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CITATION: This issue of the *Military Law Review* may be cited as 163Mil. L. Rev. (page number) (March 2000). Each issue is a complete, separately numbered volume.

INDEXING:

* The primary *Military Law Review* indices are volume 81 (summer 1978) and volume 91 (winter 1981).

* Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Military Law Review* indices.

* Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaces the volume indices in volumes 82 through 90.

* Volume 96 contains a cumulative index for volumes 92-96.

* Volume 101 contains a cumulative index for volumes 97-101.

* Volume 111 contains a cumulative index for volumes 102-111.

* Volume 121 contains a cumulative index for volumes 112-121.

* Volume 131 contains a cumulative index for volumes 122-131.

* Volume 141 contains a cumulative index for volumes 132-141.

* Volume 151 contains a cumulative index for volumes 142-151.

* Volume 161 contains a cumulative index for volumes 152-161.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government*; *Legal Contents (C.C.L.P.); Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; three computerized databases - the *Public Affairs Information Service*, *The Social Science Citation Index*, and LEXIS - and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611. The *Military Law Review* is also available on The Judge Advocate General's School, U.S. Army (TJAGSA) HomePage at <http://www.jagcnet.army.mil>. Current editions of the *Military Law Review* from Volume 155, June 1998 through Volume 163, March 2000 are available.

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review* at Mary.Bradley2@hqda.army.mil. If electronic mail is not avaialbe, please forward the submission to the Editor, *Military Law Review*, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-P, 600 Massie Road, Charlottesville, Virginia 22903-1781. Authors also should submit electronic copies on 3 1/2 inch computer diskettes, preferably in Microsoft Word format.

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MILITARY LAW REVIEW

Volume 163 **March 2000**

MEDIA RIGHTS OF ACCESS TO PROCEEDINGS, INFORMATION, AND PARTICIPANTS IN MILITARY CRIMINAL CASES

LIEUTENANT COLONEL DENISE R. LIND[1]

I. Introduction

In the good old days, a skilled trial advocate could fully and effectively represent the United States in matters of military justice. As the armed services approach criminal trial practice in the twenty-first century, training in legal skills alone will not prepare counsel to deal with media coverage and public inquiries[2] that increasingly turn routine criminal trials into high profile[3] cases.

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2. This article uses the term media interest to include the public interest. The Supreme Court has recognized that most people receive information concerning trials from the media. *See* Richmond Newspapers, Inc. v. Commonwealth, 448 U.S. 555, 572-73 (1980).

3. The term "high-profile" case in this article means any criminal investigation or case that generates significant national media and public interest.

A. Media Interest in Military Criminal Cases

Recently, there has been an explosion in public access to information of all kinds. The growth of the Internet and other technologies has made it easier to access information and disseminate it to a national audience. This information explosion is coupled with an increased interest by the media in criminal trials.[4] Military criminal trials are no exception.

Military cases are attracting local and national media interest.[5] As the armed forces grow smaller, fewer people have experienced military life. Thus, the military justice system is foreign to more and more Americans. People are interested in learning about how military justice works. The media sells its product by generating news that is interesting to the public.[6]

Public interest in military justice not only involves individual cases being investigated or prosecuted, but also, the rules and policies unique to military life. For example, there is intense public interest in the armed forces' treatment of sexual-liaison offenses involving homosexuality, fraternization, sexual harassment, and adultery.[7] The names of Air Force General Joseph Ralston,[8] former First Lieutenant (1LT) Kelly Flinn,[9] former

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4. The most obvious example is *The People of the State of California v. Orenthal James Simpson*. Other recent examples include the trials of Timothy McVeigh, Michael Espy, Mike Tyson, Julie Hiatt Steele, and Susan McDougal. *See generally* Joan Biskupic, *Supreme Court Rebuffs McVeigh's Appeal, Convicted Oklahoma City Bomber Claimed Trial was Tainted by Publicity, Juror Prejudice*, WASH. POST, Mar. 9, 1999, at A2.

5. *See* William Matthews, *Military Court Cases Suffer in the Hands of the Media*, ARMY TIMES, June 7, 1999, at 18; John Gibeaut, *In the Limelight's Glare, Military Lawyers Plan Counterattack in Response to Increased Media Coverage*, A.B.A. J., Oct. 1998, at 97.

6. *See supra* note 2 (providing that, for purposes of this article, media interest includes the public interest).

7. Recent examples of cases involving fraternization or adultery that were closely followed by the media are Major General (MG) Joseph Rallston (Air Force), former First Lieutenant (1LT) Kelly Flinn (Air Force), the Aberdeen Proving Ground cadre/trainee sexual misconduct cases (Army), Sergeant Major (SGM) of the Army (Ret.) Eugene McKinney (Army), Major General (MG) (Ret.) David Hale (Army) and Tailhook (Navy). The intense public debate over the military fraternization and adultery policies resulted in a review of the different services' fraternization and adultery policies and the 1998 adoption of a unified policy for all of the services. *See generally* Major Michael Hargis, *The Password is 'Common Sense': The Army's New Policy on Senior-Subordinate Relationships*, ARMY LAW., Mar. 1999, at 12; Lisa Daniel, *Policy Softened Against Adultery,* ARMY TIMES, Aug. 3, 1998, at 3.

8. *See* Hargis, *supra* note 7; *see also* Daniel, *supra* note 7, at 3.

9. *See* Bradley Graham & Tamara Jones, *Air Force Averts Trial of Female B-52 Pilot, General Not Honorable Discharge Granted*, WASH. POST, May 21, 1997, at A1.

Sergeant Major of the Army (SMA)(Ret.), Gene McKinney,[10] and Major General (MG)(Ret.) David Hale[11] are widely known throughout the United States.

Military cases not involving sexual misconduct are also shining in the spotlight of the national media. Recent examples include: the courts-martial of two Marine aviators, Captain (CPT) Richard Ashby and CPT Joseph Schweitzer;[12] the trials of the Army aviation crew, Chief Warrant Officer 2 (CW2) Daniel Riddell, and CW3 David Guido, following a helicopter crash that resulted in the death of Riddell's and Guido's wives;[13] and the gang murder and robbery trial of Specialist (SPC) Jacqueline Billings, the alleged "Governor" of the Fort Hood area Gangster Disciples gang.[14]

B. Issues Created by Media Presence in Criminal Cases

Media inquiries in criminal investigations and prosecutions take many forms. The media may request information from criminal investigators, prosecutors, public affairs spokes-people, local service officials, or national representatives of an armed service or the Department of Defense,

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10. *See* ABC, Inc. v. Powell, 47 M.J. 363 (1997); *see also* G.E. Willis, *McKinney Request to Rehear Case Denied–On Appeal*, ARMY TIMES, Oct. 5, 1998, at 18; Jane McHugh, *Attorney Seeks Hearing to Exonerate McKinney*, ARMY TIMES, Aug. 31, 1998, at 16; Jane McHugh, *McKinney Accuses Prosecutors of Misconduct*, ARMY TIMES, Aug. 17, 1998, at 11.

11. *See* Rene Sanchez, *Retired General to Plead Guilty*, WASH. POST, Mar. 17, 1999, at 1; G.E. Willis, *Schwartz to Consider Hale Allegations, Retired Major General Could Face Dismissal, Forfeiture of Pay, Prison*, ARMY TIMES, Oct. 5, 1998, at 18; Jane McHugh, *The Case Against Gen. Hale*, ARMY TIMES, July 20, 1998.

12. Ashby and Schweitzer originally faced courts-martial for a number of charges, including involuntary manslaughter for causing 20 deaths when their aircraft cut a ski-lift cable in Aviano, Italy. Ashby was acquitted of all charges except obstruction of justice. Schweitzer pled guilty to obstruction of justice. After Ashby's acquittal, the more serious charges against Schweitzer, the navigator, were dismissed prior to trial. *Marine Pilot in Alps Case gets 6 Months for Obstruction*, WASH. POST, May 11, 1999, at A12; Steve Vogel, *Marine Pilot Acquitted in Alps Deaths*, WASH. POST, Mar. 5, 1999, at A1; *see Pilot Tells '60 Minutes' Ski Lift Wasn't on Map*, WASH. POST, Jan. 24, 1999; *Two Marines Accused of Withholding Videotape*, WASH. POST, Sept. 2, 1998, at A19; *Airmen Face New Charges in Skiers' Deaths*, WASH. POST, Aug. 30, 1998, at A6.

13. *See* Jane McHugh, *Joyride from Hell, 2 Pilots Tried to Repay a 'Debt of the Heart', their Gift Proved Deadly*, ARMY TIMES, July 26, 1999; "*Show Off" Pilot Blamed for Helicopter Crash*, ARMY TIMES, Dec. 28, 1998, at 9.

14. *See* Elke Hutto, *Gangster Soldiers, Street Violence Hits the Military*, ARMY TIMES, Feb. 22, 1999, at 14.

about an investigation or people involved in an investigation.[15] The media may petition the court or an Article 32 officer to access, inspect, or copy evidence or judicial records. The media may request to interview military attorneys, public affairs officers, or commanders for information about how the military justice system operates, for opinions about the merits of the government's case, or for the service department or Department of Defense policy position on a volatile issue involved in a case. The media may print inaccurate information about the military criminal justice system causing negative publicity that creates a desire by the military service to reply to the misinformation.

How does a military lawyer[16] answer a request from a newspaper wanting information on how an Article 32 operates? Does the media have a right to a copy of the Article 32 investigation and exhibits before trial? If not, does the government have discretion to release them? May a government official answer whether it is true that an accused senior officer failed a polygraph and confessed? If a newspaper prints misinformation about the military justice process, may the government supply the media with correct information? Should they? Does the answer change if the misinformation involves evidence not yet introduced at trial? May the press print any information it acquires about a criminal case, regardless of how it was acquired? Does the media have an absolute right to attend all pretrial and trial proceedings? If not, what are the limits? Whose interests are balanced? What, if any control does a prosecutor or judge have on the release of information in a criminal case; or on a defense counsel trying his case in the media?[17]

These are some of the complex media-relations issues that normally arise in high-profile cases and are increasingly arising in routine cases.

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15. The Freedom of Information Act, 5 U.S.C.S. § 552 (LEXIS 2000) (FOIA), and the Privacy Act, 5 U.S.C.S. § 552a (LEXIS 2000) (PA) together govern release of information from federal government agencies. The Department of Defense and each of the services have regulations implementing FOIA and the PA. This article discusses releases of information to the media under FOIA and PA, *infra* Section IV.E.4.

16. Although media inquiries are typically the responsibility of public affairs officers, in military justice and other litigation the legal office should be the source of information regarding legal issues.

17. *See generally Latest Battles Over Lawyers' Right to Speak Out*, CHAMPION, July 1998, at 42. Captain Ashby, the accused pilot in the Aviano, Italy ski-gondola crash, appeared on CBS' *60 Minutes* to discuss the evidence his defense would present at his pending court-martial trial. Colonel (COL) James Schwenk, legal advisor to the Marine Corps Article 32 officer, was also interviewed on the show. *Pilot Tells '60 Minutes' Ski Lift Wasn't on Map*, WASH. POST, Jan. 24, 1999.

Among the goals of the government in military criminal cases are to secure justice, protect legitimate safety, personal privacy, national security, and fair trial interests, and to ensure that the public is accurately informed about, and confident in, the fair functioning of the military justice system. To intelligently promote these interests, lawyers representing the military services must understand the scope of the media right to free expression, the scope of the media's constitutional and common law rights of access to information in criminal cases, the ethical rules governing extra-judicial statements in pending criminal cases, the rules governing release of information under the Freedom of Information Act (FOIA)[18] and the Privacy Act (PA);[19] and the measures available to control publicity when a constitutionally appropriate showing has been made that such measures are necessary.

C. The Military's Changing Philosophy About Media Relations

All of the services have recognized that the days of the "no comment" response are gone.[20] Defense counsel, witnesses, other case participants, and interest groups actively solicit the media to tell their story–often to the detriment of the military.[21] The military services now recognizes that an opportunity to educate the American public about the military justice system arises with each high profile case. The services also realize that the goals of accurately informing the public about the military justice system and inspiring public confidence that the system is fair cannot be accomplished without engaging the media.[22] Both the Air Force and the Army have developed manuals to guide lawyers and other military officials in media relations in high profile cases.[23] These manuals provide media fact sheets on routine procedures in the military justice system. They also provide guidance on releasing information and how to interact effectively

18. 5 U.S.C.S. § 552 (LEXIS 2000).

19. *Id.* § 552a.

20. Matthews, *supra* note 5 (discussing negative publicity to the armed services as a result of recent high profile cases and the services' efforts to train lawyers to deal more skillfully with the media).

21. *See supra* note 17. *See also* Robert S. Bennett, *Press Advocacy and the High-Profile Client*, CHAMPION, May 1999, at 24 (discussing how defense counsel must engage in aggressive press advocacy in high profile cases to be effective).

22. Matthews, *supra* note 5.

23. *See* MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE (Feb. 1998) [hereinafter Air Force Media Guide] (Air Force publication); MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE (Nov. 1998) (Army publication).

with the media. Prior to the publication of these manuals, no service had a singular source to assist attorneys and other military officials involved in criminal trials with media relations issues.[24] In addition to the media guides, the services have begun to formally train lawyers in media relations in criminal cases. The First Joint Services High Profile Case Management Course was held from 10-12 May 1999 at the Army Judge Advocate General's School in Charlottesville, Virginia.[25] This course, geared to senior military attorneys, focused exclusively on media relations issues in high profile cases.

D. Purpose

This article examines the media's rights of free expression and access, and how these rights apply in courts-martial. Free expression is the right of the media under the First Amendment to freely publish information it gathers. Access is the media's right to attend and observe criminal proceedings, to obtain information and evidence in criminal proceedings, and to gather information from trial participants. The scope of the media's

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24. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806 (1998) [hereinafter MCM] (Public Trial); *id.* R.C.M. 405(h)(3) (discussing access by spectators to Article 32 investigations); *id.* R.C.M. 701(g)(2) (authorizing protective and modifying orders for discovery); *id.* MIL. R. EVID. 412(c)(2) (requiring a closed hearing in all nonconsensual sexual offense cases when considering the relevance of proffered evidence of the alleged victim's behavior or sexual predisposition). Among the regulatory sources for the Department of the Army are the following: U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION PROGRAM (14 May 1997) [hereinafter AR 25-55]; U.S. DEP'T OF ARMY, REG. 195-6, DEPARTMENT OF THE ARMY POLYGRAPH ACTIVITIES, para. 2-9 (29 Sept. 1995); U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, para. 7-9b (19 Sept. 1994); U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, para. 1-11, ch. 3 (15 Mar. 1994); U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, paras. 3-6, 3-8 (1 May 1992) [hereinafter AR 27-26]; U.S. DEP'T OF ARMY, REG. 360-5, PUBLIC INFORMATION (31 May 1989); U.S. DEP'T OF ARMY, REG., 190-45, MILITARY POLICE LAW ENFORCEMENT REPORTING, ch. 3 (30 Sept. 1988); U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES, para. 1-5(k) and ch. 4 (30 Oct. 1985); U.S. DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 July 1985); Policy Letter 98-6, Office of the Judge Advocate General (OTJAG), U.S. Army, subject: Relations with News Media (12 Sept. 1997).

25. The High Profile Course included instruction in information disclosure, ethical rules regarding extrajudicial statements, unlawful command influence, and press release writing as well as perspectives on high profile cases from prosecutors, agency counsel, judges, a public affairs officer, a press representative, and a defense counsel.

right of access is governed by the First Amendment and by the common law.

The purpose of this article is to enable lawyers to understand and apply First Amendment[26] analysis when the media's right of access to information conflicts with one or more interests advanced by a "player" in a criminal case. Players are people or entities involved in criminal cases, such as the accused, defense counsel, panel,[27] victims, third parties having an interest in the case,[28] and the government. Player interests typically cited to preclude media access to information or proceedings in criminal cases include: (1) preventing prejudicial publicity that threatens an accused's Sixth Amendment right to a fair trial by an impartial jury;[29] (2) protecting testifying witnesses from trauma, embarrassment, or humiliation;[30] (3) protecting trial participant privacy;[31] (4) protecting trial participant safety;[32] (5) preventing disclosure of government information that threatens national security, or is protected by government privilege;[33] (6) preserving the confidentiality of law enforcement information or the identity of undercover officers or informants;[34] (7) protecting trade secrets or other confidential commercial information;[35] and (8) concealing the identity of juveniles.[36]

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26. U.S. CONST. amend. I.

27. A military panel is similar to a civilian jury except, among other things, that military criminal trials do not require a unanimous verdict from the panel.

28. An example of such a third party who is not an actual party or witness in a criminal case is a man, commonly known as a "john," who is listed in government investigative records as a client of a prostitute who is being prosecuted. Such a third party may allege a privacy interest to prevent the release of his name as a client to the public.

29. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Sheppard v. Maxwell, 384 U.S. 333 (1966).

30. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

31. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

32. *See* Unabom Trial Media Coalition v. District Court, 183 F.3d 949 (9th Cir. 1999).

33. *See* United States v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992).

34. *See* Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997).

35. *See* United States v. Andreas, 150 F.3d 766 (7th Cir. 1998).

36. *See* United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995). *See generally* Dan Paul & Richard J. Ovelmen, *Access*, 540 PLI/PAT 157 (1998).

Section II explores the media's First Amendment right to freedom of expression. Section III examines the media's First Amendment right of access to criminal proceedings. Section IV discusses the media's First Amendment and common law rights of access to information in criminal cases, particularly to judicial records, evidence, and discovery. This section also examines how the statutory and regulatory rules of FOIA and the PA can satisfy the media's common law right of access to judicial records in military cases but may impinge on the media's First Amendment right of access to the same records. Section V examines media rights of access to information from trial participants. The section looks at ethics rules limiting extra-judicial statements to the media by attorneys involved in pending cases. This section also discusses constitutional problems with the ethics rules currently in force in each of the armed services. Finally, the section explores the power of courts to issue "gag orders"[37] limiting counsel and other players from disseminating information about a case or from making extra-judicial statements about a pending case. Ethics rules and gag orders also involve First Amendment analysis.

The body of the article recommends three changes to the *Manual for Courts-Martial* and to military service regulations to improve the armed services' management of high profile cases. These recommendations include: (1) amending Rule for Courts-Martial (R.C.M.) 806[38] in four respects: first, to eliminate the current language empowering a military judge to close a courts-martial session for good cause and substitute the four-part test required by the Supreme Court and the United States Court of Appeals for the Armed Forces (CAAF)[39] for closure;[40] second, to remove the limitation on the military judge's power to close part or all of courts-martial trials over the objection of the accused when the govern-

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37. A "gag order" is an order by the court, to proscribe extrajudicial statements by any lawyer, party, witness, or court official. Normally, the intent of a gag order is to stop the flow of information from court participants which divulges prejudicial matters, such as the refusal of the defendant to submit to interrogation or take lie detector tests, any statement made by the defendant to officials, the identity of prospective witnesses or their probable testimony, any belief in guilt or innocence, or like statements concerning the merits of the case. *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966). *See generally* Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial, What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus,"* 26 SUFFOLK U.L. REV. 1063, 1084 (1992).

38. MCM, *supra* note 24, R.C.M. 806.

39. On 5 October 1994, Congress changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The names of the four intermediate service courts (Army, Air Force, Navy-Marine, and Coast Guard Courts of Military Review, abbreviated, respectively, as

ment has demonstrated that closure is necessary and narrowly tailored to protect a compelling interest after considering all reasonable alternatives to closure;[41] third, to codify that, from referral to authentication, the military judge is responsible for all judicial records filed in connection with a court-martial and is also responsible for determining whether and when such court documents should be released to the media or to the public; and fourth, to provide that the media and the public be given notice and an opportunity to be heard before courts-martial sessions are closed or judicial records are sealed; (2) amending R.C.M. 405(h)(3)[42] to require that Article 32 hearings be open unless, prior to closing an Article 32, the media and the public are given notice and an opportunity to be heard and closure is based on the four-part test mandated by the Supreme Court and CAAF;[43] and (3) updating service ethics rules on trial publicity to delete language that is unconstitutionally vague.[44]

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39. (continued) A.C.M.R., A.F.C.M.R., N.M.C.M.R., and C.G.C.M.R.) were also changed. The current names of the four intermediate service courts are the Army Court of Criminal Appeals, the Air Force Court of Criminal Appeals, the Navy-Marine Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (codified at 10 U.S.C.S. § 941 (LEXIS 2000)).

40. As discussed *infra*, Section III, both the Supreme Court and the CAAF require four conditions to be satisfied prior to closing a criminal trial: (1) the party seeking closure must advance a compelling interest articulated by individualized, case-by-case, findings that is likely to be prejudiced; (2) closure is narrowly tailored to protect the compelling interest; (3) the trial court considered and rejected reasonable alternatives to closure; and (4) the trial court made adequate, on the record, findings supporting the closure to aid in appellate review. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); ABC, Inc. v. Powell, 47 M.J. 363 (1997); United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998).

41. MCM, *supra* note 24, R.C.M. 806(b) (currently authorizing the military judge to close a court-martial session over the objection of the accused only when expressly authorized by the MCM).

42. *Id.* R.C.M. 405(h)(3) (currently allowing Article 32 investigations to be closed in the discretion of the commander who directed the investigation or the investigating officer).

43. *See supra* note 40.

44. As discussed *infra*, Section V, each of the military service ethics rules currently contains language that the Supreme Court found unconstitutionally vague in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

II. Free Expression

A. Supreme Court

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."[45] The founding fathers recognized that a free uncensored press is essential to a democracy to inform the public about government operations and subject them to public scrutiny.[46] Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors.[47] In criminal justice matters, freedom of the press allows the public to understand the criminal justice system and to be confident that the system fairly secures justice.[48]

Attempts by the government, through statute or otherwise, to enjoin the media from publishing information are called "prior restraints."[49] Courts view prior restraints with a heavy presumption against their constitutional validity.[50] The heavy burden on the government to justify a prior restraint cannot be based on mere speculation of harm.[51]

The burden on the government is so high that it rarely tries to actually enjoin the press from publication.[52] Early landmark cases involving prior

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45. U.S. CONST. amend. I.

46. New York Times Co. v. United States, 403 U.S. 713, 715-17 (1971) (Black J., concurring).

47. *Id.* at 724 (Douglas J. concurring) (citing New York Times v. Sullivan, 376 U.S. 254, 269-70 (1963)).

48. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J. concurring jointed by Stewart J. and Marshall J). These concurring Justices said that

> commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Id.

49. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Jeffries v. Mississippi, 724 So. 2d 897 (Miss. 1998).

50. *New York Times Co.*, 403 U.S. at 714 (per curiam).

51. *Id.* at 725 (Brennan J., concurring).

52. The prior restraint doctrine doesn't apply to speech or press involving obscenity

restraints were *Near v. Minnesota*[53] and *New York Times Co. v. United States.*[54] In *New York Times*, the government tried to enjoin the *New York Times* from publishing the contents of a classified study[55] about American involvement in the Vietnam war that was secretly taken from the Department of Defense and given to the *New York Times* by a former defense department employee. The government argued that release of the classified study would endanger national security and that there were statutes that arguably made publication of the study a criminal act.[56] Six justices in a per curiam opinion held that the government did not meet its burden.

In 1976 and 1977, the Supreme Court considered for the first time, two cases in which state criminal courts enjoined the media from publishing information.[57] In *Nebraska Press Ass'n v. Stuart*, the justification for the injunction was that publication threatened the accused's Sixth Amendment right to a fair trial.[58] In *Oklahoma Publishing Co. v. District Court of Oklahoma County*, the justification for the injunction was the state's interest in preventing public access to records of juvenile proceedings.[59]

Nebraska Press involved a highly publicized multiple murder where the prosecutor and the defense jointly requested a court order stating what information the media (or anyone else) may disclose or publish to the public. Both sides were concerned that the massive press coverage created a reasonable likelihood that prejudicial news would make it difficult, if not impossible, to impanel an impartial jury and secure a fair trial. Nebraska law required that the accused be tried within six months of his arrest, and that a change of venue could move the case only to adjoining counties that, the parties argued, received the same publicity.[60] In an open hearing, the

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52. (continued) and other sppech not protected by the First Amendment. *See* Freedman v. Maryland, 380 U.S. 51 (1965).

53. 283 U.S. 697 (1931) (holding that state statute restraining publication of malicious, scandalous, and defamatory articles against political and public figures violates the First Amendment).

54. 403 U.S. 713 (1971).

55. This classified study was entitled, "History of U.S. Decision-Making Process on Viet Nam Policy" and became commonly referred to as the "Pentagon Papers." *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW, ch. 17, at 811 (2d ed. 1997).

56. *Id.* at 733-41 (discussing the germane criminal statutes to include the Espionage Act).

57. Oklahoma Publ'g Co. v. District Court of Oklahoma, 430 U.S. 308 (1977) (per curiam); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

58. *Nebraska Press Ass'n*, 427 U.S. at 542.

59. *Oklahoma Publ'g*, 430 U.S. at 1045.

60. *Nebraska Press Ass'n*, 427 U.S. at 545.

county court heard oral argument on the motion but took no evidence. No attorney for the press appeared. The original county court order prohibited everyone in attendance at the hearing from disseminating any testimony given or evidence adduced from the hearing (as well as from the open preliminary hearing held the following day) and for the press to observe the Nebraska Bar-Press Guidelines.[61] The Nebraska Supreme Court modified the order. The new order restrained the press from reporting: (1) the existence and nature of any confessions or admissions made to law enforcement officers, (2) any confessions or admissions made to any third parties except members of the press, and (3) other facts "strongly implicative" of the accused.[62] The order expired when the jury was impaneled.[63] The Supreme Court granted certiorari and reversed.

The majority first held that any attempt by the government to prohibit reporting of evidence adduced at an open proceeding is unconstitutional.[64] The majority agreed with the finding by the trial judge that there was extensive pretrial publicity that (based on common sense) may impair the accused's right to a fair trial but rejected as speculative the trial judge's conclusion that there was a clear and present danger that the pretrial publicity could impinge on the accused's right to a fair trial in this case.[65] The Court went on to hold that the state did not meet its heavy burden to justify the injunction because: (1) the record did not provide evidence that measures short of a prior restraint on the news media would not have sufficiently mitigated the adverse effects of trial publicity,[66] (2) the part of the order prohibiting the press from reporting on facts "strongly implicative" of the accused was vague and overbroad, and (3) the fact that the order was temporary did not change its character as a prior restraint.[67]

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61. *Id.* at 542, 543. The Nebraska Bar-Press Guidelines are voluntary standards adopted by members of the state bar and news media regarding what information is appropriate for print in pending criminal cases. Both the American Bar Association Model Rules and the Army have ethical standards governing extra-judicial statements in criminal cases. These ethical rules will be discussed *infra* in Section V.

62. *Id.* at 545.

63. *Id.*

64. *Id.* at 568. *See also* Jeffries v. Mississippi, 724 So. 2d 897 (Miss. 1998).

65. *Nebraska Press Ass'n*, 427 U.S. at 568-69.

66. *Id.* at 539, 543. The state court implied that alternatives to prior restraint would be ineffective. Although the county court did not hold an evidentiary hearing, the District Court conducted a hearing where county court judge testified and newspaper articles about the case were admitted into evidence. *Id.*

67. *Id.* at 568-69.

The majority noted that widespread, even adverse pretrial publicity does not necessarily lead to an unfair trial.[68] Cases where such publicity is prejudicial are rare.[69] The Court stated that, in the few cases where it had reversed convictions tainted by prejudicial pretrial publicity, the taint could have been cured by some measure short of a prior restraint on the press.[70] Such measures include a change of venue, postponement of trial until prejudicial publicity abates, voir dire, jury instructions to decide issues only on evidence presented at trial, jury sequestration, and trial court "gag orders" limiting extra-judicial statements by participating counsel, police, and witnesses.[71] Notwithstanding this dicta, the majority did not rule out the possibility of an extreme case where there would be such a

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68. *Id.* at 554.

69. *Id*.

70. *Id.* at 569 (referring to Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Estes v. Texas, 381 U.S. 532, 550-551 (1965); Rideau v. Louisiana, 373 U.S. 723, 726 (1963); Irvin v. Dowd, 366 U.S. 717, 728 (1961)).

71. *Id.* at 563-64. Thirteen years later, in 1991, the Supreme Court limited the requirement for searching voir dire to gauge the impact of pretrial publicity. In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Supreme Court affirmed a death penalty conviction in a state case of a convict serving a sentence for murder who killed again while on work release. There was massive pretrial publicity against the accused that included information about his past criminal record, that he was rejected for parole six times, accounts of his prison misconduct, details about his first murder, comments that the death penalty was not available when Mu' Min was convicted for his first murder, and indications that Mu' Min confessed to the current murder. The defense submitted 64 voir dire questions for the court to ask regarding the content of pretrial publicity, asked for individual voir dire, and a change of venue. The trial court rejected the entire defense request and, instead, asked in group voir dire, whether jurors had prior information about the case. The jurors answering "yes" were divided into groups of four and asked by the trial court whether they had formed an opinion about the case and whether they could be impartial notwithstanding the information they already knew about the case. No questions were asked about the content of the news that the jurors saw. The Supreme Court stated that trial courts have wide discretion in voir dire and held that an accused's constitutional right to an impartial jury means that an accused has a right to know whether a juror can remain impartial in spite of his exposure to pretrial publicity. An accused has no constitutional right to explore the content of publicity jurors have been exposed to. For an additional discussion of alternatives to prior restraint in high profile cases, see Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'-Min Remedy*, 69 S. CAL. L. REV. 1587 (1996); William G. Kastin, *Presumed Guilt: Trial by the Media the Supreme Court's Refusal to Protect Criminal defendants in High Publicity Cases*, 10 N.Y.L. SCH. J. HUM. RTS. 107 (1992). A few post-*Mu'Min* cases were reversed for prejudicial pretrial publicity impacting on the accused's right to a fair trial by an impartial jury. *See, e.g.*, United States v. Beckner, 69 F.3d 1290 (5th Cir. 1995) (recognizing that Federal Circuits such as the Fifth Circuit may require content based voir dire in their jurisdictions); Tuggle v. Thompson, 854 F. Supp. 1229 (W.D. Va. 1994) (granting habeas petition in part because of voir dire restrictions on the defense).

threat to fair trial rights that would possess the requisite degree of certainty to justify a prior restraint.[72] Three Justices, with a fourth leaning this way, flatly rejected prior restraints on the press as a permissible means of enforcing an accused's Sixth Amendment right to a fair trial.[73]

Nebraska Press also recognized that a state might not be able to enforce a restraining order against a media source outside its territorial jurisdiction.[74] Military courts would face similar jurisdictional issues enforcing an order against the media. The *Manual for Courts-Martial* provides no authority for the military judge to punish a media violation of an order by a military judge.[75]

The Supreme Court has consistently struck down government attempts to limit media publication of events or information when the media has legitimately obtained the information by attending a proceeding or when the government has released the information. In *Oklahoma Publishing Co. v. District Court of Oklahoma County,*[76] the Supreme Court struck down a state court order enjoining the media from publishing the name or photograph of a juvenile court proceeding attended by the media. State law mandated closed juvenile proceedings unless a judge specifically ordered an open hearing.[77] In this case, the media was allowed to attend the juvenile hearing but the judge never specifically ordered that the hearing be open. The Supreme Court held that once the media is allowed to observe the proceedings, it can "print with impunity" what it observes tran-

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72. *Nebraska Press Ass'n*, 427 U.S. at 569.

73. *Id.* at 572 (Brennan J. concurring with Stewart J., and Marshall J. joining). Justice Stevens agreed with the principle that courts cannot enjoin the press to protect an accused's right to a fair trial but he did not discount the possibility that there may be a sufficiently extreme case where a prior restraint may be imposed). *Id.* at 617 (Stevens, J. concurring).

74. *Id.* at 565 (holding that the state court lacks in personem jurisdiction over the media entity). *But see* State-Record v. South Carolina, 504 S.E.2d 592 (S.C. 1998) (citing Degen v. United States, 517 U.S. 820 (1996) for the proposition that courts have inherent authority to protect their proceedings).

75. *See* MCM, *supra* note 24, art. 48, R.C.M. 801(b)(2), R.C.M. 809. Article 48 authorizes courts-martial to punish for contempt any person using a menacing word, sign, or gesture in its presence or who disturbs its proceedings by riot or disorder. R.C.M. 801(b)(2) authorizes the military judge to exercise contempt power subject to R.C.M. 809. R.C.M. 809 implements Article 48. The discussion to R.C.M. 809 states that the military judge issue orders to ensure orderly progress of trial but may not punish violations of such orders by contempt.

76. 430 U.S. 308 (1977).

77. *Id.* at 309.

spiring in the courtroom.[78] The Supreme Court has also struck down state attempts to impose civil and criminal sanctions, not amounting to injunctions, against the media to deter the media from publishing information, such as the name of rape victims, that the state does not want publicized when the information being published was released by the government or made available in an open criminal proceeding.[79]

The Supreme Court has carved out one limited exception to *Nebraska Press* and *Oklahoma Publishing*.[80] *Seattle Times Co. v. Rhinehart* upheld a trial court order restraining a media entity that was a party to the litigation[81] from disclosing information obtained through discovery in a civil case.[82] The order in this case did not prevent the Seattle Times Company from publishing or distributing any information obtained through discovery, if it also obtained the same information from an outside source.[83] The deciding factor in this case was that the newspapers were parties to the lawsuit and would not have obtained the information but for its discovery rights as a party. The Court opined that a party's right of access to discovery is a matter of legislative grace.[84] Access to discovery is solely for purposes of trying the suit. Restraints on discovered information are not a restriction on a traditionally public source of information.[85]

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78. *Id.* at 311 (citing Craig v. Harney, 331 U.S. 367 (1947) ("Those who see and hear what transpired [in the courtroom] can report it with impunity.")).

