have (1) mandatory review of any capital case, (2) appeal as of right (by notice of appeal) from any final decision of a Court of Military Review, (3) original jurisdiction to grant extraordinary writs as to any case arising under the Code, and (4) discretionary jurisdiction to entertain certified questions relating to the Code and *Manual for Courts-Martial* from state and other federal appellate courts. *See* Discussion of Rule 4.

The rule appears to permit, rather than require, the filing of an answer to a supplement to a petition for grant of review. *See* Rule 19(a)(5)(B); *see also* Rule 21(c)(1)-(2) (answer required in Art. 62 cases, permitted in other cases). Similarly, replies are not required, Rule 21(c)(1)-(2), and in practice, replies are relatively uncommon in military appeals. The reply brief, properly prepared, can be an extraordinarily effective tool of appellate advocacy. Brevity is essential, and reargument of points previously made is to be avoided at all costs. Needless to say, new arguments should not be injected in a reply as this either disadvantages the other side or forces the preparation of a motion for leave to file a further pleading, thus turning the appellate process into a kind of prolonged legal ping-pong match.

The rule makes no provision for cross-petitions, *i.e.*, petitions filed in cases that have been certified by a Judge Advocate General. *See* Rule 8(e). Such cases are identified in the Court's *Daily Journal*,

e.g., *United States v. Remai*, 17 M.J. 29 n.* (C.M.A. 1983) (mem.), but are afforded no special treatment other than the provision of Rule 40(b)(2) that the accused is deemed the appellant for purposes of oral argument. The deadline for filing a cross-petition is calculated under Rule 19(a)(1), and is not extended by submission of the certificate for review. *See also* Discussion of Rule 33.

The following summarizes the deadlines applicable to each form of appellate review or original action over which the Court has jurisdiction:

Petitions for Grant of Review

- Triggering event: earlier of (1) date appellant is notified of decision of Court of Military Review or (2) date a copy is mailed to appellant after appellate defense counsel has been served (Rule 19(a)(1); *see also* R.C.M. 1203(d)(2)(A))

- Petition deadline: 60 days (deposit in mail or delivery to Court) (Rule 19(a)(1), (3))

- Notice of docketing issued by Clerk to Judge Advocate General and appellate counsel: no time specified (Rules 10(c), 20(d))

- Supplement to petition: 30 days after issuance of notice of docketing (Rule 19(a)(5)(B))

- Optional letter response to supplement: 10 days after filing of supplement

- Appellee's answer to supplement to petition: 30 days after filing of supplement (Rules 19(a)(5)(B), 21(c)(2))

- Reply to answer: 10 days after filing of answer (Rules 19(a)(5)(B), 21(c)(2))

- Appellant's merits brief: 30 days after order granting petition (Rule 19(a)(7)(B))

- Appellee's merits brief: 30 days after filing of appellant's brief (Rule 19(a)(7)(B))

- Reply brief: 10 days after filing of appellee's brief (Rule 19(a)(7)(B))

Article 62 Appeals

- Triggering event: earlier of (1) date appellant is notified of decision of Court of Military Review or (2) date a copy is mailed to appellant after appellate defense counsel has been served (Rule 19(a)(1))

- Petition deadline: 60 days (deposit in mail or delivery to Court) (Rule 19(a)(1), (3))

- Notice of docketing issued by Clerk to Judge Advocate General and appellate counsel: no time specified (Rules 10(c), 20(d))

- Supplement to petition: 20 days after issuance of notice of docketing (Rule 19(a)(5)(A))

- Appellee's answer to supplement to petition: 10 days after filing of supplement (Rules 19(a)(5)(A), 21(c)(1))

- Reply to answer: 5 days after filing of answer (Rules 19(a)(5)(A), 21(c)(1))

- Plenary briefs: none (Rule 19(a)(7))

Cases Certified by Judge Advocate General

- Triggering event: decision of Court of Military Review

- Certificate for review: 30 days (Rules 19(b), 22(b))

- Appellant's brief: with certificate in Article 62 and extraordinary writ cases; in other cases, 30 days after issuance of notice of docketing (Rules 19(b), 22(b))

- Answer: 10 days after filing of certificate and supporting brief in Article 62 and extraordinary writ cases; in other cases, 30 days after filing of appellant's brief (Rules 19(b), 22(b))

- Reply: 5 days after filing of answer in Article 62 and extraordinary writ cases; in other cases, 10 days after filing of answer (Rules 19(b), 22(b))

Mandatory Review (Capital) Cases

- Triggering event: expiration of period for filing motion for reconsideration in Court of Military Review, *see* C.M.R.R. 19(a) (30 days after C.M.R. decision is served on appellate defense counsel or accused), or following final decision on such a motion (Rule 19(c))

- Notice of docketing issued to Judge Advocate General by Clerk: no time specified (Rules 19(c), 23(b))

- Appellant's brief: 60 days after issuance of notice of docketing (Rules 19(c), 23(b))

- Appellee's brief: 60 days after filing of appellant's brief (Rules 19(c), 23(b))

- Reply brief: 20 days after filing of appellee's brief (Rules 19(c), 23(b))

Petitions for Extraordinary Relief (nonhabeas corpus)

- Triggering event: action complained of

- Petition and (unless *pro se*) supporting brief: as soon as possible and no later than 20 days after petitioner discovers action complained of (Rules 19(d), 27(a))

- Answer: 10 days after service of order to show cause, unless otherwise ordered (Rule 28(b)(1))

- Reply: 5 days after filing of answer (Rule 28(c))

Petitions for Writ of Habeas Corpus

- Triggering event: action complained of

- Petition and (unless filed *pro se*) supporting brief: as soon as possible—no fixed deadline (Rule 19(d))

- Answer: 10 days after service of order to show cause, unless otherwise ordered (Rule 28(b)(1))

- Reply: 5 days after filing of answer (Rule 28(c))

Writ Appeal Petitions

- Triggering event: service of decision of Court of Military Review on appellant or appellant's counsel (Rule 19(e))
- Petition and any available record (with supporting brief if petitioner is represented by counsel): 20 days (Rule 19(e))
- Answer: 10 days after filing of petition and supporting brief (Rules 19(e), 28(b)(2))
- Reply: 5 days after filing of answer (Rules 19(e), 28(c)(2))

Petitions for New Trial

- Triggering event: convening authority approval of sentence
- Petition: filed with Judge Advocate General within two years (UCMJ Art. 73, 10 U.S.C. § 873 (1988); R.C.M. 1210(a))
- Referral to Court of Military Appeals by letter: no time specified (R.C.M. 1210(e))
- Notice of filing issued by Clerk: no time specified (Rule 29(b))
- Brief in support of petition: 30 days after issuance of notice of filing (Rule 29(c))
- Answer: 30 days after filing of appellant's brief (Rule 29(c))
- Reply: 10 days after filing of appellee's brief (Rule 29(c))

Petitions for Reconsideration, Modification or Rehearing

- Triggering event: date of order, decision or opinion
- Petition: 10 days (Rule 31(a))
- Answer: 5 days after filing of petition (Rule 31(b))
- Reply: neither provided for nor precluded by rules

Motions

- No general deadline; motions made orally during a hearing must be reduced to writing and filed within 3 days after hearing (Rule 30(e))
- Answer: 5 days after filing of motion (Rule 30(b))
- Reply: neither provided for nor precluded by rules

General

- Record of trial: filed as soon as possible after docketing (Rule 35)
- *Amicus curiae* briefs: 10 days after filing of answer of appellee/respondent (Rule 26(b))
- Supreme Court review on petition for certiorari (only in cases other than denials of petitions for either (a) grant of review or (b) extraordinary relief): 90 days (extendable for an additional 60 days for good cause shown) after the later of (1) decision of Court of Military Appeals or (2) decision on timely petition for reconsideration (S. Ct. R. 13.1, 13.2, 13.4, 30.2; *see* UCMJ Art. 67a(a), 10 U.S.C.A. § 867a(a) (West Supp. 1990); 28 U.S.C. §§ 1259, 2101(g) (1988); R.C.M. 1205(a))

Rule 20. Form of Petition for Grant of Review

(a) *Form to be used by an appellant.*

A petition for grant of review under Rule 18(a)(1) filed personally by an appellant will be substantially in the following form:

IN THE UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	**PETITION FOR GRANT OF REVIEW**
	)	
Appellee	)	
	)	
v.	)	**CMR Dkt. No.**
	)	
	)	**USCMA Dkt. No.**
(Full typed name, rank & service of appellant)	)	**[For Court use only]**
(Service no.),	)	
	)	
Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

1. I hereby petition the Court for review of the decision of the Court of Military Review [on appeal by the United States under Article 62, UCMJ] [on appeal under Article 66, UCMJ].

2. I understand that, unless I specifically request the contrary, a military lawyer will be designated by the Judge Advocate General to represent me free of charge before the U.S. Court of Military Appeals.

SIGNED:
(Put your signature here)

DATED:
(Put mailing date here)

MAIL TO:
U.S. Court of Military Appeals
450 E Street, N.W.
Washington, D.C. 20442

(b) *Form to be used by an appellant's counsel.*

A petition for grant of review under Rule 18(a)(1) filed by counsel on behalf of an appellant will be substantially in the following form:

IN THE UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	PETITION FOR GRANT OF REVIEW
	)	
Appellee	)	
	)	
v.	)	CMR Dkt. No.
	)	
	)	USCMA Dkt. No.
(Full typed name,	)	[For Court use only]
rank & service of	)	
appellant)	)	
(Service no.),	)	
	)	
Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

The undersigned counsel, on behalf of (*insert appellant's full name here*), hereby petitions the United States Court of Military Appeals for a grant of review of the decision of the Court of Military Review [on appeal by the United States under Article 62, UCMJ] [on appeal under Article 66, UCMJ], pursuant to the provisions of Article 67(a)(3), UCMJ.

(Signature of counsel)
(Typed name of counsel)
(Address of counsel)
(Telephone no. of counsel)

(c) An appellant or counsel on behalf of an appellant shall file a petition for grant of review in the manner and within the time limits set forth in Rule 19(a).

(d) When a petition for grant of review is filed with the Court, the Clerk will cause a copy thereof to be delivered to the Judge Advocate General of the appellant's service, to the appellant's counsel, if named in the petition, and to government counsel. Upon receipt of a copy of the petition from the Clerk, the Judge Advocate General shall designate counsel to represent the parties unless such parties are already represented by counsel. *See* Rule 17.

(e) Upon issuance by the Clerk under Rule 10(c) of a notice of docketing of a petition for grant of review, counsel for the appellant shall file a supplement to the petition in accordance with the applicable time limit set forth in Rule 19(a)(5)(A) or (B), and the provisions of Rule 21.

DISCUSSION

A petition for grant of review may be filed *pro se* or by counsel. A petition filed by counsel is effective only if it has been authorized by the client. *United States v. Schreck*, 9 M.J. 217, 8 MLR 2474 (C.M.A. 1980) (power of attorney); *see also United States v. Smith*, 22 U.S.C.M.A. 247, 46 C.M.R. 247, 1 MLR 2300 (1973), *noted in* Comment, *The Court of Military Appeals: A Survey of Recent Decisions*, 63 Mil. L. Rev. 115, 133-34 (1974). A court-appointed conservator may also direct the conduct of litigation. *Phillips v. Cedarburg*, 14 M.J.

304 (C.M.A. 1982) (mem.) (*semble*). The authorization may in any event be oral. *United States v. Hodges*, 19 M.J. 148 n.** (C.M.A. 1984) (mem.), *citing United States v. Larneard*, 3 M.J. 76, 5 MLR 2098 (C.M.A. 1977); *United States v. Daly*, 4 M.J. 145 n.1 (C.M.A. 1977) (mem.). The withdrawal of petitions and other submissions is addressed in the Comment to and Discussion of Rule 21.

The Court has traditionally been quite forgiving about deviations from the forms prescribed in its rules. This is particularly true in *pro se* cases. *E.g., United States v. Jackson*, 2 U.S.C.M.A. 179, 7 C.M.R. 55, 57 (1953) (informal letter evincing desire to appeal will suffice); *United States v. Marshall*, 4 U.S.C.M.A. 607, 16 C.M.R. 181, 183 (1954) (noting petitioner's reliance on form supplied by Navy; no errors identified in petition); *see also United States v. Ring*, 5 M.J. 1000 (C.M.A.) (mem.), *reconsideration denied, leave to file pet. for grant of review granted*, 5 M.J. 1033 (C.M.A. 1976) (mem.). Where the circumstances are in doubt, it will endeavor to clarify the matter before ruling on whether to dismiss a facially untimely petition for grant of review. *E.g., United States v. Elrod*, 28 M.J. 271 (C.M.A. 1989) (mem.) (seeking information as to steps taken to locate and communicate with client); *United States v. Tillman*, 19 M.J. 26 (C.M.A. 1984) (mem.).

The Court regularly construes correspondence as petitions for extraordinary relief, *e.g., Beattie v. United States*, 27 M.J. 472, 473 (C.M.A. 1988) (mem.); *United States v. Avila*, 24 M.J. 346 (C.M.A. 1987) (mem.); *see also Cole v. United States*, 14 M.J. 119 (C.M.A. 1982) (mem.) (letter construed as petition for reconsideration); *Lowery v. United States*, 5 M.J. 1086 (C.M.A. 1976) (mem.) (construing petition for grant of review as petition for extraordinary relief), although it will not recast an untimely petition for grant of review into a petition for extraordinary relief, in keeping with the familiar principle that extraordinary relief is not a substitute for a timely appeal. *E.g., United States v. Williams*, 4 M.J. 353 (C.M.A. 1978) (mem.); *but cf. United States v. Adames*, 22 M.J. 234 (C.M.A. 1986) (mem.) (treating untimely petition for reconsideration as petition for extraordinary relief; *held*, relief denied on the merits).

The Court has also been lenient as regards the form in which a new trial is requested. H. Moyer, *Justice and the Military* § 2-860, at 661 (1972), *citing United States v. Ferguson*, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954) (supplemental assignment of error to board of review treated as new trial petition). One of the few pleading requirements the Court has seriously policed is the identification of the date a petition for grant of review has been mailed to the Court. *E.g., United States v. Farrell*, 9 M.J. 38 (C.M.A. 1983) (mem.); *but see United States v. Haskins*, 17 M.J. 64 (C.M.A. 1983) (mem.) (Cook, J., dissenting).

It has been correctly suggested that the term "this Honorable Court" "should be sparingly used, for it tends to nauseate even those judges most susceptible to flattery." B. Garner, *A Dictionary of Modern Legal Usage* 269 (1984); *but see, e.g., United States v. Velasco*, 14 M.J. 114 (C.M.A. 1982) (mem.). The Court's rules no longer require this archaic salutation. *But see* C.M.R.R. Attachments 1-2.

The Court regularly receives correspondence from *pro se* litigants. To deal with such inquiries, the Clerk's office has developed an "Information Questionnaire to Supplement Mail Inquiries," USCMA Form 200 (July 1978). The form is reproduced in the Appendix.

Rule 21. Supplement to Petition, Answer, and Reply

(a) Review on petition for grant of review requires a showing of good cause. Good cause must be shown by the appellant in the supplement to the petition, which shall state with particularity the error(s) claimed to be materially prejudicial to the substantial rights of the appellant. *See* Article 59(a), UCMJ, 10 U.S.C. §859(a).

(b) The supplement to the petition shall be filed in accordance with the applicable time limit set forth in Rule 19(a)(5)(A) or (B), shall include an Appendix required by Rule 24(a), shall conform to the provisions of Rule 24(b), (c), and (d), and shall contain:

(1) A statement of the errors assigned for review by the Court;

(2) A statement of the case setting forth a concise chronology, including the results of the trial, the actions of the intermediate reviewing authorities and the Court of Military Review, and any other pertinent information regarding the proceedings;

(3) A statement of facts of the case material to the errors assigned, including specific page references to each relevant portion of the record of trial;

(4) A direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to the substantial rights of the appellant. Where applicable, the supplement to the petition shall also indicate whether the court below has:

(A) decided a question of law which has not been, but should be, settled by this Court;

(B) decided a question of law in a way in conflict with applicable decisions of (i) this Court, (ii) the Supreme Court of the United States, (iii) another Court of Military Review, or (iv) another panel of the same Court of Military Review;

(C) adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts;

(D) decided the validity of a provision of the Uniform Code of Military Justice or other Act of Congress, the Manual for Courts-Martial, a service regulation, a rule of court or a custom of the service the validity of which was directly drawn into question in that court;

(E) decided the case (i) *en banc* or (ii) by divided vote;

(F) so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a court-martial or other person acting under the authority of the Uniform Code of Military Justice, as to call for an exercise of this Court's power of supervision; or

(G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review from the Supreme Court of the United States; and

(5) A certificate of filing and service in accordance with Rule 39(c).

(c)(1) Answer/reply in Article 62, UCMJ, appeals. An appellee's answer to the supplement to the petition for grant of review in an Article 62, UCMJ, case shall be filed no later than 10 days after the filing of such supplement. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

(2) Answer/reply in other appeals. An appellee's answer to the supplement to the petition for grant of review in all other appeal cases may be filed no later than 30 days after the filing of

such supplement, *see* Rule 21(e); as a discretionary alternative in the event a formal answer is deemed unwarranted, appellee may file with the Clerk of the Court a short letter, within 10 days after the filing of the appellant's supplement to the petition under Rule 21, setting forth one of the following alternative positions: (i) that the United States submits a general opposition to the assigned error(s) of law and relies on its brief filed with the Court of Military Review; or (ii) that the United States does not oppose the granting of the petition (for some specific reason, such as an error involving an unsettled area of the law). A reply may be filed by the appellant no later than 10 days after the filing of the appellee's answer.

(d) The Court may, in its discretion, examine the record in any case for the purpose of determining whether there appears to be plain error not assigned by the appellant. The Court may then specify and grant review of any such errors as well as any assigned errors which merit review.

(e) Where no specific errors are assigned in the supplement to the petition, the Court will proceed to review the petition without awaiting an answer thereto. *See* Rule 19(a)(5).

(f) An appellant or counsel for an appellant may move to withdraw his petition at any time.

RULES ADVISORY COMMITTEE COMMENT

The purpose of this rule is to help the individual preparing a petition for grant of review to write a document that will aid the Court in making a decision whether to grant review. As required by Article 67, [UCMJ,] the rule indicates that good cause must be shown before the Court will grant a petition. Not only must errors be stated with reasonable specificity, but the test of prejudice prescribed by Article 59, UCMJ, and Military Rule of Evidence 103(e) must be met.

The rule includes a catalog of considerations that should be brought to the attention of the Court in an effort to persuade it to exercise its discretion in granting review. These are not requirements, and good cause may be shown without satisfying any of the [seven] items listed in Rule 21(b)(4). Nonetheless, the Committee believes it is desirable to encourage appellant[s] to bring these matters to the Court's attention. The listed items spring from a variety of sources, including, significantly, the Supreme Court's rule on the considerations governing grants of certiorari. [Sup. Ct. R. 10.] Use of that rule

as a model is not intended to suggest that the Supreme Court's certiorari jurisdiction is a perfect analogy to the Court's petition jurisdiction. There are differences, but these are outweighed by the similarities. Indeed, the analogy to Supreme Court practice has often been noted. *E.g.*, Brosman, *The Work of the United States Court of Military Appeals*, 7 Miami L. Q. 211, 212 (1953); *Hearings on Department of Defense Appropriations, Fiscal Year 1980, Before the Sen. Comm. on Appropriations*, 96th Cong., 1st Sess., pt. 3, at 125 (1979) (statement of Fletcher, C.J.); Feld, *Development of the Review and Survey Powers of the United States Court of Military Appeals*, 12 Mil. L. Rev. 177, 182 (1961). It is the Committee's view that useful lessons may be drawn from the Supreme Court's practice as it has evolved over the years.

Rule 21(b)(4)(c) serves to highlight for the Court any departures from the rules applied in criminal trials in the U.S. District Courts, consonant with the Congressional policy expressed in Article 36(a), UCMJ, that such departures be permitted only where it would be impracticable to apply the usual Federal rule. The Committee recognizes that claims of deviation from the civilian model may be contested or justified in response to a petition.

Rule 21(d) preserves the Court's historic practice of specifying errors not assigned by an appellant.

Page limits for [supplements to petitions], answers, and replies are established by Rule [24(b)].

The provision of Rule [21(f)] authorizing motions to withdraw a petition at any time is predicated on the assumption that a withdrawal without leave of court is invalid. *See Goodman v. Secretary of the Navy*, 21 U.S.C.M.A. 242, 45 C.M.R. 16 (1972). The rule leaves to case-by-case development the grounds which will support a motion to withdraw.

The [1990] amendment to Rule 21(b)(4) is in substantial part identical to a proposed amendment referred to the Court by the Rules Advisory Committee in [1982] which was. . . not adopted by the Court [with the 1983 changes]. In light of the provisions of the intervening Military Justice Act of 1983 which provide for direct review of this Court's decisions by the Supreme Court of the United States and the similarity between some of the provisions of this. . . amendment and Rule [10] of the Rules of the Supreme Court, the Committee recommends that this. . . amendment be reconsidered by the Court for inclusion in its Rules of Practice and Procedure at this time. In

addition, new subsection (G) of this . . . amendment was more recently drafted in response to the procedural problem which was the subject of the Court's decision in *United States v. Wynn*, 26 M.J. 405, 16 MLR 2559 (C.M.A. 1988).

DISCUSSION

In light of the text of Article 67(a)(3), the second sentence of Rule 21(a) correctly places on the appellant the duty to "show" good cause. 10 U.S.C.A. § 867(a)(3) (West Supp. 1990); *see also* Rule 19(a)(5)(B). The basic vehicle for showing good cause is the Supplement to the Petition, filed under Rule 21, which should identify and argue, at least preliminarily, the issues deemed by counsel to be meritorious. While "appellate defense counsel need not advance contentions considered frivolous or lacking in merit," *United States v. Baker*, 28 M.J. 121, 122, 17 MLR 2345 (C.M.A. 1989), it is not improper to press a case in which the petition is known to be untimely. *United States v. Engle*, 28 M.J. 299, 300, 17 MLR 2472 (C.M.A. 1989) (per curiam). Counsel are under an affirmative obligation to call to the Court's attention any claims of error "which had been noted by an accused or by his trial defense counsel," *United States v. Rainey*, 13 M.J. 462, 463 n.1 (C.M.A. 1982) (mem.) (Everett, C.J., dissenting); *see generally United States v. Grostefon*, 12 M.J. 431, 10 MLR 2332 (C.M.A. 1982), and this too can show good cause. It matters not who signs a listing of *Grostefon* issues so long as the appellant has adopted them. *United States v. Peel*, 29 M.J. 235, 243, 17 MLR 2681 (C.M.A. 1989) (error—but harmless—to reject 55-page submission signed by appellant's mother).

If the record does not permit a determination as to whether good cause exists, a remand for further factual development may be ordered. *E.g., United States v. McGillis*, 28 M.J. 462 (C.M.A. 1988) (mem.). The Court remains loath to invoke the doctrine of waiver. For example, in *United States v. Burdine*, 29 M.J. 306 (C.M.A. 1989) (mem.), it remanded to the Army Court of Military Review for consideration of the effectiveness of trial defense counsel, even though that issue had evidently not previously been raised.

There is support for the view that "'good cause' also may be 'shown' by the [C]ourt's own staff—or even by a judge who concludes that the record of trial should be reviewed in greater depth." Everett, *Specified Issues in the United States Court of Military Appeals: A Rationale*, 123 Mil. L. Rev. 1, 2 (1989). The result is that even if no errors are assigned, *see* Rule 21(e), the Court's jurisdiction can be invoked—and its internal review process triggered—simply by filing

a petition for grant of review. *E.g., United States v. Scranton*, 30 M.J. 322-23 (C.M.A. 1990) (noting that petition presented case "on the merits" without specific assignment of error); *United States v. Hullum*, 15 M.J. 261, 11 MLR 2467 (C.M.A. 1983); *United States v. Grostefon*, 12 M.J. 431, 436 n.12, 10 MLR 2332 (C.M.A. 1982); *United States v. Frierson*, 20 U.S.C.M.A. 452, 43 C.M.R. 292 (1971); *United States v. Dalrymple*, 14 U.S.C.M.A. 307, 308-09, 34 C.M.R. 84, 88-89 (1963); *see also United States v. Kelly*, 14 M.J. 196, 11 MLR 2004 (C.M.A. 1982). The only constraint the Court seems disposed to apply in this regard is that it will not readily grant leave to file untimely supplements to petitions for grant of review where the supplements identify no particular issues. *United States v. Ortiz*, 24 M.J. 323, 15 MLR 2272 (C.M.A. 1987).

Rule 21(e) provides that where no errors are assigned, the Court will proceed to review the case without awaiting an answer. Given the plain meaning of Article 67(a)(3), the Court should, in the absence of plain error, *see* Rule 21(d); *cf. United States v. Paoni*, 19 M.J. 119 & n.* (C.M.A. 1984) (mem.) (error noted *sua sponte*; *held*, nonprejudicial), deny or dismiss a petition that fails to cite errors of any kind. But the Court's practice has long been to the contrary. *Compare* Everett, *supra*, *and* Early, Longstreet & Richardson, *USCMA and the Specified Issue: The Current Practice*, 123 Mil. L. Rev. 9 (1989), *with* Fidell & Greenhouse, *supra*, at 126 & nn.48, 50, *and* Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99, 104-06 (1980). If a party has not been afforded an opportunity to address an issue first identified by the Court, the Court should extend such an opportunity before taking action. *E.g., United States v. Taylor*, 28 M.J. 256 (C.M.A. 1989) (mem.) (show cause order).

