KIMMEL, SHORT, MCVAY: CASE STUDIES IN EXECUTIVE AUTHORITY, LAW AND THE INDIVIDUAL RIGHTS OF MILITARY COMMANDERS

COMMANDER ROGER D. SCOTT[1]

I. Introduction

Two sets of controversial personnel actions frame U.S. involvement in the Second World War: the relief from command of Admiral Husband E. Kimmel and Lieutenant General Walter C. Short at Pearl Harbor, and the court-martial of Captain Charles B. McVay III, Commanding Officer of U.S.S. *Indianapolis*, sunk by a Japanese submarine in July 1945. Vigorous controversy concerning the treatment of these commanders has continued to this day.

Kimmel and Short were the senior Navy and Army commanders at Pearl Harbor at the time of the Japanese attack on 7 December 1941. The Secretaries of the War and Navy Departments relieved both commanders within days of the attack. The relieved commanders reverted, by operation of law, to their regular grades of Rear Admiral and Major General. After reviewing a preliminary report on the damage at Pearl Harbor, prepared by Secretary of the Navy Frank Knox, President Roosevelt appointed an investigative commission headed by Justice Owen Roberts of the U.S. Supreme Court. The Roberts Commission found the senior Navy and Army commanders at Pearl Harbor culpable for the lack of preparedness of forces assigned to them through their failure to coordinate appropriately with each other in the defense of Pearl Harbor. Extensive correspondence and debate on the propriety of courts-martial followed. Both Kimmel and

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1. Judge Advocate General's Corps, United States Navy. Presently assigned as Assistant Legal Adviser (Civil Law), U.S. European Command. LL.M., 1994, University of Virginia School of Law; J.D., 1986, University of Virginia School of Law (Order of the Coif, Law Review); M.A., 1997, Naval War College (Highest Distinction); B.A., 1977, Mary Washington College. Formerly assigned as Head, Operational Law Department, International and Operational Law Division, Office of the Judge Advocate General, Department of the Navy (1994-96); Chief, International and Operational Law, Office of the Staff Judge Advocate, U. S. Special Operations Command (1990-93); Staff Judge Advocate, Cruiser-Destroyer Group TWO (1988-90); Attorney-Adviser, Naval Legal Service Office Charleston (1986-88); Law Education Program (1983-86); Supply Department Head, USS Philadelphia (SSN 690). Commander Scott may be contacted at HQ USEUCOM, Unit 30400, Box 1000, APO AE 09128, or by email at scottr@hq.eucom.mil.

Short retired voluntarily in 1942, in their regular grades of Rear Admiral and Major General. A Navy Court of Inquiry and an Army investigative board recommended against court-martial charges, but endorsements of the service secretaries on these investigations continued to find fault with the judgment of Kimmel and Short. Kimmel agitated for a court-martial, which Secretary Forrestal finally offered him, but Kimmel then declined it upon advice of counsel. A congressional investigation into Pearl Harbor conducted after the war, the record of which fills forty bound volumes, failed to vindicate Kimmel and Short; rather, it found Kimmel and Short culpable for multiple grave errors of judgment, including failure to use resources at their disposal effectively, and failure to coordinate with each other in their respective capacities.

Laws passed in 1947 and 1948 provided for advancement of certain officers on the retired list. Rear Admiral Kimmel and Major General Short were eligible for such advancement, but neither officer received the necessary endorsements. Advocates for Kimmel and Short point to failures in Washington as contributory to the defeat at Pearl Harbor, and assert that failure to reveal and punish these failures entitles Kimmel and Short to posthumous advancement to their temporary grades of Admiral and Lieutenant General as a remedy for government discrimination against them.

Captain Charles B. McVay III was Commanding Officer of U.S.S. *Indianapolis* on 30 July 1945, when a Japanese submarine sank her, causing great loss of life. After delivering atomic bomb components from San Francisco to Tinian, *Indianapolis* sailed from Guam for Leyte, Philippines, on 28 July 1945. The intelligence provided to *Indianapolis* before her departure included reports of three possible submarine detections along her route. In transit, *Indianapolis* received a series of additional messages and monitored live radio traffic indicating real-time interdiction of a Japanese submarine along the route to Leyte. Fleet doctrine required ships to employ anti-submarine evasive maneuvering (zigzagging) in submarine waters during good visibility. On the evening of 29 July, at a time when visibility was poor, Captain McVay told the Officer of the Deck that he could cease zigzagging at twilight. The ship ceased zigzagging at approximately 2000, but visibility improved later that night and *Indianapolis* did not resume zigzagging. Struck by at least two torpedoes near midnight, *Indianapolis* sank within fifteen minutes. Approximately 400 men went down with the ship, and 800 escaped into the water. Over the next four

days, adrift on the ocean, 480 of the survivors were preyed upon by sharks or succumbed to their wounds or the elements.

The Commander in Chief, Pacific Fleet, Admiral Nimitz, convened a Court of Inquiry, which recommended the referral of charges against Captain McVay. The Chief of Naval Operations, Admiral King, concurred. After additional investigation and advice, the Secretary of the Navy referred charges for negligently hazarding a vessel (failure to zigzag) and dereliction of duty (delay in ordering abandon ship). A court-martial conducted at the Washington Navy Yard convicted Captain McVay of hazarding a vessel, and acquitted him of the dereliction charge. Consistent with the court-martial recommendation of clemency, Secretary Forrestal set aside all punishment. Captain McVay continued to serve on active duty until he retired as a Rear Admiral in 1949.

Controversy over Captain McVay's court-martial has also continued to this day. His son and numerous supporters have actively sought expungement of the court-martial conviction. Several congressmen have requested that the Navy reconsider the matter. Several books have accused the Navy of a "cover-up," using Captain McVay as a scapegoat. Orion Pictures recently purchased the rights to make a motion picture of Dan Kurzman's book on the *Indianapolis* tragedy, *Fatal Voyage*.

Many recent books and articles have intensified debate over the Pearl Harbor cases and the McVay case. Professional interest in these cases among senior officials, civilian and military, continues unabated. At stake are fundamental legal principles, many of them founded in the Constitution and in Supreme Court precedents concerning the discretionary authority of the service secretaries and the Commander in Chief. The Pearl Harbor cases and the McVay case provide excellent opportunities to delineate the contours of the enduring constitutional principles of civilian control of the military, the separation of congressional, executive, and judicial powers relating to military personnel actions, and the attenuation of individual rights in the military.

Key decisions of the President and the Secretaries of War and the Navy in the cases of Kimmel, Short and McVay were within the scope of Executive authority under the U.S. Constitution. Specific administrative and disciplinary actions taken against these military commanders complied fully with applicable substantive and procedural law. The President retains power to grant the relief sought by advocates for Kimmel, Short and McVay; however, those who advocate official action by the United

States to rehabilitate these World War II era commanders should recast their arguments as petitions for discretionary relief instead of claims of entitlement to remedies based on alleged violations of legal rights.

A. Overview of The Commander in Chief's Powers

The Kimmel, Short and McVay cases raise questions about the relationship between Executive authority and the individual rights of military officers. The law applicable to the grievances alleged in these cases has generally resolved conflict between the authority of the President and individual interests in favor of the President, holding that the individual rights of service members are attenuated in a relationship of subordination to authority. This article explores in detail numerous separate questions of rights and authority raised by the Kimmel, Short and McVay cases, but certain overarching principles warrant clarification at the outset.

Among the characteristics of executive power that distinguish it from legislative and judicial functions are unity of action, energy, dispatch.[2] To preserve these values the Constitution vests all executive authority in one individual, the President.[3] In the exercise of executive power the President competes with no other Executive Branch officer. In his role as Commander in Chief of the armed forces,[4] the President acts in his most constitutionally defining capacity[5] and the exclusivity of his powers is at its height.[6] As Commander in Chief, the President is not merely a policy maker; he enjoys the power of actual command of the armed forces, as "first General and Admiral."[7] At his option, regardless of his experience or skills, the President may assume direct, personal command of forces in the field or at sea.[8]

The President does not issue commands to ships and aircraft. If the power of command has any meaning, the President must have authority of command over individual military persons. "The military" is not some monolithic institutional organ of the Executive Branch; its effectiveness in executing the will of the Commander in Chief is the collective consequence of individual obedience of command authority. Claims of individ-

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2. *E.g.*, THE FEDERALIST No. 70 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 722-27 (reprint 1987) (1833).

3. U.S. CONST. art. 2, § 1 ("The executive Power shall be vested in a President of the United States of America.").

4. *Id.* art. 2, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

ual exemption from the Commander in Chief's authority on the basis of perceived individual rights or subjective values set up a constitutional conflict between the President's power, which may only be exercised through subordinate people, and the constellation of individual rights enshrined in

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5. *See* THE FEDERALIST No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961):

> Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength, forms an usual and essential part of the definition of executive authority.

See also STORY, *supra* note 2, § 768:

> [T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. Timidity, indecision, obstinacy, and pride of opinion, must mingle in all such councils, and infuse a torpor and sluggishness, destructive of all military operations.

6. *E.g.*, Department of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); Nordman v. Woodring, 28 F. Supp. 573, 576 (W.D. Okla. 1939) (Under the Commander in Chief Clause the President has "power to employ the Army and the Navy in a manner which he may deem most effectual."); GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 348 (1957) ("When the President acts, literally, as Commander in Chief, his constitutional authority is on unimpeachable grounds."); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 117 (1921) ("[P]ractically all authorities agree that the President, as Commander-in-Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments.").

7. THE FEDERALIST No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (The Constitution vests in the President "supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy.").

8. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 453 (1996) (President exercises supreme military command personally and directly); HAROLD F. BASS, JR., ET AL., POWERS OF THE PRESIDENCY 156-57 (1989); WARREN W. HASSLER, JR., THE PRESIDENT AS COMMANDER IN CHIEF 7-8 (1971) (The Framers believed the Commander in Chief could, "if he wished, assume personal command of troops in the field or of warships on the water."); LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 47 (1951); HORACE CAMPBELL, AN INTRODUCTION TO MILITARY LAW 21 (1946) (President may assume military command in the field); BERDAHL, *supra* note 6, at 119 (Proposals at the Constitutional Convention to restrict the President's power to exercise "actual command in the field" were specifically rejected.).

the Constitution. In cases of conflict, a delicate balance that affects the safety of the nation must be struck between the two. The courts have resolved this conflict overwhelmingly within the paradigm of presidential authority, and not within the more familiar paradigm of individual rights that may be vindicated through litigation.

Professor Louis Henkin, a prominent scholar of executive powers, has interpreted Supreme Court deference to the executive in foreign affairs cases as reflecting "a determination that the Executive Branch was acting within its authority and hence its actions were 'law for the courts.'"[9] In essence, when the President exercises discretion within the core of his constitutional authority as a separately empowered branch of government, his act is the law. The President's Commander in Chief power is even more clearly committed to him uniquely under the Constitution than his foreign affairs powers. Accordingly, the President's exercise of unique military command functions, including inexorably the command of individual military people, should also be considered "law in action." If the President can command the supreme sacrifice of soldiers and seamen in combat,[10] how can it be said that his Commander in Chief power is limited by the potential for embarrassment of disappointed flag and general officers?

The President exercises the Commander in Chief power through control of individuals. He appoints all military officers[11]—a discretionary power not subject to revision or compulsion by any other authority.[12] No act of Congress or even of the President can create a military officer or group of officers not subordinate to the President; the President may scrutinize the performance of his military subordinates and remove any of them at will.[13] Objective standards of merit or justice do not impose limits

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9. Gabriel W. Gorenstein, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 418-19 (1984) (citing Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 612 (1976)).

10. *See, e.g.*, Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994).

11. *E.g.*, BASS, *supra* note 8, at 167 (Presidents exercise control over the military through their appointments of military officers).

12. Congress may not compel the President to appoint, commission or promote particular individuals. *See, e.g.*, 31 Op. Att'y Gen. 80 (1916); 30 Op. Att'y Gen. 177 (1913); 29 Op. Att'y Gen. 254 (1911); BERDAHL, *supra* note 6, at 127 ("Congress can in no way dictate what appointment shall be made . . . ."). An unenacted bill sponsored by Congressman Rarick in the House of Representatives on behalf of Rear Admiral Kimmel in 1968 (H.R. 18058, 99th Cong., 2d Sess. (1968)) evidenced an appreciation of the President's appointment power by *requesting* the President "to advance posthumously the late Rear Admiral Husband E. Kimmel . . . ."

on such discretionary decisions. The President may exercise command authority guided by his own purely subjective inclinations, or by selfish political considerations. In most administrative personnel matters affecting officers, the President has always been the final arbiter.[14] The fact that President Roosevelt exercised the powers of Commander in Chief more vigorously than most presidents[15] does not affect the fundamental lawfulness of administrative actions taken under his aegis with respect to Kimmel and Short.

Because it would be physically impossible for the President to exercise all executive power personally, the courts have long recognized that the constitutional authority of the President is also expressed in the official acts of the service secretaries, "without containing express reference to the direction of the President."[16] Whether specifically directed by the President or not, actions taken in the Kimmel, Short and McVay cases by Secretary Knox, Secretary Forrestal, Secretary Stimson, and their successors, bear the authority of the Commander in Chief, and enjoy all the freedom of action accorded the President himself.[17] Placement of the Commander in Chief power in the President and his appointed civilian deputies is not simply strategically appropriate to ensure the preeminence of rational policy in military affairs,[18] it is also an important constitutional guarantor of

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13. *See, e.g.*, 7 Op. Att'y Gen. 453, 464-65 (1855). The President's authority over individual officers and groups of officers has been tested and proven in recent history. *E.g.*, David McCullough, *Truman Fires MacArthur*, MIL. HIST. Q., Autumn 1992, at 8; *see also* R. GORDON HOAXIE, COMMAND DECISIONS AND THE PRESIDENCY 155-68 (1977), which discusses the "Revolt of the Admirals," a reaction to competition between carrier aviation and the B-36. "In the interest of national security" top naval officers sought to undermine the political resource allocation process to avert what they saw as the "emasculation of the Navy." Secretary of the Navy Matthews effected, with Truman's approval, the relief of the Chief of Naval Operations and other senior officers. He forced other officers to retire and in one case revoked a temporary appointment, causing a flag officer to revert to his lower, regular grade.

14. *See* SCHUBERT, *supra* note 6, at 179-80 ("As the Commander in Chief, the President has from the beginnings of our government functioned as the highest court of appeals for those subject to military law.").

15. *E.g.*, William R. Emerson, *F.D.R.* (1941-45), *in* THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 149 (Ernest R. May ed., 1960) [hereinafter THE ULTIMATE DECISION] ("Roosevelt was the real and not merely a nominal commander-in-chief of the armed forces. Every president has possessed the constitutional authority which that title indicates, but few presidents have shared Mr. Roosevelt's readiness to exercise it in fact and in detail and with such determination . . . .").

16. 7 Op. Att'y Gen. 453 (1855).

civilian control of the military,[19] a fundamental principle in the Founders' domestic political philosophy.[20]

B. The Military Milieu

"The essence of military service is the subordination of the desires and interests of the individual to the needs of the service."[21] One need not serve long in the armed forces to realize that authority and the discretion of one's superiors pervade the environment. Military personnel decisions

17. *See* United States v. Fletcher, 148 U.S. 84, 88-90 (1892) (Presidential authority presumed in disciplinary action by Secretary of War); United States v. Eliason, 41 U.S. (2 How.) 291, 302 (1842) ("The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation . . . ."); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839) (presumption that official acts of department heads bear the authority of the President); Seltzer v. United States, 98 Ct. Cl. 554, 559-62 (1943) (Secretary of War acts with authority of the President, including the dismissal of officers); McElrath v. United States, 12 Ct. Cl. 201 (1876) (Order issued by the Secretary of the Navy dismissing a naval officer was, in view of the law, the act of the President, without requirement that such order cite authority of the President.); 17 Op. Att'y Gen. 13 (1881); 7 Op. Att'y Gen. 453 (1855) (survey of judicial and historical precedents); 1 Op. Att'y Gen. 380 (1820) (Orders issued by the Secretaries of War and the Navy "are, in contemplation of law, not their orders, but the orders of the President."); PRESIDENTIAL POWER AND THE CONSTITUTION, ESSAYS BY EDWARD S. CORWIN 86 (Richard Loss ed., 1976) [hereinafter CORWIN ESSAYS]; SMITH, *supra* note 8, at 105 (The civilian departmental secretary is the "deputy of the duly elected political head of state, . . . an outpost of the Chief Executive and *a representative of the political party whose policies he is to pursue*." (emphasis added)); MILTON C. JACOBS, OUTLINE OF MILITARY LAW: UNITED STATES SUPREME COURT DECISIONS 37-38 (1948); BERDAHL, *supra* note 6, at 21.

18. *See, e.g.*, MICHAEL I. HANDEL, MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT 49-52 (1992) (theory of Clausewitz and Sun Tzu).

19. *E.g.*, Greer v. Spock, 424 U.S. 828, 845-46 (1976) (Powell, J., concurring) ("Command of the armed forces placed in the political head of state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one."); Parker v. Levy, 417 U.S. 733, 751 (1974) ("The military establishment is subject to the control of the civilian Commander in Chief and the civilian department heads under him, and its function is to carry out the policies made by those civilian superiors."); 10 Op. Att'y Gen. 74 (1861) ("[W]hatever skillful soldier may lead our armies to victory against a foreign foe, or may quell a domestic insurrection; however high he may raise his professional renown, and whatever martial glory he may win, still he is subject to the orders of the civil magistrate."); BASS, *supra* note 8, at 156 (1989) (By making the President the Commander in Chief, "the Framers attempted to ensure that civilian authority would always direct the armed forces."); HASSLER, *supra* note 8, at 13 (The President's "control over . . . military chiefs is complete. Indeed if he lacked this power, civil control of the military would be impossible."); SMITH, *supra* note 8, at 47 ("By the plain intent of the constitution, every member of the military organization, whether it be the civilian secretary or the professional commander, is fully subject to his authority. If the President lacked this power, civil control would scarcely be possible . . . .").

that determine the course of one's service career and reach into the far corners of personal life are largely unappealable. The law applicable to such decisions is fundamentally different from law applicable in the civilian setting. In numerous decisions the Supreme Court has explained the rationale for upholding standards in the military context that differ from standards applicable to civilians. The following samples from Supreme Court pronouncements on this issue make the point clearly enough: "[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."[22] "[M]ilitary necessity makes demands on its personnel 'without counterpart in civilian life.'"[23] "The Court has often noted the peculiar and special relationship of the soldier to his superiors . . . ,"[24] and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ."[25] "Centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns."[26] "The military constitutes a specialized community governed by a separate discipline from that of the civilian."[27] In *Parker v. Levy*, Justice Rehnquist, writing for the Court, stated:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between military and civilian communities result

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20. *E.g.*, Gilligan v. Morgan, 413 U.S. 1, 10-11 (1973) ("It is this power of oversight and control of military forces by elected representatives and officials which underlies our entire constitutional system."); Duncan v. Kahanamoku, 327 U.S. 304, 325 (1946) ("The supremacy of the civil over the military is one of our great heritages . . . . Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations"); MAURICE MATLOFF, ET AL., AMERICAN MILITARY HISTORY 16 (1985) (describing the principle of civilian control as "a fundamental safeguard"); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 202-03 (1985); EDMOND CHAN, THE GREAT RIGHTS 95 (1963) (quoting Chief Justice Earl Warren: "[T]he axiom of subordination of the military to the civil . . . is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life."); GEORGE F. MILTON, THE USE OF PRESIDENTIAL POWER 112 (reprint 1965) (1944).

21. Orloff v. Willoughby, 345 U.S. 83, 92 (1953).

22. Chappell v. Wallace, 462 U.S. 296, 300 (1983).

23. *Id*. at 300 (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

24. *Id*. (quoting United States v. Brown, 248 U.S. 110, 112 (1957)).

25. *Id*. (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

26. *Id*.

27. *Orloff*, 345 U.S. at 94.

> from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.[28]

Such statements by the Court are not merely dictum. In cases where service members have challenged military personnel decisions the courts have shown great deference to command authority, at the expense of claimed individual rights.[29] As stated in *Orloff v. Willoughby*,

> [F]rom top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism, or other objectionable handling of men. But judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[30]

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28. Parker v. Levy, 417 U.S. 733, 743 (1974) (citations omitted).

29. *E.g.*, United States v. Stanley, 483 U.S. 669 (1987) (In a case involving nonconsensual, experimental administration of LSD, the Court held that service members have no cause of action under the Constitution for injuries suffered incident to service, even if persons not directly in the service member's chain of command inflicted injury.); Shearer v. United States, 473 U.S. 52, 58 (1985) ("Courts traditionally have been reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman."); Chappell v. Wallace, 462 U.S. 296, 303 (1983) (Military personnel may not sue their superiors for violations of constitutional rights); Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) ("There are thousands of routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or jurisdiction of the court to wrestle with."); Simmons v. United States, 406 F.2d 456, 459 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969) ("That this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion."); Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804, 813 (1979) (Courts "allow the widest possible latitude to the armed services in their administration of personnel matters.").

30. *Orloff*, 345 U.S. at 93-94.

Central among the unique features of military life is the authority of senior officials in the chain of command to determine the qualifications for command, the suitability of individual officers for assignment to positions of command, and the tenure of service in a position of command.[31] Military commanders have plenary authority to select or remove subordinate commanders to ensure efficient accomplishment of the military mission. A claim disputing a commander's exercise of the prerogative to shape the command in the manner that is most likely to achieve unit cohesion and effective combat skills is plainly nonjusticiable. Judicial second-guessing of such fundamental command prerogatives as relief and reassignment of subordinate officers "would mean that commanding officers would have to stand prepared to convince a civilian court of a wide range of military . . . decisions,"[32] risking the total breakdown of order and discipline. In the military context, administrative personnel decisions are subject to normative, objectively-based principles only when and to the extent that Congress (within its sphere of authority) or senior officials in the chain of command deem the use of such principles appropriate.

The selection of senior officers for key positions of command is both a military and a political decision. The President may base appointment to or removal from a critical position upon any combination of such factors as the experience of the nominee, past performance, seniority, education, specific noteworthy achievements, and such unmeasurable, subjective fac-

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31. *See* Wood v. United States, 968 F.2d 738 (8th Cir. 1992) (military decision regarding qualifications for command is nonjusticiable). A striking illustration of the subjective authority of senior officials to determine the qualifications and suitability of individual officers for particular positions in the military is the near-legendary personal interview process by which Admiral Hyman G. Rickover hand-picked officers for the Navy's nuclear power program and positions of responsibility within that program. NORMAN POLMAR & THOMAS B. ALLEN, RICKOVER 267-86 (1982). Writing specifically about Rear Admiral Kimmel's selection for the position of Commander in Chief, United States Fleet (CominCh) and Commander in Chief, Pacific Fleet (CinCPac) over the heads of other more senior officers, the Chief of Naval Personnel responded to an inquiry from Senator Scott Lucas that "[a]ppointments such as that to Commander in Chief of a Fleet . . . are never made solely on a seniority basis but rather on the considered judgments and recommendations of high ranking Naval officials. Their selection is naturally dependent upon numerous factors such as availability, competency, and seniority of the officer in question." Letter from Chief of Naval Personnel to Senator Scott Lucas (27 June 1946) (Pers-191-mjc) [hereinafter Lucas Letter]. Copies of all non-public official documents, records and correspondence cited in this article are available in a special Pearl Harbor archive maintained by the Office of the Under Secretary of Defense (Personnel and Readiness) (Officer and Enlisted Performance Management) (USD (P&R) (OEPM)), or from the Office of the Judge Advocate General, Department of the Navy.

32. Shearer v. United States, 473 U.S. 52, 58 (1985).

tors as the officer's strategic or tactical "style," personality, the judgment of senior officials about the officer's flexibility or adaptability to different circumstances, whether the officer will "fit in" with others in a particular position or location, what political or public relations impact a certain nomination might have, and simple favoritism. The President's power to select, assign and remove officers in three- and four-star positions is not fundamentally different from the power to select and shuffle cabinet officers, heads of agencies, and other key political appointees within the Executive Branch. The President can remove civilian executive officers as easily as reassigning military officers.[33] The selection of individuals for positions within the Executive Branch is clearly within the President's constitutionally-protected discretion, subject in most cases to the added political dimension of Senate confirmation.

All persons, military and civilian, who occupy high government office by specific personal appointment are exposed to political forces.[34] There is no doubt that political forces played some part in the post-Pearl Harbor events surrounding Rear Admiral Kimmel and Major General Short. That professional military officers in high positions of command are exposed to political forces is an ineluctable consequence of their great responsibilities, their public visibility, and the deeply-rooted constitutional principle of civilian control of the military. Proximity to the President in

33. *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (Presidential prerogative to remove executive officials from office); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 845 n.14 (1993) ("Power to remove an officer is important because it permits the President to control the performance of that officer."); MARTIN S. SHEFFER, PRESIDENTIAL POWER 29-30 (1991) (President's "illimitable power" to remove officers exercising executive authority); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984 110, 423 (Randall W. Bland et al. eds., 5th ed., 1984); *Id.* at 122-23 (The potential for stigma in the dismissal of an officer by the President does not affect any case in which the President has the constitutional power of dismissal.). The tradition of illimitable Presidential removal power over appointees exercising executive authority is deeply rooted. *E.g.*, James Madison, *Remarks During Debate on Establishing Department of Foreign Affairs*, *in* 1 ANNALS OF CONG. 515-17 (Joseph Gales ed., 1789) (President's power of removal follows from the Appointments Clause and the Executive Power Clause); 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789, at 883 (Charles Bangs Bickford et al. eds. 1992) (Mr. Ames: "[A]dvantages may result from keeping the power of removal, in terrorem, over the heads of the officers; they will be stimulated to do their duty to the satisfaction of the principal . . . ." Mr. Ames considered and rejected as a countervailing consideration that it might be difficult to get "officers of abilities to engage in the service of their country upon such terms."); CORWIN ESSAYS, *supra* note 17, at 98-99 (on the "decision of 1789," a debate in the first Congress resolved in favor of construing the Constitution as empowering the President to dismiss executive officers at will).

34. For example, Secretary of Defense Cheney relieved General Michael Dugan, Chief of Staff of the Air Force, during Desert Shield in the Fall of 1990 without any "due process" hearing. As the press reported, the Secretary relieved General Dugan for outspoken comments during the delicate period when the international coalition for Desert Storm was being forged, and the administration was seeking congressional support for military operations. *E.g.*, Fred Kaplan, *Cheney Fires Air Force Chief of Staff*, B. GLOBE, Sept. 8, 1990, at 1; Janet Cawley, *Air Force Chief Fired Over Remarks*, CHI. TRIB., Sept. 18, 1990, at 1 (Secretary Cheney commented that General Dugan "showed poor judgment at a very sensitive time."). The nomination of Admiral Frank Kelso (Chief of Naval Operations) for retirement in four-star grade was clouded in Senate confirmation proceedings by political debate over the Tailhook incident. *E.g.*, Michael Ross & Karen Tumulty, *Senate to Retire Kelso at 4 Stars, After Fiery Debate*, L.A. TIMES, Apr. 20, 1994, at A1, col. 3. By order of President Truman, Secretary of the Navy Matthews relieved Admiral Louis E. Denfield, Chief of Naval Operations from 1947 to 1949, over a political dispute concerning testimony given by Denfield at a hearing chaired by Congressman Carl Vinson. Denfield learned of his relief from a radio newscast. *See* Paolo E. Coletta, *Louis Emil Denfield*, *in* THE CHIEFS OF NAVAL OPERATIONS 202-05 (Robert William Love, Jr., ed. 1980) [hereinafter CHIEFS OF NAVAL OPERATIONS]. In April 1951, based on disagreements over U.S. policy in the Far East, President Truman directed the summary relief and recall of General Douglas MacArthur, insisting that he be fired instead of being allowed to retire, an "unceremonious, peremptory dismissal," setting off a political firestorm. WILLIAM MANCHESTER, AMERICAN CAESAR 648-55 (1978); D. CLAYTON JAMES, COMMAND CRISIS: MACARTHUR AND THE KOREAN WAR 6 (1982) ("The clash played no small part in killing Truman's chance for another term as President."). MacArthur first learned of his relief through a public radio broadcast. *Id*. at 7. *See also* Forrest C. Pogue, *Marshall on Civil-Military Relations*, *in* THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES 202 (Richard H. Kohn ed., 1991) [hereinafter U.S. MILITARY UNDER THE CONSTITUTION] (General Marshall "reluctantly accepted" that politically-based appointments and promotions "were prerogatives of the President."); SHEFFER, *supra* note 33, at viii ("Roosevelt removed duly appointed and confirmed individuals from office without cause for partisan political reasons . . . ."); HASSLER, *supra* note 8, at 39 (To silence public opinion critical of the conduct of the War of 1812, during which British forces burned parts of Washington, President James Madison demanded and accepted the resignation of Secretary of War Eustis.); T. Harry Williams, *Lincoln (1861-1865)*, *in* THE ULTIMATE DECISION, *supra* note 15, at 86 ("Lincoln handed out many commissions at the start of the war for reasons that were completely political . . . , dispens[ing] commissions to ambitious political chieftains." The use of military patronage to give prominent members of many diverse groups a "stake" in the war was a "good investment in national cohesion."); TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 13-28 (reprint 1974) (1955) (Congress conducted its first investigation in 1792, of a disastrous military defeat under the command of Major General Arthur St. Clair. The whole St. Clair affair became entangled in Federalist/Antifederalist politics and St. Clair "was left accused but unjudged."); T. HARRY WILLIAMS, LINCOLN AND HIS GENERALS 323-24 (1952) [hereinafter LINCOLN AND HIS GENERALS] (Lincoln stalled on Grant's request to relieve Butler, a political patronage appointee, because Butler was a prominent Democrat and it was an election year—"Grant understood the vital relationship in a democracy between war and politics."). Several books could not exhaust this subject. Failure to anticipate exposure to hard politics at levels in the chain of command only several steps removed from the President is naive bordering on foolish.

the chain of command is proximity to the politics which have always surrounded the Presidency.

The relationship of the President and his civilian deputies to subordinate military officers is characterized not by the rights of officers but by the broad authority of the President. Appointment to flag or general rank, and service in important positions of command, are fragile privileges, not rights. The fragility of such privileges is suggested poignantly by the comment of President Lincoln upon being informed that a brigadier general had been captured with some horses and mules: "I don't care so much for brigadiers;" the President demurred, "I can make them. But horses and mules cost money."[35]

II. Case Study: The Pearl Harbor Commanders

Family members of Rear Admiral Kimmel and Major General Short, and assorted advocates of their cause, have sought posthumous advancement of the two officers for decades as a species of remedial justice for what they perceive as the scapegoating of Kimmel and Short to shield the Roosevelt administration from blame for the Pearl Harbor disaster.[36] This campaign for symbolic apology reached a fevered pitch in recent years, with the approach and passing of the fiftieth anniversary of the Second World War.[37] Most recently, Senator Strom Thurmond sponsored a meeting at which advocates for Kimmel and Short aired grievances against the government.[38] At this hearing Senator Thurmond extracted from then-Deputy Secretary of Defense John Deutch (facing imminent Senate confirmation hearings on his nomination as Director of Central Intelligence) a promise to conduct a thorough reconsideration of the entire Pearl Harbor dispute and the personnel actions taken with respect to Kimmel and Short. The fulfillment of that promise was the "Dorn Report," prepared by Edwin Dorn, Under Secretary of Defense for Personnel and Readiness (USDPR), accompanied by an extensive "Staff Study." [39] The *Dorn Report* and *Staff*

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35. T. Harry Williams, *Lincoln (1861-1865), in* THE ULTIMATE DECISION, *supra* note 15, at 85-86; LINCOLN AND HIS GENERALS, *supra* note 34, at 10.

36. *See, e.g.*, The "Thirty-six Flag Officer Petition," to President George Bush, at 2 (Oct. 22, 1991) [hereinafter Flag Officer Petition] (signed by 32 admirals, three vice-admirals and one rear admiral, including Admirals Thomas Moorer, William Crowe, James Holloway III, Elmo Zumwalt, and Thomas Hayward) ("A partial atonement can be achieved by posthumously promoting these two officers [Kimmel and Short] to the ranks they held at the time of the attack, promotions to which they are *entitled by law.*" (emphasis added)). Whether any officer can be "entitled" to a promotion is discussed *infra* at notes 72-97 and accompanying text.

Study recommended against posthumous advancement, which conclusion the new Deputy Secretary of Defense, John White, endorsed and communicated to Senator Thurmond on 27 December 1995.

The first case study in this article (The Pearl Harbor Commanders) is,

37. The Kimmel campaign has claimed the attention of numerous high-ranking officials who have considered and rejected the appeal for posthumous advancement. *E.g.*, Letter from Deputy Secretary of Defense White to Senator Strom Thurmond (Dec. 27, 1995); Letter from President Clinton to Manning Kimmel IV (Dec. 1, 1994) ("I agree with the judgment of prior investigatory commissions."); Letter from Secretary of Defense Perry to Edward Kimmel (Nov. 22, 1994); Letter from Secretary of Defense Perry to Edward Kimmel (Sept. 7, 1994); Letter from Chief of Legislative Affairs (Bowman), to House Armed Services Committee Chairman, Ronald Dellums (Aug. 23, 1993); Letter from Chief of Naval Operations, Admiral Kelso, to Edward Kimmel (July 1, 1993); Letter from the Military Assistant to President Bush (Trefry), to Edward Kimmel (Nov. 19, 1991) ("A possible posthumous promotion of Admiral Kimmel has been considered within the Department of Defense numerous times in the past and the suggestion has been rejected in each instance."); Letter from Under Secretary of the Navy, (Howard) to Edward Kimmel (Aug. 21, 1991); Letter from Secretary of the Navy, (Garrett) to Senator Joseph Biden (Mar. 19, 1991); Letter from Assistant Vice Chief of Naval Operations to Senator Pete Wilson (Sept. 12, 1990); Letter from Secretary of Defense Cheney to Senator William Roth (June 13, 1990); Letter from Secretary of Defense Cheney to Jackie Montgomery (Oct. 23, 1989); Letter from Deputy Secretary of Defense Taft to the Secretary of the Navy (Jan. 19, 1989) (declining to forward the Kimmel issue to the President). Senior officials have also rejected numerous efforts on behalf of Major General Short. *See* Letter from Deputy Secretary of Defense White to Senator Strom Thurmond (Dec. 27, 1995); Memorandum, Secretary of the Army, Togo West, to Under Secretary of Defense for Personnel and Readiness (30 Nov. 1995); Letter from Secretary of the Army Stone to Senator Pete Domenici (Sept. 2, 1992); Memorandum, Deputy Assistant Secretary of the Army, Mr. Matthews, SAMR-RB (Dec. 19, 1991) (officially denying the Army Board for Correction of Military Records petition to advance Major General Short). The Kimmel campaign peaked before the fiftieth anniversary of the attack on Pearl Harbor when President Bush declined to "reverse the course of history" by nominating Rear Admiral Kimmel for posthumous advancement in time for Pearl Harbor Day ceremonies. *See Pearl Harbor Admiral's Sons Fighting to Clear His Name*, ATL. J. & CONST., Dec. 8, 1991, at A11.

38. *See* Remarks at Meeting of the Office of the Secretary of Defense and Members of the Kimmel Family Dealing with the Posthumous Restoration of the Rank of Admiral for Rear Admiral Husband E. Kimmel, United States Navy (Apr. 27, 1995) [hereinafter *Thurmond Hearing*] (transcript of informal hearing conducted by Senator Thurmond, transcribed by L.B.S., Inc.), available at <http://www.erols.com/nbeach/kimmel.html>.

39. Memorandum, Under Secretary of Defense for Personnel and Readiness, to Deputy Secretary of Defense, subject: Advancement of Rear Admiral Kimmel and Major General Short (15 Dec. 1995) [hereinafter *Dorn Report*]; Staff Study, Advancement of Rear Admiral Kimmel and Major General Short on the Retired List (1 Dec. 1995) (prepared under the supervision of Nicholai Timenes, Assistant to USD (P&R) (MPP)) [hereinafter *Dorn Staff Study*]. Both documents are available at <http://www.sperry-marine.com:80/pearl/dorn.htm>.

in part, an elaboration of the author's work as a member of the ad hoc task force that supported the USDPR *Staff Study.* The focus of this first case study is to answer long-standing claims that various personnel actions taken with respect to Rear Admiral Kimmel and Major General Short were legally deficient. As demonstrated herein, such claims are without merit.

A. Relief of Command

On 1 February 1941, Rear Admiral Husband E. Kimmel relieved Admiral J. O. Richardson as Commander in Chief, Pacific Fleet and Commander in Chief, United States Fleet.[40] Solely as an incident of assuming this position of command, Rear Admiral Kimmel also assumed the temporary rank of Admiral.[41] On 7 February 1941, Major General Walter C. Short assumed duty as Commander, Hawaiian Department, and with it the temporary rank of Lieutenant General.[42] At the time, the highest regular or "permanent" grade that officers of the armed forces could hold was Rear Admiral or Major General (O-8).[43]

Before relieving Richardson, Kimmel had served at Pearl Harbor as Commander Cruisers, Battle Force, with additional duty as Commander, Cruiser Division Nine.[44] He had been commissioned as a regular Rear Admiral since 1 November 1937, and was junior to a number of other permanent rear admirals the President might have chosen as Richardson's relief.[45] The President had obviously cut short Richardson's tour of duty. Kimmel subsequently learned that the President had directed the early relief of Richardson due to a disagreement over retention of the Pacific

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40. *See* Letter from President Franklin D. Roosevelt to Rear Admiral Husband E. Kimmel (Jan. 7, 1941):

> In accordance with the provisions of an Act of Congress approved May 22, 1917, you are hereby designated as Commander in Chief, Pacific Fleet, with additional duty as Commander in Chief, United States Fleet, with the rank of admiral, effective on the date of your taking over the command of the Pacific Fleet. In accordance with this designation you will assume the rank and hoist the flag of admiral on the above mentioned date.

Documents in Rear Admiral Kimmel's service record indicate that he assumed duties as CinCPac and CominCh on 1 February 1941.

41. Then-existing law allowed the President to designate six officers as Commanders of Fleets or subdivisions thereof with the rank of Admiral or Vice Admiral. Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89. Such advancements to the rank of Admiral or Vice Admiral were effective only during the incumbency of the designated flag officer. *Id.* ("when an officer with the rank of admiral or vice admiral is detached from the command of a fleet or subdivision thereof . . . he shall return to his regular rank in the list of officers of the Navy . . . .").

Fleet at Pearl Harbor, away from its customary West Coast homeports.[46] Kimmel knew he had attained this unexpected[47] assignment, and consequently the rank of Admiral, as the result, in part, to the summary relief of his predecessor at the direction of President Roosevelt.[48]

After the Japanese attack on Pearl Harbor the service secretaries relieved both Kimmel and Short of their commands,[49] whereupon the commanders reverted, by operation of law, to their regular grades of Rear Admiral and Major General. The following discussion explores the subjective discretion of senior officials in the chain of command to relieve

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42. *Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong., 1st Sess., pt. 7, at 2967 (1946) [hereinafter PHA] (his temporary promotion was effective on 8 February 1941). A fire at the National Personnel Records Center destroyed Major General Short's official service record in 1973. References to personnel actions affecting Major General Short must be made to his official "reconstructed record" or to secondary sources such as exhibits in the PHA record. Major General Short's temporary designation as a Lieutenant General was a consequence of Act of Aug. 5, 1939, ch. 454, 53 Stat. 1214, *as amended*, Act of July 31, 1940, ch. 647, 54 Stat. 781. The Act of Aug. 5, 1939 provided that "the major generals of the Regular Army specifically assigned by the Secretary of War to command the four armies of the United States Army shall have the rank and title of lieutenant general *while so serving.*" (emphasis added). The Act of July 31, 1940 amended the above-quoted Act "to include the major generals of the Regular Army specifically assigned by the Secretary of War to command the Panama Canal and Hawaiian Departments."

43. This had long been the case. For example, Admiral Charles Frederick Hughes, the Chief of Naval Operations from 1927-30, retired in his permanent grade of Rear Admiral. William R. Braisted, *Charles Frederick Hughes*, *in* CHIEFS OF NAVAL OPERATIONS, *supra* note 34, at 66. Reflecting this tradition until recently, retirement in a higher grade than O-8 required separate nomination by the President and confirmation by the Senate. *See infra* note 274 and accompanying text.

44. Rear Admiral Kimmel held these command positions from 6 April 1939 to 1 February 1941, when he assumed the duties of CinCPac and CominCh.

45. As stated in Lucas Letter, *supra* note 31, when the President designated Rear Admiral Kimmel to relieve Admiral Richardson "there were approximately 16 officers of flag rank who were still on active duty, and were eligible for such a designation, and were ahead of Admiral Kimmel on the seniority list."

46. Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REP., Dec. 10, 1954, at 69 [hereinafter *Kimmel's Own Story*].

47. PHA (pt. 6), *supra* note 42, at 2498, 2714 ("a complete surprise").

48. *Kimmel's Own Story*, *supra* note 46, at 69 ("His [Admiral Richardson's] summary removal was my first concern. I was informed that Richardson had been removed from command because he hurt Mr. Roosevelt's feelings by some forceful recommendations . . . ."). On Richardson's relief, see HOAXIE, *supra* note 13, at 47 (Admiral J. O. Richardson relieved of command in February 1941 after his outspoken protest of the vulnerability of Pearl Harbor). Kimmel came by his command and four-star status through the exercise of a power that could obviously revoke what it bestowed.

subordinate commanders, and the propriety of the relief of Kimmel and Short from command by the Secretaries of the Navy and War Departments.

B. Law Applicable to Relief of Command

No one in the military has a right to any particular assignment or position[50] and may be reassigned to a position of greater or lesser responsibility by senior officials in the chain of command at the discretion of such officials.[51] This authority flows from the President's constitutional powers as Commander in Chief,[52] and is so well established that the courts do not recognize an individual right to seek judicial review of military personnel assignment decisions.[53] The courts recognize their own lack of practical

49. Secretary of the Navy Knox directed the relief of Admiral Kimmel on 16 December 1941 (PHA (pt. 5), *supra* note 42, at 2430), confirmed by Secretary of the Navy letter 14358 (3 Jan. 1942). Secretary of War Stimson directed the relief of Lieutenant General Short on 16 December 1941 (PHA (pt. 3), at 1529), confirmed by telegram of 6 January 1942. In later testimony at the PHA hearings, Admiral Stark and General Marshall were unable to confirm whether the President himself directed such reliefs to be effected (PHA (pt. 5), at 2430; PHA (pt. 3), at 1529-30) but Admiral Stark related that Secretary Knox took the action after returning from a meeting at the White House (PHA (pt. 5), at 2430). In any event, the official acts of the secretaries carry the weight of presidential authority. *Supra* notes 16-17 and accompanying text.

50. *E.g.*, Orloff v. Willoughby, 345 U.S. 83 (1953) (no right to particular duty assignment); Nunn, *supra* note 10, at 562 ("[N]o Servicemember is guaranteed a particular assignment in a particular location . . . . Every military man and woman must be prepared to serve wherever and in whatever capacity the Armed Forces require their skills." (quoting General Colin Powell's written response to a question posed by the Senate Armed Services Committee)).

51. Navy regulations in effect at the time of the attack on Pearl Harbor provided specifically that "[o]fficers of the Navy shall perform such duty at sea or on shore as may be assigned them by the department." U.S. Navy Regulations, art. 161 (1920). *See Orloff*, 345 U.S. at 93-94 ("There must be a wide latitude to those in command to determine duty assignments . . . . "); Sebra v. Neville, 801 F.2d 1135, 1142 (9th Cir. 1986) (Military enjoys "broad discretionary authority with respect to transfers of military personnel."); Nunn, *supra* note 10, at 559 (Duties and assignments are determined by military necessity, not personal choice.). *Cf.* Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972) (Court declined to interfere with military discretion to issue transfer orders, notwithstanding appearance of command retaliation in reassignment.).

52. *See, e.g.*, United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) (President as Commander in Chief has power to deploy troops and assign duties as he deems necessary.); 9 Op. Att'y Gen. 462, 468 (1860) (Advising the President: "As commander-in-chief of the Army it is your right to decide according to your own judgment what officer shall perform any particular duty."); SMITH, *supra* note 8, at 48 ("[T]he President has complete freedom in choosing any officer for particular duty or command . . . and this without regard to seniority in rank."); BERDAHL, *supra* note 6, at 127 ("The President is entirely free to select whom he will from among the officers for any particular duty or command . . . .").

competence to review and revise such decisions.[54] The courts also recognize the separation of powers principles that protect from judicial interference the discretion of the Executive Branch to determine the assignments of military personnel.[55]

The power to assign military personnel includes the power to reassign them, including the most senior officers. Examples of the summary relief of officers in high positions of command are legion.[56] The authority to replace military personnel in key positions of command before their regular rotation dates has been exercised with more or less vigor depending on the exigencies of peace or war, and on the personal styles of different Presidents and other senior officials in the chain of command. The authority to relieve an officer of command, however, remains a key constitutional prerogative of the President,[57] whether exercised personally or through his executive officers. No procedures and no substantive standards apply to relief of command by the Commander in Chief. A subordinate commander's potential to render future effective service, whether he is actually guilty of some offense or inadequacy in command, whether all the facts precipitating his relief are established by adequate evidence, or whether he has been allowed to make a statement or present his own evidence are all

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53. *Orloff*, 345 U.S. at 93-94 (no right to judicial review of duty assignment—"[W]e have found no case where this court has assumed to revise duty orders as to one lawfully in the service."); Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (Courts have no jurisdiction to review military duty assignments.).