79. *See* Florida Star v. BJF, 491 U.S. 524 (1989) (rape victim's name lawfully obtained from police records); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (juvenile offender's name without written approval of juvenile court where paper learned of name from witnesses, the police, and a local prosecutor); Cox Broad. Co. v. Cohn, 420 U.S. 469 (1975) (rape victim's name revealed during trial).

80. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

81. The media defendants were the *Seattle Times Co.* and the *Walla Walla Union Bulletin. See id.* at 23.

82. *Id.* The media entities were defendants in a civil defamation suit brought by a religious organization. Over plaintiff's objection the media entities obtained, through discovery, a list of donors who made contributions to the religious organization and other membership information. The court issued the protective order for good cause, pursuant to Federal Rule of Civil Procedure 26(c), finding that that public release of the information would adversely affect reputation and privacy of the donors and members.

83. *Seattle Times Co.*, 467 U.S. at 34.

84. *Id.* at 21.

85. *Id.*

The question left unresolved by *Seattle Times* is whether a court can enjoin the media from printing discovery information it obtains from a court participant who violates a protective order. Under the rationale of *New York Times*, such an injunction should violate the First Amendment.[86] Two recent cases have upheld injunctions restraining the media from publishing information gathered in violation of the attorney/client privilege. In *United States v. Noriega*, the Eleventh Circuit upheld a temporary restraining order (TRO) preventing Cable News Network (CNN) from publishing recordings of telephone calls made from prison between Noriega and his attorney.[87] In *State-Record v. South Carolina*, the Supreme Court of North Carolina upheld a TRO prohibiting the media from publishing a videotape containing privileged communication between an accused and his attorney.[88]

Nebraska Press/*Oklahoma Publishing* is the law of prior restraints in criminal cases today. The practical lesson from these cases is that enjoining the press from reporting information it lawfully obtains is, normally, not an option in criminal cases.[89]

B. Military Courts

The parties to courts-martial are the United States and the accused; thus, the facts of *Seattle Times* will not occur in military trials. To date, no military court, in any published case, has attempted to enjoin the media from publishing information.

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86. New York Times Co. v. Sullivan, 403 U.S. 713 (1971) (striking down prior restraint where media published classified study that was taken from the Department of Defense without authorization and given to the media).

87. 917 F.2d 1543 (11th Cir. 1990). The trial court granted the TRO because CNN did not produce the tape of the recorded conversations for the district court to review. The district court, in a later decision, refused to permanently enjoin CNN from publishing the tapes, finding that neither the threat of pretrial prejudice nor the impact on effective assistance of counselwas sufficiently jeopardized to justify a prior restraint. *See* United States v. Noriega, 752 F. Supp. 1045 (1990). The Supreme Court denied certiorari in *Cable News Network, Inc. v. Noriega*, 498 U.S. 976 (1990) (Marshall, J. dissenting). Justices Marshall and O'Connor would have granted certiorari to make clear that courts do not have authority to temporarily restrain media publication pending application of the *Nebraska Press* test.

88. 504 S.E.2d 592 (S.C. 1998).

89. It is unclear whether the media may be restrained from publishing information it obtains unlawfully. *See New York Times*, 403 U.S. at 17. *But see Noriega*, 917 F.2d at 1543; *State-Record*, 504 S.E.2d at 592. Injunction may not be an option even if the information is unlawfully obtained by the media.

Few military cases have addressed the impact of pretrial publicity on an accused's right to a fair trial by an impartial jury.[90] To date no military case has been reversed for this reason.

III. Access To Criminal Proceedings and Pretrial Investigations

A. Distinctions Between Right of Free Expression and Right of Access

Freedom of expression under the First Amendment allows the media to express or publish information it acquires without government restraint or interference.[91] The media also has a qualified First Amendment right of access to criminal trials and certain pretrial proceedings.[92] Finally, the media has a common law right to inspect and copy judicial records.[93] A trial attorney cannot form an effective media relations strategy without understanding the scope of and distinctions between media rights of free

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90. A detailed analysis of the impact of prejudicial pretrial publicity on the accused's right to a fair trial by an impartial jury is beyond the scope of this article. Several recent military cases have addressed this issue. *See* United States v. Rockwood, 52 M.J. 98 (1999) (rejecting accused's allegation of pretrial publicity finding that accused generated most of the publicity and argued against a government motion to instruct members to avoid pretrial publicity); United States v. Curtis, 44 M.J. 106, 132-39 (1996) (defining two types of prejudice that may result from publicity–presumed prejudice where pretrial publicity is prejudicial and inflammatory and has saturated the community; and actual prejudice where the publicity results in jurors with such fixed opinions that they cannot impartially judge the guilt of the accused); United States v. Loving, 41 M.J. 213, 253 (1994) (finding that the defense was not denied media information to raise prejudicial trial publicity challenge); United States v. Moultak, 21 U.S. 822 (N.M.C.M.R. 1985) (opining that official involvement by giving post-trial interviews with press does not automatically disqualify convening authority or SJA from post-trial review); United States v. Garwood, 20 M.J. 148 (C.M.A. 1985) (holding that the military judge's violation of the American Bar Association Code of Judicial Conduct by publicly discussing an on-going trial with the media did not disqualify him in trial by members where extensive voir dire of members revealed no prejudicial impact); United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981) (deciding that an SJA is not disqualified from preparing post trial review because he explained plea bargain procedures in post-trial interview with installation newspaper); United States v. Creer, No. NMCM 96 00469, 1997 CCA LEXIS 277 (N.M. Ct. Crim. App., Apr. 9, 1997) (finding no connection between extensive media coverage of rape of Okinawan school girl by three Marines and accused's trial).

91. *New York Times*, 403 U.S. at 713.

92. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

93. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

expression and media rights to access proceedings and information in criminal cases.

The media's right to free expression is virtually absolute.[94] Counsel and courts can almost never prevent the media from publishing information produced at a public proceeding or information the media obtains from third party sources not affiliated with a judicial proceeding.[95] The Supreme Court considers an attempt by the government to silence, delay,[96] or penalize[97] media publication of information as a prior restraint. Prior restraints are presumed unconstitutional.[98]

The media right of access to criminal proceedings is less broad than the right to free expression. The Supreme Court has held that the media has a qualified First Amendment right to attend criminal trials,[99] jury selection proceedings,[100] and pretrial probable cause hearings.[101] In these access decisions, the Supreme Court has developed a two-part test to determine whether the media has a qualified First Amendment right of access to attend other proceedings involving criminal cases. The cases refer to this analysis as the test of experience and logic.[102] First (the experience prong), the Court assesses whether the United States has experienced a history of openness or public access to the type of proceeding at issue. Second (the logic prong), the Court determines whether public access to such

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94. *See New York Times Co.*, 403 U.S. at 713.

95. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The Court recognized that there is no absolute right to free expression but it would be difficult to show the kind of threat to fair trial rights that would be so certain to justify a prior restraint on the media. *Id.* at 569-70.

96. *Id.* at 559-61 (finding a government order to the media to postpone publication to be a prior restraint); United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998) ("[O]nce access is found to be appropriate, access ought to be 'immediate and contemporaneous.'").

97. *See* Landmark Communications v. Virginia, 435 U.S. 829 (1978) (holding unconstitutional a statute criminalizing publication about proceedings of state commission investigating judicial misconduct).

98. *Nebraska Press Ass'n*, 427 U.S. at 570.

99. Richmond Newspapers, Inc. v. Commonwealth, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

100. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

101. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

102. *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149 (1993); *Press-Enterprise II*, 478 U.S. at 8; *Globe Newspaper Co.*, 457 U.S. at 604-07.

proceedings logically plays a particularly significant role in the functioning of the judicial process and the government as a whole.[103]

If the proceedings have traditionally been open and public access is essential to the proper functioning of the judicial system, then the media has a First Amendment right to attend the proceeding.[104] The media also has standing to challenge denial of access.[105] The party seeking to prevent the media right of access must show, in specific, on the record, findings that (1) closure is essential to preserve higher values or compelling interests; (2) individualized, case-by-case findings justify each closure; (3) closure is narrowly tailored to serve the compelling interest.[106] To conclude that closure is narrowly tailored to achieve the interest, the court must consider alternatives to closure.[107] This is typical fundamental right/strict scrutiny analysis.[108]

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103. *See* United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) (listing the following six societal interests encouraged by open hearings that must be considered in evaluating the logic prong: (1) promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; (2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; (3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion; (4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny; (5) enhancement of the performance of all involved; and (6) discouragement of perjury).

104. *Compare Globe Newspaper Co.*, 457 U.S. at 596 (criminal trial traditionally open to public) *with* Pell v. Procunier, 417 U.S. 817 (1974) (prisons not traditionally open to public) *and* JB Pictures, Inc v. Department of Defense, 86 F.3d 236, 240 (D.C. Cir. 1996) (military bases not traditionally open to the public). *See also Richmond Newspapers*, 448 U.S. at 565–79 (discussing historical foundation for open public trials). *Cf.* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (declining to apply the two-part test in deciding whether the media has a First Amendment right of access to a county jail).

105. *See Globe Newspaper Co.*, 457 U.S. at 596. For a case-by-case approach to be meaningful, the media and the public must have an opportunity to be heard on the question of closure. *Id.* at 609 n.25.

106. *Press-Enterprise II*, 478 U.S. at 9; Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

107. *Press-Enterprise II*, 478 U.S. at 14; *Press-Enterprise I*, 464 U.S. at 513.

108. The Sixth Amendment guarantees every accused the right to a public trial. The same strict scrutiny test applies when a criminal proceeding is closed over the objection of an accused. If the trial court closes a criminal proceeding over the objection of the accused without applying the strict compelling interest/individualized findings/narrowly tailored means test, the penalty is automatic reversal. Denial of an accused's right to public trial, over his objection, is one of the few constitutional errors the Supreme Court calls "structural defect" calls "structural defects." Such structural defects are not subject to harmless error analysis and and, if they exist, require automatic reversal without a showing of prejudice. *See* Neder v. United States, 527 U.S. 1, 5 (1999); Waller v. Georgia, 467 U.S.

When a court finds in an individual case that there is a compelling interest[109] that conflicts with the media right of access, the court weighs the interest asserted with the need and benefits for openness to determine whether closure or a less stringent alternative is required.[110]

If the compelling interest is an accused's Sixth Amendment right to a fair trial, a proceeding cannot be closed unless the court makes a case specific finding that there is a substantial probability that the Sixth Amendment right to a fair trial will be prejudiced by publicity that closure would prevent, and that reasonable alternatives to closure cannot adequately protect that right.[111] Mandatory closure statutes to protect the right of all accused to a fair trial are unconstitutional.[112]

If the compelling interest is the privacy of a juror, the physical and psychological well being of a victim, or other need to restrict disclosure of sensitive information, then closure must be supported on the record by individualized findings that closure is necessary to protect the interest in each case.[113] Mandatory closure statutes to protect these interests in every case are unconstitutional.[114]

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108. (continued) 39 (1984). *See also* Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999) (reversing for denial of the accused's Sixth Amendment right to public trial a conviction of rape and sexual assault of minor step-granddaughter); Braun v. Powell, 77 F. Supp. 2d 973 (E.D. Wis. 1999) (reversing for denial of the accused's Sixth Amendment right to public trial a conviction of first degree murder); Carter v. Maryland, 738 A.2d 871 (Md. 1999) (reversing for denial of the accused's Sixth Amendment right to public trial a conviction of rape of 14 year-old).

109. Interests typically cited to preclude media access to information or proceedings in criminal cases include: (1) preventing prejudicial publicity that threatens an accused's Sixth Amendment right to a fair trial by an impartial jury; (2) protecting testifying witnesses from trauma, embarrassment, or humiliation; (3) protecting trial participant privacy; (4) protecting trial participant safety; (5) preventing disclosure of government information that threatens national security, or is protected by government privilege; (6) preserving the confidentiality of law enforcement information or the identity of undercover officers or informants; (7) protecting trade secrets or other confidential commercial information; and (8) concealing the identity of juveniles. For examples of cases involving these interests, see *supra* notes 29-36.

110. *Press-Enterprise I*, 464 U.S. at 512.

111. *Id.* at 514; *El Vocero de Puerto Rico*, 508 U.S at 150.

112. 112. *El Vocero de Puerto Rico*, 508 U.S. at 147.

113. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-10 (1982).

114. *Id.* at 611 n.27.

Finally, when the right of access is triggered, access should occur immediately.[115] The government may not prevent the media from attending a proceeding by offering to provide a transcript of the proceeding after it occurs.[116]

B. Access to Criminal Trials

In 1980, the Supreme Court held, for the first time, that the press and the public have a First Amendment right of access to criminal trials.[117] This right of access is the right to attend a proceeding and to hear, see, and communicate observations about it.[118] In *Richmond Newspapers*, the Court held that criminal trials were historically open to the public and that the public plays a positive role in the functioning of criminal trials (the experience/logic test).[119] As the experience/logic test is met, the First Amendment right of access attaches to criminal trials.[120] Thus, a criminal trial may not be closed to the public without a compelling interest articulated in findings on the record, and a determination by the court that alternative measures short of closure were considered and deemed insufficient to protect the overriding interest.[121]

Two years later, the Supreme Court fine-tuned the test for closing proceedings to which the First Amendment right of access has attached. Any closure of part or all of a trial must also be narrowly tailored to serve that interest.[122] This test remains the law of the land. *Globe Newspaper Co. v. Superior Court* struck down a state statute mandating trial closure during

115. United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998). ("[O]nce access is found to be appropriate, access ought to be 'immediate and contemporaneous.'").

116. *Id.*

117. Richmond Newspapers, Inc. v. Commonwealth, 448 U.S. 555, 558-81 (1980).

118. *Id.* at 576.

119. *Id.* at 574-78.

120. *Id.* at 580.

121. *Id.* at 581 (suggesting alternatives to closure cited by *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-565 (1976) and *Sheppard v. Maxwell*, 364 U.S. 333, 357-362 (1966)). These alternatives include changing venue of trial to one with less publicity, postponing the trial so that public attention would decrease, intensive voir dire, and emphatic and clear jury instructions on the duty of jurors to decide a case based only on evidence presented in open court, sequestration, and court imposed "gag orders" limiting what trial participants (normally, lawyers, police and witnesses) may say. *Id.*

122. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

the testimony of a minor victim in sex offenses cases.[123] The statute did not deny the media access to transcripts of the closed portions of the trial.[124] While the Court recognized that protecting the physical and psychological well-being of a minor victim is a compelling state interest, it held that statutorily mandated closure without particularized case-by-case determinations was not narrowly tailored to serve that interest.[125] The Court emphasized that its holding was narrow in that only a mandatory closure law respecting the testimony of minor sex victims is unconstitutional.[126] The unanswered question is whether statutes mandating closure for interests other than the privacy of a minor sex victim are constitutional.[127]

Both *Richmond Newspapers* and *Globe Newspaper Co.* recognized the power of courts to impose reasonable time, place, and manner restrictions to control courtroom decorum, to withhold access to sensitive details concerning victims and the victim's future testimony, and to hold in-camera conferences.[128]

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123. *Id.*

124. *Id.* at 610.

125. *Id.* at 607-09. The court rejected as speculative and contrary to logic and common sense, the second interest advanced by the state–that mandatory closure encourages minor victims to come forward and provide accurate testimony. *Id.* at 609-10.

126. *Id.* at 609 n.22, 611 n.27. The court, in dicta, indicated that a statute giving a trial judge discretion to close a trial during the testimony of a minor victim of a sex offense is constitutional.

127. *See* United States v. Three Juveniles, 61 F.3d 86, 89 (1st Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996). The Supreme Court has never determined whether the First Amendment right of public access attaches to juvenile proceedings, nor whether across-the-board closure of such proceedings violates the First Amendment. *Id. See also* United States v. Lonetree, 31 M.J. 849, 852-55 (N.M.C.M.R. 1990), *aff'd and rem'd* 35 M.J. 396 (C.M.A. (1992). Military Rule of Evidence 505(j)(5) authorizes, but does not require, a military judge to close portions of a court-martial during testimony of a witness that discloses classified information. The court rejected the defense arguments, finding a distinction between closure based on individual privacy interests where individual findings are required to justify each closure and closure because of information detrimental to the national security where the individualized findings addresses the type information to be protected. Thus, once the military judge made findings that individualized classified information is detrimental to national security, he does not have to make individualized findings each time a witness or document refers to the information. *Id.*

128. *Globe Newspaper Co.*, 457 U.S. 607 n.17, 609 n.25; *Richmond Newspapers, Inc.*, 448 U.S. at 598 n.23. In Sixth Amendment public trial cases, federal circuit courts have distinguished between total closure (closed to the public and media) and partial closure (open to the public but closed to one or more persons). The circuits are divided over whether partial closures may be justified on a lesser standard of "substantial reason." *Compare* United States v. Osborne, 68 F.3d 94 (5th Cir. 1995) (citing decisions by the Second,

C. Access to Pretrial and Other Hearings Relating to a Criminal Trial

In 1984 and 1986, the Supreme Court, in *Press-Enterprise I*[129] and *Press-Enterprise II*,[130] extended the media's constitutional right of access to voir dire proceedings and preliminary probable cause hearings, respectively. Also in 1984, Supreme Court dicta in *Waller v. Georgia*, recognized the media's right to attend suppression hearings.[131] As with criminal trials, voir dire proceedings, preliminary probable cause hearings, and suppression hearings met the experience/logic test.[132]

Press-Enterprise I viewed voir dire as part of a criminal trial.[133] *Press-Enterprise II* found it significant that preliminary probable cause hearings often provide the sole means for the public to observe the operation of the criminal justice system in many cases.[134] No felony trial can take place unless there is a grand jury indictment or a finding of probable cause by a neutral and detached magistrate at a preliminary hearing (or both if the accused requests a preliminary hearing after the grand jury has returned an indictment).[135] Preliminary probable cause hearings are adversarial. The accused may personally appear, be represented by counsel, cross-examine witnesses, present evidence, and move to suppress illegally

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128. (continued) Eighth, Ninth, Tenth, and Eleventh Circuits to hold that partial closures do not raise the same Constitutional concerns as total closures and may be justified by a "substantial reason" for closure) *with* Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999) (declining to adopt "substantial reason" for partial closure because the Supreme Court requires a compelling interest to justify all closures).

129. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

130. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

131. 467 U.S. 39, 44-46 (1984) (holding that the Sixth Amendment is violated when a suppression hearing is closed over the objection of the accused without meeting the compelling interest/individualized findings/narrowly tailored means test). Improper closing, in violation of the Sixth Amendment is a structural defect in the trial resulting in automatic reversal. *See supra* note 108.

132. The experience prong is met when there is a tradition of public access to the type of proceeding. The logic prong is met when the public plays a particularly significant positive role in the functioning of such proceedings.

133. Openness in criminal trials, including the selection of jurors, enhances the fairness and appearances of the criminal trial. Public jury proceedings vindicate the concerns of victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected. *See Press-Enterprise I*, 464 U.S. at 501, 509.

134. *Press-Enterprise II*, 478 U.S. at 12.

135. Although *Press-Enterprise II* addressed California procedures, similar grand jury/preliminary probable cause hearing procedures are conducted in other states. *Id.* at 10-12, n.3.

obtained evidence.[136] *Press-Enterprise II* extended the First Amendment right of access to preliminary probable cause hearings because of their extensiveness and importance to the criminal justice system and the finality of the case at the preliminary hearing stage when no probable cause is found based on competent evidence.[137] *Waller* recognized similar public interests in suppression hearings, which frequently involve allegations of police and prosecutorial misconduct.[138] Thus, the strict scrutiny, First Amendment access analysis applied to closures of criminal trials applies equally to closures of voir dire proceedings, preliminary probable cause hearings, and suppression hearings.[139]

In 1993, the Supreme Court unanimously rejected an attempt by Puerto Rico to distinguish its closed preliminary probable cause hearings from the preliminary probable cause hearings (like the ones conducted in California) held to be traditionally open in *Press-Enterprise II*. In *El Vocero de Puerto Rico v. Puerto Rico*, the Puerto Rico Supreme Court upheld Puerto Rico's statute closing preliminary probable cause hearings unless the accused requests that it be open.[140] The court held that *Press-Enterprise II* was not controlling because preliminary probable cause hearings were traditionally closed in Puerto Rico's history and open hearings would prejudice an accused's right to a fair trial because Puerto Rico was small and densely populated.[141] The Supreme Court found the Puerto Rico distinctions insubstantial,[142] holding that the inquiry as to whether there is a history of openness looks to the history of the United States as a whole, not the history of a particular jurisdiction and that, although the threat of prej-

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136. *Id.* at 12.

137. *Id.*

138. Open suppression hearings are needed because the public has a strong interest in monitoring police and prosecutors and in exposing allegations of misconduct. *See* Waller v. Georgia, 467 U.S. 39, 45-46 (1984).

139. Closure must be justified by a compelling interest, based on individualized findings on the record, and must be narrowly tailored to achieve the compelling interestafter alternatives have been considered by the court. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). For a thorough overview of the Supreme Court's development of the *Richmond Newspapers/Globe Newspaper/Press-Enterprise II* test and its application by military courts, see Major Mark Kulish, *The Public's Right of Access to Pretrial Proceedings Versus the Accused's Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1.

140. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993). The preliminary hearing was similar in scope, procedure, and importance to the California probable cause preliminary hearing addressed in *Press-Enterprise II.*

141. *Id.* at 149.

142. *Id.*

udice to the defendant is a legitimate interest, it must be determined on a case-by-case basis.[143]

The Supreme Court has never held that the media has a First Amendment right of access to all pretrial proceedings or other judicial proceedings involving disposition of criminal misconduct.[144] The Supreme Court has recognized that, *in the discretion of the trial judge*, in-camera reviews and closed evidentiary hearings may be appropriate to determine admissibility of a sexual offense victim's behavior or sexual predisposition, or admissibility of unreliable or illegally obtained evidence.[145] Transcripts of in-camera conferences and other closed proceedings must be released once the interest justifying the in-camera proceeding no longer exists.[146]

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143. *Id.* at 150.

144. Both the Federal and Military Rules of Evidence 412(c) mandate closed hearings to determine relevance, in nonconsensual sexual offenses, of victims behavior or sexual predisposition. *See* MCM, *supra* note 24, MIL. R. EVID. 412(c), FED. R. EVID. 412 (c). Many states have statutes mandating closure for juvenile defendants. The Supreme Court has, thus-far, left these statutes undisturbed, even though such mandatory closures are unconstitutional under the rationale of *Globe Newspaper Co.*, 457 U.S. 596 (1982). *See* United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995) (denying public access to juvenile arraignment and interpreting the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042, to allow, but not require, closure). This case questions whether there is a First Amendment right of access to juvenile proceedings because they have historically not been open and the Supreme Court has never extended First Amendment jurisprudence applicable to adult cases to juveniles. *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 612 (Burger, J., dissenting) ("Although states are permitted to mandate the closure of all proceedings in order to protect a 17-year old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused."). *See generally* Paul S. Grobman, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. REV. 271 (1986) (discussing the conflict between mandatory rape shield closures and the First Amendment right of access to criminal proceedings and concluding that mandatory closure does not violate the First Amendment).

145. *See Globe Newspaper Co.*, 457 U.S. at 609 n.25. For the case-by-case approach to be meaningful, the media and the public must be heard on the questions of closure. This opportunity to be heard does not mean that a trial court may not protect a minor victim by denying the media an opportunity to confront or cross examine the victim or by denying the media access to sensitive details about the victim or his future testimony. This discretion is consistent with the traditional authority of trial judges to hold in-camera conferences. In so stating, *Globe Newspaper Co.* cited *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), a case decided prior to *Waller v. Georgia*, where a plurality recognized noFirst Amendment right of access for media to pretrial suppression hearing when the parties agree to closure. *Id.*

146. *See Gannett Co.*, 443 U.S. at 400 (holding that closure should be only to the extent necessary to protect the asserted interest and that transcripts of closed proceedings

In-camera conferences between judges and counsel to discuss administrative rather than adjudicative matters should not be considered trial proceedings triggering a media right of access.[147] However, parties to a trial may not thwart the media's access to criminal proceedings by litigating issues that should be addressed in open court in chambers.[148]

Media access to other pretrial or judicial proceedings in criminal cases depends on whether the proceeding is, in fact, a pretrial proceeding or a proceeding involving disposition of criminal misconduct.[149] If the proceeding is adjudicative, the First Amendment right of access attaches if the proceeding has been historically open[150] and if the public plays a particularly significant positive role in the proceeding (the experience/logic test).[151]

Finally, in each of the four Supreme Court cases establishing a right of access to trial and pretrial proceedings, the interest asserted to support closure was found compelling.[152] The problem in each case was that the

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146. (continued) should be unsealed after the reason for closure has passed); United States v. Valenti, 999 F.2d 1425 (11th Cir. 1993); United States v. Brooklier, 685 F.2d 1162, 1172 (9th Cir. 1982).

147. *See* United States v. Gonzalez, 150 F.3d 1246, 1259 (10th Cir. 1998) (upholding ex parte, in-camera proceedings under the Criminal Justice Act, 18 U.S.C. § 3006A, by court appointed defense counsel to request investigative, expert, or other services necessary for an competent defense). The court found no history of openness and that the public would frustrate the process because the purpose of the ex parte, in-camera hearing is not to reveal the strengths and weaknesses or the trial strategy of a defendant's case. *Id.*

148. *See* NBC v. Superior Court, 980 P.2d 337 (Cal. 1999) (discussing cases where parties have abused in chambers conferences by using them to discuss substantive issues, such as motions in limine).

149. *Id.*; *see also* United States v. McVeigh, 918 F. Supp. 1452, 1459 (W.D. Okla. 1996) (explaining that a "trial" begins with the appearance of a defendant in response to a criminal complaint, indictment, or information begins the adversary process).

150. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (*Press-Enterprise II*) (citing the grand jury is an example of a traditionally closed proceeding where the public would play a negative role in its functioning). *See also* United States v. Gonzales, 150 F.3d at 1259 (holding that ex parte, in-camera proceedings under the Criminal Justice Act, 18 U.S.C. § 3006A by court appointed defense counsel to request investigative, expert, or other services necessary for an competent defense fail the experience/logic test).

151. *Press-Enterprise II*, 478 U.S. at 10-13 (1986). Several circuits have applied the two-part test to find a qualified First Amendment right to guilty plea hearings. *See* Tammy Hinshaw, *Right of Access to Federal District Court Guilty Plea Proceeding or Records Pertaining to Entry or Acceptance of Guilty Plea in Criminal Prosecution*, 118 A.L.R. FED. 621 (1994).

152. *Press-Enterprise II*, 478 U.S. at 1 (accused's right to fair trial); Waller v. Georgia, 467 U.S. 39 (1984) (government interest not to taint wiretap evidence for future

trial court issued sweeping, over broad closure orders that did not target the interest the state sought to protect. In *Richmond Newspapers*, the entire trial was closed to protect the accused's right to fair trial.[153] In *Globe Newspaper Co.*, the state statute required mandatory closure during the testimony of a minor victim in a sex offense regardless of whether the victim desired closure.[154] In *Press-Enterprise I*, the entire individual voir dire of almost six weeks was closed and the transcript sealed, even though the trial judge opined that the majority of the information did not involve juror privacy.[155] In *Waller*, the entire seven-day suppression hearing was closed, over the objection of the accused, even though the playing of the wiretap evidence took only two and one-half hours.[156] In *Press-Enterprise II*, the entire forty-one day preliminary probable cause hearing was closed to protect the accused's right to a fair trial even though the defense did not move to suppress any evidence.[157]

The message the Supreme Court is sending is that there are a variety of interests that are compelling and may justify limited closure. To survive appellate review, the trial court must support the compelling interest conclusion with case-by-case findings as to why the interest is compelling, what alternatives have been considered and rejected, and why *limited* closure is necessary, narrowly tailored, and specifically targeted to protect the compelling interest.[158] Had the trial courts in *Richmond Newspapers*, *Globe Newspaper Co.*, *Press-Enterprise I*, *Waller*, and *Press-Enterprise II* gone through this analysis and limited the periods of closure, the cases may have been affirmed.[159]

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152. (continued) prosecutions and privacy interests of third parties in the wiretaps); Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*) (juror privacy); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (physical and psychological well-being of minor victim).

153. *Richmond Newspapers, Inc.*, 448 U.S. at 564.

154. *Globe Newspapers Co.*, 457 U.S. at 607-10.

155. *Press-Enterprise I*, 464 U.S. at 513.

156. *Waller*, 467 U.S. at 42.

157. *Press-Enterprise II*, 478 U.S. at 4.

158. Improper closure over the accused's objection, violates his Sixth Amendment right to public trial and results in automatic reversal. *See supra* note 108.

159. The facts in *Richmond Newspaper* and *Press-Enterprise II*, do not indicate that the defendant's right to fair trial was threatened (the asserted interest supporting closure). In these cases, limited closure probably would not be supported by the record.

D. Military Courts

1. Post-Referral Proceedings

Rule for Courts-Martial 103(8) defines a court-martial proceeding to include the trial on the merits and all post referral pretrial and extra-trial sessions under Article 39(a).[160] The CAAF[161] and the intermediate service courts of criminal appeal hold that the First Amendment right of access to criminal trials applies to courts-martial.[162] The definition of a court-martial includes all Article 39(a) sessions, thus, the media has a right of access under the First Amendment to Article 39(a) sessions as well as to trial proceedings.[163] The media also has standing to complain if access is denied.[164] Military courts apply the strict scrutiny First Amendment analysis set forth by *Richmond Newspapers*/*Globe Newspaper Co.*/*Press-Enterprise I and II* (compelling interest/individualized findings/narrowly tailored test) to closures of the trial or Article 39(a) sessions.[165]

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160. *See* MCM, *supra* note 24, R.C.M. 103(8) (defining court-martial). An Article 39(a) session is a hearing outside the presence of the court-members anytime after charges have been referred to determine motions, objections, matters ruled upon by the military judge, procedural issues, and, arraignments and pleas if permitted by service regulations. *See* UCMJ art. 39(a).

161. *See* discussion *supra* note 39.

162. United States v. Travers, 25 M.J. 61 (C.M.A. 1987). The right to public access to criminal trials extends to courts-martial. The compelling interest/individualized findings/narrowly tailored means test must be met to justify closure. *Id.* at 62.

163. *See id. See also* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997); United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998) ("It is clear that the general public has a qualified constitutional right under the First Amendment to access to criminal trials.").

164. *ABC, Inc.*, 47 M.J. at 365 ("When an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied.").

165. *See id.*; United States v. Anderson, 46 M.J. 728 (Army Ct. Crim. App. 1997) (holding it to be abuse of discretion to close part of a trial without adequate justification); United States v. Story, 35 M.J. 677 (A.C.M.R. 1992) (declining to uphold closure of a providence inquiry where the trial court did not use the compelling interest/individualized finding/narrowly tailored test). The individualized findings to justify the compelling interest differ depending on the type of interest proffered. *Compare* United States v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd in part set aside in part*, 35 M.J. 396 (C.M.A. 1992) *with* United States v. Terry, 52 M.J. 574 (N.M. Ct. Crim. App. 1999). *Lonetree* was a national security case where the military judge was not required to make individualized findings justifying each closed session where classified information would be disclosed. The court held that closure based on classified information required individualized findings that the information disclosed is classified, however, once the finding is made, closure is appropriate for each disclosure. In *Terry*, the court held that the government must do a case-by-case analysis to balance concern for protection of a victim against the accused's right to public trial. *See also* United States v. Hershey, 20 M.J. 433 (C.M.A. 1985). For an over-

Rule for Courts-Martial 806 governs public trials in the military.[166] Rule for Courts-Martial 806(b) (control of spectators)[167] authorizes miltary judges to close a session of a court-martial to maintain the dignity and decorum of the proceedings or for other good cause unless the accused objects.[168] Military judges have limited authority to close a court-martial session over the objection of the accused.[169] No session may be closed over the objection of the accused unless closure is expressly authorized by *another* provision of the manual.[170] The only *Manual* provision authorizing closure during a trial is Military Rule of Evidence (MRE) 505(j), which authorizes closure of trial proceedings when classified information is to be introduced.[171] Only four *Manual* provisions expressly authorize closure of an Article 39(a) session.[172] Military Rule of Evidence 412(c) requires closure in cases of nonconsensual sexual offenses, for hearings to deter-

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165. (continued) view of the Supreme Court's development of the *Richmond Newspapers/Globe Newspaper Co./Press-Enterprise I and II* test and its application by military courts, see Kulish, *supra* note 139, at 1.

166. MCM, *supra* note 24, R.C.M. 806 (Public Trial).

167. *Id.* R.C.M. 806(b). The discussion distinguishes between closure–no member of the public allowed to attend–and exclusion–certain individuals excluded from an open proceeding. Sessions of a court-martial may not be closed over the objection of the accused unless expressly authorized by another provision of the manual but exclusion of certain people by the military judge does not constitute closure. This contrasts with federal circuit decisions classifying exclusions of one or more persons as "partial closures" that must be justified by either a compelling interest or by a substantial reason, depending on the circuit. *See supra* note 128.