The Court's willingness to entertain cases in which no issues are identified was faulted in the Court Committee's January 27, 1989 report, which recommended (at 4) that "absent plain error the Court should not review these 'no issue' cases." *See also Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989) ("practice of specifying issues not raised by appellate counsel should be limited to those few cases where plain error has occurred or where emerging issues require further briefing").

The Court may, in its discretion, decline to grant review of a *pro forma* petition where the Court of Military Review has set aside the sentence and ordered a rehearing. In doing so it has noted that its action is without prejudice to the petitioner's right to petition again in the normal course of appellate review. *United States v. Graham*,

21 M.J. 97 n.* (C.M.A. 1985) (mem.). In light of *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 17 MLR 2348 (C.M.A. 1989), it would seem that such an order guarantees that the subsequent "normal course of appellate review" will include access to the Court of Military Appeals even if the result on remand does not meet the jurisdictional threshold of Articles 66 and 67. The practice of the Courts of Military Review had, prior to *Boudreaux*, apparently varied as to whether cases that result in subjurisdictional sentences on remand formally return to them under Article 66 following the further trial-level proceedings.

Given the Court of Military Appeals' commitment to preventing the insulation of interlocutory rulings from appellate review either by it, *see, e.g.*, FY79 C.M.A. Ann. Rep. 4 (1980); *United States v. Bullington*, 13 M.J. 184, 10 MLR 2562 (C.M.A. 1982), or by the Supreme Court, *United States v. Belz*, 20 M.J. 325 (C.M.A. 1985) (mem.); *United States v. Wynn*, 26 M.J. 405, 406 & n.2, 16 MLR 2559 (C.M.A. 1988); Rule 21(b)(4)(G) and Comment, a subjurisdictional result on such a remand would be eligible for Article 66—and therefore Article 67—review. The Court of Military Review should docket such a case following a subjurisdictional result on remand, but if it does not (thereby tolling the statutory period in which to petition for grant of review), the situation would present an appropriate occasion for issuance of an extraordinary writ.

In reporting out the Military Justice Act of 1983, the Senate Armed Services Committee wrote that it "believes that the question of what cases are heard by the Court of Military Appeals is a matter of internal management, properly left to that Court's decision in accordance with guidelines expressed in that Court's rules." S. Rep. No. 98-53, 98th Cong., 1st Sess. 34 (1983). The absence of such guidelines was a matter of growing concern, and this concern only increased when it became apparent that Supreme Court review would be confined, at least at the beginning, to cases in which the Court of Military Appeals had granted discretionary review. Rule 21(b)(4) was adopted by the Court in August 1990 and is virtually identical with the earlier version proposed by the Rules Advisory Committee, the text of which appears in Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 MLR 6001, 6006 (1988). Among those urging the Court to spell out what became the Rule 21(b)(4) considerations were the Association of the Bar of the City of New York and the Association of Trial Lawyers of America. A portion of the rule which was not adopted by the Court would have expressly encouraged opposing counsel to respond directly where a claim has been made that civilian practice has not been

followed. Another cautioned that the power to specify issues will be exercised sparingly. Rule 21(e) as proposed would have indicated that an appellee need not respond to a *pro forma* petition. The Committee's draft Comment observed that where this occurs, the Court may still invite an answer to be filed.

The Court's discretionary authority over cases arising on petition for grant of review may be analogized to the power of the geographical courts of appeals to grant leave to appeal certain decisions of United States magistrates under 28 U.S.C. § 636(c)(5) (1988). Fed. R. App. P. 5.1. Several circuits have framed their § 636 criteria in decisions. *E.g.*, *Keller v. Petsock*, 849 F.2d 839, 844 n.8 (3d Cir. 1988); *Adams v. Heckler*, 794 F.2d 303, 308-10 (7th Cir. 1986); *Wolff v. Wolff*, 768 F.2d 642, 646-49 (5th Cir. 1985); *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985). Some have opted to exercise their rulemaking authority. *E.g.*, 6th Cir. R. 29(a); 8th Cir. R. 28(a). The Court's willingness to articulate the factors set forth in the 1990 change is a major evolution and is in keeping with the practice of a growing number of appellate courts with discretionary jurisdiction.

At the same time, even so tempting an analogy should not be embraced uncritically, since the Court, unlike the geographical courts of appeals, is the practical equivalent of a state supreme court, *e.g.*, S. Rep. No. 101-81, 101st Cong., 1st Sess. 171 (1989); *cf.* S. Rep. No. 98-53, 98th Cong., 1st Sess. 35 (1983) (analogizing C.M.A. to state courts for purposes of establishing time limits for seeking certiorari), its judgments are rarely going to be reviewed by the Supreme Court of the United States, and it has the unique function of providing meaningful civilian review of courts-martial. "Counsel familiar with Supreme Court practice should not confuse the 'good cause' standard with certiorari. Those courts that may review a case by issuing a writ of certiorari are not required to hear a case merely because a party demonstrates viable legal issues requiring relief." Dep't of the Army Pam 27-173, *Legal Services, Trial Procedure* ¶ 35-5*c*(3), at 248 (1990); *cf. United States v. Kuskie*, 11 M.J. 253, 254-55, 9 MLR 2700 (C.M.A. 1981) (2-1) (rejecting analogy to Supreme Court practice); B. Feld, *A Manual of Courts-Martial Practice and Appeal* 132 (1957) (distinguishing C.M.A. functions from those of Supreme Court).

The factors set forth in the 1990 rule change are not exhaustive. Petitions will unquestionably be granted where none of the identified criteria even arguably apply. Unlike the Supreme Court's certiorari jurisdiction, the petition jurisdiction of the Court of Military Appeals is often—and properly—exercised "merely" to correct an isolated

error or injustice. The Supreme Court, in contrast, requires that there be "special and important reasons" for a grant of certiorari, S. Ct. R. 10.1, and ordinarily—although not invariably—will withhold discretionary review where all that can be said of a lower court's decision is that it was incorrect. *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.17, at 221-24 (6th ed. 1986). Adoption of such a yardstick by the Court of Military Appeals would contravene longstanding expectations that the Court will furnish meaningful civilian review to prevent individual injustice.

In other respects, however, such as the decision whether to entertain an interlocutory Article 62 appeal, the Court's reference to Supreme Court practice as a model seems entirely appropriate simply as a matter of sound judicial administration. *See United States v. Mollison*, 26 M.J. 220 (C.M.A. 1988) (mem.); *United States v. Morris*, 26 M.J. 219 (C.M.A. 1988) (mem.). The first case the Supreme Court heard on writ of certiorari to the Court of Military Appeals arose on an interlocutory government appeal. *See* Brief for American Civil Liberties Union as Amicus Curiae in Support of the Petition for a Writ of Certiorari 10-14, *Solorio v. United States*, 483 U.S. 435 (1987).

The Court's decisions will inevitably embroider on the criteria set forth in subsection (b)(4). The text itself is fairly self-explanatory and largely tracks the Supreme Court's model. Paragraph (c) reflects the congressional presumption in favor of applying district court standards. *See* UCMJ Art. 36(a), 10 U.S.C. § 836(a) (1988). Where a petitioner seeks to bring a case within the reach of Rule 21(b)(4)(c), the respondent will presumably endeavor to show that either that there has been no departure from district court practice or that any such departure is warranted by reason of factors peculiar to the military setting. Such issues have long been inherent in military law. Fidell & Greenhouse, *supra*, at 120-22; Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MLR 6049 (1976). Thus, the drafters of the Military Rules of Evidence endeavored to point out and justify a number of departures from civilian federal doctrines. *E.g.*, Mil. R. Evid. 104(a)-(b), 201(b), 804(a)(6), 901(b), 902(4a) (Drafters' Analysis). If the 1990 rule change brings Article 36(a) conformity issues more sharply into focus, the appellate process will have been well-served.

The rule implies that the factors set forth in subsection (b)(4) will bear on whether review ought to be granted. However, the same information would also be pertinent in deciding whether to dispense with plenary briefing, remand, *cf. United States v. White*, 27 M.J. 193 (C.M.A. 1988) (mem.) (intervening decision of Supreme Court);

United States v. Gregorio, 27 M.J. 180 (C.M.A. 1988) (mem.) (intervening decision of C.M.A.); *United States v. Vyskocil*, 27 M.J. 406 (C.M.A. 1988) (mem.) (remanding for further proceedings in light of other decisions of C.M.R. that "may impact" on issues); *United States v. Lopez*, 26 M.J. 40 (C.M.A. 1988) (mem.) (conflict with decision of other panel of same C.M.R.); dispense with or enlarge the usual oral argument period, *see* Rule 40(b)(3), or invite the participation of *amici curiae* under Rule 26(a)(2).

Congress has not required strict inter-service uniformity in punitive regulations, *United States v. Hoesing*, 5 M.J. 355, 358, 6 MLR 2361 (C.M.A. 1978), and inter-service diversity can serve the public interest in testing new concepts. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, *supra*, at 6057 & n.97, *citing New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But the policy behind Article 36 and indeed, the Code as a whole, clearly favors military justice uniformity as a general point of departure. *E.g.*, *The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Sen. Comm. on Armed Services*, 97th Cong., 2d Sess. 140 (1982) (statement of Everett, C.J.); Early, Longstreet & Richardson, *supra*, at 25; *cf.* W. Winthrop, *Military Law and Precedents* 35 & nn.59-61 (2d ed. 1920, repr. 1979). To this end, the existence of a split among the Courts of Military Review has long been a factor in deciding whether to respond to a certificate for review that otherwise might not be entertained. *United States v. Gutierrez*, 11 M.J. 122, 123, 9 MLR 2512 (C.M.A. 1981). The fact that the goal of interservice uniformity is served by the certification process, *United States v. Redding*, 11 M.J. 100, 114, 9 MLR 2502 (1981) (Fletcher, C.J., concurring in part and dissenting in part), does not, of course, render it inapposite in the context of deciding whether to grant review under Article 67(a)(3), which forms the largest component of the Court's docket.

Inconsistent results within an armed force are no less objectionable, under the *Uniform* Code, than inconsistent results between services. *See generally Corley v. Thurman*, 3 M.J. 192, 195, 5 MLR 2126 (C.M.A. 1977) (Perry, J., dissenting); *United States v. Jackson*, 3 M.J. 101, 102, 5 MLR 2105 (C.M.A. 1977) (per curiam); *see also United States v. Sapigao*, 9 M.J. 111, 113 n.3 (C.M.A. 1980) (mem.) (Fletcher, J., dissenting). Congress has legislated to permit rehearings *en banc* by the Courts of Military Review in the interest of "resolving conflicts among panels and promot[ing] finality of Court of Military Review decisions within the respective services, without the necessity to certify individual panel decisions to the Court of Military Ap-

peals." S. Rep. No. 98-53, 98th Cong., 1st Sess. 28 (1983); *see* UCMJ Art. 66(a), 10 U.S.C. § 866(a) (1988). But that hardly renders it inappropriate for the Court of Military Appeals to take intra-C.M.R. conflicts into account when determining whether to grant review or take other action in response to a petition. Where panels of a single Court of Military Review are split, the Court may so note in its opinion, *e.g.*, *United States v. Warner*, 25 M.J. 64, 66, 15 MLR 2527 (C.M.A. 1987), perhaps implying that this militated in favor of review. In other cases the Court has, by remanding, correctly recognized that such conflicts should be resolved in the first instance by the Court of Military Review. *E.g.*, *United States v. Coles*, 29 M.J. 322 (C.M.A. 1989) (mem.); *United States v. Lopez*, 26 M.J. 40 (C.M.A. 1988) (mem.). A grant of review in a case that falls within Rule 21(b)(4)(B)(iv) thus serves the same objective as Congress' overruling of *United States v. Wheeler*, 20 U.S.C.M.A. 595, 44 C.M.R. 25 (1971), and *United States v. Chilcote*, 20 U.S.C.M.A. 283, 43 C.M.R. 123 (1971); *cf.* C.M.R.R. 17(a)(1) (*en banc* consideration or reconsideration ordinarily not ordered except, *inter alia*, "when. . .necessary to secure or maintain uniformity of decision"). Accordingly, it makes sense to require that such conflicts be called to the Court's attention in the supplement to the petition. Far from intruding on the matters of parochial concern to the separate services, this practice will strengthen the integrity of each service's jurisprudence, and may make intrusion by the Court of Military Appeals on the merits less, rather than more, likely to occur.

On the other hand, it is worth recalling that a case in which panels of one Court of Military Review are split may also involve an inter-service conflict. In that event, remand would address only part of the problem and unnecessarily delay a resolution of the underlying issue. In other words, if there is an *inter*-service conflict, that should rule out a remand to resolve an *intra*-service conflict.

Prior to *Wynn*, referred to in the Rules Advisory Committee's Comment, it was necessary to ask the Court to modify its rulings in remanded cases "to provide that the matter be returned to it for final disposition following action in the Court of Military Review," in order to preserve the access to the Supreme Court that follows from a grant of review. *E.g.*, *United States v. Belz*, 20 M.J. 325 (C.M.A. 1985) (mem.), *discussed in* Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, *supra*, at 6006 & n.48 (collecting cases). In *Wynn*, the Court of Military Appeals simplified the process by announcing that "[h]enceforth, we shall require an appellant to file a second petition for grant of review if, after corrective action below, he wishes

to seek further review here or to preserve his opportunity for seeking review of his case by the Supreme Court. If an appellant who submits such a petition calls to our attention that an earlier petition was granted in his case and asserts that the corrective action was inadequate and that he wishes to seek review from the Supreme Court, we shall treat the prior grant as good cause to grant review of the subsequent petition." 26 M.J. at 406 & n.2. The Court's objective in doing so was to advance the interests of "economy, efficiency, and orderly administration of the appellate process." *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 183 n.4, 17 MLR 2348 (C.M.A. 1989).

In 1988, as part of its effort to reduce the time for reviewing cases, the Court approved a suggestion by the Rules Advisory Committee that, in cases in which appellate defense counsel have set forth one or more errors of law in the supplement to the petition, appellate government counsel be allowed "to file a letter with the Clerk of Court, within 10 days after the filing of a Supplement to the Petition under Rule 21, as a discretionary alternative to filing an Answer within the 30-day period permitted under Rule 19(a)(5)(B)." The measure was evaluated after a year for possible incorporation in the rules. *In re Rules Advisory Committee Suggestion* (C.M.A. 1988); Early, Longstreet & Richardson, *supra*, at 10 & n.5. The pilot program offered government counsel the option of filing (and serving) either an answer to the supplement or a letter stating either "(1) That the United States submits a general opposition to the assigned error(s) of law and relies on its brief filed with the Court of Military Review; or (2) That the United States does not oppose the granting of the petition (for some specific reason set forth in such letter, such as an error raised involves an unsettled area of the law)." Apparently content with the trial run, the Court incorporated the letter procedure in the 1990 rules changes, and the procedure is now covered in Rule 21(c)(2). The Court of course reserves the right to require a fuller expression of the government's views. *E.g., United States v. Thompson*, 30 M.J. 158 (C.M.A. 1990) (mem.) (directing submission of answer to supplement to petition for grant of review). Its Order promulgating the 1990 change urged counsel to "note that the amendment to Rule 21(c)(2) applies only to an appellee's answer to a supplement to the petition for grant of review filed in cases *other than* Article 62, UCMJ, 10 USC § 862, cases." The 10-day period for submitting Rule 21(c)(2) letters obviously requires early attention to and screening of incoming supplements.

The Court's review under Rule 21(e) is performed by the Central Legal Staff and the judges and their chambers staffs. The process

is summarized in a helpful article by three members of the Central Legal Staff. Early, Longstreet & Richardson, *supra*. Among the issues the review may address are providence of pleas, legal errors as to the sentence, and denial of "military due process." *United States v. Roukas*, 21 M.J. 293 (C.M.A. 1985) (mem.), *discussed in* Fidell & Greenhouse, *supra*, at 125-27.

A petition for grant of review may be withdrawn by the petitioner with leave of court, Rule 21(f), and such leave is ordinarily freely granted. *E.g., United States v. Woods*, 5 M.J. 1067 (C.M.A. 1976) (mem.); *but see United States v. Bailey*, 18 M.J. 431 (C.M.A. 1984) (mem.) (denying motion to withdraw cross-petition for grant of review); *United States v. Vicente*, 18 M.J. 5 & n.* (C.M.A. 1984) (mem.) (denying motion to withdraw petition). "Unless he has obtained permission from his client to do so, an appellate defense counsel should not on his own initiative move to withdraw a petition for review" even if the petition is known to be untimely. *United States v. Engle*, 28 M.J. 299, 300 (C.M.A. 1989) (per curiam). "The filing of an untimely petition is not analogous to a fraud on the Court or a misrepresentation, in which instance counsel must intervene even at the risk of being at odds with the client." *Id.*

Withdrawal may also be sought with respect to petitions for extraordinary relief, *e.g., Dent v. Ott*, 5 M.J. 1110 (C.M.A. 1976) (mem.); *but see Davies v. Secretary of the Army*, 16 M.J. 142 (C.M.A. 1983) (mem.) (denying motion to withdraw extraordinary writ petition without prejudice), or certificates for review. *E.g., United States v. Tarver*, 5 M.J. 987 (C.M.A. 1976) (mem.). When an accused is acquitted pending consideration of an Article 62 appeal, "counsel need only file a motion to withdraw petition and state in said motion that appellant was tried and acquitted on a specified date." *United States v. Scholz*, 20 M.J. 17 n.* (C.M.A. 1985) (mem.).

Rule 22. Certificate for Review, Answer, Reply

(a) A certificate for review under Rule 18(a)(2) will be substantially in the following form:

IN THE UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	CERTIFICATE FOR REVIEW
	)	
(Appellee)	)	
(Appellant)	)	
	)	
v.	)	CMR Dkt. No.
	)	
	)	USCMA Dkt. No.
(Full typed name,	)	[For Court use only]
rank & service of	)	
appellant)	)	
(Service no.)	)	
	)	
(Appellant)	)	
(Appellee)	)	

TO THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

1. Pursuant to Article 67(a)(2) of the Uniform Code of Military Justice, the record of trial and decision of the United States Court of Military Review in the above-entitled case are forwarded for review.

2. The accused has been found guilty by a *(type of court-martial)* of a violation of Article(s) of the Uniform Code of Military Justice and has been sentenced to (*include entire adjudged sentence*) on the (*insert trial date*). The trial took place at (*location*). The convening authority approved the following findings and sentence: . The officer exercising general court-martial jurisdiction (*where applicable*) took the following action:

The Court of Military Review (*state action taken*). [Substitute different case history facts as appropriate when the Court of Military Review decision involves an application for extraordinary relief.]

3. It is requested that action be taken with respect to the following issues:

The Judge Advocate General

Received a copy of the foregoing Certificate for Review this day of , 19 .

Appellate Government Counsel	**Appellate Defense Counsel**
Address and telephone no.	**Address and telephone no.**

(b)(1) Article 62, UCMJ, cases. A certificate for review of a decision by a Court of Military Review on appeal by the United States under Article 62, UCMJ, 10 U.S.C. §862, shall be filed, together with a supporting brief in accordance with Rule 24 on behalf of the appellant, no later than 30 days after the date of the decision of the Court of Military Review. *See* Rule 34(a). An appellee's answer shall be filed no later than 10 days after the filing of such certificate for review and supporting brief. A reply brief may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

(2) Extraordinary relief cases. A certificate for review of a decision by a Court of Military Review on application for extraordinary relief filed therein shall be filed, together with a supporting brief in accordance with Rule 24 on behalf of the appellant, no later than 30 days after the date of the decision of the Court of Military Review. *See* Rule 34(a). An appellee's answer shall be filed no later than 10 days after the filing of such certificate for review and supporting brief. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

(3) Other cases. In all other cases involving a decision by a Court of Military Review, a certificate for review shall be filed no later than 30 days after the date of the decision of the Court of Military Review. *See* Rule 34(a). A brief in support of the certified issues shall be filed by the appellant in accordance with Rule 24 no later than 30 days after the issuance by the Clerk of a notice of docketing of the certificate for review. An appellee's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed by the appellant no later than 10 days after the filing of the appellee's answer.

RULES ADVISORY COMMITTEE COMMENT

This rule replaces [former] Rule 19 and prescribes the form for certificate of review cases ordered to be sent to the Court by a Judge Advocate General pursuant to Article 67(a)(2), UCMJ.

The first paragraph of the form recites that the record of trial and the decision of the Court of Military Review are forwarded.

The second paragraph of the certificate sets out the history of the case in the same manner that the counsel's petition on behalf of an appellant does with respect to petition cases under Rule 20. The form also provides for recitation of a somewhat different history if the case being forwarded by certificate involves a decision by a Court of Military Review on an application for extraordinary relief. Each certificate requires the signature of the Judge Advocate General and a signature reflecting receipt of a copy of the certificate by the appellate government counsel and appellate defense counsel.

Subsection (b) of the rule requires that certificates for review [in non-writ and non-Article 62 cases] be filed not later than 20 days after the date of decision of the Court of Military Review and that a brief in support of the certified issues be filed by the appellant not later than 30 days after the certificate is filed. Again, the requirement for filing of the brief by the appellant permits the application of the standards set out in Rule 8 to determine who has the responsibility for filing initial pleadings with the Court. The appellee is required to file an answer not later than 30 days after the filing of appellant's brief. A reply may be filed not later than 10 days after the filing of the answer.

Rule 23. Mandatory Review Case

(a) The record in a mandatory review case under Rule 18(a)(3) will be filed, together with the following form:

IN THE UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	**MANDATORY REVIEW CASE**
	)	
Appellee	)	
	)	
v.	)	**CMR Dkt. No.**
	)	
	)	**USCMA Dkt. No.**
(Full typed name,	)	**[For Court use only]**
rank & service of	)	
appellant)	)	
(Service no.)	)	
	)	
Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

1. The appellant, having an approved sentence to death, is entitled to mandatory review under Article 67(a)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 867(a)(1).

2. The appellant was notified of the decision of the Court of Military Review on (*insert notification date*).

The Judge Advocate General

Received a copy of the foregoing this day of 19

Appellate Government Counsel	**Appellate Defense Counsel**
Address and telephone no.	**Address and telephone no.**

(b) In a mandatory review case, a brief setting forth assigned errors shall be filed by the appellant in accordance with Rule 24 no later than 60 days after the issuance by the Clerk of a notice of docketing of the case. Such brief shall not incorporate by reference that filed before a Court of Military Review, the convening authority, or the military judge. An appellee's answer shall be filed no later than 60 days after the filing of the assignment of errors and supporting brief. A reply may be filed by the appellant no later than 20 days after the filing of the appellee's answer.

RULES ADVISORY COMMITTEE COMMENT

This rule prescribes the form for filing an assignment of errors in those cases which the Court is required to review under Article 67(a)(1), UCMJ. This rule replaces [former] Rule 20 and makes only minor editorial changes in the substances of the form. The [former] certificate of service is replaced by the standardized certificate of filing and service prescribed in new Rule 24(a). The appellant or his counsel must file an assignment of errors not later than 30 days after service of the decision of the Court of Military Review on the appellant. A brief supporting the assigned errors must accompany the assignment. Briefs used below may not be incorporated by reference in this brief. The appellee's answer must be filed no later than 30 days after the filing of the assignment of errors and brief. A reply may be filed not later than 10 days after the filing of the answer.

BRIEFS

Rule 24. Form and Content, Page, Limitations, Style, and Classified Information

(a) *Form and content.* All briefs will be legible and will be substantially as follows:

IN THE UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	BRIEF ON BEHALF OF
	)	(APPELLANT, APPELLEE, ETC.)
(Appellee)	)	
(Appellant)	)	
(Respondent)	)	
	)	
v.	)	CMR Dkt. No.
	)	
	)	USCMA Dkt. No.
(Full typed name,	)	
rank, service &	)	
service no. of	)	
accused)	)	
	)	
(Appellant)	)	
(Appellee)	)	
(Petitioner)	)	

Index of Brief
[*See* Rule 24(c)(2)]

Table of Cases, Statutes, and Other Authorities
Statement of the Case

[Set forth a concise chronology including the results of the accused's trial, action by the convening authority, the officer exercising general court-martial jurisdiction (if any), and the Court of Military Review as well as other pertinent information regarding the proceedings.]

Statement of Facts

[Set forth a concise statement of the facts of the case material to the issue or issues presented, including specific page references to each relevant portion of the record of trial. Answers

may adopt appellant's or petitioner's statement of facts if there is no dispute, may state additional facts, or, if there is a dispute, may restate the facts as they appear from appellee's or respondent's viewpoint. The repetition of uncontroverted matters is not desired.]

Issue(s) Presented

[Set forth each issue granted review by the Court, raised in the certificate for review or in the mandatory review case, or represented in the petition for extraordinary relief, writ appeal petition, or petition for new trial. Issues presented will be set forth in upper case letters, and each will be followed by separate arguments pertaining to that issue.]

Argument

[Discuss briefly the point of law presented, citing and quoting such authorities as are deemed pertinent.]