54. *E.g.*, Covington v. Anderson, 487 F.2d 660, 665 (9th Cir. 1973) (quoting with approval Arnheiter v. Ignatius, 292 F. Supp. 911, 921 (N.D. Cal. 1968), *aff'd sub nom* Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) ("Any attempt of the federal courts . . . to take over review of military duty assignments, commands and promotions would obviously be fraught with practical difficulties for both the armed forces and the courts."). *See also* Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962): "[T]he special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'").

55. *Orloff*, 345 U.S. at 83; *Sebra*, 801 F.2d at 1142; Wilson v. Walker, 777 F.2d 427, 429 (8th Cir. 1985) ("[T]raditional notions of judicial restraint and of the separation of powers" require courts to refrain from interfering in such matters as military duty assignments.); Covington v. Anderson, 487 F.2d 660, 665 (9th Cir. 1973); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966) (Court refused to enjoin plaintiff's duty assignment on grounds that it could not preempt the Commander in Chief's judgment concerning disposition of forces). *See* Edward F. Sherman, *Judicial Review of Military Determinations*, 55 VA. L. REV. 483 (1969) (Judicial reluctance to review military personnel determinations is based on (1) inability of the courts to gauge the effects of judicial intrusion on unique discipline requirements of the military, and (2) separation of powers principles.).

irrelevant. The decision to relieve an officer of command is in no sense adjudicative. The President has plenary, unreviewable authority to assign

56. *E.g.*, LEWIS W. KOENIG, THE CHIEF EXECUTIVE 243-45 (1975) (McClellan and MacArthur); HASSLER, *supra* note 8, at 61-67 (Lincoln's appointment and removal of Army commanders); LINCOLN AND HIS GENERALS, *supra* note 34, at 8, 43 (Lincoln appointed McClellan to relieve Winfield Scott), 38-39 (Lincoln dispatched the Secretary of War to relieve Fremont, who, pained and humiliated, begged for a chance to deliver a victory before official delivery of Lincoln's letter), 57 (Lincoln replaced Secretary of War Cameron with Stanton), 70-71 (Lincoln relieved McClellan as General in Chief of the Army—the relieving order was published in the newspapers before delivery to McClellan, who discovered it by a telegram from friends), 134 (Lincoln appointed Halleck General in Chief), 151, 182-83 (Lincoln directed Halleck to relieve Buell), 161 (Lincoln directed Halleck to relieve Pope), 177 (Lincoln relieved McClellan of his remaining command and appointed Burnside in his place), 206 (Lincoln relieved Burnside and appointed Hooker), 214, 347 (Lincoln relieved Butler, a political patronage appointment), 231-32 (Grant relieved McClernand, who appealed to Lincoln; Lincoln responded: "Better leave it where the law of the case has placed it."), 259-60 (Lincoln relieved Hooker and appointed Meade), 297 (Congress revived the rank of lieutenant general, to which Lincoln appointed Major General Grant, who replaced Halleck as General in Chief).

That Chief of Staff George C. Marshall turned the Army rank structure upside down in preparation for World War II is also well known. Marshall relieved hundreds of senior officers of their posts and forced others into retirement, most of them without the distinction of having presided over a national disaster beforehand. Moreover, many junior officers, including one Colonel Eisenhower, were promoted over the heads of hundreds of more senior officers during the war. The high visibility of Marshall's personal shaping of the Army officer corps, including his use of an ad hoc "plucking board," demonstrates the understanding of the law relating to the rights of officers in their posts that prevailed in the armed forces at the time. *See* FORREST C. POGUE, GEORGE C. MARSHALL 92-100 (1965) ("[A]greeing to the harsh reproach that he was ruthless in removing officers from command," Marshall responded that he "was preparing an army for war and felt that the selection of those who could lead in battle was a duty he owed the state."); ED CRAY, GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN 174-76 (1990) (Through his personally supervised program of promotions and forced retirements, Marshall shaped "an army in his own image.").

In company with General Short, the following Army Major Generals were relieved during the Second World War and reverted to their permanent ranks: Carlos Brewer, Lloyd D. Brown, William G. McMahon, Lindsay M. Sylvester, Leroy Watson, Henry W. Baird, Julian F. Barnes, Joseph M. Cummins, Ernest J. Dawley, James P. Marley, James L. Muir, and Paul L. Ranson. Memorandum from Lieutenant General Brooks to General Bradley, file no. 3757 (13 May 1949) (CSJAGA 1949/3757 (CSGPA 201)). Admiral Ernest J. King, Chief of Naval Operations from 1942 through 1945, was notorious for his hard-nosed insistence on personally assigning all flag officers, commanding officers of capital ships and holders of major shore billets. King replaced several flag officers during World War II. President Truman's relief of General MacArthur during the Korean War may be the most dramatic recent example of Presidential exercise of the power to choose commanders. David McCullough, *Truman Fires MacArthur*, MIL. HIST. Q., Autumn 1992, at 8; DOROTHY SHAFFTER & DOROTHY M. MATHEWS, THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES, H.R. DOC. No. 84-443, at 13 (1956).

and relieve officers.[58] As President Truman stated of his relief of General MacArthur during the Korean War: "You hire them, and you fire them."[59]

The removal of officers from their posts by lesser officials within the military is governed by service procedures to ensure that meritorious officers are not discarded through hasty decisions. Such procedures, to the extent that any procedures are implemented, are designed to ensure that seniors in the chain of command review the merits of decisions to relieve subordinate officers. Review is provided to ensure that the discretion to relieve subordinate officers is exercised wisely—not because individual officers have enforceable "due process" rights in such decisions.[60] Reflecting longstanding Navy tradition, procedures in the current *Naval Military Personnel Manual* governing "detachment for cause" recognize four reasons for removal of any officer from his assigned post, providing for the highest degree of discretion in the relief of officers serving in posi-

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57. *E.g.*, KOENIG, *supra* note 56, at 242-43 ("As Commander-in-Chief the President appoints and removes his field generals."); HASSLER, *supra* note 8, at 9 ("As part of his authority as Commander in Chief, the Chief Executive was empowered by the Constitution . . . at any time to . . . change commanders, or directly interfere in any detail of command . . . ."); SMITH, *supra* note 8, at 48 ("[T]he President . . . may at his discretion remove any officer from a position of command.").

58. *See* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 2 (1976):

> In exercising his lofty prerogatives as 'Commander in Chief of the Army and Navy of the United States,' the President would seem to enjoy a peculiar degree of freedom from the review and restraints of the judicial process . . . . The . . . appointment and removal of 'high brass' . . . are matters over which no court would or could exercise the slightest measure of judgment or restraint. For his conduct of such affairs the President is responsible, so far as he can be held responsible, only to Congress, the electorate, and the pages of history.

See also Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (no jurisdiction to review relief of commanding officer).

59. HASSLER, *supra* note 8, at 128. That the sweeping constitutional power of the President over the assignments of officers might not have been clear to Rear Admiral Kimmel is reflected in Kimmel's verdict upon President Roosevelt's relief of Richardson, Kimmel's predecessor: "I could see then and can see now no adequate reason for his removal from command in such a manner." *Kimmel's Own Story*, *supra* note 46, at 69. The President need not have or express any reason for such decisions.

60. *E.g.*, Wilson v. Walker, 777 F.2d 427 (8th Cir. 1985) (no individual due process interest in duty assignment); Arnheiter v. Ignatius, 292 F. Supp. 911, 926 (N.D. Ca. 1968), *aff'd sub nom.* Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (Summary relief of officer in command was "purely internal, administrative, non-punitive Navy action" and was "clearly within its [the Navy's] powers."); Palmer v. United States, 72 Ct. Cl. 401, 406 (1931) (Military departmental regulations that might not have been followed existed "solely in the interest of orderly and consistent procedures in the service" and did not create personal rights.).

tions of command: mere "loss of confidence in an officer in command."[61] This highly discretionary basis for detachment of an officer in command reflects the critical importance of trust and confidence by the chain of command:

> The unique position of trust and responsibility an officer in command possesses; his or her role in shaping morale, good order, and discipline within the command; and his or her influence on mission requirements and command readiness make it imperative that immediate superiors have full confidence in the officer's judgment and ability to command.[62]

The *Naval Military Personnel Manual* states further that "[a]n evaluation by a superior in the chain of command of failure on the part of an officer in command to exercise sound judgment in one or more areas and loss of confidence will constitute a sufficient basis to request the DFC [Detachment for Cause] of that officer." After detailing the administrative process required to effect a "detachment for cause," the *Manual* distinguishes "summary relief:" "Nothing in the foregoing derogates the inherent authority of a superior in command to relieve an officer in command of a subordinate unit to ensure accomplishment of the assigned mission."[63] "Summary relief" involves *no* process and may be effected instantaneously. The difference between summary relief and detachment for cause is that a specific, stigmatic record of the detachment process may not be inserted in an officer's official promotion record until administrative

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61. Memorandum from Deputy Assistant Judge Advocate General for Administrative Law to Commander in Chief, U.S. Pacific Fleet Force Judge Advocate (6 Oct. 1992) (memo 5800 Ser 1MA1156A.92) [hereinafter DAJAG Memo] (Detachment of an officer "for cause" may, in accordance with applicable regulations, be based upon the subjective standard of "loss of confidence in an officer in command."). Commenting on the relief of MacArthur, General Omar Bradley pointed out that the President has the right to fire any officer "at any time he sees fit," even if he has merely lost confidence in the man's judgment. MANCHESTER, *supra* note 34, at 648-55. The other bases for detachment for cause of an officer under current regulations include (1) misconduct, (2) unsatisfactory performance involving one or more significant events resulting from gross negligence or disregard of duty, and (3) unsatisfactory performance of duty over an extended period of time. U.S. NAVY, NAVAL MILITARY PERSONNEL MANUAL [hereinafter MILPERSMAN] (NAVPERS 15560C) art. 3410105.3 (1995). *See also* U.S. NAVY, BUREAU OF NAVAL PERSONNEL MANUAL (NAVPERS 15791A) art. C-7801(4) (1959). Army policy for relief of an officer in command is stated in U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-15 (30 Mar. 1988) (written action to relieve must be reviewed by the first general officer in the chain of command.).

62. MILPERSMAN, *supra* note 61, at 3410105.3d.

63. *Id.* at 3410105.7f.

detachment for cause procedures are accomplished. These procedures do not protect an individual's continuity in command or in any other assignment; they relate to the type of record that will be made of a relief and whether future selection boards may consider details surrounding the relief.

Under service regulations, removal of an officer from a position of command does not require adversarial, trial-like procedures (such as confrontation and cross-examination of witnesses, compulsory process to secure the attendance of witnesses and the production of documents, and representation by legal counsel).[64] Such procedures would be extremely corrosive of discipline, pit subordinates and superiors in a chain of command against each other, and make more difficult the process of ensuring unit cohesion and the ability of a military unit to fulfill its mission.[65] The decision of a commander in the chain of command to relieve a subordinate commander may be "reversed" by others in the chain of command who are superior to the commander who decided to effect such a relief. When the President himself decides to relieve a commander, however, there is no appeal or review unless the President, in his sole discretion, decides to entertain additional matters in favor of the officer he has relieved.

The ability to select and remove military leaders in key positions is a fundamental, strategic component of Presidential command authority.[66] As experience has taught, the preservation of vital national interests demands no less than unfettered discretion of the President and his appointed commanders to assign to key positions those subordinate commanders deemed most capable of achieving success.[67] Only President Lincoln exercised the power to select and assign duties to his subordinate military commanders more aggressively than President Franklin D. Roosevelt.[68] Kimmel and Short were two among many who experienced

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64. *Cf.* DAJAG Memo, *supra* note 61 (Detachment of an officer for cause is an example of the type of discretionary "final agency action" that does not require a hearing under the Administrative Procedures Act.).

65. *E.g.*, Sebra v. Neville, 801 F.2d 1135, 1141 (9th Cir. 1986) ("The policy behind these decisions [citations omitted] is clear: the military would grind to a halt if every transfer were open to legal challenge.").

the President's personal exercise of command authority as "first General and Admiral."[69]

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66. *See, e.g.*, MICHAEL I. HANDEL, MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT 153-76 (1992) (importance and characteristics of the effective military commander); Scott Shuger, *General Failure*; *What the Press Doesn't Tell You About America's Military Leaders*, 23 WASH. MONTHLY, Mar. 1991, No. 3, at 11:

> [A]n essential component of success in war is generalship (and admiralship). A crafty general is the ultimate smart weapon . . . . Generals are weapons too. And like any other weapon, they should be evaluated for what they bring to a war effort . . . . Like any other reasonably complex task, fighting war has objective and subjective components. And the quality of command is one of those subjective components that is essential to a war's outcome.

KOENIG, *supra* note 56, at 242-43 ("In wartime" the President's authority to choose commanders "is especially important because of the consequences of the President's choice for the nation's survival and his own political future."); T. Harry Williams, *Lincoln* (1861-1865), *in* THE ULTIMATE DECISION, *supra* note 15, at 85-86 ("One of the most important functions Commander in Chief Lincoln had to perform was choosing generals to manage the armies."); SMITH, *supra* note 8, at 48 ("One of the essential powers of the President as commander-in-chief is that of naming the commanders of forces in the field."); BARON ANTOINE-HENRI DE JOMINI, THE ART OF WAR 43 (1862) ("If the skill of the general is one of the surest elements of victory, it will be readily seen that the judicious selection of generals is one of the most delicate points in the science of government and one of the most essential parts of the military policy of a state."). All citizens may enjoy fundamental rights equally in the eyes of the civil law, but all commanders are not equal warriors. People fight wars, and the employment of people in the military in the manner deemed most likely to achieve success is central to the Commander in Chief power. The power of selection is entirely a subjective one, entrusted uniquely to the President. The courts have recognized the relationship between the assignment of different tasks to different individuals and overall military efficiency (the human-strategic dimension of personnel assignments), as well as the importance of Presidential autonomy in this area. *E.g.*, *Sebra*, 801 F.2d at 1142 ("[M]ilitary transfer decisions go to the core of deployment of troops and overall strategies"); Luftig v. McNamara, 252 F. Supp. 819, 821 (D.D.C. 1966) ("The courts may not substitute themselves for the Commander in Chief of the Army and Navy and determine the disposition of members of the Armed Forces.").

67. *See, e.g.*, LINCOLN AND HIS GENERALS, *supra* note 34, at 151 (General in Chief Halleck's comment on Lincoln's vigorous exercise of the Commander in Chief power with respect to assignment of commanders: "The government seems determined to apply the guillotine to all unsuccessful generals."). Indeed, one of the faults attributed to General Short by the Army Pearl Harbor Board was "*not* replacing inefficient staff officers." ROBERT A. THEOBALD, THE FINAL SECRET OF PEARL HARBOR 160 (1954) (emphasis added); PHA (pt. 3), *supra* note 42, at 1451.

68. *E.g.*, SMITH, *supra* note 8, at 50, 128, 133 (During World War II, FDR "exercised in full the authority of naming military commanders and left them in no uncertainty as to the source of their authority." Demonstrating his understanding of the Commander in Chief's personal power to reassign individual officers, FDR at one point threatened to send dissident officers to Guam.).

69. THE FEDERALIST No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

As staunch a defender of Rear Admiral Kimmel as his predecessor, Admiral J. O. Richardson, has stated that:

> [T]he reliefs of Kimmel and Short should have been dispatched as soon as possible. The Army and Navy and everyone else would have understood and approved this action, because all would have recognized that, regardless of where the blame lay, no armed force should remain under the command of a leader under whom it had suffered such a loss.[70]

Even Kimmel's counsel, Edward B. Hanify, cited approvingly the comments of Admiral William H. Standley, a member of the Roberts Commission: "under the circumstances Admiral Kimmel and General Short had to be relieved of their commands."[71]

C. Due Process and Right to Rank or Office

The President's constitutional power to relieve Kimmel and Short, causing their reversion to the grades of Rear Admiral and Major General, did not "trump" individual rights possessed by the commanders. Complementary to the President's power was the commanders' absolute lack of rights to their ranks or their offices. Kimmel and Short advocates allege repeatedly that the commanders were denied due process. The Due Process Clause does not apply whenever prejudicial action is taken against an individual; instead, it applies only when a "life, liberty or property" inter-

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70. J. O. RICHARDSON, ON THE TREADMILL TO PEARL HARBOR, THE MEMOIRS OF ADMIRAL JAMES O. RICHARDSON, AS TOLD TO VICE ADMIRAL GEORGE C. DYER, USN (RETIRED) 455 (1973). *Cf*. Greer v. Spock, 424 U.S. 828, 840 (1976) ("[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of the troops under his command.").

71. *E.g*., Memorandum from Edward B. Hanify, *Ropes & Gray*, to Director of Naval History (23 Dec. 1987) (OP-09BH), *quoting from* HUSBAND E. KIMMEL, ADMIRAL KIMMEL'S STORY 143-44 (1955). Admiral Standley's quoted statement continued that he, Admiral Standley, regretted that Admiral Kimmel "had to go," praising the "state of efficiency" of the fleet. Praise of the post-disaster "state of efficiency" of the fleet, however, is not a comment on the quality of Admiral Kimmel's decision-making on how to employ the fleet before the attack. Instead, the statement tends to indicate, more tragically, that the fleet was equipped, trained and ready to undertake whatever orders Kimmel might have issued, focusing inquiry on the high-level command decisions that led to the fleet being in-port on Sunday, 7 December in, essentially, a routine, peace time readiness posture.

est recognized by the Constitution is affected. No military officer has a constitutional due process interest in his rank or office.

Before measuring government action against Kimmel and Short against the requirements of the Due Process Clause of the Fifth Amendment, the threshold question must be asked whether the protections of the Bill of Rights apply to members of the military at all. As surprising as the question might seem, the answer is even more surprising. The traditional view stated by the Supreme Court was that the Bill of Rights did not apply, that Congress determined the rights and responsibilities of service members pursuant to its constitutional power "To make Rules for the Government and Regulation of the land and naval Forces."[72] Commentators have noted the long tradition of this basic tenet in the federal courts.[73] As if struggling with an uneasy conscience over this principle, the Supreme Court has made great efforts to justify the attenuation of rights in the military on the basis of the unique need for discipline in the military and the fundamental dissimilarity of military culture from civilian society—the so-called "separate community" doctrine.[74] In recent cases the Court has

72. U.S. CONST. art. 1, § 8. *E.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) ("[T]he power of Congress, in the government of the land and naval forces, . . . is not at all affected by the fifth or any other amendment."); Swaim v. United States, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897) ("When a person enters the military service, whether as officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights.").

73. *E.g.*, Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265, 269 (1994) ("Intense debate has continued over the applicability of the Bill of Rights to individual members of the military."); Hon. Walter T. Cox III, *The Army, the Courts, and the Constitution: the Evolution of Military Justice*, 118 MIL L. REV. 1, 15-16, 23 (1987) (As late as 1957-58 we were still debating whether military members enjoyed the protections of the Bill of Rights at courts-martial.); JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE 114-15 (1974) (historical inapplicability of the Bill of Rights in the military context); LAWYER'S COOP. PUB. CO., MILITARY JURISPRUDENCE 35-36 (1951) (digest of cases holding the amendments to the Constitution inapplicable at courts-martial).

74. *E.g.*, Parker v. Levy, 417 U.S. 733, 743, 758 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society . . . . The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian."); Carter v. McLaughrey, 183 U.S. 365, 390 (1902) (Members of the military belong to a "separate community recognized by the Constitution."). *See* James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 178 (1984).

not stated specifically that the Bill of Rights does not apply, but it holds repeatedly that the rights of service members are different, and it defers to the judgment of Congress and the President.[75] The ultimate question is still open,[76] but the enactment of statutory provisions that provide many constitutional-equivalent protections has largely mooted the issue.[77]

The applicability of the Due Process Clause to administrative actions taken in the 1940s against Kimmel and Short is not an open question. In three precedential cases involving prejudicial administrative action against military officers that fell short of ordinary due process standards, the Supreme Court held that the Fifth Amendment Due Process Clause did not impose procedural requirements in the military context.[78] Moreover, in 1950, in a case in which a court-martial had convicted the accused of murder and sentenced him to imprisonment, the Supreme Court quashed a fledgling trend among federal courts to apply Fifth Amendment due process standards in habeas corpus review proceedings, holding that "[t]he single inquiry, the test" of the adequacy of courts-martial "is jurisdiction."[79] If the court-martial had jurisdiction over the offense and the accused, its procedures were inscrutable.[80] In 1953, the Court suggested in dictum in a court-martial habeas corpus case involving the death penalty

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75. *E.g.*, Weiss v. United States, 510 U.S. 163, 177 (1994) ("The Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment.'"); Solorio v. United States, 483 U.S. 435, 447-48 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . . . We have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated."); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ."). *See* Nunn, *supra* note 10, at 565 ("Differences in constitutional rights between the armed forces and civilian society have existed from the days of the Revolutionary War . . . . Throughout our history, members of the armed forces have been subjected to controls and regulations that would not have been tolerated in civilian society.").

76. *E.g.*, United States v. Lopez, 35 M.J. 35, 41 (C.M.A. 1992) ("[T]he Supreme Court has never expressly applied the Bill of Rights to the military . . . ."). *But see* United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960) (first case in which the United States Court of Military Appeals held that the Bill of Rights does apply, "except those which are expressly or by necessary implication inapplicable").

77. *See* Cox, *supra* note 73, at 28 (discussing constitutional concepts in the Uniform Code of Military Justice (enacted 1950) and the many amendments enacted after the Vietnam War.). Military Rules of Evidence 301, 304, 305, 311-17 and UCMJ Article 31 apply constitutional-equivalent principles.

78. United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); Reaves v. Ainsworth, 219 U.S. 296 (1911).

79. Hiatt v. Brown, 339 U.S. 103, 110 (1950).

that some principles of fundamental procedural fairness derived from the Due Process Clause should apply in review of courts-martial,[81] but the court affirmed the judgment of the court-martial anyway, deferring to post-trial reviews conducted within the chain of command. The Court has never applied the Due Process Clause to reverse a discretionary military administrative action.[82] If the law in effect through at least 1950 did not recognize civilian-equivalent due process in courts-martial (which could adjudge death sentences), then complaints that due process was not observed in the non-punitive, administrative actions taken with respect to Kimmel and Short certainly fail to state claims based on law. In *Reaves v. Ainsworth*,[83] the Court's seminal case on due process review of military administrative actions, the Court expressed dismay at the very idea of judicial interference with military administration, holding that review of such actions lay exclusively within the Executive Branch unless Congress had clearly expressed in legislation its intention to allow military members to carry their complaints "over the head of the President."[84]

The Due Process Clause in the Fifth Amendment states that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[85] Assuming, arguendo, general applicability of the Due Process

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80. This holding reinforced a long line of cases restricting reviewability of courts-martial to the single issue of jurisdiction. *See* United States v. Newak, 15 M.J. 541, 552 (A.F.C.M.R. 1982) (listing eighteen Supreme Court cases). The seminal case on the limited reviewability of courts-martial was Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). *See also* Grafton v. United States, 206 U.S. 333, 345-46 (1907) (review limited to jurisdiction, notwithstanding the existence of other obvious error).

81. Burns v. Wilson, 346 U.S. 137, 142-43 (1953).

82. *See* Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL L. REV. 1, 39 (1975). In reviewing due process claims in courts-martial, the Court still defers to the procedures provided by Congress without imposing additional requirements based on the Fifth Amendment. *E.g.*, Weiss v. United States, 510 U.S. 163, 177 (1994); Middendorf v. Henry, 425 U.S. 25, 43-44 (1976) (noting the view of Judge Quinn of the Court of Military Appeals that the Bill of Rights applied with equal force to the military, but holding that plaintiffs did not have civilian-equivalent due process rights under the Fifth Amendment); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

83. 219 U.S. 296 (1911).

84. *Id.* at 304-06. Judicial reluctance to intervene in military administrative matters continued throughout and beyond the tenures of Kimmel and Short. *E.g.*, Orloff v. Willoughby, 345 U.S. 93-94 (1953) ("[J]udges are not given the task of running the Army . . . ."); Covington v. Anderson, 487 F.2d 660, 664 (9th Cir. 1973) (denying plaintiff's due process claim; holding that military administrative decisions are generally immune from judicial review).

85. U.S. CONST. amend. 5.

Clause to military officers in the era of the Second World War, it is immediately apparent that no aspect of the treatment of Kimmel and Short involved capital punishment (deprivation of "life") and no aspect of their treatment involved imprisonment or involuntary detention (deprivation of "liberty"). Neither commander had any other legally cognizable property or liberty right in his temporary grade or command assignment that could call down the procedural protections of the Due Process Clause.[86] The Due Process Clause itself does not create the liberty and property interests it protects.[87] The guarantee of procedural due process does not apply to a "mere subjective expectancy."[88] Some underlying right established by other law must be at stake. Such rights must stem from independent sources.[89] While it is true that the common law of England recognized the existence of a property interest in public office, as an "incorporeal hereditament,"[90] public office in the United States, including the rank and command position of a military officer,[91] has never been a personal attribute or species of property.[92] Each successive rank an officer holds is a separate office of the United States. Courts have held repeatedly that rank and command assignment are not property within the meaning of the Due Process Clause;[93] because promotion, including posthumous promotion, requires a new appointment to a new office, the courts have also held that there is no right to promotion;[94] indeed, even continuation in the service in any rank or position is a privilege, not a right.[95] As stated aptly in *Street v. United States*, "The tenure of a military office has been from the foundation of the

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86. *E.g.*, The President "may vacate at any time a temporary appointment in a commissioned grade," and "[t]here are no applicable regulations or directives" to limit the President's exercise of discretion in this regard. Koster v. United States, 685 F.2d 407, 411, 231 Ct. Cl. 301, 308 (1982) (citing 10 U.S.C. § 3447(c) (1976), which derived from Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 196, and has been superseded by 10 U.S.C.S. § 603(b) (1997) ("temporary appointment . . . may be vacated by the President at any time")).

87. Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

88. Sims v. Fox, 505 F.2d 857, 861-62 (5th Cir. 1974).

89. *E.g.*, Blackburg v. City of Marshall, 42 F.3d 925, 936 (5th Cir. 1995).

90. *E.g.*, I THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS BY SIR WILLIAM BLACKSTONE 462-64, 464 n.1 (James Dewitt Andrews ed., 1899) (offices as incorporeal hereditaments; "Commissions in the Army of Great Britain were allowed to be sold until the privilege was abolished . . . in 1871."). *See also Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 253-54 (1839) (Argument of counsel for respondent: Under "the law of the tenure of office in England . . . [o]ffice is . . . an incorporeal hereditament, as a right of way. There is, under the common law, an estate in an office."); Street v. United States, 24 Ct. Cl. 230, 247 (1889) (describing officer status in the British military until the 1870's as "an established right, founded on unbroken usage for two centuries . . . and the public regarded . . . [a] commission as . . . well-earned property, lawfully accumulated and possessed of the sanctity of a vested right . . . .").

Government among the frailest known to the law, for it has been subject to the will of the President, and that will has been exercised repeatedly."[96]

Because there is no "property" or "liberty" interest in serving under a particular military appointment or in a particular billet for any particular duration, there is no right to any trial-like hearing to protect or preserve a service member's interest in an appointment or assignment. Where no interest protected by the Due Process Clause is implicated, due process is not due. Any internal service procedures prescribed for the relief of offic-

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91. Initial commissioning of an officer, each promotion, and particular statutorily specified military positions of "importance and responsibility" require separate Presidential appointments as separate offices of the United States. Weiss v. United States, 510 U.S. 163, 170 (1994). The law, as embodied in 10 U.S.C.S. § 624 (Law. Co-op. 1997) "requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade." United States *ex rel*. Edwards v. Root, 22 App. D.C. 419 (1903), *cert. denied*, 193 U.S. 673, *error dismissed sub nom.* United States *ex rel*. Edwards v. Taft, 195 U.S. 195 U.S. 626 (1904) (Promotion is a new appointment and can only be effected by Presidential nomination and Senate confirmation). For a partial list of particular military duty assignments that require separate appointment and confirmation, see Weiss v. United States, 510 U.S. 163, 171 (1994). *Cf*. 10 U.S.C.S. § 601 (Law. Co-op.1997) (three- and four-star positions of "importance and responsibility"). All appointments are entirely discretionary with the President; for example, the results of promotion selection boards are advisory only. The President may select for promotion an officer not recommended by a selection board, and he may reject officers a selection board has chosen. 10 U.S.C.S. § 629(a) (Law. Co-op.1997) ("The President may remove the name of any officer from a list of officers recommended for promotion by a selection board."); 41 Op. Att'y Gen. 291 (1956) (President may nominate for promotion to brigadier general an officer not selected for promotion by a statutory selection board: "[T]he President may not be bound in his selection to an officer or group of officers merely because in the opinion of others they are better qualified for promotion. To so hold would be to substitute the judgment of subordinate officers for that of the President and to unduly restrict his constitutional appointive authority."); L. Neal Ellis, *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129, 133 (1982) ("Selection board determinations are only recommendations to the service secretary who in turn makes recommendations to the President. The President then appoints all officers subject to Senate confirmation."). Officer appointments must be confirmed by the Senate, which has unconstrained discretion to confirm or deny any nomination on any ground it chooses. The Constitution does, however, allow Congress by statutory provision to waive Senate confirmation of particular appointments. U. S. CONST. art. 2, § 2 ("Congress may by law vest the Appointment of . . . inferior Officers . . . in the President alone . . . ."); Collins v. United States, 14 Ct. Cl. 568 (1879) (Military officers are "inferior officers" under the Constitution and Congress may permit the President to appoint them without Senate advice and consent.). The President appointed Kimmel and Short to four- and three-star offices for which appointment power had been vested by statute in him alone. *Supra* notes 40-42. The law applicable to assignments and promotions is founded upon political discretion and seems not to have created a property interest upon which the Due Process Clause may operate.

ers in command, including the opportunity for officers in command to challenge or comment on such decisions,[97] exist purely as discretionary

92. *E.g.*, *Hennen*, 38 U.S. at 260 ("The tenure of ancient common law offices, and the rules and principles by which they are governed, have no application . . . . [T]here is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws.") (Argument of counsel for respondent, at 38 U.S. 253-54, adopted by the Court: "There is in this country no estate in any office. Offices are held for the benefit of the community . . . . "); CORWIN ESSAYS, *supra* note 17, at 110-11 ("[A]ll appointive officials are subject to removal by the appropriate authority . . . there is no 'estate in office.'"); I COOLEY, *supra* note 90, at 463 n.1 (In the United States, public offices have always been held at the pleasure of the government and have never been considered property). The Constitution reflects the repugnance of the Founders for titular offices that are personal to the holder and take on the nature of property. The Constitution provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any . . . Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. 1, § 9. In the United States public offices are the "property" of the people.

93. *E.g.*, Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972) (no due process interest in promotion); Lane v. Secretary of the Army, 504 F. Supp. 39, 42 (D. Md. 1980); Arnheiter v. Ignatius, 292 F. Supp. 911, 920-21 (N.D. Ca 1968), *aff'd sub nom.* Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (military duty assignment and promotion status do not involve any life, liberty or property rights protected by the due process clause); Koster v. United States, 685 F.2d 407, 413, 231 Ct. Cl. 301, 310 (1982) (brigadier general "had no property right in his temporary rank" of major general). *See also* DAJAG Memo, *supra* note 61 ("[N]o member of the armed forces has a property right in any particular command or duty assignment.").

94. Reaves v. Ainsworth, 219 U.S. 296 (1910); VanderMolen v. Stetson, 571 F.2d 617, 627 (D.C. Cir. 1977); Abruzzo v. United States, 513 F.2d 608, 611 (Ct. Cl. 1975); Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Viles v. Claytor, 481 F. Supp. 465, 470 (D.D.C. 1979); Coughlin v. Alexander, 446 F. Supp. 1024, 1026 (D.D.C. 1978). Courts will not order a promotion. *E.g.*, Ewanus v. United States, 225 Ct. Cl. 598 (1980) (court lacks power to order promotion, even if failure to obtain promotion was based on defective information).

95. *E.g.*, *Reaves*, 219 U.S. at 297, 304 (To petitioner's argument that "his commission in the army constituted property of which to be retired from the army, with pay for life, was a valuable attribute, and of which he could not be deprived without due process of law" the Supreme Court responded that petitioner did not have "any right of property, title or interest in the alleged office."); Crenshaw v. United States, 134 U.S. 99 (1890) (Naval officer has no vested right in his office and may be dismissed from the service without a hearing.); Weeks v. United States *ex rel*. Creary, 277 F. 594, 51 App. D.C. 195 (1922), *aff'd*, United States *ex rel*. Creary v. Weeks, 259 U.S. 336 (1922) (Military officer has no property or contract right in his office; office is revocable by the sovereignty at will.); Sims v. Fox, 505 F.2d 857, 861-62 (5th Cir. 1974) (no due process property right in continuation of service); Kuta v. Secretary of the Army, No. 76 C 1624, slip op. (N.D. Ill. Aug. 22, 1978) ("Service in the armed forces is a privilege and not a right.").

96. 24 Ct. Cl. 230, 247 (1889).

97. *E.g.*, such as those in the current MILPERSMAN, *supra* note 61, at 3410105 (detachment for cause and relief of command).

measures within the military to ensure that personnel resources are utilized effectively. If such procedures are not followed, the aggrieved party is not the individual commanding officer relieved of his command, but the military institution itself. No service procedures have been prescribed for summary relief of an officer in command, nor have any procedures been prescribed for Presidential decisions to relieve officers in command. The commonplace statement that officers serve "at the pleasure of the President" is not a cliché; it is a shorthand statement of a fundamental constitutional prerogative vested in the President, and it is part of the language of the Presidential commission itself.[98]

D. Due Process and Investigations[99]

Advocates for Kimmel and Short consider the Roberts Commission Investigation the supreme evil among the host of alleged wrongs done to the commanders.[100] They assert that Kimmel and Short were entitled to a formal investigation that accorded them the rights of parties: to be present throughout proceedings, to call their own witnesses, to cross-examine, to testify or not, and to be represented by counsel.[101] According to this point of view, the President's access to information about the responsibility of

98. *See* Orloff v. Willoughby, 345 U.S. 83, 91 (1953) ("The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor and abilities' of the appointee he is named to the specified rank during the pleasure of the President."). Admiral Kimmel's regular commission as a Rear Admiral, signed for President Roosevelt by Secretary of the Navy Claude Swanson, states that "This Commission to continue in force during the pleasure of the President of the United States for the time being." Form N.Nav. 239, executed 7 Dec. 1937, effective from 1 Nov. 1937, in the official service record of Husband E. Kimmel.

99. Figure 1, adapted from the *Dorn Staff Study*, *supra* note 39, shows the dates of the various investigations of the Pearl Harbor disaster, leading up to the Joint Congressional Committee (JCC) investigation in 1945-46 (PHA).

100. *E.g.*, *Thurmond Hearing*, *supra* note 38, at 18 (Edward Kimmel: "[N]o weight can be given to the findings of the Roberts Commission, yet its dereliction of duty charge is the genesis of injustice done to Admiral Kimmel."); Letter from Edward R. Kimmel & Thomas K. Kimmel to Secretary of the Navy William Ball, at 2 (May 11, 1988) ("The proceedings of the Roberts Commission were a travesty of justice . . . the Robert's [sic] Commission convicted him [Admiral Kimmel] without a trial on secret evidence, withheld from him and the public, and published the findings to the world."); Hanify Memo, *supra* note 71, at 6 ("a travesty of justice"); *Kimmel's Own Story*, *supra* note 46, at 156. Members of the Roberts Commission included Supreme Court Justice Owen Roberts, a former Chief of Naval Operations, a former CominCh/CinCPac, a retired major general and a brigadier general.

101. *E.g.*, Memorandum from Edward R. Kimmel & Thomas K. Kimmel to Director of Naval History, at 5 (23 Dec. 1987) (OP-09BH). *See* NAVAL COURTS AND BOARDS 357, 734 (1937) (rights of "parties" at courts of inquiry).

his subordinates must be teased out through something that looks like litigation. As authorized, the Roberts Commission conducted an "informal" investigation, one in which the body appointed to provide advice to the convening authority runs the investigative process without interference from adversarial parties. The President had charged the Roberts Commission by formal executive order on 18 December 1941, to conduct an investigation and advise "whether any derelictions of duty or errors of judgment on the part of United States Army or Navy personnel contributed to such successes as were achieved by the enemy . . . , and if so, what these derelictions or errors were, and who were responsible therefor."[102] The focus of complaint against the Roberts Commission has been the single dereliction of duty finding in the final report submitted to the President: "[I]t was a dereliction of duty on the part of each of them [Kimmel and Short] not to consult and confer with the other respecting the meaning and intent of the warnings, and the appropriate measure of defense required by the imminence of hostilities."[103] Kimmel and Short advocates maintain that this finding condemned the commanders to "stigma and obloquy,"[104] for which the apology of posthumous promotion is now due.

Kimmel's and Short's problems with investigations did not begin with the Roberts Commission's finding of dereliction of duty. Kimmel and Short helped lay the groundwork for all later findings against them during Secretary Knox's investigation, the first investigation after the disaster,

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102. PHA (pt. 7), *supra* note 42, at 3285; *id.* (pt. 23) at 1247. Apparently finding no dissonance with this executive order, Congress speedily granted the Commission power to summon witnesses and examine them under oath. *Id.* The convergence of the President's extensive supervisory powers as Commander in Chief, and Congress's "broad and sweeping," even "plenary" power to "make Rules for the Government and Regulation of the land and naval Forces" puts the Roberts Commission investigation on unimpeachable constitutional footing. United States v. O'Brien, 391 U.S. 367, 377 (1968), United States *ex rel*. Creary v. Weeks, 259 U.S. 326, 343 (1922).

103. PHA (pt. 7), *supra* note 42, at 3299; *id.* (pt. 16) at 2265.

104. *E.g.*, *Thurmond Hearing*, *supra* note 38, at 17, 19 (Edward Kimmel: "stigma and obloquy"), 18-19 (Edward Kimmel: The Roberts Commission's finding of dereliction of duty "captured the headline of every newspaper in the United States . . . ."), 56 (Edward B. Hanify: the "smirch of delinquency" on Kimmel's reputation); Letter from Edward R. Kimmel to Chief of Naval Operations, Admiral Kelso (Oct. 23, 1991) ("We are merely seeking to have erased the stigma and obloquy stemming from a baseless and irresponsible charge of 'dereliction of duty.'"); Letter from Senators Strom Thurmond, Joseph R. Biden, Jr., John McCain, William V. Roth, & Alan Simpson to President George Bush (Oct. 17, 1991) ("the stigma and obloquy associated with the charge by the Roberts Commission . . . . this charge was widely publicized.").

conducted from 9-14 December 1941. As Secretary Knox reported to the President upon his return from Pearl Harbor:

> The Japanese air attack on the island of Oahu on December 7th was a complete surprise to both the Army and the Navy. Its initial success, which included almost all the damage done, was due to a lack of a state of readiness against such an air attack, by both branches of the service. This statement was made by me to both General Short and Admiral Kimmel, and both agreed that it was entirely true. There was no attempt by either Admiral Kimmel or General Short to alibi the lack of a state of readiness for the air attack. Both admitted they did not expect it, and had taken no adequate measures to meet one if it came. Both Kimmel and Short evidently regarded an air attack as extremely unlikely . . . . There was evident in both Army and Navy only a very slight feeling of apprehension of any attack at all, and neither Army nor Navy were in a position of readiness because of this feeling. The loss of life and the number of wounded in this attack is a shocking result of unpreparedness.[105]

Kimmel and Short had no right to determine the manner in which the President could seek information and advice, the scope of his quest, nor whether the Secretary of the Navy and the Roberts Commission could advise the President as they did. Moreover, they had no right to avoid exposure of actions they did and did not take in the execution of public office, or to determine the manner in which such exposure might be made. The exposure of officers in command to the powers of inspection and investigation held by their superiors in the chain of command, and the vulnerability of officers in command to disgrace for military failure, have always been a feature of military command.[106]

The President possesses inherent power to inspect and monitor his own branch of government. Government would grind to a halt if information about important events, including "feedback" information on the function and failure of government institutions, including the performance of appointed officials, could only be collected and reported through trial-like

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105. PHA (pt. 5), *supra* note 42, at 2338, 2342, 2345 (Knox Report read into testimony); *id.* (pt. 24) at 1749, 1753, 1756 (Knox Report as Exhibit 49 before the Roberts Commission). *See infra* note 422 (res gestae).

106. *See, e.g.*, WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 518-20 (2d ed. 1920) (listing scores of famous investigations into military failures, defeats, capitulations, and scandals, focusing on responsible officers in command).

procedures.[107] As a practical matter, supervisors in both military and civilian settings must be able to inquire into work-related issues involving subordinates without resort to cumbersome, formal "due process" procedures.[108] The Executive Branch has long conducted investigations into incidents and irregularities involving federal agencies and officials. In both military and civilian governmental settings, institutional introspection through investigations and inspections is necessary to ensure governmental efficiency and to guide personnel decisions.[109] The public would be seriously disserved if government were not introspective. Consistent with these practical considerations, the President and his designated civilian deputies have unique constitutional investigative powers inherent in the executive power itself and not dependent upon the various statutory investigative powers provided by Congress in military codes.[110] The President has authority to "inspect and control" *individual* subordinate executive officers;[111] the power to gather information relating to administration

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107. *See*, *e.g.*, Womer v. Hampton, 496 F.2d 99 (5th Cir. 1974) (discussion of panel investigation into irregularities in performance of Army Corps of Engineers supervisory inspector).

108. *See id.* at 104, 107.

109. *E.g.*, EDWARD M. BYRNE, MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS 250-51 (1970) (Administrative fact-finding bodies are necessary for "efficient command or administration." Investigations provide convening and reviewing authorities with "information essential to the efficient operation and readiness of the fleet or to improve some facet of administration . . . . For example, they may become the bases for . . . personnel determinations.").

110. Congress enacted the Articles for the Government of the Navy, the Articles of War, and the Uniform Code of Military Justice, all including powers of investigation, under its authority "to make Rules for the Government and Regulation of the land and naval forces." U.S. CONST. art. 1, § 8. *See* Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827) (President has inherent authority as Commander in Chief to develop a common law of military disciplinary procedures in cases not provided for by Congress). Military justice investigations are discussed *infra* at notes 115-18 and accompanying text.

111. 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789 (Charles Bangs Bickford et al. eds., 1992), at 846 (Madison: "inspecting and controuling" subordinate officers among the powers of the President); 854-55 (Madison: "[N]o power can be more completely executive than that of appointing, inspecting and controuling subordinate officers."); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. No. 103-6, at 559 (1996) (During debates in the First Congress in 1789, James Madison asserted that it was "the intention of the Constitution . . . that the first magistrate should be responsible for the executive department," a responsibility that carried with it, he held, "the power to 'inspect and control' the conduct of subordinate executive officers."). *See* 1 ANNALS OF CONG. 495, 499 (Joseph Gales ed., 1789). *See also* CORWIN ESSAYS, *supra* note 17, at 87 (President's authority to "inspect and control" the conduct of all subordinate executive officers).

of executive agencies;[112] and the power to gather information to support effective exercise of the Commander in Chief power.[113]

The need to investigate operational military failures is even more compelling than the practical need for investigations in the federal civilian realm. The military environment involves lethal forces that pose grave dangers to individuals and to national security. A system that denied a military commander the opportunity to dispatch patrols to a failed front to gather information quickly on the demise of his forces would be unimaginable. The fundamental principle does not change because the commander is the President and the enemy's blow fell upon the dignity of flag and general officers.

The President, the Secretary of Defense, and the Secretaries of the Military Departments are courts-martial convening authorities.[114] As such, they have unique authority and responsibility related to the investigation and disposition of suspected military offenses.[115] Preliminary military justice investigations, like other law enforcement investigations, are informal and the commander may employ the investigative services of third parties, to include individuals or groups, or established organizations

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112. *E.g.*, Independent Meat Packers Assoc. v. Butz, 395 F. Supp. 923, 931-32 (D. Neb.), *rev'd on other grounds*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976) (Article II, section 3 of the Constitution, "by necessity, gives the President the power to gather information on the administration of executive agencies.").

113. *E.g.*, Orloff v. Willoughby, 345 U.S. 83, 91 (1953) (Before reposing his confidence in an officer, the President "has the right to learn whatever facts the President thinks may affect his fitness."). *Cf.* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313 (1995) [hereinafter MCM] (recognizing inspection as an incident of command, exempt from the Fourth Amendment, based on a commander's inherent authority to determine the health, welfare, military fitness, good order, discipline and readiness of subordinates within his command).

114. 10 U.S.C.S. § 822(a) (Law. Co-op. 1997) (UCMJ art. 22(a)). The law in 1941 also specified that the President and the Secretaries of the Navy and of War were convening authorities. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930), *reproduced in* NAVAL COURTS AND BOARDS 465, ¶ B-40 (1937) ("General courts-martial may be convened . . . by the President, the Secretary of the Navy . . . ."); LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 17 (1942).

115. MCM, *supra* note 113, R.C.M. 303, at II-20 (On the commander's preliminary inquiry: "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."). *See also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5.1, at 192 (1992) ("In almost all cases the disposition of a suspected offense begins with an investigation by the commander . . . .").

such as the Army's Criminal Investigation Division (CID), the Air Force's Office of Special Investigations (OSI) or the Naval Criminal Investigative Service (NCIS).[116] As court-martial convening authorities, the President and the Secretaries of the services are entitled to investigate subordinate officers suspected of offenses under the same legal principles that support investigations of the most junior personnel by their respective military commanders. There is not one law of military justice for flag and general officers and another for soldiers and seamen.