168. *Id.*

> R.C.M. 806 (b) Control of spectators. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

Id.

169. *Id.* The discussion states that sessions may not be closed over the objection of the accused unless expressly authorized by another provision of the manual but exclusion of certain people by the military judge does not constitute closure. *See* federal circuit cases, *supra* note 128.

170. *Id.*

171. *Id.* MIL. R. EVID. 505(j); *id.* R.C.M. 806(b) analysis, app. 22, at A21-46.

172. *Id.* MIL. R. EVID. 412(c) (nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition); *id.* MIL. R. EVID. 505(i) (classified information); *id.* MIL. R. EVID. 506(j) (government privileged information other than classified).

mine admissibility of the victim's behavior or sexual predisposition.[173] Military Rule of Evidence 505(i) and (j) allow, but do not require, military judges to close an Article 39(a) session or trial during the portion of the trial where classified information is to be disclosed.[174] Military Rule of Evidence 506(i) allows, but does not require, in-camera Article 39(a) sessions to determine whether there is information that is subject to a governmental privilege.[175] There is no authority under the *Manual* to close a trial, over the objection of the accused, for any other reason, to include protecting a victim, adult, or child from trauma, embarrassment, inability to testify in public, or retaliation.[176]

Notwithstanding the literal language of R.C.M. 806, military appellate courts have consistently held that military judges have authority to close a session of a court-martial over the objection of the accused to pro-

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173. *Id.* MIL. R. EVID. 412(c). The rule also provides that the motion, related papers, and record for the hearing be closed, unless the court orders otherwise. Because MRE 412(c) mandates closure, it, arguably, violates the First Amendment as interpreted by *Globe Newspaper Co. See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding mandatory closure of trial during testimony of minor victims of sex offenses unconstitutional because it is not narrowly tailored to compelling state interest of protecting physical and psychological well-being of minor victims). *But see id.* n.25 (explaining that courts can protect minor victims by denying the press access to sensitive details concerning the victim and the victim's future testimony). The court found such discretion consistent with the traditional authority of trial judges to conduct in-camera conferences and that without such trial court discretion, a State's interest in safeguarding the welfare of minor victims would be defeated before it could be litgated. *Id.* Defense counsel should always consider objecting to any hearing closed pursuant to MRE 412(c) as violating the accused's Sixth Amendment right to public trial. Defense counsel should also consider the same objection to any motion by the government to close any part of a court-martial or an Article 32 investigation. The Supreme Court has determined that violating the accused's Sixth Amendment right to public trial is a structural defect requiring automatic reversal if the accused objects. *See supra* note 108. *See also* Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999) (finding failure by appellate counsel to brief and argue that the trial was improperly closed over the accused's objection to be ineffective assistance of counsel).

174. MCM, *supra* note 24, R.C.M. 505(i), (j).

175. *Id.* R.C.M. 505(i), 506(i).

176. R.C.M. 806 appears to give the military judge authority to reduce access in an open trial, over the objection of the accused, by excluding part of the audience. The nonbinding discussion following R.C.M. 806 states:

> Access may be reduced when no other means is available to relieve inability to testify due to embarrassment or extreme nervousness . . . . Occasionally the defense and prosecution may agree to request a closed session to enable a witness to testify without fear of intimidation or acute embarrassment, or to testify about a matter which, while not classified, is of a sensitive or private nature. Closure may be appropriate in such

tect the welfare of an alleged victim of a sexual assault if the *Richmond Newspapers/Globe Newspaper Co.* compelling interest/individualized findings/narrowly tailored test is met. In *United States v. Hershey*, the military judge, during the testimony of the thirteen-year-old victim in a child sex abuse case, closed the trial over the objection of the accused.[177] The CAAF held the closure improper because it was supported only by counsel proffer, not by evidence that closure was necessary to protect this particular victim from trauma or embarrassment. The trial court also failed to consider whether alternatives to closure could protect the victim.[178] *Hershey* is significant because the Court of Military Appeals, citing *United States v. Grunden*,[179] stated that military judges have authority to close limited portions of a trial over defense objection whenever the court determines that there is a compelling interest supported by individualized findings and closure is narrowly tailored to protect the compelling interest after considering and rejecting alternatives to closure.[180] *Grunden* involved closure to protect classified national security information, the only specific area the *Manual* expressly authorizes closure of trial over the objection of the accused.[181]

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176. (continued)

> cases, but the military judge must carefully examine the reasons for the request and weigh them against the public's interest in attending courts-martial. Excluding only part of the public may be more appropriate in some cases.

Id. R.C.M. 806 (discussion). *Cf.* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) (declining to agree that requiring a witness to testify about personal sexual history plainly does not qualify as a basis to close a pretrial hearing or court-martial). Federal courts have called this type of reduced access "partial closure." The circuits are divided over whether the interest required to justify partial closures needs to be "compelling" or "substantial." Such partial closures over the accused's objection have been reversed for violating the accused's Sixth Amendment right to public trial. *See supra* note 128.

177. United States v. Hershey, 20 M.J. 433, 435-36 (C.M.A. 1985).

178. *Id.* The CAAF held that when the accused's Sixth Amendment right to public trial has been violated, the accused does not have to prove specific prejudice to obtain relief. Nevertheless, the CAAF affirmed *Hershey*, finding that only two people (the bailiff and the escort) were asked to leave the courtroom. Because both were performing a government function at the trial and were not attending as spectators, the practical effect of closure was minimal.

179. 2 M.J. 116 (C.M.A. 1977).

180. *Hershey*, 20 M.J. at 436.

181. MCM, *supra* note 24, R.C.M. 806(b), MIL. R. EVID. 505.

In 1999, the Navy-Marine Corps Court of Military Review reversed a sexual assault case because the accused's Sixth Amendment right to public trial was violated. In *United States v. Terry*, the military judge closed the trial during the testimony of the twenty-year-old alleged victim. Like *Hershey*, the closure was based solely on the proffer of counsel and not on any evidence that closure was necessary to protect the witness in this case.[182] The Navy-Marine court in *Terry*, citing *Hershey* and *ABC, Inc. v. Powell*,[183] stated that military judges have authority to close sessions of a court-martial over defense objection if the government can demonstrate a compelling interest based on individualized findings and the closure is narrowly tailored to protect that interest.[184]

Hershey and *Terry* correctly cite the constitutional test for closures. They wrongly assume that military judges have authority to close a court-martial, over the objection of the accused, to protect an alleged victim. The impediment to closure is not the First or the Sixth Amendments to the Constitution. It is the language of R.C.M. 806. The rule clearly states, "a session may be closed over the objection of the accused only when expressly authorized by another provision in the *Manual*."[185] The only provision that authorizes closure to protect victims is MRE 412(c)(2). This rule mandates closed Article 39(a) sessions to determine whether evidence of a victim's other sexual behavior or sexual predisposition is admissible in a nonconsensual sexual offense case. If the evidence is deemed admissible, MRE 412(c)(2) provides no additional authority to close the trial during the victim's testimony about sexual behavior, predisposition, or anything else.

ABC, Inc. v. Powell is inapposite because it addresses Article 32 closures. A different rule, R.C.M. 405(h)(3), governs access by spectators to Article 32 investigations. This rule, unlike R.C.M. 806(b), does not limit the circumstances when an Article 32 investigation can be closed over the accused's objection.

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182. United States v. Terry, 52 M.J. 574 (N.M. Ct. Crim. App. 1999). Unlike *Hershey*, in *Terry* the conviction was reversed because there were spectators who were removed from the courtroom during the closure.

183. 47 M.J. 363 (1997) (holding that victim testimony about personal sexual history can be a compelling interest justifying closure of an Article 32 investigation if based on individualized findings).

184. *Terry*, 52 M.J. at 576.

185. The closure in *Globe Newspaper Co.* to protect the minor victim was pursuant to a state statute mandating closure in such cases. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

Rule for Courts-Martial 806(b) should be amended for several reasons:

(1) The literal language of R.C.M. 806 allows the military judge to close trial and pretrial proceedings for good cause without employing the compelling interest/individualized findings/narrowly tailored test. Both the Supreme Court and military courts have clearly ruled that closure of criminal proceedings without employing strict First Amendment scrutiny is an unconstitutional violation of the media's First Amendment right of access to criminal proceedings and the accused's Sixth Amendment right to public trial. The number of military cases where appellate courts have chastised the trial court's failure to follow the compelling interest/individualized findings/narrowly tailored test prior to closure shows that R.C.M. 806(b) is misleading and needs to be amended to include the requirement for heightened First Amendment scrutiny.[186]

Certainly, there are cases where closure in whole or in part may well be justified.[187] The problem with the current language of R.C.M. 806 is that it lulls trial courts into closing proceedings based on counsel proffers of "good cause" to justify closure. These cases face reversal on appeal because findings supporting the justification for closure is not in the record of trial. Rule for Courts-Martial 806 should be amended to require trial courts to make on the record findings showing how the compelling interest/individualized findings/narrowly tailored analysis was applied prior to closure.

(2) With the compelling interest/individualized findings/narrowly tailored means test added to R.C.M. 806, there is no reason to further limit closures where the accused objects. Reasons, such as protecting a victim from trauma, have been declared by both the Supreme Court and by the CAAF to be compelling interests that justify closure if supported by individualized findings.[188] Closure may be justified to protect a victim even if the accused objects.

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186. *See* United States v. Hershey, 20 M.J. 433 (C.M.A. 1985); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977); *Terry*, 52 M.J. at 574; United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998); United States v. Anderson, 46 M.J. 728 (Army Ct. Crim. App. 1997); United States v. Story, 35 M.J. 677 (A.C.M.R. 1992); United States v. Nunez-morales, No. ACM 30476, 1994 CMR LEXIS 50 (A.F.C.M.R. Feb. 18, 1994); United States v. Fiske, 28 M.J. 1013 (A.F.C.M.R. 1989); United States v. Czarnecki, 10 M.J. 570 (A.F.C.M.R. 1980).

187. *See ABC, Inc.*, 47 M.J. at 365 (holding that victim testimony about personal sexual history can be a compelling interest justifying closure of an Article 32 investigation if based on individualized findings).

188. *See id.*; *Hershey*, 20 M.J. at 436; *Terry*, 52 M.J. at 574.

(3) Both the Supreme Court and the CAAF have held that the media has standing to challenge closure orders.[189] Rule for Courts-Martial 806 is silent on the issue of media standing. Neither the discussion nor the analysis of the rule addresses media standing.

2. Pre-Referral Proceedings

There are proceedings, other than Article 32 investigations, such as seven-day pretrial confinement reviews or depositions, that may occur prior to referrals.[190] The *Manual for Courts-Martial* is silent on the issue of openness for such pre-referral proceedings. There have been no reported military cases where the press or the accused has challenged a closure of a seven-day confinement review or a deposition. Federal circuit cases have found a First Amendment right of access to bail hearings.[191]

In *United States v. Edwards*, *United States v. Chagra*, and *In re Globe Newspapers*, the District of Columbia, Fifth, and First Circuits, respectively, determined that the same societal interests supporting open trial proceedings support open bail hearing proceedings. These courts found that pretrial release proceedings involve decisions that benefit by public scrutiny. The decision to release a fugitive who subsequently flees may effectively end the criminal proceedings. The decision to confine someone deprives that person of his liberty. Public scrutiny acts to ensure that the decision to confine, to impose pretrial restrictions, or to release is made properly.[192] Civilian bail hearings and military seven-day reviews perform

189. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); *ABC, Inc.*, 47 M.J. at 363 ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied."). *See also* Washington Post v. Robinson, 935 F.2d 282, 290 (D.C. Cir. 1991) (holding that the press and the public should have notice of closure in order to have an opportunity to raise a First Amendment right of access claim).

190. MCM, *supra* note 24, R.C.M. 305(i)(2) (seven-day review of pretrial confinement). The proceeding includes a review of the confinement memorandum by the accused's commander and matters submitted by the accused. The accused and counsel may appear before the reviewing officer and make a statement, if practicable. *Id.* R.C.M. 305(i)(2)(A)(i). *See also id.* R.C.M. 702 (depositions). Depositions may be ordered after the preferral of charges. *Id.* R.C.M. 702(a).

191. *See In re* Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) (finding media right of access to bail hearings and documents); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) (finding right of access to bail hearings); United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc) (finding right of access to pretrial detention hearings).

192. *In re Globe Newspaper Co.*, 729 U.S. at 52.

the similar function of determining whether confinement is necessary due to the accused's dangerousness or likelihood of flight.

An argument can be made that the media has no First Amendment right of access to military seven-day pretrial confinement reviews because they have not been traditionally open. This argument relies on the silence of R.C.M. 305(i)(2) on the openness issue, that military confinement reviews, unlike civilian confinement reviews, are not proceedings conducted before a court,[193] and that the media has access to post-referral reviews of pretrial confinement by the military judge.[194] The stronger argument favors a media First Amendment right of access to military seven-day pretrial confinement reviews because the experience/logic value of openness that holds true for civilian bail hearings is also true for military seven-day pretrial confinement reviews.

Both *Chagra* and *In re Globe Newspaper* recognized bail determinations resulting in release of the accused are often made outside of court through informal procedures. Both courts emphasized that the First Amendment right of access to hearings concerning pretrial release would extend to such informal determinations resulting in expeditiously freeing an accused.[195] This rationale should also apply to the military forty-eight-hour probable cause reviews.[196] The media First Amendment right of access should extend only to hearings reviewing pretrial confinement, not to the initial order of confinement or the forty-eight-hour review.[197]

The Supreme Court has defined pretrial depositions as discovery material that is not required to be accessible to the media under the First Amendment.[198] Nevertheless, the media has intervened in federal cases to

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193. MCM, *supra* note 24, R.C.M. 305(i)(2) (noting that the seven-day review is to be conducted by a neutral and detached officer appointed by service regulations). *See also id.* R.C.M. 305(i) analysis, app. 21 at A21-18 – A21-19 (noting that the seven-day review is a limited proceeding that does not require an adversary hearing).

194. *Id.* R.C.M. 305(j) (review by military judge). After referral military judge reviews propriety of pretrial confinement if requested by motion to do so.

195. *Id.* at 51; *Chagra*, 701 U.S. at 362-63.

196. *See* MCM, *supra* note 24, R.C.M. 305(i) (providing for a 48-hour review, by a neutral and detached officer, of the adequacy of probable cause). *See generally* United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993).

197. Reviews of confinement by a military judge occur in an Article 39(a) session after a case is referred, thus, the media has a First Amendment right of access to these reviews.

198. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (opining that discovery, pretrial depositions, and pretrial interrogatories are not public components of a trial subject).

argue that the First Amendment right of access attaches to depositions and that the media should be able to attend the proceedings.[199] The most recent circuit cases have continued to view depositions as discovery, rather than as a trial proceeding to which the First Amendment right of access attaches.[200]

4. In-Camera Proceedings

Rule for Courts-Martial 701(g)(2) provides for in-camera review upon motion by a party for an order that discovery be denied, restricted, or deferred.[201] If the military judge grants relief, the motion and information inspected is sealed by the military judge and forwarded for review in closed session.[202] Although appellate courts have unsealed records sealed by trial courts, there is no requirement for military trial or appellate courts to conduct any post-trial review of sealed records to determine whether the interest that justified the sealing is no longer threatened.[203] Additionally,

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199. *See* United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998).

200. *Id.* at 510-13; *see also* United States v. McDougal, 103 F.3d 651, 659 (8th Cir. 1996), *cert. denied*, Citizens United v. United States, 522 U.S. 809 (1997) (finding the First Amendment satisfied where the public and the press hear the contents of the deposition in open court). There have been cases suggesting that the First Amendment right of access attaches to deposition proceedings. *See* United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990). For an excellent analysis of circuit cases involving video and audiotaped depositions, see Angela M. Lisec, Casenote: *Access to President Clinton's Videotaped Testimony Denied: The Eighth Circuit Addresses the Common Law and Constitutional Rights of Access to Judicial Records in United States v. McDougal*, 31 CREIGHTON L. REV. 571 (1998).

201. MCM, *supra* note 24, R.C.M. 701(g)(2).

202. *See* United States v. Sanchez, 50 M.J. 506 (A.F. Ct. Crim. App 1999) (holding that the military judge should conduct in-camera inspection of records allegedly impacting on victim credibility and attach a sealed copy to the record of trial); United States v. Rivers, 49 M.J. 434 (1998) (finding military judge properly refused on grounds of privilege, after in-camera review, to unseal statements made by confidential government informant and entries into the investigating agent's summary). *See also* California v. Ritchie, 480 U.S. 39 (1987) (sanctioning the use of in-camera review).

203. *See* United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998) (vacating, sua sponte, trial court seal of stipulation of fact where sealing was not justified by compelling interest/individualized findings/narrowly tailored means test). Under the rationale of *ABC, Inc. v. Powell*, military appellate courts have authority to entertain a motion for by a party, or the media, to unseal records. *See* 47 M.J. 363 (1997) (granting petition for extraordinary relief by media and accused to open Article 32 investigation regarding SGM (Ret.) McKinney).

after a courts-martial has been dissolved, the record of trial is maintained by the military services and not by the court.[204]

The Freedom of Information Act (FOIA)[205] and Privacy Act (PA)[206] govern releases of government information, including information in records of trial to the media.[207] Neither FOIA nor the PA give agencies express authority to unseal courts-martial records. It is unclear, what, if any authority the services have under FOIA to release records in agency custody that have been sealed during a court-martial.[208]

d. In Chambers Conferences

Rule for Courts-Martial 802 authorizes, at the discretion of the trial judge, post-referral conferences between the military judge and the parties that are not made part of the record.[209] The conferences are intended to resolve administrative matters and resolve matters to which the parties agree.[210] Neither R.C.M. 802 nor the accompanying discussion provides

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204. The Privacy Act System Notice Requirement Applies to Court-Martial Files, Op. Dep't of Defense Privacy Board, No. 32 *available at* <http://www.defenselink.mil/privacy/opinions/op0032.html>.

205. The FOIA was amended in 1996. *See* 5 U.S.C.S. § 552 (LEXIS 2000). The Department of Defense has implemented FOIA through directives, programs, and regulations. *See* U.S. DEP'T OF DEFENSE, DIR. 5400.7, DEP'T OF DEFENSE FREEDOM OF INFORMATION ACT PROGRAM (13 May 1988); DEP'T OF DEFENSE REG. 5400.7-R, DEP'T OF DEFENSE FREEDOM OF INFORMATION PROGRAM (22 May 1997) (includes 1996 amendments to FOIA). The Army, Air Force, Navy, and Marine Corps have their own FOIA regulation. None include the 1996 amendments. *See* U.S. DEP'T OF ARMY, REG. 25-55, THE DEP'T OF ARMY FREEDOM OF INFORMATION ACT PROGRAM, (14 Apr. 1997); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 37-131, AIR FORCE FREEDOM OF INFORMATION ACT PROGRAM (31 Mar. 1994, updated 16 Feb. 1995); U.S. DEP'T OF NAVY INSTR. 5720.42E, DEP'T OF NAVY FREEDOM OF INFORMATION ACT PROGRAM (5 June 1991); U.S. MARINE CORPS, ORDER 5720.63, AVAILABILITY TO PUBLIC OF MARINE CORPS RECORDS (26 Feb. 1985).

206. 5 U.S.C.S. § 552a.

207. This article focuses on media rights of access to criminal proceedings, to judicial records in pending criminal cases, and to trial participants. The particulars of obtaining release of records of trial under FOIA after the trial is over is beyond the scope of the article. The potential conflict between FOIA release balancing and the media First Amendment access is discussed *infra* Section IV.E.4.

208. *See Scott*, 48 M.J. at 664, n.3.

209. *See* MCM, *supra* note 24, R.C.M. 802 (Conferences). This rule states:

> (a) *In general.* After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

for the conferences to be closed. In practice, they are closed. The rule implies closure by providing that matters agreed upon at a conference shall be included into the record orally or in writing.[211] To date there have been no media challenges to the closed conferences. The discussion to R.C.M. 802 states that issues in addition to administrative matters may be resolved during conferences if the parties consent and the resolution of the conference is placed in the record.[212] This language should not be interpreted to allow trial courts to avoid media access by conducting, in chambers, criminal proceedings in which the First Amendment right of access attaches.

e. Appellate Proceedings

The media's First Amendment right of access and the accused's Sixth Amendment right to public trial do not apply to appellate reviews by military courts.[213] In *United States v. Schneider*, the accused argued that he was denied a public trial because some of his friends and some military

209. (continued)

> (b) *Matters on record.* Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall waive this requirement.
> (c) *Rights of parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.
> (d) *Accused's presence*. The presence of the accused is neither required nor prohibited at a conference.
> (e) *Admission.* No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.
> (f) *Limitations.* This rule shall not be invoked in the case of an accused who is not represented by counsel, or in special court-martial without a military judge.

Id.

210. *Id.* R.C.M. 802(a) discussion.

211. *Id.* Contrast the provision for oral or written inclusion with Federal Rule of Criminal Procedure 17.1 (Pretrial Conference) which requires the court to prepare a memorandum of agreed upon matters to be included in the record. *See* FED. R. CRIM. P. 17.1. *See also* MCM, *supra* note 24, R.C.M. 1103(b) (discussion) (Preparation of Record of Trial) ("Conferences under R.C.M. 802 need not be recorded, but matters agreed upon at such conferences must be included in the record.").

212. MCM, *supra* note 24, R.C.M. 802 discussion.

213. United States v. Schneider, 38 M.J. 387 (C.M.A. 1993).

lawyers not affiliated with the case were denied access to the oral argument of the case in front of the Army Court of Military Review.[214] The Court of Military Appeals (COMA) rejected Schneider's argument that appellate review was like a trial and closure should be subject to the same strict First Amendment scrutiny. The COMA found that appellate court determinations are conducted in-camera and that an accused had no right to oral argument. Because appellate courts base their review on the record of trial and do not conduct evidentiary hearings, they are not public trials.[215] The COMA did not apply the experience/logic test in its decision but the essence of the decision was to hold that appellate reviews fail the experience prong because they are not traditionally open.

E. Access to Pretrial Investigations

1. Grand Jury Investigations

Probable cause determinations allowing a criminal case to proceed to trial may be made by a grand jury indictment or by a finding of probable cause by a judge or magistrate in a preliminary probable cause hearing.[216] While the First Amendment right of access attached to preliminary probable cause hearings, it does not attach to grand jury investigations because they fail the experience/logic test.[217] A long line of Supreme Court cases justify grand jury secrecy for the following reasons: (1) prospective witnesses will hesitate to come forward knowing that those against whom they testify would be aware of the testimony, (2) grand jury witnesses would be less likely to testify fully and frankly because they would be open to retribution or inducement, (3) targets would be more likely to flee or try to unlawfully influence the grand jury, and (4) targets investigated and exonerated would be subject to ridicule.[218] Under the Federal Rules of

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214. *Id.* at 396-97. Approximately 20 spectators attended the oral argument. The government was advised that there would be press interest. To control order in the courtroom during the argument and to maximize access by spectators, the government placed extra chairs in the courtroom but did not allow entry or exit after arguments began.

215. *Id.* at 397 n.7 (citing United States v. Spurlin, 33 M.J. 443, 444-45 (C.M.A. 1991)).

216. Press-Enterprise II, 478 U.S. 1, 12 (1986). *See also* FED. R. CRIM. P. 6 (providing that federal grand jury investigations are conducted in secret proceedings, closed to the public and media).

217. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (*Press-Enterprise II*); *In re* Subpoena to Testify before Grand Jury, 864 F.2d 1559 (11th Cir. 1989).

Criminal Procedure (FRCP), grand juries must convene in secret with very limited allowable disclosure of grand jury information.[219]

2. Article 32 Investigations

Unlike FRCP 6(e),[220] which mandates closed grand jury investigations, R.C.M. 405(h)(3) (Access by spectators) provides that public and press access to military pretrial Article 32 investigations may be restricted or closed in the discretion of the commander who directed the investigation or the investigating officer.[221] The non-binding discussion states that

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218. *See* United States v Sells Eng'g, Inc., 463 U.S. 418 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).

219. FED. R. CRIM. P. 6(e) (Recording and disclosure of [Grand Jury] Proceedings). Subsections (2), (5), and (6) are the secrecy provisions. These subsections provide as follows:

> (2) *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, at attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court. (5) *Closed Hearing.* Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. (6) *Sealed Records.* Records, orders, and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

Id. See also In re Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998), *cert. denied*, Dow Jones & Co. v. Clinton, 525 U.S. 820 (1998) (holding that no media First Amendment right of access to portions of ancillary grand jury proceedings not involving matters occurring before the grand jury).

220. *Id.*

221. MCM, *supra* note 24, R.C.M. 405 (Pretrial investigation); UCMJ art. 32 (LEXIS 2000). The non-binding discussion states that ordinarily Article 32 proceedings should be open to the public. It also provides for closure to encourage complete testimony by an embarrassed or timid witness. Distinguish R.C.M. 806 (Public trial), which does not provide for closure of trial/pretrial proceedings for this reason over the objection of the accused.

"ordinarily [an Article 32] should be open."[222] Before 1997, no case defined the scope of discretion to hold an open or closed Article 32.[223]

In 1997, the CAAF decided *ABC, Inc. v. Powell*,[224] a case in which the Article 32 investigation concerning the sexual misconduct charges preferred against then Sergeant Major of the Army (SMA), Gene C. McKinney, was closed over the objection of the accused and the media. The CAAF held that an accused had a Sixth Amendment right to a public Article 32 investigation, notwithstanding the language of R.C.M. 405(h)(3).[225] The CAAF then went on to state that when the accused has a right to a public hearing, the press enjoys the same right and "has standing to complain if access is denied."[226] When the accused requests an open Article 32 investigation, the proceedings must be open unless the court applies the *Richmond Newspapers/Globe Newspaper Co./Press-Enterprise I and II* compelling interest/individualized findings/narrowly tailored means test.[227]

ABC, Inc. did not directly address whether the media has a First Amendment right of access to Article 32 investigations that is independent of the accused's Sixth Amendment to a public trial.[228] If so, the media has a First Amendment right of access to an Article 32 investigation even if the accused waives his Sixth Amendment right to an open proceeding.[229] Whether the media has an independent First Amendment right of access to Article 32 investigations depends on whether Article 32 investigations pass the experience/logic test.[230]

Article 32 investigations are frequently analogized to grand jury proceedings. In actuality, Article 32 investigations more closely resemble pre-

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222. *Id.*

223. *See* San Antonio Express-News v. Morrow, 44 M.J. 706, 710 (A.F. Ct. Crim. App. 1996). In this case, the media petitioned for extraordinary writ of mandamus to allow public access to Article 32 closed over defense objection. The Air Force court declined to issue a mandamus order stating that the investigating officer exercised reasoned discretion and while Article 32 investigations are presumptively public, the standards for weighing competing interests in deciding whether to close a hearing is a developing area of the law subject to differing interpretations.

224. 47 M.J. 363 (1997).

225. *Id.* at 365.

226. *Id.*

227. *Id.*

228. In *ABC, Inc.*, both the accused and the media objected to closure. *See id.*

229. *Id.* ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied.").

230. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

liminary probable cause hearings than grand jury investigations. This is critical for First Amendment access analysis because grand jury investigations are traditionally closed while preliminary probable cause hearings are traditionally open.[231]

None of the four traditionally articulated factors justifying grand jury closure are present in Article 32 investigations.[232] Grand juries are responsible for determining whether a crime has been committed.[233] They have broad powers to inquire into all information potentially bearing on its investigation and may continue to investigate until satisfied that a crime has been committed or that a crime has not been committed.[234] A target need not be identified. The purpose of an Article 32 investigation is to investigate specific charges preferred against a specific accused.[235] The accused has the right to be informed of the witnesses and other evidence known to the investigating officer.[236] Thus, the concerns about witness testimony are not present in Article 32 investigations because the accused knows who the witnesses against him are. The concerns about the accused's likelihood to flee or unlawfully impede the investigation, or about the accused's reputation if exonerated are also not present in Article 32 investigations. The accused knows about the investigation and has the right to attend it.[237] Any stigma to the accused based on alleged association with the criminal activity being investigated has already occurred upon preferral of charges. Unlike grand jury investigations, which require mandatory closure, R.C.M. 405(h)(3) places the decision to open or close

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231. An argument could be made that an Article 32 investigation, because it is an military proceeding, lends itself to a lesser form of First Amendment scrutiny to support closure. *See* Parker v. Levy, 417 U.S. 733 (1974) ("[W]hile military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it."). This argument goes against the rationale of *ABC, Inc*. Another problem with the argument is that closure is not "within the military" as it applies to civilian media and to the public.

232. In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979), the Supreme Court listed the four factors as: (1) prospective witnesses would hesitate to come forward knowing that those against whom they testify would be aware of the testimony, (2) grand jury witnesses would be less likely to testify fully and frankly because they would be open to retribution or inducement, (3) targets would be more likely to flee or try to unlawfully influence grand juries, and (4) targets investigated and exonerated would be subjected to ridicule.

233. United States v. R. Enter., 498 U.S. 292 (1991).

234. *Id.*

235. MCM, *supra* note 24, R.C.M. 405(a).

236. *Id.* R.C.M. 405(f)(5).

237. *Id.* R.C.M. 405(f)(1), (3).

an Article 32 to the discretion of the commander who directed the investigation or the investigating officer.[238] Finally, there are no comparable statutory limitations on disclosure of Article 32 information as there are for federal grand jury material.[239]

In *Press-Enterprise II* and *El Vocero de Puerto Rico*, the Supreme Court relied on a number of characteristics of preliminary probable cause hearings to find that the experience/logic test was met. These characteristics were: (1) the accused is entitled to a preliminary probable cause hearing held before a neutral magistrate in order for his case to proceed to trial; (2) the accused has the right to counsel, to cross-examine, to present testimony, and, in some instances, to suppress illegally seized evidence at the hearing; (3) if no probable cause is found, the hearing provides the only occasion for the public to observe the criminal justice system; (4) no jury is present at the hearing.[240] Characteristics (2) through (4) are present in Article 32 investigations.

Characteristics distinguishing Article 32 investigations from preliminary probable cause hearings are the following: (1) the Article 32 is an investigation rather than a proceeding with a burden of proof;[241] (2) the investigation is conducted by a neutral investigating officer rather than a magistrate;[242] (3) the investigating officer, not the government, decides what witnesses to call and what evidence to consider;[243] (4) the government is not required to be represented at an Article 32 investigation;[244] (5) the probable cause finding by the investigating officer is not binding on the convening authority;[245] (6) the accused has no right to an Article 32 inves-

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238. *Id.* R.C.M. 405(h)(3). The non-binding discussion states that ordinarily Article 32 hearings should be open.

239. Of course, certain characteristics about an Article 32 make the proceeding more like a grand jury than a preliminary probable cause hearing. For example, both the grand jury and the Article 32 are investigations. A preliminary probable cause hearing is not an investigation but a probable cause proceeding. The burden of proof lies with the government. The government decides what witnesses and evidence to present. In grand juries and Article 32 investigations, the grand jurors and investigating officer, respectively, decide what witnesses to call and what evidence to consider. The government is not required to be represented at an Article 32. *See* MCM, *supra* note 24, R.C.M. 405(d)(3)(A).

240. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 (1993); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (*Press-Enterprise II*).

241. MCM, *supra* note 24, R.C.M. 405(a).

242. *Id.* R.C.M. 405(d)(1).

243. *Id.* R.C.M. 405(g).

244. *Id.* R.C.M. 405(d)(3)(A).

245. *Id.* R.C.M. 405(a).

tigation unless the offense is referred to a general court-martial.[246] Thus, an offense may be tried by a general court-martial even if the investigating officer does not find probable cause.[247] In spite of these distinctions, an Article 32 investigation is very much like a preliminary probable cause hearing. Pursuant to the rationale in *Press-Enterprise II* and *El Vocero de Puerto Rico*, the media First Amendment right of access should attach to Article 32 investigations.

In *ABC, Inc.*, the special court-martial convening authority (SPCMA) closed the entire Article 32 investigation over the objection of both SMA McKinney and the media. As in *Richmond Newspapers*, *Globe Newspaper Co.*, *Press-Enterprise I*, *Waller*, and *Press-Enterprise II*, the interests asserted to justify closure were potentially compelling, but the closure was sweeping and overbroad. The SPCMA closed the entire Article 32 to protect the alleged victims' privacy and to prevent potential court-members from being tainted by extrajudicial influence.[248] The CAAF, citing *Globe Newspaper*, stated that it would allow limited closure if justified by individualized findings in the record.[249] Sweeping closure of the entire Article 32 investigation "employed an ax in the place of a constitutionally required scalpel."[250]

Rule for Courts-Martial 405(h)(3) leaves the decision to close an Article 32 within the discretion of the commander who directed the investigation or the investigating officer. Nothing defines the scope of the discretion and no provision gives the media standing to challenge closure. The language of the rule encourages closures that fail the compelling interest/individualized findings/narrowly tailored means test that *ABC, Inc.* applied to closures of Article 32 investigations when the accused is entitled

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246. *Id.*

247. The staff judge advocate must prepare a pretrial advice before any charge can be tried by general court-martial. *See id.* R.C.M. 406 (Pretrial Advice). A general court martial convening authority must consider the findings and recommendations of the Article 32 investigating officer (IO), however, the IO findings and recommendations are not binding on the decision to refer. *See id.* R.C.M. 601 (Referral).

248. ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997).