Conclusion

[State briefly the relief sought as to each issue presented, for example, reversal of the Court of Military Review decision and dismissal of the charges, grant of a new trial, the extraordinary relief sought, etc. No particular form of language is required, so long as the brief concludes with a clear prayer for specific Court action.]

Appendix

[The brief of the appellant or petitioner shall include an appendix containing a copy of the Court of Military Review decision, unpublished opinions cited in the brief, and relevant extracts of rules and regulations. The appellee or respondent shall similarly file an appendix containing a copy of any additional unpublished opinions and relevant extracts of rules and regulations cited in the answer.]

(Signature of Counsel)
(Typed name of counsel)
(Address of counsel)
(Telephone no. of counsel)

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was [mailed] [delivered] to the Court and [mailed] [delivered] to (*enter name of each counsel of record*) on (date).

(Typed name and signature)
(Address and telephone no.)

(b) *Page limitations.* Unless otherwise authorized by order of the Court or by motion of a party granted by the Court *see* Rule 30), the page limitations for briefs filed with the Court, not including appendices, shall be as follows:

(1) Briefs of appellants/petitioners shall not exceed 50 pages;

(2) Answers of appellees/respondents shall not exceed 50 pages;

(3) Replies of appellants/petitioners shall not exceed 15 pages;

(c) *Style.* (1) Except for records of trial and as otherwise provided by Rule 27(a)(6), all pleadings or other papers relative to a case shall be typewritten and double spaced on white paper, 8.5 by 11 inches in size, securely fastened at the top. Copies of typewritten pleadings and papers may include those produced by any process capable of producing a clearly legible block image on white paper but shall not include ordinary carbon copies. If papers are filed in any other form, the Clerk shall require the substitution of new copies, but such substitution will not affect the filing date of the papers or pleadings involved. *See* Rule 37.

(2) All pleadings presented to the Court shall, unless they are less than 20 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of cases (alphabetically arranged with citations), textbooks and statutes cited, with references to the pages where cited.

(3) Citations shall conform with the *Uniform System of Citation*.

(4) All references to the record of trial shall include page numbers or exhibit designations, as appropriate.

(5) No pleading or other paper filed with the Court shall incorporate by reference any material from any other source.

(d) *Classified information*. Classified information will be included in documents filed with the Court only when necessary to a proper consideration of the issues involved. The original or one complete copy of a document containing the classified information shall be filed with the Court. The party filing such document shall give written notice to the Clerk and to all other parties prior to the time of such filing that such document contains classified information. In addition, there shall be filed in accordance with Rule 37 an original and four copies of each such document from which the classified information has been deleted or omitted in such manner that the pages which contained the deleted or omitted classified information are clearly identified.

RULES ADVISORY COMMITTEE COMMENT

Rule 24(a) addresses matters relating to the substance and contents of briefs [formerly] contained in Rule 21.

Rule 24(b) establishes a [50] page limit for briefs of appellants or petitioners. Answers of appellees and respondents are subject to the same limit, and replies may not exceed [15] pages. Exceptions to these page limitations may be authorized by order of the Court or on motions made and granted for this purpose.

Rule 24(c) incorporates in this rule matters [formerly] addressed in Rule 36, relating to the style of briefs. The new rule recognizes that, in practice, pleadings and other papers are submitted in typewritten double-spaced format rather than in printed form. Pleadings ten pages or more in length are required to include a subject index, page references, and a table of authorities cited. The rule also requires that citations conform to the *Uniform System of Citation*. All references to the record of trial must include page numbers and exhibit designations, as appropriate.

The [penultimate] subsection is new and deals with submission of documents containing classified material. Only one complete copy of a classified pleading need be submitted. Expurgated copies from which the classified matter has been deleted may be substituted for the additional required copies of the pleading.

DISCUSSION

In addition to the matters required by Rule 24(a), it is often desirable to include a Summary of Argument immediately before the

Argument section of the brief. Morgan, *Appellate Practice Rules*, 27 A.F. L. Rev. 229, 235 (1987); *see also* Fed. R. App. P. 28(a)(4); D.C. Cir. R. 11(a)(4); Fed. Cir. R. 28(a)(9).

Rule 24(b) sets page limits for plenary briefs, but the same limits apply to supplements to petitions and corresponding answers and replies. *See* Rule 21(b).

The reference in Rule 24(c)(1) to "legible block image" should presumably read "legible black image." Letter-size paper has been required since 1982. 15 M.J. 79.

The Court will deny leave to file an index if citations are not furnished for all cases listed in the table of authorities. *United States v. Arquilla*, 21 M.J. 406 (C.M.A. 1986) (mem.). While parallel citations are not required by the Harvard "Blue Book" for decisions of the Supreme Court, *see also U. Chi. Manual of Legal Citation* (1989), the Court of Military Appeals prefers that such decisions be cited to *United States Reports* (U.S.), *Supreme Court Reporter* (S. Ct.) and *Lawyers' Edition* (L. Ed.). The Court's own decisions should be cited to the *Military Justice Reporter*, and, for cases prior to those reported in 1 M.J., to both *United States Court of Military Appeals Reports* (U.S.C.M.A.) and *Court-Martial Reports* (C.M.R.). Letter from Thomas F. Granahan, Clerk of the Court, to Captain Walter S. Landen, Sr., JAGC, USN, Chief, Defense App. Div., Navy-Marine Corps App. Rev. Activity, Dec. 1, 1983, at 3. (Note that use of "U.S.C.M.A." as the citation form for the former official reports is a deviation from the Blue Book's 13th edition (at 134), which uses the shorter "C.M.A." *See* Fulton, *Book Review*, 97 Mil. L. Rev. 127, 131 (1982). The Court's preference in this regard reflects a conscious decision, *see United States v. Rose*, 28 M.J. 132, 133 n.*, 17 MLR 2347 (C.M.A. 1989), and should be honored.) Decisions of the Court have also been published in the *Military Law Reporter* (MLR) since 1972.

Rule 24(c)(5) forbids incorporation of other briefs by reference. *See also* Rule 22(b). The rule goes beyond briefs to include "any material from any other source." Thus, it extends to staff judge advocate reviews. *United States v. Hunter*, 17 M.J. 102 (C.M.A. 1983) (mem.). It does not, however, bar reference to argument in briefs to a Court of Military Review where the references serve merely to bring matters to the Court of Military Appeals' attention under *United States v. Grostefon*, 12 M.J. 431, 10 MLR 2332 (C.M.A. 1982). *United States v. Wattenbarger*, 16 M.J. 453 (C.M.A. 1983) (mem.).

It was held in *United States v. Gray*, 30 M.J. 231, 232 (C.M.A. 1990) (per curiam), that it was improper to append to a brief a memorandum purporting to state the intent of the drafters of a Department of Defense directive on drug abuse testing. The Court cited Rule 24 with a "*cf.*" on this point, but also referred to Rule 30, implying that a motion should have been filed seeking leave to file this evidentiary attachment. In another case, the Court made clear the need for a motion in these circumstances, holding it "impermissible appellate practice [that] will not be condoned" to attempt to "catapult [documents] into the appellate arena simply by attaching them to [a] brief." *United States v. Vangelisti*, 30 M.J. 234, 237 (C.M.A. 1990). *See also United States v. Roach*, 29 M.J. 33, 37, 17 MLR 2635 (C.M.A. 1989).

The explanatory material set forth in paragraph (a) of the rule, however, expressly permits one party to adopt another's statement of facts. The Clerk's office construes the rule to prohibit incorporation by reference of portions of a legal argument or summary of facts in a staff judge advocate's review. Letter from Thomas F. Granahan, Clerk of the Court, to Walter S. Landen, Sr., Chief, Defense App. Div., Navy-Marine Corps App. Rev. Activity, Dec. 1, 1983, at 2. For an illustration of the operation of Rule 24(c)(5) see *United States v. Carlos*, 26 M.J. 308 (C.M.A. 1988) (mem.) (rejecting attempt to incorporate C.M.R. brief by reference). *See* Rule 36(b). When a brief is rejected because it incorporates by reference, the Court will typically allow counsel an opportunity to remedy the defect. *E.g., United States v. Johnson*, 22 M.J. 20 (C.M.A. 1986) (mem.); *United States v. Hunter*, 17 M.J. 102 (C.M.A. 1983) (mem.).

Where leave is sought to file additional authorities, full-text copies of unpublished cases should be appended to the motion. *E.g., United States v. Shroeder*, 26 M.J. 312 (C.M.A. 1988) (mem.); *United States v. Petersen*, 23 M.J. 288 (C.M.A. 1986) (mem.); *see also United States v. Deland*, 20 M.J. 15 (C.M.A. 1985) (mem.). "[C]opies of opinions need to be provided *only* when the opinion is unpublished at the time the motion is filed, even if it will be published later." *United States v. Lingenfelter*, 30 M.J. 219 (C.M.A. 1990) (mem.) (emphasis in original).

If it is intended to refer to additional authorities at oral argument, timely notice should be given to opposing counsel. *See, e.g., United States v. Lucy*, 2 M.J. 144 (C.M.A. 1976) (mem.); *see also United States v. Hubbard*, 21 M.J. 276 (C.M.A. 1985) (mem.) (supplemental citations of authority should not be filed the day before oral argument); *but see United States v. Cooke*, 10 M.J. 410 (C.M.A. 1981) (mem.)

(allowing additional authorities within three days of oral argument). Supplemental authorities should therefore be filed as they arise, rather than waiting until the notice of oral argument has been received. Morgan, *supra*, at 235.

Rule 25. When Briefs are Required

Unless otherwise ordered by the Court, briefs shall be filed in all mandatory review cases and in support of all granted petitions, certificates for review, petitions for extraordinary relief, writ appeal petitions, and petitions for new trial. The appellee's or respondent's answer and appellant's or petitioner's reply in any of the foregoing instances shall also be in the format specified in Rule 24. The answer and reply to the supplement to a petition for grant of review shall be in accordance with Rule 21(c).

RULES ADVISORY COMMITTEE COMMENT

The new rule substantially revises [former] Rule 22 requirements and reflects the change in the petition procedures effected by the [Supplement to the Petition] required by Rule 21. Rule 25 requires briefs in support of granted petitions, certificates for review, assignments of errors in mandatory review cases, petitions for extraordinary relief, writ appeal petitions, petitions for new trial, and in other cases where the Court orders briefs. An appellee's or respondent's answer and appellant's or respondent's reply are required to conform to the form specified in Rule 24.

DISCUSSION

"To expedite the disposition of cases, the court has occasionally waived certain briefing requirements and proceeded directly to hear oral argument." Everett, *The United States Court of Military Appeals: New Issues, New Initiatives*, 36 Fed. B. News & J. 182, 184 (1989). Such cases are quite rare. *E.g., United States v. Yates*, 23 M.J. 360 (C.M.A. 1987) (mem.); *United States v. Harvey*, 23 M.J. 271 (C.M.A. 1986) (mem.). It may also leave further briefing to counsel's discretion, particularly where briefing at the petition stage has been extensive. *United States v. Breseman*, 25 M.J. 194 (C.M.A. 1987) (mem.). In *Murphy v. Garrett*, 30 M.J. 51 (C.M.A. 1990) (mem.), a habeas case, the Court authorized the parties to submit written memoranda or merely rely on oral presentations.

More commonly, the Court will grant review and act summarily,

without oral argument, where it appears that "conservation of 'judicial time and effort' makes summary disposition appropriate." *E.g., United States v. Hayes*, 19 M.J. 6 (C.M.A. 1984) (mem.), *quoting United States v. Fox*, 10 M.J. 176, 9 MLR 2154 (C.M.A. 1981) (per curiam); *United States v. Ireland*, 17 M.J. 181 (C.M.A. 1983) (mem.) (issue concerned only one out of 30 offenses and could reduce sentence from 80½ to 77½ years); *United States v. Gentry*, 14 M.J. 209 (C.M.A. 1982) (mem.) (noting "inordinate" 490-day delay in convening authority's action on 91-page record of trial); *United States v. Perry*, 12 M.J. 112, 113 (C.M.A. 1981) (mem.). Upon reflection, the Court may always conclude that its initial inclination to act summarily was improvident. In such cases it will vacate its prior action and direct plenary briefing. *E.g., United States v. Thomas*, 23 M.J. 278 (C.M.A. 1986) (mem.).

It has been suggested that "[t]here are issues that must clearly be addressed, but which no one expects to grab the court's interest. Consider petitioning for a grant of review before [the Court of Military Appeals], but asking for 'summary disposition' of the matter, ostensibly to save judicial time and effort." Morgan, *Appellate Practice Rules*, 27 A.F. L. Rev. 229, 233 & n.19 (1987). The difficulty with this approach is that it would tend to devalue the summary disposition mechanism by crying "wolf" too often. A petitioner should suggest summary disposition only if the case is a compelling one for reversal or involves an issue which the Court has previously deemed worthy of plenary briefing but has decided adversely. Where the latter is true, summary affirmance is appropriate as a means of opening the door to potential Supreme Court review. Savings of judicial time and effort—always a desirable goal—should not be made the basis for a request for summary disposition if the actual reason for summary disposition is something else.

The Court's summary disposition procedures date from 1977, *Hearings on Dep't of Defense Appropriations for Fiscal Year 1978 Before the Sen. Comm. on Appropriations*, 95th Cong., 1st Sess., pt. 3, 1191 (1977) (statement of Fletcher, C.J.), although the technique has been employed by the Court since its earliest days. *E.g., United States v. McRory*, 1 U.S.C.M.A. 274, 3 C.M.R. 8 (1952). A typical basis for summary disposition is the existence of an intervening precedent on the question presented. *E.g., United States v. Walton*, 15 M.J. 470 (C.M.A. 1983) (mem.). The fact that a case is before the Court on certificate for review does not preclude summary disposition. *Id.* (certificate and cross-petition).

Show cause orders are generally associated with extraordinary writ procedures. *See* Rule 27(a)(4). They may, however, also be employed in cases arising under Article 67(a)(3). *E.g.*, *United States v. Green*, 28 M.J. 103 (C.M.A. 1989) (mem.) (ordering government to show cause why racial/ethnic/sex codes should not be expunged from court-martial order); *United States v. Nunezverdoore*, 28 M.J. 103 (C.M.A. 1989) (mem.) (same). A show cause order may also be issued to test the timeliness of a certificate for review. *United States v. Richardson*, 7 M.J. 215 (C.M.A. 1979) (mem.).

Rule 26. Amicus Curiae Briefs

(a) A brief of an *amicus curiae* may be filed (1) by an appellate government or defense division of an armed service other than that in which the case has arisen, (2) by invitation of the Court, or (3) by motion for leave to file granted by the Court.

(b) Unless otherwise ordered by the Court, a brief of an *amicus curiae* under subsection (a)(1) of this rule shall be filed no later than 10 days after the filing of the answer by the appellee or respondent.

(c) Neither the hearing nor the disposition of a case will be delayed pending action on a motion for leave to file an *amicus curiae* brief or a motion of an *amicus curiae* to participate in a hearing, or to await the filing of a brief of an *amicus curiae* under this rule.

(d) A brief of an *amicus curiae* shall not exceed 30 pages, excluding appendices.

RULES ADVISORY COMMITTEE COMMENT

This rule has been redrafted and substantially expanded. It permits *amicus curiae* briefs to be filed by the appellate counsel divisions of an armed force other than that in which the case arises. Other *amici* may file briefs on motion for leave to file granted by the Court . . . or at the invitation of the Court. . . . Although [the time limit in Rule 26(b)] is the only time limit for the filing of an *amicus curiae* brief, Rule 26(c) expressly provides that hearing or disposition of a case will not be delayed awaiting participation by an *amicus curiae*. The brief of an *amicus* is limited to 30 pages, although presumably an exception may be obtained on motion to the Court, as is provided for the briefs of parties. *See* Rule 24(b). . . .

DISCUSSION

The Court encourages the submission of *amicus curiae* briefs, and has periodically expressed its appreciation to *amici*. 1975 C.M.A. Ann. Rep. 6 (1976); *e.g., United States v. Jacobs*, 31 M.J. 138, 145 n.1 (C.M.A. 1990) (Everett, C.J., dissenting); *United States v. Avila*, 27 M.J. 62, 63 n.2, 16 MLR 2582 (C.M.A. 1988); *Murray v. Haldeman*, 16 M.J. 75, 77 (C.M.A. 1983) (mem.); *United States v. Larneard*, 3 M.J. 76, 79 n.9, 5 MLR 2098 (C.M.A. 1977); *see also Stewart v. Stevens*, 5 M.J. 220, 221 (C.M.A. 1978) (mem.) (Cook, J., concurring).

The Court has long made it a practice to invite the submission of such briefs in important cases. *E.g., United States v. Curtis*, No. 63,044/MC (C.M.A. Dec. 12, 1989) (mem.) (capital case); *United States v. Jefferson*, 21 M.J. 283 (C.M.A. 1985) (mem.); *United States v. Gipson*, 19 M.J. 301 (C.M.A. 1985) (mem.); *Murray v. Haldeman*, 15 M.J. 173 (C.M.A. 1985) (mem.); *United States v. Murphy*, 15 M.J. 170 (C.M.A. 1983) (mem.); *United States v. Matthews*, 14 M.J. 447 (C.M.A. 1982) (mem.); *Cooke v. Orser*, 12 M.J. 116 (C.M.A. 1981) (mem.); *United States v. Cortes-Crespo*, 11 M.J. 363, 364 (C.M.A. 1981) (mem.); *Wickham v. Hall*, 11 M.J. 357 (C.M.A. 1981) (mem.); *United States v. Schreck*, 8 M.J. 136 (C.M.A. 1979) (mem.) (case invited to attention of potential *amici* by letter from Clerk); *Hyre v. Brady*, 5 M.J. 1131 (C.M.A. 1976) (mem.); *Butler v. Kilcline*, 5 M.J. 1005, 1048 (C.M.A. 1976) (mem.) (requesting assignment of counsel versed in international law); *Stewart v. Stevens*, 4 M.J. 290 (C.M.A. 1978) (mem.); *Barnett v. Scott*, 4 M.J. 289 (C.M.A. 1978) (mem.); *United States v. Booker*, 4 M.J. 137 (C.M.A. 1977) (mem.) (granting reconsideration); *United States v. Jackson*, 2 M.J. 156 (C.M.A. 1976) (mem.); *Courtney v. Williams*, 1 M.J. 267, 4 MLR 2057 (1976), *noted in* Note, *Building a System of Military Justice Through the All Writs Act*, 52 Ind. L.J. 189, 195 & n.42 (1976); *United States v. Wilson*, 9 U.S.C.M.A. 60, 25 C.M.R. 322 (1958); *see also* R. Tedrow, *Annotated and Digested Opinions, U.S. Court of Military Appeals* 219 (1966) (collecting cases); B. Feld, *A Manual of Courts-Martial Practice and Appeal* 146 (1957), *citing United States v. Goodwin*, 5 U.S.C.M.A. 647, 18 C.M.R. 271 (1955). *Amici* may also be allowed to present oral argument. Discussion of Rule 40.

The generally smooth sailing accorded *amici* is not without exceptions. From time to time, the Court has denied would-be *amici* leave to file, *e.g., Ward v. Hall*, 13 M.J. 470 (C.M.A. 1982) (mem.); *United States v. Fimmano*, 8 M.J. 256 (C.M.A. 1980) (mem.); *United States v. Slubowski*, 8 M.J. 108 (C.M.A. 1979) (mem.) (brief tendered after issuance of decision; *held*, moot); *United States v. Lightfoot*, 4 M.J.

271 (C.M.A. 1978) (mem.) (denying individual serviceman's motion for leave to file *amicus* brief); *United States v. Yager*, 2 M.J. 162 (C.M.A. 1976) (mem.) (post-argument brief), cautioned an *amicus* to confine itself to the issues identified by the Court, *Murray v. Haldeman*, 15 M.J. 297 (C.M.A. 1983) (mem.), or granted leave to file while denying the *amicus* an opportunity to present oral argument. *E.g., United States v. Newak*, 16 M.J. 322 (C.M.A. 1983) (mem.). Overall, however, the Court goes much further out of its way to accommodate *amici* than other appellate courts. *E.g., Murray v. Haldeman*, 15 M.J. 337 (C.M.A. 1983) (mem.) (special hearing arrangements).

Like parties, *amici* may be permitted to file supplemental briefs. *Dobzynski v. Green*, 15 M.J. 394 (C.M.A. 1983) (mem.); *United States v. Brownd*, 6 M.J. 63 (C.M.A. 1978) (mem.) (reply brief); *United States v. Booker*, 4 M.J. 223 (C.M.A. 1977) (mem.) (reply to brief of another *amicus*).

Most *amicus* briefs are filed in cases before the Court for plenary consideration on petition for grant of review or extraordinary writ. At times, such a brief may be offered at the reconsideration stage. *E.g., United States v. Quillen*, 28 M.J. 79 (C.M.A. 1989) (mem.). If there is concern that the Court may not grant review in an Article 67(a)(3) case, an *amicus* brief should be filed at the petition stage, rather than waiting for a grant of review that may never occur. Given the fact that most petitions are denied, the *amicus* may not have a second chance to present its views.

Would-be *amici* typically file their motion for leave with the brief, but in some cases the motion has been filed first. *E.g., United States v. Quillen*, 28 M.J. 79 (C.M.A. 1989) (mem.). Motions for leave to file must be served on the parties. *United States v. Wheeler*, 21 M.J. 94 (C.M.A. 1985) (mem.). Once an *amicus* has appeared, all pleadings should be served on *amicus* counsel. Rule 39(a); *United States v. Hood*, 6 M.J. 105 (C.M.A. 1978) (mem.) (granting motion to compel service of motions and briefs on *amicus*). Typically counsel for the parties will, upon request, furnish courtesy copies of pleadings that have been filed prior to the *amicus*' entry into the case.

In the 1983 rules changes, the Court deleted proposed provisions that would have (1) allowed filing of *amicus* briefs by consent of the parties and (2) encouraged organizations wishing to be advised of cases in which the Court invites the submission of briefs as *amicus curiae* may inform the Clerk in writing of their interest in such matters. It also modified a provision that would have required the brief

of an *amicus curiae* filed by an appellate counsel division to be filed within the time allowed the party whose position the brief will support.

EXTRAORDINARY RELIEF

Rule 27. Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply

(a) *Petition for extraordinary relief.* (1) A petition for extraordinary relief, together with any available record, shall be filed within the time prescribed by Rule 19(d), shall be accompanied by proof of service on all named respondents, and shall contain:

(A) A previous history of the case including whether prior actions or requests for the same relief have been filed or are pending in this or any other forum and the disposition or status thereof;

(B) A concise statement of the facts necessary to understand the issue presented;

(C) A statement of the issue;

(D) The specific relief sought;

(E) The jurisdictional basis for the relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of trial or appellate review or through administrative procedures; and

(F) Reasons for granting the writ.

(2) *Service on Judge Advocate General.* The Clerk shall forward a copy of the petition to the Judge Advocate General of the service in which the case arose.

(3) *Brief, answer and reply.* Each petition for extraordinary relief shall be accompanied by a brief in support of the petition substantially in the form specified in Rule 24, unless it is filed *in propria persona*. The Court may issue an order to show cause, in which event the respondent(s) shall file an answer. The petitioner may file a reply to the answer. *See* Rule 28(b)(1) and (c)(1).

(4) *Initial action by the Court*. The Court may, as the circumstances require, dismiss or deny the petition, order the respondent(s) to show cause and file an answer within a time specified, or take any other action deemed appropriate, including referring the matter to a special master, who may be a military judge or other person, to make further investigation, to take evidence, and to make such recommendations to the Court as are deemed appropriate. *See United States v. DuBay*, 17 U.S.C.M.A. 147 (1967).

(5) *Hearing and final action*. The Court may set the matter for hearing. However, on the basis of the pleadings alone, the Court may grant or deny the relief sought or issue such other order in the case as the circumstances may require.

(6) *Electronic message petitions*. The Court will docket petitions for extraordinary relief submitted by means of an electronic message.

(A) The message will contain the verbatim text of the petition, will conclude with the full name and address of petitioner's counsel, and will state when counsel placed the written petition and brief required by subsections (a)(1) and (a)(3) in the mail addressed to the Court and to all named respondents in accordance with Rules 36 and 39.

(B) As the Court does not possess the capability for direct receipt of electronic messages, each such message will be transmitted to the Chief of the Appellate Defense Division or Appellate Government Division, as appropriate, within the Office of the Judge Advocate General of petitioner's service, with copies to all named respondents. Upon receipt of the message in the appropriate appellate division office, clearly legible copies will be reproduced and filed in accordance with Rule 37 by an appellate counsel appointed within such office.

(b) *Writ appeal petition, answer and reply*. A writ appeal petition for review of a decision by a Court of Military Review acting on a petition for extraordinary relief shall be filed by an appellant, together with any available record, within the time prescribed by Rule 19(e), shall be accompanied by proof of service on the appellee, and shall contain the specific information required by subsection (a)(1) above. In addition, unless it is filed *in propria persona*, such petition shall be accompanied by a sup-

porting brief substantially in the form specified in Rule 24. If such petition is filed *in propria persona* appellate military counsel designated by the Judge Advocate General in accordance with Rule 17 will file a supporting brief no later than 20 days after the issuance by the Clerk of a notice of docketing of the petition. The appellee shall file an answer no later than 10 days after the filing of the appellant's brief. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer. *See* Rule 28(b)(2) and (c)(2). Upon the filing of pleadings by the parties, the Court may grant or deny the writ appeal petition or take such other action as the circumstances may require.