Among the offenses triable by courts-martial are many unique "employment-related" failures alien to the civilian setting, such as disobedience of orders, dereliction of duty, and improper hazarding of a vessel. These are criminal offenses under military law and may be investigated under the same juridical principles that govern law enforcement investigations for homicide, larceny, or any other offense. Informal military justice investigations, like civilian law enforcement investigations, need not be conducted using trial-like procedures that afford the rights of a "party" to individuals involved in an incident under investigation. A law enforcement investigation typically does not include the active participation of suspects at each step of the investigation, including each witness interview. Yet military and civilian law enforcement investigations may result in the opinion that offenses have been committed, and in arrests or other legal processes. In furtherance of their law enforcement duties, courts-martial convening authorities at all levels of the chain of command routinely direct that administrative investigations of military failures specifically address culpability for offenses.[117] Moreover, persons appointed to conduct investigations that involve possible military offenses may include specific pro-

116. MCM, *supra* note 113, R.C.M. 303 (Discussion), at II-20 ("The preliminary inquiry is usually informal" and the commander may seek the assistance of third parties to conduct the inquiry.). Nearly identical provisions appeared in the first *Manual for Courts-Martial* promulgated after enactment of the Uniform Code of Military Justice. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 32b, at 36 (1951). *See also* SCHLUETER, *supra* note 115, § 5.2, at 192 (On the commander's preliminary investigation: Information that an offense might have been committed may come from formal or informal sources; the commander may investigate personally or direct a third party to "gather more information and make a report." The investigation may include searches or seizures or "personal interrogation of a suspect or an accused.").

117. U.S. DEP'T OF NAVY, THE MANUAL OF THE JUDGE ADVOCATE GENERAL (C2, 1995) (JAGINST 5800.7C) [hereinafter JAG MANUAL] contains examples of informal investigation convening orders, specifically providing for findings and recommendations on disciplinary matters; for example: "Investigate the cause of the [mishap], resulting injuries and damages, and any fault, negligence, or responsibility therefor, and recommend appropriate administrative or disciplinary action." *Id.* at A-2-c.

posed charges and specifications with the final report forwarded to the convening authority.[118]

The President, who is also the Chief Executive of the Justice and Treasury Departments and all of their law enforcement agencies, would have reason to be familiar with the constitutional scope of his law enforcement investigative powers, powers which derive from a separate specific clause in Article 2 of the Constitution.[119] Such powers exceed anything delineated in service regulations.

The commission form of investigation chosen by President Roosevelt to inquire further into responsibility at Pearl Harbor was not inappropriate or unlawful. Presidents have long used ad hoc commissions to conduct informal investigations of military and other matters,[120] including, for example, the "Dodge Commission" appointed by President William McKinley to investigate the War Department and the Secretary of War,[121] the "Holloway Commission" appointed to investigate the failed Iranian hostage rescue mission,[122] and the "Long Commission" to investigate the bombing of the Marine Barracks in Beirut in 1983.[123] Deflecting congres-

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118. *See id.* at A-2-c ("If an investigating officer recommends trial by court-martial, a charge sheet drafted by the investigating officer may be prepared and submitted to the convening authority with the investigative report.").

119. U.S. CONST. art. 2, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."). An entire, separate jurisprudence exists on this single clause and the law enforcement powers it confers.

120. *E.g.*, CORWIN ESSAYS, *supra* note 17, at 74 (discussing the established use of ad hoc investigative commissions by presidents before Franklin Roosevelt, particularly John Tyler, Theodore Roosevelt and Herbert Hoover). The "Downing Commission" investigation is the most recent ad hoc executive commission investigation of a military disaster. *See, e.g.*, *Remarks on American Security in a Changing World at George Washington University*, 32 WEEKLY COMP. PRES. DOC. 1404 (Aug. 5, 1996) (President Clinton: "After Khobar Towers, I immediately ordered investigations by the FBI and a commission headed by General Wayne Downing [USA, Ret.] . . . ."); Art Pine, *Panel Cites Broad Security Failures in Saudi Bombing . . . Commanders Failed to Respond Adequately to Warnings*, L.A. TIMES, Sept. 17, 1996, at A1 (reporting key findings of the "Downing Commission" in its investigation of the Khobar Towers bombing in Dharan, Saudi Arabia). The Downing Commission's report focused particularly on failings attributable to the U.S. Central Command and Air Force Brigadier General Terry Schwalier, commander of U.S. forces at Dharan at the time of the bombing on 25 June 1996.

121. *E.g.*, HASSLER, *supra* note 8, at 83 (The "Dodge Commission" focused on inefficiency and negligence of Secretary Russel A. Alger. McKinley dismissed Alger from office as a result.).

122. SPECIAL OPERATIONS REVIEW GROUP, RESCUE MISSION REPORT (August 1980) (final report of the "Holloway Commission," appointed in May 1980) (available in one bound volume in the Pentagon Army Library).

sional criticism of his frequent use of ad hoc commissions, Theodore Roosevelt asserted, "Congress cannot prevent the president from seeking advice."[124] Congress has in fact facilitated ad hoc advisory commissions by passing enabling legislation and providing funding.[125] This legislation, the Federal Advisory Committee Act, requires public access to the proceedings and reports of advisory commissions, absent special national security justification for secrecy.[126] President Roosevelt's decision to publish the findings of the Roberts Commission[127] was not unusual or unlawful.

Thousands of informal, administrative investigations are conducted yearly throughout the military.[128] In the Navy, the single-officer *JAG Manual* investigation is the format used most frequently to investigate mishaps.[129] Informal, single-officer *JAG Manual* investigations often find fault and recommend disciplinary action against individuals, without having observed formal, "due process" procedures.[130] Army regulations also

123. Report of the DOD Commission on Beirut International Airport Terrorist Act, Oct. 23, 1983 (Dec. 20, 1983) (final report of the "Long Commission," appointed on 7 Nov. 1983—the commission found fault with those in the chain of command, and particularly with two on-scene commanders.).

124. CORWIN ESSAYS, *supra* note 17, at 74.

125. Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C.S. app. §§ 1-15 (Law. Co-op.1997)) (establishing a system governing the creation and operation of advisory committees in the Executive Branch). The Act, at 5 U.S.C.S. app. § 1(a) (Law. Co-op.1997), refers approvingly to "numerous committees, boards, commissions, councils and similar groups . . . established to advise officers and agencies in the executive branch," finding such bodies "a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." The report of the Long Commission specifically cited FACA as authority.

126. 5 U.S.C.S. app. § 10 (1997).

127. PHA (pt. 6), *supra* note 42, at 2494; *id.* (pt. 7) at 3262.

128. The *JAG Manual* lists seven types of administrative investigations in addition to the standard accident/incident *JAG Manual* investigation, including "situation reports" required by Navy Regulations and other sources of authority; inspector general investigations; aircraft accident investigations; security violation reports; safety investigations; Naval Criminal Investigative Service investigations; and investigations of allegations of personal misconduct by senior officials. JAG MANUAL, *supra* note 117, para. 0202c, at 2-5.

129. In accordance with current Navy JAG Instruction 5830.1, and the *JAG Manual*, para. 0205, at 2-7, courts of inquiry are the preferred format for investigating major incidents. However, the convening authority and the next superior in the chain of command, may, in their discretion, determine that a court of inquiry is not warranted. *Id.* The principal source of authority for "informal," single-officer investigations in the Army is U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) [hereinafter AR 15-6].

provide for informal administrative investigations. As stated pointedly in Army Regulation 15-6:

> Appointing authorities have a right to use investigations and boards to obtain information necessary or useful in carrying out their official responsibilities. The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual.[131]

The principal in an administrative investigation is the commander who seeks information to support decision-making, not a subordinate who happens to be involved in the incident of interest. Investigations do not form legal judgments of responsibility. They make non-binding recommendations to the convening authority.[132]

Congress also frequently conducts investigations that do not afford formal "due process" rights to individuals, and the courts have agreed that such rights need not be provided.[133] Congressional investigations in particular have focused on military and national security failures,[134] and have made political spectacles of individual military officers.[135] The Courts continue to recognize that authority to conduct "non-due process" investigations inheres in Congress's constitutional powers.[136] That Congress should have such power over agents of the Executive Branch and the President lack a similar power within his own sphere is too dissonant with the

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130. *E.g.*, BYRNE, *supra* note 109, at 251 ("Fact-finding reports may provide information which is useable in connection with various personnel actions arising out of the conduct or performance of individuals, such as . . . disciplinary actions, and other administrative actions."). A recent example of a well known career-ending informal investigation is the investigation into the attack on U.S.S. *Stark* in the Persian Gulf in 1987. Letter from Rear Admiral Grant Sharp to The Judge Advocate General, Dep't of Navy (12 June 1987) (ltr 5102 Ser 00/S-0487) (recommending detachment for cause and disciplinary action against the Commanding Officer, Executive Officer and Tactical Action Officer on watch at the time of the attack).

131. AR 15-6, *supra* note 129, para. 1-6.

132. *E.g.*, BYRNE, *supra* note 109, at 250:

> The primary purpose of all administrative fact-finding bodies is to provide convening and reviewing authorities adequate information upon which to base decisions in the matters involved. These bodies are not judicial. Their reports are purely advisory and their opinions, when expressed, do not constitute final determinations or legal judgments. Their recommendations, when made, are not binding upon convening or reviewing authorities.

constitutional separation of powers principle to merit serious consideration.

The Roberts Commission investigation and the various single-officer investigations in the Pearl Harbor case (e.g., Hart, Hewitt, Clausen) are not extraordinary among the thousands of investigations conducted within the Executive Branch every year. Persons interviewed in the course of such investigations, including witnesses and potential suspects, are routinely not allowed to cross-examine witnesses, to demand the inclusion of specific evidence, to inspect other evidence collected during the investigation, or to comment thereon. A convening authority may use a formal, due-process method to investigate an incident, but he is not required to do so until he has decided to initiate the process that leads to a general court-martial.[137] Before enactment of the Uniform Code of Military Justice in 1950

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133. *E.g.*, Hannah v. Larche, 363 U.S. 420, 443-45 (1960); United States v. Fort, 443 F.2d 670, 679 (D.C. Cir. 1971) (Congressional investigations are not criminal trials, and are therefore "outside the guarantees of the due process clause of the Fifth Amendment and the confrontation right guaranteed in criminal proceedings by the Sixth Amendment."). *See, e.g.*, ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 284, 287, 289, 296 (reprint 1973) (1928) (Congress does not follow principles of courts of law in conducting investigations; the Bill of Rights does not apply; hearings may be public or secret); JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 244-72 (1976) (Rights of witnesses are those granted in House and Senate rules; no right to confront witnesses or cross-examine them; no right to call one's own witnesses; rules of evidence do not apply). Witnesses before congressional investigations not only have no right to examine other witnesses, but they are routinely compelled to give self-incriminating testimony. *See* TAYLOR, *supra* note 34, at 193-95 (Because it has never been conclusively resolved whether the Fifth Amendment privilege against self-incrimination applies to witnesses before congressional investigations [because an investigation is not a "criminal case," in the language of the Fifth Amendment], the practice evolved of merely granting testimonial use immunity and ordering testimony.). There is no right to avoid embarrassment or stigma by asserting a Fifth Amendment privilege against self-incrimination before a congressional investigation after being immunized from criminal prosecution and then ordered to testify. *See* Kastigar v. United States, 406 U.S. 441 (1972). Failure to testify after being immunized is punishable as a contempt. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 103-05 (1996).

134. TAYLOR, *supra* note 34, at 33-34 (Historically, congressional investigations have focused on military operations); SMITH, *supra* note 8, at 176-78 (By 1951 Congress had conducted over 100 investigations involving the military departments and the armed forces.). *See also* 3 ANNALS OF CONG. 490-94 (1792) (The first congressional investigation involved the disastrous defeat of Army forces by Indians in the Ohio Territory).

135. *See, e.g.*, TAYLOR, *supra* note 34, at 13-28 (Congressional investigation of defeat of forces commanded by Major General Arthur St. Clair). President Washington dispatched St. Clair's expedition to subdue Indians that had been preying on settlers in the Ohio Territory. General St. Clair was governor of the Ohio Territory and used some of his own resources to outfit the expedition. In a battle along the Wabash River, St. Clair lost half his army in three hours and his retreat turned into a rout. The incident inflamed the public against St. Clair, who claimed that he had been inadequately equipped for the expedition, with respect to both men and material. The House of Representatives appointed a select committee to investigate the incident on 27 March 1792. Before the investigation began, Jeffersonian Democrats began using the disaster as a whip against the incumbent Federalists. The politicized investigation raised many issues but failed to reach conclusions or take action. St. Clair's hope for exoneration was dashed. The incident haunted St. Clair for the rest of his life and he died under impoverished conditions due to congressional hesitation to reimburse him for his expenses. The whole St. Clair affair became entangled in Federalist/Antifederalist politics and St. Clair "was left accused but unjudged."

More recently, Rear Admiral John Poindexter and Lieutenant Colonel Oliver North were called as witnesses during hearings on the so-called "Iran-Contra Affair" in 1987. When they asserted their Fifth Amendment rights against self-incrimination, Congress compelled their testimony by a grant of use immunity. The testimony of North and Poindexter was carried live on national television and radio, replayed on news shows, and analyzed in the public media. The hearings focused on fixing individual responsibility, and were fraught with political controversy over the Reagan Administration's policy in Central America. Moreover, in December 1986, the President had already appointed a non-due process ad hoc advisory commission, the "Tower Commission," to investigate the Iran-Contra allegations. *See Report of the Congressional Committee to Investigate Covert Arms Transactions with Iran*, H.R. REP. NO. 100-433, S. REP. NO. 100-216, 100th Cong., 1st Sess. (1987); United States v. North, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); United States v. Poindexter, 698 F. Supp. 300 (D.D.C.), *appeal dismissed*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). In *United States v. Poindexter*, 698 F. Supp. at 304, the court stated:

> Congress may compel witnesses to testify over their assertion of Fifth Amendment rights . . . , and it may cause a recalcitrant witness to be punished for contempt if this fails. Few formal procedures or evidentiary rules apply during this process. The power to compel testimony in aid of legislative inquiry was assumed to exist by American legislatures even before the Constitution itself was ratified, both Houses of Congress took the same view thereafter, and the Supreme Court has recognized the Constitutionality of this authority . . . sustaining this enormous nonjudicial power in spite of the obvious possibility of abuse.

The Supreme Court precedent that recognized the constitutionality of compelling an immunized witness to testify over his objection is *Kastigar v. United States*, 406 U.S. 441 (1972). *See* United States v. Poindexter, 727 F. Supp. 1488 (1989) (motion to dismiss denied on *Kastigar* grounds). The notion that reputation must be secured from public damage by strictly formal "due process" proceedings when branches of government at the highest levels investigate failures in government operations of national-level concern is a fiction that appears throughout the standing brief of the Kimmel camp, including the brief of counsel Edward B. Hanify, in which appears not one citation to legal authority. Hanify Memo, *supra* note 71.

a convening authority could proceed directly to a general court-martial without ever having conducted a formal investigation.[138]

Justice Roberts compared his commission's investigation to a grand jury investigation.[139] Grand juries are convened to investigate activity and determine whether criminal charges are warranted.[140] Grand jury proceedings are conducted in secret; a grand jury may have nearly unlimited investigative powers; representation by counsel has not been established as a right before a grand jury; a grand jury takes evidence in secrecy; no accused has the right to cross-examine grand jury witnesses or to inspect and comment on documentary evidence presented to a grand jury; an indictment based on evidence previously obtained in violation of the Fifth Amendment right against self-incrimination is nevertheless valid;[141] the rules of evidence do not apply at grand jury proceedings; and a grand jury's failure to return an indictment is not preclusive of subsequent attempts to obtain an indictment from other grand juries convened for that purpose.[142]

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136. McGrain v. Daugherty, 273 U.S. 135, 177-78 (1927) (ratifying "in sweeping terms" the power of Congress to inquire into the administration of executive departments and to sift charges of malfeasance). For general discussion of the broad investigative powers of Congress, see *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Barenblatt v. United States*, 360 U.S. 109 (1959). *See also* 9 Op. Off. Legal Counsel 60 (1985) (Congress has broad authority to conduct investigations, as long as it does not usurp executive or judicial functions); 10 Op. Off. Legal Counsel 68, 73-74 (1986).

137. Today a "formal" method of investigation must precede referral of charges to a general court-martial. UCMJ art. 32 (1994); MCM, *supra* note 113, R.C.M. 405(b), 601(d)(2). The current requirement for a "formal" investigation before charges may be referred to a general court-martial does not preclude the conduct of "informal" investigations. The rule simply provides that an "informal" method of investigation will not support the referral of charges to a general court-martial. On the basis of an "informal" investigation, a convening authority may decide to take no action in a particular case; he may decide to take administrative, non-punitive action, to commence non-judicial punishment procedures under UCMJ article 15, to refer charges to a summary or special court-martial, or to order a UCMJ article 32 investigation with a view toward referral of charges to a general court-martial. See also the discussion of general courts-martial under the sub-heading "Courts and Boards of Inquiry and Supplemental Investigations," *infra* section II(H).

138. Humphrey v. Smith, 336 U.S. 695, 698 (1949).

139. PHA (pt. 7), *supra* note 42, at 3267 (Justice Roberts testified: "This seemed to me a preliminary investigation, like a grand jury investigation . . . . ").

140. Compare the charter of the Roberts Commission—to report responsibility for derelictions. *id.* (pt. 23) at 1247.

141. *See generally* United States v. Calandra, 414 U.S. 338, 346 (1974); Lawn v. United States, 355 U.S. 339, 348-50 (1958); United States v. Blue, 384 U.S. 251, 255 n.3 (1966).

142. On these broad powers of grand juries, see *United States v. Williams*, 504 U.S. 36, 48-51 (1992); *Calandra*, 414 U.S. at 342-45.

These are sweeping, non-due process powers exercised in federal jurisdictions every day. The findings of grand juries are routinely publicized when their investigations are complete. The Roberts Commission investigation does not compare unfavorably to a grand jury investigation—a procedure one might expect a Supreme Court justice to understand, particularly one who had risen to national prominence (before his judicial appointment) as special counsel investigating the Teapot Dome Scandal.[143]

As Justice Roberts stated to Rear Admiral Kimmel and to Congress, his investigation was not a trial.[144] Due process may be warranted at a trial where life, liberty or property interests protected by the due process clause may be deprived, but the Roberts Commission had no such power.[145] Advisory investigations such as those conducted by Secretary Knox and the Roberts Commission, however embarrassing, are not governed by due process procedures. Reputation is not a constitutionally protected interest.[146] Military commanders have no right to enjoin such investigations or to demand remedies from their collateral effects.[147]

The findings in the Roberts Commission report are not so outrageous as to indicate a conspiracy by the members of the Commission to protect Washington by singling out Rear Admiral Kimmel and Major General Short as scapegoats, especially in light of Secretary Knox's preliminary report to the President, including admissions of unpreparedness at Pearl Harbor. Advocates for Kimmel and Short have never presented evidence of a conspiracy to frame Kimmel and Short for dereliction as scapegoats to protect the Roosevelt Administration. Advocates for Kimmel and Short do, however, continue to vilify the Roberts Commission's proceedings and its report, comparing the investigation to a trial and conviction without due process, as if the performance of Kimmel and Short were subject to the

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143. *E.g.*, Peter G. Fish, *Perspectives on the Selection of Federal Judges*, 77 KY. L. J. 545, 571 (1989).

144. *See Kimmel's Own Story*, *supra* note 46, at 156 (complaining that the Supreme Court justice had used the term "trial" in its "strictly legalistic sense."); PHA (pt. 7), *supra* note 42, at 3267 (testimony of Justice Roberts).

145. As stated by Admiral Robert Theobald, who assisted Admiral Kimmel as counsel at the Roberts Commission investigation, the commission was "a fact-finding body." THEOBALD, *supra* note 67, at 153-54. *Compare* Arnheiter v. Ignatius, 292 F. Supp. 911, 923 (N.D. Ca. 1968), *aff'd sub nom.* Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (Informal investigation into plaintiff's fitness to command "was not a trial," but "an administrative fact-finding investigation designed to provide the convening and reviewing authorities with adequate advisory information upon which to base decisions."). The charter of the Roberts Commission went no further than the provision of information and advice to the President.

146. *See infra* notes 316-20 and accompanying text.

President's scrutiny only through the stilted medium of lawyers and rules of evidence in an adversarial hearing. Such a relationship between military superiors and subordinates would destroy the chain of command. One can only wonder whether any commanding officer would feel constrained to use such awkward adversarial procedures to apprise himself of the performance of each soldier and seaman assigned to his command, when the law clearly does not require him to do so.

E. "Dereliction of Duty"

Over the years, advocates of Kimmel and Short have attributed talismanic significance to the phrase "dereliction of duty," used in the report of the Roberts Commission to describe the failure of Admiral Kimmel and Lieutenant General Short "to consult and confer with each other respecting the meaning and intent of the warnings and the appropriate means of defense required by the imminence of hostilities."[148] The Kimmels have referred to this finding as a "charge" and have treated it as an accusation of criminal misconduct, if not a conviction of such conduct, in the very inscription of the three words in the Commission's report to the President.[149] As a matter of fact, however, the applicable military law in existence in 1941 did not recognize "dereliction of duty" as an offense.[150] It was not until 1950 that Article 92 of the first Uniform Code of Military

147. *E.g.*, *Chafee*, 435 F.2d 691 *aff'g Ignatius*, 292 F. Supp. at 926 (Court has no jurisdiction to review informal investigation of fitness of officer in command, his relief of command, or his failure to be promoted; nor did the court have jurisdiction to order the Secretary of the Navy to conduct a court of inquiry or other formal hearing into plaintiff's relief from command). Rear Admiral Kimmel complained years after the relevant events that naval regulations called for courts of inquiry in disaster cases. *See, e.g.*, *Kimmel's Own Story*, *supra* note 46, at 156. Courts of inquiry are still the preferred form of investigation in disaster cases, but the regulations have never precluded other forms of investigation. The traditional preference for courts of inquiry did not create a due process right. *See* Sebra v. Neville, 801 F.2d 1135, 1142 (9th Cir. 1986):

> The "fatal flaw" in petitioner's due process claim was that he had "no property interest in the regulations governing investigations . . . . When a substantive property interest does not independently exist, rules for procedural fairness do not create such an interest . . . . [R]egulations designed to assure procedural fairness in investigations do not confer or create a protected property interest.

Moreover, Navy guidance on investigations applies "down," not "up." The President's constitutional authority is not constrained by the Secretary of the Navy's regulations.

148. PHA (pt. 7), *supra* note 42, at 3299.

149. *E.g.*, Letter from Edward R. Kimmel & Thomas K. Kimmel to Secretary of the Navy Ball (May 11, 1988) ("[T]he Robert's [sic] Commission convicted him without trial . . . .").

Justice included "dereliction of duty" as a court-martial offense.[151] The applicable military law through 1950 was, for the Army, the Articles of War, and, for the Navy, the Articles for the Government of the Navy. Under the Articles for the Government of the Navy, offenses arising from deficiencies in the performance of duty were chargeable under article 8(9) as "negligence or carelessness in obeying orders" or "culpable inefficiency in the performance of duty."[152] Similar offenses under the Articles of War would have been charged as violations of the general article, article 96 ("disorders and neglects to the prejudice of good order and military discipline").[153] The fact that "dereliction of duty" was not the language of a statutory court-martial offense in 1941 may not have softened its impact,

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150. The press pointed out this fact at the time. *See* GORDON W. PRANGE, AT DAWN WE SLEPT 612 (1981). Subjectivists who claim the power to divine "justice" in these cases by their own lights continue to consider such annoying legal distinctions as clouding the quest for truth with "semantics and legalisms." *E.g.*, Thomas B. Buell, *Memorandum for the Deputy Secretary of Defense: "Advancement of Rear Admiral Kimmel and Major General Short,"* NAVAL INST. PROCEEDINGS, Apr. 1996, at 99.

151. U.S. DEP'T OF DEFENSE, LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter MANUAL LEGAL BASIS], ¶ 171, at 258 (discussing UCMJ art. 92, MCM (1951) ¶ 171c (dereliction of duty): "As a specific punitive provision, this latter sub-section is new to the Army and Air Force, but has been known to the Navy as neglect of duty . . . and culpable inefficiency in the performance of duty."); Exec. Order No. 10,214 (MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)), ¶ 171c, at 324—the criminal offense of "dereliction of duty" *after 1950* signified willful or negligent failure to perform duties, or performance of duties in a culpably inefficient manner.

152. ARTICLES FOR THE GOVERNMENT OF THE NAVY 8(9) (1930); MANUAL LEGAL BASIS, *supra* note 151, ¶ 171, at 258. *See* PHA (pt. 11), *supra* note 42, at 5495 (unofficial draft court-martial charges and specifications for culpable inefficiency and neglect of duty in the case of Rear Admiral Kimmel).

153. MANUAL LEGAL BASIS, *supra* note 151, ¶ 171, at 258:

> Under the present Army and Air Force practice offenses of this nature [i.e., dereliction of duty] would be charged under Article of War 96 . . . . The third part [of Article 92, UCMJ (1950)] is directed against any person subject to the code who is derelict in the performance of his duties. As a specific punitive provision, this latter sub-section is new to the Army and Air Force . . . .

TILLOTSON, *supra* note 114, at 206.

but it was not the language of an "indictment" prepared to support prosecution.[154]

Admiral King and Secretary Forrestal in their endorsements on the Navy Court of Inquiry, the Army Pearl Harbor Board and Secretary Stimson's final report, and the Joint Congressional Committee in its final findings all echoed the key finding of the Roberts Commission, but without the appellation of "dereliction." Although the Roberts Commission's report found some fault with the actions of officials in Washington[155] (a fact overlooked by those zealously committed to rehabilitation of Kimmel and Short), the full extent of that fault would not be revealed until later when more time was available for detailed investigation. In this respect, the Roberts Commission, working quickly in the aftermath of the attack without access to highly classified evidence that would later become available, produced a report that addressed its investigative precept, but was not as comprehensive as later investigations. The discovery of additional fault with other officials in later investigations, however, does not indicate that Rear Admiral Kimmel and Major General Short were blameless. Later investigations, including the findings of the Joint Congressional Committee,[156] added to the list of faults the Roberts Commission had found with Kimmel and Short, but characterized such faults not as "dereliction" but as failures of judgment.[157] The real significance of not characterizing the failings of Kimmel and Short as derelictions in later investigations is not forgiveness but the more damning implication that the commanders lacked capacity to perform at the level expected of them. Capacity wasted in inattention or culpable disregard is the gravamen of dereliction or

154. As soon as three days after the Roberts Commission report had been submitted, the press reported that the President did not intend to order courts-martial or take any other action personally. *Inquiry on Hawaii Urged in Congress*, N.Y. TIMES, Jan. 27, 1942, at 4, col. 1.

155. PHA (pt. 7), *supra* note 42, at 3299-3300.

156. Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, Pursuant to S. Con. Res. 27, 79th Cong., at 252 (Letter of Transmittal from Committee Chairman and Vice-Chairman to Speaker pro tempore of the Senate and Speaker of the House, dated July 16, 1946) [hereinafter JCC].

157. *See infra* note 232.

neglect of duty.[158] Later investigations found, essentially, that the commanders lacked the capacity to be derelict.[159]

To whatever extent the findings of the Roberts Commission suggested that the Pearl Harbor commanders committed criminal "dereliction" offenses, the findings of the Navy Court of Inquiry, the Army Pearl Harbor Board, together with the endorsements of the Secretaries, and the findings of the Joint Congressional Committee, stand as official "corrections" of the offensive dereliction finding.[160] Kimmel and Short had full opportunities to present their sides of the Pearl Harbor story at these later proceedings and to load the historical record with their versions of the facts[161]—but neither they nor anyone else in uniform has ever held ultimate power to decide what official conclusions should be drawn from these facts.

F. Retirement

Advocates of Kimmel and Short have stated on a number of occasions that the commanders were "forced into retirement."[162] The record, however, reflects that both officers were retired pursuant to their own requests. According to his own testimony, Major General Short telephoned General Marshall on 25 January 1942, and asked whether he should retire, to which

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158. *See, e.g.*, MCM, *supra* note 113, Pt. IV, para. 16c(3)(d) ("Ineptitude. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished.").

159. *E.g.*, PHA (pt. 16), *supra* note 42, at 2424, 2425 (ADM King: "lack of superior judgment necessary for exercising command commensurate with their rank and their assigned duties"), 2425-26 (ADM King: "lack of the superior judgment necessary for exercising command commensurate with their responsibilities."), 2427 (Navy Judge Advocate General: "failed to exercise the discernment and judgment to be expected from officers occupying their positions;" "poor quality of strategical planning"); JCC, *supra* note 156, at 252 ("errors of judgment and not derelictions of duty").

160. And it has been the official position of the Navy ever since that "the Navy does not contend that RADM Kimmel was guilty of dereliction of duty." Memorandum, Secretary of the Navy, to Deputy Secretary of Defense (4 May 1995).

161. *See, e.g.*, Memorandum No. 5861 from PERS-00F to PERS-00X, Bureau of Naval Personnel (7 Apr. 1993). Kimmel has already had his "day in court" and no action was subsequently taken to promote him on the retired list.

> Between December 1941 and January 1946 there were no less than eight different investigations into the facts surrounding the attack on Pearl Harbor. At both a Naval Court of Inquiry and before a Joint Congressional Committee RADM Kimmel was allowed to tell his side of the story. Results of these proceedings are part of the historical record.

Id.

General Marshall responded, "Stand pat."[163] On his own initiative, Short then prepared a formal application for retirement and forwarded it to General Marshall with a personal letter, stating as follows:

> I appreciate very much your advice not to submit my request for retirement at the present time. Naturally, under existing conditions, I very much prefer to remain on the active list and take whatever assignment you think it necessary to give me. However, I am inclosing [sic] application so that you may use it should you consider it desirable to submit it at any time in the future.[164]

General Marshall informed the Secretary of War in writing on 26 January that he had spoken to General Short, that General Short had volunteered to retire, and he recommended to the Secretary that General Short's application be accepted "quietly without any publicity at the moment."[165] In the same letter to Secretary Stimson, General Marshall stated further that Admiral Stark had proposed to communicate Short's request for retirement to Rear Admiral Kimmel, "in the hope that Kimmel will likewise apply for retirement."[166] On 25 January 1942, the Commandant of the 12th Naval District at San Francisco informed Kimmel that he had been directed to relate to him that Major General Short had submitted a request

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162. *E.g.*, Flag Officer Petition, *supra* note 36, at 1 ("Kimmel and Short were forced into retirement."). Compare this near-proprietary attitude of personal attachment to public office to MILTON, *supra* note 20, at 112 ("The supremacy of the civil executive must go unquestioned . . . . When a President loses confidence in a commander, the latter should resign or be dismissed.").

163. PHA (pt. 7), *supra* note 42, at 3133.

164. *Id.* at 3134-35. The enclosed request for retirement stated, "I hereby submit my request for retirement . . . , effective upon a date to be determined by the War Department." *Id.*

165. *Id.* at 3139.

166. *Id.* In this letter Marshall also advised the Secretary that The Judge Advocate General had no objections "to the foregoing procedure."

for retirement.[167] Kimmel took this as a suggestion that he submit a similar request, and he did so on 26 January 1942.[168]

In a letter to Kimmel dated 27 January 1942, Admiral Stark informed him that he had shown the Secretary of the Navy and the President "your splendid letter stating that you were not to be considered and that only the country should be considered," assuring Kimmel that "we will try and solve the problem on the basis of your letter—'whatever is best for the country.'"[169] In his letter to Kimmel, Admiral Stark also stated that notification of General Short's request to retire was not intended to influence Kimmel "to follow suit."[170] In a letter to the Secretary of the Navy, dated 28 January 1942, Rear Admiral Kimmel acknowledged that he had been "informed today by the Navy Department that my notification of General Short's request was not intended to influence my decision to submit a similar request," but he reaffirmed his request to retire.[171]

The President was informed immediately that both officers had submitted requests for retirement, and he proposed in a cabinet meeting that an announcement be made that acceptance of their requests for retirement would not bar subsequent courts-martial.[172] With the concurrence of the President, Kimmel's retirement was formally accepted by letter of 16 February 1942,[173] and Short's by letter of 17 February 1942.[174] Rear Admiral

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167. *See id.* (pt. 17) at 2727-28:

> Rear Admiral Randall Jacobs, U.S.N., Chief of the Bureau of Navigation, Navy Department, Washington, D.C., had telephoned an official message to be delivered to me which stated that Admiral Jacobs had been directed by the Acting Secretary of the Navy [later discovered to have been Secretary Knox, not the Acting Secretary] to inform me that General Short had submitted a request for retirement.

168. *Id.* at 2728. The request for retirement is reproduced on page 2733 ("I hereby request that I be placed upon the retired list . . . .").

169. *Id.* at 2732. Admiral Kimmel restated these sentiments in a letter to Admiral Stark on 22 February 1942: "I submitted this request [for retirement] to permit the department to take whatever action they deemed best for the interests of the country." *Id.* at 2729.

170. *Id.*

171. "I desire my request for retirement to stand, subject only to determination by the Department as to what course of action will best serve the interests of the country and the good of the service." *Id.* at 2732. *See also id.* (pt. 6) at 2561 (Rear Admiral Kimmel's testimony).

172. *Id.* (pt. 7) at 3140. *See* PRANGE, *supra* note 149, at 608 (quoting from Secretary Stimson's Diary). Secretary Stimson suggested to the President that non-condonation language be included in the official retirement letters ("In order that the acceptance of these requests for retirement may not be considered as a condonation of . . . offenses"). *Id.* at 3140.

Kimmel's retirement was effected under 34 U.S.C. § 381,[175] and Major General Short's retirement was effected under 10 U.S.C. § 943.[176] Both officers had submitted their applications for voluntary retirement in the face of advice that they were not required to do so, having specifically acknowledged that they were not required to do so.

Both of the letters approving the commanders' requests to retire contained the phrase "without condonation of any offense or prejudice to future disciplinary action."[177] The President himself had proposed similar language, and had indicated that an opinion on the exact language to be used should be obtained from the Attorney General of the United States.[178] The Attorney General, Francis Biddle, recommended against specific reference to courts-martial, to leave "the matter open for further action on the part of the government without stating that a particular course is planned or that any special interpretation has been placed upon the acts committed."[179] The Judge Advocate General of the War Department had also been consulted about the non-condonation language and he submitted detailed legal memoranda to the Chief of Staff of the Army and the Secretary of War, recounting the difficulties with immediate courts-martial,[180] assessing the possibility that acceptance of voluntary retirements could be construed as condonation, and analyzing the public relations aspects of various courses of action available to the government (i.e., which legally available courses of action might lead to public charges of whitewashing, and which legally available courses of action might lead to claims of persecution).[181] The final course of action chosen left the matter open for further consideration, provided notice to the affected officers that additional

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173. *Id.* (pt. 17) at 2731.

174. *Id.* (pt. 7) at 3142; *id.* (pt. 19) at 3804.

175. "When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application." *Id.* (pt. 17) at 2731.

176. This section provided for retirement of Army officers after 30 years of service, upon the officer's own application, in the discretion of the President. *See id.* (pt. 7), at 3142, 3146.

177. *Id.* (pt. 17) at 2731; *id.* (pt. 7) at 3142.

178. *Id.* (pt. 7) at 3140-41.

179. *Id.* at 3141-42. The Attorney General's advice to leave open the question of what specific action might be taken is exactly the kind of advice that any staff judge advocate might give his convening authority today, to ensure that the full range of discretionary options is left open until a considered decision can be made.

180. The publication of secret documents or testimony during the war, and the time and effort required of many senior officers to act as courts-martial members and witnesses, would distract from prosecution of the war. *Id.* at 3145.

action might be taken, and informed the public that future action had not been ruled out in a matter in which the public had every right to be intensely interested.[182] Retired officers, as a matter of law, remain subject to recall to active duty for disciplinary action.[183] There is no legal reason why the non-condonation language could not be included in the retirement letters.

Under the law as it then existed, Kimmel retired in his permanent grade, as a Rear Admiral,[184] and Short retired in his permanent grade, as a Major General.[185] The retirements of Kimmel and Short were clearly lawful, and the permanent grades in which they retired were those provided for by the law applicable to all officers of the Navy and Army who had previously held temporary appointments to higher ranks.[186] Whether the Secretaries of the Navy and War Departments, the Chief of Naval Operations and Chief of Staff of the Army, or the President himself desired or encouraged the retirement of Kimmel or Short has no bearing on the legitimacy of their retirements. The retirements were voluntarily requested and

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181. *Id.* at 3145-47; *id.* (pt. 19) at 3809-10. The Judge Advocate General also noted that the President had authority to summarily discharge Major General Short under Article of War 118. *See* TILLOTSON, *supra* note 114, at 253-56 (discussing administrative discharges and dismissal). One would expect any staff judge advocate's personal advice to his commander or client in a highly visible case to include consideration of the possible external impacts of various courses of action available.

182. The press releases are reproduced in PHA (pt. 19), *supra* note 42, at 3811 (Short) and 3815 (Kimmel). Both releases quote the non-condonation clause and indicate that charges would not be tried until the "public interest and safety would permit."

183. *See id.* (pt. 7) at 3146 (advice of the Judge Advocate General, War Department, to Secretary of War, para. 2 (citing applicable laws)); 10 U.S.C.S. § 802(a)(4) (Law. Co-op. 1997) (UCMJ art. 2(a)(4)); United States v. Fletcher, 148 U.S. 84 (1892) (officer court-martialled four years after retirement and dismissed from the service).

184. Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89.

185. Act of Aug. 5, 1939, ch. 454, 53 Stat. 1214, *as amended*, Act of July 31, 1940, ch. 647, 54 Stat. 781.

186. Officials have made this point previously. *See, e.g.*, Memorandum, Secretary of the Navy (Ball), to Secretary of Defense, subject: Request for Posthumous Promotion of Rear Admiral Husband E. Kimmel (7 Dec. 1988) ("[N]either Rear Admiral Kimmel nor any other flag officer was statutorily eligible to retire as an Admiral at the time of his retirement. For that reason, it does not appear that retirement in his permanent grade was intended as punishment."); Memorandum, First Endorsement, Chief of Naval Operations (Trost), to The Secretary of The Navy (19 Jan. 1988) (Ser 00/8U500015), *endorsing* Memorandum, Director of Naval History to The Secretary of The Navy (5 Jan. 1988) [hereinafter Trost Endorsement] ("Rear Admiral Kimmel's retirement as a two star cannot be considered punitive since it was required by the law at that time.").

effected in accordance with law. As discussed below, the President could have fired them anyway.

G. Right to a Court-Martial

Advocates for Kimmel and Short have treated the fact that they were never court-martialled as a grievance.[187] No one has a right to a court-martial to "clear his name."[188] The decision to convene a court-martial or to refer particular charges to a court-martial is highly discretionary with individual military convening authorities. A "forced" court-martial would probably be defective jurisdictionally. There are, however, two situations in which a commissioned officer may request a court-martial: in response to an order of dismissal,[189] and in lieu of nonjudicial punishment. In neither situation, however, is there a right to receive a court-martial.

1. Dismissals and Courts-Martial

A commissioned officer has no constitutional right to remain in the service[190] and may be separated involuntarily in a number of different ways, including the stigmatic order of dismissal.[191] Dismissal of an officer from the service is a much more severe measure than subtle pressure to retire voluntarily. A formal dismissal would cause not only injury to reputation, but also deprivation of material benefits. Dismissal deprives an officer of his commission and all pay, benefits and entitlements, including

187. *E.g.*, Flag Officer Petition, *supra* note 36, at 1-2. Kimmel advocates are apparently unaware that Kimmel declined the offer of a court-martial. *See infra* note 359.

188. Mullan v. United States, 212 U.S. 516, 520 (1909) (holding specifically that the Secretary of the Navy is under no obligation to convene a court-martial "to clear the name of any officer").

189. CHARLES A. SHANOR & TIMOTHY P. TERRELL, MILITARY LAW IN A NUTSHELL 249 (1980) (A commissioned officer dismissed by order of the President may request a court-martial, but "there is no right to such a trial.").

190. *See supra* note 95.

191. 10 U.S.C.S. § 1161(a)(3) (Law. Co-op. 1997). On the Executive power of dismissal, see 4 Op. Att'y Gen. 603, 609-13 (1847); 8 Op. Att'y Gen. 223, 230-32 (1856); 17 Op. Att'y Gen. 13 (1881). Congress also has power to provide for the removal of officers. One of the great compromises made in the drafting of the Constitution was the decision to omit any clause prohibiting the existence of a standing army, allowing Congress, instead, sufficient power to "increase the Army, or reduce the Army, or abolish it altogether." Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd* 165 U.S. 553 (1897). *See* THE FEDERALIST No. 24, at 153 (Hamilton) (Jacob E. Cooke ed., 1961); MCDONALD, *supra* note 20, at 202-03. If Congress has power to disestablish the Army and Navy altogether, which is scarcely subject to doubt, it must have power to provide for the removal of one officer at a time.

retirement pay.[192] The President's power to dismiss an officer from the service, once unlimited,[193] is today, in peace time, limited (by statute) to dismissal pursuant to the sentence of a general court-martial.[194] Congress has not attempted, however, to abrogate the power of the President to dismiss an officer in time of war.[195]

Today, Article 4 of the Uniform Code of Military Justice (UCMJ) provides some procedural safeguards for officers subject to presidential dismissals in time of war, including that officers dismissed by order of the President may request a court-martial.[196] The right to request a court-martial in such cases, however, was not provided to officers of the Army until 1950 with the enactment of the first UCMJ,[197] although the right to request a court-martial pre-existed the UCMJ in the Articles for the Government of the Navy.[198] The current UCMJ standard, adopted from the Articles for

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192. *See, e.g.*, United States v. Ballinger, 13 C.M.R. 465 (A.B.R. 1953) (Dismissal is officer-equivalent of a dishonorable discharge and has equivalent effect on benefits and entitlements.); Van Zante v. United States, 62 F. Supp. 310 (Ct. Cl. 1945); JAGJ 1953/4541 (25 May 1953); TILLOTSON, *supra* note 114, at 255 ("Summary dismissal by executive order is a separation from the service under other than honorable conditions."). *See also* 38 U.S.C.S. § 101(2) (Law. Co-op. 1997) ("Veteran" does not include one discharged under conditions other than honorable), and provisions throughout Title 38 U.S.C. that state the impact on various veterans' benefits of a discharge under conditions other than honorable.

193. *See, e.g.*, Wallace v. United States, 257 U.S. 541, 544 (1922); United States v. Corson, 114 U.S. 619, 620-21 (1885); Blake v. United States, 103 U.S. 227, 231-33 (1881); 4 Op. Att'y Gen. 1 (1842) (advising the Secretary of the Navy that the President, as Commander in Chief, has absolute power to dismiss an officer from the service without a court-martial, notwithstanding that the exercise of such power might subject "brave and honorable men" to "capricious despotism," "deprive them of their profession" and even "sully their good name.").

194. 10 U.S.C.S. § 1161(a)(1) (Law. Co-op. 1997). A convening authority may also commute a court-martial sentence to dismissal. 10 U.S.C.S. § 1161(a)(2) (Law. Co-op. 1997). But for the statutory limitation imposed by the 1866 predecessor to 10 U.S.C.S. § 1161 (Law. Co-op. 1997) (founded upon Congress's Constitutional power to "make Rules for the Government and Regulation of the land and naval Forces"), the President could summarily dismiss an officer from the service *at any time*, peace or war, revoking his commission and cutting off all pay and benefits. Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92. *See* Fletcher v. United States, 26 Ct. Cl. 541, *rev'd on other grounds*, 148 U.S. 84 (1891).

195. The law, codified at 10 U.S.C.S. § 1161(a)(3) (Law. Co-op. 1997) specifically recognizes the President's authority to order the dismissal of an officer in time of war. *See* McElrath v. United States, 102 U.S. 426 (1880) (In time of war neither sentence of court-martial, nor any commutation thereof, is required as "condition precedent" to the President's exercise of the power of dismissal). *See also* CORWIN, *supra* note 33, at 187 (Congress has never attempted to limit the President's power of dismissal in time of war; that power remains absolute.); BERDAHL, *supra* note 6, at 128-29 (short legal history of President's power to dismiss officers—the power is unimpaired in time of war).

the Government of the Navy, does not provide a right to a court-martial even after the President has ordered such a harsh sanction as dismissal. "If the President fails to convene a general court-martial within six months . . . the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue,"[199] and "[i]f an officer is discharged from any armed force by administrative action . . . he has no right to trial under this article."[200] Accordingly, the President may order a dismissal, ignore a demand for court-martial, and the officer will be administratively separated from the Service without a hearing after six months. Moreover, according to the law, if the President does convene a court-martial, and it acquits the officer or fails to order dismissal or death, "the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue."[201] An officer would under no circumstances be entitled by a court-martial acquittal to restoration to his previous military position, or to any particular position in the armed forces, because the President has the sole power to appoint officers of the Armed Forces.[202] The limited victory

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196. *See* 10 U.S.C.S. § 804 (Law. Co-op. 1997) (UCMJ art. 4):

> If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations . . . .

197. *See* TILLOTSON, *supra* note 114, at 255 ("An officer summarily dismissed by order of the President in time of war is not entitled to trial by court-martial."). The first Uniform Code of Military Justice added the right to request a court-martial in 1950. Act of May 5, 1950, ch. 169, § 1, 64 Stat. 110 (UCMJ art. 4).

198. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 37, *reprinted in* NAVAL COURTS AND BOARDS 465, § B-39 (1937).

199. 10 U.S.C.S. § 804(b) (Law. Co-op. 1997).

200. *Id.* § 804(d). *See* ARTICLES FOR THE GOVERNMENT OF THE NAVY, arts. 36, 37 (1930) (same as the UCMJ).

201. 10 U.S.C.S. § 804(a) (Law. Co-op. 1997).

202. *Id.* § 804(c) ("If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed.").

achieved at a court-martial today, if one were convened, would mean only that the dismissed officer would be separated under Service regulations.[203]

After the United States had declared war, President Roosevelt had at his disposal the severe power of executive dismissal in time of war,[204] and it is clear under then-existing law that Rear Admiral Kimmel and Major General Short had no right to courts-martial. Speaking of himself and Kimmel, Major General Short testified before a Joint Congressional Committee that "both Departments had the legal right to refuse us a courts-martial, if they saw fit to do so."[205]

There is one other circumstance in which the law provides that service members may request a court-martial: all officers and enlisted members who are not attached to or embarked in a vessel may refuse non-judicial punishment under Article 15 UCMJ, and request a court-martial in lieu of such proceedings.[206] In the face of such a request, however, the convening authority may decline to pursue charges in any forum, choosing to resolve issues administratively. Article 15 does not provide a right to a court-martial.

Service members never have a right to a court-martial, only a right to request one under limited circumstances. Actions or statements that impugn the judgment or professional performance of an officer in a particular situation need not be authorized by the verdict of a court-martial or other "due process" hearing beforehand, nor do such actions or statements afterwards give rise to a right to a court-martial or other hearing to challenge or rebut them. No one in the military has or has ever had the right to demand a court-martial in lieu of an administrative investigation, to correct perceived errors in an administrative investigation, to challenge a relief from command, to ensure that the fault of others is publicly revealed,[207] or to counteract bad publicity. If an appropriate convening authority were

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203. *See* SHANOR AND TERRELL, *supra* note 189, at 249-50.

204. *See supra* note 195. The current statutory scheme applicable to dismissal in time of war (10 U.S.C.S. § 804 (Law. Co-op. 1997)) still affirms the extensive discretionary powers of the President over the appointment, removal and service, generally, of officers.

205. PHA (pt. 7), *supra* note 42, at 3149.

206. 10 U.S.C.S. § 815(a) (Law. Co-op.1997) (UCMJ art. 15(a)). *See* MCM, *supra* note 113, pt. V, para. 4.

207. *See infra* notes 474, 481. Under the rules of evidence, the collateral misconduct of others would be inadmissible as irrelevant. A court-martial for dereliction of duty would not try the alleged derelictions or omissions of others. *See* MCM, *supra* note 113, MIL. R. EVID. 402. The Military Rules of Evidence are based on the Federal Rules of Evidence. The rule of relevance has ancient common law roots.

inclined to refer charges to a court-martial as a "courtesy," and the jurisdictional prerequisites for a court-martial were met, he could do so, but no officer, including Kimmel and Short, has a right to compel his own court-martial.[208]

2. Effect of Acquittal

A judgment of acquittal at a court-martial merely reflects the opinion of two-thirds of the members of the court-martial that the government did not prove beyond a reasonable doubt that the accused committed a criminal offense. Charges tried before a court-martial may not be referred to another court-martial after an acquittal.[209] A court-martial acquittal, however, does not mean that the accused committed no misconduct, or that an acquitted officer was free from errors of judgment unacceptable for one in his position of responsibility, or that he is or was properly qualified for any particular position of responsibility. As stated in *Fletcher v. United States*, the military "holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code."[210] Acquittal at a court-martial does not entitle an officer to restoration of privileges previously enjoyed through the President's discretion.[211] A verdict that absolves one of criminal responsibility does not also deprive the Commander in Chief of the power to command.

The standard of proof at a court-martial, as in any criminal trial, is "beyond a reasonable doubt." This high evidentiary standard might produce an acquittal for want of evidence in a court-martial case where more than sufficient evidence exists to support administrative decisions not sub-

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208. *See* Mullan v. United States, 42 Ct. Cl. 157, 172 (1907), *aff'd*, 212 U.S. 516 (1909) (In a case noteworthy for the personal participation of President William McKinley, the Court of Claims held that a naval officer had no right to demand that charges against him be investigated by a court of inquiry or a court-martial. The Secretary of the Navy was empowered to convene a court of inquiry or a court-martial at the request of an officer, but he also had discretion as to whether any such tribunal would be convened.).

209. 10 U.S.C.S. § 844 (Law. Co-op.1997) (UCMJ art. 44).

210. 26 Ct. Cl. 541, 562-63 (1891), *rev'd on other grounds*, United States v. Fletcher, 148 U.S. 84 (1893); Swaim v. United States, 28 Ct. Cl. 173, 227 (1893) (quoting *Fletcher*). Certainly the same standard, that mere freedom from crime is not sufficient, applies to the most senior officers of the Navy.

211. As Admiral Carlisle Trost stated, "[I]n terms of accountability, there is a vast difference between a degree of fault which does not warrant punitive action and a level of performance which would warrant bestowal of a privilege." Trost Endorsement, *supra* note 186 (on the failure of previous administrations to nominate Rear Admiral Kimmel for advancement on the retired list).

ject to any form of adjudication.[212] The administrative actions taken by the government with respect to Kimmel and Short could have been taken notwithstanding the existence of hypothetical courts-martial acquittals of "dereliction of duty."[213] Finally, any court-martial of Kimmel or Short that had followed the applicable rules of evidence would have found inadmissible evidence of the collateral fault of others in the Pearl Harbor disaster. Courts-martial, like all criminal trials, do not try whole incidents and everyone involved in them; they try specific charges against specific individuals only. The collateral fault of others is not a defense; and Kimmel and Short could not have used courts-martial as soapboxes to demand the indictment of others.[214]

H. Courts and Boards of Inquiry and Supplemental Investigation

Advocates of Rear Admiral Kimmel treat the favorable findings of the Navy Court of Inquiry as tantamount to a judicial acquittal.[215] A court of inquiry is not a criminal court; such bodies may not try, acquit, or convict anyone of a criminal offense,[216] nor do they make professional personnel decisions.[217] Courts of inquiry are investigative tools[218] to assist

212. Related to this reasoning is the traditional rule that acquittal of a criminal charge does not bar subsequent civil actions for damages based on the same conduct. The same evidence that might not meet the higher standard of proof applicable in a criminal context ("beyond a reasonable doubt") might satisfy the standard of proof for liability in a civil context ("a preponderance of evidence"). In *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972), the Supreme Court held that a prior criminal acquittal on the underlying offense did not bar a civil forfeiture action because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel." Likewise, in *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938), the Court observed that "the difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*." The O.J. Simpson cases are a familiar recent example of civil proceedings following a criminal acquittal.

213. In fact, even more severe administrative action could have been taken notwithstanding courts-martial acquittals. *E.g.*, 12 Op. Att'y Gen. 421, 424-26 (1868) (President had authority to disapprove findings of court-martial and dismiss officer from service notwithstanding his acquittal on charges of neglect of duty. The discretionary power of the President to dismiss is separate from the power of a court-martial to sentence an officer to dismissal.). *See also* McElrath v. United States, 102 U.S. 426, 437-39 (1880) (Presidential dismissal is valid even if based upon an erroneous understanding of predicate facts.).

214. *See infra* notes 378, 474, 481, and accompanying text. The McVay case raises this issue more directly; hence, Part III of this article develops the issue more thoroughly.

215. *E.g.*, Flag Officer Petition, *supra* note 36, at 2 ("The Court of Inquiry cleared Admiral Kimmel of any improper performance with regard to his duties . . . ."); Letter from Thomas K. Kimmel to Secretary of the Navy Ball (May 11, 1988) (The court of inquiry "completely exonerated him."); Hanify Memo, *supra* note 71 (thirteen pages of argument on the findings of the court of inquiry, without citation to a single legal authority).

decision making by the authorities that convened them.[219] The principal purpose of a court of inquiry is to gather and organize information. Such a "court" may express opinions and recommendations only when specifically authorized to do so.[220] A convening authority is not required to accept the findings, opinions or recommendations of a court of inquiry. Such findings, opinions and recommendations are advisory only.[221] If dissatisfied with the results of a court of inquiry, the convening authority may order additional investigation by the court,[222] or conduct additional investigation by other means, including single-officer investigations.[223] The findings of a court of inquiry, being in no way a legal judgment, are not entitled to finality nor do they create some form of estoppel of the secretary's or the president's inherent investigative powers. No one has a right to a court of inquiry,[224] to enforcement of its findings, or to correction of

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216. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) ("The proceedings of these bodies [courts of inquiry] are in no sense a trial of an issue or of an accused person; they perform no real judicial function . . . ."); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 212, ¶ 459 (1910) ("The court of inquiry is not a judicial tribunal.").

217. Rogers v. United States, 270 U.S. 154 (1926) (Findings of military courts of inquiry merely adduce evidence and are not binding on subsequent personnel decisions—officer's discharge upheld notwithstanding favorable finding of court of inquiry.).

218. JACOBS, *supra* note 17, at 59 (Courts of inquiry "are convened to investigate a matter."); WINTHROP, *supra* note 106, at 517 (A court of inquiry is not a court; not a trial; its opinions, when given, are not judgments; it does not administer justice; its role is to "examine and inquire."). *See* 10 U.S.C.S. § 935(a) (Law. Co-op. 1997) (UCMJ, art. 135(a)).

219. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Courts of inquiry "are convened solely for the purpose of informing the convening authority in a preliminary way as to the facts involved in the inquiry . . . ."); 8 Op. Att'y Gen. 335, 347, 349 (1857) (In a case involving the use of courts of inquiry to investigate the general fitness of officers of the Navy, of all grades, the Attorney General specifically rejected the notion that "the sole object of a court of inquiry is the exculpation of some officer, the individual subject of the inquiry" and clarified that "[t]he object of a court of inquiry is the ascertainment of facts for the information of superior authority." The Attorney General noted that members of the military community often mistook the "real nature" of such courts, and "their true legal relation to the Executive.").

220. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Courts of inquiry are fact-finding bodies and will not express opinions or make recommendations unless directed to do so in the convening authority's precept.); 8 Op. Att'y Gen. 335, 339, 342 (1857) (Courts of inquiry merely state facts and do not offer opinions unless specifically required to do so by the convening authority); BYRNE, *supra* note 109, at 258 (Opinions and recommendations are expressed in the report of an investigation only when directed by the convening authority). The same rule applies today. 10 U.S.C.S. § 935(g) (Law. Co-op. 1997) (UCMJ, art. 135(g)).

its errors. Courts of inquiry are tools for those empowered to convene them. They do not create personal rights.

A proper convening authority may appoint a court of inquiry to investigate and advise on any matter within the convening authority's responsibility. Convening authorities frequently seek from courts of inquiry recommendations with respect to personal responsibility and whether evidence would support courts-martial. A convening authority may proceed, however, to a general court-martial, or decide not to proceed to a general

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221. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Conclusions of courts of inquiry "are merely advisory."); Beard v. Stahr, 370 U.S. 41 (1962) (Plaintiff's due process claim against board of inquiry and board of review dismissed as premature because the secretary had not yet exercised his discretion to approve or disapprove recommendations of the boards—such boards are merely advisory to the convening authority.); WINTHROP, *supra* note 106, at 531 (The convening authority may take action on a court of inquiry "at his discretion." "If an opinion be given, it is in no respect binding upon him, being in law merely a recommendation to be approved or not as he may determine."); DUDLEY, *supra* note 216, at 218 ¶ 476 ("The record of the court [of inquiry] when received by the convening officer may be acted upon, in his discretion, by approval or disapproval."); 4 Op. Att'y Gen. 1 (1842) (advising the Secretary of the Navy that the President has absolute, constitutional power to dismiss an officer from the service without a court-martial, notwithstanding the favorable findings of a court of inquiry). That courts of inquiry are advisory only has been the tradition from time immemorial, and it is still taught in the Navy today. *E.g.*, NAVAL JUSTICE SCHOOL, ADMINISTRATIVE LAW STUDY GUIDE, Ch. 1, para. 0101, 0103 at 1-1 (Aug. 1996) (Administrative investigations, including courts of inquiry, "are purely administrative in nature—not judicial." Such investigations are "advisory only; the opinions are not final determinations or legal judgments." Recommendations made in the report of an investigation are not binding upon convening or reviewing authorities. "Originally adopted by the British Army," the court of inquiry "has remained in its present form with only slight modifications since the adoption of the Articles of War of 1786."). *But see*, Ned Beach, *Comment, "Reopen the Kimmel Case,"* NAVAL INST. PROCEEDINGS, Apr. 1995, at 27 (mistaking the 1944 court of inquiry for "a legal judgment of fault").

222. *E.g.*, DUDLEY, *supra* note 216, at 219 ¶ 476 ("If the proceedings [of a court of inquiry] are not satisfactory to him [the convening authority], he may return them for revision or further investigation . . . .").

223. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Convening authority has discretion to decide whether to use a court of inquiry, a single-officer investigation, or a board of investigation.). Forrestal's decision to order single-officer investigations by Admiral Hart and Admiral Hewitt was clearly within his lawful powers. Admiral Thomas Hart conducted his investigation pursuant to a precept of the Secretary of the Navy, dated 12 February 1944. PHA (pt. 16), *supra* note 42, at 2265. Admiral H. Kent Hewitt conducted his investigation pursuant to Forrestal's precept of 2 May 1945. *Id.* at 2262. Kimmel advocates refer to these additional investigations as "ex parte inquiries," as if Kimmel had some right to stand between the Secretary of the Navy and any quest for information concerning him. *See*, *e.g.*, Hanify Memo, *supra* note 71, at 10 (without citation to a single legal authority).

court-martial, notwithstanding a contrary recommendation by a court of inquiry. Before 1950 a convening authority could proceed directly to a general court-martial without conducting a court of inquiry or other formal investigation.[225] Under the current military justice system, a hearing that accords due process rights to an individual accused of an offense must be conducted, unless waived by the accused, before a convening authority may refer charges to a general court-martial.[226] The requirement for such a hearing may be satisfied by a properly conducted court of inquiry, by an investigation conducted pursuant to Article 32 UCMJ, or by similarly "formal" proceedings.[227] The findings and recommendations of a court of inquiry or Article 32 investigating officer still have no legal finality or effect of res judicata.[228] If a convening authority is satisfied with the sufficiency of evidence, he may refer charges directly to a general court-martial contrary to the recommendations in an investigative report.[229] This type of discretion afforded convening authorities in the military is inherent throughout the structure of the Uniform Code of Military Justice, and the courts have upheld it repeatedly.[230]

To say that the Court of Inquiry or Army Pearl Harbor Board vindicated or exonerated either Kimmel or Short and therefore entitled them to restoration of rank misstates the purpose and effect of such investigative

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224. Mullan v. United States, 42 Ct. Cl. 157, 172 (1907), *aff'd*, 212 U.S. 516 (1909) (Naval officer had no right to demand that charges against him be investigated by a court of inquiry or a court-martial. The Secretary of the Navy had unreviewable discretion as to whether any such tribunal would be convened.); WINTHROP, *supra* note 106, at 521 (Exercise of the authority to order a court of inquiry is discretionary—"Neither the President nor a commanding officer is obliged to order a court under *any* circumstances.") (emphasis in original). The courts will not order that a court of inquiry or other formal investigation be conducted. *E.g.*, Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970), *aff'g* Arnheiter v. Ignatius, 292 F. Supp. 911, 926 (N.D. Ca. 1968) (civil court had no jurisdiction to issue mandamus to Secretary of the Navy to conduct a court of inquiry or other formal hearing into plaintiff's relief from command).

225. *E.g.*, Humphrey v. Smith, 336 U.S. 695, 698 (1949) (Articles for the Government of the Navy do not require that formal investigations be conducted before courts-martial). The Fifth Amendment also specifically excludes courts-martial from the pretrial requirements of the Grand Jury Clause. U.S. CONST. amend. 5.

226. 10 U.S.C.S. § 832 (Law. Co-op. 1997) (UCMJ art. 32); MCM, *supra* note 113, R.C.M. 405.

227. MCM, *supra* note 113, R.C.M. 405(b).

228. *I.e.*, "the matter has already been decided," precluding inconsistent subsequent action.

229. *E.g.*, *U*nited States v. Schaffer, 12 M.J. 429 (CMA 1982) (Unlike a grand jury's refusal to indict—a recommendation against prosecution in a pretrial investigation will not preclude trial by court-martial.).

bodies within the military.[231] The complete proceedings in both the Kimmel and Short cases included the endorsements of senior military and civilian officials, based on additional investigation and deliberation. The juridical significance of the Navy Court of Inquiry and the Army Pearl Harbor Board resides solely in the final reports of the Secretaries who convened them. The endorsements and final reports continued to find significant fault with both Rear Admiral Kimmel and Major General Short.[232]

Challenges of the legitimacy of supplemental investigations conducted by Hewitt and Clausen, at the direction of the Secretary of the Navy and the Secretary of War, have overlooked not only the standing law on investigations, but also the specific statutory charge that precipitated the Court of Inquiry and the Army Board. Both investigations were conducted pursuant to the following Congressional resolution: "The Secretary of War and the Secretary of the Navy are severally directed to proceed forthwith with an investigation into the facts surrounding the catastrophe."[233] As clarified by Congressman Murphy at the Joint Congressional Committee hearings, Congress charged the secretaries to investigate, without prescrib-

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230. Courts-martial convening authorities play a decisive role throughout the military justice process, including decision-making under the following rules: R.C.M. 303 (preliminary inquiry); R.C.M. 304(b), R.C.M. 305 (pretrial restraint and confinement); R.C.M. 306 (initial disposition of offenses); R.C.M. 401 (disposition of charges); R.C.M. 404 (actions available to special court-martial convening authority); R.C.M. 407 (actions available to general court-martial convening authority); R.C.M. 502, R.C.M. 503 (selection and detailing of members of courts-martial); R.C.M. 601 (referral of charges); R.C.M. 702(b) (ordering depositions); R.C.M. 704 (grants of immunity); R.C.M. 705 (negotiating and entering pretrial agreements on behalf of the government); R.C.M. 1101 (temporary deferment of sentence to confinement); R.C.M. 1107 (action on findings and sentence). *See* Parker v. Levy, 417 U.S. 733 (1974); United States v. Solorio, 483 U.S. 435 (1987) ("universal" courts-martial jurisdiction over military personnel).

231. As a factual matter, the Army Pearl Harbor Board did not exonerate Major General Short. The Board did, however, spread blame to General Marshall, Secretary of State Cordell Hull, and others. PHA (pt. 3), *supra* note 42, at 1450-51.

232. After considering the findings of the Army Pearl Harbor Board, in his official report Secretary of War Stimson reached conclusions regarding the responsibility of Major General Short that were, as he stated, "in general accord" with the findings of the Roberts Commission and the Army Pearl Harbor Board. *Official Report of the Secretary of War Regarding the Pearl Harbor Disaster*, Dec. 1, 1944, PHA (pt. 35), *supra* note 42, at 19. Secretary Forrestal's lengthy final report analyzed the findings of the court and the intermediate endorsements, concluding that Kimmel had not been guilty of dereliction of duty, but that Kimmel and Stark had "failed to demonstrate the superior judgment necessary for exercising command commensurate with their rank and their assigned responsibilities." *The Findings, Conclusions and Action by the Secretary of the Navy*, PHA (pt. 16), *supra* note 42, at 2429.

233. PHA (pt. 3), *supra* note 42, at 1358-59.

ing the particular form of investigation. The secretaries chose the court of inquiry or board format, in their discretion, "as a medium for obtaining information."[234] That the secretaries conducted additional investigation merely reflects their dissatisfaction with the non-binding advice they received from the Court and the Board, again, a matter entirely within their discretion.[235] The Secretaries could have fulfilled the purpose of the legislation by appointing investigative committees without according "party" rights to Kimmel or Short.[236] Additional informal investigation conducted in both cases did not violate any due process rights because neither Kimmel nor Short had any right to a particular form of investigation, nor were the investigations used as the basis for denying any interest protected by the Due Process Clause.

The Court and the Board, after much dispute in Congress and in the public over extending the statute of limitations, and over whether courts-martial would ever be conducted, were appropriate fora to provide advice to the Secretaries on the sustainability of courts-martial charges. The real impact of the Court and Board, understood in the proper military context, was that the Secretaries concurred in advisory recommendations against the referral of courts-martial charges. As explained above, the Secretaries could have referred charges notwithstanding such recommendations.

The core function of any administrative investigation, including courts of inquiry, is to accumulate evidence for use by a convening authority.[237] The recommendations of a court of inquiry are just that—recommendations. The convening authority may give the final recommendations of a court of inquiry whatever weight he thinks they deserve, and that may be no weight at all. Advocates for Kimmel and Short have misrepresented the roles of the Navy Court of Inquiry and the Army Pearl Harbor Board.[238] Such proceedings are not trials by one's peers; they are a form

234. *Id.* at 1359.

235. Secretary Stimson took the additional step of consulting the Judge Advocate General of the Army and obtaining his confirming advice before ordering supplemental investigation. PHA (pt. 35), *supra* note 42, at 12-13.

236. Indeed, the Army Board was not a full "due process" hearing on the model of a court of inquiry.

237. Other service regulations are consistent with the Navy's on this point. *See, e.g.*, AR 15-6, *supra* note 129, para. 1-5: "The primary function of any investigation or board of officers is to ascertain facts and to report them to the appointing authority."

238. *See supra* note 215 and accompanying text.

of investigation conducted for a convening authority, in these cases the service secretaries.

All of the actions taken by the government with respect to the Navy and Army hearings were proper and lawful. The Court and the Board recommended against courts-martial, and no courts-martial were convened, reflecting the concurrence of the Secretary of the Navy and the Secretary of War that evidence of criminal misconduct by Kimmel or Short was inadequate to support courts-martial. The principal findings of the Court and the Board, and the decisions of the Secretaries not to bring courts-martial charges, were released to the public,[239] and detailed information of an exculpatory nature appeared in the press.[240]

I. Failure to Recommend Advancement

1. Rear Admiral Kimmel

In June 1942, Congress enacted a law "to provide for the retirement, with advanced rank, of certain officers of the Navy."[241] Specifically, the law provided that,

> [A]ny officer of the Navy who may be retired while serving as the commander of a fleet or subdivision thereof in the rank of admiral or vice admiral, or who has served or shall have served *one year or more* as such commander, may . . . *in the discretion of the President,* by and with the advice and consent of the Sen-

239. Advocates for Kimmel and Short have complained that the entire records of the proceedings of the Court of Inquiry and Army Board were not released immediately (for security reasons). Again, this reflects lack of understanding of applicable law. The decision to publish investigative findings lies with the convening authority. DUDLEY, *supra* note 216, at 219 ¶ 477 (The convening authority may publish, in whole or in part, or not at all, the report and proceedings of a court of inquiry.); WINTHROP, *supra* note 106, at 531-32 (Convening authority may publish all, part, or none of a court of inquiry, as he sees fit.). *Cf.* 8 Op. Att'y Gen. 335, 346 (1857) ("[T]he legal authorities are unanimous that a court of inquiry may be open or close, according as the authority ordering it shall prescribe," and such courts are presumed to be closed unless an exception is specified). *But see*, Beach, *supra* note 221, at 27 (Secretary Forrestal "impounded the court's proceedings"—insinuating that he had acted ultra vires).

240. *E.g.*, Lewis Wood, *Kimmel and Short Will Not be Tried,* N.Y. TIMES, Dec. 2, 1944, at 1, col 7; Felix Belair, Jr., *Army, Navy Report on Pearl Harbor; Marshall, Hull and Stark Censured*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 1; *Pearl Harbor Summary*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 2.

241. Act of June 16, 1942, ch. 414, 56 Stat. 370.

> ate, when retired, be placed on the retired list with the highest grade or rank held by him while on the active list . . . . [T]he President, by and with the advice and consent of the Senate, may in his discretion extend the *privilege* herein granted to such officers as have heretofore been retired and who satisfy the foregoing conditions.[242]

Rear Admiral Kimmel had served in a position that met the conditions of the law, but not for a full year (from 1 February 1941 through 17 December 1941).[243] The legislative history associated with this 1942 enactment does not mention Rear Admiral Kimmel, nor is there evidence of any particular purpose in the one year requirement.[244] There is no evidence that Congress designed the law to exclude Rear Admiral Kimmel. If Kimmel had served for more than one year, or if the law had provided for a shorter period of service, Kimmel would still have had no claim to advancement. He would merely have been eligible for such advancement. The law still recognized the constitutional discretion of the President to make appointments,[245] referring to the authority provided by the law as "a privilege." No claim of right or entitlement can exist in an honorary privilege[246] that is wholly within the President's discretion to recommend for advice and consent of the Senate.

In August 1947, Congress removed the one-year requirement in the Act of June 1942, as follows:

> Any officer of the Navy who may be retired while serving in accordance with the provisions of section 413 of this Act,[247] or subsequent to such service, may, in the discretion of the President, by and with the advice and consent of the Senate, when retired, be placed on the retired list with the highest grade or rank held by him while on the active list . . . . [T]he President, by and

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242. *Id.* (emphasis added). A final section of the law allowed the President to place the Commander in Chief, Asiatic Fleet, Admiral Hart, on the retired list as an Admiral without the advice and consent of the Senate.

243. Letter from the Chief of Naval Personnel to the Commanding Officer, Navy Finance Center (3 June 1958) (Pers-E24-BS:lja 5015) (RADM Husband E. Kimmel, USN-Ret, served on active duty as Admiral from 1 February 1941 through 17 December 1941).

244. 88 CONG. REC. 3177, 4016-17, 5009 (1942); S. REP. NO. 77-1277, at 47 (1942); H.R. REP. NO. 77-2184, at 77 (1942).

245. U.S. CONST. art. 2, § 2 (the "Appointment Power").

246. According to Senator Vinson, "This is an honor given them in recognition of their distinguished service, that is all." 88 CONG. REC. 5009 (1942).

> with the advice and consent of the Senate, may *in his discretion extend the privilege herein granted to such officers* heretofore or hereafter retired, who served in the rank of admiral or vice admiral pursuant to the authority of section 18 of the Act of May 22, 1917.[248]

Under this Act, Rear Admiral Kimmel was eligible for consideration for advancement on the retired list to four-star rank, as an honorary privilege.[249] In May 1948, the Department of the Navy initiated action to advance those retired officers who were eligible under the 1947 Act, but the Navy did not submit the name of Rear Admiral Kimmel.[250] Records of the Bureau of Naval Personnel reflect that Kimmel was the only officer eligible for advancement under the 1947 Act who was not so advanced.[251]

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247. In other words, officers designated by the President for particular positions of importance who were also designated, and confirmed by the Senate, for service in the grades of admiral or vice admiral. Officer Personnel Act of 1947, ch. 512, §414, 61 Stat. 795, 876. "It was required that all three- and four-star officers be confirmed by the Senate—a definite departure from previous law [i.e., the 1917 Act under which Kimmel had been appointed, and the 1939/1940 Acts under which Short had been appointed]. . . . [T]he appointment of the top-most military and naval officers in the Nation should be subject to Senate approval." H.R. REP. NO. 80-640 (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1644 (1657-58).

248. Officer Personnel Act of 1947, ch. 512, §414, 61 Stat. 795, 876 (emphasis added).

249. He had attained the rank of Admiral pursuant to an appointment under the 1917 Act, and he had "heretofore . . . retired." Notice that the 1947 Act does not provide for "restoration" of the highest grade or rank held, a term used by the Kimmel family. "Restoration" implies the resumption of a right or entitlement, an individualized "property" interest in a rank or grade that has been deprived. Service in three- or four-star grade had always been a temporary privilege. The 1947 law provided for the discretionary grant of that privileged status de novo to members of that class of officers who had enjoyed it previously, should the President and the Senate so choose. The honorary nature of the post-retirement promotions authorized under the 1942 and 1947 Acts is reflected in the fact that both acts specifically stated that no entitlement to increased retired pay would result from such promotions. Act of June 16, 1942, ch. 414, 56 Stat. 370 ("[N]o increase in retired pay shall accrue as the result of such advanced rank on the retired list"); Officer Personnel Act of 1947, ch. 512, § 414, 61 Stat. 795, 876.

250. Memorandum, Bureau of Naval Personnel (22 Apr. 1954) (BUPERS memo Pers-B13-leh); Memorandum from Chief of Naval Personnel (Holloway), to The Secretary of The Navy (27 Apr. 1954) (CHNAVPERS memo Pers-B13-leh) [hereinafter Holloway Memo].

251. Holloway Memo, *supra* note 250; Letter from Chief of Naval Personnel (Holloway) via Chief of Naval Operations to The Secretary of The Navy (30 July 1957) (CHNAVPERS ltr Pers-ig) [hereinafter CHNAVPERS Letter]; Memorandum from Pers-B8b-j1 to Chief of Naval Operations (24 Jan. 1967) ("The names of all eligible officers except Admiral Kimmel were submitted to the President for nomination to the Senate for . . . advancements in early 1948.").

Notwithstanding the favorable recommendations of the Chief of Naval Personnel (Admiral Holloway) in 1954 and 1957 when the subject of Kimmel's advancement was raised again, Secretary of the Navy Gates did not recommend the advancement of Rear Admiral Kimmel.[252] Rear Admiral Kimmel passed away on 14 May 1968.

Edward R. and Thomas K. Kimmel submitted an application to the Board for Correction of Naval Records (BCNR) on 7 April 1987, requesting "the Department of the Navy posthumously to take appropriate action pursuant to Title 10, U.S.C. § 1370(c)[253] to place Rear Admiral Husband E. Kimmel on the retired list with the rank of Full Admiral (Four Stars), the highest grade in which he served when on active duty."[254] The Board, which acts in an advisory capacity for the Secretary,[255] recommended administrative closure of the case on 9 June 1987, on the grounds that the relief requested was not within BCNR's or the Secretary's jurisdiction.[256] Essentially, the position taken by the Navy has been that exercise of the President's constitutionally-based discretion to make (or decline to make) appointments is not subject to compulsion as a "correction" for error or injustice.[257] In January 1989 the Deputy Secretary of Defense rejected an appeal to forward the Kimmel BCNR matter to the President for his consideration,[258] which was affirmed by Secretary Cheney in June 1990.[259]

Currently, there is no statute under which Rear Admiral Kimmel may be posthumously advanced.[260] Among current laws, 10 U.S.C. § 601(a) applies to the appointment of officers *on active duty* to current military

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252. Holloway Memo, *supra* note 250; CHNAVPERS Letter, *supra* note 251. The CNO's endorsement on Admiral Holloway's letter of 30 July 1957 recommended against advancement of Rear Admiral Kimmel; it stated that "[t]he question of responsibility has never been removed from controversy." Letter Endorsement, Chief of Naval Operations to The Secretary of The Navy (9 Aug. 1957) (CNO ltr Op-212/ras, Ser 4667P21) *endorsing* CHNAVPERS Letter, *supra* note 251. Secretary Gates wrote as follows to Senator John Cooper on 27 August 1957:

> I have given the matter the most careful and sympathetic consideration, and I do not believe that it would be in the best interest of the Nation, nor in the ultimate interest of Rear Admiral Kimmel, for the Navy to recommend his advancement on the retired list. I, therefore, intend to initiate no action in this regard in behalf of the Department of the Navy.

253. This provision applies only to *current* retirements of officers who have served in three- and four-star positions by appointment under 10 U.S.C.S. § 601 (Law. Co-op. 1997), a provision enacted in 1980. Therefore, 10 U.S.C.S. § 1370(c) (Law. Co-op. 1997) by its own terms, could not have applied to Rear Admiral Kimmel.

254. U.S. Dep't of Defense, DD Form 149, Application for Correction of Military Record in the case of Rear Admiral Husband E. Kimmel (Apr. 7, 1987) (BCNR file 05382-87).

positions of command designated to carry the grade of general or admiral, and 10 U.S.C. § 1521 applies only to posthumous commissions *which would have become effective but for the death of the officer* involved.[261] The only avenue now available for the posthumous advancement of Rear Admiral Kimmel is a direct Presidential appointment, with advice and consent of the Senate, under article 2 of the Constitution.[262]

2. Major General Short

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255. In accordance with 10 U.S.C.S. § 1552 (Law. Co-op. 1997), it is the Secretary of the Navy who "may correct any military record" of the Navy when he "considers it necessary to correct an error or remove an injustice." Except under limited circumstances that do not apply to the Kimmel case, records must be corrected, if at all, with the approval of the Secretary, acting on advice from the Board. The Board does not have authority to compel the correction of records over the Secretary's objection. *See* Voge v. United States, 844 F.2d 776, 781-82 (Fed. Cir. 1988) (The Board for Correction of Naval Records (BCNR) acts on behalf of the Secretary of the Navy); Miller v. Lehman, 801 F.2d 492 (D.C. Cir. 1986) (final decision made by the Secretary); Board for Correction of Naval Records, Action by the Secretary, 32 C.F.R. § 723.7 (1997) (The Secretary "will direct such action in each case as he determines to be appropriate"); 41 Op. Att'y Gen. 94, 97 (1952) (Upon a petition to correct military records for error or injustice, responsibility for determining whether circumstances constitute an "injustice" rests solely with the Secretary.). As is the case with courts of inquiry, the findings and recommendations of BCNR are advisory only. The Secretary may grant or deny relief contrary to BCNR's recommendation. 41 Op. Att'y Gen. 10, 11 (1948) (A correction board's decision has "the character of advice or counsel;" the principal authorized by law to take action is the Secretary, who need not take the action recommended by the Board). The Secretary's authority over BCNR is another example of the discretion of civil Executive Branch officials in military administrative matters.

256. Letter from Executive Director, BCNR, to Thomas M. Susman (June 9, 1987) ("[T]he appointment of officers shall be made by the President by and with the advice and consent of the Senate," a matter "not within the power either of the Secretary of the Navy or the Board for Correction of Records."). *See* U.S. CONST. art. 2, § 2 (Presidential appointment power). The BCNR does not have the power to exercise discretion constitutionally committed to the President. 41 Op. Att'y Gen. 10 (1948) (Appointment of officers can only be made by the President with the advice and consent of the Senate. The Board for Correction of Naval Records and the Secretary of the Navy do not have power to make an appointment as a remedy or correction.).

257. *See supra* notes 12, 13, 91 and accompanying text.

258. Memorandum, Deputy Secretary of Defense Taft, to Secretary of the Navy (19 Jan. 1989).

259. Letter from Secretary of Defense Cheney to Senator William V. Roth (June 13, 1990).

260. Letter, Deputy Assistant Judge Advocate General for Administrative Law (3 Nov. 1995) (DAJAG ltr 5000 Ser. 13/1MA1128B.95) ("We continue to find no statutory basis . . . .").

261. *See* Letter, Deputy Assistant Judge Advocate General for Administrative Law (1 May 1987) (DAJAG ltr 1420 Ser. 132/11123/7).

In August 1947, Congress enacted a law to provide for advancement on the retired list of those officers who had served in the grade of Lieutenant General or General during World War II. The law authorized the President, in his discretion, with the advice and consent of the Senate, to advance such officers on the retired list to the highest grade held during the War.[263] Like the parallel Navy provision in the same Act, no minimum time of service in grade was specified. Major General Short was eligible for consideration under the Act.[264] In the following year, Short became eligible for advancement under a second legislative provision. In June 1948 Congress enacted the Army and Air Force Vitalization and Retirement Equalization Act, providing, in pertinent part:

> Each commissioned officer of the regular Army . . . heretofore . . . retired . . . shall be advanced on the applicable officers retired list to the highest temporary *grade in which he served satisfactorily* for not less than six months while serving on active duty, *as determined by the cognizant Secretary*, during the period September 9, 1940, to June 30, 1946 . . . .[265]

Major General Short had served as a Lieutenant General from 8 February 1941 to 16 December 1941, more than eleven months. On 2 December 1948, Major General Short submitted a request to the Secretary of the Army to be advanced on the retired list to Lieutenant General, under the 1948 Act.[266] The 1948 Act did not require Presidential appointment or advice and consent of the Senate.[267] The Judge Advocate General of the

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262. *See* 41 Op. Att'y Gen. 56 (1956). Such constitutional appointments do not create additional pay entitlements. *See also* Matter of: General Ira C. Eaker, USAF (Retired) and General James H. Doolittle, USAF (Retired), B-224142, 1986 WL 64488 (Comp. Gen. Nov. 28, 1986) (Lieutenant General Ira Eaker and Lieutenant General James Doolittle were advanced to grade of General on the retired list in April 1985—military pay entitlements, however, depend on *statutory* authority); 10 U.S.C.S. § 1524 (Law. Co-op. 1997) ("No person is entitled to any bonus, gratuity, pay, or allowance because of a posthumous commission or warrant.").

263. *See* Officer Personnel Act of 1947, ch. 512, § 504(d), 61 Stat. 795, 888:

> [T]he President, by and with the advice and consent of the Senate, may in his discretion extend the privilege herein granted [i.e., retirement in the highest grade or rank held while on the active list] to officers heretofore or hereafter retired, who served in the grade of general or lieutenant general between December 7, 1941, and June 30, 1946.

264. *See* DAJA-AL 1991/2852 (11 Dec. 1991).

265. Army and Air Force Vitalization and Retirement Equalization Act of 1948, ch. 708, § 203, 62 Stat. 1081, 1085 (emphasis added).

266. *See* DAJA-AL 1990/0041 (22 June 1990).

Army advised that Major General Short was eligible for advancement to lieutenant general under the 1948 Act, "if it is administratively determined that he served satisfactorily in that grade for not less than six months."[268] Congress left the question of "satisfactory service" to the determination of the Secretary.[269] The Secretary of the Army did not act on this request during General Short's lifetime.[270] General Short passed away on 3 September 1949.

On 10 August 1990, General Short's son, Walter D. Short, filed a petition with the Army Board for Correction of Military Records (ABCMR), requesting the posthumous advancement of General Short on the retired list under the Act of 1948.[271] The Army Board, an instrumentality of the Secretary, like the Navy Board, accepted jurisdiction of the case on the basis of the 1948 Act. The 1948 Act allowed the Secretary of the Army to effect advancements, in his discretion—an authority for which the Navy had no parallel. Two of the three members of the Board recommended "[t]hat all of the Department of the Army records related to this case be corrected by advancing [Major General Short] . . . to the rank of lieutenant general on the retired list."[272] Writing for the Secretary, however, Deputy Assistant Secretary Matthews sided with the single dissenter, finding no error or injustice, and denying the petition.[273] Secretary Stone affirmed this decision in a letter to Senator Domenici, dated 2 September 1992, specifically stating his inability to find that General Short had served satisfac-

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267. Congress may by law waive Senate advice and consent and vest power to appoint lesser officers in executive department heads. U.S. CONST. art. 2, § 2. *See also supra* note 91 and accompanying text.

268. CSJAGA 1949/3757 (13 May 1949); CSJAGA 1948/5133 (2 July 1948).

269. CSJAGA 1949/3757 (13 May 1949).

270. DAJA-AL 1990/0041 (22 June 1990).

271. U.S. Dep't of Defense, DD Form 149 Application for Correction of Military Record in the case of Major General Walter C. Short (10 Aug. 1990) (Docket no. AC91—08788).

272. In the Case of Major General Walter D. Short, ABCMR Docket No. AC91-08788 (Nov. 13, 1991).

273. Mr. Matthews conveyed the decision in a pair of memorandums (SAMR-RB) dated 19 December 1991, to Commander, U.S. Army Reserve Personnel Center, and to the Executive Secretary, ABCMR. Specifically finding that no error or injustice had been committed, Mr. Matthews wrote that posthumous advancement of Major General Short "would reverse the course of history as adjudged by his superiors who were in a better position to evaluate the Pearl Harbor disaster."

torily in the grade of lieutenant general for at least six months, a decision committed by law to the discretion of the Secretary.[274]

Recommendations of the Army Board for the Correction of Military Records are subject to the discretion of the Secretary of the Army,[275] just as the recommendations of BCNR are subject to the discretion of the Secretary of the Navy. With some narrow exceptions that do not apply to this case, the Boards have no independent authority. As is the case with Rear Admiral Kimmel, Major General Short was the only general officer from

274. Letter from Secretary of the Army to Senator Pete V. Domenici (Sept. 2, 1992) (Advancement of Major General Short "would have required a conclusion by me that General Short had served satisfactorily in the grade of lieutenant general for at least six months. Absent such a determination from me, there is no authority for his advancement on the retired list. I am unable to make that determination."). On the absolute nature of the secretary's discretion in a similar case, see *Koster v. United States*, 685 F.2d 407, 413-14, 231 Ct. Cl. 301, 310-12 (1982) (Determination of satisfactory performance in temporary grade for retirement purposes was committed by law to the discretion of the secretary and could not be redetermined by the court, notwithstanding plaintiff brigadier general's assertions that "he has been made to suffer for the political and public pressures that were brought to bear on the Army" and that he was "treated harshly" as "a scapegoat."). Current law also grants the Secretary of the Navy discretion to advance a retired Navy and Marine Corps officer on the retired list to the "highest officer grade in which he served satisfactorily under a temporary appointment." 10 U.S.C.S. § 6151(a) (Law. Co-op. 1997). The retirement grade of three- and four-star officers today depends by law on the discretion of the Secretary of Defense. Act of February 10, 1996, Pub. L. No. 104-106, Div. A, Tit. V, Subtit. A, 110 Stat. 292, amended 10 U.S.C.S. § 1370(c) (Law. Co-op. 1997) by removing a provision which required officers in the grades of O-9 and O-10 appointed under 10 U.S.C. § 601 to be nominated by the President and receive Senate confirmation to retire at three- or four-star grade. Section 1370(c) now confers discretion upon the Secretary of Defense to retire such officers at three- or four-star grade, if he "certifies in writing to the President and Congress that the officer served on active duty satisfactorily in that grade." The law does not define "satisfactorily" and provides no appeal from the Secretary's determination. As Justice Story stated in *Martin v. Mott*, 25 U.S. (12 Wheat) 19, 31 (1827), "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

275. *See* Army Board for Correction of Military Records (ABCMR), 32 C.F.R. § 581.3(f)(2) (1997). The record of ABCMR's proceedings is forwarded to the Secretary, "who will direct such action in each case as he determines to be appropriate." *Id.*

his era who was eligible for advancement under the 1947 and 1948 Acts, but who has not been advanced on the retired list.[276]

Some decision-making powers are committed to the Executive Branch exclusively by specific grants of authority in the Constitution, such as the power of appointments and commissions. Appointments and commissions are privileges,[277] not remedies. Because officials charged with discretion to grant, deny, or rescind privileges do not dispense them in accord with the expectations of earnest suitors does not mean that such disappointments have been arranged through conspiracy, vindictiveness, or failure to hear and appreciate reasonable arguments. Officials who have considered the issue have believed, for one reason or another,[278] that Rear Admiral Kimmel and Major General Short should not be advanced. Whatever reasons these officials have given, their decisions not to recommend Kimmel and Short for advancement on the retired list have been made in accordance with law.

J. Survey of Treatment of Admiral Kimmel and General Short in the Press[279]

As soon as he had finished reading the Roberts Commission report on Saturday, 24 January 1942, President Roosevelt asked if the report contained anything that would impede military operations or provide sensitive

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276. The Army Center of Military History (website at <http://www.army.mil/cmh-pg/faq.htm>) provided this information on Major General Short and advancement on the retired list of other World War II general officers. The Flag Officer Petition, *supra* note 36, makes the same point about Rear Admiral Kimmel and Major General Short.

277. *See*, *e.g.*, Kuta v. Secretary of the Army, No. 76 C 1624, slip op. (N.D.Ill. Aug. 22, 1978) ("Service in the armed forces is a privilege and not a right."); Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972) ("It is well-established law that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained in service and that the services of an officer may be terminated with or without reason."); United States *ex rel.* Edwards v. Root, 22 App. D.C. 419 (1903) (no right to promotion), *cert. denied*, 193 U.S. 673 (1904), *appeal dismissed*, 195 U.S. 626 (1904).

278. Some officials have stated that Rear Admiral Kimmel or Major General Short did not perform to the standard expected of officers of their seniority (e.g., Secretary of the Navy Forrestal, Secretary of the Army Stone), and others have stated that posthumous advancement is not an appropriate "remedy" for the initial failure of the Roberts Commission to spread blame among all those who bore some responsibility for the lack of preparedness at Pearl Harbor.

279. This section is not intended as a comprehensive survey of media treatment of Kimmel and Short; instead, it demonstrates by sampling that the basic arguments of advocates for Kimmel and Short have been in the public domain since the 1940s, and most of these arguments have their roots in heated party politics.

information to the enemy. Upon determining that there were no such objections to publication of the report, the President ordered that the report be released in its entirety to the press for publication in the Sunday newspapers.[280] The headline on the front page of the *New York Times on Sunday*, 25 January 1942, read: "ROBERTS BOARD BLAMES KIMMEL AND SHORT; WARNINGS TO DEFEND HAWAII NOT HEEDED." A sub-headline added: "Stark and Marshall Directed Hawaii Chiefs to Prepare—Courts-Martial Likely."[281]

Almost immediately after the publication of the Roberts Commission's findings, the politically-charged quest for additional investigation of fault in Washington began. On 27 January, the *New York Times* reported that members of Congress of both parties had demanded a congressional investigation, asserting that officials in Washington had been remiss in failing to follow up on actions being taken at Pearl Harbor, and charging that the Army and the Navy had not coordinated properly with each other at the highest levels.[282] As the press reported, the debate in Congress began immediately to take on a partisan political tone.[283]

After the initial blaze of interest in additional investigation into responsibility for the disaster at Pearl Harbor in early 1942, mention of Rear Admiral Kimmel and Major General Short appeared from time to

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280. PHA (pt. 6), *supra* note 42, at 2494; *id.* (pt. 7), at 3262, 3265-66 (Congress later directed publication of the Roberts Commission's report as a public document.).