249. *Id.* Regarding victim privacy, the CAAF cited factors that should be considered on the record. These factors include age, maturity, desires of the victim, nature of the crime, and the interests of the victim's parents and relatives. The CAAF, relying on *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), recognized that "mortification imposed on victim-witnesses in sex cases . . . is a condition which cannot be eliminated from our judicial system."

250. *Id.*

to a public proceeding.[251] *ABC, Inc.* also stated that when the accused is entitled to a public Article 32 hearing, the media has standing to challenge an Article 32 closure. Article 32 investigations closely resemble the preliminary probable cause hearings that the Supreme Court held were subject to a media right of access that is independent of the accused's Sixth Amendment right to public trial.[252]

The reasoning of both the Supreme Court, in *Press-Enterprise II*, and *El Vocero De Puerto Rico*, and CAAF, in *ABC, Inc.*, make it likely that the media has a First Amendment right of access to Article 32 investigations, even if all the parties agree to closure. Rule for Courts-Martial 405(h)(3) should be amended to incorporate the First Amendment closure test and to provide for media standing to challenge closures. The test for closure and the requirement for media standing are the same for both Article 32 investigations and trials, therefore, R.C.M. 405(h)(3) (access by spectators to Article 32 investigations) and R.C.M. 806 (access to courts-martial proceedings) should provide the same test for closure and, also, for media standing to challenge closures.

IV. Access to Judicial Records, Evidence, and Materials or Information Obtained By Discovery in Criminal Cases

A. Access to Judicial Records Generally

There are two sources of media access to judicial information, records, and proceedings: the First Amendment and common law.[253] What comprises a judicial record is not clear.[254] The Supreme Court has not defined the scope of what qualifies as judicial information, records, and proceedings.[255] Federal circuit courts have held that documents filed

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251. *See* San Antonio Express-News v. Morrow, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). The Air Force court denied a media request to open an Article 32 closed over defense objection without applying the compelling interest/individualized findings/narrowly tailored means test. This closure would be unconstitutional under *ABC, Inc.*, 47 M.J. at 363.

252. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 (1993); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (*Press-Enterprise II*).

253. Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978) (noting that the media has equal, but not greater, right of access than does the general public). *See also* Lisec, *supra* note 200.

254. Lisec, *supra* note 200, at 579-80 (discussing differing definitions of judicial records in *Black's Law Dictionary* and the Federal Rules for Appellate Procedure).

255. *Nixon*, 435 U.S. at 589.

with or introduced into evidence in a court during a criminal or civil trial or pretrial proceeding qualify.[256] Some courts limit the scope to those documents or evidence that are central to the process of adjudication.[257]

Although frequently litigated together, the common law right to copy and inspect judicial records is in addition to, and independent of, the constitutional right of access to criminal proceedings.[258] *Nixon v. Warner Communications, Inc*. is the only Supreme Court case that specifically addresses the media's right of access to judicial records under the First Amendment and under the common law.[259] In 1998, the Supreme Court declined to revisit the issue.[260]

B. First Amendment Right of Access to Judicial Records

Clearly, the media has a First Amendment right to attend and observe criminal proceedings, and to publish information observed in open trial and pretrial proceedings, or contained in court records open to the public.[261] Less clear, however, is whether the First Amendment gives the press any right of access to judicial records, exhibits, or other evidence and information that become part of the record of trial in a criminal case.

In *Nixon v. Warner Communications, Inc.*, the media asserted a right of access under both the First Amendment and the common law, to copy

256. *See* Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 906 (D.C. Cir. 1996).

257. *See* Smith v. United States Dist. Ct. for Southern Dist., 956 F.2d 647 (7th Cir. 1992) (holding that judicial records include documents not admitted into evidence but explicitly relied upon by judge ruling from the bench refusing to grant a delay).

258. *Nixon*, 435 U.S. at 597 (recognizing that the media has a right of access to judicial records under the First Amendment, and, separately, under the common law).

259. *Id.*

260. The Tenth Circuit approved the trial court's denial of access to documents filed in the Timothy McVeigh trial. *See* United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997). The media petitioned for certiorari on the issue of whether the First Amendment right of access extends to documents filed in connection with criminal proceedings. The Supreme Court denied certioriari in *Dallas Morning News v. United States*, 552 U.S. 1142 (1998). Stephen Jones, Timothy McVeigh's defense counsel has written an excellent synopsis of the media issues that arose during the McVeigh case. *See* Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53 (1998).

261. Cox Broad. Co. v. Cohen, 420 U.S. 469 (1975) (holding that the First Amendment prevents the government from enjoining the media from publishing the name of a rape victim where the information was in a court record that was accessible to the public).

audiotapes played into evidence during a criminal trial.[262] The media attended the hearing where the tapes were played, listened to the tapes in open court, and was given transcripts of the tapes' contents.[263] The media argued that it had a First Amendment right of access to copy and publish exhibits and materials displayed in open court.[264] The Supreme Court rejected the media's argument.

The majority prefaced its decision by recognizing that both the public and the media have a First Amendment right to attend, see, and hear what transpires in a courtroom; however, the media news-gathering function does not give it a superior right of access than the right of access available to the general public.[265] In this case, the media was provided transcripts of the audiotapes so there was no issue of the government trying to prevent information from reaching the public. Physical copies of the audiotapes were never made available to the public for copying. *Nixon* held that the First Amendment requires that the media be allowed to see and hear what transpires in court and to freely publish its observations. The First Amendment does not require that the government allow the media to inspect and copy physical evidence or other judicial records to which the public has never had access.[266]

Nixon was decided prior to the *Richmond Newspapers*/*Press-Enterprise* line of cases that recognized a media First Amendment right of access to trials and other criminal proceedings that pass the experience/logic test.[267] No Supreme Court case has addressed what impact, if any, the *Richmond Newspapers*/*Press-Enterprise* line of cases has on the *Nixon* holding the First Amendment requires that the media be able to see and hear what transpires in court but does not require the government to allow the media access to inspect and copy physical evidence, exhibits, or judicial records that have not been made available to the public in a criminal

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262. *Nixon*, 435 U.S. at 591-93.

263. *Id.*

264. The media relied on the rationale of the Supreme Court in *Cox Broadcasting Co. v. Cohen. See* 420 U.S. at 469.

265. *Nixon*, 435 U.S. at 608, 609.

266. *Id.* at 609.

267. A proceeding passes the experience prong if there has been a history of openness or public access to the type of proceeding at issue. A proceeding passes the logic prong if public access to the type of proceeding logically plays a particularly significant role in the functioning of the judicial process and the government as a whole. *See supra* Section III.

trial.[268] As a result, federal and state courts do not apply consistent scrutiny to cases where the media argues it has a First Amendment right of access to judicial records, exhibits, and evidence filed in criminal cases.

A majority of the federal circuits, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits, have extended *Richmond Newspapers*/*Press-Enterprise* to find that the First Amendment right of access to criminal proceedings includes a right of access to certain documents submitted in connection with the proceeding if access to the documents passes the experience/logic test.[269] The Tenth Circuit has avoided the issue of whether there is a First Amendment

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268. In 1998, the Supreme Court denied certiorari to decide whether the media has a First Amendment right of access to documents filed with a court in a connection with criminal proceedings. *See* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (finding that *Nixon* was the only Supreme Court decision addressing access to court files and that *Nixon* did not decide if there was a First Amendment right to court documents), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998). For an excellent analysis of why the *Richmond Newspapers/Press-Enterprise* line of cases did not extend the media First Amendment right of access to court records and documents, see *Applications of NBC*, 828 F.2d 340, 348-52 (6th Cir. 1987) (Ryan, J., dissenting).

269. *See* Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (records submitted in connection with criminal proceedings); *In re* Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) (bail hearings); United States v. Haller, 837 F.2d 84 (2d Cir. 1988) (plea agreements); *In re* New York Times Co., 828 F.2d 110 (2d Cir. 1987), *cert. denied*, Esposito v. New York Times Co., 485 U.S. 977 (1988) (suppression motions and exhibits); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); United States v. Smith, 787 F.2d 111, 116 (3d Cir. 1986) (transcript of sidebar conference); United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) (bills of particular); *In re* Washington Post Co., 807 F.2d 383(4th Cir. 1986) (plea agreements); Applications of NBC, 828 F.2d 340 (6th Cir. 1987) (documents in proceeding to disqualify judge); United States v. Ladd (*In re* Associated Press),162 F.3d 503 (7th Cir. 1998) (sealed records filed in a criminal trial); *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988)(documents filed to support search warrant); Oregonian Publ'g Co. v. United States Dist. Court, 920 F.2d 1462 (9th Cir. 1990) (plea agreements); Associated Press v. United United States Dist. Court, 705 F.2d 1143 (9th Cir. 1983) (documents filed in pretrial proceedings); United States. v. El-Sayegh, 131 F.3d 158 (D.C. Cir. 1997) (plea agreements); Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (plea agreements). In *In re Gannett News Service*, the Fifth Circuit held that there is no First Amendment right to motions in limine and exhibits attached thereto because these documents filed with the court are not evidence. The Fifth Circuit implied that there is a First Amendment right of access to the same information once it is introduces as evidence at trial. *In re* Gannett News Serv., 772 F.2d 113 (5th Cir. 1985). The District of Columbia Circuit and Seventh Circuit rulings illustrate the confusion in this area. *Compare Robinson*, 935 F.2d 282 (citing *Haller*, *In re Washington Post Co.*, and *Oregonian Publ'g Co.* to find a media First Amendment right of access to plea agreements because they pass the experience/logic test) *with El-Sayegh*, 131 F.3d 158 (recognizing a media First Amendment right of access to "aspects

right of access to judicial records filed in criminal proceedings by assuming, without deciding, that First Amendment strict scrutiny applies to access cases involving such documents.[270] The practical result is that the Tenth Circuit conducts the same compelling interest/individualized findings/narrowly tailored means test required by the majority of circuits that expressly recognize a First Amendment right of access to documents in criminal proceedings. The Eleventh Circuit has not expressly extended the First Amendment right of access to judicial records.[271] Some state courts have found a media First Amendment right of access to documents filed in connection with criminal proceedings; others recognize only a common

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269. (continued) of court proceedings, including documents" if they pass the logic/experience test). The court in *El-Sayegh* went on to find no First Amendment right of access to an unexecuted plea agreement filed as an exhibit to a motion to seal because the experience test is failed. There was no history of access to documents accompanying a criminal procedure until *Robinson* created it in 1991. The Seventh Circuit held that the First Amendment gives the media a presumption that there is a right of access to criminal proceedings and documents meeting the experience/logic test. The Seventh Circuit then stated that the First Amendment presumption is rebuttable when necessary to "preserve higher values" and when denial of access is narrowly tailored. *See* United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998). *See also* State v. Archuleta, 857 P.2d 234 (Utah 1993) (documents filed in relation to criminal preliminary hearing). *See generally* Tammy Hinshaw, Annotation, *Right of Access to Federal District Court Guilty Plea Proceeding or Records Pertaining to Entry or Acceptance of Guilty Plea in Criminal Prosecution*, 118 A.L.R. FED. 621 (1994).

270. United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (acknowledging other Circuit cases recognizing a First Amendment right of access to documents related to court proceeding via an extension of *Press-Enterprise* rationale, yet, also acknowledging that *Nixon* did not decide definitively whether there is or is not a First Amendment right of access to such documents), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998). *But see* Lamphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994) (finding no First Amendment right of access to criminal justice records). Additional cases hold that there is no First Amendment right of access. *See, e.g.*, *McVeigh*, 119 F.3d at 813 (evidence actually ruled inadmissible); United States v. El-Sayegh, 131 F.3d 158 (D.C. Cir. 1997) (unexecuted plea agreement); United States v. Corbitt, 879 F.2d 224, 229-30 (7th Cir. 1989) (presentence report); Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989) (pre-indictment search warrant affidavits); People v. Atkins, 509 N.W.2d 894 (Mich. Ct. App. 1993) (psychiatrist competency report on accused).

271. *See* United States v. Kooistra, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986) ("The denial of access may be governed by the somewhat less protected common law right to inspect and copy court records."); United States v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985) (no First Amendment right of access to audiotape evidence); Belo Broad. Corp. v. Clark, 654 F.2d 423, 428 (5th Cir. 1981) (no First Amendment right of physical access to trial exhibits). The Eleventh Circuit adopted as precedent all of the Fifth Circuit opinions prior to October 1981. *See* Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

law right of access to judicial records and do not apply First Amendment strict scrutiny at all.[272]

Jurisdictions employing strict scrutiny avoid applying it in some cases by finding that certain information fails the experience/logic test and, therefore, is not a judicial record subject to First Amendment access[273] or by excluding physical evidence, such as videotapes, audiotapes, clothing, or weapons from the definition of judicial record.[274]

When courts apply First Amendment strict scrutiny to judicial records, the sealing of records or other denial of access must be justified by the compelling interest/individualized findings/narrowly tailored means test.[275] The same interests normally asserted to support closure motions are asserted to support sealing of records.[276] The media has standing to challenge sealing or other denial of access.[277]

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272. *Compare* People v. Burton, 189 A.D.2d 532 (N.Y. 1993) (finding First Amendment right of access for documents submitted in conjunction with a motion to be heard in open court); *In re* Times-World Co., 488 S.E.2d 677 (Va. 1997) (finding First Amendment right to documents submitted into evidence during competency hearing) *with* KNSD Channels 7/39 v. Superior Court, 74 Cal. Rptr. 2d 595 (Cal. Ct. App. 1998) (finding public right of access to judicial records by virtue of common law not First Amendment).

273. *See* United States v. Gonzales, 150 F.3d 1246 (10th Cir. 1998) (finding no First Amendment right of access to court-sealed fee, cost, and expense applications by defense counsel for assistance under the Criminal Justice Act, 18 U.S.C. § 3006A because the records are administrative documents, not "judicial records," filed with the court and are not germane to the adjudication process); *see also* the following cases finding no First Amendment right of access: McVeigh, 119 F.3d at 813 (evidence actually ruled inadmissible); *El-Sayegh*, 131 F.3d at 158 (unexecuted plea agreement); *Corbitt*, 879 F.2d at 229-30 (presentence report); *Baltimore Sun Co. v. Goetz*, 886 F.2d at 64-65 (pre-indictment search warrant affidavits); *Atkins*, 509 N.W.2d at 894 (psychiatrist competency report on accused).

274. *See* Sideri v. Office of Dist. Atty., 243 A.D.2d 423 (N.Y. App. Div. 1997), *leave to appeal denied*, 692 N.E. 2d 130 (N.Y. 1998) (holding that clothing and weapons are not judicial records); United States v. McDougal, 103 F.3d 651, 656 (8th Cir. 1996) (holding that a videotape itself is not a judicial record); *but see* KNSD Channels 7/39 v. Superior Court of San Diego County, 163 Cal. App. 4th 1200 (Cal. Ct. App. 4th 1998) (holding that, under common law, courts must allow media access audiotapes introduced in evidence unless significant risk of impairment to integrity of evidence).

275. *See* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (per curiam), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998); *see also* cases discussed *supra* note 269.

276. Interests typically cited to preclude media access to information or proceedings in criminal cases include: (1) preventing prejudicial publicity that threatens an accused's Sixth Amendment right to a fair trial by an impartial jury; (2) protecting testifying witnesses from trauma, embarrassment, or humiliation; (3) protecting trial participant privacy; (4) protecting trial participant safety; (5) preventing disclosure of government information

What, if any, First Amendment right of access exists for records filed with the court but not admitted into evidence is unclear.[278] Recent decisions have found no First Amendment right of access to discovered but not admitted evidence[279] and suppressed evidence.[280] The circuits have inconsistent holdings as to whether there is a First Amendment right of access to search warrant affidavits.[281]

In summary, the vast majority of federal circuits have extended *Richmond Newspapers*/*Press Enterprise* to hold that the First Amendment right of access to criminal trials includes a right of access to at least some documents filed in connection with criminal trials. The case law is especially strong with regard to information introduced into evidence and to executed guilty plea agreements. Courts are less likely to recognize a First Amendment right of access to evidence actually suppressed and to judicial records not relevant to the adjudication of guilt. There is no clear trend of the courts with respect to a First Amendment right of access to pretrial motions and accompanying exhibits filed with the court. Some jurisdictions routinely allow the media access to all documents and exhibits filed with the

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276. (continued) that threatens national security, or is protected by government privilege; (6) preserving the confidentiality of law enforcement information or the identity of undercover officers or informants; (7) protecting trade secrets or other confidential commercial information; and (8)concealing the identity of juveniles. *See generally* Dan Paul & Richard J. Ovelmen, *Access*, 540 PLI/PAT 157 (1998).

277. *See* United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998); *cf. In re* Grand Jury Proceedings in the Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983) (holding that it is harmless error for a trial court to deny media standing to challenge denial of access where merits of media claim considered on appeal); United States v. Preate, 91 F.3d 10 (3d Cir. 1996).

278. *See* Michael A. DiSabatino, *Right of Press, in Criminal Proceeding, to have Access to Exhibits, Transcripts, Testimony, and Communications not Admitted in Evidence or Made Part of Public Record*, 39 A.L.R. FED. 871 (Supp. 1998).

279. *Id.*

280. *McVeigh*, 119 F.3d at 813-14 (holding that the First Amendment right of access does not extend to suppressed evidence).

281. *See In re* 2 Sealed Search Warrants, 710 A.2d 202 (Del. Super. Ct. 1997) (citing cases from the Fourth and Ninth Circuits finding no First Amendment right of access during investigative stage and an Eighth Circuit case holding there is a First Amendment right of access); Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989) (finding no First Amendment right of access prior to indictment); *In re* Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp., 971 F. Supp. 251 (W.D. Tex. 1997) (finding no First Amendment right during investigative stage).Even where there is a First Amendment right of access, the government's interest in protecting its investigation can outweigh the media right of access. *See In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988).

courts unless they are under seal.[282] Other courts hold that motions in limine and exhibits attached thereto fail the experience/logic test because public dissemination of these documents prior to trial chills an accused's ability to raise pretrial motions.[283]

C. Common Law Right of Access to Judicial Records

Nixon v. Warner Communications, Inc., recognized a common law right of the media to inspect and copy public records and documents, including judicial records.[284] This right is independent of, and in addition to, any First Amendment right of access to judicial records.[285] The common law right of access to inspect and copy judicial records receives far less protection from the courts than does the First Amendment right of access to criminal proceedings.[286] Denials of this common law right of access to inspect and copy judicial records do not receive strict scrutiny analysis. The decision to apply the common law right rests with the discretion of the trial court.[287] A trial court may deny the common law access if it determines that court files will be used for improper purposes. *Nixon* cited the following examples of improper purposes: using divorce records to promote private spite or public scandal, using court files to publish libelous information, or using court files to gain business information to harm a litigant's competitive standing.[288] The trial court balances the presumed public interest in access against the interests asserted by other parties. The balance struck by the trial court is reviewed for abuse of discretion.[289]

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282. Court files were open during the William Kennedy Smith case. Prosecutors filed a motion in limine to introduce evidence of similar sexual misconduct by Smith involving three women other than the victim. The evidence was ruled inadmissible and was not introduced at trial. Because the motion in limine was not filed under seal, the media had access to the information and widely publicized it. In such cases, prosecutors could file motions in limine hoping that media publication would create public pressure for the court to admit the evidence or to make potential jurors aware of the evidence. *See* Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 551 n.310 (1993).

283. *See McVeigh*, 119 F.3d at 813; *In re* Gannett News Serv., Inc. 772 F.2d 113 (5th Cir. 1985); United States v. Martin, 38 F. Supp. 2d 698 (C.D. Ill 1999).

284. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

285. *Id.*

286. When the First Amendment right of access applies, courts must apply the compelling interest/individualized findings/narrowly tailored means test to deny access.

287. *Nixon*, 435 U.S. at 599.

288. *Id.* at 598.

289. *Id.* at 599.

Finally, *Nixon* rendered the common law right of access to inspect and copy judicial records ineffective as a remedy in many cases by holding that a statute providing a means and procedures for release of the information, tips the balance in favor of denying access under the common law because the statute provides an alternative means of access.[290] Examples of statutes that tip the balance against the common law right of access are FRCP 6(e) (grand jury secrecy)[291] and FOIA.[292]

Once the media legitimately obtains information disclosed in an open proceeding or in openly filed documents with the court, it can publish the information with impunity.[293] This is true even if the government, inadvertently, or by mistake, allows the media access to the information.[294]

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290. *Id.* at 605 (noting that the Presidential Recordings Act provides an alternative means of accessing the audiotapes at issue and satisfies the common law right of access).

291. FED. R. CRIM. P. 6(e). *See In re* Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998); Doe. No. 4 v. Doe No. 1 (*In re* Grand Jury Subpoena), 103 F.3d 234, 237 (2d Cir. 1996).

292. 5 U.S.C.S. § 552 (LEXIS 2000). *See* Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 903 (D.C. Cir. 1996) (discussing FOIA, the court recognized that statutory alternative means of access tips the scales against common law disclosure. The court declined to address whether statutory alternative precludes assertion of common law right of access).

293. Some courts have ordered information sealed after it has been publicly filed with the court by mistake or otherwise. *See* United States v. Gangi, 1998 U.S. Dist. LEXIS 6308 (S.D.N.Y. May 1, 1998). In *Gangi*, the government mistakenly filed publicly with the with the court a prosecution memorandum discussing ongoing investigations and identities of confidential witnesses. The court, over media objection, granted government's request to redact information in the prosecution memorandum pertaining to ongoing investigations and confidential witness identity. The court provided the defense the redacted prosecution memorandum and issued a protective order precluding the defense from further disclosing it. The media objected arguing that since the prosecution memorandum had been publicly filed and widely distributed, it should have a right to view and publish the redacted memorandum. Although not addressed in *Gangi*, if the media had legally acquired the prosecuprosecution memorandum prior to the sealing, it would have been free to print the information. *See supra* Section II. *See also* Howard Publications, Inc. v. Lake Mich. Charters, 649 N.E.2d 129 (Ind. Ct. App. 1995).

294. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (holding that courts can impose protective orders preventing parties from disseminating information gained through discovery but may not prohibit parties from disseminating the same information if it is obtained from another source). *Seattle Times* dealt with protective orders upon parties to litigation. It did not address protective orders to non-parties regarding publication of information gained through discovery. At least one civil case has interpreted *Seattle Times* to allow a court to enjoin a non-party newspaper from publishing information labeled "privileged documents for in-camera review" examined by a reporter while inspecting the court's case file. *Howard Publications Inc.*, 649 N.E.2d at 129) (allowing a protective order to be

D. Access to Information Obtained Through Discovery

The media does not have a First Amendment right of access to discovered information that has not been filed or otherwise introduced into a trial.[295] In *Seattle Times*, a civil case, the Supreme Court opined that discovery, pretrial depositions, and pretrial interrogatories are not public components of a civil trial.[296] The purpose of discovery is solely to prepare for trial.[297] Neither a litigant, nor anyone else, has a First Amendment right of access to information made available solely by discovery rules.[298] *Seattle Times*, recognizing that liberal discovery rules may result in abuses such as delay, expense, and damage to the privacy of litigants and third parties, held that civil courts have the power to restrict participants in a case from further disseminating information gained through discovery.[299]

Although the Supreme Court has never expressly held *Seattle Times* applicable to criminal discovery, it has so stated in dicta.[300] Lower courts addressing the issue have consistently held that *Seattle Times* applies to discovered information in criminal cases.[301] Thus, courts may impose protective orders prohibiting the dissemination of information gained through

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294. (continued) entered after third-party newspaper gains access to discovery information intended to be privileged).

295. *Seattle Times Co.*, 467 U.S. at 20.

296. *Id.* at 33. The case cites *Gannett Co. v. DePasquale*, 443 U.S. 368, 369 (1979), to support its conclusion that pretrial depositions and interrogatories were not traditionally open to the public at common law. *Gannett*, decided seven years prior to *Press-Enterprise II*, refused to find a media first amendment right of access to pretrial proceedings. *Press-Enterprise II* did not expressly overrule *Gannett*, even though the holdings are clearly inconsistent. *See* Kulish, *supra* note 139, at 1-9

297. *Seattle Times Co.*, 467 U.S. at 32-34 (recognizing that, although discovery rules vary among jurisdictions based on legislative determination, the purpose of discovery is to prepare for trial).

298. *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (recognizing in-camera review by trial court as an appropriate means to determine if the public interest in preventing disclosure of sensitive information is outweighed by an accused's right to discover exculpatory evidence).

299. *Seattle Times Co.*, 467 U.S. at 32.

300. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1052 (1991) ("[The Supreme Court] ha[s] upheld restrictions upon the release of information gained only by virtue of the trial court's discovery processes . . . *Seattle Times* would prohibit release of discovery information by the attorney as well as the client.").

301. *See* United States v. Gonzalez, 150 F.3d 1246, 1260 (10th Cir. 1998) (holding discovery proceedings to be different from other proceedings where courts recognize a First Amendment right of access); United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998) (finding discovered but not admitted documents not within the scope of the media right of access); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986)

discovery without resorting to the compelling interest/individualized findings/narrowly tailored means test and without providing the media notice and an opportunity to be heard.[302]

It bears remembering that once the media legitimately obtains information, it can publish the information with impunity.[303] This is true even if the information is released inadvertently, or by mistake.[304]

E. Military Cases

1. First Amendment Right of Access

Only one reported military case has addressed the First Amendment right of access to judicial records in courts-martial trials. In *United States v. Scott*, the ACCA, sua sponte, set aside a trial judge's order sealing a stipulation of fact after it was admitted into evidence in open court.[305] The stipulation described the details of multiple sexual acts between the accused and the fifteen-year-old victim and the details of an attempted murder of another soldier by the accused.[306] The trial judge justified the seal based on privacy interests of persons referenced in the stipulation, but did not make any specific findings on the record.[307] No party requested the seal. No Article 39(a) session was held to address the sealing.[308]

The ACCA, citing *Nixon*, stated that the Supreme Court has recognized a qualified First Amendment right of access to "materials entered into evidence in federal criminal trials."[309] The ACCA declined to

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301. (continued) (holding that discovery is not public process or public record and that discovery materials are not judicial records); United States v. Gangi, 1998 U.S. Dist. LEXIS 6308 (S.D.N.Y. May 1, 1998). *See generally* DiSabatino, *supra* note 278, at 871.

302. *See Gangi*, 1998 U.S. Dist. LEXIS 6308, at *2 (declining to require First Amendment scrutiny to issue a protective order prohibiting dissemination of discovery.).

303. *See* discussion *supra* note 293.

304. *Id.*

305. United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998) (setting aside the seal but upholding the conviction finding no prejudice to the accused).

306. *Id.* The accused plead guilty to carnal knowledge with the fifteen-year-old and to attempted murder of another soldier.

307. *Id.* The tenor of the decision indicates that the trial judge was trying to protect the privacy interest of the fifteen-year-old victim.

308. *Id.* at 664.

309. *Nixon* did not find a First Amendment right of access to materials entered into evidence. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). Federal cases holding that there is a First Amendment right of access to documents in criminal trials have

expressly decide whether the First Amendment right of access attaches to records of courts-martial trials, stating only that the First Amendment right of access that applies to information in evidence in federal criminal trials *may* apply equally to exhibits presented during a public court-martial trial.[310]

The ACCA went on to state:

> [It] need not decide in this case whether or to what extent the public has a qualified right of access to the record of trial. Our concern is only that the record and exhibits appended thereto are not improperly burdened by overly restrictive protective orders issued by a trial judge. Thus, we focus on the procedures a military judge must use before issuing a protective order concerning a prosecution exhibit admitted during a public hearing.[311]

The ACCA then went on to require that military judges conduct the First Amendment compelling interest/individualized findings/narrowly tailored means test before sealing an exhibit presented in open court.

2. Common Law Access

No reported military case addresses the common law right of access to judicial records in courts-martial. Both federal courts and courts-martial are exempt from FOIA.[312] Unlike records of trial in federal court, which

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309. (continued) relied on the *Richmond Newspapers*/*Press-Enterprise* line of cases Those arguing against such a First Amendment right of access cite *Nixon. Nixon* found no First Amendment right to copy audio-tape played in open court when there was no attempt by the government to inhibit the flow of information and the media was provided with a transcript of the audio-tape. *See also* United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (finding that *Nixon* did not recognize First Amendment right of access to court files), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998). *See also* Applications of NBC, 828 F.2d 340, 346-52 (6th Cir. 1987) (Ryan, J., dissenting) (citing *Nixon* to argue that the Supreme Court does not recognize a First Amendment right of access to court documents and records and that any right of access to such documents and records arises only from the common law); Jones & Hillerman, *supra* note 260, at 53, 77 (discussing the fact that defense counsel for Timothy McVeigh cited *Nixon* in opposing media motion for access to sealed documents).

310. *Scott*, 48 M.J. at 664.

311. *Id.* at 664 n.3.

312. Congress exempted "the Courts of the United States" and courts-martial from the definition of "agency" for purposes of FOIA and PA. *See* 5 U.S.C.S. § 551(1)(B), (F) (LEXIS 2000). *See also* Smith v. United States Dist. Ct. for Southern Dist., 956 F.2d 647 (7th Cir. 1992) (holding that FOIA does not apply to federal courts).

are public documents maintained by the office of the Clerk of Court after the trial is over,[313] courts-martial records of trial are maintained after trial by the armed services as federal agencies.[314] Thus, after court-martial trials are completed, FOIA and the PA govern release of the records.[315] Nothing defines when the "end" of a court-martial occurs to subject courts-martial records to FOIA. It is also not clear at what point records normally subject to FOIA because they are maintained by an armed service become "judicial records" of a court-martial that are exempt from FOIA.

If there is a common law right of access to courts-martial records, FOIA,[316] as implemented by the Department of the Defense (DOD), provides an alternative means to access records of courts-martial.[317] This alternative means of public access should tip the balance in favor of denying access under the common law, even though access may not be contemporaneous with the trial.[318]

3. Discovery

Rule for Courts-Martial 701(g) provides for regulation of discovery.[319] The rule authorizes the military judge to make time, place, or manner restrictions on discovery and provides for in-camera inspection of

313. *See* Warth v. Department of Justice, 595 F.2d 521 (9th Cir. 1979) (holding that transcript of a federal trial in the possession of the Department of Justice remained a court document not subject to FOIA).

314. *See* 5 U.S.C.S. § 552(a)(e)(4); The Privacy Act System Notice Requirement Applies to Court-Martial Files, Op. Defense Privacy Board, No. 32 *available at* <http://www.defenselink.mil/privacy/ opinions/op0032.html>.

315. 5 U.S.C.S. § 552(a)(e)(4).

316. *Id.* § 552.

317. U.S. DEP'T OF DEFENSE, DIR. 5400.7, DEP'T OF DEFENSE FREEDOM OF INFORMATION ACT PROGRAM (13 May 1988) (DOD regulation implementing FOIA); DEP'T OF DEFENSE FREEDOM OF INFORMATION PROGRAM (4 Sept. 1998) (includes 1996 amendments to FOIA); AR 25-55, *supra* note 24 (Army regulation implementing FOIA). *See also* United States v. Scott, 48 M.J. 663 (1998).

318. Nixon v. Warner Communications, Inc., 435 U.S. 589, 606 (1978).

319. MCM, *supra* note 24, R.C.M. 701(g). The regulation of discovery section reads as follows:

> (1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.
>
> (2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be

discovery materials.[320] Regulating dissemination of discovery is authorized by R.C.M. 701(g) section 1 as a time, place, or manner restriction.[321] Rule for Courts-Martial 701 provides adequate authority for a military judge to regulate discovery. Neither the Supreme Court nor the CAAF has recognized a First Amendment right of access to discovery. Thus, military judges are free to regulate discovery without employing strict First Amendment scrutiny or providing the media notice and an opportunity to be heard. There have been no reported military cases involving media challenges to protective orders prohibiting or regulating dissemination of discovery or to in-camera reviews of discovery by the military judge.[322]

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319. (continued)

> denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination by the military judge.
>
> (3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:
>
> (A) Order the party to permit discovery;
>
> (B) Grant a continuance,
>
> (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
>
> (D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

Id.

320. *Id.*

321. *Id.* app. 21, R.C.M. 701(g) analysis.

322. There are many reported cases where the accused has challenged a military judge's in-camera review of discovery or denial of discovery. None of these challenges are based on First Amendment access or Sixth Amendment public trial grounds. *See id. See also* United States v. Morris, 52 M.J. 193 (1999) (denying discovery of victim's medical, psychological and counseling records); United States. v. Sanchez, 50 M.J. 506 (A.F. Ct. Crim. App. 1999) (chastising the military judge for not conducting an in-camera review before defense request for records affecting victim's credibility); United States v. Briggs, 48 M.J. 143, 145 (1998) (addressing challenge by accused that trial counsel denied him exculpatory and material evidence in victim's medical records). The CAAF stated in dicta:

Two relevant military cases defining the scope of protective orders for discovery are *Gray v. Mahoney*[323] and *Carlson v. Smith.*[324] In *Gray*, after a trial in which the accused was acquitted, the government tried to prevent the accused from making copies of a videotape obtained through discovery. The videotape was made by one of the accused showing several of the victims engaging in sex acts with him. The government gave the tape to the defense as discovery, without restriction. The CAAF held that any restrictions on discovery must be imposed before the discovered information is made openly available. Once the government makes discovery openly available and does not seek regulation before or during the trial, it has waived any ability to regulate what has been discovered.[325] The case was not clear on whether the government, prior to the end of a trial, can seek a protective order regarding discovery it has publicly released or whether the public release precludes a curative protective order under all circumstances.[326]

In 1995, one year after *Gray* was decided, the CAAF in a summary disposition, opined that a trial judge had authority, before and during a court-martial, to withdraw documents previously given to defense counsel and to impose a protective order on documents previously released by the government with no restriction. In *Carlson v. Smith*, the CAAF considered

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322. (continued)

> The preferred practice is for military judges to inspect medical records in camera to determine whether any exculpatory evidence was contained in the file prior to any government or defense access . . . The proper procedure is for trial counsel to call the records custodian as an authenticating witness. This witness need only deliver an accurate and sealed copy of the records to the military judge for in camera review. Once reviewed, the military judge makes a ruling either allowing access to both sides, or denying access and resealing the records as an exhibit for appellate review.