RULES ADVISORY COMMITTEE COMMENT

This rule deals with topics addressed in Rule 25 of the [former] Rules of the Court.

Rule 27(a) requires that a petition for extraordinary relief be filed within the time prescribed by Rule 19(d), accompanied by proof of service on all named respondents. Material which must be included in the petition is listed. This material has been expanded to require that the jurisdictional basis for the relief sought include the reasons why the relief requested cannot be obtained during the ordinary course of trial or appellate review or through administrative procedures. The Clerk is required to forward a copy of the petition to the Judge Advocate General of the service of which the petitioner is or was a member. Each petition for extraordinary relief must be accompanied by a brief in support of the petition unless it is filed *in propria persona*. The Court may thereupon issue a show cause order, in which event the respondent(s) shall file an answer and the petitioner may file a reply to any answer. The Court may, depending on the circumstances of a particular case, dismiss or deny the petition, order the respondent(s) to show cause and file an answer, or take other appropriate action. It may also direct that the Judge Advocate General furnish counsel to represent the petitioner and respondents. The Court may set the matter for oral argument or, on the basis of the pleadings alone, may grant or deny the relief sought or issue any other order which the circumstances require.

Rule 27(a)(6) adds a provision for submitting petitions by electronic message, but only in exceptional circumstances and then from petitioners located outside the contiguous 48 states. Administrative requirements are set forth to ensure that these messages are received by the Court. A written petition and brief must be in the mail, addressed to the Court and to named respondents, on or before the

day that the electronic message is transmitted. Such messages must be sent to the chief of the appropriate appellate division. When the message is received in an appellate division office, legible copies will be reproduced and filed with the Court by an appellate counsel appointed within that office.

A new subsection 27(b) to this rule provides for a "writ appeal petition" as a new style of pleading. A "writ appeal petition" is a petition for discretionary review of a decision of a Court of Military Review on application for extraordinary relief. Such a petition must be filed by an appellant not later than 20 days after the date the Court of Military Review decision is served on the appellant or his counsel (*see* Rule 19(e)). Unless the appellant has filed the petition himself, the petition shall be accompanied by a brief in the format specified in Rule 24. If the appellant is not represented by counsel, the Court will normally direct the appointment of counsel and the filing of a supporting brief not later than 20 days after the filing of the writ appeal petition. The appellee files an answer no later than 10 days after the filing of appellant's brief. A reply may be filed within 5 days after the filing of the answer. Upon filing of pleadings by the parties, the Court may grant or deny the writ appeal petition or take such other action as may be appropriate.

DISCUSSION

Entry of an order directing the appointment of counsel, *see* Rule 17, indicates only that the Court may believe a substantial question is presented. It by no means guarantees a favorable ruling on the merits. *See, e.g., Dansby v. Commanding Officer*, 15 M.J. 287 (C.M.A.) (mem.), *app. dismissed as moot*, 15 M.J. 464 (C.M.A. 1983) (mem.).

The Court may, under Rule 27(a), grant *ex parte* relief. For example, in *Johnson v. Thurman*, 3 M.J. 373 (C.M.A. 1977) (mem.), a *pro se* original habeas application, the Court, over the dissent of Judge Cook, summarily issued the writ *ex parte* where it was alleged that an accused's conviction had been reversed but he had been retained in confinement for 60 days thereafter without being brought before a magistrate. An *ex parte* stay was granted in *Murphy v. Garrett*, 30 M.J. 51 (C.M.A. 1990) (mem.). The stay issued the same day that the petition was filed. *Ex parte* writs should be extremely rare since it is ordinarily possible to schedule a hearing on short notice, as the Court has frequently done. *See* Discussion of Rule 40.

Under a 1990 rules change, a Senior Judge may be designated as a special master. Rule 3A(b). In *U.S. Navy-Marine Corps Court of*

Military Review v. Carlucci, 26 M.J. 328, 341, 16 MLR 2443 (C.M.A. 1988), *report accepted and filed*, 30 M.J. 29 (1990) (mem.), the Court appointed one of its own judges as a special master, but that should no longer be necessary. More commonly, it will appoint a member of its staff. *E.g., United States v. Everhart*, 30 M.J. 164 (C.M.A. 1990) (mem.); *United States v. Malaterre*, 30 M.J. 165 (C.M.A. 1990) (mem.); *United States v. Capps*, 23 M.J. 405 (C.M.A. 1987) (mem.). It has also relied on military judges to perform tasks resembling those of a special master. *United States v. Vietor*, 10 M.J. 69, 73, 9 MLR 2019 (C.M.A. 1980); *United States v. Killebrew*, 9 M.J. 154, 162, 8 MLR 2372 (C.M.A. 1980).

Extraordinary relief has been sought by electronic message in only a few cases. *E.g., Green v. United States*, 9 M.J. 130 (C.M.A. 1980) (mem.). An analogous provision to Rule 27(a)(6) appears in C.M.R.R. 20(c). Unlike some other courts, *see* 76 A.B.A.J. 19-20 (May 1990), the Court has made no provision for filing by facsimile machine (fax). In one instance, a writ pleading was faxed to the courthouse from Hawaii and apparently was circulated to chambers, but it was not deemed filed.

Rule 28. Form of Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply

(a) *Petition/writ appeal petition*. A petition for extraordinary relief or a writ appeal petition for review of a Court of Military Review decision on application for extraordinary relief will be accompanied by any available record and will be substantially in the following form:

IN THE UNITED STATES COURT OF MILITARY APPEALS

)	**[PETITION FOR EXTRAORDINARY**
)	**RELIEF IN THE NATURE OF**
)	**(Type of writ sought)]**
)	
)	**OR**
)	

(Petitioner)	)	[WRIT APPEAL PETITION FOR
(Appellant)	)	REVIEW OF COURT OF MILITARY
	)	REVIEW DECISION ON
	)	APPLICATION FOR
v.	)	EXTRAORDINARY RELIEF]
	)	
	)	USCMA Misc. Dkt. No.
	)	[For Court use only]
(Respondent)	)	
(Appellee)	)	

Preamble

The (petitioner) (appellant) hereby prays for an order directing the (respondent) (appellee) to:

[Briefly state the relief sought.]

I

History of the Case

[*See* Rule 27(a)(1)(A)]

II

Statement of Facts

[*See* Rule 27(a)(1)(B)]

III

Statement of Issue

[Do not include citations of authority or discussion of principles. Set forth no more than the full question of law involved.]

IV

Relief Sought

[State with particularity the relief which the petitioner or appellant seeks to have the Court order.]

V

Jurisdictional Statement

[*See* Rule 27(a)(1)(E)]

VI

Reasons for Granting the Writ

[Where applicable, indicate why the Court of Military Review erred in its decision]

Signature of

[petitioner][appellant][counsel]

Address & phone number of

[petitioner][appellant][counsel]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was [mailed] [delivered] to the Court and [mailed] [delivered] to the [respondent] [appellee] on (date).

(Typed name and signature)

(Address and telephone no.)

(b) *Answer*. (1) The respondent's answer to an order to show cause, if ordered by the Court after consideration of a petition for extraordinary relief, shall be in substantially the same form as that of the petition, except that the answer may incorporate the petitioner's statement of facts, add supplementary facts, or contest the statement. To the extent that the petitioner's state-

ment of facts is not contested by the respondent, it shall be taken by the Court as representing an accurate declaration of the basis on which relief is sought. The answer to the order to show cause will be filed no later than 10 days after service on the respondent of the order requiring such answer, unless a different time for filing the answer is specified in the Court's order.

(2) The appellee's answer to a writ appeal petition shall be filed no later than 10 days after the filing of the appellant's writ appeal petition and supporting brief.

(c) *Reply*. (1) A reply may be filed by the petitioner no later than 5 days after the filing of a respondent's answer to an order to show cause.

(2) A reply may be filed by an appellant, in the case of a writ appeal petition, no later than 5 days after the filing of an appellee's answer.

RULES ADVISORY COMMITTEE COMMENT

This rule provides in subsection (a) a form which may be used for a petition for extraordinary relief in the exercise of the Court's original jurisdiction or for a writ appeal petition.

In the case of a petition for extraordinary relief, subsection (b)(1) requires that an answer be filed only when the Court issues a show cause order. Such answer shall be substantially in the same form as that of the petition. It may incorporate the petitioner's statement of facts, add supplementary facts, or contest that statement. The answer must be filed by the respondent no later than 10 days after service of the show cause order, unless a different time is specified by the Court. Under subsection (c)(1), a petitioner may file a reply no later than 5 days after the filing of the respondent's answer to the show cause order.

In the case of a writ appeal petition, subsection (b)(2) requires that an appellee's answer be filed not later than 10 days after the filing of the appellant's writ appeal petition and supporting brief, without the issuance by the Court of a show cause order. Under subsection (c)(2), a reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer.

DISCUSSION

If the petition fails "to allege sufficient facts and circumstances to enable [the] Court to determine if it has jurisdiction," it will be dismissed. *Sills v. Keller*, 14 M.J. 317 (C.M.A. 1982) (mem.) (noting failure to allege that "complaint resulted from any court-martial proceeding or any other action under" UCMJ). *See generally* Discussion of Rule 4 (collecting cases).

PETITIONS FOR NEW TRIAL

Rule 29. Filing, Notice, and Briefs

(a) *Filing*. A petition for new trial will be filed with the Judge Advocate General of the service concerned, who, if the case is pending before this Court, will transmit it, together with four copies, to the Clerk's office for filing with the Court.

(b) *Notice*. Upon receipt of a petition for new trial transmitted by the Judge Advocate General, the Clerk will notify all counsel of record of such fact.

(c) *Briefs*. A brief in support of a petition for new trial, unless expressly incorporated in the petition, will be filed substantially in the form specified in Rule 24 no later than 30 days after the issuance by the Clerk of a notice of the filing of the petition. An appellee's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed no later than 10 days after the filing of the appellee's answer.

(d) *Special Master*. The Court may refer a petition for new trial to a special master, who may be a military judge or other person, to make further investigation, to take evidence, and to make such recommendations to the Court as are deemed appropriate. *See United States v. DuBay*, 17 U.S.C.M.A. 147 (1967).

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 27 are retained. However, . . . subsection (c) contains an express requirement for the filing of a brief in support of the petition and sets forth the time limits for filing the brief, answer, and reply.

DISCUSSION

"A petition for new trial is to be initially filed with the Judge Advocate General, who will cause said petition to be transmitted *by letter* signed by his designated representative to the appropriate court." *United States v. Loguda*, 19 M.J. 307 n.* (C.M.A. 1985) (mem.) (emphasis in original). *See generally* R.C.M. 1210; D. Schlueter, *Military Criminal Justice: Practice and Procedure* § 16-21 (2d ed. 1987); Carlle, *New Trial Petitions Under Article 73, UCMJ*, 13 Advocate 2 (1981). Ordinarily the Court will dispose of a new trial petition and the merits of a case before it under Article 67(a)(3) at the same time. An order in the Article 67(a)(3) case alone, however, does not divest the Court of jurisdiction over the new trial petition. *United States v. Thompson*, 21 M.J. 179 n.* (C.M.A. 1985) (mem.). Where a new trial petition has been mooted by a decision under Article 66, but that decision is overturned by the Court of Military Appeals, the new trial petition is *un*mooted and may be addressed by the Court of Military Review on remand, even if the petition had not been briefed to the Court of Military Appeals. *United States v. Seivers*, 9 M.J. 612, 614, 8 MLR 2177 (A.C.M.R.), *aff'd mem.*, 9 M.J. 397, 8 MLR 2531 (C.M.A. 1980).

When a new trial is sought on grounds of newly discovered evidence, the burden on the petitioner is heavier than during direct appellate review. *United States v. Bacon*, 12 M.J. 489, 10 MLR 2357 (C.M.A. 1982). New trial petitions are rarely filed, *e.g.*, FY87 C.M.A. Ann. Rep. 20 (1988) (2769 total filings, eight new trial petitions), and even more rarely granted.

New trial issues may be raised by petition for grant of review of a Court of Military Review decision on a new trial petition as well as by submission of an original petition for new trial to the Court of Military Appeals. *E.g.*, *United States v. Chaff*, 13 U.S.C.M.A. 438, 32 C.M.R. 438 (1963). The Court's scope of review—and the petitioner's burden—should be unaffected by the choice. For the effect of submission of a new trial petition on the deadline for filing a petition for grant of review see Discussion of Rule 19.

MOTIONS

Rule 30. Motions

(a) All motions will be filed in writing and will state with particularity the relief sought, the factual or legal grounds for requesting such relief, and will include a certificate of filing and service in accordance with Rule 39(c). A copy will be served on opposing counsel and others who have entered an appearance in the proceedings.

(b) Any answer to a motion will be filed no later than 5 days after the filing of the motion.

(c) Motions will be separately filed before the Court and shall not be incorporated in any other pleading.

(d) Once a notice of hearing has been given to counsel for the parties, motions other than those to file recent supplemental citations of authority without additional argument may not be filed within 5 working days prior to the date on which such hearing is scheduled except by leave of the Court and for good cause shown.

(e) Oral motions presented by leave of the Court during a hearing shall be forthwith reduced to writing by the moving counsel and filed with the Court within 3 days after such hearing.

(f) Notwithstanding any other provision of these rules, the Court may immediately act on any motion without awaiting an answer from the opposing side, if it appears that the relief sought ought to be granted. Any party adversely affected by such action may request reconsideration, vacation, or modification of such action.

RULES ADVISORY COMMITTEE COMMENT

This rule covers material contained in Rule 28 of the Court's [1977] rules. Editorial revisions have been made to require that all motions state the legal and factual grounds for requesting relief and that there be included in each motion pleading the new standardized certificate of filing and service. An answer to a motion, if any, will be filed within 5 days after filing of the motion. However, a new provision in subsection (b) encourages the filing counsel, where applicable, to incorporate a statement that opposing counsel indicated no objection to the motion. In addition, subsection (c) expressly prohibits counsel from incorporating a motion in any other pleading. Once

notice of hearing has been given to the parties, subsection (d) provides that motions may not be filed within 5 working days prior to the date on which the hearing is scheduled, except by leave of Court and for good cause shown.

COMMENT

There is no page limit for motions, answers and replies.

A motion should not be made in or combined with a brief. Rule 30(c) does not preclude the combination of more than one motion in a single paper. Where motions are combined in this fashion, all must be identified in the title of the pleading, *see United States v. Barna*, 16 M.J. 194 (C.M.A. 1983) (mem.) (*semble*) (striking portion of motion to cite additional authority that sought summary disposition), to the right of the caption. The precise relief sought in respect of each aspect should be stated. Any response to a motion should be styled an "Answer." *See generally* Letter from Thomas F. Granahan, Clerk of the Court, to Captain Walter S. Landen, Sr., JAGC, USN, Chief, Defense App. Div., Navy-Marine Corps App. Rev. Activity, Dec. 1, 1983, at 2; *e.g.*, *United States v. Talty*, 16 M.J. 435 (C.M.A. 1983) (mem.). The rule's choice of terms can create confusion, as the same word is used to describe certain briefs submitted by an appellee or respondent. A good solution is to name the pleading to which any particular answer responds (*e.g.*, Petitioner's Answer to Motion to Dismiss).

Motions that are noncontroversial—particularly, but not only, those that fall within the Clerk's authority under Rule 9(d)—should be discussed beforehand with opposing counsel and, where consent or lack of objection has been obtained, that fact should be stated prominently in the pleading. Letter from Thomas F. Granahan, *supra*, at 3. This will permit the Court to identify matters that can safely be addressed without awaiting an answer. *See* Rule 30(f). A typical formula might be: "We are authorized by Lieutenant William Bligh, JAGC, USNR, counsel for the respondent, to state that respondent has no objection to the relief requested herein [and will not be filing an answer]." There should be no need to secure opposing counsel's signature on a consented pleading, but at times this may be desirable. *Cf.* Discussion of Rule 16.

Where a motion rests on factual averments, an affidavit should be submitted, and the Court may so require. *E.g.*, *United States v. Loguda*, 19 M.J. 307, 308 (C.M.A. 1985) (mem.); *United States v. Ramirez*, 19 M.J. 289 (C.M.A. 1985) (mem.). For a convenient method

that dispenses with the need for an officer authorized to administer oaths see 28 U.S.C. § 1746 (1988).

The Clerk has also indicated that a motion to correct errata may be filed, rather than a motion for leave to file corrected pages, where the corrections are limited to "a few minor typographical spelling errors." Letter from Thomas F. Granahan, *supra*, at 3.

Unlike some tribunals, *e.g.*, D.D.C.R. 108(c), the Court does not require that a proposed order be submitted with motions. Preparation of a proposed order may, however, be useful as a means of avoiding possible confusion as to the precise relief sought.

For rare instances in which motions may be made in open court see *United States v. Dicupe*, 19 M.J. 151 (C.M.A. 1984) (mem.) (motion to argue *pro hac vice*); *United States v. Thurman*, 6 M.J. 166 (C.M.A. 1979) (mem.).

RECONSIDERATION

Rule 31. Petition for Reconsideration

(a) A petition for reconsideration may be filed no later than 10 days after the date of any order, decision, or opinion by the Court.

(b) An answer may be filed by opposing counsel no later than 5 days after the filing of the petition.

(c) The concurrence of two judges who participated in the original decision shall be required for the allowance of a petition for reconsideration.

(d) Consecutive petitions for reconsideration, and any such petition that is out of time, will not be filed unless accompanied by a motion for leave to file the same, in accordance with Rule 30, and unless such motion is granted by the Court.

RULES ADVISORY COMMITTEE COMMENT

Editorial changes have been made to [former] Rule 29 to provide for filing of answers no later than 5 days after filing of the petition. A requirement has been added for the concurrence of two judges to allow a petition for reconsideration, modification or rehearing. A judge who did not participate in the initial decision is expressly permitted to take part in the decision to dispose of petitions under

this rule. This provision should ameliorate problems which may arise from the occurrence of a vacancy on the Court.

DISCUSSION

If there are viable grounds to do so, a petition for reconsideration should by all means be filed. The Court grants reconsideration sparingly, *see, e.g.*, FY87 C.M.A. Ann. Rep. 20-21 (1988) (237 master docket filings, five petitions for reconsideration granted), but lightning occasionally strikes. *E.g.*, *United States v. McKinney*, 9 M.J. 86, 8 MLR 2362 (C.M.A. 1980) (per curiam); *United States v. Bowling*, 9 M.J. 54 (C.M.A. 1980) (mem.); *United States v. Hybertson*, 2 M.J. 154 (C.M.A. 1976) (mem.); *United States v. Binkley*, 19 U.S.C.M.A. 494, 42 C.M.R. 96 (1970) (reconsidering denial of petition after reversal of coaccused's case); *United States v. Adams*, 19 U.S.C.M.A. 262, 41 C.M.R. 262 (1970) (intervening Supreme Court decision); *United States v. Garcia*, 18 U.S.C.M.A. 5, 39 C.M.R. 5 (1968) (contrary C.M.A. ruling in another case three days after denial of petition for grant of review). The judges will give the matter serious attention, and a further opinion may ensue. Even if the petition fails to achieve the desired result, it at least furnishes additional assurance to the accused that his or her case has been considered based on a correct understanding of the facts and the issues. *E.g.*, *United States v. Berg*, 31 M.J. 38 (C.M.A. 1990); *United States v. Toledo*, 26 M.J. 104, 16 MLR 2319 (C.M.A.), *cert. denied*, 109 S. Ct. 220, 16 MLR 2641 (1988). Under Rule 32, the petition may not merely restate arguments already presented, but must show that the Court " 'overlooked or misapprehended' [a] point of law or fact critical to [its] original decision." *United States v. Quillen*, 28 M.J. 166 (C.M.A. 1989) (mem.).

One factor that militates against reconsideration requests in the lower federal courts—the risk of having a good appellate issue "cert-proofed"—should play no role in the decision to seek reconsideration from the Court of Military Appeals for the simple reason that the chances of obtaining a grant of certiorari are so slender to begin with that the incremental harm to the litigant's prospects are, for all practical purposes, nil. If there is doubt about the meaning of an action by the Court, the matter should be made the subject of an appropriate motion, either under this rule or the generic provisions of Rule 30. *E.g.*, *United States v. Hawkins*, 11 M.J. 4, 9 MLR 2472 (C.M.A. 1981).

In a proper case, the period for seeking reconsideration may be enlarged. *E.g.*, *United States v. Repp*, 24 M.J. 447, 15 MLR 2542 (C.M.A. 1987) (mem.), *cert. denied*, 108 S. Ct. 749, 16 MLR 2055

(1988), *discussed in* Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 MLR 6001, 6003 & nn.24-26, 6006 (1988); *United States v. Kuskie*, 11 M.J. 253, 254, 9 MLR 2700 (C.M.A. 1981) (2-1) (granted petition for reconsideration filed 14 days late; Appellate Review Activity unaware of petitioner's death until day petition for grant of review was denied).

Rule 31(c) clarifies a point that arose in *United States v. Fimmano*, 8 M.J. 197, 8 MLR 2074 (C.M.A. 1980), *reconsideration not granted*, 9 M.J. 256, 8 MLR 2532 (C.M.A. 1980) (mem.), where Chief Judge Everett concluded that he should not vote on a petition for reconsideration of a case decided before he was elevated to the bench. *Fimmano* was overturned soon after, in *United States v. Stuckey*, 10 M.J. 347, 9 MLR 2292 (C.M.A. 1981). *See also United States v. Goodson*, 19 M.J. 138 (C.M.A. 1984) (mem.) (petition for reconsideration not granted by equally divided vote, Cox, J., not participating), *vacated & remanded on other grounds*, 471 U.S. 1063, 13 MLR 2286 (1985) (mem.).

Where the Court announces its ruling but defers issuance of the opinion, the period for seeking reconsideration will run from release of the opinion. *E.g., United States v. Smith*, 27 M.J. 408 (C.M.A. 1988) (mem.).

Rule 31(d) requires that a motion for leave be filed with an untimely petition for reconsideration. *United States v. Simpkins*, 19 M.J. 272 n.* (C.M.A. 1985) (mem.).

"Although [its] rules do not so provide, th[e] Court has on numerous occasions recalled a previous ruling on its own motion." *United States v. Ledbetter*, 2 M.J. 37, 52, 4 MLR 2577 (C.M.A. 1976) (Cook, J., concurring in part), *citing United States v. Sanchez*, 23 U.S.C.M.A. 650 (1975) (mem.), *and United States v. Aharonian*, 23 U.S.C.M.A. 649 (1975) (mem.); *see, e.g., United States v. Scranton*, 30 M.J. 322-23 (C.M.A. 1990) (noting *sua sponte* rescission of order denying issueless petition for grant of review).

The Court enters an order making its opinion final when no petition for reconsideration is filed within the period prescribed by Rule 31(a). *E.g., United States v. True*, 28 M.J. 241 (C.M.A. 1989) (mem.).

Rule 32. Form of Petition for Reconsideration

A petition for reconsideration will be filed in substantially the following form:

IN THE UNITED STATES COURT OF MILITARY APPEALS

	)	**PETITION FOR RECONSIDERATION**
	)	
(Appellee)	)	
(Appellant)	)	
(Respondent)	)	
(Petitioner)	)	
	)	
v.	)	**CMR Dkt. No.**
	)	
	)	**USCMA Dkt. No.**
	)	
(Appellant)	)	
(Appellee)	)	
(Petitioner)	)	
(Respondent)	)	

TO THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

The Court is requested to reconsider its (opinion) (order) (decision) in this case for the following reason(s):

[The petition shall state with particularity the points of law

or fact which, in the opinion of the party seeking reconsideration, the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the party desires to present. Petitions are not to contain merely a restatement of arguments already presented.]

(Counsel's typed name and signature)

(Counsel's address and telephone no.)

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was [mailed] [delivered] to the Court and [mailed] [delivered] to the [appellant] [appellee] [petitioner] [respondent] on (date).

(Typed name and signature)

(Address and telephone no.)

RULES ADVISORY COMMITTEE COMMENT

A new standardized certificate of filing and service has been substituted for the certificate of service in [former] Rule 30. Otherwise, [former] Rule 30 remains unchanged.

PRACTICE BEFORE THE COURT

Rule 33. Suspension of Rules

For good cause shown, the Court may suspend any of these rules in a particular case, on application of a party or on its own motion, and may order proceedings in accordance with its direction.

RULES ADVISORY COMMITTEE COMMENT

The provision in [former] Rule 31 for suspending rules for excusable neglect has been omitted. The Committee feels the "good cause" exception in the rule is sufficiently broad to cover cases of "excusable neglect."

DISCUSSION

Where a proposed pleading does not comply with the rules, it is important that a Rule 33 suspension be sought. Even if the noncon-

forming pleading is ultimately accepted (as when opposing counsel voices no objection), or counsel is afforded an opportunity to remedy the defect, *e.g.*, *United States v. Reichenbach*, 28 M.J. 88 (C.M.A. 1989) (mem.); *United States v. Dillon*, 28 M.J. 86 (C.M.A. 1989) (mem.), counsel may still be needlessly embarrassed. *E.g.*, *United States v. Poole*, 24 M.J. 224 (C.M.A. 1987) (mem.) (ordering argument on motion for leave to file untimely supplement to petition); *United States v. Thompson*, 22 M.J. 2 (C.M.A. 1986) (mem.); *United States v. Lloyd*, 20 M.J. 141 (C.M.A. 1985) (mem.).