281. James B. Reston, *Roberts Board Blames Kimmel and Short*, N.Y. TIMES, Jan. 25, 1942, at 1, col. 8. Initial reports in the German and Japanese media on the fate of Admiral Kimmel reflected an even harsher judgment of the responsibility of on-scene commanders. *E.g., Nazis Cite Tokyo Report Kimmel is Ordered to Die*, N.Y. TIMES, Jan. 29, 1942, at 2, col. 5 (The German press quoted the Japanese *Times Advisor* as stating that Admiral Kimmel had been sentenced to death.).

282. *Inquiry on Hawaii Urged in Congress*, N.Y. TIMES, Jan. 27, 1942, at 4, col. 1. By the next day, a list of specific topics that many Congressmen wanted to investigate further appeared in the press, including the degree of responsibility of the Administration, and the reason messages from Washington focused on the Far East as the most likely point of attack. Arthur Krock, *Pearl Harbor Issue: Many in Congress Want Inquiry*, N.Y. TIMES, Jan. 28, 1942, at 5, col 2.

283. *Republicans Push Inquiry on Hawaii*, N.Y. TIMES, Jan. 28, 1942, at 5, col 1 [hereinafter *Republicans Push Inquiry*] (Representative Whittington of Mississippi told the House that Pearl Harbor "could not be permitted to rest by finding the Hawaiian area commanders derelict in their duty." He continued, "I have come to the conclusion that there also was dereliction in the War and Navy Departments." Representative Hoffman attributed blame for the losses at Pearl Harbor to President Roosevelt: "So long as we have a Commander in Chief who claims credit for all the good things, he should not shirk his responsibility and try to pass it to someone down the line.").

time in the press in 1943 and 1944 in connection with extension of the two-year statute of limitations for courts-martial.[284] The partisan political tone of debates in Congress over courts-martial increased as the 1944 election approached, with Democrats assailing the Republicans for seeking to make a campaign issue of the evidence to embarrass the Administration, and Republicans charging that the Democrats wanted to delay potentially damaging disclosures until after the Presidential election.[285]

Information that the 1944 Army Pearl Harbor Board and Navy Court of Inquiry would clear Major General Short and Rear Admiral Kimmel began to appear in November and December 1944.[286] Final release of the reports made front page news in August 1945, with stories reporting that the inquiries had also cited Marshall, Hull, Stark and Lieutenant General

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284. *E.g.*, *Silent on Kimmel's Case*, N.Y. TIMES, Sept. 15, 1943, at 12, col. 6; *Plans Bill for Kimmel Trial*, N.Y. TIMES, Dec. 2, 1943, at 14, col. 5; *Votes Peace Trial on Kimmel, Short*, N.Y. TIMES, Dec. 7, 1943, at 18, col. 6; *Votes Trial Time for Pearl Harbor*, N.Y. TIMES, Dec. 8, 1943, at 9, col. 1; *Firm on Post-War Trial*, N.Y. TIMES, Dec. 10, 1943, at 16, col. 7; *Defer Pearl Harbor Case*, N.Y. TIMES, May 25, 1944, at 10, col. 1; C. P. Trussell, *Both Houses Weigh Kimmel Extension*, N.Y. TIMES, May 30, 1944, at 7, col. 1; *Delay is Favored on Court-Martial*, N.Y. TIMES, June 1, 1944, at 1, col. 2; *Votes Year Delay on Kimmel Trial*, N.Y. TIMES, June 2, 1944, at 7, col. 1 ("Explaining its shift of directives from court-martial proceedings to investigations into the facts surrounding the attack, the [Senate Judiciary] committee report stated: 'Having in mind the existing critical exigencies of total war, the committee was unwilling to add to the burdens of our biggest Army and Navy officials . . . .'").

285. Kathleen McLaughlin, *House Votes Trial for Short, Kimmel*, N.Y. TIMES, June 7, 1944, at 11, col. 8. Throughout the months leading up to the 1944 election, numerous articles appeared in the press reporting disputes in Congress over the Administration's fault for Pearl Harbor, and charges that the Administration was delaying courts-martial until after the election.

286. *E.g.*, *Hints Vindication of Kimmel, Short*, N.Y. TIMES, Nov. 26, 1944, at 44, col. 3; Wood, *supra* note 240, at 1, col. 7.

Gerow for various failures.[287] The partisans renewed their calls for additional investigation almost immediately.[288]

Kimmel declined in writing Secretary Forrestal's offer of a general court-martial, in view of the pending congressional investigation.[289] Again, issues associated with the planned congressional investigation stimulated lively partisan debate, with accusations that Democrats on the Committee would control the proceedings.[290] In July 1946, after months of hearings, the press described the Joint Congressional Committee's findings as exonerating Roosevelt and determining that "the overshadowing responsibility . . . lay with the Navy and Army commanders in Hawaii," Admiral Kimmel and General Short.[291]

Years later, the press reported Admiral King's modification of his endorsement of the 1944 Navy Court of Inquiry, changing "dereliction" to "errors of judgment."[292]

Additional study of news accounts could be undertaken, but a reasonable survey of reporting in the *New York Times* indicates that reporting on Kimmel and Short in the mainstream media was fairly balanced, with little evidence of vilification of them personally.[293] Newsworthy information covering developments about Rear Admiral Kimmel and Major General Short appeared in the press as matter of fact events.[294] This is not unlike

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287. *E.g.*, Belair, *supra* note 240, at 1, col. 1. The same newspaper reproduced the full texts of the Army and Navy reports in section 2. The Kimmel family cites as a grievance the government's failure to release immediately the full reports of the Navy Court of Inquiry and the Army Pearl Harbor Board. The principal findings of the Court and Board with respect to Kimmel and Short *were* published immediately. *See supra* note 239 and accompanying text. The complete records could not be published immediately due to inclusion of "Magic" intelligence and the risk of compromising such cryptologic capabilities during the war.

288. Arthur Krock, *Pearl Harbor Questions, Congress is Likely to Seek More Light than Reports*, N.Y. TIMES, Sept. 4, 1945, at 4, col. 4; William S. White, *Congressional Inquiry Predicted As Bills Ask Pearl Harbor Action*, N.Y. TIMES, Sept. 6, 1945, at 1, col. 2.

289. *Kimmel Defers Bid for Court-Martial*, N.Y. TIMES, Sept. 13, 1945, at 2, col. 2 [hereinafter *Kimmel Defers Bid*].

290. C.P. Trussell, *Angry Senators Debate on 'Records' of Pearl Harbor*, N.Y. TIMES, Nov. 3, 1945, at 1, col. 6; *Hannegan Says Republicans are Trying to Smear the Memory of Roosevelt*, N.Y. TIMES, Nov. 18, 1945, at 2, col. 5 [hereinafter *Hannegan Says*]; W. H. Lawrence, *Pearl Harbor Inquiry Enmeshed in Politics*, N.Y. TIMES, Nov. 18, 1945, pt. IV, at 5, col. 1.

291. William S. White, *Roosevelt Found Blameless for Pearl Harbor Disaster*, N.Y. TIMES, July 21, 1946, at 1, col. 2 [hereinafter *Roosevelt Found Blameless*].

292. *Modifies Blame for Pearl Harbor*, N.Y. TIMES, Nov. 11, 1948, at 3, col. 6.

the way the press treats any prominent figures. The media seem to have been most interested in the heated party rivalry between Democrats and Republicans generated by the whole course of public actions arising out of the Pearl Harbor disaster.[295] Demands for additional inquiry into the Pearl Harbor attack appeared in the press frequently during the early 1940s, openly stating the underlying political motive of impugning the Roosevelt Administration.[296] One report suggested that Governor Dewey might have won the 1944 Presidential election had he revealed information he possessed on U.S. code-breaking capabilities and the intelligence available in Washington not provided to the commanders at Pearl Harbor.[297] The political dimensions of the Pearl Harbor cases were constantly before the pub-

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293. To assess allegations that Rear Admiral Kimmel and Major General Short were still widely held to be solely responsible for the losses suffered at Pearl Harbor, the three service academies were requested to submit portions of any text books used to teach the event to midshipmen and cadets, and to comment on the manner in which instructors present the material. Naval Academy instructors responded that their military history survey course for all midshipmen covered too much ground to explore such issues as personal blame for Pearl Harbor; the History Department at the Academy takes no official position on responsibility for Pearl Harbor and encourages midshipmen to consider such issues for themselves. Air Force Academy instructors responded that Kimmel and Short are mentioned only briefly in an advanced course on World War II, "as links in a long chain of failure surrounding the Pearl Harbor attack." U.S. Military Academy instructors responded that their history department takes no official position on the matter and their courses do not focus on the assessment of blame for Pearl Harbor. Texts used by the U.S. Military Academy include Stephen B. Oates' *Portrait of America (from Reconstruction to the Present)* and John Keegan's *The Second World War.* The Naval Academy uses E. B. Potter's *Sea Power;* Kenneth J. Hagan's *This People's Navy;* Nathan Miller's *The U.S. Navy;* and Robert W. Love, Jr.'s *History of the U.S. Navy.* The Air Force Academy uses Larry H. Addington's *The Patterns of War Since the Eighteenth Century* and Gerhard L. Weinberg's *A World at Arms.* Inspection of relevant portions of these texts revealed that only Professor Love's text is particularly critical of Kimmel. The other texts barely mention Kimmel or Short, or include no reference to them.

294. The government also provided press releases upon the occurrence of key events. *See, e.g.*, Navy press releases of 17 Dec. 1941 (advising of Admiral Kimmel's relief of command), 7 Feb. 1942 (announcing his application for retirement), 28 Feb. 1942 (advising of the Navy's acceptance of Kimmel's request to retire, "without condonation of any offense or prejudice to any future disciplinary action"), and 2 Oct. 1943 (advising of Navy and War Department decisions to postpone courts-martial of Kimmel and Short, and that they had waived the statute of limitations for the duration of the war). Memorandum, Director of Naval History, to Undersecretary of Defense for Personnel & Readiness (1 Nov. 1995) (memo 5750 Ser. AR/02848). Navy Department records did not include additional press releases.

295. *See* MARTIN V. MELOSI, THE SHADOW OF PEARL HARBOR: POLITICAL CONTROVERSY OVER THE SURPRISE ATTACK, 1941-1946, at xi-xii, 161-68 (1977).

296. *E.g., Hannegan Says*, *supra* note 290, at 2, col. 5; *Republicans Push Inquiry*, *supra* note 283, at 5, col. 1.

lic; Republicans were diligent to ensure this. Recent advocates for Kimmel and Short have not uncovered any political secrets hitherto denied to the public. All of the elements of their brief for the exoneration of Kimmel and Short appeared in the newspapers in the 1940s.

The publication of official information about Rear Admiral Kimmel and Major General Short reflects the politically charged world in which officers holding three- and four-star positions become involved by virtue of the visibility and public importance of such offices. Officials in high government positions are more susceptible to injuries to reputation as an inexorable consequence of holding such positions.[298]

K. Injury to Reputation and Official Immunity

Advocates of Kimmel and Short have complained that the commanders were not allowed sufficient opportunity to "clear their names" while their reputations were subjected to "stigma and obloquy" by the official report of the Roberts Commission.[299] The normal remedy for injury to reputation is a suit for the tort of defamation.[300] Following the basic rule of

297. *Editor Says Dewey Guarded War Data*, N.Y. TIMES, Sept. 21, 1945, at 4, col. 7 (reporting on a story published in *Life* magazine). Allegedly, Governor Dewey suggested in a campaign speech that he was aware of secret information in Washington not provided to Pearl Harbor, whereupon General Marshall visited him in person and shared the information on code-breaking with Governor Dewey in a secret meeting, challenging him that revealing it would cost American lives in the ongoing war. This visit reportedly persuaded Governor Dewey to abandon the subject in his campaign.

298. *See* Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978), *cert denied*, 444 U.S. 931 (1979) (Captain Arnheiter was relieved of command of U.S.S. *Vance* when senior officers concluded that he was not fit for command). *See also* Secord v. Cockburn, 747 F. Supp. 779 (D.D.C. 1990) (summary judgment against Major General Secord in defamation suit over a book alleging various illegal activities of Reagan Administration officials in Nicaragua). *See generally* 53 C.J.S. Libel and Slander § 93 (1987). Moreover, the United States has not waived sovereign immunity for intentional torts, such as defamation. *See* Federal Tort Claims Act (FTCA), *codified* at 28 U.S.C.S. §§ 2671 *et seq.* (Law. Co-op. 1997), particularly §§ 2680(h) ("The provisions of this chapter . . . shall not apply to . . . any claim arising out of . . . libel, slander . . . ."), 2679(b)(1) (FTCA is exclusive remedy); United States v. Smith, 499 U.S. 160 (1991) (FTCA is exclusive even when it bars recovery); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (FTCA clearly excepts defamation claims from the waiver of sovereign immunity). Section II(K) explores more fully the natural vulnerability of high officials to public discussion and criticism.

299. *See supra* note 104.

300. *E.g.*, Jiminez-Nievez v. United States, 682 F.2d 1, 6 (1st Cir. 1982) (The "heartland of the tort of defamation: injury to reputation."); Walker v. Couture, 804 F. Supp. 1408, 1414 (D. Kan. 1992) ("Damage to one's reputation is the essence and gravamen of an action for defamation.").

common law, however, executive officers of a state or the federal government enjoy absolute immunity from suits for defamation arising out of publications or statements made within the scope of their official duties, "regardless of the existence of malice . . . improper motive, bad faith, or false statement of facts."[301] Defamatory matter subject to an absolute privilege will not support an action for defamation even if it is published maliciously and with knowledge of its falsity. A similar privilege of immunity applies to the findings of committees lawfully appointed by public authorities to make an investigation.[302] Findings and reports of investigative committees are immune from actions for defamation in so far as they deal with matters which are the subject of inquiry in the discharge of the investigative committee's duty. The President charged the Roberts Commission by executive order on 18 December 1941 to advise "whether any derelictions of duty or errors of judgment on the part of United States Army or Navy personnel contributed to such successes as were achieved by the enemy . . . and if so, what these derelictions or errors were, and who was responsible therefor."[303] The "dereliction of duty" finding in the Roberts Commission's report would, therefore, under general principles of law, be immune from any action for defamation, since the President specifically directed that such findings be made.

The seminal Supreme Court case on official immunity is *Barr v. Matteo*,[304] a defamation case in which the Court propounded the even broader rule that federal executive officials enjoy absolute immunity from suit for all common law torts based on acts within the "outer perimeter" of their discretionary authority.[305] The significance of "absolute" immunity is that "The claim of an unworthy purpose does not destroy the privilege."[306] In *Barr,* the Supreme Court upheld the absolute immunity of an acting federal agency head for the issuance of press releases that allegedly defamed agency employees. Barr, reacting to sharply critical comments made in the Senate (widely reported in the press and in the Congressional Record), and

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301. *See* 53 C.J.S. *Libel and Slander* § 70, at 127 (1987). *See also id.* § 69, at 126 (including specifically official communications of military and naval officers). Under the Speech and Debate Clause, statements made by congressmen in session also enjoy absolute privilege (U.S. CONST. art. I, § 6), and a similar absolute privilege applies to judicial proceedings (Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)). *See* 53 C.J.S. *Libel and Slander* § 71, at 129-30 (1987).

302. *See generally* 53 C.J.S. *Libel and Slander* § 82, at 154 (1987).

303. PHA (pt. 23), *supra* note 42, at 1247.

304. 360 U.S. 564 (1959).

305. *Id.* at 575.

306. *Id. See* Howard v. Lyons, 360 U.S. 593 (1958). *Cf.* Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

to inquiries from the media, issued a press release which identified two agency subordinates by name as culpable for potentially criminal payroll irregularities. Barr announced his decision to suspend immediately the two employees. In the subsequent defamation suit brought by the two employees, Barr raised as a defense that the issuance of the press release was protected by absolute privilege. In upholding Barr's claim of absolute privilege, the Supreme Court found that issuing press releases was standard agency practice, and that public announcement of personnel actions taken in response to a matter of widespread public interest was within the scope of an agency head's official duties.[307] From a legal perspective, the key facts in *Barr* are on all fours with the key facts concerning government action in the Kimmel and Short cases, including the brief press releases provided by the Navy.[308] The Court found that Barr was entitled to absolute immunity from a defamation action for publication of information on the agency's actions. Recognizing the implications of denying a remedy for defamation by executive officials, the Court added: "To be sure, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."[309]

Behind the common law concept of official immunity lies the belief that the public interest in information about government actions, and the need of public officials to act and speak decisively without fear of lawsuits, support an efficiency-based privilege accorded to statements public officials make in the execution of their duties. The Supreme Court in *Barr* specifically contemplated that harm to reputation might be done under a rule of absolute immunity and embraced the traditional common law of immunity as the law of the land notwithstanding.[310] Supporting the public policy served by the common law, the *Barr* Court upheld official immunity on the grounds that government officials should be free to perform their duties and exercise the discretion pertinent to their offices "unembarrassed by the fear of damage suits—suits which would consume time and energies which would otherwise be devoted to governmental service, and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."[311] The Court stated this rationale for official immunity as strongly the previous century in *Spalding v. Vilas*,[312] like *Barr*, a defamation case. The defendant official in *Spalding*

307. *Barr*, 360 U.S. at 574-75.

308. *See supra* note 294.

309. *Barr*, 360 U.S. at 575.

310. *See also* Expeditions Unlimited v. Smithsonian Inst., 184 U.S. App. D.C. 397, 566 F.2d 289, 291 (D.C. Cir. 1977) (Defamation case applying the rule from *Barr*).

311. *Barr*, 360 U.S. at 571.

v. Vilas was a postmaster, and in *Barr*, the Acting Director of the Office of Rent Stabilization. Within the rational framework applied by the Supreme Court, the public interest in ensuring that military command is "fearless, vigorous, and effective," and not encumbered with lawsuits over discretionary decisions, is particularly compelling—and that interest is most compelling in the case of command decisions made by the Commander in Chief in time of grave national crises.

The Supreme Court later held in *Butz v. Economou*[313] that federal officials enjoyed only a qualified, good-faith immunity from suits for *constitutional* torts (known as *Bivens* actions),[314] but it seemed to have left intact the *Barr* rule of absolute immunity for all common law torts, including particularly defamation.[315] The Court then clarified in *Paul v. Davis* that defamation, even if it produces stigma or injury to reputation, does not rise to the level of a constitutional tort unless the defamation deprives some other constitutionally protected "liberty" or "property" interest.[316] As stated by one lower federal court, "Defamation or injury to reputation, while actionable in tort, is insufficient to invoke procedural due process guarantees."[317] More recently, the Court suggested in *Siegert v. Gilley*[318] that "no consequences, however grave, resulting from a loss of reputation can make defamation actionable as a constitutional tort."[319] Other lower federal courts have read *Siegert* as holding squarely that defamation is *never* cognizable as a constitutional tort.[320]

In other cases in which plaintiffs might establish the commission of constitutional torts, the Supreme Court did not leave government officials

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312. 161 U.S. 483, 498-99 (1896).

313. 438 U.S. 478 (1978).

314. Suits for constitutional torts are referred to as "*Bivens* actions" for the seminal case, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (suit for money damages arising out of a search that was held violative of the Fourth Amendment).

315. *See, e.g.*, Queen v. Tennessee Valley Auth., 689 F.2d 80 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983); George v. Kay, 632 F.2d 1103 (4th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981); Sami v. United States, 617 F.2d 755, 768 (D.C. Cir. 1979); Granger v. Marek, 583 F.2d 781, 784-85 (6th Cir. 1978).

316. *See* Paul v. Davis, 424 U.S. 693, 701, 707-12 (1976) (respondent's photograph included in publicly distributed flyer of alleged "active shoplifters"). *See* Binstein v. Fahner, No. 81-C-1444, slip op. (N.D. Ill. July 6, 1982).

317. Warmus v. Hank, No. 5:92-CV-15, 1993 U.S. Dist. LEXIS 6855, at 8 (W.D. Mich. Mar. 31, 1993).

318. 500 U.S. 226 (1991).

319. Mahoney v. Kesery, 976 F.2d 1054, 1061 (7th Cir. 1992) (construing *Siegert v. Gilley)*.

fully exposed to distracting, harassing law suits. The Court supplemented *Butz v. Economou* by expounding the principle of "qualified immunity" for constitutional torts in *Harlow v. Fitzgerald*.[321] The doctrine of qualified immunity, as explained in *Harlow*, shields government officials from personal suits based on exercise of their discretionary authority "insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known."[322] To meet this test, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[323] In a defamation case the *Harlow* qualified immunity inquiry is likely never to be reached, since *Siegert v. Gilley* also requires that the existence of a constitutional violation be established as the threshold inquiry in any *Bivens* suit, and the courts have found repeatedly that defamation does not rise to the constitutional level. In a hypothetical constitutional defamation suit that could mount the forbidding *Siegert* hurdle, *Harlow* and progeny would still most likely provide immunity because defamation, given the fulsome precedents against its constitutional status, would not violate "*clearly established* . . . constitutional rights of which a reasonable person would have known."[324]

In *Westfall v. Erwin*,[325] a case involving a warehouse injury, the Supreme Court clarified that absolute immunity principles from *Barr v. Matteo* did not apply to *all* common law torts, holding, consistent with the common law, that absolute immunity would be available only for the exercise of decision-making discretion by government officials.[326] Congress

320. *E.g.*, Kelly v. Borough of Sayreville, 107 F.3d 1073 (3d Cir. 1997) ("[T]here is no constitutional liberty interest in one's reputation and . . . a claim that is essentially a . . . defamation claim cannot constitute a claim for violation of one's federal constitutional rights."); Smith v. Morgan, No. 96-1445, 1997 U.S. App. LEXIS 3106 (4th Cir. Feb. 21, 1997); Rohan v. ABA, No. 95-7601, 1996 U.S. App. LEXIS 2903 (2d Cir. Feb. 21, 1996); Williams v. Horner, No. 95-3811, 1996 U.S. App. LEXIS 14489 (6th Cir. May 13, 1996); Schwartz v. Pridy, 94 F.3d 453 (8th Cir. 1996); Steele v. Cochran, No. 95-35373, 1996 U.S. App. LEXIS 14648 (9th Cir. May 20, 1996); Moore v. Agency for Int'l Dev., 80 F.3d 546 (D.C. Cir. 1996). *Siegert* may have modified *Pauls v. Davis* by removing the ambiguity in attempting to determine what other interest coupled with defamation might be sufficient to rise to the constitutional level—after *Siegert* defamation is simply out of the constitutional calculus. *See also* Valmonte v. Bane, 18 F.3d 992, 1001 (2d Cir. 1994) (establishment of a due process liberty interest requires "much more than a loss of employment flowing from the effects of simple defamation").

321. 457 U.S. 800, 817-18 (1982).

322. *Id.*

323. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

324. *Harlow*, 457 U.S. at 817-18.

325. 484 U.S. 292 (1988).

responded to *Westfall* immediately by enacting the Liability Reform Act of 1988, an amendment to the Federal Tort Claims Act (FTCA).[327] The Liability Reform Act "established the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall*."[328] The Act conferred such immunity on individual government employees by making an action against the United States under the FTCA the exclusive remedy for common law torts committed by government employees in the scope of their employment.[329] In other words, the law substituted the United States as defendant for all federal officials sued in their individual capacity. The Supreme Court has held that government employees enjoy absolute immunity from common law tort actions under the Liability Reform Act even where the FTCA does not provide a remedy or where the government has a defense that precludes relief.[330] The FTCA preserves absolute official immunity for the whole range of defamation-related torts, and indicates clearly that the government has also not waived sovereign immunity to allow such suits against the United States as a party. As stated in the Act,[331] "The provisions of this chapter . . . shall not apply to . . . any claim arising out of . . . malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit . . . ."[332] The Liability Reform Act did exclude *Bivens* actions from the scope of the absolute official immunity it conferred, leaving the high hurdle of the *Butz*, *Harlow*, and *Siegert* line of cases undisturbed.[333] Essentially, individual public officials may not be sued for defamation; the government may not be sued for defamation.

Developing from the common law in effect during the service of Kimmel and Short, the law has erected in the last forty years even more substantial hurdles to lawsuits against government officials based on stigma or injury to reputation caused by allegedly defamatory statements. When an official makes negative statements about an individual in the course of exercising the discretion attendant upon his duty, even if he makes such statements with intentional malice, the law will usually bar relief. The counterpart concept to the extensive immunity of government officials for

326. *See* Barr v. Matteo, 360 U.S. 564, 573 (1959).

327. Codified at 28 U.S.C.S. § 2671 (Law. Co-op. 1997).

328. United States v. Smith, 499 U.S. 160, 163 (1990).

329. 28 U.S.C.S. § 2679(b)(1) (Law. Co-op. 1997).

330. *Smith*, 499 U.S. at 165-67.

331. *See* 28 U.S.C.S. § 2680(h) (Law. Co-op. 1997).

332. *See* Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (defamation claims clearly excepted from waiver of sovereign immunity in FTCA).

333. 28 U.S.C.S. § 2679(b)(2) (Law. Co-op. 1997).

defamation is the consequent vulnerability of individuals to reputation injury caused by government officials. This is the balance public policy has struck and implemented through law.[334] Individuals who put themselves in a position to be judged and commented upon by government officials should be aware of their heightened vulnerability. Military officers in particular serve in an environment where this vulnerability should be apparent. They control the most dangerous artificial forces on earth; they are responsible for the security of the nation; and at the three- and four-star level they are within but a few degrees of the President of the United States in the chain of command.

The Supreme Court has ruled that the scope of qualified official immunity for constitutional torts is greater as the scope of official discretion increases, as the responsibilities of allegedly offending public officials increase—the more senior the more immune.[335] The President himself enjoys absolute and permanent (i.e., surviving his term of office) immunity from civil suits for all "acts within the 'outer perimeter' of his official responsibility," whether an alleged wrong is characterized as a constitutional tort or a common law tort.[336]

The principles of official immunity and sovereign immunity are not new. The doctrine of official immunity is part of a highly articulated common law that dates back to English law before the Revolution.[337] Anyone who seeks or accepts an office exposed to comment, evaluation or discretionary decisions by senior government officials should be aware of the obvious conditions of such service. Common law defamation suits against

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334. *See* Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values*, 61 CHI.-KENT L. REV. 61, 66 (1985) (Correlative of official immunity is disability of individuals who might bring suit as plaintiffs—immunity is a form of "right" held by a government official; immunity is a standing "trump.").

335. Harlow v. Fitzgerald, 457 U.S. 800, 806-08 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Butz v. Economou, 438 U.S. 478, 511-12 (1978).

336. *Nixon*, 457 U.S. at 756. *See* Brief for the United States as Amicus Curiae in Support of Petitioner, Clinton v. Jones (No. 95-1853) (Aug. 8, 1996) (on writ of certiorari issued to the United States Court of Appeals for the Eighth Circuit).

337. *See Nixon*, 457 U.S. at 747-50 ("[O]ur immunity decisions have been informed by the common law."); *Butz*, 438 U.S. at 508; Spalding v. Vilas, 161 U.S. 483, 492-98 (1896). *See also* 3 STORY, *supra* note 2, § 1563, at 418-19 ("The president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."). *See generally* RESTATEMENT (SECOND) OF TORTS § 895D (1979) (immunity of public officers); W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 1059-60 (5th ed. 1984).

such government officials are absolutely barred, and defamation of even hypothetically constitutional dimensions is generally not actionable. To draw in the "circle of immunity" even tighter, the Supreme Court has held that *military* personnel in particular may not bring *Bivens* constitutional actions for injuries incident to service,[338] and the *Feres* Doctrine bars all suits by military personnel under the Federal Tort Claims Act, even where the Act has not already barred suits, as it has for defamation, malicious prosecution and related torts.[339] The significance of the regime of immunity law applicable to defamation of military officers by other government officials is that military officers have no right to vindicate reputation under such circumstances, no right to be free of "stigma" resulting from action within the outer perimeter of the scope of discretion accorded senior federal officials in the execution of their duties.

Under principles of official immunity and sovereign immunity embedded in federal law, the findings of the Roberts Commission and all of the other investigations into the Pearl Harbor attack, and official actions and statements of President Roosevelt, Secretary Knox, Secretary Stimson, Secretary Forrestal, Admiral King, General Marshall, and other key government officials would be absolutely privileged against any legal remedy for defamation, even if such statements, hypothetically, were known to be false when made.

L. Media Exposure of Public Officials and Public Figures

The common law of defamation has long provided public officials, including military officers, a diminished degree of protection from criticism by the public.[340] In *New York Times v. Sullivan*[341] the Supreme Court recognized special First Amendment concerns with suits for defamation against private defendants by public officials, erecting a substantial additional hurdle of proof for public official plaintiffs—the demonstration of "actual malice."[342] The *New York Times* case represents a shift in the common law balance of interests even farther away from the aggrieved individual public official to the greater values to be preserved in freedom of

338. Chappell v. Wallace, 462 U.S. 296 (1983); United States v. Stanley, 483 U.S. 669 (1987).

339. Feres v. United States, 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."). *See Chappell*, 462 U.S. at 299 (Feres doctrine based on the corrosive effect lawsuits would have on military discipline).

340. *See* 53 C.J.S., *Libel and Slander* § 70, at 127 (1987).

341. 376 U.S. 254 (1964).

speech about government, unencumbered by fear of lawsuits. The Court in *New York Times* recognized that debate on public issues might well include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[343] The Court intended to deter "libel suits brought by public officials who objected to criticisms of their official conduct."[344] One study estimated that only ten percent of public-figure defamation plaintiffs prevail under the actual malice rule.[345] The principles relied upon in the *New York Times* case trace back to the founding of the nation[346] and have been reaffirmed by the Supreme Court in cases of extreme criticism and tasteless satire.[347]

A modern case illustrative of the diminished defamation protection afforded military officials is *Arnheiter v. Random House*.[348] Captain Arnheiter, relieved of command of a naval vessel by superior officers who believed him unfit for command, sued for defamation the author and publisher of a book on the incident, *The Arnheiter Affair.* Affirming the trial court's summary dismissal of Arnheiter's claim, the circuit court observed that,

> The commanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites public scrutiny and discussion and fits the description of a public official under *New York Times* . . . . Arnheiter's removal from command of a war vessel implicated critical issues of public concern, i.e.,

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342. Under the "actual malice," standard, adapted from the common law standard of "malice,"

> One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct . . . [or] fitness . . . is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.

Plaintiff's proof of these elements of liability must meet the higher evidentiary standard of "clear and convincing evidence." RESTATEMENT (SECOND) OF TORTS § 580A (1977).

343. *Sullivan*, 376 U.S. at 270.

344. Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667, 692 (1994) (Court's intention to deter libel suits by spawning "a litigation system in which few public figure libel plaintiffs could prevail on the merits."); Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L. J. 315, 333 (1986).

345. R. BEZANSON ET AL., LIBEL LAW AND THE PRESS 122 (1987).

346. *See Sullivan*, 376 U.S. at 269-77.

347. *E.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

348. 578 F.2d 804 (9th Cir. 1978).

> military decision-making in the conduct of war, and the selection of those entrusted with our national defense. Arnheiter did much more than seek reversal of his removal. He used every conceivable effort to gain public exposure and to make his case a 'cause celebre'. . . . Under these conditions, we hold that Arnheiter qualifies under both the public official and public figure[349] tests and that the book must be judged against the *New York Times* standard of actual malice.[350]

The reasoning of the *Arnheiter* court applies with even greater force to Rear Admiral Kimmel and Major General Short, the commanders who presided over forces destroyed at Pearl Harbor, and one of them the second ranking officer in the Navy.

Government, like the military, is not an abstract, autonomous entity; it consists of people. Criticism of government necessarily includes criticism of people and their actions. As the Court stated in *Garrison v. Louisiana*, "Of course any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."[351] In fact, there is substantial authority that aggressive media reporting on high officials better serves the public and may even be fundamental to the maintenance of a free society; accordingly, the courts have been particularly cautious to protect critical statements about the highest government officials.[352]

Under a separate principle of common law, accurate reports of official governmental proceedings (such as officer personnel actions and the find-

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349. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (Public figures are "those who assume special roles of prominence in society" or who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."); Curtis Pub. Co. v. Butz, 388 U.S. 130 (1967) (seminal "public figure" case). Public figures are subject to the same "actual malice" standard as public officials.

350. Arnheiter v. Random House, 578 F.2d 804, 805-06 (9th Cir. 1978); *see also* Arnheiter v. Sheehan, 607 F.2d 994 (2d Cir. 1979).

351. Garrison v. Louisiana, 379 U.S. 64, 76 (1964).

352. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."); *Garrison*, 379 U.S. at 76 ("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."); New York Times v. Sullivan, 376 U.S. 254, 273-80 (1964).

ings of investigations, such as the Roberts Commission investigation) enjoy immunity from suits for defamation.[353] Publication of such reports by the media is also privileged.[354]

Vulnerability to public scrutiny and criticism, some of which may be half-truths, misinformation, satire, or inartful fiction, inheres in high public office. That the law so clearly leaves the reputations of public officials vulnerable to criticism by other officials and the media is one of the conditions under which public offices are held. This greater vulnerability of reputation to significant injury does not somehow "amend" the Constitution by altering in some compensating way the powers of the President and his deputies. The Commander in Chief may investigate, relieve, reassign or prosecute flag and general officers notwithstanding the inevitability of public interest. The law does not make exceptions for the thin-skinned or for those who fail to anticipate their potential exposure to embarrassment after a long career in a semi-closed society in which respect is mandated by criminal law. The alleged injury to Rear Admiral Kimmel's and Major General Short's reputations would not be remediable under the law that applies to others similarly situated. As the Supreme Court suggested in *New York Times v. Sullivan*, the law that protects reputation assumes that high public officials should be treated as "men of fortitude, able to thrive in a hardy climate."[355]

M. Official Actions Have Already Provided the Remedy

Kimmel's counsel, Charles B. Rugg, stated publicly that the Navy Court of Inquiry, including the comments of Secretary Forrestal, had cor-

353. *See, e.g.*, Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 88-89 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981) (cited with approval in White v. Fraternal Order of Police, 909 F.2d 512, 527 (D.C. Cir. 1990) and Secord v. Cockburn, 747 F. Supp. 779, 783 (D.D.C. 1990)). *Cf.* Annotation, *Libel and Slander: Proceedings, Presentments, Investigations, and Reports of Grand Jury as Privileged*, 48 A.L.R.2d 716 (1956). The accuracy qualification applies to the accuracy of the recordation of the allegedly defamatory material (such as the accuracy of the transcription of finding 17, the dereliction finding, in the Roberts Commission report); the qualification does not apply to the underlying fact-accuracy of the governmental findings or proceedings themselves.

354. *E.g.*, *Secord*, 747 F. Supp. at 783 (ruling against Major General Richard Secord in his defamation suit against various authors and publishers for publication of a book critical of his role in the "Iran-Contra Scandal," the court noted that "passages will not be actionable if subject to certain common-law privileges" including "the privilege for publication of accurate reports of official governmental proceedings.").

355. *Sullivan*, 376 U.S. at 273.

rected the Roberts Commission's finding of dereliction, reported in the press as follows:

Kimmel Cleared, Says Lawyer

> BOSTON, Dec. 1—Charles B. Rugg, counsel for Rear Admiral Husband E. Kimmel, declared here tonight that "the statement of Secretary of the Navy Forrestal means that Admiral Kimmel has been cleared" of charges of dereliction of duty at Pearl Harbor.[356]

President Truman, after reading the 1944 Army and Navy Pearl Harbor reports, stated publicly that the whole country shared in the blame for the disaster at Pearl Harbor, given the widespread resistance to preparations for war.[357] President Truman also stated that he had no intention of ordering courts-martial for any of the officers involved in the Pearl Harbor disaster, but that he would "see to it that any one of them could have a fair and open trial if they wanted one."[358] Rear Admiral Kimmel, however, declined a court-martial in writing to Secretary Forrestal, deferring to the pending congressional investigation,[359] arranged largely, or so Kimmel claimed, through the efforts of his counsel, Charles Rugg.[360]

The Joint Committee on the Investigation of the Pearl Harbor Attack (JCC) completed its final report on 16 July 1946[361] and provided it to the press immediately.[362] The Congressional report clearly did not single out Kimmel and Short to bear all of the blame for Pearl Harbor.[363] Major General Short issued a statement from his home in Texas indicating his satisfaction at the conclusion of the hearings: "I am satisfied that the testimony presented at the hearings fully absolved me from any blame and I believe such will be the verdict of history. As I have stated before, my conscience is clear."[364]

Dissatisfied with the results of the JCC hearings, however, Rear Admiral Kimmel blamed political intrigue by the Democrats, Committee

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356. N.Y. TIMES, Dec. 2, 1944, at 5, col. 6.

357. Felix Belair, Jr., *Truman Says Public Must Share Blame for Pearl Harbor*, N.Y. TIMES, Aug. 31, 1945, at 1, col. 1.

358. *Id.*

Counsel (William D. Mitchell), Presidential orders issued by the Truman administration,[365] Committee staff prejudiced in favor of the administration, and failure of the congressional committee to call all of the witnesses that he, Rear Admiral Kimmel, had determined that it should call.[366] After months of hearings and thousands of pages of testimony and exhibits, col-

359. *Kimmel Defers Bid*, *supra* note 289, at 2, col. 2. In a letter to Rear Admiral Kimmel dated 28 August 1945, Secretary Forrestal wrote: "I am disposed to order your trial by General Court-Martial in open court in the event that you still desire to be so tried." PHA (pt. 19), *supra* note 42, at 3944. Kimmel responded: "In view of the agitation for a Congressional Investigation before Congress reconvened and the action of the Senate in ordering a joint Congressional Investigation of Pearl Harbor, I wish to defer my reply to your letter of August 28, 1945 until that investigation is completed." *Id.* at 3943. On advice of counsel, Charles Rugg, Kimmel had previously declined to participate in the Hart Investigation (104 CONG. REC. app. A6997 (Aug. 5, 1958); *Kimmel's Own Story*, *supra* note 46, at 157), in which Secretary of the Navy Knox had ordered Hart to afford Kimmel "the right to be present, to have counsel, to introduce, examine, and cross-examine witnesses, to introduce matter pertinent to the examination and to testify or declare in his own behalf at his own request." PHA (pt. 26), *supra* note 42, at 4. On advice of counsel, Kimmel made a tactical decision in both instances to forego opportunities for enhanced "due process." Despite these rejected opportunities, Kimmel and his counsel continued to complain later about "star chamber" proceedings that did not afford him basic "due process" rights. During the War, Kimmel himself admitted that a public court-martial would have been damaging to the war effort. *Asks Trial At Once For Pearl Harbor*, N.Y. TIMES, Oct. 12, 1943, at 11, col. 1 (Representative Cole, New York Republican, demanded immediate courts-martial; Admiral Kimmel stated, "I realize that a court-martial at this time could only be had at the expense of the war effort because of the resulting interferences with the very important duties of essential witnesses of high rank . . . .").

360. *Kimmel's Own Story*, *supra* note 46, at 159.

361. JCC, *supra* note 156.

362. *E.g.*, William S. White, *Disaster Onus Put on Kimmel, Short*, N.Y. TIMES, July 16, 1946, at 1, col. 3 [hereinafter *Disaster Onus*]; *Roosevelt Found Blameless*, *supra* note 291, at 1, col. 2.

363. *E.g.*, "While the primary responsibility for the severe initial defeat suffered by the United States at Pearl Harbor is put in the majority report upon Rear Admiral Husband E. Kimmel . . . and Maj. Gen. Walter C. Short, in Army command at Hawaii, the War and Navy Departments do not escape censure." *Disaster Onus*, *supra* note 362, at 1, col. 3, & at 2, col. 4.

364. *Short Reiterates Stand*, N.Y. TIMES, July 21, 1946, at 12, col. 6.

365. Kimmel did not identify the presidential orders to which he took exception. President Truman did specifically direct in a series of memoranda that all information material to the investigation be provided to the Committee, including information relating to cryptanalytic activities, and that any witnesses with relevant information come forward. *See* JCC, *supra* note 156, app. C, at 285-87. The Joint Congressional Committee considered all of the various intelligence matters which had not been provided to Kimmel and Short before the attack at Pearl Harbor, but which had been available in Washington.

366. *Kimmel's Own Story*, *supra* note 46, at 159 (referring, in the concluding sentence, to authorities in Washington as "criminal.").

lected in forty full-sized, bound volumes, the JCC still found that the Hawaiian commands bore the principal fault, by failing:

> (a) To discharge their responsibilities in the light of the warnings received from Washington, other information possessed by them, and the principle of command by mutual cooperation.
> (b) To integrate and coordinate their facilities for defense and to alert properly the Army and Navy establishments in Hawaii, particularly in the light of the warnings and intelligence available to them during the period November 27 to December 7, 1941.
> (c) To effect liaison on a basis designed to acquaint each of them with the operations of the other, which was necessary to their joint security, and to exchange fully all significant intelligence.
> (d) To maintain a more effective reconnaissance within the limits of their equipment.
> (e) To effect a state of readiness throughout the Army and Navy establishments designed to meet all possible attacks.
> (f) To employ the facilities, material, and personnel at their command, which were adequate at least to have greatly minimized the effects of the attack, in repelling the Japanese raiders.
> (g) To appreciate the significance of intelligence and other information available to them.[367]

The JCC report stated specifically that the "errors made by the Hawaiian commands were errors of judgment, and not derelictions of duty."[368] The press reported this finding prominently.[369] The findings of the JCC stand as final, official "corrections" of the original finding of "dereliction of duty" in the Roberts Commission's report.

N. Executive Discretion: the Controlling Constitutional Principle

Kimmel and Short advocates have complained that the commanders were denied due process, that they were not allowed representation by counsel, to cross-examine witnesses, or to air their version of events pub-

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367. JCC, *supra* note 156, at 252.
368. *Id.*
369. *E.g.*, *Roosevelt Found Blameless*, *supra* note 291, at 12, col. 2.

licly,[370] and that there is therefore error in the associated personnel actions taken against them and in the many investigations of the attack on Pearl Harbor. The government, however, has taken no action against Kimmel or Short that entitled either of them to due process. The actions taken by the government include: (1) Secretary Knox's initial investigation of the disaster at Pearl Harbor for the President; (2) the decision to relieve Admiral Kimmel and Lieutenant General Short of command; (3) the decision of the President to order a more thorough inquiry, presided over by a sitting Supreme Court Justice;[371] (4) the acceptance of Kimmel's and Short's offers to retire; (5) the conduct of additional investigations amidst the din of partisan accusations and global war; (6) the postponement of decision on courts-martial to protect vital cryptologic capabilities and keep America's admirals and generals engaged in combat; (7) the release of information to the public on actions being taken in the wake of the worst military disaster in American history; (8) the President's and Secretaries' discretionary decisions with respect to the appropriate action to take against Admiral Stark, General Marshall, General MacArthur and other subordinate officials; and (9) decisions not to advance Kimmel or Short on the retired list.[372] Whatever grievances Rear Admiral Kimmel and Major General Short might have had against these actions, they are not recognized or remediable at law.

Kimmel's advocates have focused on the findings of the Court of Inquiry, that Rear Admiral Kimmel was not derelict in the performance of his duties. Similarly, they have emphasized the failure to provide courts-martial (apparently unaware that Kimmel refused the offer of a court-martial), implying that courts-martial would have produced acquittals. Perhaps so, but the discretion of the President and senior officials in the military chain of command to weigh evidence and make determinations about the quality of Rear Admiral Kimmel's and Major General Short's judgment, and their suitability for three- and four-star rank, has never been coterminous with the question of guilt of a criminal offense. As stated by

370. *But see supra* note 161 and accompanying text.

371. The appointment of Justice Owen Roberts to head the Roberts Commission's initial investigation into the attack on Pearl Harbor was a significant step taken to ensure the integrity of the investigation. The integrity of the investigation might have been questioned if an Executive Branch official had been appointed to head the Commission. To insulate them from political influence, the Constitution provides that federal judges enjoy life tenure and their salaries may not be reduced while in office. U.S. CONST. art 3, § 1. Additionally, no credible investigation of the Pearl Harbor attack could have been conducted without the participation of the military commanders in charge on Oahu. PHA (pt. 7), *supra* note 42, at 3267.