Id.; United States v. Charles, 40 M.J. 414 (1994) (denying discovery of internal investigation reports involving civilian police officer witnesses after in-camera review); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996) (denying discovery of prosecutor's interview notes after in-camera review); United States v. Watkins, 32 M.J. 1054 (Army Ct. Crim. App. 1991) (upholding non-disclosure of informant).

323. 39 M.J. 299 (C.M.A. 1994).

324. 43 M.J. 402 (1995) (summary disposition).

325. *Gray*, 39 U.S. at 305. Judge Gierke concurred in the result but disagreed with the majority view that a protective order must be issued before the release of evidence to be enforceable. *Id.* at 306.

326. *Compare Gray*, 39 U.S. at 299, *with* United States v. Gangi, 1998 U.S. Dist. LEXIS 6308 (S.D.N.Y. May 1, 1998) *and* discussion *supra* note 293.

a request by two non-parties for the CAAF to issue a writ of mandamus ordering the trial court to withdraw a subpoena duces tecum for allegedly privileged information and to withdraw or protect confidential Equal Employment Opportunity (EEO) documents that had already been disclosed to the defense in a special court-martial.[327] The CAAF ordered the military judge to examine the subpoenaed documents and conduct an in-camera hearing to include the accused, counsel for the government and defense, and the non-party petitioners and their counsel.[328] The military judge was ordered to allow all participants to present evidence, argument, and legal authority regarding the propriety and legality of disclosing the documents.[329] The purpose of the hearing was to determine whether any subpoenaed documents were privileged or should not be disclosed for some other reason and whether any EEO documents previously released to the defense should be withdrawn or otherwise protected from further dissemination.[330]

In *Gray*, the government requested the post trial withdrawal order to protect privacy interests of victims of sexual misconduct. In *Carlson*, non-parties who had no control over the government's initial unrestricted release of information, requested withdrawal and protection. The ability to subsequently request a protective order for information released for discovery without restriction by the government, may depend on whether it is the government or another interested person who requests the protection. The government has power to control the release of information in its possession. In *Carlson*, the other parties in interest do not.

Gray should be limited to its facts. Arguably, it would be unconstitutional for the military courts to prevent an accused who makes a videotape prior to the litigation from disseminating it. *Seattle Times* held that courts may regulate dissemination of information gained through discovery but not if the same information was gained outside of the litigation process.[331] The accused in *Gray* technically acquired the videotape during discovery after it was seized from him. In light of the fact that this accused made the tape prior to the litigation, he gained the information independent of the litigation process. In any event, the military has open discovery rules. In

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327. Carlson v. Smith, 43 M.J. 402 (1995) (summary disposition). *United States v. Reeves* was the special court-martial for which the information was sought.

328. *Carlson*, 43 M.J. at 402.

329. Any documents not disclosed after the hearing were to be forwarded with the record as a sealed appellate exhibit.

330. *Carlson*, 43 M.J. at 402.

331. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).

many jurisdictions, the prosecution routinely allows the defense to review the file and the investigative report. A requirement on the government to impose restrictions on discovery prior to release or be forever precluded from obtaining a protective order will chill open discovery and encourage tedious discovery litigation. The better approach would be for CAAF to limit *Gray* to its facts and allow the government to request a protective order for discovered information at any time.

4. Conflict Between Access Under FOIA and the First Amendment Right of Access

The media has been aggressive in asserting that it has both a Constitutional and a common law right of access to inspect and copy judicial records filed in federal and state criminal trials.[332] As military trials continue to attract media attention, these First Amendment and common law challenges from the media are likely to increase.[333] The majority of federal circuits have interpreted the *Richmond Newspapers*/*Press-Enterprise* line of cases to find that the First Amendment right of access to criminal proceedings includes a right of access to, at least some, judicial records filed in criminal trials. The case law in favor of access is particularly strong with regard to information introduced into evidence at trial and executed guilty pleas.

The media will likely be successful in asserting standing to raise First Amendment and common law rights of access to judicial records and documents filed in courts-martial trials.[334] The *Manual for Courts-Martial* provides no procedure for notifying the public or the media of contemplated closures of criminal proceedings or sealing of records. Docketing and motions filing are normally conducted pursuant to local rules of court and are not uniform.[335]

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332. *See* Jones & Hillerman, *supra* note 260.

333. *See supra* text accompanying Introduction.

334. Civilian courts and CAAF have also recognized that the media has a right to notice and opportunity to raise access issues even though they are not parties to the case. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding that whenever an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied); ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) (same).

335. This fact is based on the author's experience as an Army trial and defense counsel in Kentucky, Germany, and Hawaii. Docketing procedures that deny the media and the public notice of closed proceedings or in-camera hearings have been held to be unconstitutional. *See* United States v. Valenti, 987 F.2d 708 (11th Cir. 1993).

Assuming the media has been notified of a pending sealing or other denial of access and the military judge properly provided the media standing to challenge the denial of access, there is no express authority in the *Manual for Courts-Martial* for military judges to release trial exhibits, motions, plea agreements, or any other information filed in the trial.[336] The trial counsel, not the military judge, is responsible for preparing and forwarding the record of trial.[337] Military judges also do not have initial denial authority under FOIA. The initial denial authority for records pertaining to courts-martial is the service judge advocate general, or other agency official.[338]

Three conflicts, therefore, arise between the media First Amendment right of access to judicial records and FOIA. First, FOIA does not employ the compelling interest/individualized findings/narrowly tailored means test required to deny access to judicial records when the First Amendment right of access has attached. The FOIA mandates release of agency records unless an exemption or exclusion applies.[339] Exemptions that are typically asserted to deny access in courts-martial records cases are Exemption 5 (deliberative process privilege, attorney-work- product privilege and attorney-client privilege), Exemption 6 (information in personnel, medical, and similar files), and Exemption 7 (records compiled for law enforcement purposes).[340] The FOIA employs criteria for release and balancing tests for each exemption.[341] Second, officials from the armed services, not the

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336. An argument can be made that control of court records is an implied part of the military judge's responsibility as the presiding officer in a court-martial. *See* MCM, *supra* note 24, R.C.M. 801.

337. The trial counsel, under the supervision of the military judge, is responsible for preparation of the record of trial. *See id.* R.C.M. 1103(b)(1)(A).

338. *See* AR 25-55, *supra* note 24, para. 5-200d(14) (designating The Judge Advocate General as the initial denial authority for records relating to courts-martial).

339. An in-depth discussion of releases of records in criminal cases pursuant to FOIA is beyond the scope of this article.

340. *See* 5 U.S.C.S. § 552(b)(5), (6), (7) (LEXIS 2000); AR 25-55, *supra* note 24, para. 3-200, 5, 6, and 7.

341. The Privacy Act generally prohibits disclosure of personal information that is maintained in a system of records (a group of records retrieved by name or personal identifier) to third parties without the consent of the individual to whom the record pertains. 5 U.S.C.S. § 552a(b). One exception to the "no disclosure without consent rule" is when FOIA requires release. *Id.* § 552(b)(2). While FOIA generally mandates release, FOIA Exemption 6 allows withholding of personal information maintained in "personnel, medical, or other similar files." *Id.* § 552(b)(6). Similarly, Exemption 7(c) allows agencies to withhold personal information maintained in law enforcement records. *Id.* § 552(7). Both Exemptions 6 and 7(c) require the government to conduct a balancing test to weigh the public interest in release against the privacy interest in withholding. If the public interest out-

341. (continued) weighs the privacy interest, FOIA require release. *See* United States Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989). The government may not make a discretionary release of information protected by FOIA Exemptions 6 or 7(c) or the Privacy Act. *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, 257-303, 342-71 (1998). An interesting issue that is beyond the scope of this article is the extent to which the media's First Amendment right of access to judicial records containing Privacy Act protected information is weighed in Exemption 6 and 7(c) balancing test. Arguably, if the First Amendment right of access attaches, then the balance should be in favor of release. The balance may change depending on the timing of the request for records. The public interest in the information is particularly acute during the trial. The public interest in the Privacy Act information may diminish over time. *See Reporters Committee*, 489 U.S. at 749 (deciding that, under FOIA Exemption 6 and 7(c) analysis, there can still be substantial privacy interests for information that has been available to the general public). This issue is problematic for the government under the current rules because the government may be sued under the Privacy Act for unlawful release of protected information and under Federal Tort Claims Act for releases in violation of a constitutional right to privacy. *See* Cochran v. United States, 770 F.2d 949 (11th Cir. 1985) (noting that an Army major general sued under the Privacy Act for improper release of non-judicial punishment taken against him); Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995) (suit against Army under the Federal Tort Claims Act for improper release of investigation records).

In *Cochran*, the Eleventh Circuit upheld the release by the Army of nonjudicial punishment given to Major General Cochran for misconduct involving use of government facilities and funds. The court held that release was required under FOIA Exemption 6 because the public interest in this type of misconduct by a high ranking military officer outweighed the privacy interest. In a footnote, the Eleventh Circuit questioned whether release of the Article 15 was even covered by the Privacy Act. The court stated:

> As an aside, it might be questioned whether current newsworthy information of interest to the community, such as contained in the press release at issue in the present case, even falls within the strictures of the Privacy Act. As the legislative history indicates, the Privacy Act was primarily concerned with the protection of individuals against the release of stale personal information contained in government computer files to other government agencies or private persons . . . The legislative history of the Act does not evidence any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people. Furthermore, there is great public interest in insuring the dissemination of current, newsworthy, information by the press, particularly when the information relates to the operations of the government . . . . We do not need to reach this intriguing question in view of our resolution of the present case.

Cochran, 770 F.2d at 959 n.15. Another interesting area where the Army can be sued is the increasing scope of the constitutional right to privacy. For example, the Sixth Circuit recently held that it may be a violation of police officers' constitutional right of privacy for prosecutors to release their personnel files to defense counsel. *See* Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). Thus, the government cannot adopt a "release everything" to the media approach in criminal cases.

military judge, control access decisions. The armed service prosecuting the case, at least from the perspective of the accused, is a party in interest in the trial.[342] Third, release pursuant to FOIA may not be contemporaneous with the trial.[343] Thus, the common law right of access is probably satisfied by the availability of FOIA as an alternate mechanism of release even though release of court-martial records may not take place contemporaneously with the trial.[344]

Although FOIA provides an alternative means for releasing courts-martial records that satisfies the common law right of access, FOIA procedures do not satisfy the First Amendment right of access.[345]

Rule for Courts-Martial 806 (Public Trial) should be amended to place judicial records filed in connection with a court-martial within the control of the military judge during the trial (from referral to authentication); authorize the military judge to decide, during a trial, whether to release or withhold judicial records and evidence filed in connection with a pending court-martial; and provide the media and public notice and an opportunity to be heard prior to sealing or other denial of judicial records filed in a court-martial trial.

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342. Military cases often involve challenges to armed service policies. For example, former First Lieutenant Kelly Flynn challenged the military fraternization policies and alleged that the armed forces discriminated between low and high-ranking officers and between men and women when enforcing the policy. *See supra* note 9. Command Sergeant Major (Ret.) Gene McKinney alleged that the military treated senior officers and enlisted personnel differently in sexual misconduct cases. *See supra* note 10. *But see* United States v. Mitchell, 39 M.J. 131 (C.M.A. 1994) (finding The Judge Advocate General or The Assistant Judge Advocate General for Military Law not prosecutors or "aligned with the government"); *See also* Weiss v. United States, 510 U.S. 163 (1994) (stating that The Judge Advocates General do not have an interest in the outcome of an individual court-martial).

343. FOIA allows agencies to have 20 days to respond to FOIA requests and an extra 10 working days upon written notice to the requester (5 U.S.C. § 552(a)(6)(A)(i)). *See also* United States DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, 40-44 (1998).

344. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 603 (1978) (holding that administrative procedure for process and release of information to the public at some time in the future, tips the balance in favor of denying common law right of access).

345. The scope of the First Amendment right of access to records of completed trials may depend on why access is sought. Many states have enacted laws applying more stringent standards for release for commercial purposes. *See, e.g.*, Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1999); United Reporting Publ'g Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998); Lamphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994).

V. Access To Information From Trial Participants: Ethics Rules and Gag Orders

A. Generally

The essence of the media's First Amendment right of access to criminal proceedings and evidence is the right to attend, see, and hear what is presented and to freely publish what it has observed.[346] Neither the public nor the media has a First Amendment right to be free from court restriction on interviewing attorneys or other trial participants about pending cases in litigation.[347]

Attorneys and other trial participants have free speech rights under the First Amendment.[348] This section discusses the extent to which states and courts can regulate trial participants' speech when the speech threatens to prejudice a criminal trial or other adjudicatory proceeding.

Two methods exist to restrain release of extrajudicial information in pending cases by case participants. The first are rules of ethics imposed by jurisdictions on attorneys practicing within the jurisdiction. The second are restraining or "gag" orders imposed by trial courts on some or all court participants. Ethics rules govern extrajudicial speech by attorneys.[349] They are applicable sua sponte to all cases tried within the jurisdiction. Gag orders are optional measures that can be imposed by trial courts to prevent attorneys and other trial participants, to include parties, law enforcement personnel, witnesses, and anyone else connected with the trial, from disclosing information or making extrajudicial statements about a particular case. Both of these methods impact upon the First Amendment free speech rights of the speaker.

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346. United States v. Nixon, 435 U.S. 589, 609 (1978).

347. *Id.*

348. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1071-72 (1991) (holding, generally, that attorneys and other trial participants have First Amendment free speech rights, however, speech may be limited in pending cases to prevent material prejudice to the proceedings).

349. Most ethics rules also require prosecutors to exercise reasonable care to prevent persons assisting or associated with the prosecutor, such as investigators, persons involved with law enforcement, and lawyer support personnel, from making comments that the prosecutor may not make. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 3.8 (1 May 1992). *See* discussion *infra* note 388.

B. Ethics Rules Limiting Attorney Speech and Disclosure of Information

Almost all jurisdictions have rules of professional responsibility governing trial publicity that are modeled on some version of the American Bar Association (ABA) Model Rules.[350] The ABA rules have different standards of harm that must be met to restrict extrajudicial speech by attorneys. The first ABA rule, Disciplinary Rule 7-107, adopted in 1968, restricted attorney speech based on a reasonable likelihood of prejudice.[351] The second ABA rule, adopted in 1978, allowed restriction only if there was a clear and present danger of prejudice.[352] Finally, ABA Model Rule of Professional Conduct 3.6, originally drafted in the 1980s, selected an intermediate approach and allowed restriction based on a substantial likelihood of material prejudice.[353]

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350. *See Gentile*, 501 U.S. at 1067-69, nn.1, 2 (listing states with ethics rules regarding trial publicity that are modeled on the American Bar Association (ABA) Model Rules or Disciplinary Rules); *see also* Barry Tarlow, *Latest Battles Over Lawyers' Right to Speak Out*, THE CHAMPION (July 1998) (discussing federal district courts local rules governing attorney speech in pending criminal cases); Katrina M. Kelly, *The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulations in the 1990s*, 16 N. ILL. U. L. REV. 483, 493-45 (1996) (discussing state ethics rules). For a thorough review of the development of ABA trial publicity rules. *See* Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 502-24 (1993).

351. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1968) (restricting extrajudicial speech if there was a reasonable likelihood of prejudice). *See also Gentile*, 501 U.S. at 1068 n.2 (citing 11 states having adopted the reasonable likelihood of prejudice standard as of 1991); Kelly, *supra* note 350, at 493 (citing seven states having the reasonable likelihood of prejudice standard as of 1996); Catherine Cupp Theisen, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837 (1996) (describing historical development of ABA rules dealing with tribunal publicity).

352. *See Gentile*, 501 U.S. at 1068 n.3 (citing five states and the District of Columbia applying the clear and present danger standard); Kelly, *supra* note 350, at 493 (citing nine states and the District of Columbia with a clear and present danger standard as of 1996). *See also* Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. 1347 (1993) (discussing debate on what First Amendment standard is required to restrict attorney speech).

353. MODEL RULE OF PROFESSIONAL CONDUCT 3.6 (1983). *See also Gentile*, 501 U.S. at 1068 n.1 (citing 31 states applying the substantial likelihood of material prejudice standard as of 1991); Kelly, *supra* note 350 (citing 33 states with a substantial likelihood of material prejudice standard as of 1996).

1. Gentile v. State Bar of Nevada

In 1991, the Supreme Court addressed whether an ethics rule regulating attorney speech under the substantial likelihood of material prejudice standard violates the First Amendment free speech rights of attorneys participating in pending cases.[354] Dominic Gentile, a defense attorney, challenged disciplinary action taken against him by the Nevada State Bar for violating Nevada Supreme Court Rule 177 (Rule 177).[355]

The basis for discipline was Gentile's violation of Rule 177 by holding a press conference shortly after his client, Grady Sanders, was indicted. Sanders was charged with stealing four kilos of cocaine and approximately $300,000 from a safety deposit vault at Western Vault Corporation.[356] Gentile held the press conference to publicize Sanders's side of the case. His purposes were to counter publicity adverse to his client that Gentile believed originated from the police and prosecutors and to prevent further poisoning of the jury venire.[357] Gentile feared that, unless some prosecution weaknesses were made public, the defense would be unable to get an impartial jury.[358] At the time of the press conference, Gentile was aware of at least seventeen articles publicizing the theft in the major local newspapers as well as numerous television reports about the investigation.[359]

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354. *Gentile*, 501 U.S. at 1030.

355. Rule 177 is based on the ABA Model Rule of Professional Conduct 3.6 that restricts attorney speech when there is a substantial likelihood of material prejudice to an adjudicative proceeding. *See Gentile*, 501 U.S. at 1070 n.4.

356. *Gentile*, 501 U.S. at 1039-40. The drugs and money had been used in undercover operations by the Las Vegas Metropolitan Police Department (Metro). Gentile's client, Sanders, owned Western Vault.

357. The theft occurred approximately one year prior to Mr. Sanders's indictment. Metro police initially reported at a press conference that the police and Western Vault employees were suspects. Two Metro officers, Scholl and Schaub, had free access to the vault during the time of the theft. During the year prior to the indictment, the media reported, among other things, that the police did not consider Scholl and Schaub responsible, that thefts had been reported from other safety deposit boxes in the Vault, that investigative leads pointed to Sanders as the thief, that Sanders's business records suggested he had a business relationship with the targets of the undercover investigation, that the police cleared Scholl and Schaub because they passed lie detector tests given by Ray Slaughter, a man subsequently arrested by the FBI for distributing cocaine to an FBI informant, that Sanders refused to take a lie detector test, and that the FBI believed Metro officers were responsible for the theft. *Id.* at 1039-42.

358. *Id.* at 1042-43.

359. *Id.* at 1042.

Gentile challenged the disciplinary action on two grounds. First, he argued that the First Amendment requires that there be a clear and present danger or imminent threat of material prejudice to an adjudicative proceeding before a state may regulate attorney speech.[360] Gentile cited *Nebraska Press v. Stuart*, the case in which the Supreme Court held that there must be a clear and present danger or imminent threat of material prejudice before a state can regulate media publication during pending trial proceedings.[361]

Second, Gentile argued that even if the substantial likelihood standard is constitutionally permissible, his press conference fell within the "safe harbor provision"[362] of Rule 177 because he was describing the general nature of the defense without elaboration as allowed by the rule.[363] The language of Rule 177 allows attorneys to make statements that fall within this "safe harbor provision" notwithstanding the prohibitions in the rest of

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360. *Id.* at 1051-52.

361. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See supra* Section II.

362. "Safe harbor provision" is the term used by the Supreme Court in *Gentile* to describe that part of ABA Model Rule 3.6 that allows attorneys to make certain enumerated extrajudicial statements even if they are substantially likely to prejudice an adjudicative proceeding. Rule 177(3)(a) allows an attorney to "state without elaboration . . . the general nature of the . . . defense . . . notwithstanding subsections 1 [prohibition against statements when there is substantial likelihood of material prejudice to an adjudicative proceeding] and 2(a-f) [list of statements likely to cause substantial likelihood of material prejudice]." *See Gentile*, 501 U.S. at 1048.

363. *Gentile*, 501 U.S. at app. A. Gentile read a prepared statement and responded to questions. The prepared statement said:

> I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases–at least two cases there–have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops. When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl. There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being. And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police

the rule. Thus, Gentile could describe the general nature of the defense without elaboration even if he knew or should have known that his statements had a substantial likelihood of materially prejudicing the trial.[364]

The Supreme Court addressed two issues in *Gentile*: first, whether regulating speech of attorneys participating in a pending case under the substantial likelihood of material prejudice test satisfies the First Amendment; and second, whether the "safe harbor provision" made Rule 177 void for vagueness. On each issue, the vote was five to four. No single opinion expressed the majority view on both issues.

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363. (continued)

> Department and at the District Attorney's office. Now, with respect tothese other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something. Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them. Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' checks were missing. Many of the contracts that these people had show on the face of the contract that there is $100,000 in insurance for the contents of the box. If you look at the indictment very closely, you're going to see that these claims fall under $100,000. Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box. And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box. That's about all that I have to say.

Id. Questions from the floor followed.

364. *Id.* at 1048.

a. The Substantial Likelihood of Material Prejudice Test

The majority opinion on the first issue was written by Chief Justice Rehnquist and joined by Justices White, Scalia, and Souter (hereinafter the Rehnquist foursome).[365] The Rehnquist foursome held that the substantial likelihood of material prejudice standard for regulating attorney speech does not violate the First Amendment because attorney speech regarding pending cases can be regulated under a lesser standard than the clear and present danger standard for regulating what the media may publish.[366] Justice O'Connor concurred with this portion of the Rehnquist opinion to form a majority.[367]

Justice Kennedy, joined by Justices Marshall, Blackmun, and Stevens (hereinafter the Kennedy foursome) dissented. These justices opined that attorney speech cannot be regulated unless there is a clear and present danger or imminent threat of prejudice to an adjudicative proceeding. Looking to the history of Rule 177, the Kennedy foursome found that the drafters of ABA Model Rule meant for the substantial likelihood of material prejudice test to approximate the clear and present danger test.[368] Thus, the language of the rule did not violate the First Amendment.[369] The problem was the application of the rule in this case by the Nevada Supreme Court. The Kennedy foursome also found no proof of substantial likelihood of material prejudice from Gentile's statements[370] and that First Amendment protection of Gentile's comments was particularly important because it was political speech criticizing the government and its officials.[371]

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365. *Id.* at 1062-76.

366. *Id.*

367. *See id.* at 1081 (O'Connor, J., concurring).

368. *Id.* at 1037.

369. *Id.* at 1036 ("[I]nterpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm.").

370. *Id.* at 1038. Justice Kennedy questioned whether extrajudicial statements by a defense attorney can ever prejudice the prosecution as there was no evidence produced of any case where such prejudice occurred. *Id.* at 1055.

371. *See supra* note 348. Gentile's defense was that the police committed the crimes.

b. Void for Vagueness

The Kennedy foursome joined by Justice O'Connor formed the majority opinion that held Rule 177 void for vagueness because the "safe harbor" provision leads attorneys to assume that they may state the general nature of a claim or defense without elaboration even if the statements have a substantial likelihood of material prejudice.[372] The Kennedy foursome found the words "general" and "without elaboration" to be too vague to provide sufficient guidance. Justice O'Connor found that Gentile had a strong argument that his comments at the press conference were protected by the safe harbor provision, but that Nevada also had a strong argument that Gentile's comments fell outside the safe harbor provision. Because the language of Rule 177 could provide strong support for both sides, Justice O'Connor opined that the rule was unconstitutionally vague.[373]

The Rehnquist foursome dissented in the part of the decision addressing the second issue. The four justices opined that Rule 177 was not void for vagueness in this case, because Gentile admitted that a primary purpose of his press conference was to influence potential jurors.[374] The "safe harbor provision" covers general statements of a claim or defense made without elaboration. In this case, Gentile's comments were obviously not general and not made without elaboration.[375]

3. Analysis of the Gentile Decisions

The most interesting divergence in the two *Gentile* opinions concerns the right of a defense counsel to reply to adverse publicity. The Kennedy foursome suggested that there should be a higher level of scrutiny to regulate speech by defense counsel than to regulate speech by government sources. These justices doubted whether extrajudicial statements by a defense attorney are even capable of materially prejudicing the government's case, thus, negating the need to regulate defense counsel speech at all.[376] They believed that only the rare case presents a danger of prejudi-

372. *Gentile*, 50 U.S. at 1048.

373. *Id.* at 1081-82 (O'Connor, J., concurring).

374. *Id.* at 1077. Gentile stated that he wanted to counter prejudicial pretrial publicity generated by the government. *Id.* at 1042-43.

375. *Id.* at 1078-79.

376. *Id.* at 1055 (citing several ABA and other sources showing that extrajudicial statements creating a danger of prejudicial publicity come primarily from the police, the prosecution, other government sources, and the community at large, not the defense).

cial publicity and empirical evidence shows that juries exposed to prejudicial publicity can disregard it. The Kennedy foursome also recognized that a legitimate part of a defense counsel's representation may involve media comment to protect the client's reputation and prevent abuse by the courts.[377] Defense counsel speech criticizing government officials in the performance of official duty is political speech of great concern to the public and, often in criminal cases, the police, prosecution, government sources, or the community at large have disseminated information adverse to the accused.[378] The Kennedy foursome opined that there should be no danger of prejudicial publicity when an accused replies to adverse publicity generated against him by others.[379]

The Rehnquist foursome flatly rejected the idea that an attorney has a self-help right of reply to combat adverse publicity generated by other sources.[380] They also rejected the conclusion that no prejudicial publicity

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377. *Id.* at 1058.

378. *Id.* at 1043.

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Id.

379. Many commentators believe that extrajudicial speech by attorneys in pending cases is not normally prejudicial and is usually beneficial to the public understanding of criminal justice. For these reasons the standard for regulating attorney speech should be elevated to the clear and present danger standard. *See* Erwin Chererinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998); Berkowitz-Caballero, *supra* note 350, at 494.

380. *Gentile*, 50 U.S. at 1080 n.6.

> Justice Kennedy would find that publicity designed to counter prejudicial publicity cannot be itself prejudicial despite its likelihood of influencing potential jurors, unless it actually would go so far as to cause jurors to be affirmatively biased in favor of the lawyer's client . . . such a test would be difficult, if not impossible, to apply . . . it misconceives

results when an attorney seeks to balance the publicity by replying to adverse publicity.[381]

Gentile upheld the substantial likelihood of material prejudice test to regulate attorney speech in pending cases. The decision did not address the constitutionality of the lesser reasonable likelihood test. The Second and Fourth Circuits have held that *Gentile* did not preclude regulation of attorney speech based on the reasonable likelihood test.[382]

2. New Model Rule 3.6

In response to *Gentile*, the ABA amended Model Rule 3.6 in 1994.[383] The amended Model Rule 3.6 retained the substantial likelihood of material prejudice standard for regulating attorney speech.[384] Two major changes were made to Model Rule 3.6. First, the list of subjects upon

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380. (continued)

> the constitutional test for an impartial juror–whether the juror can lay aside his impression or opinion and render a verdict on the evidence presented in court . . . . A juror who may have been initially swayed from open-mindedness by publicity favorable to the prosecution is not rendered fit for service by being bombarded by publicity favorable to the defendant. . . . A defendant may be protected from publicity by, or in favor of, the police and prosecution through voir dire, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds. The remedy for prosecutorial abuses that violate the rule lies not in self-help in the form of similarly prejudicial comments by defense counsel, but in disciplining the prosecutor.

Id.

381. *Id.* For an argument that restrictions on trial participant speech effectively combat the prejudice resulting from extensive media coverage. *See* Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95 (1995).

382. *See In re* Morrissey, 168 F.3d 134 (4th Cir. 1999); United States v. Cutler, 58 F.3d 825 (2d Cir. 1995).

383. *See* TRIAL PUBLICITY, CERTIFICATION UNDERGO MODEL RULE CHANGES, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 243 (Aug. 24, 1994) [hereinafter TRIAL PUBLICITY] (discussing ABA amendments to the Model Rules of Professional Conduct regarding trial publicity).

384. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994). The rule reads as follows:

> Model Rule 3.6 (Trial Publicity) (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make

which extrajudicial comment is likely to have a substantial likelihood of material prejudice is moved from the rule to the comment.[385] Second, the "safe harbor provision" is replaced by a "right to reply" provision.[386] The new provision allows a lawyer to protect his client from substantial prejudicial effect of recent adverse publicity not initiated by the lawyer or his client. The right to reply is limited to information needed to mitigate recent adverse publicity and applies even if the reply may have a substantial likelihood of materially prejudicing an adjudicative proceeding.[387] The language of new Rule 3.6 makes the right to reply equally applicable to the government and to the defense.

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384. (continued)

> an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. (b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the person involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of anystep in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1)-(6): (I) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation. (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity. (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Id.

385. *Id.* Rule 3.6 cmt.

386. *Id.* Rule 3.6 (c). This section was, apparently approved over the objection of the Department of Justice. *See* TRIAL PUBLICITY, *supra* note 383, at 243.

387. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6.

3. Armed Services' Rules of Professional Responsibility–Trial Publicity

Each of the services has a rule of professional responsibility that governs trial publicity.[388] Army Rule 3.6, like all of the service rules on trial publicity, is nearly identical to Nevada Supreme Court Rule 177 (Rule 177), at issue in *Gentile*.[389] Both rules restrict attorney speech based on the substantial likelihood of materially prejudice standard.[390] Both rules list the same statements that are ordinarily likely to materially prejudice a

388. Although this article discusses Army Rule 3.6 in depth, each of the services currently has an ethical rule governing trial publicity that is similar to Nevada Rule 177 challenged in *Gentile*. *See* AR 27-26, *supra* note 24, Rule 3.6; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5803-1A, NAVY AND MARINE CORPS RULES OF PROFESSIONAL RESPONSIBILITY (13 July 92) [with three change transmittals: CH 1, 12 Jul 93; CH 2,27 Jun 94; CH 3, 30 May 96]; U.S. DEP'T OF COAST GUARD, COMMANDANT INSTR. M5810.1C, MILITARY JUSTICE MANUAL, CH. 6 (STANDARDS OF CONDUCT AND ABA STANDARDS); Policy Letter No. 26, Office of the Judge Advocate General, United States Air Force, subject: Air Force Rules of Professional Conduct and the Air Force Standards for Criminal Justice (undated).

389. *Army Regulation 27-26*, Rule 3.6 is identical to the Nevada Rule 177 challenged in *Gentile*, except that it is slightly more extensive. The provisions in Rule 3.6(b)(7) and 3.6(d) are unique to the Department of the Army and are not in Nevada Rule 177. *See* AR 27-26, *supra* note 24.

390. *Army Regulation 27-26*, Rule 3.6 (Tribunal Publicity) states:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, discharge from the Army or other adverse personnel action and that statement relates to:
>
> (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action;
>
> (5) information the lawyer knows or reasonably should know is likely

proceeding.[391] Finally, both rules have a "safe harbor provision" with

390. (continued)

> to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;
>
> (6) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or
>
> (7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense. This does not preclude the lawyer from commenting on such matters in a representational capacity.
>
> (c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
>
> (1) the general nature of the claim or defense;
>
> (2) the information contained in a public record;
>
> (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
>
> (7) in a criminal case:
>
> (i) the identity, duty station, occupation, and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time, and place of apprehension; and
>
> (iv) the identity of investigating and apprehending officers or agencies and the length of the investigation.
>
> (d) The protection and release of information in matters pertaining to the Army is governed by such statutes as the Freedom of Information Act and Privacy Act, in addition to those governing protection of national defense information.

AR 27-26, *supra* note 24, Rule 3.6. In addition, regulations of the Department of Defense, the Department of the Army, The Judge Advocate General, Corps of Engineers, and U.S. Army Material Command may further restrict the information that can be released or the source from which it is to be released.

391. *Id.* The statements ordinarily likely to materially prejudice an adjudicative proceeding in Nevada Rule 177 are all included in the Army rule. *Army Regulation 27-26(b)(7)* adds an additional statement about the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense unless commented upon by a lawyer in a representational capacity.

seven categories of information a lawyer involved in an investigation or litigation may state without elaboration, notwithstanding the prohibitions in the rest of the rule.[392]

None of the armed services has implemented new Model Rule 3.6.[393] Each service trial publicity rule continues to allow the same "safe harbor provision" found to be void for vagueness in *Gentile*.[394] Thus, all of the armed services' ethics rules governing trial publicity are void for vagueness and may not be enforceable. None of the current service ethics rules on trial publicity authorize any right to reply for the government or the defense.[395]

The Supreme Court has not heard a case involving new Model Rule 3.6. There are strong void for vagueness arguments against the new Model Rule. The Rehnquist foursome in *Gentile* warned that a self-help right to reply would be "difficult, if not impossible to apply."[396] New Model Rule 3.6 affords a lawyer the right to reply to protect a client from "substantial undue prejudicial effect of recent publicity not initiated by the lawyer or his client."[397] How can one determine how much prejudice is "substantial"? What is the definition of "recent"? Does the prejudicial publicity have to originate with someone other than the client or does the initiation of any publicity by the client preclude the right to reply? These are all questions of degree, as were the words "general" and "elaboration" that caused the vagueness in *Gentile*.[398] Finally, routine publications by the government that are allowed by trial publicity rules, such as the fact that

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392. Gentile v. State Bar of Nev., 501 U.S. 1030, 1048 (1991) ("Safe harbor provision" is the term used by the Supreme Court in Gentile to describe that part of the ethics rule that allows attorneys to make certain enumerated extrajudicial statements even if they are substantially likely to prejudice an adjudicative proceeding). *See also* AR 27-26, *supra* note 24, Rule 3.6 (c); Nevada Supreme Court Rule 177(3).