The nature of the case should be considered in deciding how much of an enlargement to seek. For example, the Court has noted, in a case involving a cross-petition, that certificates for review and petitions for grant of review are processed differently, and a particular filing date may delay rather than promote the petition process. *United States v. Brabant*, 27 M.J. 420 (C.M.A. 1988) (mem.). It is always preferable not to wait until a pleading is due before seeking an extension of time. *E.g.*, *United States v. Reichenbach*, *supra*; *United States v. Jones*, 26 M.J. 312 (C.M.A. 1988) (mem.); *United States v. McDougald*, 19 M.J. 213 (C.M.A. 1984) (mem.).

If leave to file an out-of-time submission is sought, the proposed pleading should accompany the motion for leave. *See United States v. Simpkins*, 19 M.J. 272 n.* (C.M.A. 1985) (mem.). The rule refers to "good cause" as the basis for suspensions, but the concept of excusable neglect, which previously was an alternative basis for relief, seemingly still figures in the Court's decision making. *United States v. Aho*, 23 M.J. 171 (C.M.A. 1986) (mem.) (Cox, J., dissenting).

The Court has become increasingly concerned about anything that contributes to appellate delay, and has therefore been anxious to keep extensions of time to a minimum. The reasons for failing to file on time should be stated with particularity. *United States v. Reichenbach*, *supra* ("[m]erely saying other duties do not permit counsel to file pleading is inadequate"); *United States v. Dillon*, *supra*. The request should "include specific reasons why the normal time is inadequate." *United States v. Coleman*, 24 M.J. 67 (C.M.A. 1987) (mem.); *United States v. Toledo*, 23 M.J. 44 (C.M.A. 1986) (mem.). Conclusory statements, *United States v. Zayas*, 21 M.J. 309 (C.M.A. 1985) (mem.), or broad generalities such as "administrative oversight," *United States v. Poole*, 24 M.J. 224 (C.M.A. 1987) (mem.); *United States v. Bradshaw*, 24 M.J. 200 n.* (C.M.A. 1987) (mem.), or "pressing business commitments attendant to the close of the fiscal year," *United States v. Lewicki*, 22 M.J. 377 (C.M.A. 1986) (mem.) ("sounds

too much like saying the law firm has more important things to do than to timely file a brief in the appeal of a murder case involving a life sentence''), are insufficient.

The need to be specific increases where repeated extensions of time are sought. *See United States v. Harvey*, 22 M.J. 235 (C.M.A. 1986) (mem.); *Davies v. Secretary of the Army*, 16 M.J. 142 (C.M.A. 1983) (mem.). But even if counsel fails to justify an enlargement, the Court remains loath to penalize the client. *United States v. Adames*, 22 M.J. 234 (C.M.A. 1986) (mem.) (counsel's failure to file timely petition for reconsideration attributed to noncompliance with Rule 16(b); *held*, relief not warranted on the merits); *see also, e.g., United States v. Coleman*, 24 M.J. 126, 127 (C.M.A. 1987) (mem.) (granting further extension but noting failure to comply with earlier order, 24 M.J. 67, requiring specificity); *United States v. Lowery*, 23 M.J. 237 (C.M.A. 1986) (mem.) (directing counsel to submit statement of explicit reasons for enlargement); *United States v. Vessels*, 22 M.J. 189 (C.M.A. 1986) (mem.) (''minimally acceptable reason''; supplement accepted for filing). If an enlargement is granted (or the Court has taken other procedural action) predicated on a particular understanding of the circumstances, counsel are obligated to immediately inform the Court *sua sponte* of any change in those circumstances. *United States v. Sandefur*, 25 M.J. 157, 158 (C.M.A. 1987) (mem.).

The rules do not provide that briefing schedules are tolled by the filing of a motion. Hence, if disposition of a motion might render further briefing unnecessary—*e.g.*, motions to dismiss or remand—a motion to suspend the briefing schedule should also be made. *See United States v. Gordon*, 27 M.J. 292 (C.M.A. 1988) (mem.) (suspending time for filing answer pending ruling on motion to dismiss petition). The Clerk has properly suggested that a motion to extend the time in which to file a brief, answer or reply should ''be filed far enough in advance of the due date of such pleading to allow a reasonable time for the Court to act before the original filing period has expired.'' Letter from Thomas F. Granahan, *supra*, at 2; *see, e.g., United States v. Jones*, 26 M.J. 312 (C.M.A. 1988) (mem.). ''If this cannot be done, the reasons therefor should be stated in the motion.'' *United States v. Wilson*, 18 M.J. 434, 435 (C.M.A. 1984)(mem.). There is, as usual, an ''on the other hand'': an extension should not be requested until it appears necessary. *United States v. Coleman* 24 M.J. 67 (C.M.A. 1987) (mem.).

Rule 34. Computation of Time

(a) *General.* In computing any period of time prescribed or allowed by these rules, order of the Court, or any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the next day which is neither a Saturday, Sunday, nor a holiday. When the period of time prescribed or allowed is less than 7 days, intervening Saturdays, Sundays, and legal holidays will be excluded in the computation. When a period of time is computed under these rules from the date of the decision of a Court of Military Review, such time is to be computed from the date of such decision unless a petition for reconsideration is timely filed, in which event the period of time is to be computed from the date of final action on the petition for reconsideration.

(b) *Additional time when service by mail.* Whenever a party has the right or is required to do some act within a prescribed period after the issuance of an order or the filing of a notice, pleading, or other paper relative to a case when service is made upon him by mail, 5 days will be added to the prescribed period if the party upon whom the service is made is within the limits of the contiguous 48 States and the District of Columbia, and 15 will be added if the party is located outside these limits, including the States of Alaska and Hawaii. This provision for additional time shall not apply, however, to the time limitations prescribed in Rule 19(a)(1) for the filing of a petition for grant of review.

RULES ADVISORY COMMITTEE COMMENT

This rule retains the provisions in [former] Rule 32 for determining time limits for action in accordance with the rules. A new sentence at the end of Rule 34(b) excepts the time limits for filing petitions for grant of review from this subsection.

DISCUSSION

For an illustration of the application of Rule 34(a) to the filing of a petition for grant of review see *United States v. Quarnstrom*, 11 M.J. 292 (C.M.A. 1981) (mem.) (accepting petitioner's sworn statement that document was mailed one day before postmark shown on envelope).

The last sentence of the rule was added as part of the January 20, 1982 rules changes. 12 M.J. 411, 415 (C.M.A. 1982).

Rule 35. Filing of Record

The record shall be filed by the Judge Advocate General as soon as practicable after the docketing of any action pursuant to Rule 4. *See* Rule 27(a)(1) and (b).

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 33 are retained.

DISCUSSION

The Court may direct production of documents which are not part of the record. *E.g., United States v. Curtis*, 30 M.J. 22 (C.M.A. 1990) (mem.) (psychiatric records); *United States v. Hock*, 30 M.J. 26 (C.M.A. 1990 (mem.) (vacation proceeding).

Rule 36. Filing of Pleadings

(a) All pleadings or other papers relative to a case will be submitted to the Clerk's office, 450 E Street, Northwest, Washington, D.C. 20442[-0001]. Pleadings transmitted by mail or other means for filing in the Clerk's office will be deemed to have been filed when received by the Court or when deposited in the United States mails addressed to the Court, whichever occurs first. *See* Rule 27(a)(6).

(b) If any pleading or paper is not filed or offered for filing in compliance with these rules or an order of the Court, the Court may issue an order to show cause, dismiss the proceeding, or return the proferred pleading or paper on its own motion or the motion of a party.

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 34(b) have been expanded to authorize the Court to issue a show cause order where a pleading or paper is not filed or offered for filing in compliance with the rules or an order of the Court.

DISCUSSION

For illustrations of the application of this rule see *United States v. Graves*, 22 M.J. 186 (C.M.A. 1986) (mem.) (noting Clerk's return of documents to writ appeal petitioner); *United States v. Johnson*, 22 M.J. 20 (C.M.A. 1986) (mem.) (directing submission of corrected brief where filed version incorporated portion of another pleading by reference; *see* Rules 22(b), 24(c)(5)). Where the rules have been flagrantly or repeatedly disregarded, the Court may also impose sanctions on counsel, including suspension or disbarment. *United States v. Ortiz*, 24 M.J. 323, 15 MLR 2414 (C.M.A. 1987). *See also* Rule 15(a).

Rule 37. Copies

An original and four legible copies of all pleadings or other papers relative to a case will be filed. See Rule 24(d) concerning documents which contain classified information.

RULES ADVISORY COMMITTEE COMMENT

This rule retains the provisions of [former] Rule 35, but adds a cross-reference to Rule 24(d) concerning documents which contain classified information.

Rule 38. Signatures

(a) *General.* Except for documents filed *in propria persona* and those provided for in subsection (b), all original pleadings or other papers filed in a case will bear the signature of at least one counsel who is a member of this Court's Bar and who is participating in the case. The name, address, telephone number, and rank, if any, of the person signing, together with the capacity in which such counsel signs the paper will be included. This signature will constitute a certificate that the statements made in the pleading or paper are true and correct to the best of the counsel's knowledge, information, or belief, and that the pleading or paper is filed in good faith and not for the purpose of unnecessary delay. A counsel who signs a pleading "for" some other counsel whose name is typed under such signature must, in addition, affix their own signature in a separate signature block with their own name, address, telephone number, and rank, if any, typed thereunder.

(b) *Exception.* If the counsel signing a pleading or paper presented to the Clerk's office for filing is not a member of the

Bar of this Court, the pleading or paper shall nonetheless be received as if such counsel were a member. However, within 30 days of the filing of a pleading, such counsel shall, as a prerequisite to continuing in the case as counsel of record, apply for admission to the Bar of this Court or move to appear *pro hac vice* under Rule 13.

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 38 are retained.

DISCUSSION

All signatures must be legible. *E.g., United States v. Yslava*, 21 M.J. 408 (C.M.A. 1986) (mem.). Appellate counsel's signature may be affixed by another attorney acting at his or her direction. *United States v. Daly*, 4 M.J. 145, 146 n.5 (C.M.A. 1977) (mem.) (2-1). Only a counsel who has signed a pleading may sign the certificate of filing and service, *see* Rule 39(c), for another person. *United States v. Burke*, 22 M.J. 20 n.* (C.M.A. 1986) (mem.). Counsel who are retired from the military and reservists not on active duty should not refer to their military rank or status when signing papers to be submitted to the Court. *But see* Amicus Curiae Brief on Behalf of One or More Former Judge Advocates General of the United States Navy 22-23, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, Misc. No. 88-31/NA (C.M.A. filed Aug. 8, 1988). Such counsel also do not appear in uniform.

Regardless of who signs, care should be taken to ensure accuracy in pleadings. *See, e.g., United States v. Shewmake*, 29 M.J. 444 & n.* (C.M.A. 1989) (mem.).

Rule 39. Service of Pleadings

(a) *In general*. At or before the filing of any pleading or other paper relative to a case in the Clerk's office, service of the same will be made on all counsel of record, including amicus curiae counsel, in person or by mail.

(b) *Certificate for review*. In the case of a certificate for review, service of a copy thereof will be made on the appellate defense counsel and appellate government counsel as prescribed in Rule 22(a).

(c) *Form of certificate of filing and service*. A certificate of

filing and service will be included in any pleading or other paper substantially in the following form:

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was [delivered] [mailed] to the Court and was [delivered] [mailed] to (*enter name of each counsel of record*) on (date).

(Typed name and signature)
(Address and telephone no.)

RULES ADVISORY COMMITTEE COMMENT

[Former] Rule 39 provisions have been amended to require service upon all counsel of record of pleadings or other papers at or before their filing in the office of the Clerk. Counsel for *amicus curiae* are expressly included among those to be served. A new subsection (b) provides that a certificate for review by a Judge Advocate General will be served as prescribed in Rule 22(a). New subsection (c) requires a certificate of filing and service to be included in all pleadings or other papers in the form prescribed by this subsection.

DISCUSSION

In *Kelly v. United States*, 23 U.S.C.M.A. 567, 50 C.M.R. 786, 3 MLR 2571 (1975) (mem.) (2-1), the Court entertained a mandamus petition over the objection that it did not, on its face, show proof of service. The majority noted that the petitioner was acting *in propria persona* (counsel being appointed for him later), and the Court itself gave the respondents notice and an opportunity to argue. It should not be assumed that a similar result would be reached today.

If the name of lead counsel on the opposing side is known, service should be made on that individual. If opposing counsel has not yet been designated by name, service should be made by name on the chief of the opposing appellate counsel division. Where civilian counsel has entered an appearance, it is appropriate to serve that person in addition to military counsel even if he or she is not lead counsel, in order to avoid undue delay in the briefing process. Whoever is served, the Clerk suggests that the certificate of service identify the particular individual served. Letter from Thomas F. Granahan, Clerk of the Court, to Walter S. Landen, Sr., Chief, Defense App. Div., Navy-Marine Corps App. Rev. Activity, Dec. 1, 1983, at 3. *Amicus curiae* counsel should be served in the same fashion.

If a certificate of service shows an incorrect date, a corrected certificate should be filed promptly. In *United States v. Downs*, 17 M.J. 351 (C.M.A. 1984) (mem.), and *United States v. Gonzales*, 17 M.J. 349 (C.M.A. 1984) (mem.), the Court directed counsel to submit affidavits setting forth in detail the reasons an incorrect certificate was filed. This seems an overreaction to a minor and apparently infrequent problem.

HEARINGS

Rule 40. Hearings

(a) *Motions, petitions for grant of review, petitions for extraordinary relief, writ appeal petitions, petitions for new trial, and petitions for reconsideration.* Except when ordered by the Court, hearings will not be permitted on motions, petitions for grant of review, petitions for extraordinary relief, writ appeal petitions, petitions for new trial, or petitions for reconsideration.

(b) *When and how heard.* After the case is calendared as provided in Rule 11 and all required briefs have been filed, a hearing may be ordered by the Court.

(1) *Notice of hearing.* The Clerk will give at least 20 days notice in writing to counsel for the parties of the time and place for the hearing, unless ordered otherwise by the Court. Upon receipt of such notice, counsel will notify the Clerk's office of the identity of the counsel who will present oral argument.

(2) *Presentation.* Unless directed otherwise by the Clerk, counsel for the appellant or petitioner will open and close the argument. When the subject of a hearing is a motion, counsel for the moving party will be entitled to open and close. When both parties seek review in this Court, the accused shall be deemed the appellant for the purpose of this rule. Argument by counsel for an *amicus curiae* will be allowed on motion filed under Rule 30.

(3) *Time Allowed.* Each side will normally be allotted 30 minutes to present oral argument.

RULES ADVISORY COMMITTEE COMMENT

This rule contains material covered by Rule 40, *Oral Argument*, in the [1977] Rules. Subsection (a) and the first paragraph of subsec-

tion (b) are unchanged, except for the redesignation of "oral argument" as "hearings" and the addition of the term "writ appeal petitions." Rule 40(b)(1) requires the Clerk to give 20 days (instead of the current 10 days) notice in writing of the time and place of hearing. A new provision requires each party to identify to the Clerk the attorneys who will present oral argument at the hearing.

Rule 40(b)(2) revises the [former] rule to provide that the appellant or petitioner will open and close argument unless otherwise directed by the Clerk and that, in hearings on motions, the moving party is entitled to open and close. Where both parties exercise the right to initiate review in this Court, the accused is deemed the appellant for purposes of the rule. Arguments by *amici curiae* are permitted only for cogent reasons, by motion filed under Rule 30. Argument of an *amicus* will follow those of counsel for the parties. Advice is provided that regardless of whether the notice of hearing limits the issues, counsel should be prepared to address the Court on all factual and legal matters reasonably at issue. A new subsection (b)(3) provides that each side will normally be allotted 30 minutes to present oral argument. A new subsection (c) makes cross-reference to Rules 24(d) and 12(b), and authorizes closed hearings in cases involving classified information.

DISCUSSION

Oral argument on motions is ordered sparingly, but will be held where the Court believes that significant issues are presented. *E.g., United States v. Curtis*, 30 M.J. 108, 109 (C.M.A. 1990) (mem.) (motions to stay proceedings and attach documents in capital case); *U.S. Navy-Marine Corps Court of Military Review v. Cheney*, 29 M.J. 98, 17 MLR 2638 (C.M.A. 1989) (motion to dismiss application for fees and expenses under Equal Access to Justice Act); *United States v. Baker*, 28 M.J. 121, 123, 17 MLR 2345 (C.M.A. 1989) (motion to remand); *United States v. Bradford*, 28 M.J. 125, 126, 17 MLR 2347 (C.M.A. 1989) (per curiam) (same); *United States v. Poole*, 24 M.J. 335 n.* (C.M.A. 1987) (mem.) (motion for leave to file untimely supplement to petition); *United States v. Tucker*, 20 M.J. 52, 13 MLR 2362 (C.M.A. 1985) (motion to dismiss); *United States v. Williams*, 14 M.J. 166 (C.M.A. 1982) (mem.) (motions to file exhibits and take judicial notice); *McPhail v. United States*, 5 M.J. 1016 (C.M.A. 1976) (mem.) (motion to dismiss); *United States v. Larneard*, 3 M.J. 76, 5 MLR 2098 (C.M.A. 1977) (same); *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961) (same). A hearing may also be held on an order to show cause why a petition should not be dismissed. *E.g., United States v. Mills*, 12 M.J. 71 (C.M.A. 1981) (mem.).

Hearings are not invariably ordered even in cases in which plenary briefing occurs. If the Court does not schedule a case for hearing, counsel may move for oral argument. *E.g., United States v. Jefferson*, 12 M.J. 306 (C.M.A. 1981) (mem.). The Court can also provide a hearing by telephone or in chambers when a full hearing in open court is impracticable. *E.g., U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 27 M.J. 10, 11 (C.M.A. 1988) (mem.) (telephone hearing); *United States v. Coronado*, 7 M.J. 74 (C.M.A. 1979) (mem.) (granting stay following oral argument in chambers before Cook and Perry, JJ.).

The Court may, in its discretion, indicate in the hearing notice that argument will be limited to fewer than all of the granted or certified issues. *E.g., United States v. Ballard*, 20 M.J. 192 (C.M.A. 1985) (mem.); *see also United States v. Ballesteros*, 29 M.J. 14, 17 MLR 2628 (C.M.A. 1989). Absent such a limitation, counsel should be prepared on all issues. Letter from Thomas F. Granahan, Clerk of the Court, to Captain Walter S. Landen, Sr., JAGC, USN, Chief, Defense App. Div., Navy-Marine Corps App. Rev. Activity, Dec. 1, 1983, at 4. The Court may also indicate that it wishes counsel to be prepared to argue a particular issue, without necessarily limiting argument to that issue. *E.g., United States v. Elliott*, 19 M.J. 258 (C.M.A. 1984) (mem.). Where additional issues appear as a result of give-and-take in oral argument, further briefing may be ordered. *E.g., United States v. Ragins*, 10 M.J. 303 (C.M.A. 1981) (mem.); *United States v. Smith*, 9 M.J. 115 (C.M.A. 1980) (mem.); *see also* Discussion of Rule 5 (collecting cases).

From time to time *amici* are permitted to present oral argument. *E.g., United States v. Curtis*, No. 63,044/MC (C.M.A. Aug. 2, 1990) (mem.); *United States v. Jacobs*, 30 M.J. 114 (C.M.A. 1990) (mem.); *United States v. Matthews*, 16 M.J. 354, 11 MLR 2819 (C.M.A. 1983); *Corley v. Thurman*, 3 M.J. 107 (C.M.A. 1977) (mem.); *United States v. Hunter*, 25 U.S.C.M.A. 155, 54 C.M.R. 173 (1976) (interim). In *United States v. Booker*, 4 M.J. 137 (C.M.A. 1977) (mem.) (on petition for reconsideration), the Court *sua sponte* extended the opportunity for *amici* to present oral argument.

A party or *amicus* may be allowed to supplement its oral argument, *e.g., United States v. Conley*, 28 M.J. 84 (C.M.A. 1989) (mem.); *Murray v. Haldeman*, 16 M.J. 218 (C.M.A. 1983) (mem.), or present additional authority on matters raised at oral argument. *United States v. McCoy*, 30 M.J. 229 (C.M.A. 1990) (mem.); *United States v. Vanzandt*, 13 M.J. 124 (C.M.A. 1982) (mem.); *United States v. Wallace*, 11 M.J. 169 (C.M.A. 1981) (mem.). When this occurs, opposing counsel will be afforded an opportunity to reply. *E.g., United States v. Davis*,

19 M.J. 323 (C.M.A. 1985) (mem.). Ordinarily, however, post-hearing briefs are disfavored. *Compare United States v. Johnson*, 5 M.J. 1001 (C.M.A. 1976) (mem.), *with McPhail v. United States*, 5 M.J. 1038 (C.M.A. 1976) (mem.). After oral argument in *United States v. Westmoreland*, 31 M.J. 160, 161 n.1 (C.M.A. 1990), the Court granted the appellant's unopposed motion to expand the issue on which review had been granted.

In urgent cases, the hearing may be accelerated. *E.g.*, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 27 M.J. 10, 11 (C.M.A. 1988) (mem.) (two hours' notice); *Stufflebeam v. Torres*, 24 M.J. 196 (C.M.A. 1987) (mem.) (one day's notice); *United States v. Van Slate*, 14 M.J. 285 (C.M.A. 1982) (mem.) (hearing held on day case was filed); *Berta v. United States*, 9 M.J. 390 (C.M.A. 1980) (mem.) (one day's notice); *Fletcher v. Commanding Officer*, 2 M.J. 226 (C.M.A. 1977) (mem.) (two days' notice); *Kelly v. United States*, 23 U.S.C.M.A. 567, 50 C.M.R. 786, 788, 3 MLR 2571 (1975) (Cook, J., dissenting) (three days' notice).

If divided argument is desired, a motion should be made. *E.g.*, *United States v. Pollard*, 27 M.J. 435 (C.M.A. 1988) (mem.). The Court will generally allow divided argument, although counsel should first weigh the pros and cons carefully, since splitting the argument may prove artificial and make it more difficult to shift gears as the argument develops in open court.

The Court tape records all oral arguments. The recordings may be obtained upon application to the Clerk. No transcripts are prepared by the Court.

Hearings are noted in the Court's *Daily Journal*. The normal length of a hearing in a case that has been fully briefed is 30 minutes per side. In rare cases the Court may allow longer arguments, *e.g.*, *United States v. Curtis*, No. 63,044/MC (C.M.A. Aug. 2, 1990) (mem.) (capital case with constitutional issues; 60 minutes per side, with additional time for *amici*), or may resume a hearing on a later day, *e.g.*, *United States v. Holley*, 17 M.J. 28 (C.M.A. 1983) (mem.), or order additional argument in light of the initial hearing. *United States v. West*, 16 M.J. 447 (C.M.A. 1983) (mem.). For useful suggestions on oral argument see Ferencik, *Appellate Advocacy*, 27 A.F. L. Rev. 221, 226-28 (1987), and Morgan, *Appellate Practice Rules*, 217 A.F. L. Rev. 229, 233- 35 (1987).

Historically, the only function performed by the Court away from

the courthouse was the admission of attorneys. *See* Rule 13(f); *e.g.*, 1961 C.M.A. Ann. Rep. 54-55 (1962) (noting sundry special admissions sessions, including one, for a single applicant, eight miles from Arctic Circle); 1964 C.M.A. Ann. Rep. 47 (1965) (Atlanta); 1970 C.M.A. Ann. Rep. 8 (1971) (Boston); 1971 C.M.A. Ann. Rep. 9 (1972) (London and Boston); 1972 C.M.A. Ann. Rep. 7 (1973) (Charlottesville); 1973 C.M.A. Ann. Rep. 7 (1974) (Providence and Anaheim); 1975 C.M.A. Ann. Rep. 6 (1976) (San Diego, Charlottesville, Camp Pendleton and Monterey); FY77 C.M.A. Ann. Rep. 3 (1978) (Chicago); FY78 C.M.A. Ann. Rep. 6 (1979) (Newport and New York). Such sessions have served no practical purpose since 1977, when the rules were changed to permit bar admissions in absentia. *See* FY77 C.M.A. Ann. Rep. 3 (1978).