Admiral Carlisle Trost in 1988 while serving as Chief of Naval Operations, "there is a vast difference between a degree of fault which does not warrant a punitive action and a level of performance which would warrant bestowal of a privilege."[373]

In the selection of two-star officers for advancement to three- and four-star grade, superior judgment and performance are touchstones. The President and his principal subordinate officials in the Executive Branch make such determinations on the basis of nonjusticiable constitutional discretion. There is no adjudicative forum in which a final judgment of "appointment" may be won, nor may Congress compel an appointment by legislative act.[374] Three- or four-star rank is not a *personal attribute*; it is a public office. Advancement to such rank is not a "remedy;" it is the investiture of enhanced authority to facilitate the execution of increased

372. The Kimmels have also alleged that the Navy Department threatened "to take away construction contracts from Frederick R. Harris, Inc., a naval contractor, if they [sic] continued to employ Admiral Kimmel" after he had retired. Letter from Edward R. Kimmel to Undersecretary of Defense for Personnel and Readiness (Sept. 26, 1995) (enclosing a list of grievances dated 26 February 1995). The Kimmels have not produced a copy of correspondence or any other evidence to support this allegation. The complaint may allude to standards of conduct warnings. Rear Admiral Jacobs stated the official position of the Navy in Letter from Chief of Naval Personnel to Rear Admiral Kimmel (June 16, 1942), which approved Kimmel's employment "provided you will not be engaged in selling or contracting or negotiating for the sale of naval supplies and war material to the Navy or to the Navy Department." Rear Admiral Jacobs' letter to Rear Admiral Kimmel enclosed a legal memorandum that addressed the limitations on post-retirement employment with government contractors. Similar limitations, or "standards of conduct," are still in effect today. *See* Standards of Conduct, Digest of Laws, 32 C.F.R. § 721.15(c)(1)(ii) (1997). Otherwise, the Navy publicly defended Kimmel's right to receive retired pay and to accept post-retirement employment with Harris, Inc. *See Navy Justifies Pay Received by Kimmel; Department also Backs Right to Accept Civilian Post*, N.Y. TIMES, Aug. 11, 1942, at 4, col. 2. There has never been an issue of wrongful denial of compensation in the cases of the Pearl Harbor commanders. The Act under which Rear Admiral Kimmel had been advanced temporarily to the grade of Admiral (Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89) provided specifically that officers who returned to their regular ranks after being detached from temporary promotion billets would receive only the pay and allowances of their regular rank. Pursuant to an Act of May 20, 1958, 72 Stat 122, 130, Rear Admiral Kimmel's retired pay was recomputed in accordance with a complex statutory formula, and he received thereafter retired pay comparable to that of a retired three-star admiral. Congress did not base eligibility for recomputation of retired pay under the 1958 Act on discretionary selection of individuals; no one attempted to deny Rear Admiral Kimmel this benefit to which he was entitled by law. *See Dorn Staff Study*, *supra* note 39, at I-1. A fire at the National Personnel Records Center destroyed Major General Short's pay records in 1973. Neither Major General Short nor any of his survivors has ever claimed that the government denied Short due compensation before his death in 1949.

373. *Supra* note 211.

responsibilities. The conclusion has been reached numerous times that Admiral Kimmel and Lieutenant General Short's execution of such increased responsibilities did not rise to the level expected of officers serving in three- or four-star rank. As stated by Secretary Forrestal, Kimmel "failed to demonstrate the superior judgment necessary for exercising command commensurate with [his] rank and . . . assigned duties."[375] In declining to recommend Major General Short for advancement on the retired list, Secretary of the Army Stone stated in 1992 that he was "unable to make th[e] determination" "that General Short had served satisfactorily in the grade of lieutenant general."[376] The freedom to make such judgments inheres in executive office.

Failure to advance Kimmel and Short does not signify that they were solely responsible for Pearl Harbor, nor does it reattach to them the badge of "dereliction," long since officially removed through the findings of various investigations and endorsements. The fact that executive discretion supported the advancement of other officers on the retired list, or that Roosevelt decided to allow other officers to continue serving (who thereafter distinguished themselves during the War), is not legally relevant to any decision made with respect to Rear Admiral Kimmel and Major General Short.[377] They must be judged on their own merits.[378] There is no system or methodology to compare and "regularize" the ranks of admirals and generals by *officially* "correcting," up or down, the allegedly undeserved positive or negative impacts of constitutionally sound decisions upon individual reputations. No officer has a right to the equal affection and confidence of the President. The President may prefer different officers over others, for purely subjective reasons.

Advocates for Kimmel and Short have characterized the government's actions with respect to the commanders as a series of outrages against law—star chamber proceedings, denial of counsel, secret evidence, impoundment of records, suppression of witnesses. All of these emotional arguments are based on claims to rights that did not exist. No legal error can be discerned in the various personnel actions taken in the Pearl Harbor cases. Counsel for the Kimmels has not cited one case or statute that indi-

374. *See, e.g.*, 41 Op. Att'y Gen. 291, 292 (1956) ("Congress may not, in connection with military appointments or promotions to higher offices, control the President's discretion to the extent of compelling him to commission or promote a designated individual.").

375. PHA (pt. 16), *supra* note 42, at 2429.

376. Letter from Secretary of the Army to Senator Pete V. Domenici (Sept. 2, 1992).

cates otherwise. The controlling legal principle in these cases is constitutional executive discretion.[379]

Under the authority conferred upon him by the Constitution, the President may revisit today, tomorrow, or at any time, the judgments made about Kimmel and Short. He may make or decline to make posthumous appointments, notwithstanding the precedents set by his predecessors. Both sides of this debate may appeal to the President's discretion. Some

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377. As long as actions taken in an individual case are within the limits defined by law, comparison to other cases does not give rise to any issue on appeal—with one exception. The only possible claim of "selective prosecution" that might be recognized by law is rooted in the principle of equal protection implicit in the Due Process Clause of the Fifth Amendment. Schlesinger v. Ballard, 419 U.S. 498, 500 (1975) (Although the Fourteenth Amendment's Equal Protection Clause applies only to the states, the Fifth Amendment Due Process Clause contains an equal protection element); Woodard v. Marsh, 658 F.2d 989 (5th Cir. 1981) (citing Rostker v. Goldberg, 453 U.S. 57 (1981) (The due process clause of the Fifth Amendment has generally been held to make Fourteenth Amendment equal protection law applicable to the federal government.). In the context of "selective prosecution," the equal protection principle does not guarantee equal results for all. A successful "selective prosecution" claim must demonstrate that the claimant was "similarly situated" with respect to others who received more favorable treatment, and that discrimination against him was based on a constitutionally impermissible ground. The lead case, *Wayte v. United States*, 470 U.S. 598 (1984), spells out these principles. The Kimmel and Short cases cannot meet the standards prescribed for "selective prosecution" claims, because the principle applies only in criminal cases. Kimmel and Short were not "similarly situated" with respect to other officials in Washington or elsewhere (the various senior officers to whom fault has been attributed had profoundly different duties, different experience, and different skills, as assessed by the President), and there has been no discrimination against Rear Admiral Kimmel or Major General Short on a "constitutionally impermissible basis" (narrowly confined by equal protection precedent to such bases as race, religion, ethnicity, or retaliation for the exercise of individual constitutional rights, such as freedom of speech). *See* United States v. Hagen, 25 M.J. 78, 83 (C.M.A. 1987); United States v. Means, 10 M.J. 162, 165-66 (C.M.A. 1981). In the absence of discrimination on a constitutionally impermissible basis, the law is well-settled that there is no claim to "comparative justice."

The President's paramount constitutional power as Commander in Chief to retain particular subordinate military officers of his selection in key command positions establishes per se that officers not so selected are not "similarly situated." The President, as Commander in Chief, was entitled constitutionally to continue employing Marshall, Stark, MacArthur and Turner in the military capacity he deemed appropriate, without reference to whatever jealousies their assignments might generate. *E.g.*, BASS, *supra* note 8, at 167 ("[T]he power to assign military officers to posts . . . gives presidents the opportunity to shape the leadership of the military."); ROSSITER, *supra* note 58, at 2 ("The . . . appointment and removal of 'high brass' . . . are matters over which no court would or could exercise the slightest measure of judgment or restraint."); KOENIG, *supra* note 56, at 242-43 ("As Commander-in-Chief the President appoints and removes his field generals."); SMITH, *supra* note 8, at 48 ("[T]he President . . . may at his discretion remove any officer from a position of command.").

authors continue to point out grave errors in Kimmel's or Short's judgment,[380] while others continue to capitalize on the scapegoat brief first formulated by Republicans seeking to discredit the Roosevelt Administration.[381] The archive of material consulted to prepare this article

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378. Kimmel's counsel has criticized "the scapegoat approach to assessing responsibility for a national calamity by the process of hastily fixing sole responsibility on the Army or Navy commander at the scene of its impact." Hanify Memo, *supra* note 71, at 2. The Pearl Harbor section of this article has not explored the principle of strict accountability of officers in command, because no official ever held Rear Admiral Kimmel or Major General Short accountable under the theory of "strict liability" traditionally applicable to officers in command. *See* U.S. Navy Regulations, art. 0802 (1990) ("The responsibility of the commanding officer for his or her command is absolute . . . . While the commanding officer may . . . delegate authority to subordinates . . . such delegation of authority shall in no way relieve the commanding officer of continued responsibility for . . . the entire command."). *Cf.* U.S. Navy Regulations, art. 182(6) (1920). The "doctrine" of accountability does not depend on personal fault. The actions taken with respect to Kimmel and Short, however, did not depend on the principle of strict accountability, but on discretionary assessments of the commanders' actual conduct, failure to act, or ability to command effectively.

In legal proceedings, the responsibility of an on-scene commander is measured by what he did with what he had, in terms of both knowledge and resources, not by what he might have done had he been given more by higher authority. The latter standard would lead in every case to a finding of no responsibility for local commanders based on their hypothetical ex post facto assertions of what they *would* have done "if only . . . ." Thus Secretary Stimson assessed the conduct of General Short as follows: "I find that he failed *in the light of information which he had received* adequately to alert his command to the degree of preparedness which the situation demanded . . . ."; PHA (pt. 35), *supra* note 42, at 15 (emphasis added). The Secretary did not fault General Short for failing to avert the attack; instead, he faulted him for what he did and did not do with what he had. The Roberts Commission premised its finding of dereliction of duty on this standard. *Id.* (pt. 7) at 3285 ("In light of the warnings and directions to take appropriate action, transmitted to both commanders between November 27 and December 7 . . . ."). Similarly, Secretary Forrestal in his endorsement of the Navy Court of Inquiry concurred with Admiral King that "the pertinent question is whether Admiral Kimmel used the means available to the best advantage," notwithstanding unavoidable shortages in personnel and material, and that "the information *available to Admiral Kimmel* called for a tightening up of the defense precautions." *Id.* (pt. 16) at 2403, 2405 (emphasis added). The JCC report based its findings of fault on "information possessed by them" [the Hawaiian commands], finding that the commanders failed "to employ the facilities, matériel, and personnel *at their command*, which were adequate at least to have greatly minimized the effects of the attack . . . ." JCC, *supra* note 156, at 252 (emphasis added). In his recent review of government actions taken with respect to Admiral Kimmel and General Short, Dr. Edwin Dorn, Under Secretary of Defense (Personnel and Readiness) applied the same situationally sensitive standard: "The intelligence *available to Admiral Kimmel and General Short* was sufficient to justify a higher level of vigilance than they chose to maintain." *Dorn Report*, *supra* note 39, at 4 (emphasis added). *See also Dorn Staff Study*, *supra* note 39, at III-15. *Cf.* David Kaiser, *Conspiracy or Cock-up? Pearl Harbor Revisited*, 9 INTEL AND NAT'L SECURITY 354, 368 (1994); WILLIAM F. HALSEY, ADMIRAL HALSEY'S STORY 75-76 (1947).

evidences many thousands of hours of work by government officials to

379. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-167 (1803) (opinion by Chief Justice Marshall):

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive . . . . [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable . . . . The powers of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion.

See also 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789, at 921-27 (Charles Bangs Bickford et al., eds. 1992) (Madison: The checks on the President for "wanton removal of meritorious officers" are impeachment and public opinion); ROSSITER, *supra* note 58, at 2 (1976) (The President's "powers in the broad field of national defense are largely discretionary. . . . For his conduct of such affairs the President is responsible, so far as he can be held responsible, only to Congress, the electorate, and the pages of history.").

380. *See, e.g.*, HARRY A. GAILEY, THE WAR IN THE PACIFIC 83-84 (1995):

> Washington authorities believed that sufficient warning had been given to both Kimmel and Short . . . . The admiral saw no reason to change the orders that he had issued in October regarding security aboard ships. He further decided against increasing security and readiness measures on the vessels within Pearl Harbor. Nor did Kimmel order any long-range aerial scouting missions . . . . However one wishes to sympathize with Kimmel, it is difficult to comprehend why a seasoned flag officer who had been told that a dispatch was a "war warning" failed to take such basic precautions. One possible explanation is that, confident in his preparations, he ignored the fact that during fleet exercises in 1928 and again in 1932 and 1938, successful air attacks had been launched against Hawaii by American planes acting as aggressors . . . . Vice Admiral William F. Halsey Jr., aboard the *Enterprise*, believed hostilities were imminent and put the carrier on war alert. Because of the movement of these carriers [i.e., *Lexington* and *Enterprise* to Midway and Wake], the southwest approaches to Hawaii were reasonably well covered by planes from the two task forces. However, nothing was done to cover the northwest approaches—which in previous naval air exercises had been considered the most important sectors.

respond to decades of reiteration of the same complaints made with respect to Kimmel and Short. The Kimmels have vowed to continue this struggle.[382] Although there is no formal principle of res judicata in discretionary executive decisions, at some point in history the Executive Branch must have a practical, efficiency-based interest in the finality of administrative decisions which are nonjusticiable, decisions from which there would be no recourse for ordinary people whose rights are subject to the many preclusive legal principles discussed in this article. The Kimmels, with the Shorts in tow, seek, through cross-branch political manipulation, exception from established principles of law.

The campaign to reverse lawful decisions of a previous President and his deputies challenges fundamental principles of executive authority. The disregard for such authority, evident in the frequently petulant demands of the Kimmels,[383] sheds light on the unfavorable reception their campaign continues to receive within the executive branch. The consequences of officially "correcting" discretionary decisions made by past constitutional authorities would be a creeping encroachment on the exercise of discretion in future cases, by recognizing standards and limits in the exercise of discretion where no standards or limits exist and none were intended to exist. It is one thing for the President to change his mind and show leniency in a case in which he has already acted, and entirely another to attempt to compel a future President to reverse his predecessor on the basis of subjective values argued as superior to the President's constitutional power.

There is no "cover-up." The *Dorn Report* candidly admitted broadly shared fault for the Pearl Harbor disaster. Denial of posthumous promo-

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381. *E.g.*, EDWARD L. BEACH, SCAPEGOATS (1995):

> The emotional change in national outlook, combined with the shock to our pride, brought about, as Roosevelt understood it might, an almost pathological search for someone to blame for allowing it to happen. He needed scapegoats, if for no other reason than to allow him to carry on the war. Upon Adm. Husband E. Kimmel . . . and Lt. Gen. Walter C. Short . . . therefore landed the weight of national obloquy . . . .

382. *E.g.*, Bradley Peniston, *Defending His Life, Son Continues Fight to Clear Father's Name in Pearl Harbor Disaster*, THE CAPITAL, Jan. 4, 1996, at B1 (Retired Navy Captain Thomas Kimmel, one of Rear Admiral Kimmel's sons, reacted with disappointment to the *Dorn Report*. Captain Kimmel blamed the rejection of posthumous advancement for Rear Admiral Kimmel on politics—"[T]he Democrats were worried about tarnishing Roosevelt"—and indicated that the Kimmels would wait for another Republican administration to renew their intergenerational efforts into yet the next generation of Kimmels.); *Thurmond Hearing*, *supra* note 38, at 72-73 (Manning Kimmel IV).

383. *E.g.*, *Thurmond Hearing*, *supra* note 38, at 15-16, 66 (Manning Kimmel IV).

tion for Kimmel and Short can no longer be called "a large concrete sarcophagus which is inscribed with a large rump on the backside saying this butt [President Roosevelt's] must be protected."[384] Even admitting for the sake of argument all of the facts alleged by the Kimmels and Shorts and their more rational advocates, nothing done in the Kimmel and Short cases exceeded the President's power. The more important consideration in these cases is not protection of Roosevelt's reputation, but, unapologetically, protection of the established scope of Presidential power itself.

As executive officials have stated repeatedly with respect to these cases, the facts do not warrant posthumous promotion, nor, let it be added, does the law require it.

III. Case Study: U.S.S. *Indianapolis*

Three recent Congressional inquiries concerning Captain Charles B. McVay III have renewed interest in his famous court-martial.

In a letter of 18 September 1995 to Vice Admiral Philip M. Quast (then Commander, Military Sealift Command), Representative Andrew Jacobs, Jr., of Indiana requested that Admiral Quast lend his efforts to the exoneration of Captain McVay.[385] On 17 October 1995, Admiral Quast forwarded Congressman Jacobs' letter to the General Counsel of the Navy for response to Congressman Jacobs.

In a letter to the Secretary of Defense, dated 7 February 1996, Representative Timothy Holden of Pennsylvania requested reconsideration of the McVay case, enclosing a copy of a recent letter to the President from constituent Leon Bertolet. The White House forwarded Congressman Holden's request to the Secretary of the Navy for direct response.

On 13 March 1996, Representative Floyd Spence, Chairman of the House Committee on National Security, wrote to Rear Admiral Robert Natter, Chief of Legislative Affairs, Department of the Navy, requesting

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384. *Id.* at 44 (John Costello).

385. Congressman Jacobs' letter followed a public speech given by Admiral Quast at the dedication of a national memorial to U.S.S. *Indianapolis* in the City of Indianapolis on 2 August 1995, the fiftieth anniversary of the rescue of the surviving crewmen.

an investigation of the McVay case and a full report. Chairman Spence's letter also enclosed a copy of Leon Bertolet's letter to the President.

The circumstances surrounding the sinking of *Indianapolis*, the four-day delay in rescuing the surviving crew members from the water, and the court-martial of Captain McVay have been the subject of numerous previous inquiries, several books, many journalistic articles, a television movie, and a legal study completed at the request of Senator Richard Lugar in 1992.[386] The centerpiece of controversy over the fate of *Indianapolis* has become the court-martial of Captain McVay. Critics have impugned the court-martial on numerous legally imprecise grounds, stimulating widespread popular misconception. Proponents of a theory that Captain McVay was made a "scapegoat" for institutional failures of the Navy and the shortcomings of higher ranking officers have urged that his court-martial be expunged and Captain McVay be exonerated of fault for the tragedy. Accordingly, this section reviews the facts surrounding Captain McVay's trial, and analyzes in detail the charge under which he was convicted. Even taking the basic facts as the critics generally allege, the conclusion compelled by applicable law is that Captain McVay's court-martial is sound and remedial action is not warranted.[387]

A. The Sinking of Indianapolis and the Court-Martial of Captain McVay[388]

On 18 November 1944, Captain Charles B. McVay III assumed command of *Indianapolis*. A kamikaze attack damaged *Indianapolis* at Okinawa in April 1945 while serving as Admiral Spruance's Fifth Fleet flagship. Mare Island Naval Shipyard overhauled her between early May and mid-July 1945, then she put to sea on 16 July 1945, to deliver atomic bomb components to Tinian. Upon completion of this mission on 26 July, the Commander in Chief of the Pacific Fleet (CinCPac) ordered *Indianapolis* to proceed to Guam (CinCPac's forward headquarters) for further routing to Leyte, Philippines. Upon arrival at Leyte, CinCPac's orders stated that *Indianapolis* should report by dispatch to Commander, Task Force 95 (then at Okinawa) for duty, but that Commander, Task Group 95.7 should arrange ten days of training for *Indianapolis* in the Leyte area. The CinCPac orders did not specify departure and arrival dates. Commander, Task

386. Letter, J. Lee McNeely of McNeely, Sanders, Stephenson & Thopy, of Shelbyville, Indiana, to Senator Richard Lugar, subject: Review of the Proceedings Surrounding the Court-Martial of Captain Charles B. McVay III (Nov. 20, 1992) [hereinafter *Lugar Study*].

Force (CTF) 95 and Commander, Task Group (CTG) 95.7 were information addressees of these orders, but CTG 95.7's copy was garbled in reception or decoding and his communications staff did not request a retransmission. Accordingly, CTG 95.7 was not aware that *Indianapolis* had been directed to report to him for refresher training.

After *Indianapolis* arrived at Guam on 27 July, the CinCPac Assistant Chief of Staff for Operations, Commodore Carter, referred Captain McVay to the Port Director for routing instructions and an intelligence briefing. In the Port Director's office, Captain McVay and the routing officer assigned to work with him settled on a 15.7 knot speed of advance[389] along the standard transit route between Guam and Leyte.[390] The routing instructions specified departure from Guam at 0900 on Saturday, 28 July, with expected arrival at 1100 on Tuesday, 31 July, a three-day transit. Captain McVay inquired about the availability of an escort and the routing officer informed

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387. In addition to legal sources cited herein, the following sources of information were reviewed in the preparation of this study: the complete official service record of Captain McVay and all accompanying official personnel files maintained by the National Archives and Records Administration; the original Record of Trial of Captain McVay's general court-martial, and all post-trial review records; the official record of the court of inquiry commenced on 13 August 1945 to inquire into the demise of *Indianapolis*, at the direction of Admiral Nimitz, and all endorsements and subsequent correspondence included with the record, including the two supplemental reports of the Naval Inspector General; Navy Department correspondence concerning the disposition of Captain McVay's case; the report of a legal review commissioned by Senator Lugar; recent press treatment of the sinking of *Indianapolis* and Captain McVay's court-martial; and four books dedicated to the *Indianapolis* tragedy and Captain McVay. *See* DAN KURZMAN, FATAL VOYAGE (1990); RAYMOND B. LECH, ALL THE DROWNED SAILORS (1982); RICHARD F. NEWCOMB, ABANDON SHIP! (1976); THOMAS HELM, ORDEAL BY SEA (1963). Samuel Eliot Morison's account of the loss of *Indianapolis* was also consulted. SAMUEL ELIOT MORISON, 14 HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, VICTORY IN THE PACIFIC 319-30 (1960). John Harriss's SCAPEGOAT! FAMOUS COURTS MARTIAL (1988) has an unnumbered chapter on Captain McVay, beginning on page 224. Harriss's account is based entirely on Lech and Newcombe and is narrowly focused on the "scapegoat" thesis without in-depth analysis. Harris presents a collection of the clichés of the conspiracy theorists: he discounts the information on submarine contacts that was available to *Indianapolis*; he assumes that discretion to zigzag in the sailing instructions freed McVay of responsibility for prudent decisions on evasive maneuvering; he attributes too much significance to ULTRA information (supposing, incorrectly, like other authors, that ULTRA showed exactly where the Japanese submarines were located); and he also sensationalizes the fact that a Japanese commander testified at Captain McVay's court-martial. This article addresses each of these issues.

388. Official accounts of the events surrounding the sinking of *Indianapolis* are readily available to the public in two Naval Inspector General's reports of 7 January 1946 (to CNO), *reprinted in* LECH, *supra* note 387, at 231-53 (1982). There is no substitute, however, for careful reading of the sworn testimony in the record of the Court of Inquiry and the Record of Trial.

him that none was required.[391] *Indianapolis* had traveled unescorted before,[392] and Captain McVay gave no further consideration to the issue of an escort. A standard clause in the routing instructions left zigzagging to the discretion of the commanding officer.[393]

After *Indianapolis* departed Guam on 28 July, the Port Director transmitted her departure time, speed, route, estimated time of arrival at Leyte, and expected mid-transit "chop"[394] date from Commander, Marianas

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389. Captain McVay chose this speed when offered a two-day transit at 24-25 knots, or a three-day transit at approximately 16 knots. United States v. McVay, Record of Trial, at 350 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20) (testimony of Captain McVay). A fuel conservation limit on transit speeds in effect in the Pacific theater apparently did not affect the choice of transit speeds. The speed chosen accommodated Captain McVay's desire to arrive off the entrance to Leyte Gulf at daylight in order to conduct anti-aircraft practice prior to entering the Gulf. A higher speed would have made submarine targeting of *Indianapolis* more difficult.

390. The Wartime Pacific Routing Instructions in effect at the time specified standardized routes between combat operations areas. Accordingly, the Port Director's office assigned *Indianapolis* route "Peddie," the standard route between Guam and Leyte. Changes in the standard routes had been recommended, but the Navy Department had not acted on the recommendation before *Indianapolis* sailed.

391. The issue of an escort has been the subject of considerable controversy. As an older cruiser (launched in 1931), *Indianapolis* was not outfitted with submarine detection equipment. In his endorsement of the Court of Inquiry's report, Fleet Admiral King (Chief of Naval Operations) recommended that the Secretary of the Navy (Forrestal) direct additional investigation into the reasons for routing *Indianapolis* without an escort. Further consideration of the question revealed that a requirement for escort by anti-submarine capable ships was in place in an area well to the north of Guam. Allied forces had pushed the sphere of Japanese control back across the Pacific to the immediate vicinity of Japan; the area along the route from Guam to Leyte was considered a rear area at this point in the war. Requirements closer to Japan had stretched escort assets thin. Although escorts were not required for warships transiting route "Peddie," one could have been provided if available. However, Captain McVay and the routing officer did not discuss the availability of an escort further after the Operations Office for Commander, Marianas (COMMARIANAS) affirmed the policy that an escort was not required. LECH, *supra* note 387, at 19-20, 234-35; NEWCOMB, *supra* note 387, at 49-50.

392. For example, *Indianapolis* had transited unescorted from San Francisco to Tinian (near Guam) while transporting critical atomic bomb components. *See* LECH, *supra* note 387, at 20; *McVay* Record at 350 (testimony of Captain McVay) ("I didn't give it another thought, because I had traveled many times without an escort."). Proponents of Captain McVay, however, have perpetuated the false assertion that "McVay was . . . ordered to sail unescorted, the first time during the war that a large ship did so." *See, e.g.*, Burl Burlingame, *Historian: McVay Didn't Have Spy Data*, HONOLULU STAR BULL., Nov. 4, 1993, at A6.

393. "Commanding Officers are at all times responsible for the safe navigation of their ships . . . . Zigzag at discretion of the Commanding Officer." LECH, *supra* note 387, at 211. The routing instructions are at *McVay* Record, Exhibit 1.

(COMMARIANAS), to Commander, Philippine Sea Frontier (30 July).[395] CTF 95, who had received CinCPac's tasking orders for *Indianapolis,* did not receive from the communications center on Okinawa the Guam Port Director's departure message with specific dates and times. CTG 95.7 did receive the Port Director's departure message, but its significance to him was not clear because he was unaware of the previous (garbled) CinCPac orders that had tasked him to provide ten days of training for *Indianapolis.*[396] Because of these communications lapses, neither commander possessed sufficient information to cause him to monitor the arrival of *Indianapolis* at Leyte on 31 July. COMMARIANAS, Commander, Philippine Sea Frontier, and the Port Director at Leyte received the Guam Port Director's message.

All sources agree that no one provided Captain McVay information on enemy submarine activity derived from codebreaking of Japanese communications under the "ULTRA" signals intelligence (SIGINT) program.[397] ULTRA information concerning the activities of Japanese submarines in the Western Pacific in July was available to key officials on the staffs of CNO (then also serving as Commander in Chief, U.S. Fleet), CinCPac, and COMMARIANAS.[398] The apparent policy at CinCPac was that pertinent ULTRA information should be provided with routing instructions in a generalized and sanitized form so that its source could not be identified.[399] The Port Director at Guam relied on the Surface Operations Officer on the COMMARIANAS staff to provide intelligence for inclusion with ship routing instructions.[400] Captain Oliver Naquin, the Surface Operations Officer, did not provide the Port Director the ULTRA information on submarine threats he held in July.[401] The 16 July ULTRA

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394. "Chop" signifies "Change of Operational Control" from one regional commander to another.

395. Commander, Marianas (COMMARIANAS) and Commander, Philippine Sea Frontier, were regional sea commanders, responsible for naval activities in their geographic areas. The Commander in Chief, Pacific (CinCPac) Port Director transmitted the routing message for action to the Shipping Control Officer, Marianas Area; the Port Director at Tacloban, Leyte, Philippines; and CTG 95.7. Information addressees included Commander, Fifth Fleet (COMFIFTHFLT); COMMARIANAS; CTF 95; Commander, Philippine Sea Frontier; and CinCPac. *See* LECH, *supra* note 387, at 53, 215; USS Indianapolis Court of Inquiry, exhibits 2, 19 (Aug. 13, 1945).

396. LECH, *supra* note 387, at 26-27, 240-41 (Naval Inspector General's report to Chief of Naval Operations).

397. Signals intelligence information within the ULTRA program was highly classified and tightly controlled. The Japanese would have changed their code had they suspected that the Allies had broken it, depriving the United States of a bounty of information critical to prosecution of the war.

report for the Pacific theater included the Japanese submarine that attacked *Indianapolis* days later, I-58.[402]

The intelligence briefing for *Indianapolis's* transit provided by the Port Director at Guam also omitted the sinking of a destroyer escort, U.S.S. Underhill, by a sub-launched suicide torpedo (a "*kaiten*"[403]) on 24 July near Okinawa.[404] Why the sinking of *Underhill* was omitted is not clear.[405] The 16 July ULTRA report for the Pacific indicated that I-53, the submarine that sank *Underhill*, had departed the Empire on 14 July for patrol in the Okinawa area, far to the North of *Indianapolis's* track.[406]

The intelligence enclosure provided with *Indianapolis's* routing instructions did contain three reports of "enemy submarine contacts:" on 22 July a submarine had been sighted surfaced seventy-two miles south of *Indianapolis's* projected track and a hunter-killer group had been ordered to respond; on 25 July a "possible periscope" had been sighted ninety-five miles north of the projected track; and again on 25 July a sound contact characterized as a "doubtful submarine" had been detected 105 miles south of *Indianapolis's* track.[407] The government presented testimony at Captain McVay's trial that these three contact reports placed possible enemy submarines within striking distance of *Indianapolis*, given the course and

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398. LECH, *supra* note 387, at 13-16, 23-24, 233 (Naval IG's report); KURZMAN, *supra* note 387, at 44-47. *See also* Richard A. von Doenhoff, ULTRA and the Sinking of USS Indianapolis, Remarks before the 11th Naval History Symposium (Oct. 1993) (Among sources consulted, von Doenhoff stands alone in doubting that COMMARIANAS would have been provided copies of ULTRA intelligence reports.). Exactly how much information was available in ULTRA channels on the four Japanese submarines has never been conclusively established, but this has not deterred proponents of McVay from suggesting that dissemination of ULTRA information would have changed the course of history. Declassified reports that have been identified include a Joint Intelligence Committee, Pacific Ocean Area (JICPOA) Report A-1 dated 16 July 1945, which indicated that submarines I-58 (the submarine that sank *Indianapolis*) and I-367 were scheduled to depart the Empire on 19 July for patrol in the Marianas-Carolinas area, a vast ocean area generally east of *Indianapolis's* track to Leyte. A Seventh Fleet Intelligence Center weekly report of 21 July warned that I-58 and I-367 were patrolling in the central Pacific area, and daily CinCPac bulletins warned of I-367 (with no mention of I-58) on three occasions prior to 27 July. *See* von Doenhoff, *supra*, at 8-9, nn.7, 8, and enclosure (1) (citing NSA records held by the National Archives and Records Administration).

399. LECH, *supra* note 387, at 23.

400. *Id.* at 24. The Surface Operations Officer at COMMARIANAS received ULTRA information from a pipeline through CinCPac. KURZMAN, *supra* note 387, at 44-45.

401. The Naval Inspector General's reports to CNO attributed to Captain Naquin responsibility for the fact that *Indianapolis* did not receive ULTRA-derived information. *See* LECH, *supra* note 387, at 233, 247 (texts of the two IG reports of 7 January 1946).

speed specified in the routing instructions.[408] *Indianapolis* received additional information on submarine threats along her track after she departed

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402. A great deal of finger-pointing has been indulged over the failure to provide ULTRA information to Captain McVay. For example, writers have pointed out that Commodore Carter, the CinCPac Assistant Chief of Staff for Operations, failed to provide ULTRA information to Captain McVay when he directed him to the Port Director's office for routing instructions and an intelligence briefing (duties normally handled by routing officers in the Port Director's office). *E.g.*, LECH, *supra* note 387, at 15-16; KURZMAN, *supra* note 387, at 44-45. Kimo McVay, one of Captain McVay's sons, protested that,

> [b]efore taking over the *Indianapolis*, dad was the chairman of the joint intelligence committee of the combined chiefs of staff in Washington, the Allies' highest intelligence unit. And he was entrusted with the secrets of the atomic bomb. But they didn't want to give him a heads-up that Japanese submarines were in his path.

Burlingame, *supra* note 392, at A6 (quoting Kimo McVay).

While assigned to such duties from 1943 to 1944, Captain McVay would have had access to a great deal of highly classified information, but access to such information was and still is a consequence of the particular billet in which an officer is serving at the time. Failure to receive classified information is not justiciable. No one has an enforceable right to a security clearance or particular classified information. *See* Department of the Navy v. Egan, 484 U.S. 518, 528-29 (1988):

> It should be obvious that no one has a 'right' to a security clearance . . . . For 'reasons . . . too obvious to call for enlarged discussion,' the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.

The legal significance of the ULTRA intelligence to Captain McVay's court-martial is discussed below. *See infra* notes 474, 481 and accompanying text.

403. *Kaiten* torpedoes were manned mini-submarine torpedoes equipped with a periscope and capable of independent piloting toward a selected target. Once launched, *kaitens* were unrecoverable. Up to six *kaitens* could be carried on the deck of an appropriately modified attack submarine.

404. LECH, *supra* note 387, at 12, 22-23; KURZMAN, *supra* note 387, at 43, 45-47; MORISON, *supra* note 387, at 317-19. *See generally* NEWCOMB, *supra* note 387, at 10. *Underhill* was broken in half when she attempted to ram a periscope, which turned out to be a kaiten and not a Japanese submarine.

405. Shortly after the *Underhill* sinking, Lech states that "Naval Intelligence at Pearl Harbor broadcast an emergency message to all commands in the Pacific" advising them not to ram suspected submarine contacts. Whether Indianapolis received this message with more detailed information about the sinking of *Underhill* is not known. LECH, *supra* note 387, at 13.

406. *Underhill* sank at 19-20.5N, 126-42E, and *Indianapolis* at 12-02N, 134-48E, a distance of over 730 miles. *See* MORISON, *supra* note 387, at 318, 324. The relevance of *Underhill*'s demise, therefore, is not entirely clear.

407. United States v. McVay, Record of Trial, at 20-21, exhibit 1(2) (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20); NEWCOMB, *supra* note 387, at 50-51. Captain McVay's testimony at trial indicated that these three submarine contacts were already known aboard *Indianapolis* from radio traffic. *McVay* Record at 350.

Guam on 28 July. On Saturday, 28 July, a merchant vessel hauling Army cargo to Manila, the *Wild Hunter*, reported sighting a periscope seventy-five miles south of the position *Indianapolis* would pass on its track on Monday, 30 July. In a second message, *Wild Hunter* reported sighting the periscope again and firing on it. A U.S. hunter-killer group was dispatched and reported contact approximately 200 miles south of *Indianapolis's* position. *Indianapolis* received a series of messages from *Wild Hunter* and the U.S.S. *Albert T. Harris* (DE 447) hunter-killer group on 29 July,[409] leading Commander Janney, *Indianapolis's* Navigator, to comment that evening in the wardroom that Indianapolis would pass a Japanese submarine during the night.[410] Information on the *Harris* datum was available on the bridge, and the Officer of the Deck was aware of it.[411] During the night of 29 July, the radio room on *Indianapolis* reportedly received another message that two torpedoes had missed a merchant ship about 300 miles to the south.[412]

Indianapolis was a very "tender" ship, meaning that she was particularly susceptible to capsizing or sinking from flooding. Like many warships launched before the age of radar, so much equipment had been added topside that Admiral Spruance once determined her metacentric height to be less than one foot, remarking that if she ever took a clean torpedo hit she

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408. *McVay* Record at 20-24 (LCDR Alan R. McFarland, USN, who had served in various destroyers and was Commanding Officer of U.S.S. *Beche* (DD 470) at Iwo Jima and Okinawa).

409. *Id.* exhibit 15; NEWCOMB, *supra* note 387, at 55-56, 58; LECH, *supra* note 387, at 34; KURZMAN, *supra* note 387, at 52-54.

410. *McVay* Record at 68, 73; NEWCOMB, *supra* note 387, at 56; KURZMAN, *supra* note 387, at 52-53. When he dropped the night orders off on the bridge later that evening, Commander Janney commented that *Indianapolis* would pass through the area where Harris was prosecuting a submarine contact the next morning. *McVay* Record at 48, 56; LECH, *supra* note 387, at 34; NEWCOMB, *supra* note 387, at 58. Janney had apparently also listened to radio communications between ships in the *Harris* hunter-killer group as they coordinated their operations. KURZMAN, *supra* note 387, at 57.

411. *McVay* Record at 34-35, 37 (testimony of LTJG McKissick), at 48, 56 (testimony of LCDR Redmayne); KURZMAN, *supra* note 387, at 53-54, 56-57 (McVay visited the bridge one last time before retiring and chose not to inspect the message file there that contained the *Wild Hunter* message traffic).

412. *McVay* Record at 96, 99 (testimony of RM1 Moran) (a "high precedence message" received at 2100); KURZMAN, *supra* note 387, at 53.

would capsize and sink in short order.[413] Captain McVay testified to this effect at the Court of Inquiry held after the sinking of *Indianapolis:*

> Q. Is the INDIANAPOLIS class of cruisers reported as being a soft ship?
>
> A. . . . [T]hey are so tender there are strict orders not to add any weight that cannot be fully compensated for. I have heard high ranking officers state as their opinion that they feel certain this class of ship could hardly be expected to take more than one torpedo hit and remain afloat.[414]

In addition to her inherent stability-based vulnerability, the crew operated *Indianapolis* when cruising in "material condition YOKE modified," meaning that all of the watertight doors on the second deck were left open to provide ventilation to improve habitability.[415] Leaving these watertight fittings open made the ship particularly susceptible to loss by flooding.[416] Captain McVay's night orders specified that *Indianapolis* was steaming in "YOKE modified" when he retired on 29 July.[417] Captain

413. MORISON, *supra* note 387, at 319; KURZMAN, *supra* note 387, at 15; HELM, *supra* note 387, at 10-11.

414. USS Indianapolis Court of Inquiry, at 7 (Aug. 13, 1945).

415. KURZMAN, *supra* note 387, at 59; *McVay* Record at 285, 352, 362; *Court of Inquiry* at 2. The three "material conditions," XRAY, YOKE and ZEBRA (or ZED), refer to increasing degrees of watertight integrity aboard surface vessels. ZEBRA is the most secure condition, when all watertight enclosures are secured for battle. YOKE is the normal cruising condition. "YOKE modified" was an informally recognized condition less secure than YOKE.

416. *McVay* Record at 283-86 (testimony by an officer formerly in charge of the stability section at the Bureau of Ships (BUSHIPS)) ("It was obvious . . . that the water was free to flow down the second deck into the engineering spaces, so that the ship, for all practical purposes, was wide open."), 362 (McVay). The function of BUSHIPS is now performed by Naval Sea Systems Command.

417. *Court of Inquiry* at 3; *McVay* Record at 362.

McVay was fully aware of the special vulnerability of his ship to torpedo attack.[418]

On the evening of 29 July, at a time when visibility was poor, Captain McVay told the Officer of the Deck that he could secure zigzagging after twilight.[419] The ship ceased zigzagging at approximately 2000.[420] Visibility improved later that night after moonrise,[421] characterized by Captain McVay as follows: "There was intermittent moonlight at which times the visibility was unlimited."[422] The record of Captain McVay's court-martial contains extensive testimony by various *Indianapolis* crew members of improved visibility around the time of I-58's attack at midnight.[423] The

418. BUSHIPS was also aware of the use of condition "YOKE modified" on many older ships and tacitly approved it. The point is not that Captain McVay was responsible for placing his ship in a dangerous, unauthorized condition with respect to watertight integrity. The Navy has never faulted Captain McVay for cruising in "YOKE modified." The point is that Captain McVay knew that his ship was particularly vulnerable to flooding, a fact that should have counseled even greater circumspection with respect to the threat of torpedo attack. The Captain also knew that Portland-class cruisers, like *Indianapolis*, were not equipped with acoustic submarine detection equipment.

419. *McVay* Record at 31, 37-38, 186-87, 360, (McVay: "I told the officer-of-the-deck . . . that he could cease zigzagging at dark . . . ."). *See* KURZMAN, *supra* note 387, at 55-56; HELM, *supra* note 387, at 25, 45. Captain McVay did not recall specific orders on zigzagging in the night orders prepared by Commander Janney, but the Quartermaster of the Watch, Allard, did. *McVay* Record at 186-87.

420. *McVay* Record at 139, 183, 186, 192, 359, 371, and Exhibit 6(1) (Captain McVay's report to the Secretary of the Navy (SECNAV) on the loss of *Indianapolis*, 12 August 1945: "We had ceased zigzagging at 2000.").

421. *See* KURZMAN, *supra* note 387, at 57-58; NEWCOMB, *supra* note 387, at 59.

422. *McVay* Record, exhibit 6(1). Captain McVay thus described the visibility in a report to SECNAV prepared shortly after his rescue. He amended other parts of the report numerous times before submitting it, but he did not amend his statement on the visibility. *Id.* at 357. As he stated at his court-martial (when the *legal* significance of visibility had become clear), "[a]t the time I made out that official report . . . the question of visibility did not appear to me to be one of importance." *Id.* at 356. The conditions under which Captain McVay made his official report do not impugn but lend *veracity* to his description of the visibility. NAVAL COURTS AND BOARDS 142-433, ¶ 189 (1937) (Res gestae have "an element of truthfulness" because they are spontaneous, and near enough in time to the principal transaction "to preclude the idea of deliberate design or afterthought in making them." Strict contemporaneity is not required; some admissible res gestae occur days later. Each instance depends on circumstances.). *See* BLACK'S LAW DICTIONARY 1173 (5th ed. 1979) (Res Gestae: "A spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a falsehood."). Scholars of evidence have long recognized "spontaneity as the source of special trustworthiness." *See*, *e.g.*, MCCORMICK ON EVIDENCE § 288, at 836 (Edward W. Cleary et al., eds. 1984).

significance of the degree of visibility is apparent from the following standing Naval instructions in effect at the time:

I. War Instructions, Fleet Tactical Publication (FTP) 143(A):[424]

Paragraph 702: When cruising, the officer in tactical command normally orders his command to zigzag . . . whenever there is a probability of encountering enemy submarines.

Paragraph 703: Generally speaking, all vessels . . . zigzag in submarine waters.

Paragraph 704: During thick weather and at night, except on very clear nights or during bright moonlight, vessels normally cease zigzagging.

Paragraph 707: Single ships of any speed zigzag in dangerous submarine waters.

II. U.S. Fleet 10B:[425]

Paragraph 3410: Ships . . . shall zigzag during good visibility, including bright moonlight, in areas where enemy submarines may be encountered . . . . Zigzagging should normally cease after evening twilight and commence prior to morning twilight, unless the phase of the moon requires that zigzagging be continued.

III. Wartime Pacific Routing Instructions:[426]

Paragraph 342: Unescorted ships of speeds of 10 knots or more shall zigzag day and night except in heavy weather or low visibility while in open waters . . . .

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423. *See McVay* Record at 370 (the Judge Advocate's closing argument, cataloging specific references in testimony to good visibility). The previous court of inquiry had also found that visibility had been good. *Court of Inquiry,* Opinion 2. *See* LECH, *supra* note 387, at 172.

424. *See McVay* Record, exhibit 3.

425. *Id.* exhibit 4 (acknowledged by Captain McVay at 359, 362).

426. *Id.* exhibit 5. *See Court of Inquiry,* at 10 (*Indianapolis* was sailing within the area to which this instruction applied).

Shortly before midnight, submarine I-58 surfaced and spotted *Indianapolis* against the horizon.[427] I-58 dove and maneuvered into attack position, launching a fan of six torpedoes, at least two of which struck *Indianapolis* shortly after midnight. With the fire, smoke, flooding and loss of critical systems aboard the ship, the crew responded valiantly. The Captain attempted to ascertain the degree of damage before deciding whether to abandon ship. When it was clear that the ship could not be saved, the word to abandon ship had to be passed orally due to the loss of internal communications systems. *Indianapolis* did not transmit successfully a distress message, despite two reported attempts; a wave swept the Captain into the Ocean before he could verify this important detail.[428] The Pacific Ocean swallowed *Indianapolis* in less than fifteen minutes after the first blast. Of the nearly 1200 men aboard, approximately 400 went down with the ship, and 800 managed to escape into the water. Over the next four days, adrift on the ocean, 480 of the survivors of the submarine attack were preyed upon by sharks or succumbed to their wounds or the elements. Only 320 survived to be rescued.[429]

Many factors contributed to delay in the rescue of the *Indianapolis* survivors. *Indianapolis* did not successfully transmit a distress message.[430] No one took action on a Japanese kill report.[431] Personnel in the Port Director's office in Leyte did not expect the ship to arrive until 31 July, and did not report her non-arrival on 31 July, due in part to the heavy volume of ship traffic. CTF 95 and CTG 95.7 were missing message traffic that might have caused them to inquire into the failure of *Indianapolis* to report at Leyte on 31 July.[432] Vessel routing procedures in CINCPAC 10-CL-45 and COMSEVENTHFLT 2-CL-45 stated that "arrival reports shall not be made for combatant ships,"[433] which the Port Director at Leyte construed as implying that non-arrivals of combatant ships should also not be reported.[434] Personnel in the Port Director's office were responsible primarily for merchant vessels and were accustomed to irregularities in the schedules of combatant ships due to unannounced diversions ordered by the operational chain of command.[435] No procedures existed for reporting overdue combatant vessels. Personnel of COMMARIANAS and Com-

427. *Indianapolis* did not detect I-58 by radar.