393. *See* Army, Air Force, and Navy rules, *supra* note 388.

394. *Gentile*, 501 U.S. at 1030.

395. Both the Army and Air Force Media Guides cite new Model Rule 3.6 for its statement that there is a right to reply under military ethics rules. Unless and until the services adopt new Model Rule 3.6, this guidance is not correct. *See* U.S. ARMY PUBLIC AFFAIRS, MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE 7,10 (Nov. 1998); U.S. AIR FORCE, MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE 6 (Feb. 1998).

396. *Gentile*, 501 U.S. at 1080 n.6. *See* Kelly, *supra* note 350 (discussing vagueness problems with new Model Rule 3.6).

397. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

398. 501 U.S. at 1048-49. *See* United States v. McVeigh, 964 F. Supp. 313 (D. Colo. 1997) (denying defense counsel right to reply because it is impossible to define the scope of the right).

an investigation is ongoing, the arrest of an accused, and the substance of the charges against an accused cannot help but create adverse publicity towards an accused, even if they are accompanied by a caveat that the charges are only allegations and the accused is presumed innocent until proven guilty. These routine publications harm an accused's standing in the community and should trigger a right to reply by the accused under the new Model Rule. The accused's reply may then trigger a government right of reply. This circular result creates a strong risk that a right to reply provision may swallow the rule and render it unenforceable.

All of the services need to update their ethics regulations dealing with trial publicity. At a minimum, the "safe harbor" language found void for vagueness in *Gentile* should be deleted from the rule. Each service should then assess whether to adopt new Model Rule 3.6 in its entirety, thereby affording the parties a right of reply to adverse publicity or whether to adopt an ethics rule without any "safe harbor provision." Arguably, under the Kennedy rationale in *Gentile*, the defense may have a constitutional basis for asserting a right to reply.[399] The majority, however, rejected this reasoning.[400]

C. Gag Orders

1. Media Challenges

Like ethics rules, gag orders restrain extrajudicial speech or disclosures in criminal cases. There are two major distinctions between gag orders and ethics rules. First, gag orders can apply to all trial participants where ethics rules apply only to attorneys.[401] Second, gag orders are an optional exercise of authority by trial courts on a case-by-case basis, whereas ethics rules apply to all cases in the jurisdiction.

Participant gag orders restrain the persons gagged from exercising their First Amendment right to free speech. Gag orders also affect the media in that they prevent the media from gathering the news. Gag orders are subject to challenge by the media, by the person gagged, or by both.

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399. *Gentile*, 501 U.S. at 1043, 1055-56.

400. *Id.* at 1080, n.6.

401. Ethics rules often require attorneys to exercise supervision over the speech of agents or subordinates, however, the rules are directed towards attorneys only.

Historically, gag order jurisprudence has been unclear and inconsistent. The Supreme Court has repeatedly declined to set forth a level of scrutiny required to sustain gag orders.[402] The circuits and the states have applied varying levels of scrutiny in reviewing gag order challenges. The Second, Fifth, Ninth and Eleventh Circuits distinguish between gag orders challenged by the media and gag orders challenged by the person gagged.[403] These courts afford more strict scrutiny to gag orders challenged by persons gagged than to gag orders challenged by the media or other third parties.[404] The reasons for the differing standards of scrutiny is that gag orders to trial participants are prior restraints because they directly impact on the right of the persons gagged to freely express themselves. The same gag orders are only indirect restraints on the media.

Although these circuits agree that media challenges to gag orders receive lesser scrutiny than participant challenges, the scrutiny applied to media challenges is not consistent. The Fifth Circuit affirmed a gag order justified by a substantial likelihood of prejudicial publicity but did not require the trial court to consider alternatives to enjoining speech.[405] The Second and Ninth Circuits uphold gag orders challenged by the media if there is a reasonable likelihood that pretrial publicity would prejudice a

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402. *See In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), *cert. denied*, Dow Jones & Co. v. Simon, 488 U.S. 946 (1988) (denying certiorari in case where media challenged participant gag order based on reasonable likelihood that pretrial publicity would prejudice accused's right to fair trial); United States v. Davis, 902 F. Supp. 98 (E.D. La. 1995), *aff'd* 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998) (denying certiorari in case where trial court held that participant gag order is not a prior restraint on the media).

403. *See* United States v. Salameh, 992 F.2d 45, 446-47 (2d Cir. 1993) (defendant's challenge); *In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), *cert. denied*, Dow Jones & Co., 488 U.S. 946 (1988) (media challenge); News-Journal Corp. v. Foxman, 939 F.2d 1499 (11th Cir. 1991) (media challenge); Radio & Television News Ass'n v. United States Dist. Court, 781 F.2d 1443 (9th Cir. 1985) (media challenge); Levine v. United States Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985) (defense challenge); United States v. Davis, 902 F. Supp. 98 (E.D. La 1995), *aff'd* 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998) (media challenge). *See also* South Bend Tribune v. Elkhart Circuit Court, 691 N.E.2d 200 (Ind. Ct. App. 1998) (media challenge); State *ex rel* The Missoulian v. Montana 21st Judicial Dist. Court, 933 P.2d 829, 843 (Mont. 1997) (media challenge).

404. *Id.*

405. *See Davis*, 902 F. Supp. at 103. *See also State ex rel The Missoulian*, 933 P.2d at 843 (Mont. 1997) (holding that scrutiny for media challenges to gag orders is greater than reasonable likelihood but less than clear and present danger–applies the substantial probability test); State *ex rel* NBC v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (applying substantial probability test).

fair trial.[406] The Eleventh Circuit recognizes the split in authority as to a standard of scrutiny applicable to gag orders, but has not ruled on an appropriate standard for its courts.[407]

Even the circuits employing the reasonable likelihood standard apply it differently. The Second Circuit requires the trial court to consider, on the record, whether alternatives to enjoining speech, either individually or in combination, could remedy the effect of prejudicial pretrial publicity.[408] The Ninth Circuit, on the other hand, does not require the trial court to consider alternatives before issuing a gag order in a case where the person gagged is not challenging the order.[409]

The Sixth Circuit applies strict scrutiny to all gag orders, whether they are challenged by the media or by the person gagged.[410] Courts following the Sixth Circuit hold that gag orders restrain the media's First Amendment right to gather news.[411] These courts apply the same clear and present danger standard to gag orders affecting media news-gathering as the Supreme Court applies to restraints of media publications.[412] Such orders are presumed unconstitutional.[413]

In 1988, the Supreme Court had an opportunity to reconcile the differing circuit opinions regarding the level of scrutiny that should attach to gag orders when challenged by the media. The court declined certiorari in *In re Application of Dow Jones & Co.*, a Second Circuit case involving a

406. *See In re Application of Dow Jones & Co.*, 842 F.2d at 611; *Radio & Television News Ass'n*, 781 F.2d at 1443.

407. *News-Journal Corp.*, 939 F.2d at 1515 n.18.

408. *See In re Application of Dow Jones & Co.*, 842 F.2d at 611.

409. *See Radio & Television News Ass'n*, 781 F.2d at 1443 (declining to require consideration of alternatives).

410. United States v. Ford, 830 F.2d 596 (6th Cir. 1987) (challenge by accused); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (challenge by media).

411. For examples of participant gag orders held to be prior restraints on the media's right to gather news. *See, e.g.*, Journal Publ'g Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (order to jurors); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (order to trial participants); Connecticut Magazine v. Moraghan, 676 F. Supp. 38 (D. Conn. 1987) (order to trial attorneys).

412. *Id. See* Nebraska Press Ass'n v. Stuart, 27 U.S. 539 (1976) (applying clear and present danger test to prior restraint on media publication allegedly prejudicing a pending criminal case).

413. *See* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).

media challenge to a participant gag order requested by the defense.[414] The Second Circuit held that a lesser standard was required to uphold a gag order challenged by the media than the same gag order challenged by a person restrained by it and that a gag order challenged by someone other than the person gagged is justifiable if there is a reasonable likelihood that pretrial publicity would prejudice the defendant's right to a fair trial and alternatives to enjoining speech have been considered and rejected.[415]

Three justices would have granted certiorari to decide: first, whether there should be a higher level of scrutiny for gag orders challenged by persons restrained than for the same gag order challenged by the media; and second, to set forth a standard for gag order challenges to clear up the inconsistent standards applied by the circuits.[416]

In 1998, the Supreme Court again declined certiorari in a Fifth Circuit case upholding a gag order challenged by the media.[417] In this case the trial court followed the Second and Ninth Circuits' reasoning that gag orders challenged by the media receive a lesser level of scrutiny than those challenged by persons gagged. The trial court upheld the gag order finding a substantial likelihood of material prejudice to the trial, without considering alternatives to the gag order.[418]

2. Participant Challenges

The Supreme Court has allowed gag orders challenged by the media to stand if they are based on a reasonable likelihood of material prejudice to the proceedings.[419] Alternatives to the gag order do not have to be considered.[420] The remaining issue is the level of scrutiny required to withstand participant challenges to gag orders.

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414. The case involved racketeering charges of numerous defendants, including state and local elected officials, based on their involvement with Wedtech, a New York defense contractor. *See In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), *cert. denied*, Dow Jones & Co. v. Simon, 488 U.S. 946 (1988).

415. *Id.* at 608-09.

416. *Dow Jones & Co.*, 488 U.S. at 946 (denying certiorari to *In re* Dow Jones & Co, 842 F.2d 603 (1988) (White, J., dissenting)).

417. United States v. Davis, 902 F. Supp. 98, 103 (E.D. La. 1995), *aff'd* 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998).

418. *Id.*

419. *See id.*; *Dow Jones & Co.*, 488 U.S. at 946 (White, J., dissenting).

420. *Davis*, 902 F. Supp. at 103.

Gentile v. State Bar of Nevada, held that speech of attorneys participating in pending cases may be regulated based on a substantial likelihood of material prejudice. The case concerned a Nevada ethics rule that applied in every case tried in Nevada, thus, there was no requirement for trial courts to consider and reject alternative measures to control publicity.[421] Post-*Gentile* cases addressing participant challenges to gag orders cite *Gentile* as the bottom line level of scrutiny required for such gag orders.[422] Nevertheless, some of these cases uphold participant gag orders on the lesser reasonable likelihood standard.[423] Others cases require the heightened clear and present danger standard to uphold gag orders within their jurisdictions.[424]

Post-*Gentile* cases have consistently ruled that trial courts may impose gag orders on trial participants to the same extent as they can upon attorneys.[425] This is consistent with the language of the Supreme Court in *Gentile*.[426]

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421. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

422. *See* United States v. Salameh, 992 F.2d 445 (2d Cir. 1993); FTC v. Freecom Communications, 966 F. Supp. 1066 (D. Utah 1997); United States v. Walker, 890 F. Supp .954 (D. Kan. 1995); Twohig v. Blackmer, 918 P.2d 332 (N.M. 1996) (recognizing *Gentile* bottom line standard of substantial likelihood of prejudice, but, adopting clear and present danger test for New Mexico gag orders); State v. Bassett, 911 P.2d 385 (Wash. 1996) (en banc); James v. Hines, No. 98-CA-001955-OA, 1998 Ky. App. LEXIS 71 (Ky. App. Aug. 17, 1998).

423. *See Bassett*, 911 P.2d at 385 (holding that a gag order may be based on reasonable likelihood of prejudice); *James*, 1998 Ky. App. LEXIS 71 (applying reasonable likelihood of prejudice standard).

424. *See Twohig*, 918 P.2d at 332 (recognizing *Gentile* bottom line standard of substantial likelihood of prejudice, but, adopting clear and present danger test for New Mexico gag orders); Breiner v. Takao, 835 P.2d 637 (Haw. 1992) (applying clear and present danger standard).

425. *See* United States v. Cutler, 58 F.3d 825, 837 n.1 (2d Cir. 1995) (finding defense attorney disqualified from case for seven months remains associated with the defense to be subject to gag order); Pedini v. Bowles, 940 F. Supp. 1020 (N.D. Tex. 1996) (upholding contempt holding against witness who violated gag order); State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997) (holding the accused subject to gag order); People v. Buttafuoco, 599 N.Y.S.2d 419 (1993) (finding attorney for the wife of the accused a trial participant subject to ethics rules and gag order); James v. Hines, No. 98-CA-001995-OA, 1998 Ky. App. LEXIS 71 (Ky. App. Aug. 17, 1998) (finding the victim's family to be potential witnesses subject to gag order).

426. 501 U.S. at 1030. Rehnquist's opinion cited *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), to draw a distinction between participants and strangers to litigation to support limiting participant speech. *Gentile*, 501 U.S. at 1072-73.

The Supreme Court has yet to address a gag order case. Lower courts have been hostile to overbroad gag orders that are not narrowly tailored towards prohibiting only that speech substantially likely to materially prejudice a proceeding. For example, in *United States v. Salameh*, the Second Circuit overturned a gag order prohibiting defense counsel from publicly discussing anything about the case.[427] In *James v. Hines*, the family of three children killed in the Paducah, Kentucky, school shooting held a press conference where they released a psychiatric report on the accused and criticized the government prosecution of the case.[428] The trial court enjoined the attorneys, police, potential witnesses, and anyone considering civil litigation from making extrajudicial statements about the case. The Court of Appeals of Kentucky overturned the gag order, in part, stating that trial participants cannot be prohibited from criticizing the government or from discussing anything already in the public domain. However, participants can be enjoined from disseminating information obtained through the litigation process that is not in the public domain, such as the accused's psychiatric report.[429]

In *Seattle Times Co. v. Rhinehart*, the Supreme Court held that trial courts may enjoin dissemination of information gained through the litigation process but may not enjoin dissemination of the same information if gained from a source not associated with the litigation.[430] This distinction should also apply to gag orders. The infringement upon First Amendment free speech rights of trial participants is not as great when they would not have had the information they are releasing or discussing but for their participation in the litigation.

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427. *Salameh*, 992 F.2d at 445. *See also* Breiner v. Takao, 835 P.2d 637 (Haw. 1992) (overturning gag order prohibiting counsel from communicating with the media about anything in the case); *Bassett*, 911 P.2d at 385 (same–in this case the trial judge denied defense counsel's request for a right to reply to adverse publicity); *Twohig*, 918 P.2d at 332 (striking down, under clear and present danger standard, gag order prohibiting communication with the media because there were no findings on the record to show the need for a gag order to combat a substantial likelihood of prejudice or clear and present danger to fair trial). *See also* Rodriguez v. Feinstein, 734 So. 2d 1162 (Fla. App. 1999) (citing *Salameh* and *Breiner*, to overturn gag order in a civil case that prohibited parties and counsel from discussing the case without leave of court).

428. *James*, 1998 Ky. App. LEXIS 71.

429. *Id.* at *9.

430. *Seattle Times Co.*, 467 U.S. at 34. The distinction drawn in *Seattle Times Co.* between participants and strangers to litigation was again cited by the Rehnquist opinion in *Gentile*. *See Gentile*, 501 U.S. at 1073.

Gag orders are not routine measures to be imposed in trials with extensive media publicity. The Supreme Court has repeatedly held that extensive publicity does not equate to prejudicial publicity.[431] Trial judges should make, on the record, case specific findings that gag orders against specified (not all) speech are necessary and narrowly tailored to mitigate prejudicial publicity and that alternatives were considered and rejected. Finally, gag orders should not preclude participants from criticizing the government or from discussing information in the public domain.[432]

c. Military Gag Orders

Military trial courts have inherent authority to impose gag orders.[433] There have been no significant post-*Gentile* reported military cases addressing the level of scrutiny that military courts would apply to gag orders.

The Joint Service Committee on Military Justice has proposed amending R.C.M. 806 to expressly authorize military judges to issue gag orders "to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members."[434] Notice of the proposed amendment has been published in the Federal Register for public comment.[435]

Proposed amendment R.C.M. 806(d) sets forth a constitutionally permissible standard for the military judge to issue gag orders. The proposed rule itself does not provide for party or media standing to be heard, however the discussion states that the military judge will conduct a hearing prior to issuing a gag order and afford parties and media standing.[436]

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431. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554, 565 (1976) (holding that cases involving prejudicial publicity are rare and that "pre-trial publicity–even pervasive publicity–does not inevitably lead to an unfair trial").

432. For an article suggesting that the scope of gag orders in high profile cases should change depending on the stage of the proceedings, see Minnefor, *supra* note 381, at 144-51.

433. *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966) (indicating that trial courts not only have authority but a duty to control court resources and participants to mitigate prejudicial pretrial publicity); United States v. Garwood, 16 M.J. 863, 868 (N.M.C.M.R. 1983) (upholding military judge's gag order).

434. *See* Notice of Proposed Amendments, 63 Fed. Reg. 25,835-37 (1998). The text of the proposed R.C.M. 806(d) is as at the Appendix.

435. *Id.*

436. *Id.*

There is nothing in the discussion or analysis that addresses the propriety of imposing gag orders to prevent political speech or speech criticizing military policies or government handling of a case. It is important to recognize that gag orders are meant to protect prejudicial information from leaking to potential jurors before the trial. Political speech critical of government activity is at the core of the First Amendment and should not be curtailed by gag orders. For example, there is a distinction between extrajudicial statements accusing the military of engaging in disparate treatment of officers and enlisted personnel in sex offenses and disclosures to the media of information gained through discovery about individual cases not already in the public record. The former is political speech that should not be prohibited by a gag order. The latter is prejudicial information and is the proper subject of a gag order.[437]

Finally, proposed amendment 806(d), as written, is silent as to what point in the proceedings the military judge has authority to impose a gag order. A court-martial against an accused does not begin until charges are referred to trial.[438] Nothing in the *Manual for Courts-Martial* expressly authorizes military judges to take pre-referral actions. Thus, gag orders under proposed amendment 806(d) will be ineffective to deter publicity occurring during the investigative and charging phases and during the Article 32 investigation. Nothing in the *Manual for Courts-Martial* authorizes convening authorities or Article 32 investigating officers to impose gag orders. However, there have been military gag orders imposed prior to referral.[439] To date no reported military case has addressed a challenge by the media or a gagged trial participant, to a gag order imposed prior to referral or one imposed by a convening authority or Article 32 investigating officer.[440]

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437. Such disclosures also violate ethics rules governing trial publicity. *See supra* text in Section V.B.

438. MCM, *supra* note 24, R.C.M. 601 (Referral), R.C.M. 103(8) (Definition of Court-Martial).

439. *See* Sue Anne Pressley, *Hate May Have Triggered Fatal Barracks Beating, Slain Soldier Had Been Taunted on Base as Secret Emerged About His Sexuality*, WASH. POST, Aug. 11, 1999, at A1 (stating that counsel and witnesses were under gag order during and after Article 32 investigation against the accused).

440. In many cases, the accused requests the gag order. If the parties agree to a gag order, and there is no media challenge, a gag order that may not otherwise withstand appellate review, will stand.

In federal and state criminal cases, the trial judge has authority to control pretrial publicity.[441] Proposed amendment 806(d) should expressly extend the military judge's authority to impose gag orders to begin when charges are preferred.

VI. Conclusion

The current Rules for Courts-Martial governing access to Article 32 investigations and courts-martial proceedings provide standards for closure that violate the media First Amendment right of access. Rule for Courts-Martial 405(h)(3) allows Article 32 investigations to be closed in the discretion of the commander who directs an Article 32 investigation or the investigating officer. Rule for Courts-Martial 806(b) allows courts-martial proceedings to be closed for good cause. Closure under these standards does not satisfy the compelling interest/individualized findings/narrowly tailored means test. The current closure rules lull counsel and trial courts into closing proceedings and sealing information without making findings on the record. There is also no express authority for the military judge to control and release judicial records filed in connection with a court-martial.

Both R.C.M. 405(h)(3) and R.C.M. 806 should be amended to incorporate the compelling interest/individualized findings/narrowly tailored means test to justify closing proceedings or sealing records to which the First Amendment right of access attaches. This test should be the rule for closure with or without defense objection. Rule for Courts-Martial 801(a)(3) should be amended to authorize military judges to control and release judicial records filed in connection with courts-martial. Finally, R.C.M. 405(h)(3) and R.C.M. 806 should provide for media notice and opportunity to be heard with respect to closure/sealing.

Suggested language to amend and combine R.C.M. 806(a) and (b)[442] is set forth below. Similar language can be used to amend R.C.M. 405(h)(3):

> 806(a) *Courts-martial proceedings.* Courts-martial shall be open to the public unless: (1) there is a compelling interest likely to

441. *See* Minnefor, *supra* note 381, at 146-50 (discussing pretrial stage gag orders).
442. R.C.M. 806 (a) and (b) currently read:

be prejudiced if the courtroom remains open, (2) closure is no broader than necessary to protect the compelling interest, (3) reasonable alternatives to closure were considered and rejected by the court, and (4) the court has made specific findings on the record to support closure.

Before a court-martial proceeding is closed, the military judge shall ensure that the public has notice of intent to close and an opportunity to be heard regarding closure, if requested. This section does not prohibit the military judge to reasonably limit the number of spectators in, and the means of access to, the courtroom in order to maintain the dignity and decorum of the proceedings or for other good cause.

The military judge's control over judicial records pertaining to courts-martial can be codified by amending R.C.M. 801(a)(3) to include records. Amended R.C.M. 801(a)(3) would read as follows: "[The military judge shall] subject to the code and this *Manual*, exercise reasonable control over the proceedings *and records* to promote the purposes of these rules and this *Manual*."

Lastly, the ethics rules governing trial publicity for each of the armed services are void for vagueness. Each service should review its rule and decide whether to adopt new Model Rule 3.6 with its limited right to reply provision. At a minimum, each service should delete the "safe harbor provision" that the Supreme Court found to be void for vagueness in *Gentile v. State Board of Nevada*.[443]

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442. (continued)

(a) *In general.* Except as provided in this rule, courts-martial shall be open to the public. For purposes of this rule, "public" includes membersof both the military and civilian communities.

(b) *Control of spectators.* In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

MCM, *supra* note 24, R.C.M. 806.

443. 501 U.S. 1030 (1991).

Appendix

Proposed R.C.M. 806(d)

"R.C.M. 806(d) Protective orders. The military judge may, upon request of any party or sua sponte, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members. For purposes of this subsection, "military judge" does not include the president of a special court-martial without a military judge.

"The following Discussion is added after R.C.M. 806(d):

"A protective order may proscribe extrajudicial statements by counsel, parties, and witnesses that might divulge prejudicial matter not of public record in the case. Other appropriate matters may also be addressed by such a protective order. Before issuing a protective order, the military judge must consider whether other available remedies would effectively mitigate the adverse effects that any publicity might create, and consider such an order's likely effectiveness in ensuring an impartial court-martial panel. A military judge should not issue a protective order without first providing notice to the parties and an opportunity to be heard. The military judge must state on the record the reasons for issuing the protective order. If the reasons for issuing the order change, the military judge may reconsider the continued necessity for a protective order.

"The Analysis accompanying R.C.M. 806(d) is created as follows:

"*1999* Amendment: Section (d) was added to codify the military judge's power to issue orders limiting and trial participants' extrajudicial statements in appropriate cases. *See* United States v. Garwood, 16 M.J. 863, 868 (N.M.C.M.R. 1983) (finding military judge was justified in issuing restrictive order prohibiting extrajudicial statements by trial participants), *aff'd on other grounds*, 20 M.J. 148 (C.M.A. 1985); United States v. Clark, 31 M.J. 721, 724 (A.F.C.M.R. 1990) (suggesting, but not deciding, that the military judge properly limited trial participants' extrajudicial statements).

"The public has a legitimate interest in the conduct of military justice proceedings. Informing the public about the operations of the criminal justice system is one of the "core purposes" of the First Amendment. In the appro-

priate case, where the military judge is considering issuing a protective order, absent exigent circumstances, the military judge must conduct a hearing prior to issuing such an order. Prior to such a hearing the parties will have been provided notice. At the hearing, all parties will be provided an opportunity to be heard. The opportunity to be heard may be extended to representatives of the media in the appropriate case.

"Section (d) is based on the first Recommendation Relating to the Conduct of Judicial Proceedings in Criminal Cases, including in the Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 87 F.R.D. 519, 529 (1980), which was approved by the Judicial Conference of the United States on September 25, 1980. The requirement that the protective order be issued in writing is based on R.C.M. 405(g)(6). Section (d) adopts a "substantial likelihood of material prejudice" standard in place of the Judicial Conference recommendation's "likely to interfere" standard. The Judicial Conference's recommendation was issued before the Supreme Court's decision in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *Gentile*, which dealt with a Rule of Professional Conduct governing extrajudicial statements, indicates that a lawyer may be disciplined for making statements that present a substantial likelihood of material prejudice to an accused's right to a fair trial. While the use of protective orders is distinguishable from limitations imposed by a bar's ethics rule, the *Gentile* decision expressly recognized that the "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and the cases which preceded it," 501 U.S. at 1074. The Court concluded that "substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1075. *Gentile* also supports the constitutionality of restricting communications of non-lawyer participants in a court case. *Id.* at 1072-73 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)). Accordingly, a protective order issued under the "substantial likelihood of material prejudice" standard is constitutionally permissible.

"The first sentence of the discussion is based on the committee comment to the Recommendations Relating to the Conduct of Judicial Proceedings in Criminal Cases. 87 F.R.D. at 530. For a definition of "party," see R.C..M. 103(16). The second sentence of the discussion is based on the first of the Judicial Conference's recommendations. *Id.* at 532; United States v. Salameh, 992 F.2d 445, 447 (2d Cir 1993 (per curiam), and *In re*

Application of Dow Jones & Co., 842 F.2d 603, 611, 612 n. 1 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988). The fourth sentence is based on *Salameh*, 992 F.2d at 447. The fifth sentence is based on *In re Halkin*, 598 F.2d 196-97 (D.C. Cir. 1979), and Rule for Courts-Martial 905(d)."

REVISING THE COURT MEMBER SELECTION PROCESS

COLONEL JAMES A. YOUNG III, UNITED STATES AIR FORCE[1]

> *Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.*
>
> — Louis de Gaya, *The Art of War*[2]

I. Introduction

The method for selecting military members to sit on courts-martial has been under attack for some time.[3] The battle has been joined during and immediately following combat operations. It is during combat operations that the tension between our constitutional system of government and the need for military discipline in an effective fighting force becomes most acute. Cases arising out of the exigencies of war may result in harsher sentences than in peacetime because the offenses often have a greater impact on morale and discipline than the same offenses committed during peacetime. These cases attract the attention of the politicians, the media, and the public who are focused on the military action.

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2. LOUIS DE GAYA, THE ART OF WAR (1678) *quoted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY iii (1921) [hereinafter MCM, 1921].

3. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-31.00 (1991).

After both World War I and World War II, the court member selection process was debated and changes were made. In the wake of the Vietnam conflict, military justice came under scrutiny as never before. The sixties and seventies saw numerous articles and studies of the military justice system that were critical of the court member selection process.[4] The Court of Military Appeals criticized the process,[5] and legislative proposals for change were submitted to Congress.[6] With the passing of the Vietnam era and the introduction of the all-volunteer military, criticism of the military justice system appeared to diminish, until recently. Lately, Congress has shown a renewed interest in the court member selection process. Although the catalyst for this interest is unclear, several recent cases questioning the fairness of the military justice system have received considerable publicity. The process for selecting court members is so alien to the civilian courts process, it is an easy target. While there is little evidence to suggest that the system is used routinely to "rig the court," many military personnel and civilians think that it is.[7]

In the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999,[8] Congress ordered the Secretary of Defense to submit alternatives to the current method for selecting members of the armed forces to serve on courts-martial. The only alternative specifically mentioned by Congress was a random selection method. All the alternatives examined by the Secretary were to be consistent with the criteria specified for service

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4. Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343, 349 (1978) (listing law review articles). *See* U.S. GENERAL ACCOUNTING OFFICE, MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS (1977); UNITED CHURCH OF CHRIST TASK FORCE ON MINISTRIES TO MILITARY PERSONNEL, IN ORDER TO ESTABLISH JUSTICE 173 (10th General Synod, 1975); U.S. DEP'T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 88-90 (1972) ("[I]n the interest of fairness, as well as the appearance of fairness, it would be wise to adopt some form of random selection [of court members]."); ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 76, 81-84 (1969).

5. United States v. McCarthy, 2 M.J. 26, 26 n.3 (C.M.A. 1976) ("Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process.").

6. Smallridge, *supra* note 4, at 352-53.

7. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-31.00.

8. Pub. L. No. 105-261, § 552, 112 Stat. 1920 (1998).

on courts-martial contained in Article 25(d)[9] of the Uniform Code of Military Justice (UCMJ).[10] Article 25(d) provides as follows:

> (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.
>
> (2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

This article explains the current method of selecting court members, reviews the historical underpinnings of the current rule to understand how we got where we are today, and examines alternatives to the current system that comply with the congressional mandate to maintain the Article 25(d) selection criteria. After demonstrating that the court member selection criteria contained in Article 25(d)(2) are incompatible with a random selection scheme, this article proposes abolishing the criteria and adopting a random selection scheme, but only after establishing military judges as the sole sentencing authority.

II. The Current System

Under the Sixth Amendment to the Constitution, an accused is entitled to a trial by "an impartial jury."[11] Federal jurors are selected for the venire randomly, from a cross-section of the community, using a written plan established by each United States district court.[12] But, the jurors actually chosen to hear the case "need not mirror the community."[13] Although juries have historically been comprised of twelve jurors, the number

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9. UCMJ art. 25(d) (LEXIS 1999).

10. The Uniform Code of Military Justice is codified at 10 U.S.C. §§ 801-948.

11. U.S. CONST. amend. VI, cl. 1. A jury trial is not required for petty offenses. Duncan v. Louisiana, 391 U.S. 145, 156-58 (1968).

12. 28 U.S.C.S. §§ 1861-1871 (LEXIS 1999).

13. JAMES C. CISSELL, FEDERAL CRIMINAL TRIALS § 12-4(a) (1996) (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

appears to be an "historical accident" and is not constitutionally required.[14] The Constitution does not require that a guilty verdict be unanimous,[15] although it appears that at least six jurors must vote for conviction.[16]

Courts-martial are not subject to "the Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected."[17] Instead, Congress has established the laws governing courts-martial pursuant to its authority to regulate the land and naval forces.[18] In reviewing these laws, the Supreme Court has accorded Congress considerable deference.[19]

Courts-martial do not have juries or jurors. Instead, they have "court members." The difference in terms is not a matter of mere semantics, but rather reflects the historical differences between their respective duties and the processes by which they are selected. In the military, certain commanding officers are authorized to determine whether a case shall be tried by court-martial.[20] The accused is not entitled to a panel composed of a cross-section of the military community.[21] The commanding officer, or "convening authority," is required by statute to select as court members "such members of the armed forces as, *in his opinion*, are *best qualified* for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[22] The convening authority may select only officers to serve as members, unless the accused is enlisted and requests, in writing, that enlisted members be included in the panel. If the accused so requests, at least one-third of the court members must be

14. Williams v. Florida, 399 U.S. 78, 89 (1970).

15. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

16. *See* Ballew v. Georgia, 435 U.S. 223 (1978) (holding that at least six members must concur in finding of guilty); Burch v. Louisiana, 441 U.S. 130 (1969) (holding that conviction for a serious offense by five out of six jurors sufficiently threatened the fairness of the proceedings and the proper role of the jury to violate the Sixth Amendment right to a jury trial).

17. United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973). *See* United States v. Roland, 50 M.J. 66, 68 (1999); United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986) (citing *cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)).

18. U.S. CONST. art. I, § 8, cl. 14.

19. Weiss v. United States, 510 U.S. 163, 177 (1994) (citing Middendorf v. Henry, 425 U.S. 25, 43 (1976)).

20. *See* UCMJ arts. 22, 23, 24 (LEXIS 1999) (explaining which commanding officers may convene courts-martial).