Since 1987, hearings have occasionally been conducted away from Washington as part of Project Outreach, the Court's public awareness project. *See generally* FY89 C.M.A. Ann. Rep. 6-7 (1990). The practice follows that of the United States Courts of Appeals for the Fourth and Eighth Circuits in conducting occasional hearings at law schools, Everett, *The United States Court of Military Appeals: New Issues, New Initiatives*, 36 Fed. B. News & J. 182, 184 (1989), and was suggested by Professor Steven A. Saltzburg, of the University of Virginia School of Law, and members of the staff of The Judge Advocate General's School of the Army. Code Comm. Minutes, Oct. 29, 1986, at 12. Two cases were heard at the University of Virginia, *United States v. Guaglione*, 25 M.J. 382 (C.M.A. 1987) (mem.); *United States v. Sherrod*, 25 M.J. 382 (C.M.A. 1987) (mem.), and two others at the Wake Forest University School of Law, Winston-Salem, N.C. *United States v. Avila*, 26 M.J. 207 n.* (C.M.A. 1988) (mem.); *United States v. Byers*, 26 M.J. 207 n.* (C.M.A. 1988) (mem.). Other cases have been heard at the University of South Carolina School of Law, *see* Everett, *supra*; *United States v. Moore*, 28 M.J. 236 n.* (C.M.A. 1989) (mem.), the United States Military Academy, *United States v. Baker*, 30 M.J. 224 n.* (C.M.A. 1990) (mem.); *United States v. Reichardt*, 28 M.J. 113, 114 n.1, 17 MLR 2345 (C.M.A. 1989), the United States Air Force Academy, *United States v. Thompson*, 30 M.J. 122 n.* (C.M.A. 1990) (mem.), St. Mary's University School of Law, *United States v. Jacobs*, 30 M.J. 124 n.* (C.M.A. 1990) (mem.), 31 M.J. 138, 145 n.1 (C.M.A. 1990) (Everett, C.J., dissenting), and the Association of the Bar of the City of New York, *United States v. Lingenfelter*, 30 M.J. 224 n.* (C.M.A. 1990) (mem.), which has a long history of involvement in military justice matters.

It is likely that out-of-town activities will be curtailed (as an economy measure) in light of the Court's expansion to five judgeships.

See S. Rep. No. 101-384, 101st Cong., 2d Sess. 147 (1990) (suggesting reduced travel so as to foster collegial relationships and avoid delays); H. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. (1990) (same). The Court Committee has also suggested that the judges "carefully evaluate their travel schedules to assure that the judicial business of the Court is conducted efficiently and effectively." *Presentation of Court Committee Report*, 28 M.J. 99, 102 (1989). *See* FY89 C.M.A. Ann. Rep. 7-9 (1990).

Rule 41. Photographing, Televising, or Broadcasting of Hearings

(a) The photographing, broadcasting, or televising of any session of the Court or other activity relating thereto is prohibited within the confines of the courthouse unless authorized by the Court.

(b) Any violation of this rule will be deemed a contempt of this Court and, after due notice and hearing, may be punished accordingly. *See* 18 U.S.C. §401.

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 42 have been retained.

DISCUSSION

Rule 41 represents an effort to insulate the Court from the possible disorder that may attend the activities of the mass media in gathering news. As such, it is part of a sizable body of court rules seeking to minimize the chances that the judicial atmosphere of a court and its quarters will be compromised. The difficulty with the rule is that it may be overbroad. For example, could the "other activity" clause of subsection (a) be construed to cover reporters not accompanied by cameramen? Are news media investigators covered? Are courtroom sketch artists barred even though employed by a television station (and not if employed by a newspaper)? What criteria govern the granting of exceptions? These questions remain largely unanswered.

Notwithstanding the rule, on February 23, 1989, the Court— which is not covered by Judicial Conference rules forbidding cameras in the courtroom, Wash. Post, Feb. 25, 1989, at A5, col. 1; *see also id.*, Mar. 3, 1989, at A18, col. 1—allowed a network television news team

to videotape arguments in two cases to determine the feasibility of the process. N.Y. Times, Feb. 28, 1989, at A18, col. 6. On July 14, 1989, the Court permitted C-Span cable television to videotape the argument in *United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989), as part of a three-hour documentary and call-in program about the Court. FY89 C.M.A. Ann. Rep. 7 (1990). On August 29, 1990, acceding to a further request by C-Span, the Court permitted live coverage of the argument in *United States v. Curtis*, No. 63,044/MC, a capital case with numerous *amici*. With numerous *amici*, the argument lasted over four hours and was broadcast in its entirety. N.Y. Times, Sept. 21, 1990, at A30, col. 4.

These recent efforts illustrate how the Court can, because of its unusual status, serve as a laboratory for new approaches to sensitive issues of judicial administration. *See* Brosman, *The Court: Freer Than Most*, 6 Vand. L. Rev. 166, 167-68 (1953); *cf.* Fidell & Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117, 118-23 (1988). Ironically, however, when the Judicial Conference of the United States voted, two weeks after the *Curtis* broadcast, to authorize a pilot program on the use of cameras in the courtroom, N.Y. Times, Sept. 13, 1990, at A18, col. 5. it did not include the one type of case to which the Court of Military Appeals' jurisdiction extends: criminal appeals.

Rule 41(b) asserts the power to punish for contempt, even though "[t]he Court has no express contempt power nor any machinery to enforce interlocutory decrees." Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 Mil. L. Rev. 27, 57 n.266 (1972). Subsection (b) provides the due process requirements of notice and hearing for contempt proceedings. The contempt power has never been exercised, and the Court has acknowledged that there is an issue as to its availability. In *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 335 & n.10, 16 MLR 2443 (C.M.A. 1988), it observed that Congress has not explicitly conferred the contempt power on either it or the Courts of Military Review, suggested that both it and the intermediate courts have inherent contempt power, and urged Congress to attend to the matter.

Special legislation was deemed necessary to confer the contempt power on the Tax Court in 1969. 26 U.S.C. § 7456(d) (1988), as amended by Tax Reform Act of 1969, Pub. L. No. 91-172, § 956, 83 Stat. 487 (1969). Indeed, the Senate Report on the Tax Reform Act was at pains to note that the Court of Military Appeals was in the same

category as the Tax Court, S. Rep. No. 91-552, 91st Cong., 1st Sess. 304 (1969), thus implying the need for legislation if it, too, is to be afforded contempt power.

The precise contours of the Rule 41(b) contempt power are unclear. Article 48 of the Code, which creates an offense of contempt for "any menacing word, sign, or gesture in [a court's presence], or [anyone] who disturbs its proceedings by any riot or disorder," 10 U.S.C. § 848 (1988), applies only to courts-martial, provost courts and military commissions. *See generally* R.C.M. 809; Hennessey, *Courts-Martial Contempt—An Overview*, The Army Lawyer, June 1988, at 38; Ochstein, *Contempt of Court*, 16 JAG J. 25 (1962). Rule 41(b), read broadly, goes considerably beyond the contempt power described in the Code and *Manual*, for example, in not requiring that there be an actual disturbance of the Court's proceedings.

OPINIONS

Rule 42. Filing, Reproduction, and Distribution

All opinions of the Court will be filed with the Clerk for preservation. The reproduction, printing, and distribution of all opinions will be under the supervision of the Clerk.

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rules 43 and 44 on publication and retention of opinions of the Court have been consolidated into this single rule.

DISCUSSION

For many years, the Court's practice was to issue opinions at noon on Fridays. *Dep't of Defense Appropriations for 1966: Hearings on H.R. 9221 Before the Subcomm. of the Sen. Comm. on Appropriations*, 89th Cong., 1st Sess., pt. 2, 467 (1965) (testimony of Ferguson, J.); Hanlon, *Ten-Year Chronology of the United States Court of Military Appeals*, 1961 C.M.A. Ann. Rep. 53 (1962); U.S. Court of Military Appeals, *Military Law and Military Justice* ii (1972). When the West Publishing Company assumed responsibility for publishing the Court's decisions, Monday became the sole decision day. In early 1989 the Court sensibly decided to issue opinions on other days of the week as well. In addition, "[i]n some instances the court has filed its decision without waiting for the West Publishing Company

to put the opinion in headnote form and publish it." Everett, *The United States Court of Military Appeals: New Issues, New Initiatives*, 36 Fed. B. News & J. 182, 184 (1989). Since delay in release of an opinion favorable to an accused may unjustly prolong his or her confinement, attention might usefully be given to issuing locally-reproduced decisions as a regular practice.

All opinions, as well as other actions of the Court (such as orders, rules changes, Law Day observances and even some marriages), are reported in the *Military Justice Reporter*. A single opinion may be issued to decide several cases, even where they arise in different branches. *E.g., United States v. Ezell*, 6 M.J. 307, 7 MLR 2067 (C.M.A. 1979). Issuances other than opinions (including per curiams) are found in the *Daily Journal* portion of the reporter. The utility of the *Daily Journal* would be materially increased if it were published more promptly. At this writing, delays of several months in the reporting of these frequently important miscellaneous actions are common.

At present, opinions are keyed only to the Military Justice topic in the West Publishing Company's key number system. The Court Committee's recommendation that "opinions of the Court should be indexed in additional key topics and numbers in that system," *Presentation of Court Committee Report*, 28 M.J. 99, 101 (1989), is well-taken and should be implemented in order to facilitate research in military case law and foster doctrinal interaction between civilian and military jurisprudence. *See generally* Fidell, *"If a Tree Falls in the Forest . . .": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1, 19-26 (1982).

The Court occasionally—and chiefly on petitions for extraordinary writ—decides a case subject to later issuance of an opinion. *E.g., United States v. Vangelisti*, 31 M.J. 68 (C.M.A. 1990) (mem.); *Waller v. Swift*, 30 M.J. 107 (C.M.A. 1990) (mem.); *Frage v. Moriarty*, 27 M.J. 459 (C.M.A. 1988) (mem.); *United States v. Smith*, 27 M.J. 408 (C.M.A. 1988) (mem.); *Woodrick v. Divich*, 24 M.J. 213 (C.M.A. 1987) (mem.); *Burtt v. Schick*, 23 M.J. 236 (C.M.A. 1986) (mem.); *Gragg v. United States*, 10 M.J. 180 (C.M.A. 1980) (mem.), *opinion issued*, 10 M.J. 296 (C.M.A. 1981) (mem.). The substance of the decision may be delivered orally at the time of the hearing. *Berta v. United States*, 9 M.J. 390 & n.* (C.M.A. 1980) (mem.).

Rule 43. Issuance of Mandates

(a) Mandates implementing opinions of the Court will issue as a matter of course after expiration of the time for filing a petition for reconsideration under Rule 31(a). In the event such a petition for reconsideration is filed, the mandate shall not issue until the Court takes action on the petition. In any case, the Court may order the mandate to issue forthwith.

(b) The effective date of any order shall be the date of that order, and no mandate will issue. The Clerk will furnish copies of all such orders to counsel of record and to the Judge Advocate General of the service in which the case arose.

RULES ADVISORY COMMITTEE COMMENT

The provisions of [former] Rule 45(a) have been retained in Rule 43(a). Rule 43(b) retains the provisions of [former] Rule 45(b), except for deletion of the word "forthwith" in the provision requiring the Clerk to furnish copies of the Court's orders to concerned persons.

DISCUSSION

When the Court acts by means of an order, as opposed to a decision, no mandate issues. Rule 43(b); *United States v. Cabatic*, 7 M.J. 438, 440, 7 MLR 2461, 2462 (C.M.A. 1979) (Cook, J., concurring).

The Court retains power to recall the mandate. *E.g., United States v. Williams*, 27 M.J. 422 (C.M.A. 1988) (mem.). One purpose of doing so is to clarify the Court's intent. *E.g., United States v. Heyward*, 22 M.J. 274 (C.M.A. 1986) (mem.); *United States v. Belz*, 20 M.J. 325 (C.M.A. 1985) (mem.). Until the mandate issues, the decision of the Court is without effect. *United States v. Tanner*, 3 M.J. 924, 925-27, 5 MLR 2442 (A.C.M.R.), *pet. denied* 4 M.J. 169 (C.M.A. 1977).

Article 71 prohibits execution of portions of a sentence that extend to death, dismissal or punitive discharge until completion of review by the Supreme Court or expiration of the period in which to seek certiorari. UCMJ Art. 71(c)(1)(c)(ii)-(iii), 10 U.S.C. § 871(c)(1)(c)(ii)-(iii) (1988). Under the Military Justice Act of 1983, the mandate is thus effectively stayed upon filing of a timely certiorari petition, until the Supreme Court acts on the petition. S. Rep. No. 98-53, 98th Cong., 1st Sess. 25 (1983). The period for seeking certiorari runs from the date of the decision or the date of action on a timely rehearing petition, not from the date the mandate issues. S. Ct. R. 13.4. *See* Discussion of Rule 19.

JUDICIAL CONFERENCE

Rule 44. Judicial Conference

(a) *Purpose*. There shall be held annually, at such time and place as shall be designated by the Court, a conference for the purpose of considering the state of business of the Court and advising on ways and means of improving the administration of military justice. The conference shall be called "The Judicial Conference of the United States Court of Military Appeals," and may be held in conjunction with the Homer Ferguson Conference or otherwise.

(b) *Composition*. In addition to the Judges, the following shall be invited to participate in the Conference:

(1) The Senior Judges of the Court;

(2) The Judge Advocates General;

(3) The Director, Judge Advocate Division, U.S. Marine Corps;

(4) The Chief Counsel, U.S. Coast Guard;

(5) The General Counsel, Department of Defense;

(6) The General Counsels, Committees on Armed Services, United States Senate and House of Representatives;

(7) The Chiefs, Military Justice Divisions, of each Armed Force;

(8) The Chiefs, Appellate Defense and Appellate Government Divisions, of each Armed Force;

(9) The Chief Judge of each Court of Military Review;

(10) The Chief of the Trial Judiciary of each Armed Force, or his designee;

(11) The Clerk of the Court;

(12) The Central Legal Staff Director of the Court;

(13) The Chairman, Rules Advisory Committee;

(14) The deans of one of more approved law schools, or their designees; and

(15) Members of the Bar of the Court invited by the Court.

DISCUSSION

Rule 44 was added in 1983, following a suggestion in the first edition of this Guide and in an article by a former Judge Advocate General of the Army. Hodson, *Military Justice: Abolish or Change?*, 22 U. Kans. L. Rev. 31, 53 (1973). It also appears to have drawn inspiration from an abortive 1977 proposal for a Military Justice Council, which would have served as a "new staffing organization for the Code Committee which would blend the features of the Joint Services Committee [on Military Justice] with those of a Judicial Council as it is known in the civilian community." Letter from Ward Mundy, C.M.A. Court Exec., to Chief Judge Albert B. Fletcher, Jr., Nov. 16, 1977. Along with a draft rule on practice by law students, what became Rule 44 was reported on by the Rules Advisory Committee without a favorable recommendation in 1982. It has never been implemented. The Court decided not to promulgate a rule on student practice. *See* Discussion of Rule 13.

REVISION OF RULES

Rule 45. Rules Advisory Committee

(a) *Establishment of committee; membership.* A Rules Advisory Committee is hereby created for this Court. The Committee shall consist of not less than 9 members of the Bar of this Court and shall be selected by the Court, in such a way as to represent a broad cross-section of the legal profession. Representatives from government, the law schools, and public interest groups shall, when practicable, be included on the Committee, as shall private practitioners. The Clerk of the Court shall be a member of the Committee and shall serve as its Reporter.

(b) *Duties of committee.* The Rules Advisory Committee appointed by this Court shall have an advisory role concerning practice and procedure before the Court. The Committee shall, among other things, (1) provide a forum for continuous study of the operating procedures and published rules of the Court; (2) serve as a conduit between the Bar, the public, and the Court regarding the Rules of the Court, procedural matters, and suggestions for changes; (3) draft, consider and recommend rules

and amendments to the Court for adoption; and (4) render reports from time to time, on its own initiative and on request, to the Court on the activities and recommendations of the Committee. The Committee shall prepare explanatory materials with respect to any rule change or other recommendation it submits to the Court.

(c) *Terms of members; chairman*. With the exception of the Clerk of the Court, the members of the Committee shall serve three-year terms, which will be staggered in such a way as to enable the Court to appoint or reappoint one-third of the Committee each year. The Court shall appoint one of the members of the Committee to serve as chairman.

DISCUSSION

The Committee's commentary is omitted since it merely restates the provisions of the rule.

Rule 45 was added in 1983, following a suggestion in the first edition of this Guide. It is based on D.C. Cir. R. 21. The Court had rejected a companion proposal that would have spelled out arrangements for the dissemination of proposed rules for comment. *See* D.C. Cir. R. 22. But in 1988, Congress required "appropriate public notice and an opportunity for comment" except where "there is an immediate need for a rule." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 403(a)(1)(c), 102 Stat. 4642, 4650. In light of that statute, the Court caused certain rule changes to be published in the *Federal Register* for a 60-day comment period in 1989. 54 Fed. Reg. 20631 (1989). Whether or not it could have dispensed with the notice-and-comment process for the portion that changed Rule 21 because that proposal had been circulated for comment several year before, the decision to recirculate it shows the Court's strong interest in having as much input as possible when promulgating rules. Use of the *Federal Register* in this fashion is consonant with the Department of Defense's policy of giving notice of the availability of proposed *Manual* changes for public comment. 32 C.F.R. § 152.4(c) (1989); 47 Fed. Reg. 3401 (1982); *e.g.*, 51 Fed. Reg. 4530, 31164 (1986); *cf.* Letter from the author to Sen. Roger W. Jepsen, May 21, 1981, *reproduced in* S. Rep. No. 97-146, 97th Cong., 1st Sess. 53, 56-57 (1981) (recommending legislation to require notice-and-comment rulemaking for *Manual* changes); Letter from David E. Landau, American Civil Liberties Union, to Sen. Roger W. Jepsen, June 16, 1981, *id.* at 64 (same).

The Court had also declined in 1983 to include a "sunshine" provision making meetings of the Rules Advisory Committee open to the public unless otherwise directed by the Chief Judge. As a practical matter, nonmembers (other than members of the Court's staff) have not sought to attend. Given the congressional encouragement of open meetings of the Code Committee, *see* S. Rep. No. 98-53, 98th Cong., 1st Sess. 30 (1983); *see, e.g.*, 53 Fed. Reg. 48708 (1988), one would expect any question to be resolved in favor of openness. *See also* 28 U.S.C.A. § 2073(c)(1) (West Supp. 1989) (Judicial Conference rules committees to meet in public).

The Rules Advisory Committee was created in 1981, and has reported on a variety of rule changes. Its membership has not quite followed the letter of the Rule, as there have never been representatives from the law schools, and the only representative from a public interest group has been the author, who has been a cooperating attorney for the American Civil Liberties Union. It is an overstatement to call the Committee representative of a "broad cross-section of the legal profession," and it is to be hoped that this will be remedied in the future.

Military members have included chiefs of defense and government appellate divisions of various services and a chief judge of a Court of Military Review. Government members have included attorneys from the Criminal Division of the Department of Justice, including, in one instance, an attorney with broad military legal experience who had previously served in a government appellate division and continued as a drilling Reservist. The Committee chair has been a retired judge advocate. All Committee members have had military service. There have been no women or minority members.

Non-active duty membership in the Committee has been stable. The serving officers, however, have tended to move off as their tours of duty have come to an end. Members receive no compensation for service on the Committee. *Cf.* 28 U.S.C. § 2077(b) (1988), *amended in other respects*, Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(b), 102 Stat. 4650.

The Committee's functions partially overlap with those of the Court Committee, which is charged with studying issues and making recommendations "concerning the Court's statutory mandate, status, organization, size, staff, administration, and operation." *Reestablishment of the Court Committee*, 25 M.J. 154 (1987). The two bodies meet separately and have no members in common.

The rules change process has at times moved with "all deliberate speed." For example, the 1989 change to Rule 21, which for the first time states factors that might bear on whether review will be granted, originated in the Committee in 1981. Although reported on by the Committee, the proposed rule was omitted by the judges from the final 1983 rules changes, without explanation. It was revived within the Committee in 1988, following enactment of the Military Justice Act of 1983, which provided for the first time for direct Supreme Court review of certain decisions of the Court. It was reported on a second time, slightly revised, in February 1989, and approved by the judges, further modified and after a second comment period, in 1990. *See* Discussion of Rule 21(b)(4).

Another change that was studied by the Committee at some length involved the certification of state law issues to the highest courts of the states. The evolution of that proposal indicates the extent to which the Committee may read Rule 45(b) as words of limitation, rather than words of purchase, as the Committee declined to comment on the desirability of an arrangement under which the Court could act on questions of military law certified to it, as well as certifying questions out to other courts. The Committee confined itself to the observation that such incoming certifications would require authorizing legislation. *See* Discussion of Rule 4.

Rule changes concerning the processing of Article 62 cases were developed by the Committee in early 1985, but were held for review and consideration until a third judge was appointed to the Court. Code Comm. Minutes, Dec. 18, 1985, at 7.

As suggested in Rule 45(b), the Committee has initiated some proposals and at other times has been asked by the Court to consider particular issues, *see e.g.*, *United States v. Tucker*, 20 M.J. 52, 54, 13 MLR 2362 (C.M.A. 1985); *United States v. Mills*, 12 M.J. 225, 227, 10 MLR 2183 (C.M.A. 1982), including operational questions not directly tied to any particular rule. For example, in 1988 the judges asked the Committee to give careful attention to ways the processing time for cases could be reduced. This led to a thorough review of the appellate process with members of the Court's staff, and resulted in a pilot program under which the government appellate divisions could waive response in appropriate cases under Article 67(a)(3). No rule change was necessary at the time, although one was made when the program was evaluated and the Court decided to make it permanent. *See* Discussion of Rule 21. In the course of this and other projects, the Committee has, since its inception, endeavored to meet at one time or another with each sitting judge.

The last sentence of Rule 45(b), requiring "appropriate explanatory materials with respect to any rule change or other recommendation," has not been read to require formal comments. A detailed drafters' commentary accompanied the Committee's 1982 proposed comprehensive revision, but other proposals have been submitted to the judges accompanied only by brief letters of transmittal. Where a change emerges directly from the judges, without Rules Advisory Committee drafting, the only explanatory matter is likely to be in the order promulgating the change. *E.g., In re Establishment of Term of Court*, 27 M.J. 412 (C.M.A. 1988). With enactment of 28 U.S.C.A. § 2073(d) (West Supp. 1990), explanatory notes should be prepared as a matter of routine.

Although much may be gleaned from sources such as Early, Longstreet & Richardson, *USCMA and the Specified Issue: The Current Practice*, 123 Mil. L. Rev. 9 (1989), the Court should publish its operating procedures, as other courts of appeals must do under 28 U.S.C. § 2077(a) (1988).

The extent of the judges' rule making power remains an open question at the fringes. In addition to doubts harbored as to the Court's authority to fashion a mechanism for the receipt of certified questions of military law, *see* Discussion of Rule 4, a number of the staff's 1976 proposals were deemed too controversial. Everett, *Foreword*, C.M.A. Guide vii-viii (1978). The Court's claim of authority to prescribe a rule regarding constructive service of Court of Military Review decisions, *United States v. Larneard*, 3 M.J. 76, 80, 5 MLR 2098 (C.M.A. 1977), as had been suggested by the Judge Advocate General of the Air Force, Code Comm. Minutes, July 12, 1977, at 2, was overtaken by congressional action, *see* UCMJ Art. 67(b)(2), 10 U.S.C.A. § 867(b)(2) (West Supp. 1990), although the Court did not feel moved to exercise that power until 12 years after *Larneard* and eight years after the legislation, when it did so in order to clear a backlog of pre-1981 cases. *United States v. Myers*, 28 M.J. 191, 17 MLR 2350 (C.M.A. 1989); *see* 55 Fed. Reg. 7769 (1990).

Nor had the Court developed a rule to bar frivolous petitions for grant of review, *Hearings on H.R. 6583 to Amend the Uniform Code of Military Justice Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 84th Cong., 2d Sess., pt. 4, at 8575 (1956) (testimony of Quinn, C.J.), although the Committee discussed the virtues of releasing appellate defense counsel in plainly uncertworthy cases after the Supreme Court's jurisdiction was expanded to include military cases. While that particular suggestion seems to

be a dead letter, and while a number of past suggestions for rule making have already been acted upon, *see generally* C.M.A. Guide 72-73 (1978), it is clear that the rule making process will remain an active one as the Court continues its search for ways to streamline and rationalize the delivery of appellate military justice while remaining solicitous of the competing substantive interests of the parties.

APPENDIX

UNITED STATES COURT OF MILITARY APPEALS
Washington, D.C. 20442
[USCMA Form 200 (July 1978)]

INFORMATION QUESTIONNAIRE
TO SUPPLEMENT MAIL INQUIRIES

Name: Rank or Grade:

(Attach court order if your name has been changed since your conviction.)

Service: Current or Last Military Address:

Current Civilian Address (if applicable):

Service No. Current Telephone Number:

1. (a) Place of Confinement (if any):

   (b) Anticipated release date:

   (c) Is such confinement on civilian charges? Yes ( ) No ( )

   (d) If so, how are they related to your present or former military service?

2. (a) Command and location of court-martial which entered conviction:

   (b) Name of military judge:

   (c) Name of defense lawyer:

3. Date of court-martial conviction:

4. Specific nature of sentence:

5. Specific nature of offense or offenses for which you were convicted:

6. What was your plea? (Check one)

(a) Not guilty to *all* charges ( )

(b) Guilty to *all* charges ( )

If you entered some guilty pleas and some not guilty plea, give specific details:

7. If you pleaded guilty, what were the terms of any plea bargain you made?

8. Level of court-martial: (Check one)

(a) General court-martial ( )

(b) Special court-martial ( )

(c) Summary court-martial ( )

9. Kind of trial: (Check one)

(a) Military judge alone ( )

(b) Court-martial with members ( )

10. Did you testify at the trial? Yes ( ) No ( )

11. Do you have a copy of the record of trial? Yes ( ) No ( )

12. Did you file an appeal from the conviction: Yes ( ) No ( )

13. If you did appeal from the conviction, indicate below each military appellate court or reviewing authority to which you appealed, the result at each level, and the date of such result:

(a) *The Judge Advocate General* under Article 69, UCMJ. ( )

(i) Result:

(ii) Date of result:

(b) *Court of Military Review* under Article 66, UCMJ. ( )

(i) Result:

(ii) Date of result:

(c) *U.S. Court of Military Appeals* under Article 67, UCMJ. ( )

(i) Result:

(ii) Date of Result:

14. Other than a direct appeal from the court-martial conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this case in any court or with any superior reviewing authority not noted above (such as a U.S. District Court, Court of Claims, Board for Correction of Military Records, Discharge Review Board, etc.):

Yes ( ) No ( )

15. If your answer to 14 was "yes," give the following information as to *each* such proceeding (use additional sheets if necessary):

(a) Name of court or reviewing authority and docket number of case, if any:

(b) Nature of proceeding:

(c) Grounds raised:

(d) Did you receive an evidentiary hearing on your petition, application or motion: Yes ( ) No ( )

(e) Result:
(Attach copy of decision, if available)

(f) Date of Result:

(g) Did you appeal from any adverse action noted in 15(e) above?