428. The Navy has never challenged Captain McVay's uncorroborated account that he did not go down with his ship because he was swept over the side by a wave, notwithstanding apparent conflicts in his testimony. *See McVay* Record at 351 (". . . I abandoned ship."), 355 ("I was sucked off . . . the ship by a wave."); *Court of Inquiry*, at 5 (". . . I was washed off by a wave . . . .").

429. LECH, *supra* note 387, at 156.

mander, Philippine Sea Frontier, simply assumed that *Indianapolis* had crossed the "chop" line on 30 July and had arrived in Leyte and took no further action.[436] COMMARIANAS could have but did not reroute *Indi-*

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430. *Court of Inquiry*, Finding of Fact 13 (negative check of all stations that might have received a distress signal). In his report forwarding the record of the 13 August Court of Inquiry, Admiral Nimitz attributed blame to Captain McVay for *Indianapolis's* failure to send a distress message immediately after the explosions. *See also Court of Inquiry*, Opinion 42(b). In his first endorsement, Admiral King found that "[m]easures had not been taken in advance to provide for the sending of a distress signal in an emergency." King added:

> The failure of Commanding Officer of the *Indianapolis* to have anticipated an emergency which would require the sending of a distress message on extremely short notice and his failure to have a procedure for dispatching such a message established on board ship, undoubtedly contributed to the apparent fact that no message was sent. The responsibility for this deficiency must rest with Captain McVay. It is possible that mechanical failure might have precluded the sending of a distress message even if one had been immediately available in proper form, but the record indicates no such message was ready and that this emergency had not been anticipated.

Id.

In the Eighth Endorsement on the report of the Court of Inquiry, the Chief of the Bureau of Ships stated that evaluation of the evidence indicated that electrical power was available to the radio transmitters on *Indianapolis* for an appreciable time before she sank. The convening authorities never charged Captain McVay with an offense based on these findings.

431. Commander in Chief, Pacific, intercepted a report from I-58 that it had sunk a battleship, but the geographic grid system used by the Japanese to indicate location had not been deciphered. The Pacific command intercepted many Japanese reports bragging of spurious ship sinkings. Commander in Chief, Pacific, did not provide a copy of I-58's message to COMMARIANAS, the commander responsible for the sea area where *Indianapolis* was later discovered to have been sunk. No one gave further attention to I-58's report when a confirming SOS was not received. KURZMAN, *supra* note 387, at 94-95.

432. *See* LECH, *supra* note 387, at 249 (IG's report of 7 Jan. 1946).

433. Commander in Chief, Pacific, intended this provision to reduce message traffic and provide greater security for the movement of combat vessels. *Court of Inquiry*, Opinion 23.

434. Admiral King placed blame for the ambiguity in these instructions on Admiral Nimitz. Nimitz later accepted blame for this deficiency publicly. *See also* LECH, *supra* note 387, at 252 (IG's report).

435. Admiral King placed blame for complacency and lack of initiative on personnel in the Leyte Port Director's office. Admiral Nimitz issued a letter of reprimand and a letter of admonition to two junior officers responsible for ship arrivals at Leyte. The Secretary of the Navy later withdrew these letters. The Inspector General's (IG) report of 7 January 1946 identified the "faulty general practice of ordering combatant units to one destination and then diverting them to another without giving information of the change to all interested commands" as a contributing factor in the failure to report *Indianapolis's* non-arrival. LECH, *supra* note 387, at 249 (text of IG's report).

anapolis after receiving the *Wild Hunter* series of reports. The rescue of *Indianapolis* survivors finally commenced on 2 August after an overflying aircraft spotted men in the water. Upon being rescued by U.S.S. *Ringness*, Captain McVay insisted that *Ringness's* message report to CinCPac include the fact that *Indianapolis* was "not zigzagging," notwithstanding the thoughtful objections of the Commanding Officer of *Ringness.*[437]

On 9 August, Admiral Nimitz ordered a Court of Inquiry into the sinking of *Indianapolis* and delay in reporting her loss.[438] The Court designated Captain McVay an "interested party"[439] and two legal counsel of Captain McVay's choice represented him throughout the proceedings. The Court of Inquiry met from 13 through 20 August. In its final report, the Court placed blame on Captain McVay for failure to zigzag[440] and to transmit a distress message,[441] recommending that charges against Captain McVay be referred to a general court-martial. Admiral Nimitz disagreed with this recommendation and issued a letter of reprimand to the skipper of his former flagship instead. Upon reviewing the record of the Court of Inquiry, the Chief of Naval Operations, Fleet Admiral King, disagreed with Admiral Nimitz and recommended the court-martial of Captain McVay.[442] King's endorsement pointed to evidence of deficiencies in Captain McVay's performance more than sufficient to establish reasonable grounds to believe that offenses had been committed under applicable military law.[443] But King was not satisfied with the thoroughness of the Court of Inquiry on numerous other grounds.[444] The Secretary directed the Naval Inspector General to conduct additional investigation. After consideration of delaying a court-martial until the Inspector General's supple-

436. The Secretary of the Navy issued letters of reprimand to Commodore Gillette and Captain Granum of the Philippine Sea Frontier, but later withdrew these letters. The procedures in place did not provide for arrival reports for combatant vessels, thus COMMARIANAS and Commander, Philippine Sea Frontier, routinely assumed that combatants had arrived at their destination on time absent contrary information.

437. *See* KURZMAN, *supra* note 387, at 181.

438. The President of the three-member court was Vice Admiral Lockwood, Commander, Submarine Forces, Pacific (COMSUBPAC). The other members were Vice Admiral Murray, COMMARIANAS, and Rear Admiral Francis Whiting.

439. *Court of Inquiry*, at 2. The rights of an "interested party" at a court of inquiry included: to be present, to examine witnesses, to introduce new matter, to be represented by counsel, to testify (or not to testify) at the party's option. NAVAL COURTS AND BOARDS 357, ¶ 734 (1937). The record of the Court of Inquiry reflects that Captain McVay was allowed to exercise freely all of these rights.

440. *Court of Inquiry*, Opinions 3 ("That in view of all the attendant circumstances including Fleet doctrine, sound operational practice required *Indianapolis* to zigzag on the night in question.") and 42(a).

441. *Id.* Opinions 40, 42(b).

mentary investigation could be completed, Admiral King recommended that Secretary Forrestal refer charges to a court-martial immediately. The Judge Advocate General proposed charging Captain McVay with negligently suffering a vessel to be hazarded (failure to zigzag) and culpable inefficiency in the performance of duty (delay in ordering abandon ship).[445] After a well-documented deliberative process, Secretary Forrestal referred these charges on 29 November 1945.[446]

Captain McVay's court-martial was conducted at the Washington Navy Yard from 3-19 December 1945 and was open to the public.[447]

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442. When invited to comment on the Court of Inquiry and endorsements before the disposition of charges had been determined, Captain McVay declined to do so in a letter to the Chief of Naval Personnel, dated 7 November 1945. This letter is included with the official record of the Court of Inquiry. Proponents of Captain McVay have criticized Vice Admiral Murray's participation in the investigation, since *Indianapolis* sank within COMMARIANAS's area of responsibility. Neither Captain McVay nor his counsel challenged the composition of the Court of Inquiry, during the inquiry or afterwards. Neither McVay nor his counsel challenged the court's findings. No legal irregularity appears in the record of the Court of Inquiry. Courts of inquiry are investigative tools and were not legally related to courts-martial under the Articles for the Government of the Navy. No defect in the court of inquiry would have invalidated a subsequent court-martial. Humphrey v. Smith, 336 U.S. 695, 698 (1949). Even today, when such formal investigations are required before charges may be referred to a general court-martial, defects in a pretrial investigation are not jurisdictional and are waived if not raised by the accused before trial. *See* 10 U.S.C.S. § 832(d) (Law. Co-op. 1997) (UCMJ art. 32(d)); MCM, *supra* note 113, R.C.M. 405(k). *Compare* Humphrey v. Smith, 336 U.S. 695, 700 (1949) (Failure to conduct the pre-trial investigation required by Article 70 of the Articles of War does not affect jurisdiction of general courts-martial or subject them to reversal).

443. On 22 January 1946, the Judge Advocate General reviewed the record of the Court of Inquiry and determined that its proceedings, findings, opinions and recommendations, and the actions of the convening and reviewing authorities, were legal. Memorandum, Third Endorsement, The Judge Advocate General, Dep't of Navy (22 Jan. 1946) (JAG:I:JHK:nrc (SC)A17-24/CA35 Doc. No. 190398) endorsing the USS *Indianapolis* Court of Inquiry Report.

444. For example, he wanted to know why route "Peddie" was chosen, why no escort was assigned, why CTG 95.7 did not receive CinCPac's tasking message, and whether survival equipment should be designed more effectively. Kurzman suggests that King wanted to buttress the Navy's case against McVay by additional investigation. KURZMAN, *supra* note 387, at 215. An honest reading of King's endorsement, however, reveals that King had already decided that sufficient evidence existed to support charges against Captain McVay; King urged additional investigation into other matters.

445. The Judge Advocate General reviewed the record of the Court of Inquiry and the supplemental investigation conducted by the IG, and he met with the IG to consider what charges the evidence might support. He determined that the charges forwarded to the Secretary of the Navy were "the only ones that can be supported." Memorandum, The Judge Advocate General to the Secretary of the Navy (29 Nov. 1945).

McVay selected his own counsel,[448] Captain John Cady, joined by two assistant defense counsel.[449] The seven-member court was regularly com-

446. Kurzman's book is replete with melodramatic conjecture on the motivations of Fleet Admiral King and Secretary Forrestal and the interpersonal dynamics between King, Denfield (CHNAVPERS), Colclough (JAG), Snyder (IG) and Secretary Forrestal with respect to the decision to court-martial McVay. KURZMAN, *supra* note 387, at 189-91, 214-16, 249-53. *See also* LECH, *supra* note 387, at 174-201. For example, Kurzman suggests that Forrestal "had to avoid a scandal that might threaten his chances to keep the Navy independent" (KURZMAN, *supra* note 387, at 215), that he was reluctant "to defy Admiral King" (*id.* at 216) or "to lock horns" with him (*id.* at 253), describing the Secretary's actions with respect to the court-martial as taken "reluctantly" (*id.* at 216), "anxiously" (*id.* at 248), as he "clung" to the thread of a rationale (*id.* at 249), and "grappled with . . . doubts" (*id.* at 250) with a "troubled conscience" (*id.* at 249), and "deeply disturbed" (*id.* at 248). But after all, some "lower-grade officer" had to be punished to protect the Navy and the admirals (*id.* at 253). Admiral King could "never forget" that he had been "stained" once in his youth by a reprimand from McVay's father (Admiral McVay II), and now again "he was being haunted" by a McVay of the same name—"the admiral's son!" (*id.* at 191). "Something had to be done" (*id.* at 191). King, believing that McVay "would understand the necessity of sacrifice" (*id.* at 215), decided to "demolish" (*id.* at 215) him, first urging additional investigation to add more "flesh to the bones" of the case (*id.),* then, worried that more investigation might exonerate McVay and "troublemakers might demand that someone else be punished" (*id.* at 216), he urged that the court-martial proceed immediately (*id.* at 216). After all, "King wanted scapegoats" (*id.* at 253) and the "rotten system" (*id.* at 254) (the "system" that led the fight against the Japanese back across the Pacific) "had to depend on scapegoats to protect arrogant admirals like himself" (*id.* at 254). Secretary Forrestal, who "had been trying to appear tough since childhood," trying "to assert his manhood" (*id.* at 189), "powerless and dependent on others" (*id.* at 190), was unable to resist the wicked counsel of his ambitious partner. After all, Forrestal "feared there would be screams for blood, perhaps even his own." (*id.* at 190) Thus, the tortured pen of Kurzman's Forrestal was driven across the bottom of the charge sheet that sent Captain McVay, the "Toy of Treachery" (*id.* at 261), to a general court-martial. Lech is substantially more temperate in his description of the Navy Department's staffing of issues associated with the McVay court-martial, but he also imagines sinister motives from strikingly dispassionate documents. *See, e.g.*, LECH, *supra* note 387, at 180.

447. Proponents of McVay purport to find something sinister and prejudicial in the fact that his court-martial was open to the public (*e.g.*, KURZMAN, *supra* note 387, at 252), notwithstanding the fact that section 368 of NAVAL COURTS AND BOARDS, at 205 (1937), required that courts-martial sessions be conducted publicly, and the Sixth Amendment of the U.S. Constitution guarantees an accused the right to a "speedy and public trial." The Navy declassified numerous documents to ensure that Captain McVay's court-martial could be conducted publicly. *See* Letter from Judge Advocate Captain Ryan to The Secretary of The Navy (Nov. 28, 1945) (ltr TJR:lja 00-McVay, C.B./A17-20). Under current Rule for Courts-Martial 806, public trials are still the norm. MCM, *supra* note 113, R.C.M. 806, and Appendix 21, at A21-45. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (public has a First Amendment right to attend criminal trials). Public trials are generally thought to provide greater assurance that procedural rights of the accused will be observed. *E.g*., United States v. Hershey, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986) (public scrutiny of courts-martial promotes fairness of the process).

posed in accordance with the Articles for the Government of the Navy, consisting of Rear Admiral Wilder Baker (President), two commodores and four captains, all with considerable combat experience. On 3 December, the defense requested that trial be delayed until the next day, then reported it was ready to proceed on 4 December. The prosecution opened, called thirty-nine witnesses and introduced fifteen exhibits. Among the witnesses, the prosecution called was Commander Mochitsura Hashimoto, the Commanding Officer of submarine I-58. After defense objections to Hashimoto's legal competence to testify,[450] the court concurred with the judge advocate that there was no basis in law to preclude testimony by Hashimoto.[451] Hashimoto's testimony was probably more favorable to Captain McVay than prejudicial, because he stated that zigzagging would not have made an appreciable difference in his attack.[452] The prosecution rested on 13 December. The defense opened on 14 December, called eighteen witnesses (including Captain McVay), and introduced one exhibit. A

448. United States v. McVay, Record of Trial, at 1 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20); NEWCOMB, *supra* note 387, at 192.

449. Captain D. C. White joined the defense as a fourth counsel and technical adviser on 13 December. *McVay* Record at 263.

450. *Id.* at 257 ("His nation is not of Christian belief."), 258 ("There are numerous questions as to the veracity of the Japanese as a race.").

451. *Id*. at 257-58, 264 (applicable law on the competence of witnesses and alternative oaths to be administered to them). *See* NAVAL COURTS AND BOARDS 163, ¶ 243 (1937) (presumption in favor of the competency of witnesses; burden of proof of incompetency is on the objecting party; matters in objection that do not establish incompetency of a witness may still affect his credibility; in preference to complete exclusion of witnesses, the court as factfinder should hear testimony and decide what credibility and weight it deserves). On the authoritativeness of the rules of evidence in Naval Courts and Boards, see NAVAL COURTS AND BOARDS 2, 130 (1937) (endorsed as authoritative by President Franklin D. Roosevelt, 5 Mar. 1937) ("No statute lays down the rules of evidence to govern naval courts-martial and the decisions of the department on such a question are the highest authority for a naval court-martial to follow."). The general rule of liberally allowing testimony and leaving issues of competence to the jury parallels civil practice. *See*, *e.g*., Fed. R. Evid. 601 (providing that "[e]very person is competent to be a witness except as otherwise provided in these rules."). *See* Fed. R. Evid. 601 (Advisory Committee's note). The Advisory Committee states that "this general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article," noting that issues of witness competency go to weight because "[a] witness wholly without capacity is difficult to imagine." Capacity to testify as a witness is not an issue of race, religion or alienage, but of physical or mental capacity to observe and communicate information.

452. Hashimoto's testimony also indicated that visibility was sufficiently good for him to track *Indianapolis* visually for over 27 minutes from the time of his first sighting at an approximate range of 10,000 meters until he launched torpedoes at a range of approximately 1500 meters. *McVay* Record at 267-69 (ranges and time), 275 (radar was not used because visibility was good), 276 (continuous periscope observation). *Cf.* HELM, *supra* note 387, at 207.

seasoned submarine commander called as an expert by the defense, Captain Glynn Donaho, testified that zigzagging would not defeat a proficient submarine attack. Captain Donaho admitted on cross-examination, however, that zigzagging did make targeting more difficult and could increase the chance of evading torpedoes after they had been launched. The defense rested on 18 December. Both sides made closing arguments and the court retired to deliberate.

The court found Captain McVay guilty of Charge I, through negligence suffering a vessel to be hazarded, and not guilty of Charge II, culpable inefficiency. After a brief sentencing hearing, at which the defense introduced Captain McVay's outstanding record of service, the Court sentenced him to lose 100 lineal numbers in his temporary grade of Captain and 100 lineal numbers in his permanent grade of Commander.[453] The members of the Court joined unanimously in recommending that the reviewing authority exercise clemency, in view of Captain McVay's outstanding previous record. In accordance with ordinary post-trial procedures, the Judge Advocate General reviewed the record of trial and determined that the proceedings, findings, and sentence were legal. The Chief of Naval Personnel and Admiral King recommended that the Secretary remit the sentence and restore Captain McVay to duty. On 20 February 1946, Secretary Forrestal approved the proceedings, findings and sentence, but he ordered that the sentence be remitted in its entirety and that Captain McVay be returned to duty.

Reassigned as Chief of Staff for Commander, Eighth Naval District, New Orleans, Captain McVay served in that capacity until he retired with 30 years of service on 30 June 1949. He was placed on the retired list in the grade of Rear Admiral. Rear Admiral McVay committed suicide on 6 June 1968, leaving no suicide note or other explanation.

1. The Bertolet Letter

Recent inquiries from Representatives Floyd Spence and Timothy Holden enclosed an unsigned letter from "Leon J. Bertolet," indicating that he was a surviving crew member of *Indianapolis*.[454] The letter from Mr. Bertolet stated numerous specific grievances with the treatment of Captain McVay. The letter stated that Captain McVay had been convicted of "der-

453. Loss of lineal numbers places an officer lower in the order of seniority among officers of the same grade and could delay eligibility to participate in the selection process for promotion to the next grade.

eliction of duty" and had been reduced in rank. The Uniform Code of Military Justice first introduced the offense of "dereliction of duty" in 1950.[455] Captain McVay's court-martial convicted him of suffering a vessel to be hazarded, and did not reduce him in rank but sentenced him to lose numbers, a sentence never imposed. Mr. Bertolet's letter also attributed Captain McVay's suicide to the Navy's use of him as a "scapegoat." Critics of the McVay court-martial have made this allegation before but have never presented any evidence to support it. It is equally possible that Captain McVay succumbed to his own sense of personal responsibility for the *Indianapolis* tragedy, or that he was distressed over some completely unrelated issue. The letter also states that crew members of *Indianapolis* have petitioned Congress to have Captain McVay's rank restored. Not only was Captain McVay never reduced in rank, but he was retired as a Rear Admiral. Finally, Mr. Bertolet's letter alleged that Congress's failure to act on requests from "we survivors"[456] is attributable to shame over *Indianapolis's* connection to the atomic bombing of Japan. This allegation appears to have been raised for the first time in Mr. Bertolet's letter.

2. Appropriateness of the Navy's Disposition of Captain McVay's Case

Congressman Jacobs' letter raises broader issues of the propriety and legality of the Navy's disposition of Captain McVay's case. Orion Pictures has purchased the film rights to Dan Kurzman's novel, *Fatal Voyage*, and more broad-based inquiries can be expected if the film is completed and released.[457] Popular accounts of Captain McVay's court-martial and the decision-making process that led to the referral of charges do not reflect understanding of applicable law, the uniqueness of command accountability and the discretion of courts-martial convening authorities in the military. An in-depth exposition of the unique military law applicable to

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454. The surname "Bertolet" does not appear in *Indianapolis's* final sailing list of 30 July 1945 (HELM, *supra* note 387, at 213-43; KURZMAN, *supra* note 387, at 287-300), nor in the list of survivors (NEWCOMB, *supra* note 387, at 285-94; KURZMAN, *supra* note 387, at 287-300). The surname "Bertolet" does not appear in the official crew lists in exhibit 20 of the Court of Inquiry. Mr. Bertolet must have served aboard *Indianapolis* at some time before her final voyage.

455. The comparable offenses that existed under the Articles for the Government of the Navy were "neglect of duty" and "culpable inefficiency in the performance of duty." *See supra* notes 151-53.

456. *See supra* note 454.

457. *E.g.*, Bonnie Britton, *Film May Clear Reputation of Warship Captain*, INDIANAPOLIS STAR, Aug. 3, 1995, at C01; *Orion Pictures Looks Forward to Making "Fatal Voyage,"* BUSINESS WIRE, Aug. 1, 1995.

Captain McVay's case has long been needed to demonstrate the legality and appropriateness of the Navy's disposition of charges against Captain McVay.

B. The Doctrine of Command Accountability

Kurzman's research revealed that it had occurred to Captain McVay, an experienced naval officer, that he would be called to account for the sinking of *Indianapolis* as early as the moment he watched the ship disappear beneath the surface of the sea,[458] an expectation he later repeated to the *New York Times*: "I was in command of the ship and I am responsible for its fate."[459] As he stated when testifying at his court-martial, "I know I can not shirk the responsibility of command."[460]

The traditional scope of duties and accountability that attach to command at sea has no parallel in the military or civilian spheres. Navy regulations in effect in 1945 provided that the commanding officer "is always responsible for the safe conduct of his ship."[461] Current Navy regulations have continued the tradition of strict command accountability:

> The responsibility of the commanding officer for his or her command is absolute . . . . While the commanding officer may, at his or her discretion, . . . delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, well-being and efficiency of the entire command.[462]

The doctrine of accountability holds that officers in command may be made to answer for failures within their commands, whether they were active participants in a mishap or not.[463] The doctrine applies most

458. KURZMAN, *supra* note 387, at 92 ("[I]t would be much easier if I go down. I won't have to face what I know is coming after this.").

459. *Id.* at 211; also quoted in LECH, *supra* note 387, at 161.

460. United States v. McVay, Record of Trial, at 362 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20).

461. Navy Regulations, art 880(5), *quoted in McVay* Record at 372.

462. Navy Regulations, art. 0802 (1990). *See* Navy Regulations, art. 182(6) (1920) (similarly absolute).

emphatically to command at sea, and has been variously expressed in naval writings. For example:

> The Department considers that the good of the Naval service requires the commanding officer of every Naval vessel to be held to very strict responsibility for the safety of the ship and its officers and men.[464]

> A vital element in the equipment of an officer for command is a complete appreciation on his part of his full responsibility for the safety of his ship at all times.[465]

As Senator Malcolm Wallop explained:

> Th[e] principle of command responsibility is the bedrock upon which all military discipline rests. It is particularly prominent in the U.S. Navy, which holds the commander of a vessel accountable if his ship runs aground or collides with another ship, even if he is not on the bridge at the time.[466]

The doctrine of command accountability is most strictly applied to command at sea in recognition of the fact that naval vessels frequently operate independently, far from sources of assistance, in an environment

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463. *See, e.g.*, United States v. Day, 23 C.M.R. 651, 656-57 (N.M.B.R. 1957) (conviction of commanding officer for negligently hazarding a vessel affirmed, notwithstanding matters not reported to him by his subordinates, including their failure to post an anchor watch, failure to inform him of receipt of two weather messages, and failure to inform him of worsening of the weather). In accordance with Navy Regulations and "many years of custom and usage," "the responsibility of the commanding officer for his command is absolute . . . ." *Id.* at 657. In accordance with the traditional rule, the failure of Captain McVay's subordinates to brief him on the *Wild Hunter*/U.S.S. *Harris* radio traffic, to inform him of changes in the weather, or to commence zigzagging in accordance with fleet doctrine, would not be exculpatory for him as the commanding officer of *Indianapolis.* In the *Day* case, the court specifically rejected the commanding officer's argument that he should not be held accountable for the errors of subordinate officers who had formal training, had sufficient experience to test their training, and had demonstrated ability to carry out their assigned duties.

464. NAVAL DIGEST, *Navigation*, para. 16, at 410 (1916), *quoted in United States v. MacLane*, 32 C.M.R. 732, 735 (C.G.B.R. 1962) and referred to as a source for the underlying standards in the offense of hazarding a vessel in MANUAL LEGAL BASIS, *supra* note 151, at 265.

465. Court-Martial Order 2, at 5 (1924), *quoted in MacLane*, 32 C.M.R. at 735.

466. Letter from Senator Malcolm Wallop to Mr. & Mrs. Edward Kimmel (Jan. 31, 1992).

made hostile by the elements or by enemies. Life at sea is surrounded by dangerous forces on the ship and around it. Mistakes and omissions can mean the death of all hands on board. The doctrine of command accountability inculcates vigilance, circumspection, independence, self-sufficiency, resourcefulness and diligent husbanding. It forces the commanding officer to turn every opportunity to his advantage, to ensure that his ship is in the optimum material condition possible, and that his subordinates are well-trained, disciplined and properly qualified to assume duties entrusted to them. No one is in a better position to ensure the safety of a ship than its commanding officer. He must take aggressive measures to ensure the adequacy of off-ship support and on-ship proficiency, and not be lulled into a sense of complacency based on confidence in others. A commanding officer operating under such a principle is more likely to achieve the ultimate goal that lies behind the accountability doctrine—maximum possible readiness and efficiency. No less should be expected when the object of command at sea on a ship-of-the-line is war. "The complete responsibility of a commanding officer for his command has always been one of the cornerstones of any naval service."[467] Captain McVay's routing instructions for the last voyage of *Indianapolis* cautioned that "Commanding Officers are at all times responsible for the safe navigation of their ships."[468]

While it is true that off-ship support activities should also be held to high standards, it would unacceptably dilute the principle of command accountability to allow commanding officers of warships to cite the collateral shortcomings of others as an excuse for their own, separate deficiencies. Accountability is not an all-or-nothing concept. Each commander is separately responsible for his own deficiencies, without regard to the culpability of others or the discretionary decisions made by the chain of command in deciding what measures to take in the wake of a multiple-fault disaster. The doctrine of command accountability, however, does not *require* that punishment be imposed for command defects; instead, it exposes a commander to the *risk* of punishment or administrative sanctions, based on the circumstances of the case and the discretion of his superiors. Sanctions available to superior commanders range from private censure through relief from command and nonjudicial punishment to referral of charges to a court-martial. Moreover, different superior officers have different disciplinary and enforcement policies, and they are afforded dis-

467. United States v. Sievert, 29 C.M.R. 657, 668 (N.M.B.R. 1959).

468. United States v. McVay, Record of Trial, exhibit 1 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20).

cretion by law to make distinctions among different cases based on the circumstances of each case.[469] Captain McVay's comments upon his fate after the sinking of *Indianapolis* demonstrated that he well understood the culture of command at sea in the Navy.

C. Through Negligence Suffering a Vessel of the Navy to be Hazarded

Among the offenses triable by courts-martial are many unique "employment-related" failures alien to the civilian setting, such as disobedience of orders, dereliction of duty, and improper hazarding of a vessel.[470] From the earliest days of our nation, criminal liability has existed for one who negligently hazarded a vessel of the United States.[471] The offense of negligently hazarding a vessel and the strict doctrine of accountability associated with command at sea are closely related. The doctrine of accountability defines the duties of a commanding officer, breach of which may lead to criminal liability for negligently hazarding his vessel. As

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469. The principles of prosecutorial discretion and selective prosecution are discussed more fully at *infra* notes 474, 481, and section III(D).

470. Parker v. Levy, 417 U.S. 733, 749 (1974) (specifically listing UCMJ article 110, improper hazarding of a vessel, as an example of unique, military-only offenses); United States v. Day, 23 C.M.R. 651, 655 (N.M.B.R. 1957) (hazarding a vessel "is a statutory offense . . . peculiar only to the armed forces"). Quoting from numerous precedents, the Supreme Court in *Parker v. Levy* stated that the superficially vague standards expressed in many military-only offenses must be understood in light of the unique customs and usages of the military:

> [T]o maintain the discipline essential to perform its mission effectively, the military has developed what may not unfitly be called the customary military law or general usage of the military service . . . . Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to . . . seemingly imprecise standards . . . . [O]f questions not depending upon the construction of . . . statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.

417 U.S. at 743-48 (citations omitted).

471. Article 42 of the first Articles for the Government of the Navy, 1 Stat. 713 (1799), included a hazarding offense substantially similar to the offenses currently included in the UCMJ.

stated in *United States v. MacLane*,[472] a case involving conviction of a commanding officer for negligently hazarding a vessel,

> It seems evident that the highest standards of performance of duty are demanded for the ship's safe operation; standards consonant with a full understanding of the substantial risks of loss of life and damage involved. The duty is to take all necessary precautions; to exercise due care and eternal vigilance. The criminal liability imposed is justified from the preventive point of view by the harmful conduct it seeks to deter.[473]

Captain McVay was convicted of an offense under Article 8(11) of Articles for the Government of the Navy, described as follows: "Such punishment as a court-martial may adjudge may be inflicted upon any person in the Navy . . . . Who . . . , through inattention or negligence, suffers any vessel of the Navy to be . . . hazarded." The complete list of "elements" that the government was required to prove to establish guilt of the hazarding offense at Captain McVay's trial was simple:

1. That Captain McVay was "in the Navy;"

2. That he had a duty (*i.e.*, safety of his ship/antisubmarine evasive maneuvering);

3. Which he failed to discharge in the manner expected of a reasonably prudent person in his circumstances;

4. Which failure proximately caused

5. A vessel of the Navy

6. To be hazarded.

Elements 1 and 5 were easily established. Captain McVay was "in the Navy" and *Indianapolis* was a "vessel of the Navy." The core of the

472. 32 C.M.R. 732 (C.G.B.R. 1962).
473. *Id.* at 735.

McVay case was negligence in failing to zigzag, and whether this failure "hazarded" the ship.[474]

1. Negligence

Elements 2 and 3 reflect the traditional legal formula for "negligence," a concept derived chiefly from the law of torts.[475] In the context

474. *See id.* at 735 ("The bare essentials for a conviction . . . are: proof that the vessel was hazarded, and proof that the hazarding was the proximate result of the accused's negligence."). A criminal trial is not a far-ranging investigation of a whole sequence of events; it is a focused inquiry into specific charges against a specific individual. The "elements" of a criminal offense, and of any affirmative defenses raised, define the scope of relevant evidence for trial. The government presents evidence that tends to establish the elements of the offense, or that tends to refute any affirmative defense raised by the accused. The accused presents evidence that tends to refute the existence of any of the elements of the offense, or that tends to establish an affirmative defense, such as alibi or entrapment. Evidence at Captain McVay's court-martial was properly limited to matters relevant to the specific charges referred for trial. *See McVay* Record at 68-69, 187; NEWCOMB, *supra* note 387, at 188, 204, 220. Critics of Captain McVay's court-martial have complained that the lead defense counsel, Captain John Cady, did not explore the fault of others for the sinking or delay in rescue, and he missed opportunities to elicit testimony about ULTRA intelligence. *E.g.*, LECH, *supra* note 387, at 196-198; von Doenhoff, *supra* note 398, at 8, 14. First, the collateral fault of others for such matters as the garbling of a message or the ambiguity of an order not to report the arrival of combatant vessels would have been irrelevant to the charges against Captain McVay. There is no defense recognized by criminal law that allows the accused to assert his innocence on the grounds that others were guilty of different misconduct. The concept of "comparative negligence" in civil law, by which degrees of fault are assigned to multiple actors in a single mishap, has no place in criminal law. Second, information about the sinking of U.S.S. *Underhill* and the ULTRA intelligence were irrelevant precisely because the government could not show that Captain McVay had reason to be aware of that information. The question at trial was whether Captain McVay was negligent, given what he did know or should have known, not whether he would have acted differently if he had been provided more information. The gist of Captain McVay's defense was that he made a reasonable mistake of fact about the existence of a submarine threat. To support such a defense, Captain Cady very adroitly elicited testimony from Captain Naquin that he considered the risk of enemy submarine activity to be "very slight," and from Captain Granum that he considered the risk to be "[n]o more than a normal hazard that could be expected in wartime." *McVay* Record at 329-30, 332; LECH, *supra* note 387, at 195-97. This testimony tended to *negate* one of the key "elements" of the government's case—that Captain McVay should have known a sufficient submarine threat existed to warrant zigzagging in accordance with fleet doctrine. However, the court considered the information available to Captain McVay and found it sufficient to indicate the presence of a submarine threat. Critics of Captain McVay's court-martial have demonstrated profound misunderstanding of fundamental principles of criminal law, suggesting that everyone's responsibility for the whole *Indianapolis* tragedy should have been aired at Captain McVay's court-martial. The issues on trial under the hazarding charge at Captain McVay's court-martial were limited to the "elements" of the offense, listed above.

of hazarding a vessel, negligence means the following:

> [F]ailure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order.[476]

Captain McVay's "duty" as the commanding officer of a warship, and whether he fell below the standards expected of a reasonably prudent commanding officer in executing that duty, were questions that could only be

475. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 282 ("Negligence is conduct which falls below the standard established by law for the protection of others . . . ."), § 283 (The standard of conduct expected is that of a "reasonable man under like circumstances."), § 284(b) (failure to perform an act for the protection of others "which the actor is under a duty to do") (1977).

476. MCM, *supra* note 113, ¶ 34c(3) (defining terms applicable to UCMJ article 110, improper hazarding of a vessel). UCMJ article 110 derived from the hazarding offenses in the Articles for the Government of the Navy. MANUAL LEGAL BASIS, *supra* note 151, at 265; United States v. Roach, 26 M.J. 859 (C.G.C.M.R. 1988), *aff'd*, 29 M.J. 33 (C.M.A. 1989); United States v. Adams, 42 C.M.R. 911 (N.M.B.R. 1970).

answered by application of the customs and usages of the Navy, as determined by the senior officer members of the court-martial.[477]

As discussed above, Captain McVay's duty as commanding officer was extremely demanding. Navy Regulations provided specifically that the commanding officer "is always responsible for the safe conduct of his ship."[478] Compliance with fleet doctrine on anti-submarine evasive maneuvering was part of Captain McVay's duty to take precautions for the safety of his ship. Noncompliance with this doctrine was the specific breach of duty alleged in the charge before Captain McVay's court-martial. Because applicability of the fleet doctrine on evasive maneuvering was contingent upon visibility and the presence of a submarine threat, the prosecution opened a detailed factual inquiry into these matters at trial.[479] Ultimately, the judgment of the court reflected a conclusion that the conditions of visibility and indications of a submarine threat were such that *Indianapolis* should have been zigzagging.

Under traditional concepts of negligence, an individual generally may not be held responsible for information that a reasonable person under similar circumstances would not have reason to possess.[480] Whether *Indianapolis* should have been zigzagging depended on whether sufficient

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477. *See, e.g.*, United States v. MacLane, 32 C.M.R. 732, 738 (C.G.B.R. 1961):

> Since the officers of the service are the best judges of what constitutes due care and prudence aboard a vessel . . . , it is peculiarly within the province of the court-martial to say whether or not on the evidence adduced in the particular case before it, blameworthy and punishable negligence existed.

The civil courts show great deference to court-martial determinations based on customs and usages of the service. *See* Parker v. Levy, 417 U.S. 733, 743-48 (1974); Carter v. McClaughry, 183 U.S. 365, 401 (1902); Smith v. Whitney, 116 U.S. 167, 178 (1886) ("[O]f questions . . . depending upon . . . unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.").

478. *McVay* Record at 372 (quoting NAVREGS 880(5)).

479. *See supra* notes 407-12, 422, 423 & *infra* note 482.

480. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) (Official Draft and Revised Comments 1985) (defining negligence in terms of circumstances knowable to the accused); BLACK'S LAW DICTIONARY 933 (5th ed. 1979). The definition of negligence applicable to improper hazarding of a vessel included consideration of the unique circumstances of the accused. NAVAL COURTS AND BOARDS 133, ¶ 153 (1937) ("The degree of care and caution to avoid mischief required to save from criminal responsibility . . . is that which a man of ordinary prudence would have exercised *under like circumstances*." (emphasis added)). The same individualized, circumstantial standard still applies. MCM, *supra* note 113, ¶ 34c(3) (defining terms applicable to UCMJ article 110, improper hazarding of vessel).

information was available to indicate the existence of a submarine threat. Although it is entirely consistent with traditional notions of the duties of a commanding officer to charge Captain McVay with knowledge of intelligence available on board his own ship, it would have been unreasonable to attribute knowledge of the ULTRA intelligence to him. Evidence that would have indicated the existence of a submarine threat was properly limited at Captain McVay's court-martial to those matters *which he had reason to know.* Evidence of the ULTRA intelligence would have been irrelevant and inadmissible.[481] Ultimately, the court-martial found sufficient evidence of a submarine threat in the information available to Captain McVay, as cataloged by the Judge Advocate in his closing argument.[482] The independent committee of attorneys that reviewed Captain McVay's court-martial for Senator Lugar examined the Record of Trial and found that sufficient evidence existed to support the judgment of the court:

> There was sufficient evidence to conclude that Captain McVay knew or should have known of a hostile submarine presence in the immediate vicinity of the course of the *Indianapolis* as it was proceeding to the Philippine Islands.
>
> . . . . There was sufficient evidence to conclude that Captain McVay was not in compliance with the naval regulation regarding "zigzagging" given the weather conditions on the night of the incident.[483]

The remaining issue is whether Captain McVay's failure to discharge his duty caused *Indianapolis* to be hazarded.

2. Hazarding by Failure to Zigzag

Whether a ship is hazarded or "at risk" at a particular time under particular circumstances is a question of external fact unrelated to individual culpability.[484] A ship is "hazarded" if it is placed at risk, without regard to ultimate harm.[485] Whether *Indianapolis* was "hazarded" by failure to zigzag, then, is not a question of ultimate blame for her sinking.[486] Based on evidence of submarine activity in the vicinity of route "Peddie," including I-58, the members of Captain McVay's court-martial found that *Indianapolis* had been placed at risk, or hazarded (element 6). *Indianapolis* was hazarded before I-58 detected her, and would have been hazarded if I-58 had never detected her. This perpetrator-neutral fact could have been the result of any number of contributing causes, but the only question of cau-

sation before the court was whether failure to zigzag was, legally, the proximate cause of hazarding (element 5).[487] The question was *not* whether

481. Failure to provide Captain McVay ULTRA intelligence, or a sanitized summary of it, might indicate that others shared some measure of fault for the ultimate fate of *Indianapolis*, but the untried fault of others would not have been exculpatory for Captain McVay under the charges brought against him. A court-martial, like any criminal trial, is not a trial of an incident but of specific charges brought against an individual. The potential contributory fault of others in the Indianapolis tragedy was not on trial at Captain McVay's court-martial. The only possible purpose for introducing ULTRA evidence in defense would have been to urge the members of the court-martial to "punish" the Navy for not court-martialling others by acquitting Captain McVay—manifestly contrary to their duty to try the specific charges before them, based on evidence relevant to those charges. It is often true that in a single course of events many separate offenses by many actors can be identified. The law does not excuse some actors for their own, separate offenses even when the greater offenses of others go unpunished. For example, in multiple perpetrator criminal cases, the acquittal or non-prosecution of principal offenders does not entitle accessories to acquittal or the dismissal of charges based on their own, separate conduct. *See* Standefer v. United States, 447 U.S. 10, 14-26 (1980) (discussing the prevailing rule in the states, adopted by federal legislation as early as 1909); 18 U.S.C.S. § 2 (Law. Co-op. 1997); United States v. Sievert, 29 C.M.R. 657, 664-65 (N.M.B.R. 1959); WAYNE R. LAFAVE AND AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 517 (1972) ("[I]t is now generally accepted that an accomplice may be convicted notwithstanding the fact that the principal in the first degree has been acquitted or has not yet been tried."). *Cf.* 10 U.S.C.S. § 877 (Law. Co-op. 1997) (UCMJ art. 77). The multiple perpetrator severability rule has established that even minor actors may not avoid liability for their own conduct by citing the greater fault of others in the same offense. The concept of "separate fault" is even stronger where separate offenses are involved. The following examples might help to explain the irrelevance to Captain McVay's hazarding offense of the failure to provide ULTRA intelligence:

1. The driver of an automobile is traveling at twice the speed limit when a maintenance worker suddenly emerges in the middle of the road from a manhole cover and is killed by the driver's automobile. Other maintenance workers who were responsible for placing caution signs and barricades along the road had failed to do so. The driver could still be fined for speeding or reckless driving without regard to investigation or prosecution of any of the parties for negligent homicide. Whether the workers responsible for placing the signs and barricades were tried for their dereliction or not would have no bearing on a speeding or reckless driving charge. Even if the negligent workers were tried and convicted for failure to place barricades, proof of their offenses would not be exculpatory with respect to a speeding or reckless driving charge.

2. The commanding officer of a submarine is conning the submarine at a speed and depth that places the submarine outside the peacetime "safe-operating envelope" (SOE) prescribed by submarine operational doctrine when the submarine strikes an uncharted submerged mountain and is seriously damaged. Information is later discovered that the National Imagery and Mapping Agency had hydrographic survey information indicating the presence of the mountain and negligently failed to include the mountain on charts provided to the submarine. The commanding officer can still be convicted of negligently hazarding his vessel without regard to the collateral fault of cartographers, based solely on failure to observe the SOE. The offense of hazarding a vessel is complete if the vessel was negligently placed *at risk of harm*, without regard to any specific harm that resulted.

failure to zigzag was the proximate cause of *Indianapolis's* sinking, but whether failure to zigzag placed Indianapolis at risk.

Whether failure to zigzag placed *Indianapolis* at risk depends on whether zigzagging contributes to the survivability of a ship with respect to submarine attack. The testimony of Commander Hashimoto and Captain Donaho was equivocal on this question. Captain McVay's counsel attempted to show that zigzagging would not effectively *preempt* submarine attack. The absolute effectiveness of zigzagging, however, was not the issue. The real issue was whether failure to zigzag increased the likelihood or risk of effective submarine attack. Standing fleet doctrine on zigzagging[488] reflected the institutional judgment of the Navy that zigzagging did contribute to ship safety in submarine waters—a powerful element of proof.

3. The Value of Zigzagging

Whether proficient submarine commanders can still effectively prosecute a zigzagging surface target does not mean that zigzagging is useless. Zigzagging makes submarine targeting of a surface vessel more difficult, and a zigzagging target can evade torpedoes once they are fired.[489] Zigzagging increases the chances of survival. A commanding officer should take every possible tactical measure to increase the opportunity for his ship

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482. *See McVay* Record at 370: the Intelligence Annex to the Routing Instructions; the *Wild Hunter/*U.S.S. *Harris* sub-prosecution reports that Captain McVay admitted were received on board *Indianapolis* on 28 July; the Quartermaster's testimony that Captain McVay's night orders included mention of a submarine in a position that *Indianapolis* would cross by morning on 30 July. *Id.* at 187).

483. *Lugar Study*, *supra* note 386, at 8-9.

484. *See* MCM, *supra* note 113, ¶ 34c(1).

485. "The element of risk is the center around which the law of hazarding revolves." United States v. Cunningham, No. 84-3469, slip op. (N.M.C.M.R. July 31, 1985); United States v. Buckroth, 12 M.J. 697, 700 (N.M.C.M.R. 1981), *aff'd in part, rev'd in part on other grounds*, 13 M.J. 108 (C.M.A. 1982). To hazard a vessel is "to put the vessel in danger of loss or injury." United States v. Krewson, No. 86-1004, slip op. (N.M.C.M.R. June 16, 1986). The offense of hazarding a vessel "is thus unusual in criminal law in that it makes a person punishable for merely risking (hazarding) an item of property quite irrespective of resultant damage." United States v. MacLane, 32 C.M.R. 732, 735 (C.G.B.R. 1962). *See also* United States v. Tusing, 12 M.J. 608 (N.M.C.M.R. 1981), *aff'd in part, rev'd in part on other grounds*, 13 M.J. 98 (C.M.A. 1982); United States v. Adams, 42 C.M.R. 911 (N.M.C.M.R. 1970). The law has long been settled that "'hazard' means to *put in danger of* loss or injury." MCM, *supra* note 113, ¶ 34f(2); NAVAL COURTS AND BOARDS § 69 (1937). *See McVay* Record at 371 (proper definition of "hazarded" applied at Captain McVay's court-martial).

486. While it was and is permissible to include ultimate harm to a vessel in a hazarding specification (*see* NAVAL COURTS AND BOARDS, Specimen Charges and Specifications, at 125-126; MCM, *supra* note 113, ¶ 34f(2)), and proof of such ultimate harm "is conclusive evidence that the vessel was hazarded" (MCM, *supra* note 113, ¶ 34c(1)), the gravamen of any hazarding offense is that the accused placed the vessel at *risk* of harm, even if no harm ultimately resulted. The hazarding charge against Captain McVay did not include consummation by the sinking of *Indianapolis.* The government's burden was to demonstrate that failure to zigzag placed *Indianapolis* at risk with respect to any possible submarine contacts. Captain McVay's court-martial conviction did not attribute fault to him for the sinking of *Indianapolis*, the deaths of crew members, or delay in the rescue of survivors. The Judge Advocate General has stated this fact clearly before. *See* Letter from The Judge Advocate General of the Navy (Colclough), to Senator Tom Connally (May 15, 1946):

> The conviction of Captain McVay by general court-martial held 3 December 1945 of Charge I, THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE HAZARDED . . . did not establish that he was responsible for the loss of approximately eight hundred men who failed to survive the sinking of the INDIANAPOLIS.