21. United States v. Lewis, 46 M.J. 338, 341 (1997).

22. UCMJ art. 25(d)(2) (emphasis added).

enlisted. The enlisted members may not come from the accused's unit.[23] The accused can be convicted on the vote of as few as two-thirds of the members,[24] on a court panel that may number as few as three members in a special court-martial[25] and five members in a general court-martial.[26]

Normally, the convening authority's legal staff is tasked with providing the convening authority a fairly short list of names of military members who are available to sit on the court-martial panel.[27] The convening authority often selects the court panel from this list, although it is not unusual for him to select at least some members who were not included in the list.[28] Military appellate courts have upheld this process as "a reasonable means of assisting the convening authority, provided it does not improperly exclude eligible service members."[29]

While a military accused does not have a right to a civilian jury,[30] he does have a right to court members who are fair and impartial.[31] Thus, the convening authority may not detail as a court member the accuser, a witness for the prosecution, or an individual who acted as investigating officer or as counsel in the same case,[32] or, "when it can be avoided," any member junior in rank or grade to the accused.[33] The convening authority may not systematically exclude from consideration any segment of military society,[34] except E-1s and E-2s.[35] Further, the convening authority cannot "pack" the panel to achieve a desired result.[36] The convening authority's subordinates are also precluded from packing the list of available personnel from which the convening authority selects the court panel.[37] However, "[t]he fact that there is a high percentage of commanders on a court, in and

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23. UCMJ art. 25(c)(1). Appointing enlisted members from the same unit is not a jurisdictional defect. United States v. Wilson, 21 M.J. 193 (C.M.A. 1986).

24. UCMJ art. 52(a)(2). Unanimous verdicts are required to convict an accused of any offense for which the death penalty is mandatory. UCMJ art. 52(a)(1).

25. UCMJ art. 16(2). Special courts-martial are often unofficially equated to misdemeanor trials.

26. UCMJ art. 16(1). General courts-martial are often unofficially equated to felony trials.

27. United States v. Roland, 50 M.J. 66, 69 (1999)

28. *Id.*

29. *Id.* (citing United States v. Kemp, 46 C.M.R. 152 (1973)).

30. *Id.* at 68 (1999) (dictum) (citing Solorio v. United States, 483 U.S. 435, 453 (1987) (Marshall, J., dissenting)).

31. *Id.* (citing Wainwright v. Witt, 469 U.S. 412 (1985); Chandler v. Florida, 449 U.S. 560 (1981))

32. UCMJ art. 25(d)(2).

33. UCMJ art. 25(d)(1). This precludes a member voting for conviction of his superior to improve his own promotion chances.

of itself, is not indicative of an improper selection process."[38] Court packing does not deprive the court-martial of jurisdiction, but an appellate court "may not affirm unless [it is] convinced beyond a reasonable doubt that the court members were properly selected."[39]

To facilitate the accused's ability to challenge the composition of the court and the process by which the members were selected, the Court of Appeals for the Armed Forces has granted broad discovery and compulsory process.[40] Once the defense makes a preliminary showing that the members were improperly selected, the burden shifts to the prosecution to "demonstrate that no impropriety occurred."[41] Furthermore, an accused has the right to have the members questioned concerning their suitability to sit on the court.[42] A member shall be excused for cause on any of several

34. *Roland*, 50 M.J. at 68 (citing United States v. Nixon, 33 M.J. 433 (C.M.A. 1991)); United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975) (holding improper the convening authority's fixed policy of excluding lieutenants and warrant officers from the membership of courts-martial)); United States v. Greene, 43 C.M.R. 72, 76-77 (C.M.A. 1970) (holding that the convening authority violated the UCMJ by appointing only senior officers to the court-martial panel).

35. United States v. Yager, 7 M.J. 171 (C.M.A. 1979) (noting that enlisted members in the lowest pay grades of E-1 and E-2 are presumptively unqualified under Article 25(d)(2)).

36. United States v. White, 48 M.J. 251 (1998); United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991); United States v. Smith, 27 M.J. 242 (C.M.A. 1988) (involving female members selected for case involving sex crimes). Court "packing," or stacking, occurs when a subordinate provides the convening authority with a list of potential court members, or the convening authority selects the court members, on some basis other than the criteria of Article 25(d)(2), for the purpose of getting a desired result. For example, selecting supporters of hard discipline; or selecting women solely because the crime alleged was rape. *See* United States v. Hedges, 29 C.M.R. 458 (1960) (finding that because of its composition the court-martial appeared to be "hand-picked" by the government).

37. *Hilow*, 32 M.J. at 440-41.

38. *White*, 48 M.J. at 253-54 (stating that commanders have unique military experience which is conducive to selection as a court-martial member).

39. United States v. Lewis, 46 M.J. 338, 341 (1997).

40. United States v. Roland, 50 M.J. 66, 69 (1999). Upon a defense request, the prosecution must provide questionnaires submitted by potential court-members outlining their military careers and personal life, and any written materials considered by the convening authority in selecting the members. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(a) (1998) [hereinafter MCM]. The list of members of the pool provided to the convening authority and the convening authority's selection is typically done in writing.

41. *Roland*, 50 M.J. at 69.

42. MCM, *supra* note 40, R.C.M. 912(d). It is normal practice for the military judge to permit counsel to conduct the voir dire personally. However, it is within the military judge's discretion to conduct the examination himself. If he does so, he must also ask supplemental questions submitted by counsel, which he deems appropriate.

specified grounds or "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[43] Although military judges have great discretion in ruling on challenges for cause, the CAAF has made it clear that they must grant such challenges liberally.[44] Each party is also entitled to one peremptory challenge,[45] although that challenge must not be used to eliminate members based on their race or gender.[46]

Court members are protected from attempts by military members, including superiors, to coerce or unlawfully influence the outcome of a case and from disciplinary measures based on "the findings or sentence adjudged by the court, or with respect to any other exercise[] of its . . . functions in the conduct or the proceedings."[47] Nor may their performance as court members be reflected in fitness reports used to help determine promotions or assignments.[48]

III. How the Current System Developed

Before proposing to change the current system, it might be advantageous to understand how and why the military uses the current system. The purpose of the military justice system is broader than its civilian counterpart. "The purpose of the criminal law is to define socially intolerable conduct, and to hold conduct within the limits which are reasonably acceptable from the social point of view."[49] The purpose of the military justice system, on the other hand, is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[50] The Constitution, Congress, and the Supreme Court have long recognized the necessity of having a military justice system separate and different from civilian systems of justice.[51] A separate system of military justice grew out of the need

43. *Id.* R.C.M. 912(f).
44. United States v. White, 36 M.J. 284, 287 (C.M.A. 1993).
45. UCMJ art. 41(b)(1) (LEXIS 1999).
46. United States v. Witham, 47 M.J. 297 (1997).
47. UCMJ art. 37(a).
48. UCMJ art. 37(b).
49. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 1B (3d ed. 1982).
50. MCM, *supra* note 40, pt. I, ¶ 3.
51. The Continental Congress adopted 69 articles of war on 30 June 1775. W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE

for discipline–to be effective, commanders must be able to count on military prsonnel to carry out their assigned duties in the face of mortal danger.[52]

For most of the history of this nation, criteria were not established for selecting members for courts-martial; the convening authority had unfettered discretion to select any officer under his command,[53] except members of the Judge Advocate General's Department,[54] chaplains,[55] and those disqualified because of some prior participation in the case.[56] Yet, the court

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51. (continued) § 5 (1955) *cited in* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE § 1-6(A) (4th ed. 1996). The Fifth Amendment to the Constitution provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment of a Grand Jury, *except in cases arising in the land or naval forces . . . .*" U.S. CONST. amend. V (emphasis added). In 1806, Congress enacted 101 articles of war. 2 Stat. 359 (1806), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint). *See* Dynes v. Hoover, 61 U.S. 65, 79 (1857).

52. *See* 1 GILLIGAN & LEDERER, *supra* note 3, §§ 1-10.00; SCHLUETER, *supra* note 51, § 1-1.

53. Article of War 4 (1916) *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, App. 1 (1917) [hereinafter MCM, 1917]. Of course, a court member was subject to challenge for cause if he were the accuser, investigated the offense, would be a witness for the prosecution, sat as a member of the court in a former trial of the accused on the same charges, is related to the accused, or was prejudiced or biased against the accused. *Id.* ¶ 121(*a*); WINTHROP, *supra* note 51, at 214-30.

54. WINTHROP, *supra* note 51, at 70. In the early days of the American military, lawyers were not as prevalent as they are today. Their duties included acting as trial "judge-advocate" in important cases and reviewing and reporting on the proceedings of trials which would make them unavailable to sit as members. *Id.* at 70 n.6. The trial "judge-advocate" served as the prosecutor, advisor to the court in matters of form and law, and where the accused was without counsel, he would "render [the accused], both in and out of court, such assistance as may be compatible with his primary duty of efficiently conducting the prosecution." *Id.* at 197-98 (foonotes omitted). Until 1892, he sat with the members during their closed session deliberations to provide them advice, but he could not vote. *Id.* at 195. From 1921 until 1951, a "law member" was appointed to general courts-martial. This officer issued interlocutory rulings subject to objection by the other members. He actively participated in the deliberations and voted on the findings and sentence, as he was a member of the court. *Compare* MCM, 1917, *supra* note 53, ¶ 81 *with* MCM, 1921, *supra* note 2, ¶ 81 *and* MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, ¶ 4*e* (1949) [hereinafter MCM, 1949] *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 39*b* (1951) [hereinafter MCM, 1951].

55. WINTHROP, *supra* note 51, at 70. Chaplains were legally eligible for court-martial duty, but the Secretary of War made it known that he did not view such a practice favorably. *Id.* at n.7. *See also* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 494 (2d ed. rev. 1909). The *MCM, 1917* noted that chaplains, veterinarians, dental surgeons, and second lieutenants in the Quartermaster Corps were not in practice detailed to serve as members of courts-martial. MCM, 1917, *supra* note 53, ¶ 6(*b*).

56. Articles of War 8, 9 (1916), *reprinted in* MCM, 1917, *supra* note 53, app. 1.

members did not just serve as jurors. As there were no judges in the military justice system, the court members themselves performed many judicial duties; they determined the sufficiency of the charges, objections by the accused to the proceedings, and challenges for cause against other members of the court.[57] They also ruled on objections to evidence,[58] and, if they found the accused guilty of any offense, they determined an appropriate sentence.[59]

Experiences in World War I resulted in establishing court member selection criteria for the first time. Before entry into the war, the American army was "small and compact, and for the most part removed from centers of population. There was little public interest, either in the Army itself or in military affairs."[60] With war came the rapid mobilization of civilians into the Army and a concomitant increase in the number of officers. With so many men under arms, from every city, village, and town in the nation, the press and the public became considerably more interested in military affairs.

For the first time since the Civil War, the Army had a considerable cadre of officers who were unaccustomed to command and almost totally unfamiliar with the military justice system.

> These new officers, not sitting easily in the saddle, and feeling unsure of themselves (1) are prone as commanding officers to resort too readily to courts-martial, and (2) as court martial judges they display ignorance of military law and traditions, uncertainty of themselves, undue fear of showing leniency lest they be thought weak or unmilitary, and a tendency to avoid responsibility by giving severe . . . sentences, accompanied with recommendations to clemency, attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment; a responsibility which our sys-

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57. WINTHROP, *supra* note 51, at 163-4; 1 GILLIGAN & LEDERER, *supra* note 3, § 15-11.00.

58. WINTHROP, *supra* note 51, at 288.

59. *Id.* at 390.

60. JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, 46-47 (1992) (quoting William C. Rigby, Draft of Report on Court-Martial Procedures, *in Records of the Judge Advocate General*, NARC, RG 153, entry 26, box 20. N.p. (1919)).

> tem contemplates shall be assumed and discharged by the court martial judges themselves.[61]

By the end of World War I, a debate within the Army Judge Advocate General's Department about the fairness of military justice spilled over into Congress and the press.[62] The story is complicated and political, but a complete understanding of it is not necessary for the purposes of this article.[63] While the debate started over the appellate authority of The Judge Advocate General,[64] it resulted in proposals for a complete overhaul of the military justice system. With the rapid demobilization after the conclusion of the war, the corresponding diminution of interest by the people and the press, and the political maneuvering of the Army, the overhaul became a revision. Regardless, Congress mandated several changes. For the first time, the convening authority was required to apply formal criteria to the court member selection process.

> When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.[65]

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61. *Id.* at 46 (quoting Rigby, *supra* note 60, records).

62. Most notable was a case involving 10 African-American soldiers tried for murder and sentenced to death. The sentence was executed two days later. The cases were reviewed in the office of The Judge Advocate General four months after they were hanged. Major Gerald F. Crump, *A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. L. REV. 55, 60 (1975) (citing Letter to Senator Chamberlain from former acting TJAG Ansell, 16 August 1919, *in* 58 CONG. REC. 3942 (1919)). Others put the figure at 13 hanged. LURIE, *supra* note 60, at 69. After World War I, a special clemency board created by the Army recommended reduction of the sentences in over 77% of the cases that came before it and remitting over 18,000 years of confinement. *Id*. at 111.

63. For an enlightening discussion of the debate, see LURIE, *supra* note 60, at 46-126.

64. *Id.* at 52. The established procedure was to recommend to the Secretary of the War to revise courts-martial in which errors were detected.

65. Article of War 4 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1; MCM, 1921, *supra* note 2, ¶ 6. The Articles for the Government of the Navy did not prescribe such qualifications for court members. United States v. McClain, 22 M.J. 124, 129 n.2 (C.M.A. 1986).

Another change authorized both parties to exercise one peremptory challenge against any of the court members, except the law member.[66]

At the same time, the attempt by some reformers to have a trial judge appointed to each general court-martial failed. Instead, the convening authority was required to appoint a law member, when possible a member of the Judge Advocate General's Department, to each general court-martial.[67] This officer ruled on all interlocutory questions, except challenges for cause against court members. Except on objections concerning the admissibility of evidence, the law member's decision was subject to objection by any other member and a vote of the entire panel.[68] As the law member was a member of the court, he participated in all of the deliberations and decisions of the court, including voting on findings and sentence.[69]

The imposition of criteria for selecting court members made eminent sense. Congress did not want a repeat of the World War I experience. As court members still performed some judicial duties, it made sense to select them by applying standards similar to those for selecting judges.

During the inter-war years, changes to the military justice system were modest and mostly technical.[70] During World War II, however, the nation was destined to repeat the rapid mobilization and demobilization of forces that had been the catalyst of the earlier 1918-1920 debate over court member selection. The grievances had not changed. Some saw the system as "an instrument of oppression by which officers fortify low-caliber leadership."[71] A commission appointed by the American Bar Association found the military justice system was well designed to secure swift and sure justice and that the results of courts-martial were quite reliable. But, the committee was convinced court-martial sentences were often too severe and too disparate.[72] Many veterans' organizations agreed.[73]

Early in 1947, both the Army and the Navy submitted bills to Congress calling for reform of the military justice system. But before any

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66. Article of War 19 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1.

67. Article of War 8 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1.

68. Article of War 31 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1; MCM, 1921, *supra* note 2, ¶ 89a; MCM, 1949, *supra* note 54, ¶ 40.

69. Article of War 8 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1.

70. Crump, *supra* note 62, at 55.

71. *Id.* at 58 (quoting Maurice Rosenblatt, *Justice on a Drumhead*, NATION, CLXII (Apr. 27, 1946) at 502).

72. *Id.* at 58-60.

73. *Id.* at 61.

action could be taken on the Army bill or hearings conducted on the Navy bill, the National Security Act of 1947[74] created the Department of the Air Force and unified the branches of the military services under the Department of Defense.[75]

Congress further reformed the Army and Air Force system in the Elston Act of 1948.[76] Among other reforms, the Elston Act permitted an enlisted accused to elect trial by a court consisting of at least one-third enlisted personnel, none of whom would be from his unit.[77] Enlisted members could not be drawn from the accused's unit,[78] and, when possible, had to have at least two years of service, as did the other court members.[79] The law member was given powers approaching those of a judge; his decisions on interlocutory questions were final except for those pertaining to challenges for cause, motions for findings of not guilty, and the accused's sanity.[80]

The unification of the services under the Department of Defense and the continued calls for reform led to the adoption of the UCMJ in 1950.[81] For the first time, all of the military services would employ the same law. The law member was replaced by a quasi-judge, called a law officer, who was not a member of the court and did not enter the deliberations.[82] In the UCMJ, Congress added "education" and "length of service" as criteria for selecting court members and eliminated the requirement that, when possible, court members with less than two years of service not constitute a majority.[83]

As a result of amendments to the UCMJ in 1968,[84] the law officer became a military judge.[85] With the new name, came greater responsibilities. The military judge, not the president of the court-martial, was now

74. Pub. L. 80-253, 61 Stat. 495 (1947).

75. Crump, *supra* note 62, at 62.

76. The so-called Elston Act was actually an amendment to the Selective Service Act of 1948. Pub. L. No. 80-759, 62 Stat. 604 (1948).

77. Article of War 4 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1.

78. Article of War 16 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1.

79. Article of War 4 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1.

80. Article of War 31 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1; 1 GILLIGAN & LEDERER, *supra* note 3, § 14-10.00.

81. 10 U.S.C. §§ 801-940 (1950).

82. *See* UCMJ arts. 26, 51 (1950); MCM, 1951, *supra* note 54, ¶¶ 4*e*, 39.

83. UCMJ art. 25(d)(2) (1950).

84. Military Justice Act of 1968, 82 Stat. 1335 (1968).

85. 1 GILLIGAN & LEDERER, *supra* note 3, § 14-10.00.

the presiding officer.[86] "The finality of the military judge's rulings was extended to all questions of law and all interlocutory questions, except the factual issue of the accused's mental responsibility."[87] Military judges could be detailed to special courts-martial whereas there was no authority to so appoint law officers.[88] The accused now had an option to select trial by military judge alone.[89] There was only one traditional judicial duty that was not given to military judges–sentencing.[90] The court members retained their sentencing authority except for cases in which the accused chose to be tried by military judge alone.[91]

IV. An Analysis of Article 25(d)(2)

The primary impetus for adopting the best-qualified criteria of Article 25(d)(2) was the wretched sentencing practices of court members during World War I.[92] But, adopting criteria also made sense in light of the number of other judicial duties assigned to court members in a system without judges. Some commentators believed the criteria would establish blue-ribbon panels[93] of members able to grasp complex legal concepts, render a fair decision on guilt, and, where guilt is found, assess a sentence that is fair to the accused while meeting the needs of good order and discipline in the military. But, applying these criteria to select court members is more difficult than it may appear.

The criteria contained in Article 25(d)(2) are inherently subjective, and neither the UCMJ nor the *Manual for Courts-Martial* provides useful definitions or guidance for interpreting them. How is a convening authority supposed to evaluate a potential court member's age? Is older supposed to be wiser? Is it another way of showing a preference for experience, or is the criterion just meant to convey a warning about selecting an entire panel of very young members? If age and length of service are important

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86. UCMJ art. 26(a) (1968).

87. Gilbert D. Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F. L. REV. 1, 5 (1975) (footnotes omitted) *quoted in* 1 GILLIGAN & LEDERER, *supra* note 3, § 14-10.00.

88. *Compare* UCMJ art. 26(a) (1950) *with* UCMJ art. 26(a) (1968).

89. UCMJ art. 16 (1968).

90. There are a few states in which the jury does have sentencing responsibilities. 1 GILLIGAN & LEDERER, *supra* note 3, at 515 n.15.

91. UCMJ art. 51(a) (1968).

92. *See* LURIE, *supra* note 62, at 77-78, 103, 111, 128.

93. *See* United States v. Rome, 47 M.J. 467, 471 (1998) (Crawford, J., dissenting); United States v. Matthews, 16 M.J. 354, 383 (C.M.A. 1983) (Fletcher, J., concurring).

criteria, it would appear that officers and enlisted personnel with less than ten years of experience would not qualify. But, the Court of Appeals for the Armed Forces held that it is only permissible to "look first at senior grades so long as lower grades are not systematically excluded."[94]

How is the convening authority to evaluate a person's education? Does a professional degree make one more suitable for court-martial duty than a bachelor's degree or a high school diploma? Should the type of education matter–liberal arts degree versus engineering degree? If the case is likely to involve scientific evidence, should the convening authority appoint mostly persons with degrees in science? What sort of "training" does the statute envision a court member should have? If an accused is charged with negligent homicide or dereliction of duty because of improper maintenance on an aircraft, should the convening authority select mostly maintenance personnel to sit on the court? What is judicial temperament and how is a convening authority expected to evaluate a potential member's possession of such an attribute? People often disagree on the meaning of such terms. One need only look to some of the rancorous debates over the nominations of federal judges to see how truly subjective assessments of judicial temperament can be.[95]

The Article 25(d)(2) criteria seem to be premised on a belief that the convening authority has the ability to personally assess the qualities of the members he details for court-martial duty. This may have been true in the past, when commands were smaller. It may even be true today for special courts-martial, where the convening authority is usually selecting members from the same installation he commands. But, it is certainly not true for general courts-martial. A general court-martial convening authority, especially overseas, may have several installations under his command and may be located hundreds of miles from the installation at which the accused is to be tried.[96] It is unlikely that he knows many prospective members at that installation other than the senior leadership, well enough

94. United States v. White, 48 M.J. 251, 254 (1998).

95. Consider the debates in the Senate over the nominations of Robert Bork and Clarence Thomas to sit on the Supreme Court of the United States. *See* SENATOR PAUL SIMON, ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES (1992); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

96. Except for very large installations, the commanders of most Air Force bases (normally a wing commander) are usually only authorized to convene special courts-martial. General courts-martial may be convened by commanders of numbered air forces (e.g., 8th Air Force) and a few large installations.

to personally apply the selection criteria in the manner contemplated by the drafters of the UCMJ. Thus, the convening authority is forced to rely on his staff and subordinate commanders to recommend service members for court-martial duty. But, that means someone other than the convening authority is actually deciding that the member is "best qualified" for court-martial duty under Article 25(d)(2).

This raises another problem. What does "best qualified" mean? The term suggests that the convening authority should detail only the most qualified members. Typically, that would be commanders and other senior officers and enlisted members. While the convening authority is not prohibited from appointing senior leadership to sit on a court,[97] the military appellate courts would probably not view favorably the detailing of the same members to every court. In any event, appointing senior leadership to every court-martial would seriously diminish the ability of these individuals to accomplish other important duties.

With the detailing of military judges to preside over courts-martial in 1969,[98] court members no longer perform many of the judicial duties with which they were formerly tasked. The sole judicial duty they now perform is sentencing. But, the inability of court members to perform this duty was precisely why Congress legislated the criteria in Article 25(d)(2) in the first place. As long as members are required to perform the sentencing function, there is good reason to retain criteria for selecting mature, intelligent, and experienced court members.

V. Article 25(d)(2) and Random Selection of Court Members

While noting the theoretical problems with Article 25(d)(2), it would not be fair to dismiss the congressional mandate outright without first examining how Article 25(d)(2) would affect any random selection scheme. Before evaluating the alternatives, this article must define a few terms. These terms are not normally associated with the selection of court members, but should assist in clearly defining the alternatives.

> The *pool* consists of those military members eligible to sit on a particular court-martial from which the *venire* is selected.

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97. *See* United States v. White, 48 M.J. 251, 253-54 (1998) (stating commanders have unique military experience which is conducive to selection as court-martial members).

98. The Military Justice Act of 1968 was implemented in 1969, and military judges were detailed to preside over all general courts-martial and special courts-martial for which a bad-conduct discharge could be adjudged.

> The *venire* consists of the members detailed to sit on a court-martial.
>
> The *panel* consists of the members that make it through challenges and actually hear evidence and render judgment on the case.

If Congress insists on retaining Article 25(d)(2), there are two basic random selection alternatives to the current system: (1) randomly select a pool of candidates from the base population and then select the venire by applying Article 25(d)(2) criteria; and (2) identify a pool of eligible court members by applying Article 25(d)(2) to the military population of the base, post, command, or ship and then randomly select the venire from that pool.

In the first alternative, some sort of random selection method would be employed to identify the pool. The convening authority would then select the venire from the pool by applying the Article 25(d)(2) criteria. The ability of the convening authority to shape the panel would be directly proportional to the size of the pool. The larger the pool, the more discretion the convening authority would have in selecting the venire. Thus, large pools would not alleviate the perception of unfairness. There would be little if any difference from the current system in which the convening authority selects from the largest pool, the entire military population of the installation. Severely restricting the size of the panel would diminish the convening authority's discretion, but would also inhibit his ability to select members who would best be able to sentence the accused, if the court-martial convicts. Article 25(d)(2) would be rendered meaningless.

In the second alternative, the convening authority would apply the criteria of Article 25(d)(2) to each member of the base population to establish the pool. Then some random selection scheme would be applied to the pool to pick the venire. Implementing this alternative would be problematic. The larger the segment of the population against which the Article 25(d)(2) criteria are applied, the more time consuming the task for a flag officer already burdened with considerable other responsibilities. The convening authority and his staff would have to monitor the list continuously to delete members who move to another station or get in trouble and to add members who arrive at the new station or have matured into warranting consideration as court members. Article 25(d)(2) requires that the convening authority select the "best qualified," not those who are merely qualified. If the convening authority conscientiously applies the "best qualified" criteria in evaluating the base personnel, the pool would be quite

small. Selecting the venire randomly from this pool, hand-picked by the convening authority, will not convince critics that the system is fairer.

Article 25(d)(2) is not the sine qua non; it is the problem. It is basically incompatible with a random selection system. As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate. Some of that criticism might disappear if someone other than the convening authority applied the criteria. The two most likely candidates for such duties would be a different convening authority or a military judge. But, such a system would be cumbersome and impractical. It is doubtful that either a different convening authority or a military judge would be able to personally apply the criteria to prospective court members they do not know. They would still have to rely on the recommendations of the prospective members' commanders and supervisors. And, because flag officers are likely to know each other, there would be allegations that one convening authority picked harsh disciplinarians with the expectation that when he referred a case to trial, other convening authorities would reciprocate.

Having the military judge select the members sounds promising, but offers its own problems. While military judges may be presumed to be fair, is the selection of court members compatible with duties as a military judge? The military judge is even further removed from the court members than is the convening authority. The only way the military judge could apply the Article 25(d)(2) criteria is to depend on others to judge a prospective member's experience and judicial temperament. The choices forced on the military judge would open the position to criticism by the accused and the defense bar. After all, if the accused had wanted the military judge so involved, he could have requested trial before a military judge sitting alone.

V. A Proposal

Now that this article has established that the random selection of court members is incompatible with the criteria contained in the first sentence of Article 25(d)(2), should the quest for a more impartial method of selecting court members be abandoned? If Congress is truly convinced that the current method for selecting court members is, or appears to be, unfair, then it does not make sense to stop looking for a remedy. It just means that any remedy must include a mechanism for insuring the sentencing authority has the experience and judicial temperament to render a fair and just sen-

tence that caused Congress to enact Article 25(d)(2) in the first place. If we could devise such a system, the need for Article 25(d)(2) would disappear, and consequently, the door would be open to explore alternatives for the random selection of court members. To be viable, any proposal must satisfy three criteria: (1) remedy the perception of unfairness caused by the convening authority's power to select the court members who will try the case, (2) assure that verdicts and sentences are fair and just, and (3) be efficient and promote good order and discipline in the armed forces.[99]

This article proposes a system that eliminates the sentencing concerns of Congress and provides for the random selection of court members who are superior in rank to the accused. The main features of the proposed system include the following:

(1) Military judges will preside over all special and general courts-martial.

(2) A military judge performs the sentencing function in all special and general courts-martial, except capital cases.

(3) The convening authority will refer a case for trial by general or special court-martial, not to a specific court panel.

(4) If an accused elects trial before court members, the venire will consist of a cross-section of the military community (by grade), who are superior in rank to the accused and have at least two years of military service, randomly selected from those military members assigned to the installation or command and not a member of the accused's unit. Enlisted accused will no longer get to elect whether the panel shall contain enlisted members.

(5) The elimination of peremptory challenges.

A. The Military Judge as Sentencing Authority

Debate over whether military judges should be the sole sentencing authority has been percolating since at least 1919, when Samuel Ansell proposed such a scheme.[100] The Military Justice Act of 1983 Advisory Commission recommended against adopting judge-only sentencing.[101]

99. *See* MCM, *supra* note 40, pt. I, ¶ 3.

While judge-only sentencing is worthy of a more thorough treatment, this section covers only the major points of the debate.[102]

Several reasons have been cited for moving to a judge-only sentencing system, but the most important is that military judges are trained, professional jurists who are better able to perform the sentencing function than court members. Military judges are commissioned officers who are members of the bar of a federal court or the highest court of a state. The Judge Advocate General (TJAG) of the service to which the officer belongs certified the officers as qualified to perform judicial duties.[103] Although the UCMJ does not impose any Article 25(d)(2) criteria on the selection of military judges, the officers that the TJAGs appoint to these positions have considerable legal training and experience.

Military judges receive initial and continuing training provided by both military and civilian judicial training institutions.[104] They likely have considerable experience with sentences from their days as trial and defense counsel, from reading appellate opinions, and sentencing service members who elect trial by military judge alone. They have a considerably better understanding of the law, the rationales for sentencing, and the collateral consequences of a sentence than do members. They are more likely to monitor trends in sentencing and be more concerned with disparate sen-

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100. Major Gerald F. Crump, *A History of the Structure of Military Justice in the United States, 1775-1920*, 16 A.F. L. REV. 41, 65 (1974). During World War I, while The Judge Advocate General of the Army, Major General Enoch Crowder, served as the provost marshal overseeing the conscription effort, his trusted aide, Brigadier General Ansell, performed the duties of The Judge Advocate General. With the end of the war, and after a bitter debate with General Crowder over proposed changes to the military justice system, Ansell was returned to his "permanent" rank of lieutenant colonel, and then retired in July 1919. He had been returned to the rank of lieutenant colonel before he made the proposal. *Id.* at 59-64; LURIE, *supra* note 60, at 102, 115. Of course, there were no military judges at that time.

101. *See* THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION REP. 12 (1984) [hereinafter 1983 ADVISORY COMMISSION].

102. *See* Major Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (providing a thorough analysis of many of the issues involved).

103. UCMJ art. 27(b) (LEXIS 1999).

104. Each military trial judge receives three weeks of initial training at The Army Judge Advocate General School at Charlottesville, Virginia. Each year, the Air Force hosts a week-long interservice judges' seminar at The Air Force Judge Advocate General School at Maxwell Air Force Base, Alabama. Judges from each of the military services have also attended the National Judicial College in Reno, Nevada.

tences than would officers and enlisted members who are rarely called upon to perform court-martial duty.

> The experienced and professional military lawyers who find themselves appointed as trial judges . . . have a solid feel for the range of punishments typically meted out in courts-martial. . . . We have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a military judge imposes sentence.[105]

Unlike court members, who normally report up their chain of command to the convening authority who referred the case to trial, military judges report up a judicial chain of command to the TJAG of their service.[106] Thus, judge-only sentencing would insulate the sentencing function from undue command influence and improve the public's perception of military justice. Civilians are used to having trained, professional, independent judges impose sentences. Retaining court member sentencing in a random selection scheme would not change public perception that courts-martial are appointed to do the convening authority's bidding. While one could argue about the independence of military judges, because they are not in the same chain of command as the convening authority, they are certainly more independent than are the court members.

The military employs an individualized sentencing scheme. "Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[107] This can be a daunting task that requires an expertise court members cannot possibly be expected to possess. In the military, all known offenses committed by an accused may be tried at the same time, even if the offenses are not related to each other in any way.[108] Unlike the federal and state systems, a military accused is not sentenced for each offense separately, with some running concurrently with others. The military has a unitary system of sentencing–the accused receives one sentence for all of his offenses.[109]

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105. United States v. Lacy, 50 M.J. 286, 288 (1999) (quoting United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985)).

106. UCMJ art. 26(c).

107. United States v. Snelling, 14 M.J. 267, 268 (1982) (quoting United States v. Mamaluy, 27 C.M.R. 176, 180-81 (1959)).

108. MCM, *supra* note 40, R.C.M. 307(c)(4) ("Charges and specifications alleging all known offenses by an accused may be preferred at the same time.").

109. *See* United States v. Weymouth, 43 M.J. 329, 336 (1995).

The sentencing authority is not encumbered by guidelines, but has the unfettered discretion to impose any sentence between "no punishment" and the maximum punishment prescribed by Congress or the President.[110] The maximum sentence to confinement is calculated by totaling the maximum confinement that may be imposed for each offense. The sentencing authority often has to determine an appropriate sentence for a number of unrelated offenses with a maximum period of confinement that may reach beyond one hundred years.

The military judge instructs the members on, among other things, the goals of sentencing, the maximum sentence they may adjudge, and the requirement to consider all factors in aggravation, extenuation, and mitigation.[111] But, no one tells the members how these factors are to be evaluated or what to apply them to. Court members are rightly concerned that the sentence they adjudge is neither too harsh nor too lenient. With the small number of courts-martial being tried these days, few court members have much experience. Further, even experienced members may never have sat on a case with similar charges before. It is not surprising that court members readily admit that they are uncomfortable with the sentencing function.[112]

The critics of judge-only sentencing, including the Military Justice Act of 1983 Commission, have asserted several reasons against adopting judge-only sentencing. These include: (1) the lack of "persuasive evidence that judge sentencing produces more consistent sentences than court-member sentencing for similarly situated accuseds,"[113] (2) judge-only sentencing would terminate an important right of the accused to choose a sentencing forum, (3) many service members prefer member trials and sentencing, (4) the court panel enjoys a knowledge of existing stan-

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110. Except for offenses warranting the death penalty, Congress left the maximum punishment to the discretion of the President. UCMJ art. 56.

111. *See* MCM, *supra* note 40, R.C.M. 1005(e).

112. This fact is based on the author's personal experiences. While serving as the staff judge advocate at Laughlin Air Force Base, Texas, from 1985-88, several officers who sat on courts-martial complained that military judges did not provide them realistic guidance on how to determine an appropriate sentence. While sitting as a trial judge, on at least two occasions, I was approached, after trial, by court members who voiced similar complaints. The president of one court-martial, in which the possible sentence was well over 50 years, asked, on the record, if I could provide the court with a ball-park figure of what an appropriate period of confinement would be for the offenses of which the accused was convicted, to which the court members could then apply the aggravating and mitigating factors to reach an appropriate sentence.