Yes ( ) No ( )

(h) If no appeal was taken, explain briefly why you did not appeal:

16. State concisely each ground on which you now claim that you are being held unlawfully *or* on which you claim that your court-martial conviction is invalid. Summarize *briefly* the specific *facts* supporting each ground.

A. Ground one:

Supporting FACTS (tell your story *briefly* without citing cases or law):

B. Ground two:

Supporting FACTS (tell your story *briefly* without citing cases or law):

C. Ground three:

Supporting FACTS (tell your story *briefly* without citing cases or law):

17. If any of the grounds listed in 16A, B and C were not previously presented to any other reviewing authority or court, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

18. Do you have any petition or appeal now pending in any court or elsewhere as to this particular court-martial? Yes ( ) No ( )

If so, give details:

19. Are you now represented by any lawyer? Yes ( ) No ( )

If so, give name, address, and telephone number of your lawyer:

20. If counsel is appointed to represent you, may this form be given to him or her Yes ( ) No ( )

(Signature)
(Date)

DISCUSSION

Form 200 is neither included nor provided for in the rules. It is mailed by the Clerk's office to persons who address *pro se* inquiries to the Court concerning their convictions, and assists the Court in deciding whether jurisdiction exists and whether substantial issues are presented. The form could usefully be updated. For example, ¶ 14 should refer to the United States Claims Court. Similarly, the references in ¶ 14 to the Board for Correction of Military Records and Discharge Review Board are obsolete because Congress in 1983 deprived those bodies of the power to review courts-martial for purposes other than clemency, or, in the case of the Board for Correction of Military Records, to reflect actions taken by reviewing authorities. 10 U.S.C. §§ 1552(f), 1553(a) (1988).

CODE PROVISIONS

§ 867. Art. 67. Review by the Court of Military Appeals

(a) The Court of Military Appeals shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;

(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

(b) The accused may petition the Court of Military Appeals for review of a decision of a Court of Military Review within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Military Review; or

(2) the date on which a copy of the decision of the Court of Military Review, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address for the accused in his official service record.

The Court of Military Appeals shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Military Review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(d) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

§ 867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Military Appeals in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§ 941. Art. 141. Status

There is a court of record known as the United States Court of Military Appeals. The court is established under article I of the Constitution. The court is located for administrative purposes only in the Department of Defense.

§ 942. Art. 142. Judges

(a) NUMBER.—The United States Court of Military Appeals consists of five judges.

(b) APPOINTMENT; QUALIFICATION.—(1) Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, for a specified term determined under paragraph (2). A judge may serve as a senior judge as provided in subsection (e).

(2) The term of a judge shall expire as follows:

(A) In the case of a judge who is appointed after March 31 and before October 1 of any year, the term shall expire on September 30 of the year in which the fifteenth anniversary of the appointment occurs.

(B) In the case of a judge who is appointed after September 30 of any year and before April 1 of the following year, the term shall expire fifteen years after such September 30.

(3) Not more than three of the judges of the court may be appointed from the same political party, and no person may be appointed a judge of the court unless the person is a member of the bar of a Federal court or the highest court of a State.

(4) For purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life.

(c) REMOVAL.—Judges of the court may be removed from office by the President, upon notice and hearing, for—

(1) neglect of duty;

(2) misconduct; or

(3) mental or physical disability.

A judge may not be removed by the President for any other cause.

(d) PAY AND ALLOWANCES.—Each judge of the court is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Court of Appeals.

(e) SENIOR JUDGES.—(1) A former judge of the court who is receiving retired pay or an annuity under section 945 of this title (article 145) or under subchapter III of chapter 83 or chapter 84 of title 5 shall be a senior judge.

(2)(A) The chief judge of the court may call upon a senior judge of the court, with the consent of the senior judge, to perform judicial duties with the court—

(i) during a period a judge of the court is unable to perform his duties because of illness or other disability;

(ii) during a period in which a position of judge of the court is vacant; or

(iii) in any case in which a judge of the court recuses himself.

(B) A senior judge shall be paid for each day on which he performs judicial duties with the court an amount equal to the daily equivalent of the annual rate of pay provided for a judge of the court. Such pay shall be in lieu of retired pay and in lieu of an annuity under section 945 of this title (article 145), subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, or any other retirement system for employees of the Federal Government.

(3) A senior judge, while performing duties referred to in paragraph (2), shall be provided with such office space and staff assistance as the chief judge considers appropriate and shall be entitled to the per diem, travel allowances, and other allowances provided for judges of the court.

(4) A senior judge shall be considered to be an officer or employee of the United States with respect to his status as a senior judge, but only during periods the senior judge is performing duties referred to in paragraph (2). For the purposes of section 205 of title 18, a senior

judge shall be considered to be a special government employee during such periods. Any provision of law that prohibits or limits the political or business activities of an employee of the United States shall apply to a senior judge only during such period.

(5) The court shall prescribe rules for the use and conduct of senior judges of the court. The chief judge of the court shall transmit such rules, and any amendments to such rules, to the Committees on Armed Services of the Senate and the House of Representatives not later than 15 days after the issuance of such rules or amendments, as the case may be.

(6) For purposes of subchapter III of chapter 83 of title 5 (relating to the Civil Service Retirement and Disability System) and chapter 84 of such title (relating to the Federal Employees' Retirement System) and for purposes of any other Federal Government retirement system for employees of the Federal Government—

(A) a period during which a senior judge performs duties referred to in paragraph (2) shall not be considered creditable service;

(B) No amount shall be withheld from the pay of a senior judge as a retirement contribution under section 8334, 8343, 8422, or 8432 of title 5 or under any other such retirement system for any period during which the senior judge performs duties referred to in paragraph (2);

(C) no contribution shall be made by the Federal Government to any retirement system with respect to a senior judge for any period during which the senior judge performs duties referred to in paragraph (2); and

(D) a senior judge shall not be considered to be a reemployed annuitant for any period during which the senior judge performs duties referred to in paragraph (2).

(f) SERVICE OF ARTICLE III JUDGES.—(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States court of appeals or of a United States district court to perform the duties of judge of the United States Court of Military Appeals—

(A) during a period a judge of the court is unable to perform his duties because of illness or other disability; or

(B) in any case in which a judge of the court recuses himself.

(2) A designation under paragraph (1) may be made only with the consent of the designated judge and the concurrence of the chief judge of the court of appeals or district court concerned.

(3) Per diem, travel allowances, and other allowances paid to the designated judge in connection with the performance of duties for the court shall be paid from funds available for the payment of per diem and such allowances for judges of the court. [*Author's note*: The authority conferred by § 942(f) terminates on September 30, 1995, under § 1301(i) of Pub. L. No. 101-189, 103 Stat. 1352.]

(g) EFFECT OF VACANCY ON COURT.—A vacancy on the court does not impair the right of the remaining judges to exercise the powers of the court.

§ 943. Art. 143. Organization and employees

(a) CHIEF JUDGE.—The President shall designate from time to time one of the judges of the United States Court of Military Appeals to act as chief judge.

(b) PRECEDENCE OF JUDGES.—The chief judge of the court shall have precedence and preside at any session which he attends. The other judges shall have precedence according to the seniority of their original commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(C) STATUS OF ATTORNEY POSITIONS.—(1) Attorney positions of employment under the Court of Military Appeals are excepted from the competitive service. Appointments to such positions shall be made by the court without the concurrence of any other officer or employee of the executive branch, in the same manner as appointments are made to other executive branch positions of a confidential or policy-determining character for which it is not practicable to examine or to hold a competitive examination. Such positions shall not be counted as positions of that character for purposes of any limitation on the number of positions of that character provided in law.

(2) In making appointments to the positions described in paragraph (1), preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5).

§ 944. Art. 144. Procedure

The United States Court of Military Appeals may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum.

§ 945. Art. 145. Annuities for judges and survivors

[Omitted]

§ 946. Art. 146. Code Committee

(a) ANNUAL SURVEY.—A committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter.

(b) COMPOSITION OF COMMITTEE.—The committee shall consist of—

(1) the judges of the United States Court of Military Appeals;

(2) the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps; and

(3) two members of the public appointed by the Secretary of Defense.

(C) REPORTS.—(1) After each such survey, the committee shall report—

(A) to the Committees on Armed Services of the Senate and of the House of Representatives; and

(B) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation.

(2) Each report under paragraph (1) shall include the following:

(A) information on the number and status of pending cases.

(B) any recommendations of the committee relating to—

(i) uniformity of policies as to sentences;

(ii) amendments to this chapter; and

(iii) any other matters considered appropriate.

(d) QUALIFICATIONS AND TERMS OF APPOINTED MEMBERS.—Each member of the committee appointed by the Secretary of Defense under subsection (b)(3) shall be a recognized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

(e) APPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App. I) shall not apply to the committee.

[As amended through National Defense Authorization Act for Fiscal Year 1991]

BOOK REVIEWS

THE CORPS OF ENGINEERS AND AMERICAN DEFENSE POLICY IN THE NINETEENTH CENTURY: *FORTRESS AMERICA**

Reviewed by William S. Fields**

In the era of the Strategic Defense Initiative, an analysis of America's coastal defense policies of the nineteenth century might appear, at first glance, to be of little practical value. But a study of such matters is not as anachronistic as it may seem. For as David A. Clary aptly demonstrates in his recent work, *Fortress America*, there is a definite continuity in American defense policies and programs, driven by a desire to protect the nation's territorial integrity from "sudden war," of which the Strategic Defense Initiative is but the most recent expression. As he notes at the outset of his book, in many respects, today's debate by "scientific experts" over the viability of our contemporary programs is not unlike the debates of previous generations of experts who sought to promote systems of defense that were considered "state of the art" in their day.

In *Fortress America* Mr. Clary gives the reader a concise but comprehensive look at the history of coastal fortifications and their central role in America's defense policies of the nineteenth century. On a technical level, he presents a detailed review of the architecture,

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*David A. Clary, *Fortress America - The Corps of Engineers, Hampton Roads, and United States Coastal Defenses*. Charlottesville: The University of Virginia Press, 1990. Pages, xii, 222. Hardcover. Illustrations, Abbreviations, Notes, Bibliography of Primary Sources, and Index.

**Attorney Adviser, Office of the Solicitor, U.S. Department of the Interior. B.A., University of Virginia, 1976; J.D., College of William and Mary, 1979. Member of the Bar of Virginia. Author: *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 Mil. L. Rev. 195 (1989); *The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs?*," 12 Geo. Mason U. L. Rev. 227 (1990) (with James R. Richards). The opinions expressed herein are those of the author and do not represent the views of the United States Government or any of its agencies or officials.

construction (including the procurement practices of the era), and armament of those fortifications, and he discusses their evolution and ultimate demise as a result of the multitude of military, technological, economic, and political changes that occurred throughout the century. As a case study, he focuses on the military engineering programs at Hampton Roads, Virginia, an area of tremendous strategic significance, which throughout the nineteenth century became the country's major naval center and the location of the greatest fort ever built in the United States. His work is the product of an extensive review of original sources, including correspondence, reports, appropriations acts, drawings, and other public documents.

In conjunction with his technical analysis, Mr. Clary also examines the dominant role played by the Corps of Engineers in defense planning and implementation during the golden age of coastal fortifications. Founded in 1802 along with the United State Military Academy at West Point (which it ran for sixty-five years), the Corps assimilated the Academy's most distinguished graduates into its ranks and served as the brain center of the military establishment throughout the first half of the nineteenth century. During that period the Corps was the principal proponent and builder of the nation's three major fortifications systems and was the leading voice in the formulation of the nation's defense policy. As an institution, however, it became so closely tied to the fortification system of defense that it was blinded to the many changes that were driving the system into obsolescence. As a result of its inability to appreciate the significance of, and adapt to, those changes, the Corps ultimately was forced to relinquish its control over national defense policy to the more flexible and forward thinking combat branches of the Army. In the end, it underwent a change in mission, assuming responsibility for the Army's general military construction activities—duties that previously had been performed by the quartermasters.

Mr. Clary concludes that, along with its engineering achievements, the Corps of Engineers' activities during their early years left an enduring political and economic legacy. As part of its advocacy of coastal fortification projects, it had also called for improved roads and canals. This approach struck a resonant cord with every community (and their elected representatives) that would benefit from access to commerce and local projects that provided public employment. By making internal transportation a military necessity, the Corps ensured that the nation's internal regions and coastal centers would have common cause to support its construction programs. A resulting by-product of this approach was the tendency of military

construction programs to become larger, more expensive, self-serving, and often obsolete before completion. Cost overruns became a recurring problem. Whether intentionally or unintentionally, the Corps' practices laid the foundation for modern "pork-barrel" politics and the bureaucratic growth of the military establishment.

The Corps of Engineers also set a precedent for the modern practice of obtaining financing for their programs by offering extravagant warnings about external dangers, and correspondingly extravagant claims as to the military's ability to avert those dangers if given adequate budgetary resources. Their coastal fortifications systems, which were at times of dubious military value, were the product of generations of dire predictions; yet no enemy fleet every raided an American port after 1814.

Mr. Clary does not overlook the fact, however, that Corps of Engineers' activities in the early nineteenth century had certain positive effects that, in the long run, may have proved more beneficial for the nation. By vastly improving coastal transportation infrastructure, its projects facilitated economic growth and the development of naval facilities. These achievements ultimately made the country stronger, regardless of the usefulness of the forts. Perhaps more important, Mr. Clary credits the Corps with keeping the military establishment focused upon its real purpose—national defense against modern enemies— at a time when the Army was small and scattered. Its orientation toward external enemies, real or imaginary, kept the Army from "sinking entirely into the military barbarism that its Indian fighting tended to encourage."

At the beginning of chapter 7, Mr. Clary quotes with approval Winston Churchill's statement: "Everyone has his day and some days last longer than others." While this certainly may be true of coastal fortifications in their physical sense, there is still much that can be learned from an examination of their origins and development. *Fortress America* presents a well-researched, interesting, and thoughtful analysis of the subject that goes beyond the cliche that soldiers always prepare for the last war. It examines the technical aspects of coastal fortifications, as well as their significance in a broader historical context. It will be a useful reference for all who seek a better understanding of the roots of American defense policy.

MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE*

Reviewed by Judge Ronald M. Holdaway**

This book deserves a wide audience. The role played in the Vietnam war by military lawyers is, perhaps, a minor theme in the overall story of that fated conflict; it is nonetheless an important one.

The social and political upheavels on the home front (caused largely but not entirely by the war) inevitably affected the morale and discipline of those singled out and sent to the war zone. Military law and military lawyers were closely intertwined with the military hierarchy's response to these problems as well as with the individuals, relatively few in numbers, who were causing them.

This fine book tells the story and tells it well. It does so in both a scholarly and interesting manner. All the facts, figures, names, dates, and the other "dry facts of history" are here. If that was all, there would be little to recommend it to the average reader. It is, however, also a lively and interesting account of evolution of law and policy that led to an ever increasing use of, and reliance on, lawyers by their commanders as they attempted to cope with a severe and eroding disciplinary environment. The fraggings, drug culture, racial unrest, and general indiscipline were greatly exaggerated by the popular press, but they did exist to a degree and were a real part of the war. The integration in the narrative of the details of important cases and other anecdotal material that portray these problems in a legal context is excellent. These "war stories," together with the numerous and well chosen photographs, truly evoke the Zeitgeist of those momentous years.

The Marine experience in developing legal services in Vietnam was a little different, as the book points out, in that it involved the establishment and rapid evolution from a legal system operated by part-time (and in some cases, reluctant) lawyers to a professional body of judge advocates not unlike the other services. Too much can be made of this. Army judge advocates who served in Vietnam will

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*Lieutenant Colonel Gary D. Solis, USMC, *Marines and Military Law in Vietnam: Trial by Fire*. Government Printing Office, 1989. Pages: xi, 295. Price: $17.00. Appendix, Index.

**Judge Holdaway is an Associate Judge on the United States Court of Veterans Appeals. He retired from the Army in December 1989 in the grade of Brigadier General. He served in Vietnam in 1969-1970 as Staff Judge Advocate of the 1st Cavalry Division (Airmobile).

find quickly, upon reading this book, that the problems, ways of living and working, and the adjustments to the environment substantially were identical for Army lawyers and Marine lawyers. The same is true concerning the relationships between commanders and lawyers and their mutual approach to the problems they faced.

The book closes by posing the questions of whether the military justice system "worked" in Vietnam and whether it would work in future conflicts. My own answer to both questions, and I think it is in accord with the author, Lieutenant Colonel Solis, is a qualified yes. It did work. It sputtered and squeaked, and at times threatened to come to a halt; in the end, however, the job got done and done reasonably well. That may seem a modest claim, but I know of no criminal law system—military or civilian, in war or peace—that justifiably could make a stronger one. The system worked, and will work in the future, because of the type of people portrayed in this book—lawyers and commanders—who made do with what they had, adapted to the environment (legal and physical), and got on with the job. Lieutenant Colonel Solis deserves high praise for the book. Read it. Get your friends to read it. I await with interest a similar effort from the other services. It is important that these histories be written.

SHOT AT DAWN*

Reviewed by Major Fred L. Borch**

Military lawyers will find this a fascinating book. Written by two British civil servants who are amateur historians, it reveals the facts behind the execution by firing squad of 312 British soldiers during World War I. The authors conclude that those shot at dawn got little justice at their trials by courts-martial, but the authors do not blame any particular person. Rather, they see "an unforgiving military judicial system" as the culprit. *Shot at Dawn* shows that military justice in time of war can be very imperfect.

Great Britain's involvement in World War I began on August 4, 1914, and ended on March 31, 1920. By 1916, a full-scale draft was needed to replace the heavy combat losses suffered by the all-volunteer British army; average daily casualties were 2000, including 400 dead. Against this backdrop, British army commanders believed that military discipline would crumble without a death penalty. The commanders were relying on the deterrent effect of the death penalty: "pour encourager les autres" (to encourage others) was the phrase of the day. The sanction had to be more frightening to the men than the prospect of facing the enemy—the death penalty had that quality.

During the period from 1914-1920, 3,080 soldiers were sentenced to death under the British Army Act. Of this number, 312 men actually were executed. Yet, surprisingly few were put to death for violent crime; only 37 were executed for murder. Rather, the majority were shot at dawn for military crimes: desertion (268), cowardice (18), going from place of duty without authority (7), disobedience of orders (5), assault upon commissioned officer (5), mutiny (4), sleeping on duty (2), and shamefully casting away weapons (2). Other capital military offenses under the Act included "knowingly committing as act which imperils the success of the forces," "breaking into a place for plunder," "intentionally causing false alarms," and "irregularly appropriating supplies contrary to orders," although no soldiers were put to death for any of these offenses.

The authors view these statistics as evidence that the British Army made excessive use of capital punishment to enforce military discipline. They argue that defects in courts-martial procedure per-

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*Julian Putkowski & Julian Sykes, *Shot at Dawn*. Barnsley, United Kingdom: Wharncliffe Publishing Ltd., 1989. Pages 352. Price: L15.95 (hardcover).

**Instructor, Criminal Law Division, The Judge Advocate General's School.

mitted the death penalty to be imposed arbitrarily and capriciously. Certainly, the court proceedings lacked the "due process" of today's military tribunals. The accused soldiers did not have lawyers to defend them; they could have officers represent them as "prisoners' friends," but these officers were not necessarily skilled advocates. The authors' research showed that over ten percent of those men executed were *not* represented at trial at all. An accused on trial for cowardice might have benefited from medical testimony on the issue of "shell-shock" or "battle fatigue," but lack of adequate defense representation meant that this type of evidence often was not presented. Likewise, evidence in extenuation and mitigation did not reach the finder of fact in those cases in which the accused had no representation.

Unlawful command influence existed in those days as well. In one reported case a superior officer publicly criticized a junior officer who refused to impose a death sentence upon a deserter. Post-trial review was so minimal that an accused could be put to death within two days of trial. Additionally, at each stage of the post-sentencing procedure, each higher commander could attach "comments" to the record of trial for ultimate review by the commander-in-chief. In one case a battalion commander wrote that the accused was "considered to be an undesirable man who was likely to prove a source of corruption." He also wrote that the "soldier's fighting value was not of a high standard." Not surprisingly, the accused's sentence to death was confirmed. There was no civilian review of these courts-martial; in fact, the next-of-kin of those executed often were told that the men had been killed in action. The authors write that some families today still do not know that a relative thought to have been killed in battle actually was shot by firing squad.

Shot at Dawn suffers from poor organization, and the writing is somewhat uneven. The authors' provide a short introduction, then follow chronologically with the story of each executed soldier's case. Stringing 312 cases one after another makes for difficult reading, and any analysis is limited to that individual case. The authors might have done better to group the cases in chapters discussing particular shortcomings of the British military justice system. Nevertheless, the book is well worth reading; these are pages of history not often seen.

SHORT HISTORY OF THE KOREAN WAR*

Reviewed by 1LT William W. Way**

There seems to be a renewed interest in the Korean War, as evidenced by the great number of books about the war that recently have been published. If I could read only one book on the war, however, it would not be James L. Stokesbury's *A Short History of the Korean War*. In order to make the book a "short history," the author cut out too much of the necessary analysis and discussion. The result is a book containing too many conclusionary statements such as, "Reputations were made and lost; men fought and died." These passages add little to our understanding of the war.

Nevertheless, the book provides a fine introduction to the Korean War. It is a good book to tie together some of the highlights of the conflict. The book was easy to read. Sentences were simple, and the chapters were well organized into subsections. The narrative moved quickly, although in some places this was achieved by oversimplification of the issues and discussions. The book had good discussions of the Inchon landing, the air war, and the prisoners of war issues. Unfortunately, the author failed to discuss some other important issues, such as the failure of intelligence to warn about the initial North Korean invasion, and the massive post-Inchon involvement of Communist China. There was limited discussion of the clash of personalities between Washington and General MacArthur.

Although written by a scholar, *A Short History of the Korean War* does not break much new ground. Nevertheless, the book may serve as a good introductory survey for further reading on the Korean War.

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*James L. Stokesbury, A Short History of the Korean War. William Morrow and Company, 1988 (1990 paperback reprint). Pages: 276. Price $8.95.

**Trial Defense Service, 3d Armored Division, Hanau Field Office.

CUMULATIVE INDEX, VOLS. 122-131

I. AUTHOR INDEX

Addicott, MAJ Jeffrey F., Developing a Security Strategy for Indochina, Vol. 128, at 35.

Anderson, MAJ David A., Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty, Vol. 127, at 1.

Berry, CPT Dean C., Changing Face of Disparate Impact Analysis, The, Vol. 125, at 1.

Bigelow, CPT Donovan R., Equal But Separate: Can the Army's Affirmative Action Program Withstand Judicial Scrutiny After *Croson*?, Vol. 131, at 147.

Borch III, MAJ Frederic L., Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility, The, Vol. 124, at 163.

Capofari, LTC Paul A., Military Rule of Evidence 404 and Good Military Character, Vol. 130, at 171.

Clark, M. Wesley, Electronic Surveillance and Related Investigative Techniques, Vol. 128, at 155.

Connor, MAJ Mark J., Government-Owned Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?, Vol. 131, at 1.

Davis, MAJ Jeffrey S., Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, Vol. 131, at 55.

Dean, CPT Benjamin P., Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model, Vol. 122, at 149.

Douglass, Dean John Jay, Nineteenth Annual Kenneth J. Hodson Lecture: Military Lawyer Ethics, The, Vol. 129, at 11.

Early, William N., Lizann M. Longstreet, & James S. Richardson, USCMA and the Specified Issue: The Current Practice, Vol. 123, at 9.

Echols, MAJ J. Bryan, Open Houses Revisited: An Alternative Approach., Vol. 129, at 185.

Everett, Robinson O., Military Rules of Evidence Symposium: An Introduction, Vol. 130, at 1.

Everett, Robinson O., Specified Issues in the United States Court of Military Appeals: A Rationale, Vol. 123, at 1.

Feeney, Thomas J., & CPT Margaret L. Murphy, Judge Advocate General's Corps, 1982-1987, The, Vol. 122, at 1.

Fennelly, John E., Inevitable Discovery, the Exclusionary Rule, and Military Due Process, Vol. 131, at 109.

Fidell, Eugene R., Culture of Change in Military Law, The, Vol. 126, at 125.

Fidell, Eugene R., Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals, Vol. 131, at 169.