As his special assistant, Edward Hidalgo, advised Secretary Forrestal, "the technical charge on which McVay was convicted was that of 'hazarding' his ship—not causing its loss or sinking." KURZMAN, *supra* note 387, at 249. The *Lugar Study* highlighted the distinction between Captain McVay's conviction and responsibility for the loss of Indianapolis:

> It is important to note . . . that Captain McVay was not charged with taking or failing to take actions which resulted directly in the sinking of U.S.S. *Indianapolis*. While this may seem a "technical" distinction, it was an important one for our committee to keep in mind during the course of our review of the proceedings. Our committee also would submit that this is an important distinction to consider for those who review this report and choose to continue to discuss this incident . . . . Because of the sequence of events, to wit: the sinking of the U.S.S. *Indianapolis*, the instigation of the court martial proceedings, and the conviction of Captain McVay on a violation of a naval regulation that resulted in the "hazarding" of the ship, it is reasonable to assume that many consider Captain McVay to have been convicted of dereliction of duty that directly resulted in or caused the sinking of the U.S.S. *Indianapolis.* This is not the case. The nature of the charges, the penalty imposed, and the ultimate disposition of this case clearly indicate otherwise.

Lugar Study, *supra* note 386, at 4.

The distinction between "hazarding" a vessel and causing ultimate harm to it is not a "technical" distinction; it is a traditional, professional distinction of considerable consequence. The law of hazarding is intentionally prophylactic; it reflects such great solicitude for the safety of naval vessels that serious criminal sanctions, including death, are available to punish those whose conduct exposes naval vessels to mere inchoate risk. The deterrent message of the law is that "not only shall you not cause harm to a naval vessel; you shall not so much as expose her to the risk of harm." This policy would also apply to operationally inappropriate risks taken in combat. Failing to appreciate the aspect of *risk* in a hazarding offense, even well-known naval historians continue to perpetuate the error that "a court-martial convicted McVay of being responsible for this unnecessary tragedy." *E.g.*, ROBERT W. LOVE, JR., HISTORY OF THE UNITED STATES NAVY 1942-1991, at 276 (1992).

and crew to survive. Even if the ship must inevitably go down, then it should only be after available tactical measures to avoid such a fate have been employed.

In a submarine or ship engagement with torpedoes, there are three moving objects: the submarine, the ship, and the torpedoes. All three move relatively to each other. Timing is of the essence. Torpedoes used during World War II were not steerable and did not employ acoustic seekers. Torpedoes were launched on a fixed course at a fixed speed[490] and had to impact a moving target along a straight line. To employ such torpedoes successfully, first a submarine had to determine the course, speed and range of the surface target; then it had to maneuver into an appropriate attack position. Finally, the course and speed settings for the torpedoes had to be determined to ensure that they would physically impact the target vessel along its track. Making the necessary calculations was not as simple as it might seem. If the target vessel was not maintaining a steady course and speed, the targeting problem could be significantly complicated.

As an illustration of the effect of zigzagging on a relative motion/intercept calculation, Figure 2 (at end of article) depicts a submarine at the center of the "maneuvering board." The submarine first detects a target bearing 090 at 10,000 yards.[491] The submarine observes the target for ten minutes and correctly determines its course and speed to be 262 at 17 knots. The submarine launches a torpedo at 48 knots, course 110, at time 11, to intercept the target at time 13. One minute before the torpedo was launched at time 11, the submarine did not observe that the target began a

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487. *See* United States v. Day, 23 C.M.R. 651, 656-57 (N.M.B.R. 1957) which discusses proximate cause in hazarding a vessel:

> The requirement of proximate cause is satisfied if the accused's act or omission "was one of several factors which all together caused the final result . . . . [T]he inquiry is not directed toward discovering the cause . . . but whether the accused's conduct was a cause . . . . There are innumerable cause factors in every case . . . . We are only interested in determining what part the conduct of the accused played in producing the result . . . . In the case of plural, concurrent or intervening causes, in relation to the determination of proximate cause, we consider the 'substantial factor' rule as providing the best yardstick—the act of the accused must have been a substantial factor in producing" the result.

488. The doctrine is quoted *supra* at 424-26 and accompanying text.

489. *See McVay* Record at 337.

490. There were only a few preset speeds which could be selected, limiting the choices of ranges and bearings to the target when a torpedo could be launched to intercept it.

491. Hashimoto first observed *Indianapolis* bearing 090, at an estimated range of 10,000 meters.

20° zig to port (or starboard) at time 10. It is evident from the maneuvering board that the torpedo would miss the target. Even if a fan of six torpedoes were launched, with a spread of 2° between the center torpedoes, and 3° between the others (covering 14°),[492] at time 13 the torpedoes would cross the original firing solution track of the target along true bearings from the submarine ranging from 103° to 117°. All torpedoes would miss the target, regardless of the direction of the zig at time 10.[493]

The illustration in Figure 2 assumes that the submarine has calculated the course, speed and range of the target perfectly. Using night-time visual observations alone, such perfection would have been unlikely.[494] Visual calculation of the range to a target requires an estimation of its mast-head height, which depends on correct identification of the class of the ship, which is also difficult to do at night. Hashimoto had ship silhouettes available to assist him with this determination, but he believed *Indianapolis* was an Idaho-class battleship.[495] For the sake of convenience, the illustration also assumes that the submarine is stationary, which would make calculation of a targeting solution much easier. Adding a course and speed for the submarine would make a relative motion/intercept calculation even more complicated. Removing these simplifying assumptions made for the sake of illustration, zigzagging could be even more effective in complicating or evading a submarine attack. An infinite number of hypothetical submarine/ship engagements could be constructed along *Indianapolis's* track, in which zigzagging might make a decisive difference. The finding that *Indi-*

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492. *See McVay* Record at 269 (testimony of Hashimoto).

493. *See id.* at 338 (the Judge Advocate cross-examining Captain Donaho):

> 39. Q. [A]ssuming . . . you haven't gotten a new setup while she is on this course, this forty-five away from you, and then she changed, say, twenty more to the left and she makes seventeen knots all this time, and you are submerged; what effect would these changes have on the accuracy of your torpedo fire?
>
> A. I would probably miss.
>
> 40. Q. Pardon?
>
> A. I would probably miss.

494. *See id.* at 260 (Hashimoto believed *Indianapolis* was on course 260 at 12 knots, vice 262 at approximately 17 knots), 338 (Captain Donaho: "We fire spreads to take into consideration errors in course and errors in speed.").

495. *Id.* at 271 (Hashimoto did not use the book of silhouettes before firing); *supra* note 431 (report of sinking a battleship).

anapolis was placed at risk did not depend on any particular ship/submarine positions.

In the illustration, several things could happen at time 13 when the hypothetical fan of torpedoes misses the zigzagging target. The ship could immediately turn towards the line-of-bearing from which the torpedoes were launched, presenting a "narrow aspect" to the submarine, minimizing the surface area of the ship that could be targeted. The ship could drop depth charges or accelerate to flank speed and clear the attack datum immediately.[496] The ship could transmit a message reporting the attack and her exact latitude and longitude. Radar operators and lookouts alerted after a near-miss torpedo attack could search for and possibly detect a periscope. Location of the periscope could facilitate a counterattack or even more effective evasive maneuvering. If the submarine suspected that it had been detected, it might crash-dive to avoid counterattack, abandoning its mission. Finally, if the visibility were intermittently good and poor, as clouds intermittently blocked the moon (as was the case on the night of 29 July 1945), the submarine's ability to target the ship visually might be impeded by poor visibility after an initial failed attack. If a World War II era submarine were able to reposition and launch a successful re-attack, which is not at all certain, given the slow maximum speeds of Japanese diesel submarines, at least the ship might have fought a tactically honorable engagement. There might have been more time to send a message reporting the attack. Whatever advantage zigzagging might have provided in any number of hypothetical submarine engagements on the night of 29 July 1945, the crew of *Indianapolis* was denied that advantage, contrary, as the court found, to standing fleet doctrine. Captain McVay himself obviously attributed special significance to the fact that *Indianapolis* was not zigzagging; he insisted on reporting that fact from *Ringness* immediately upon being rescued.

Critics of Captain McVay's court-martial have argued that failure to zigzag was not an appropriate basis for his conviction by (1) impugning the tactical efficacy of zigzag maneuvering as an anti-submarine measure in general,[497] (2) by arguing that zigzagging would not have defeated the

496. Hashimoto testified that his submarine could only make 7 knots submerged and 12 knots on the surface (where it would be vulnerable to counterattack). On the other hand, *Indianapolis* had just broken the world speed record from San Francisco to Pearl Harbor (LECH, *supra* note 387, at 6; KURZMAN, *supra* note 387, at 36 (averaging 29.5 knots)), and "no submarine could touch her at 24 knots" (NEWCOMB, *supra* note 387, at 42).

497. *See, e.g.*, LECH, *supra* note 387, at 33, 172; KURZMAN, *supra* note 387, at 55, NEWCOMB, *supra* note 387, at 58.

attack on *Indianapolis* under the specific facts of the engagement, and (3) by arguing supersession of standing naval doctrine by pointing out that Captain McVay's routing instructions from CinCPac left zigzagging to his discretion. Consideration of applicable legal principles and the professional naval aspects of the case, however, reveal the weakness of these arguments.

First, commanding officers of naval vessels choose to deviate from standing operational doctrine[498] or instructions at their own peril. No one is expected to commit suicide in obedience to doctrine—but the choice to deviate must be the right one when it is made. Individual officers are encouraged to contribute to the evolution of effective naval doctrine, and naval exercises are designed specifically to serve this purpose, but operational defiance of doctrine deemed obsolete by individual commanders is not part of the disciplined culture of the Navy. Military discipline would crumble under the individualistic theory of adherence to tactical doctrine suggested by McVay's proponents. Furthermore, arguments against the tactical efficacy of zigzagging are factually incorrect as a matter of relative motion science. Zigzagging was considerably more effective as a submarine evasion measure before the era of acoustic warfare and steerable, homing torpedoes, but it is still considered to be sufficiently effective to warrant continued inclusion in current Navy anti-submarine doctrine.[499] Second, arguing that I-58 would have sunk the ship whether it was zigzagging or not presupposes that Captain McVay was held responsible for the sinking of the ship by not zigzagging. Whether zigzagging would have defeated submarine I-58's targeting of *Indianapolis* was not the issue at Captain McVay's court-martial. The members of the court-martial found Captain McVay responsible for placing the vessel at risk by not zigzagging, a finding applicable to any possible submarine threat along the track

498. The applicable doctrine on zigzagging was introduced as Exhibit 4 at Captain McVay's court-martial.

499. *See* U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, 1 ALLIED TACTICAL PUBLICATION 1(C), at 2-23 to 2-25 (1983) (updated through Jan. 1998); U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, ALLIED TACTICAL PUBLICATION 3(B), ANTI-SUBMARINE EVASIVE STEERING, paras. 101b & c, at 1-1 (1995) (updated through September 1997) (anti-submarine and anti-torpedo objectives of evasive steering); *id.* para. 106, at 1-2 (doctrine for evasive steering applies to independent ships in areas where there is a submarine threat); *id.* para. 115, at 1-7 (specific criteria applicable to ships in formation and ships steaming independently); U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 61, ANTI-SUBMARINE WARFARE, para. 2.1.2.6.2 (1990) ("Evasion"). In accordance with these references, not only is zigzagging still prescribed, but the condition of visibility is irrelevant in view of modern accoustic methods of submarine anti-ship warfare.

to Leyte.[500] Finally, the fact that the CinCPac routing instructions left zigzagging to the discretion of Captain McVay did not relieve him from potential liability for the negligent exercise of his discretion. No commanding officer of a naval vessel could ever be freed by such an instruction from the criminally-enforceable professional standards relating to his duty, military law enacted by Congress, and the customs and traditions of the naval service. Civilian critics of the court-martial have read CinCPac's instruction as an absolute license to zigzag or not, as if it relieved Captain McVay of the duty to engage in sound operational practices to ensure the safety of his ship. Certainly, Captain McVay could not have been found guilty of an orders violation under Article 4 of the Articles for the Government of the Navy (disobedience of a lawful order of a superior officer), because he was not specifically ordered to zigzag, but he could most certainly be found guilty of culpable inefficiency or negligence in the manner in which he chose to exercise his discretion.[501]

The attorneys commissioned by Senator Lugar to study the *McVay* case stated their "unanimous opinion that the determination that Captain McVay was guilty of violating a naval regulation that resulted in the hazarding of his ship was . . . supported by the weight of the evidence."[502] In particular, the *Lugar Study* examined the record of trial and found that

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500. Members of the public often disagree with jury fact-finding and emphasize particular evidence that tends to prove or disprove a particular fact. The experienced senior officer members of McVay's court-martial found that not zigzagging caused *Indianapolis* to be hazarded. Both sides presented evidence on this issue at trial. The prevailing practice in courts throughout the United States allows the fact-finding province of a jury, or members of a court-martial, to be disturbed only upon the strongest showing of the inadequacy of evidence. For example, Rule for Courts-Martial 917(d) provides that:

> [a] motion for a finding of not guilty shall be granted only in the absence of *some evidence* which, together with all reasonable inferences and applicable presumptions, could reasonably *tend* to establish every essential element of an offense charged. The evidence shall be viewed in the light *most favorable to the prosecution*, without an evaluation of the credibility of witnesses.

MCM, *supra* note 113, R.C.M. 917(d) (emphasis added). *See also* Jackson v. Virginia, 443 U.S. 307 (1979).

501. *See* MCM, *supra* note 113, ¶ 34c(3) (definitions applicable to improper hazarding of a vessel):

> No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order.

502. *Lugar Study*, *supra* note 386, at 5.

"[t]here was sufficient evidence to conclude that the actions of Captain McVay and his immediate subordinates, who were subject to his command, resulted in the hazarding of the *Indianapolis*."

D. Prosecutorial Discretion

The decisions to investigate or prosecute, and what particular charges to bring, have traditionally been the province of broad prosecutorial discretion.[503] Prosecutors acting in their official capacity are "absolutely privileged" to initiate criminal proceedings.[504] Prosecutorial decisions in the context of the federal government are generally entrusted to Executive Branch discretion.[505] Many factors influence the exercise of such discretion, including the interest of the public.[506] The great degree of discretion that exists in deciding the disposition of cases involving offenses committed by military officers is but one aspect of a total milieu of authority and discretion within which disciplinary personnel decisions are made in the military. The law of prosecutorial discretion applicable in the military is similar to the law applicable in the civilian setting, with the key difference that the commander[507] is also a court-martial convening authority, and it

503. *E.g.*, Borden-Kircher v. Hayes, 434 U.S. 357, 364 (1978) (Public officials making decisions to prosecute exercise broad discretion.); JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 1.09, at 11 (1985) ("[P]rosecutors enjoy broad discretionary powers to investigate and/or decline to investigate allegations of crime. For all intents and purposes, their discretion is unbridled."); *Id.*, § 1.14, at 14 ("[T]he prosecutor enjoys extremely broad discretion in the decision to indict or initiate criminal proceedings against a suspected wrongdoer and, to a large extent, that decision is unassailable.").

504. RESTATEMENT (SECOND) OF TORTS § 656 (1977).

505. *E.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) (The decision to indict or not "has long been regarded as the special province of the Executive Branch"); 10 Op. Off. Legal Counsel 68, 72-73 (1986) ("[N]either the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals" (citations omitted)). *See* United States v. Nixon, 418 U.S. 683, 693 (1974); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457-59 (1869) (Decision to prosecute or abandon a case on behalf of the United States is discretionary.). *See also* Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

506. Prosecutors, in exercising their discretion, are often responsive to public opinion. When an aroused public demands prosecution in a particular case, a more vigorous prosecution is likely. Newman F. Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM L. & CRIMINOLOGY 770, 792-93 (1933). In many jurisdictions the prosecutor is a politically elected official.

is he who is endowed with the broad discretionary powers of the prosecutor under military law.[508]

No one has a right to compel the prosecution of others,[509] nor is failure to prosecute others generally recognized as a defense. In both the military and civilian settings, "selective prosecution" is unlawful only if it is founded upon a constitutionally impermissible basis, such as race, sex, alienage, or retaliation for the exercise of First Amendment or other constitutional rights.[510] Mere failure to prosecute others does not establish the defense of selective prosecution.[511] To sustain a defense of "selective prosecution," the accused must show that persons similarly situated were not prosecuted, and that the prosecuting authority intentionally based his decision on a constitutionally[512] impermissible classification.[513] Moreover, the defense must be raised at trial or it is waived,[514] and the defendant "bears the heavy burden" of establishing a prima facie case.[515] Selective

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507. Including the Commander in Chief and his deputies, the secretaries. 10 U.S.C.S. § 822(a) (Law. Co-op. 1997) (UCMJ art. 22(a)). The law in 1945 also specified that the President and the Secretaries of the Navy and of War were convening authorities. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930), *reproduced in* NAVAL COURTS AND BOARDS 465, ¶ B-40 (1937) ("General courts-martial may be convened . . . by the President, the Secretary of the Navy . . . ."); TILLOTSON, *supra* note 114, at 17.

508. *E.g.*, NAVAL COURTS AND BOARDS 5, ¶ 13 (1937) (convening authority discretion to determine what charges will be referred to a court-martial).

509. *E.g.*, Schulke v. United States, 544 F.2d 453, 455 (10th Cir. 1976) (Appellant's attempt to force courts-martial of other service members rejected—decisions of military authorities whether to refer court-martial charges are not subject to judicial review.).

510. Wayte v. United States, 470 U.S. 598 (1984); United States v. Hagen, 25 M.J. 78, 83 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060 (1988); United States v. Means, 10 M.J. 162, 165-66 (C.M.A. 1981). The Supreme Court has found the equal protection principle applicable to federal action through the Due Process clause of the Fifth Amendment. On the limited number of classifications prohibited in the exercise of prosecutorial discretion, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 13.4, at 633 (2d ed. 1992).

511. *E.g.*, United States v. Maplewood Poultry Co., 320 F. Supp. 1395 (D. Me. 1970); United States v. Rickenbacker, 309 F.2d 462 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963). *See also* Oyler v. Boyles, 368 U.S. 448 (1962). *In Oyler*, the Court held that the exercise of reasonable selectivity in enforcement does not deny equal protection to those prosecuted, declaring that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." This is so, the Court stated, even where statistics may imply a policy of selective enforcement. The Court added that the defendant must prove that his prosecution was "deliberately based" on *constitutionally* impermissible discrimination. *Id.* at 456.

512. *Wayte*, 470 U.S. at 608 (Selective prosecution claims are judged according to Equal Protection Clause standards.); Willhauck v. Halpin, 953 F.2d 689, 711 (1st Cir. 1991) (Claim of selective prosecution must show that defendant's equal protection rights were violated.).

prosecution claims are seldom successful, even in death penalty cases involving lopsided racial statistics.[516] It is inconceivable that a legally sufficient case of selective prosecution could be made with respect to Captain McVay. As the only commanding officer of *Indianapolis* in late July 1945, he was not "similarly situated" with respect to anyone, and the charges brought against him are not similar to charges that might have been brought against anyone else who might have contributed to the *Indianapolis* tragedy. Finally, no evidence exists of intentional discrimination on a constitutionally impermissible basis, such as race or ethnicity. The general rule with respect to prosecutorial discretion is well-settled—prosecution authorities have "broad discretion to initiate and conduct criminal prosecutions," and "the decision to prosecute is particularly ill-suited to judicial review."[517]

Unique aspects of criminal law in the military provide even greater support for the exercise of discretion by court-martial convening authorities. As the U.S. Supreme Court has stated, "The military constitutes a specialized community governed by a separate discipline from that of the civilian."[518] "[T]he special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[519] In cases where military decisions affect-

513. *See, e.g.*, Government of the Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3d Cir. 1986); Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983), *reh'g denied*, 460 U.S. 1056 (1983); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); United States v. Garwood, 20 M.J. 148, 154 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005 (1985).

514. *E.g.*, United States v. El-Amin, 38 M.J. 563, 564 (A.F.C.M.R. 1993).

515. *E.g.*, United States v. Union Nacional de Trabajadores, 576 F.2d 388, 395 (1st Cir. 1978).

516. *E.g.*, McClesky v. Kemp, 481 U.S. 279, 292-97 (1987).

517. *See* Katherine Lowe, *Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1991-1992*, 81 GEO. L.J. 853, 1029-32 (1993) (citing *Wayte*, 470 U.S. at 607 and Newton v. Town of Rumery, 480 U.S. 386, 396 (1987)).

518. Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

519. Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962)).

ing service members have been challenged, courts have shown great deference to the unique circumstances of military service.[520]

Central among the unique features of military life is the authority of senior officials in the chain of command to form judgments on the adequacy of the performance of subordinate officers in command. Where the law allows superior officials discretion to decide the disposition of cases involving perceived defects in an officer's performance, many different factors may influence the decision, including the experience of the officer, his or her past performance, seniority, specific noteworthy achievements, and such external factors as assessment of the impact on others of the officer's unsatisfactory performance. The threshold standard of evidentiary weight for referring charges to a court-martial is low. If a convening authority finds reasonable grounds to believe that a particular individual has committed an offense, he may refer charges against that individual to a court-martial.[521] The decision to refer particular charges to a court-martial is highly discretionary with individual military convening authorities. This type of discretion afforded convening authorities in the military inheres throughout the structure of the Uniform Code of Military Justice, and its predecessors, the Articles of War and Articles for the Government of the Navy. The courts have found the system of military justice consistent with the Constitution.[522]

Military law contains many criminal offenses related to obedience of authority and job performance, concepts totally alien in civilian employment. In *Parker v. Levy*, the Supreme Court further observed that there are

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520. *E.g.*, *Chappell*, 462 U.S. at 303 (Military personnel have no constitutional tort remedy against actions taken by their superiors.); United States v. Stanley, 483 U.S. 669 (1987) (In a case involving nonconsensual, experimental administration of LSD, the Court held that service members have no cause of action under the Constitution for injuries suffered incident to service.); Feres v. United States, 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."); *Orloff*, 345 U.S. at 93-94; Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827) (Military decisions of superior officers are immune from civil suits by subordinates.); Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) ("There are thousands of routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or jurisdiction of the court to wrestle with."). Courts traditionally have been reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." Shearer v. United States, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional military decisions as to the composition, training, equipping and control of a military force are essentially professional judgments . . . ." Gilligan v. Morgan, 413 U.S. 1, 10 (1983).

military cases "beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."[523] In accordance with the practice of the federal courts, such matters are generally left to the judgment of military authorities. It would be difficult to imagine matters more uniquely related to military customs and usage than the duties incident to command

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521. The current *Manual for Courts-Martial* states the minimal standard for referral of charges as follows:

> If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority . . . . The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

MCM, *supra* note 113, R.C.M. 601(d)(1).

Generally accepted ethical standards for prosecution authorities reflect a similarly low threshold for the initiation of a prosecution. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(a) (1995) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). The Supreme Court has articulated a similar standard: "so long as the prosecutor has probable cause to believe that the accused committed an offense . . . , the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). An action for the tort of malicious prosecution will not lie unless criminal charges were brought without probable cause and the plaintiff was acquitted. *See* KEETON, *supra* note 337, § 119, at 871; RESTATEMENT (SECOND) OF TORTS § 658 (1977) ("[C]riminal proceedings must have terminated in favor of the accused."). *See also* Buckley v. Fitzsimmons, 509 U.S. 259, 286 (1993) (Kennedy, J., concurring in part and dissenting in part) (cause of action for malicious prosecution depends on lack of probable cause to indict). "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'" Brinegar v. United States, 338 U.S. 160, 175 (1949), *quoting* Carroll v. United States, 267 U.S. 132, 161 (1925). The Articles for the Government of the Navy did not state a standard of evidentiary sufficiency for the referral of charges to a court-martial. Notwithstanding this fact, the Judge Advocate General carefully reviewed the evidence and advised Secretary Forrestal that it supported only the two proposed charges, and not other charges that had been considered previously. Memorandum, The Judge Advocate General of the Navy, to the Secretary of the Navy (29 Nov. 1945) (applying a "prima facie case" standard, a standard higher than "probable cause"). *See* LECH, *supra* note 387, at 181-82 (suggesting that trial on the zigzagging charge was an open-and-shut case, "over before it began," at this pre-referral deliberation phase—more than sufficient to meet the standard of "probable cause.").

at sea and the standards associated with the safe navigation of naval vessels.

As the *Lugar Study* concluded, "The decision to bring court-martial charges against Captain McVay was a decision appropriately within the scope of prosecutorial discretion."[524] Stated less tentatively, the decision to refer charges against Captain McVay was one committed by law to the discretion of the Secretary of the Navy.[525]

E. Reviewability of Captain McVay's Conviction

Captain McVay was tried and convicted under the Articles for the Government of the Navy.[526] The Articles for the Government of the Navy did not provide for appeals.[527] Power to reverse a Navy conviction remained with the convening authority, who could be reversed only by the Secretary of the Navy or the President.[528] Accordingly, once Secretary Forrestal took final action on the court-martial and the President did not intervene, the judgment was final. Captain McVay was not entitled to collateral review pursuant to a writ of habeas corpus because he was not sentenced to confinement.[529] He was released and restored to duty. Nor was Captain McVay entitled to review in the Court of Claims because the sen-

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522. Court-martial convening authorities play a decisive role throughout the military justice process, including decision-making under the following rules: MCM, *supra* note 113, R.C.M. 303 (preliminary inquiry); R.C.M. 304(b), 305 (pretrial restraint and confinement); R.C.M. 306 (initial disposition of offenses); R.C.M. 401 (disposition of charges); R.C.M. 404 (actions available to special court-martial convening authority); R.C.M. 407 (actions available to general court-martial convening authority); R.C.M. 502, 503 (selection and detailing of members of courts-martial); R.C.M. 601 (referral of charges); R.C.M. 702(b) (ordering depositions); R.C.M. 704 (grants of immunity); R.C.M. 705 (negotiating and entering pretrial agreements on behalf of the government); R.C.M. 1101 (temporary deferment of sentence to confinement); R.C.M. 1107 (action on findings and sentence). *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (The separate and distinct system of military justice is constitutional.); *Ex parte* Reed, 100 U.S. 13, 20 (1879) ("The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court.").

523. Parker v. Levy, 417 U.S. 733, 748 (1974) (quoting Swaim v. United States, 28 Ct. Cl. 173, 228 (1893)).

524. *Lugar Study*, *supra* note 386, at 6.

525. *See* ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930); NAVAL COURTS AND BOARDS 5, ¶ 13 (1937) (convening authority discretion to determine what charges will be referred to a court-martial).

526. The Articles for the Government of the Navy was not a Navy regulation, but an enactment of Congress (Act of April 2, 1918, 40 Stat. 501), pursuant to constitutional authority (U.S. CONST. art. 1, § 8; amend. 5).

tence, as approved by the Secretary, did not affect his pay.[530] Congress has "no power whatever" to revise or reverse a court-martial judgment.[531] In 1983 Congress limited the power of the military boards for correction of records in court-martial cases to corrections that reflect clemency and actions taken by reviewing authorities.[532] The Board for Correction of Naval Records, therefore, does not have authority to set aside a court-martial conviction.[533] At this point in time, the only power possessed by military authorities over a final judgment fifty years old is the power of the Secretary of the Navy to remit or suspend any unexecuted part of Captain

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527. The Supreme Court has consistently held that the Constitution does not require that systems of criminal justice provide for appellate review of convictions. *See, e.g.*, McKane v. Dunston, 153 U.S. 684 (1894); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 690-91 (1986). Until the 1984 Military Justice Amendments provided for review of courts-martial by the Supreme Court by writ of certiorari (*see* 10 U.S.C.S. § 867a (Law. Co-op. 1997)), the Court held that federal courts had no jurisdiction to hear direct appeals or petitions from courts-martial. *E.g.*, *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863) (writ of certiorari from courts-martial not provided for in the Constitution nor in the statutes); *In re* Vidal, 179 U.S. 126 (1900) (same). *Cf. In re* Yamashita, 327 U.S. 1, 13-14 (1946) ("Correction of their [i.e., courts-martial] errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.").

528. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 54 (1930); NAVAL COURTS AND BOARDS 243, ¶ 471 (1937) (Convening authority of a court-martial is the reviewing authority.); Hiatt v. Brown, 339 U.S. 103, 111 (1950) (Correction of any errors in a court-martial "is for the military authorities which are alone authorized to review its decision."); Carter v. McClaughry, 183 U.S. 365, 385 (1902) (Court-martial convening authority was "the reviewing authority, and the court of last resort."); Swaim v. United States, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897):

> The proceedings of . . . military tribunals can not be reviewed in the civil courts. No writ of error will lie to bring up the rulings of a court-martial. Even in the trial of a capital offense the various steps by which the end is reached can not be made the subject of judicial review. The only tribunal that can pass upon alleged errors and mistakes is the commanding officer . . . .

529. *See, e.g.*, United States v. Augenblick, 393 U.S. 348, 350 (1969) (Habeas corpus "not available to respondent . . . because he was . . . not imprisoned . . . ."); 28 U.S.C.S. § 2241 (Law. Co-op. 1997) (Writ of habeas corpus not available unless petitioner is "in custody"); 16 FED. PROC., L. ED. §§ 41:12 to 41:34 (Supp. 1995) (meaning of "in custody").

530. Back-pay suits under 28 U.S.C.S. § 1491 have long been an alternative method of collaterally attacking a court-martial judgment. *See* United States v. Augenblick, 393 U.S. 348, 349 n.2, 350-52 (1969); Cooper v. United States, 20 Ct. Cl. 70 (1990). The limited methods by which courts-martial may be collaterally reviewed in federal courts are discussed in *Brown v. United States*, 365 F. Supp. 328 (E.D. Pa. 1973).

531. *See, e.g.*, BERDAHL, *supra* note 6, at 142.

532. 10 U.S.C.S. § 1552(f) (Law. Co-op. 1997).

533. *See* Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986); Stokes v. Orr, 628 F. Supp. 1085 (D.Kan. 1985).

McVay's sentence—but Secretary Forrestal has already remitted the sentence in its entirety.[534] As provided by law, then, the judgment of conviction is "final and conclusive" and is "binding upon all departments, courts, agencies, and officers of the United States, subject only to . . . the authority of the President."[535] The President has constitutional power to grant pardons,[536] but in the post-conviction setting, "a pardon is in no sense an overturning of a judgment of conviction . . . ; it is an executive action that mitigates or sets aside punishment for a crime."[537] Captain McVay received no punishment that may be set aside by pardon; moreover, the Pardon Attorney's office at the Department of Justice related that applications for posthumous pardons are not accepted under current Executive policy.[538] The President, however, has unlimited discretion to grant pardons and may make an exception from his own policy as he sees fit.[539] Given the current legal understanding of the limited effects of a post-conviction pardon, however, Captain McVay's conviction is not subject to

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534. 10 U.S.C.S. § 876 (Law. Co-op. 1997).

535. *Id.*

536. U.S. CONST. art 2, § 2(1) (The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

537. Nixon v. United States, 506 U.S. 224, 232 (1993) (case involving former federal district court judge Walter Nixon). *See also* Burdick v. United States, 236 U.S. 79, 94 (1915) (A pardon "carries an imputation of guilt; acceptance [of a pardon] a confession of it."); Carlesi v. New York, 233 U.S. 51 (1914) (Pardon does not erase previous conviction.). *See generally* Henry Weihofen, *The Effect of Pardon*, 88 U. PA. L. REV. 177 (1939); Samuel Williston, *Does Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 n.7 (1915) (federal cases taking narrow view of effect of pardon). According to Chief Justice Marshall, "A pardon is an act of grace . . . which exempts the individual, on whom it is bestowed, *from the punishment* the law inflicts for a crime he has committed." United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833) (emphasis added). Justice Field in *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867) took a broader view of the effect of a pardon:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.

This broad view of the pardon power is today, however, restricted to pardons granted before conviction. *See* CORWIN, *supra* note 33, at 187.

538. Telephone Interview with Keith Waters, Department of Justice, Pardon Attorney's Office (June 3, 1996). *See* Office of the Pardon Attorney, 28 C.F.R. §§ 0.35 to 0.36 (1997); Executive Clemency, 28 C.F.R. §§ 1.1 to 1.2 (1997).

539. *E.g.*, 20 Op. Att'y Gen. 330 (1892) (Pardon may be granted before or after conviction, and absolutely or upon conditions. "The ground for the exercise of the power is wholly within the discretion of the Executive.").

legal reversal by any recognized means. A Presidential pardon granted as an exception to policy would be chiefly ceremonial.[540]

F. Conclusion

Others than Captain McVay share fault in the *Indianapolis* tragedy, and history has recorded it that way. In fact, the popular literature and editorial commentary on the subject has been remarkably one-sided in highlighting the failings of others and trivializing the role of Captain McVay. Nowhere in such writings is there manifested an appreciation of the special role of the commanding officer of a naval vessel and the awesome responsibility entrusted to him. Uninformed popular literature has portrayed Captain McVay as a hapless victim—a role he never chose to play. The strict principle of accountability inherent in command at sea predates the United States and transcends all of the actors in the tragedy of *Indianapolis*. Each case involving loss or damage to a vessel is different. Sometimes punitive measures are invoked, at other times, they are not, but the risk of personal ruin for a commanding officer is always present.

Captain McVay was tried for a professional shortcoming by a panel of his peers and was awarded a commensurate professional sentence, loss of numbers, later remitted in view of his outstanding professional record. There was no reversible error in this process. It is too late now to call to account others who might have failed with respect to *Indianapolis*, but that is not an appropriate reason to reverse the conviction of Captain McVay. The most appropriate "remedy," if one is due, is to acknowledge other factors that contributed to the *Indianapolis* tragedy: Admiral Nimitz's staff issued an ambiguous order not to report the arrival of combat ships; the Navy had no procedure in place to monitor the non-arrival of warships; warships were routinely diverted by the operational chain of command without informing port officials; personnel in the Port Director's office at Leyte did not take the initiative to inquire into the delay in *Indianapolis's* arrival; communications personnel on CTG 95.7's staff decoded a message incorrectly and communications personnel at Okinawa failed to provide a sailing report to CTF 95; the CinCPac staff failed to follow-up on an unconfirmed sinking report; personnel at COMMARIANAS and Commander, Philippine Sea Frontier, did not monitor the scheduled "chop" of Indianapolis between their regional sea commands; COMMARIANAS could have but did not reroute *Indianapolis* in view of the *Wild Hunter*

540. *Cf.* Knote v. United States, 95 U.S. 149, 153-54 (1877) (pardon confers no right to compensation).

reports;[541] ULTRA intelligence was not disseminated to the level where it might have been most useful;[542] ASW-capable escorts were being employed in a hotter combat zone to the north; standard transit routes were used instead of varying them to confuse the enemy; *Indianapolis* was a "soft" ship and had to sail routinely in a compromised condition of watertight integrity; and survival equipment was outdated or poorly designed. Fleet Admiral King saw to it that every one of these issues was thoroughly explored, apart from the culpability of Captain McVay, to ensure that no valuable "lessons-learned" were lost.[543]

A "scapegoat" is "one who is blamed or punished for the sins of others."[544] The Navy has never attributed blame to Captain McVay for any of the above-listed contributory causes of the *Indianapolis* tragedy. He was tried on charges that arose uniquely from matters within his control as Commanding Officer of *Indianapolis*. The Navy's press release of 23 February 1946, reporting the results of the court-martial and the action on sentence by the Secretary, was accurate in every respect, including the clear statement that Captain McVay "was neither charged with, nor tried for, losing the *Indianapolis.*"[545] In another press release of the same date, the Navy provided a lengthy "Narrative of the Circumstances of the Loss of the USS *Indianapolis*,"[546] which clearly stated the contributory fault of others.[547] Anyone can speculate that there were surreptitious reasons for

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541. Arguments that the *Wild Hunter* reports should have caused COMMARIANAS to reroute Indianapolis cut both ways—if these reports indicated that the risk of submarine activity was so great that *Indianapolis* should have been rerouted, then the same reports should also have indicated to Indianapolis that the risk of submarine activity was great enough to warrant evasive maneuvering.

542. Even if the ULTRA intelligence had been provided, it is not at all clear that the Officer of the Deck on *Indianapolis* would have resumed zigzagging at night when conditions of visibility began to improve. Would the week-old ULTRA information have been more convincing than the real-time reports of submarine prosecution along *Indianapolis's* track transmitted by *Wild Hunter* and the *Harris* hunter-killer group?

543. These records are included with endorsements in the Court of Inquiry and in the IG's supplemental investigation.

544. OXFORD ENGLISH DICTIONARY 2657 (compact ed. 1971). *See Leviticus* 6:16-20.

545. Reproduced in LECH, *supra* note 387, at 268-69. In fact, the committee that studied the McVay case for Senator Lugar concluded that "[t]here was evidence to support the conclusion that the sinking of the *Indianapolis* would have resulted, irrespective of Captain McVay's compliance with the naval regulation regarding 'zigzagging.'" *Lugar Study*, *supra* note 386, at 9.

546. Reproduced in LECH, *supra* note 387, at 254-67.

547. The Navy, however, did not mention the ULTRA matter, which was still highly classified for national security reasons unrelated to Captain McVay. The classification of ULTRA was not within the authority of the Department of the Navy.

court-martialling Captain McVay for his part while others were not punished for theirs. Official records reflect careful consideration of fault on the part of all personnel involved. One effect of the disciplinary decisions finally made was re-emphasis of the strict doctrine of accountability associated with command at sea.

Captain McVay has an important place in naval history, and not as a "scapegoat." He was highly decorated during the war in the Pacific, but he is also a *memento mori* to all commanding officers that they are responsible for vigilance to the limits of human capacity for the safety of their crews. All commanding officers should reflect upon the *Indianapolis* and the hard lesson that Captain McVay teaches—those who labor against the ocean in obedience and trust of authority must know that their captain has neglected no measure to preserve them. That is the traditional bargain of command at sea. Without the responsibility of it, there would be no cause for unquestioning faith in it.[548]

IV. Closing Comments

Advocates for Kimmel, Short and McVay attempt to obtain official remedies on the basis of emotional appeals, frequently disguised in the language of legal grievance. Officials who took administrative or disciplinary action in the three cases did not exceed their lawful authority in any of the matters about which the commanders' advocates have complained. The fundamental nature of Executive power is discretionary decision-making, not adjudication. The President and his appointed deputies had constitu-

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548. In the American Navy, the principle of accountability for the safety of one's crew, derives directly from our longstanding tradition of the citizen-soldier. The Founding Fathers explicitly rejected the European tradition of a professional officer caste that put its own stature and survival above that of troops forcibly drawn from the peasantry. Instead, in our democracy the military leader's authority over his troops was linked to a parallel responsibility to them as fellow citizens.

Accountability is a severe standard: The commander is held responsible for everything that occurs under his command. Traditionally, the only escape clause was "an act of God," an incident that no prudent commander could reasonably have foreseen. And "reasonably" was tied to the requirement to be "forehanded"—a sailor's term dictating that even unlikely contingencies must be thought through and prepared for. The penalties of accountable failure can be drastic: command and career cut short, sometimes by court-martial.

Captain Larry Seaquist, USN, *Iron Principle of Accountability Was Lost in Iowa Probe*, NAVY TIMES, Dec. 9, 1991, at 31.

tional or statutory discretion to make each decision that affected the three commanders: to relieve them, to investigate them, to withhold recommendations for advancement, and to refer charges to a court-martial, or, in the case of Kimmel and Short, not to do so. In these cases, the exercise of executive discretion was a manifestation of the fundamental principle of civilian control of the military; that over-arching principle should not be eroded to appease organized demands for exception from it.

When the law provides one party a power over the other, and deprives the party subject to that power of any avenue of redress or appeal, it has already resolved the dispute between them. To be an officer in the military is to submit to such a regime of authority. Generations may argue about "fairness" or "justice," whatever those terms mean to a particular individual at a particular time, but there can be no argument about the legitimacy of the exercise of powers that are left to the conscience of the empowered. The very exercise of such powers is law in action.

The military cases cited in this article are not academic writings. They are the real records of individual plaintiffs and defendants who lost in their struggle to escape the ill consequences of the exercise of authority. The quest for official remedies for Kimmel, Short and McVay is not a quest to correct what was done to them unlawfully, but a quest for exception from the same laws that have claimed so many others. Because these three commanders are infamous is no reason to treat them differently than the thousands of others who have long since been forgotten.

The point of view that redemption may be had only at the hand of government, that the government must officially "reverse" actions taken by the President that were completely and unarguably within his constitutional powers, to reconcile old history with new moods, ascribes a strange spiritual power of absolution to the government that the government does not possess. The government is a creature of law, not the repository of the national spirit. Officials within government are understandably hesitant to discard the road map provided by law and assume the haughty role of oracle and arbiter of the national conscience. It is the job of government officials to execute their duties in accordance with law. "Justice" is administered by reference to law. Sanctions or remedies are imposed or granted as law provides. Errors that may be corrected on appeal are defined with reference to some law that has been violated, some procedure that has not been observed. The notion that government action is somehow the road to redemption in these historical cases, notwithstanding the provisions of law, ascribes an expansive power of conscience to the government

that perhaps reflects the values of a passing generation. However, the fact that no official has thus far felt comfortable to assume such a role, to decide that the President and his subordinates should be retrospectively "corrected" on the basis of subjective factors, is reassuring to those who still believe that government is itself a creature of the Constitution, limited and defined by it.

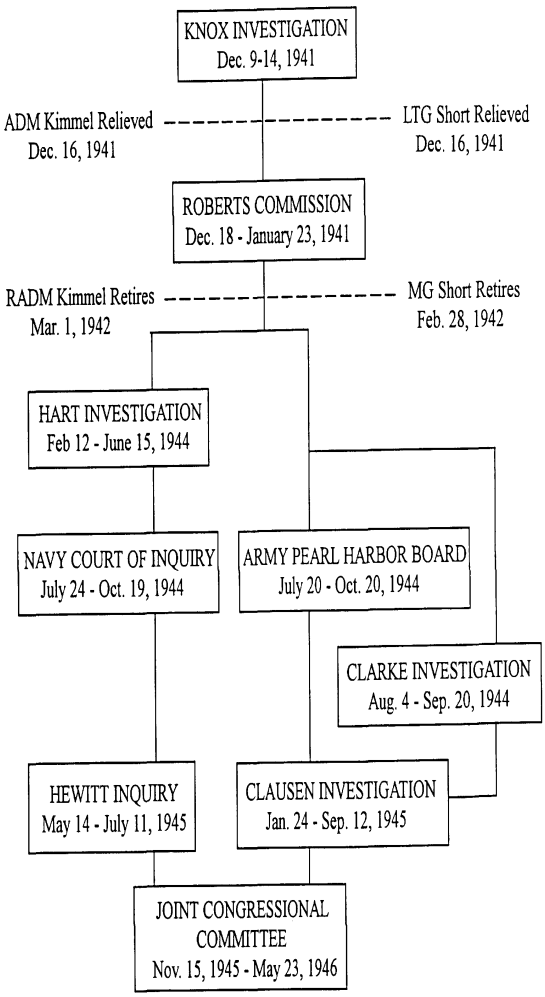

Figure 1
Chronology

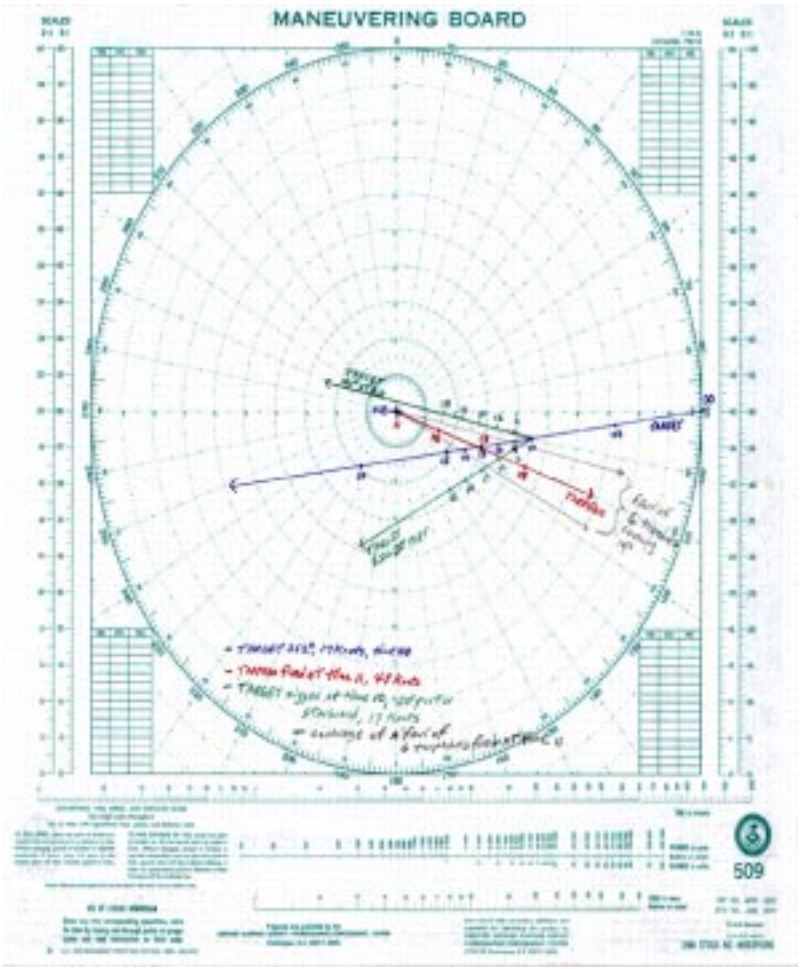

Figure 2