Fidell, Eugene R., & Linda Greenhouse, Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, A, Vol. 122, at 117.

Fields, William Sutton, Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers, The, Vol. 124, at 195.

Goldberg, Hon. Arthur J., Can We Afford the Bill of Rights?, Vol. 129, at 1.

Greenhouse, Linda, & Eugene R. Fidell, Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, A, Vol. 122, at 117.

Griffin, CPT Natalie L., Wages of Federal Employees: Can We Talk?, The, Vol. 129, at 141.

Hatfield, CPT Steven A., & MAJ Michael N. Schmitt, Scientific Evidence in Courts-Martial: From the General Acceptance Standard to the Relevancy Approach, Vol. 130, at 135.

Hawkens, LCDR E. Roy, Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service, The, Vol. 125, at 99.

Hayden, MAJ David L., Should There Be a Psychotherapist Privilege in Military Courts-Martial?, Vol. 123, at 31.

Imwinkelried, Edward J., Use of Evidence of an Accused's Uncharged Misconduct to Prove *Mens Rea*: The Doctrines That Threaten to Engulf the Character Evidence Prohibition, The, Vol. 130, at 41.

Ingold, MAJ Bernard P., An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers, Vol. 124, at 1.

Jewell, LTC W. Gary, & MAJ Harry L. Williams, COMA Watch 1989, Vol. 128, at 115.

Jewell, LTC W. Gary, & MAJ Michael D. Warren, Instructions and Advocacy, Vol. 126, at 147.

Lederer, Fredric I., Military Rules of Evidence: Origins and Judicial Implementation, The, Vol. 130, at 5.

Longstreet, Lizann M., William N. Early, & James S. Richardson, USCMA and the Specified Issue: The Current Practice, Vol. 123, at 9.

Lurie, Jonathan, Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam, Vol. 126, at 133.

McMillion, MAJ Michael R., Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?, Vol. 127, at 169.

Medsger, MAJ William R., Weapon Systems Warranties: Unleashing the Genius in American Industry?, Vol. 127, at 63.

Milhizer, MAJ Eugene R., Voluntary Intoxication as a Criminal Defense Under Military Law, Vol. 127, at 131.

Murphy, CPT Margaret L., & Thomas J. Feeney, Judge Advocate General's Corps, 1982-1987, The, Vol. 122, at 1.

Parkerson, Jr., MAJ John E., & MAJ Carolyn S. Stoehr, U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, The, Vol. 129, at 41.

Pregent, MAJ Richard, Presidential Authority to Displace Customary International Law, Vol. 129, at 77.

Prescott, CPT Jody M., Soviet Military Justice and the Challenge of Perestroika, Vol. 123, at 129.

Pribble, CPT Fred T., A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979, Vol. 125, at 187.

Ransick, MAJ Scott E., Adverse Impact of the Federal Bankruptcy Law on the Government's Rights in Relation to the Contractor in Default, Vol. 124, at 65.

Richardson, James S., William N. Early, & Lizann M. Longstreet, USCMA and the Specified Issue: The Current Practice, Vol. 123, at 9.

Rollins, CPT Timothy J., Contract Lawyer's Guide to the Requirement for Meaningful Discussions in Negotiated Procurements, A, Vol. 122, at 221.

Santerre, Elyce K.D., From Confiscation to Contingency Contracting: Property Acquisition On or Near the Battlefield, Vol. 124, at 111.

Schmitt, MAJ Michael N., & CPT Steven A. Hatfield, Scientific Evidence in Courts-Martial: From the General Acceptance Standard to the Relevancy Approach, Vol. 130, at 135.

Sharp, Mark E., Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?, Vol. 130, at 77.

Sofaer, Abraham D., Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, The, Vol. 126, at 89.

Steinbeck, CPT Margaret O., Liability of Defense Contractors for Hazardous Waste Cleanup Costs, Vol. 125, at 55.

Stoehr, MAJ Carolyn S., & MAJ John E. Parkerson, Jr., U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, The, Vol. 129, at 41.

Sullivan, CPT Annamary, President's Power to Promulgate Death Penalty Standards, The, Vol. 125, at 143.

Sun, GEN Zhang Chi, Chinese Military Law: A Brief Commentary On Captain Rodearmel's Article, Vol. 129, at 31.

Supervielle, CPT Manuel E.F., Article 31(b): Who Should Be Required to Give Warnings?, Vol. 123, at 151.

Vint, CPT Peter D.P., International Export of Hazardous Waste: European Economic Community, United States, and International Law, The., Vol. 129, at 107.

Warren, MAJ Michael D., & LTC W. Gary Jewell, Instructions and Advocacy, Vol. 126, at 147.

Welton, MAJ Mark D., NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics, The, Vol. 122, at 77.

Wiener, AUS (Ret.), COL Frederick Bernays, American Military Law in the Light of the First Mutiny Acts Tricentennial, Vol. 126, at 1.

Wiener, AUS (Ret.), COL Frederick Bernays, Seamy Side of the World War I Court-Martial Controversy, The, Vol. 123, at 109.

Williams, MAJ Harry L., & LTC W. Gary Jewell, COMA Watch 1989, Vol. 128, at 115.

Winter, CPT Matthew E., "Finding the Law"—The Values, Identity, and Function of the International Law Adviser, Vol. 128, at 1.

Woods, MAJ Carl J., An Overview of the Military Aspects of Security Assistance, Vol. 128, at 71.

II. SUBJECT INDEX

-A-

ACQUISITIONS, see also PROCUREMENT, CONTRACTS

A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979, by CPT Fred T. Pribble, Vol. 125, at 187.

From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield, by Elyce K.D. Santerre, Vol. 124, at 111.

ADMISSIBILITY

Inevitable Discovery, the Exclusionary Rule, and Military Due Process, by John E. Fennelly, Vol. 131, at 109.

Military Rule of Evidence 404 and Good Military Character, by LTC Paul A. Capofari, Vol. 130, at 171.

Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?, by Mark E. Sharp, Vol. 130, at 77.

Scientific Evidence in Courts-Martial: From the General Acceptance Standard to the Relevancy Approach, by MAJ Michael N. Schmitt, & CPT Steven A. Hatfield, Vol. 130, at 135.

Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility, The, by MAJ Frederic L. Borch III, Vol. 124, at 163.

Use of Evidence of an Accused's Uncharged Misconduct to Prove *Mens Rea*: The Doctrines That Threaten to Engulf the Character Evidence Prohibition, The, by Edward J. Imwinkelried, Vol. 130, at 41.

ADVISER

"Finding the Law"—The Values, Identity, and Function of the International Law Adviser, by CPT Matthew E. Winter, Vol. 128, at 1.

AFFIRMATIVE ACTION

Equal But Separate: Can the Army's Affirmative Action Program Withstand Judicial Scrutiny After *Croson*?, by CPT Donovan R. Bigelow, Vol. 131, at 147.

ALCOHOL, see also DRUGS

Voluntary Intoxication as a Criminal Defense Under Military Law, by MAJ Eugene R. Milhizer, Vol. 127, at 131.

ARTICLE 31(b), U.C.M.J.

Article 31(b): Who Should Be Required to Give Warnings?, by CPT Manuel E.F. Supervielle, Vol. 123, at 151.

-B-

BANKRUPTCY

Adverse Impact of the Federal Bankruptcy Law on the Government's Rights in Relation to the Contractor in Default, by MAJ Scott E. Ransick, Vol. 124, at 65.

BID PROTESTS, see also CONTRACTS

Contract Lawyer's Guide to the Requirement for Meaningful Discussions in Negotiated Procurements, A, by CPT Timothy J. Rollins, Vol. 122, at 221.

BILL OF RIGHTS

Can We Afford the Bill of Rights?, by Hon. Arthur J. Goldberg, Vol. 129, at 1.

-C-

CHINA

Chinese Military Law: A Brief Commentary on Captain Rodearmel's Article, by GEN Zhang Chi Sun, Vol. 129, at 31.

CIVIL RIGHTS

Changing Face of Disparate Impact Analysis, The, by CPT Dean C. Berry, Vol. 125, at 1.

Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service, The, by LCDR E. Roy Hawkens, Vol. 125. at 99.

CLAIMS

Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service, The, by LCDR E. Roy Hawkens, Vol. 125. at 99.

COLLECTIVE BARGAINING

Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?, by MAJ Michael R. McMillion, Vol. 127, at 169.

CONFESSIONS, see also ADMISSIONS

Article 31(b): Who Should Be Required to Give Warnings?, by CPT Manuel E.F. Supervielle, Vol. 123, at 151.

CONTRACTING OFFICERS

Liability of Defense Contractors for Hazardous Waste Cleanup Costs, by CPT Margaret O. Steinbeck, Vol. 125, at 55.

CONTRACTS

Adverse Impact of the Federal Bankruptcy Law on the Government's Rights in Relation to the Contractor in Default, by MAJ Scott E. Ransick, Vol. 124, at 65.

Contract Lawyer's Guide to the Requirement for Meaningful Discussions in Negotiated Procurements, A, by CPT Timothy J. Rollins, Vol. 122, at 221.

From Confiscation to Contingency Contracting: Property Acquisition On or Near the Battlefield, by Elyce K.D. Santerre, Vol. 124, at 111.

Weapon Systems Warranties: Unleashing the Genius in American Industry?, by MAJ William R. Medsger, Vol. 127, at 63.

COURT OF MILITARY APPEALS

COMA Watch 1989, by LTC W. Gary Jewell, & MAJ Harry L. Williams, Vol. 128, at 115.

Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals, by Eugene R. Fidell, Vol. 131, at 169.

Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, A, by Eugene R. Fidell, & Linda Greenhouse, Vol. 122, at 117.

Specified Issues in the United States Court of Military Appeals: A Rationale, by Robinson O. Everett, Vol. 123, at 1.

USCMA and the Specified Issue: The Current Practice, by William N. Early, Lizann M. Longstreet, & James S. Richardson, Vol. 123, at 9.

COURTS-MARTIAL

Instructions and Advocacy, by MAJ Michael D. Warren, & LTC W. Gary Jewell, Vol. 126, at 147.

Military Rules of Evidence Symposium: An Introduction, by Robinson O. Everett, Vol. 130, at 1.

Military Rules of Evidence: Origins and Judicial Implementation, The, by Fredric I. Lederer, Vol. 130, at 5.

Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, A, by Eugene R. Fidell, & Linda Greenhouse, Vol. 122, at 117.

Scientific Evidence in Courts-Martial: From the General Acceptance Standard to the Relevancy Approach, by MAJ Michael N. Schmitt, & CPT Steven A. Hatfield, Vol. 130, at 135.

Seamy Side of the World War I Court-Martial Controversy, The, by COL Frederick Bernays Wiener, AUS (Ret.), Vol. 123, at 109.

Should There Be a Psychotherapist Privilege in Military Courts-Martial?, by MAJ David L. Hayden, Vol. 123, at 31.

-D-

DEATH PENALTY

President's Power to Promulgate Death Penalty Standards, The, by CPT Annamary Sullivan, Vol. 125, at 143.

Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty, by MAJ David A. Anderson, Vol. 127, at 1.

U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, The, by MAJ John E. Parkerson, Jr., & MAJ Carolyn S. Stoehr, Vol. 129, at 41.

DEFENSES

Voluntary Intoxication as a Criminal Defense Under Military Law, by MAJ Eugene R. Milhizer, Vol. 127, at 131.

DRUGS, see also ALCOHOL

Voluntary Intoxication as a Criminal Defense Under Military Law, by MAJ Eugene R. Milhizer, Vol. 127, at 131.

-E-

ELECTRONIC SURVEILLANCE

Electronic Surveillance and Related Investigative Techniques, by M. Wesley Clark, Vol. 128, at 155.

EMPLOYMENT

Changing Face of Disparate Impact Analysis, The, by CPT Dean C. Berry, Vol. 125, at 1.

ENVIRONMENTAL LAW

Government-Owned Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?, by MAJ Mark J. Connor, Vol. 131, at 1.

International Export of Hazardous Waste: European Economic Community, United States, and International Law, The, by CPT Peter D.P. Vint, Vol. 129, at 107.

Liability of Defense Contractors for Hazardous Waste Cleanup Costs, by CPT Margaret O. Steinbeck, Vol. 125, at 55.

ETHICS, see also PROFESSIONAL CONDUCT

An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers, by MAJ Bernard P. Ingold, Vol. 124, at 1.

Nineteenth Annual Kenneth J. Hodson Lecture: Military Lawyer Ethics, The, by Dean John Jay Douglass, Vol. 129, at 11.

EUROPE

International Export of Hazardous Waste: European Economic Community, United States, and International Law, The, by CPT Peter D.P. Vint, Vol. 129, at 107.

U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, The, by MAJ John E. Parkerson, Jr., & MAJ Carolyn S. Stoehr, Vol. 129, at 41.

EVIDENCE, see also MILITARY RULES OF EVIDENCE

Article 31(b): Who Should Be Required to Give Warnings?, by CPT Manuel E.F. Supervielle, Vol. 123, at 151.

Electronic Surveillance and Related Investigative Techniques, by M. Wesley Clark, Vol. 128, at 155.

Inevitable Discovery, the Exclusionary Rule, and Military Due Process, by John E. Fennelly, Vol. 131, at 109.

Military Rule of Evidence 404 and Good Military Character, by LTC Paul A. Capofari, Vol. 130, at 171.

Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?, by Mark E. Sharp, Vol. 130, at 77.

Military Rules of Evidence Symposium: An Introduction, by Robinson O. Everett, Vol. 130, at 1.

Military Rules of Evidence: Origins and Judicial Implementation, The, by Fredric I. Lederer, Vol. 130, at 5.

Scientific Evidence in Courts-Martial: From the General Acceptance Standard to the Relevancy Approach, by MAJ Michael N. Schmitt, & CPT Steven A. Hatfield, Vol. 130, at 135.

Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility, The, by MAJ Frederic L. Borch III, Vol. 124, at 163.

Use of Evidence of an Accused's Uncharged Misconduct to Prove *Mens Rea*: The Doctrines That Threaten to Engulf the Character Evidence Prohibition, The, by Edward J. Imwinkelried, Vol. 130, at 41.

-F-

FEDERAL EMPLOYEES

Wages of Federal Employees: Can We Talk?, The, by CPT Natalie L. Griffin, Vol. 129, at 141.

FIRST AMENDMENT

Open Houses Revisited: An Alternative Approach, by MAJ J. Bryan Echols, Vol. 129, at 185.

-G-

GERMANY, see also EUROPE

NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics, The, by MAJ Mark D. Welton, Vol. 122, at 77.

-H-

HEARSAY, see also EVIDENCE

Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?, by Mark E. Sharp, Vol. 130, at 77.

Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility, The, by MAJ Frederic L. Borch III, Vol. 124, at 163.

HISTORY

American Military Law in the Light of the First Mutiny Acts Tricentennial, by COL Frederick Bernays Wiener, AUS (Ret.), Vol. 126, at 1.

Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam, by Jonathan Lurie, Vol. 126, at 133.

Culture of Change in Military Law, The, by Eugene R. Fidell, Vol. 126, at 125.

Judge Advocate General's Corps, 1982-1987, The, by Thomas J. Feeney, & CPT Margaret L. Murphy, Vol. 122, at 1.

Seamy Side of the World War I Court-Martial Controversy, The, by COL Frederick Bernays Wiener, AUS (Ret.), Vol. 123, at 109.

Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers, The, by William Sutton Fields, Vol. 124, at 195.

HOMOSEXUALS

Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, by MAJ Jeffrey S. Davis, Vol. 131, at 55.

HUMAN RIGHTS

Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model, by CPT Benjamin P. Dean, Vol. 122, at 149.

U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, The, by MAJ John E. Parkerson, Jr., & MAJ Carolyn S. Stoehr, Vol. 129, at 41.

-I-

INDOCHINA

Developing a Security Strategy for Indochina, by MAJ Jeffrey F. Addicott, Vol. 128, at 35.

INEVITABLE DISCOVERY

Inevitable Discovery, the Exclusionary Rule, and Military Due Process, by John E. Fennelly, Vol. 131, at 109.

INSTRUCTIONS

Instructions and Advocacy, by MAJ Michael D. Warren, & LTC W. Gary Jewell, Vol. 126, at 147.

INSURGENTS

Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model, by CPT Benjamin P. Dean, Vol. 122, at 149.

INTERNATIONAL LAW

Chinese Military Law: A Brief Commentary on Captain Rodearmel's Article, by GEN Zhang Chi Sun, Vol. 129, at 31.

Developing a Security Strategy for Indochina, by MAJ Jeffrey F. Addicott, Vol. 128, at 35.

"Finding the Law"—The Values, Identity, and Function of the International Law Adviser, by CPT Matthew E. Winter, Vol. 128, at 1.

International Export of Hazardous Waste: European Economic Community, United States, and International Law, The, by CPT Peter D.P. Vint, Vol. 129, at 107.

Presidential Authority to Displace Customary International Law, by MAJ Richard Pregent, Vol. 129, at 77.

Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model, by CPT Benjamin P. Dean, Vol. 122, at 149.

Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, The, by Abraham D. Sofaer, Vol. 126, at 89.

U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, The, by MAJ John E. Parkerson, Jr., & MAJ Carolyn S. Stoehr, Vol. 129, at 41.

-J-

JUDGE ADVOCATE GENERALS CORPS

Judge Advocate General's Corps, 1982-1987, The, by Thomas J. Feeney, & CPT Margaret L. Murphy, Vol. 122, at 1.

-L-

LABOR LAW, see also PERSONNEL, FEDERAL

Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?, by MAJ Michael R. McMillion, Vol. 127, at 169.

Wages of Federal Employees: Can We Talk?, The, by CPT Natalie L. Griffin, Vol. 129, at 141.

LAW OF WAR

"Finding the Law"—The Values, Identity, and Function of the International Law Adviser, by CPT Matthew E. Winter, Vol. 128, at 1.

LIABILITY

Liability of Defense Contractors for Hazardous Waste Cleanup Costs, by CPT Margaret O. Steinbeck, Vol. 125, at 55.

-M-

MILITARY AID

An Overview of the Military Aspects of Security Assistance, by MAJ Carl J. Woods, Vol. 128, at 71.

Developing a Security Strategy for Indochina, by MAJ Jeffrey F. Addicott, Vol. 128, at 35.

MILITARY JUSTICE

COMA Watch 1989, by LTC W. Gary Jewell, & MAJ Harry L. Williams, Vol. 128, at 115.

Military Rules of Evidence Symposium: An Introduction, by Robinson O. Everett, Vol. 130, at 1.

Military Rules of Evidence: Origins and Judicial Implementation, The, by Fredric I. Lederer, Vol. 130, at 5.

MILITARY LAW

American Military Law in the Light of the First Mutiny Acts Tricentennial, by COL Frederick Bernays Wiener, AUS (Ret.), Vol. 126, at 1.

Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam, by Jonathan Lurie, Vol. 126, at 133.

Chinese Military Law: A Brief Commentary on Captain Rodearmel's Article, by GEN Zhang Chi Sun, Vol. 129, at 31.

Culture of Change in Military Law, The, by Eugene R. Fidell, Vol. 126, at 125.

MILITARY RULES OF EVIDENCE, see also EVIDENCE

Inevitable Discovery, the Exclusionary Rule, and Military Due Process, by John E. Fennelly, Vol. 131, at 109.

Military Rule of Evidence 404 and Good Military Character, by LTC Paul A. Capofari, Vol. 130, at 171.

Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?, by Mark E. Sharp, Vol. 130, at 77.

Military Rules of Evidence Symposium: An Introduction, by Robinson O. Everett, Vol. 130, at 1.

Military Rules of Evidence: Origins and Judicial Implementation, The, by Fredric I. Lederer, Vol. 130, at 5.

Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility, The, by MAJ Frederic L. Borch III, Vol. 124, at 163.

-N-

NATIONAL GUARD, see also RESERVES

Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service, The, by LCDR E. Roy Hawkens, Vol. 125. at 99.

NATO MUTUAL SUPPORT ACT OF 1979

A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979, by CPT Fred T. Pribble, Vol. 125, at 187.

NATO SOFA

A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979, by CPT Fred T. Pribble, Vol. 125, at 187.

NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics, The, by MAJ Mark D. Welton, Vol. 122, at 77.

-O-

OPEN HOUSE

Open Houses Revisited: An Alternative Approach, by MAJ J. Bryan Echols, Vol. 129, at 185.

-P-

PAY

Wages of Federal Employees: Can We Talk?, The, by CPT Natalie L. Griffin, Vol. 129, at 141.

PERSONNEL, FEDERAL

Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?, by MAJ Michael R. McMillion, Vol. 127, at 169.

Wages of Federal Employees: Can We Talk?, The, by CPT Natalie L. Griffin, Vol. 129, at 141.

PERSONNEL, MILITARY

Equal But Separate: Can the Army's Affirmative Action Program Withstand Judicial Scrutiny After *Croson*?, by CPT Donovan R. Bigelow, Vol. 131, at 147.

Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, by MAJ Jeffrey S. Davis, Vol. 131, at 55.

Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers, The, by William Sutton Fields, Vol. 124, at 195.

PROCUREMENT, see also CONTRACTS

From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield, by Elyce K.D. Santerre, Vol. 124, at 111.

PROFESSIONAL CONDUCT, see also ETHICS

An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers, by MAJ Bernard P. Ingold, Vol. 124, at 1.

Nineteenth Annual Kenneth J. Hodson Lecture: Military Lawyer Ethics, The, by Dean John Jay Douglass, Vol. 129, at 11.

PSYCHOLOGY

Should There Be a Psychotherapist Privilege in Military Courts-Martial?, by MAJ David L. Hayden, Vol. 123, at 31.

-S-

SEARCH AND SEIZURE, see also EVIDENCE

Electronic Surveillance and Related Investigative Techniques, by M. Wesley Clark, Vol. 128, at 155.

SECURITY

Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, The, by Abraham D. Sofaer, Vol. 126, at 89.

SECURITY ASSISTANCE

An Overview of the Military Aspects of Security Assistance, by MAJ Carl J. Woods, Vol. 128, at 71.

Developing a Security Strategy for Indochina, by MAJ Jeffrey F. Addicott, Vol. 128, at 35.

SELF-DETERMINATION

Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model, by CPT Benjamin P. Dean, Vol. 122, at 149.

SENTENCING

Instructions and Advocacy, by MAJ Michael D. Warren, & LTC W. Gary Jewell, Vol. 126, at 147.

President's Power to Promulgate Death Penalty Standards, The, by CPT Annamary Sullivan, Vol. 125, at 143.

SOFA

NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics, The, by MAJ Mark D. Welton, Vol. 122, at 77.

SOVIET MILITARY JUSTICE

Soviet Military Justice and the Challenge of Perestroika, by CPT Jody M. Prescott, Vol. 123, at 129.

SPECIAL FORCES

Developing a Security Strategy for Indochina, by MAJ Jeffrey F. Addicott, Vol. 128, at 35.

SPECIFIED ISSUES

Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, A, by Eugene R. Fidell, & Linda Greenhouse, Vol. 122, at 117.

Specified Issues in the United States Court of Military Appeals: A Rationale, by Robinson O. Everett, Vol. 123, at 1.

USCMA and the Specified Issue: The Current Practice, by William N. Early, Lizann M. Longstreet, & James S. Richardson, Vol. 123, at 9.

SPYING

Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty, by MAJ David A. Anderson, Vol. 127, at 1.

-T-

TERRORISM

Presidential Authority to Displace Customary International Law, by MAJ Richard Pregent, Vol. 129, at 77.

Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, The, by Abraham D. Sofaer, Vol. 126, at 89.

TESTIMONY

Should There Be a Psychotherapist Privilege in Military Courts-Martial?, by MAJ David L. Hayden, Vol. 123, at 31.

Use of Evidence of an Accused's Uncharged Misconduct to Prove *Mens Rea*: The Doctrines That Threaten to Engulf the Character Evidence Prohibition, The, by Edward J. Imwinkelried, Vol. 130, at 41.

THIRD AMENDMENT

Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers, The, by William Sutton Fields, Vol. 124, at 195.

-U-

UNIFORM CODE OF MILITARY JUSTICE

Article 31(b): Who Should Be Required to Give Warnings?, by CPT Manuel E.F. Supervielle, Vol. 123, at 151.

Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty, by MAJ David A. Anderson, Vol. 127, at 1.

UNIONS, see also LABOR LAW, PERSONNEL, FEDERAL

Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?, by MAJ Michael R. McMillion, Vol. 127, at 169.

Wages of Federal Employees: Can We Talk?, The, by CPT Natalie L. Griffin, Vol. 129, at 141.

-W-

WARRANTIES

Weapon Systems Warranties: Unleashing the Genius in American Industry?, by MAJ William R. Medsger, Vol. 127, at 63.

WASTE

International Export of Hazardous Waste: European Economic Community, United States, and International Law, The, by CPT Peter D.P. Vint, Vol. 129, at 107.

Liability of Defense Contractors for Hazardous Waste Cleanup Costs, by CPT Margaret O. Steinbeck, Vol. 125, at 55.

WEAPONS

Weapon Systems Warranties: Unleashing the Genius in American Industry?, by MAJ William R. Medsger, Vol. 127, at 63.

WITNESSES

Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?, by Mark E. Sharp, Vol. 130, at 77.

WORLD WAR I

Seamy Side of the World War I Court-Martial Controversy, The, by COL Frederick Bernays Wiener, AUS (Ret.), Vol. 123, at 109.

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