113. 1983 ADVISORY COMMISSION, *supra* note 101, at 4-5.

dards of the military community that are not shared by the military judge, (5) the sentences rendered by court members provide military judges important feedback on the values and needs of a military community that helps establish a standard for cases tried by military judge alone, and (6) court member sentencing ensures a fair sentence in cases in which the military judge has learned of inadmissible evidence. This article will next considers each of the Commissions' criticisms of judge-alone sentencing.

(1) *Consistent sentences.* The commission may be correct in asserting that there are no studies to show that military judges are more consistent in sentencing than court members. But, the commission's own survey indicated that the overwhelming number of participants perceived that military judge's were far more likely to adjudge more consistent sentences in similar cases.[114]

(2) *Military accused have long enjoyed a right to elect member sentencing the removal of which would deprive them of an option they value*; and (3) *many accused prefer member sentencing.* Before the introduction of military judges in 1969, military accused did not elect sentencing by members; it was required by statute.[115] And, the election is not as great a right as the Commission suggests. Under the current system, the accused is faced with a dilemma. If the accused elects trial on the findings before members and is convicted, he is stuck with members for sentencing. While he may believe he has a better chance of an acquittal before court members, he may be afraid of the severity of the sentence they would impose if they convict, especially in a case with a sympathetic victim. By adopting judge-only sentencing, an accused would no longer have to worry about the sentencing consequences of trying his case to a court-martial panel of members.

Initially, adopting judge-only sentencing may lead to more contested trials than is presently the case. Such a reaction should be expected because military judges will not have much of a record of sentencing in contested cases. This issue should disappear once military judges start sentencing in cases litigated before court members and defense counsel

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114. *Id.* at 369. Except for the judges on the Navy appellate court, who split evenly, all other groups "agreed overwhelmingly that military judge sentencing is more consistent in similar cases than member sentencing." The other groups included convening authorities, trial and defense counsel, staff judge advocates, and trial and appellate judges.

115. *Compare* UCMJ art. 52(b) (1950) *with* UCMJ art. 52(b) (1968).

and accused are convinced that military judges will reward them for pleading guilty.

As the critics suggest, judge-only sentencing would deprive an accused of an option that many value. But, why should an accused get to select the sentencing authority? The current system promotes sentence disparities and is the reason military accused want to retain it.[116] They can exploit the system by demanding trial by the sentencing authority likely to be the most lenient for his offenses. If a court-martial sentence is to promote good order and discipline, it seems incongruous that an accused would be permitted to decide who sentences him.

(4) *The court panel enjoys a knowledge of existing "attitudes and concerns of a particular command"*[117] *that are not shared by the military judge*; and (5) *the sentences rendered by court members provide feedback to the military judge on the community standards.* These conclusions are based on several premises that are of questionable validity. First, is the premise that the "attitudes and concerns of a particular command" should play a significant role in military sentencing. The Court of Appeals for the Armed Forces has consistently held that command policies do not belong in the courtroom because they raise the specter of unlawful command influence.[118] The service courts of criminal appeals can only approve a sentence if they find it to be correct in law and fact.[119] The military appellate judges are even further removed from the local command's concerns than is the trial judge, yet it is doubtful they would approve the sentence of one accused who is sentenced to a considerably harsher sentence than similarly situated accused in other commands.

Second, court member sentencing would have to produce consistent results to provide meaningful feedback to the military judge. Such is not the case, and the Commission's own opinion polls demonstrate as much.[120] How can court member sentencing establish community "punishment norms," when an enlisted accused gets to choose whether to be tried by a

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116. Only defense counsel and convening authorities opposed judge only sentencing. 1983 ADVISORY COMMISSION, *supra* note 101, *Minority Report in Favor of Proposed Change to Judge-Alone Sentencing*, at 28 n.1. "The right to members' sentencing is no more than the right to gamble on a group of inexperienced or overly sympathetic laymen reaching a less severe sentence than a professional judge." *Id.* at 39.

117. 1983 ADVISORY COMMISSION, *supra* note 101, at 5.

118. United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983).

119. UCMJ art. 66(c) (LEXIS 1999).

120. *See supra* note 114.

court consisting of officers or officer and enlisted members? Furthermore, we can expect the random selection of court members to exacerbate the lack of experience of court members in sentencing. The resulting disparate sentences would not provide useful guidance on which military judges could base a sentence. The community standards for a court composed of officers is unlikely to be the same as for a court in which enlisted members participate.[121]

Although military judges now provide detailed sentencing instructions to the court members, it is impossible to educate court members on the collateral consequences of a sentence. The Court of Appeals for the Armed Forces insists that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."[122] But, how can a sentence be just if the sentencing authority does not understand what the sentence means to the accused in practical terms?

No wonder court members readily admit they are uncomfortable with the sentencing function.[123] Court members are concerned with adjudging an appropriate sentence and understand that the accused's sentence should not be considerably different from other accused who are similarly situated. Telling court members that they may adjudge a minimum of "no punishment" and a maximum that might include a punitive discharge and confinement for 120 years does not provide them with any meaningful guidance on which to fashion a fair and just sentence. Without knowing what is an appropriate range of punishments for a particular offense, they are often clueless as to how they are supposed to be applying the aggravating, extenuating, and mitigating factors.[124]

(6) *Court members ensure a fair sentence in cases in which the military judge has learned of inadmissible evidence*. Military judges are keenly aware of their responsibilities not to consider inadmissible evidence when they sentence.[125] They understand the court of criminal appeals must review the sentence and "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds

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121. Enlisted accused charged with cheating on promotion examinations invariably demand trial by officer members because they expect that enlisted members would view such transgressions more harshly.

122. United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989).

123. *See supra* note 112.

124. *Id.*

correct in law and fact and determines, on the basis of the entire record, should be approved."[126] The trial judges also have their experience, training, and knowledge of other cases to act as a check on the imposition of an inappropriately harsh or light sentence.[127]

Judge-only sentencing is an important step to improving the military justice system and is absolutely necessary if Congress decides to order the random selection of court members. Judge-only sentencing will ensure that sentences are made by trained professionals concerned with the consistency, as well as the fairness, of the sentence.

B. Military Judges Preside Over all Special and General Courts-Martial

In 1968, when Congress introduced military judges into courts-martial, they left a loophole. The UCMJ still permits convening authorities to refer cases to special courts-martial without a military judge; however, such a court-martial cannot adjudge a punitive discharge.[128] Despite this provision, service regulations compel the use of military judges in all special and general courts-martial.[129] Even during conflicts such as Vietnam and Desert Storm, military judges traveled to, and presided over, courts-martial in the combat zone.[130] The rigorous technical demands placed on courts-martial by the UCMJ, the President in his Rules for Courts-Martial and Military Rules of Evidence, and the appellate courts, militate against convening authorities referring cases to court without a military judge presiding. But, to advance to a judge-only sentencing system, Congress must

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125. *Cf.* United States v. Howard, 50 M.J. 469, 471 (1999) ("Military and civilian judges are routinely tasked with hearing facts for limited purposes, which they later disregard if consideration would be improper.").

126. UCMJ art. 66(c) (LEXIS 1999).

127. *See* United States v. Lacy, 50 M.J. 286, 288 (1999).

128. UCMJ art. 19.

129. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-12.00.

130. The author presided over the two Air Force courts-martial associated with Operation Desert Shield in Saudi Arabia in January 1991. *See* THE ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FISCAL YEAR 1991, 34 M.J. CXVIII (noting that the Marine Corps tried 67 courts-martial in FY 91 in-theater during Desert Shield/Desert Storm); COLONEL JACK CROUCHET, VIETNAM STORIES: A JUDGE'S MEMOIR (1997).

amend Article 16, UCMJ, to abolish special courts-martial to which no military judge is detailed.

C. Referral of Case to Trial

In the military, the convening authority decides whether an accused will stand trial by court-martial. "Referral is the order of a convening authority that charges against an accused will be tried by a *specified* court-martial."[131] The UCMJ does not require the convening authority to refer the case to a specific panel,[132] but it has been done this way throughout our history.[133] The practice is now enshrined in the President's pretrial procedural rules, the Rules for Courts-Martial (R.C.M.).[134]

Before 1969,[135] the practice was efficient and made sense. There were no military judges, so all courts-martial were tried before court members. By referring a case to a specified court panel, the convening authority could order a case to trial by a court panel already in existence. Now, the accused may elect trial before a military judge sitting alone[136] and does so in over fifty percent of the cases.[137] Under these circumstances, it is no longer efficient to select court members before referral when it is more than likely that the accused will agree to trial by judge alone.

The convening authority should merely refer the case to a general or special court-martial. If the accused wants to be tried by court members, he can demand them at arraignment, or earlier through counsel. There is no reason to waste the time and resources necessary to run the program to identify a pool of members, determine their availability, and then select the venire, if the accused decides to be tried by military judge alone. In many cases, the accused has already elected to be tried by military judge alone as part of his pretrial agreement. As the UCMJ does not require referral to

131. MCM, *supra* note 40, R.C.M. 601(a) (emphasis added).

132. United States v. Clark, 11 M.J. 179, 182 (C.M.A. 1981); 1 GILLIGAN & LEDERER *supra* note 3, § 10-31.00 n.47.

133. WINTHROP, *supra* note 51, at 158.

134. UCMJ art. 36(a) (LEXIS 1999) ("Pretrial, trial, and post-trial procedures . . . may be prescribed by the President . . . .").

135. The Military Justice Act of 1968, 82 Stat. 1335 (1968), provided for military judges. UCMJ art. 16 (1968).

136. UCMJ art. 16 (LEXIS 1999).

137. *See* 1 GILLIGAN & LEDERER, *supra* note 3, § 15-60.00 (Supp. 1998).

a specified court, the process can be changed simply by amending R.C.M. 601(a).

The defense community may argue that referring a case to a specific court provides the accused with an important right–knowing the names of the court members before he has to elect the forum that will try him. Thus, the accused can try to assess whether the panel or the military judge would be more lenient. Although the convening authority has permitted an accused to make such judgments, it is as a matter of economy, not of right. Those economies have disappeared with the increase in pretrial agreement induced judge-alone trials that now predominate. The proposed changes in the court member selection process are aimed at eliminating the appearance of undue command influence by removing the convening authority from the process. The accused will be in a state similar to that of his civilian counterpart; the court members will not be selected until after the accused demands trial before members.

D. A Random Selection Scheme

This proposal outlines one possible random selection scheme. The scheme itself would be codified in only the broadest terms to permit the services to implement the changes in a manner to meet their own peculiar needs.

In constructing a proposal for the random selection of court members, the first issue that must be confronted is the composition of the pool. Under the current system, probably because the convening authority has such broad discretion in selecting the venire, there are only few rules limiting the composition of the pool.

First, unless an enlisted accused affirmatively requests enlisted members on the panel, the pool is limited to eligible officers.[138] Granting an enlisted accused this right may have made sense when court members were required to determine the sentence if they convicted the accused of any offense, but it makes no sense in a system in which court members are selected randomly and have no part in sentencing. Article 25(c)(1), UCMJ, should be amended to eliminate this choice. Enlisted members

138. UCMJ art. 25(d)(1) (LEXIS 1999).

should be eligible to sit on the court-martial of any military member inferior in grade.

Second, a military member is not eligible to serve on a court-martial if, in the same case, he acted as an accuser, counsel, investigating officer, or a prosecution witness.[139] This rule must be retained, but it is more easily applied in excluding a member from the venire, rather than from the pool.

Finally, when possible, service members who are junior in grade to the accused are not to be detailed as members of a court-martial.[140] This rule makes sense, as it prevents the appearance that the junior members of the court have an interest in seeing the accused cashiered from the service so that they can be promoted.[141] The rule could be designed into the computer program used to select the pool and should be retained. Of course, this will cause the pool to shrink and expand depending upon the accused's grade.

While there is no statute specifically prohibiting members with certain specialties from serving on courts-martial, service regulations have long discouraged the appointment of many professionals. The Army discourages convening authorities from detailing chaplains, veterinarians, doctors, dentists, and members of the Inspector General's Corps (IG) to court-martial duty.[142] In practice, the services do not detail judge advocates to sit on courts-martial, either.

It seems appropriate to exclude judge advocates, chaplains, and members of the IG from the pool. Judge advocates are viewed in the military as the backbone of the military justice system. Junior judge advocates are often prosecutors, defense counsel, or subordinate to the staff judge advocate whose office is prosecuting the case. If not, the judge advocate is probably closely acquainted with the counsel who are prosecuting or defending the case. It just does not make sense to waste the time and

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139. *Id.* art. 25(d)(2).

140. *Id.* art. 25(d)(1). Since at least 1874, federal statutes have prohibited the detailing of court members who are junior to the accused. Article of War 79, 18 Stat. 228 (1874), *reprinted in* WINTHROP, *supra* note 51, at 993; Article of War 16, 39 Stat. 619, 650-70 (1916), *reprinted in* MCM, 1917, *supra* note 53, app. 1; Article of War 16, 41 Stat. 787 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1; UCMJ art. 25(d)(1) (1950).

141. *See* WINTHROP, *supra* note 51, at 72.

142. SCHLUETER, *supra* note 51, § 8-3(C)(1).

resources of voir dire and challenge to qualify judge advocates when they will normally be excused.

Chaplains and members of the IG should also be eliminated from the pool. Chaplains do not merely counsel and preach to their congregations. They are tasked with providing aid and comfort to all military members. Members of the IG are, in some ways, like ombudsmen. Their duty is to investigate complaints of wrongs. Thus, both chaplains and members of the IG often have knowledge of the facts of a case from talking to either the accused or to the accused's victims. It just makes sense to eliminate these members from the pool before a venire is selected. If not, a system whereby they may be excused from the venire before the court-martial convenes may be appropriate.

Doctors, dentists, and veterinarians, on the other hand, do not have duties that are incompatible with court-martial duty. In fact, they are often detailed as members in Air Force courts-martial.[143] Of course, with the draw down of medical professionals in the military, having them sit on courts-martial could seriously degrade the ability of hospital commanders to provide necessary medical services to the military community in a timely manner. Rather than a blanket exclusion from the pool, it might be more appropriate to leave this issue to the individual services to resolve by regulation.

Between 1921 and 1951, service members with less than two years of service could constitute no more than the minority membership of the court-martial unless manifest injustice would result.[144] The UCMJ eliminated this provision, but the appellate courts have declared that service members in the two lowest enlisted grades are presumed to lack the experience and maturity contemplated by Congress in establishing the criteria in Article 25(d)(2).[145]

There is good reason for totally excluding service members with less than two years of military service from the pool, whether they are officers or enlisted members. This is not a function of any perceived inability to

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143. This fact is based on the author's personal experience as a military trial judge presiding over several hundred courts-martial and, as an appellate judge, reading the records of trial in several hundred other cases.

144. *Compare* Article of War 4 (1916), (1920), and (1948) *with* UCMJ art. 25(d) (1950).

145. *See* United States v. Lewis, 46 M.J. 338, 342 (1997); United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

perform the duty, especially if sentencing were reserved for the military judge, but is merely a reflection of the reality of military training. For the first two years of service, most military members are deeply involved in training–first basic training, then advanced training, and often on-the-job training when they arrive at their first duty station. Interrupting such training can disrupt training schedules and cause considerable difficulty with individual military members completing their course work and being ready to move on to their next assignment. By making those with less than two years of service ineligible, the program will be easier to administer and would not be unduly prejudicial to an accused.

Once the pool is established, the venire must be selected. In the federal model, you would expect each venire to represent a cross-section of the community from which it was drawn because each member in the pool has an equal chance of being selected for the venire. Military demographics are considerably different than those of the general public. Although military personnel range in age from seventeen to sixty-two years of age, a substantial portion of the population is twenty-five and under, enlisted, and has less than two years of military service.[146] If each member of the pool, heavily weighted with young, junior enlisted members, had an equal chance of sitting on a court-martial, it is unlikely that any panel would represent a cross-section of the military community. In fact, we could reasonably expect some panels to be composed entirely of members in the grades of E-4 and below who are under twenty-five years of age.

To avoid such a situation, the selection scheme should guarantee that the venire consists of a cross-section of the military community by grade. This could be accomplished by setting up categories of members based on grade: senior officer (O-6 and above if necessary),[147] field grade officer (O-4 and O-5), company grade officer (O-2 and O-3),[148] senior non-commissioned officer (E-7 to E-9), noncommissioned officer (E-5 and E-6),

146. As of the beginning of the year 2000, the demographics in the Air Force reflected the following: Approximately 41% of the enlisted force and 12% of the officers were 25 years of age or under; approximately 19% of the enlisted force and 11% of the officers had under two years of service; and, enlisted members in the grades E-1 – E-4 represented approximately 48% of the enlisted force and over 38% of the total Air Force. *See* Air Force Personnel Center, *Interactive DEmographic Analysis System (IDEAS II)* (visited 5 Jan. 2000) <www.afpc.randolph.mil>.

147. Due to the limited number of senior officers and the gravity of their other responsibilities, it may be appropriate to limit their participation to general courts-martial and cases in which, because of the accused's grade, they were necessary.

148. O-1s usually have less than two years of military service. Those that have more than two years of service could be considered for court-martial duty along with the O-2s.

and junior enlisted (E-3 to E-4).[149] A computer program would randomly rank each member of the category.

The staff judge advocate would then eliminate the convening authority, the accuser, witnesses, persons in pretrial or post-trial confinement, and those with court-martial convictions, and perhaps non-judicial punishments, from the list. The staff judge advocate would contact the commanders for the highest ordered members in each category to determine the members' availability to sit on the court-martial. The convening authority, or the member's commander if the convening authority is not in the member's chain of command, would make the final determination of availability. The names and reasons of those who claim to be unavailable would be referred to the convening authority for a final determination.

Before the court-martial is assembled, the convening authority may excuse any detailed member by reason of duty, emergency, illness, or disqualification. The convening authority may delegate this authority to his staff judge advocate or principal assistant. Any member excused after being detailed to the court-martial would be replaced by the next available member in the excused member's category. Decisions by the convening authority and the staff judge advocate eliminating members from the venire, and the reasons therefore, shall be submitted to the military judge in writing and be attached to the record of trial.

The court would be convened with an equal number of members from each category. The court would be assembled with the members remaining after voir dire and challenges.

E. Peremptory Challenges

While peremptory challenges have been part of American jurisprudence for over 200 years and of the common law for several additional centuries,[150] they are not constitutionally required.[151] They also were not part

149. E-1s and E-2s usually have less than two years of military service and should not be considered.

150. Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting).

151. *See, e.g.*, *Batson*, 476 U.S. at 91; Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 538, 586 (1919).

of court-martial practice until 1921 in the Army[152] and 1951 in the Navy.[153]

Adopting a scheme for randomly selecting court members is not dependent upon either the existence or elimination of the peremptory challenge. However, because the random selection of court members represents such a fundamental change to the system, it is worth considering whether peremptory challenges will still be necessary and appropriate.

Peremptory challenges were designed to be exercised without explanation.[154] Over the past thirty-five years, however, the Supreme Court has restricted their use. In 1965, the Court held in *Swain v. Alabama*,[155] that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution for prosecutors to use peremptory challenges to systematically exclude African-American jurors in every criminal trial. But, *Swain* placed "a crippling burden of proof" on defendants that basically immunized prosecutors' peremptory challenges from judicial scrutiny.[156] Twenty-one years later, in *Batson v. Kentucky*, the Supreme Court adopted a new procedure that made it easier for the accused to establish a prima facie case of purposeful discrimination–now, it could be based solely on the prosecutor's conduct at the defendant's trial. The Supreme Court has extended the *Batson* rationale to apply to defense challenges,[157] challenges based on race when the accused and juror were not members of the same race,[158] and to gender-based challenges.[159]

The Court of Military Appeals adopted *Batson* in *United States v. Santiago-Davila*.[160] As the Supreme Court extended *Batson*, the Court of Military Appeals followed suit. Thus, in the military, the *Batson/Santiago-*

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152. *Compare* Article of War 18, 41 Stat. 787 (1920) ("The accused or the trial judge advocate . . . shall be entitled to one peremptory challenge . . . .") *with* Article of War 18, 39 Stat. 653 (1916) ("Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court.").

153. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-55; UCMJ art. 41(b) (1950).

154. Lewis v. United States, 146 U.S. 370, 378 (1892) (It is "an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."); MCM, 1951, *supra* note 52, ¶ 62*e* ("A peremptory challenge does not require any reason or ground therefor to exist or to be stated.").

155. 380 U.S. 202 (1965).

156. *Batson*, 476 U.S. at 92-93.

157. Georgia v. McCollum, 505 U.S. 42 (1992).

158. Powers v. Ohio, 499 U.S. 400 (1991).

159. J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127 (1994).

160. 26 M.J. 380 (C.M.A. 1988).

Davila rationale applies to defense challenges,[161] challenges when the accused is not a member of a cognizable group,[162] and to gender-based challenges.[163]

In the federal system, each party uses peremptory challenges to try to shape the jury. There are two impediments to the peremptory challenge being an effective tool for shaping the court panel in the military: (1) each side gets only one peremptory challenge,[164] and (2) the exercise of that peremptory challenge is subject to objection if used against a member of a cognizable group; in such an instance, to overcome the challenge, the party exercising it must establish a connection between the reason for the challenge and the "rejected member's ability to faithfully execute his duties on a court-martial."[165] But, as long as the convening authority who refers the case to trial also selects the court members, the accused and many critics will view the peremptory challenge as an indispensable requirement for a fair trial.

Although *Batson* was based on the harm caused to the accused by eliminating jurors of his own race from the jury, the Supreme Court recognized that "the prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large," as well.[166] In expanding the scope of *Batson*, the Court changed its focus and concentrated more on the harm to the excluded jurors and the community.[167] But, if jurors and court members have some right not to be removed arbitrarily, why should members of cognizable groups have any more right to serve than other members of the community?[168]

If Congress adopts a scheme for the random selection of court members, it should abolish the peremptory challenge. The challenge will no longer be necessary to protect the accused from the convening authority's court member selections or the possibility that members will be removed

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161. United States v. Witham, 47 M.J. 297, 298 (1997).

162. *See* United States v. Ruiz, 49 M.J. 340, 343 (1998); *Witham*, 47 M.J. at 302-03.

163. *Witham*, 47 M.J. at 298.

164. UCMJ art. 41(b)(1) (LEXIS 1999); MCM, *supra* note 40, R.C.M. 912(g).

165. United States v. Tulloch, 47 M.J. 283, 286 (1997).

166. *Powers*, 499 U.S. at 406 (citing Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

167. *See* J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 141 (1994); Georgia v. McCollum, 505 U.S. 42, 48-49 (1992); *Powers*, 499 U.S. at 406.

168. *See* Akil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U. C. DAVIS L. REV. 1169, 1182 (1995).

because of purposeful discrimination.[169] To abolish peremptory challenges, Congress will need to amend Article 41, UCMJ.[170]

VI. Conclusion

In 2000, we mark the 50th anniversary of the UCMJ. It is a time to celebrate the success of a remarkable document that, with minor modifications, survived the massive changes the military and the nation have undergone since its adoption. Some view this anniversary as not just a time to celebrate, but an opportunity to establish a broad-based commission to conduct a thorough and comprehensive review of the entire military justice system.[171] Others are not persuaded that the UCMJ needs a comprehensive review by a commission that will include segments of society unfamiliar with the military justice system.[172] They believe such a review will inevitably lead to the further "civilianization" of the military justice system and a resulting deterioration of discipline–the heart and soul of every military organization. It is within this environment that Congress ordered the Secretary of Defense to propose reforms to the court member selection process.

The Secretary of Defense can resist change, or he can embrace it. In the current environment, resisting change would be a mistake. It is clear from the congressional mandate that Congress is interested in change. By failing to advocate a viable alternative to the current court member selection process, the Secretary of Defense would be inviting Congress to impose change from outside the military and lend credibility to those who propose a comprehensive review of the system.

> [I]t is vitally important if there is an outside threat to the system, to carefully assess the threat to see if it is justified. If it appears to be justified, no amount of wriggling will save the situation, and rapid steps should be taken to remedy it. Such steps should be taken by the armed forces themselves. Waiting is fatal, for it

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169. *See Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) (ending discrimination in peremptory challenges requires eliminating them entirely).

170. 10 U.S.C.S. § 841 (LEXIS 1999). The Appendix contains a suggested amendment to Article 41.

171. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ARMED FORCES LAW REPORT TO THE HOUSE OF DELEGATES (1999).

172. This fact is based on the author's personal discussions with senior judge advocates in the Army, Navy, Marine Corps, and Air Force.

> means that the solution will be enforced by an outside authority, whose understanding of the needs of the Services may not be sufficient to ensure that the system survives in an acceptable state.[173]

The threat to the court member selection process is real and justified. It "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack."[174] When it is impossible to convince even military judges from other countries that our current system of selecting court members is fair,[175] it is unlikely Congress or the American public will be so convinced. Many in the public and even the military believe that courts-martial are routinely rigged, although little evidence exists to suggest it.[176] Sooner or later, however, the system will be changed. But, the military should not fear change, for change is inevitable in the democratic society it serves. Just as the military is evolving to meet new missions and employ new weapon systems, the military justice system must evolve to meet the expectations of justice in our society and to enhance the performance of the military mission. It is better for the military to embrace change now and attempt to control its course by proposing changes that will minimize the damage, rather than have some unpalatable alternative imposed by Congress.

The convening authority's inability to control the composition of court-martial panels will not spell the end of discipline in the military. Instead, it will do much to erase the perception that military justice is unfair. After all, justice is not incompatible with discipline.

> Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as

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173. His Honour Judge James W. Rant, CB, QC, Findlay, *The Consequences: Remarks Given at The Judge Advocate General School, November 1997*, THE REPORTER, Sept. 1998, at 7 (reporting on changes to British court-martial procedures resulting from finding of European Court of Human Rights that the convening authority's role in the court-martial system was a violation of the European Convention on Human Rights–Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997)).

174. United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring).

175. The author has tried.

176. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-31.00.

> an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.[177]
>
> The military needs to be in the vanguard, continually looking for changes that will not only enhance the ends of justice, but also the needs of military discipline and efficiency. It is essential that the military develop and propose its own reform to the court member selection process. The primary requirements for such a system should be judge-only sentencing and the random selection of members within grade categories. Such a system should assuage the reformers, ensure that courts-martial are fair, just, and efficient, and promote good order and discipline in the armed forces.

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177. THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 12 (Jan. 18, 1960), *quoted in* SCHLUETER, *supra* note 49, § 1-1.

APPENDIX

Proposed Changes to the UCMJ and R.C.M.

This appendix provides the statutory and rule changes necessary to implement the change to the court member selection process proposed in this article. Deletions are indicated by strike-throughs and additions are indicated by underlines.

Article 16, UCMJ, 10 U.S.C. § 816

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

~~(A) not less than three members; or~~

~~(B)~~(A) military judge and not less than three members; or

~~(C)~~(B) only a military judge, if ~~one has been detailed to the court, and~~ the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

Article 19, UCMJ, 10 U.S.C. § 819

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title [10 U.S.C. § 817] (article 17), special courts-martial have jurisdiction to try persons subject to this chapter [10 U.S.C. §§ 801 et seq.] for any noncapital offense made punishable by this chapter [10 U.S.C §§ 801 et seq.] and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter [10 U.S.C. §§ 801 et seq.] except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title [10 U.S.C. § 827(b)] (article 27(b)) was detailed to represent the accused~~, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed~~.

Article 25, UCMJ, 10 U.S.C. § 825

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c) (1) Any enlisted member of an armed force on active duty who is not

a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial~~, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.~~

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade, or has less than two years of military service.

(2) ~~When convening a court-martial,~~ As provided in regulations to be prescribed by the Secretary concerned, the convening authority shall detail as members of the court-martial ~~thereof~~ such members of the armed forces as are selected at random from a cross-section of the command and reasonably available to the location of trial~~, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament~~. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the

case by reason of duty, emergency, illness, or disqualification. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

Article 26, UCMJ, 10 U.S.C. § 826

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general and special court-martial. ~~Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial.~~ The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those

relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

Article 40, UCMJ, 10 U.S.C. § 840

§ 840. Art. 40. Continuances

The military judge or a summary court-martial ~~without a military judge~~ may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

Article 41, UCMJ, 10 U.S.C. § 841

§ 841. Art. 41. Challenges

(a) ~~(1)~~ The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel, but only for cause ~~stated to the court~~. The military judge, ~~or, if none, the court,~~ shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges for cause by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) ~~(2)~~ If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent

against the remaining members of the court before additional members are detailed to the court~~. However, peremptory challenges shall not be exercised at that time.~~

~~(b)~~ ~~(1)~~ ~~Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court.~~

~~(2)~~ ~~If exercise of a peremptory challenge reduces the court below the minimum number of members required by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.~~

~~(c)~~ ~~Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.~~

Article 45, UCMJ, 10 U.S.C. § 845

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a <u>summary</u> court-martial ~~without a military judge~~, a finding of guilty of the charge or specification may~~, if permitted by regulations of the Secretary concerned,~~ be entered immediately ~~without vote~~. This find-

ing shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Article 50a, UCMJ, 10 U.S.C. § 850a

§ 850a. Art. 50a. Defense of lack of mental responsibility

(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge~~, or the president of a court-martial without a military judge,~~ shall instruct the members of the court as to the defense of lack of mental responsibility under this section and charge them to find the accused—

(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—

(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

(2) in the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

Article 51, UCMJ, 10 U.S.C. § 851

§ 851. Art. 51. Votings and rulings

(a) Voting by members of a general or special court-martial on the findings ~~and on the sentence, and by members of a court-martial without a military judge upon questions of challenge,~~ shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge ~~and, except for questions of challenge, president of a court-martial without a military judge~~ shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused~~, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty,~~ is final and constitutes the ruling of the court. However, the military judge ~~or the president of a court-martial without a military judge~~ may change his ruling at any time during the trial. ~~Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title [10 U.S.C. § 852] (article 52), beginning with the junior in rank.~~

(c) Before a vote is taken on the findings, the military judge ~~or the presi-~~

~~dent of a court-martial without a militaryjudge~~ shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings ~~and, if the accused is convicted, adjudge an appropriate sentence~~. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

(e) Except in capital cases, the military judge shall sentence an accused convicted of any offense. If court members convict the accused of an offense referred to trial as a capital offense by a unanimous vote, the court members will also determine the sentence.

Article 52, UCMJ, 10 U.S.C. § 852

§ 852. Art. 52. Number of votes required

(a) (1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the

members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title [10 U.S.C. § 845(b)] (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) ~~(1)~~ No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter [10 U.S.C. §§ 801 et seq.] expressly made punishable by death.

~~(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.~~

~~(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.~~

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty ~~or to reconsider a sentence, with a view toward decreasing it,~~ may be made by a any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding ~~or sentence. A tie vote on a challenge disqualifies the member challenged.~~ A tie vote ~~on a motion for a finding of not guilty or~~ on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

Article 53, UCMJ, 10 U.S.C. § 853

§ 853. Art. 53. Court to announce action

A court-martial shall announce its findings ~~and sentence~~ to the parties as soon as determined.

R.C.M. 601

Rule 601. Referral

(a) *In general.* Referral is the order of a convening authority that charges against an accused will be tried by a ~~specified~~ general, special or summary *court-martial.*

THE TWENTIETH CHARLES L. DECKER LECTURE IN ADMINISTRATIVE AND CIVIL LAW[1]

JANICE R. LACHANCE[2]

It is a true pleasure for me to be here for the Twentieth Annual Charles Decker Lecture.[3] I have to admit, one of the reasons I decided to accept the invitation to be here today was the intriguing write-up I received on JAG. It said: "The combination of mystery, courtroom drama, and men and women in uniform keeps viewers coming back for a taste of the excitement. The military spin makes for some intriguing situations in what could

1. This article is an edited transcript of a lecture delivered on 17 November 1999 by Ms. Janice R. Lachance to member of the staff and faculty, distinguished guests, and officers attending the 48th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The lecture is named in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, United States Army, in Charlottesville and the 25th Judge Advocate General of the Army. Every year, The Judge Advocate General invites a distinguished speaker to present the Charles L. Decker Lecture in Administrative and Civil Law.

2. Janice R. Lachance is the Director of the U.S. Office of Personnel Management (OPM). She was sworn in as Director by Vice President Al Gore on 10 December 1997, after a unanimous confirmation by the U.S. Senate on 9 November. At the swearing-in ceremony, the Vice President called Ms. Lachance "the voice of fairness for Federal employees and for excellence in government, and a champion of working people everywhere." Additionally, Ms. Lachance is the Chair of the National Partnership Council and the President's Task Force on Federal Training Technology. She is a member of the President's Management Council, the President's Commission on White House Fellows, the Presidential Task Force on Employment of Adults With Disabilities, the President's Interagency Council on Women, the Planning Committee Forum for Health Care Quality Measurement and Reporting, the Inter-Departmental Council for Hispanic Educational Improvement, and the Advisory Committee on Veteran's Employment and Training. Before becoming the agency's Director, Ms. Lachance held the following positions in OPM: Deputy Director (appointed by President Clinton in August 1997); Chief of Staff (1996-1997); Director of Communications and Policy (1994 to 1996); Director of Communications (1993-1994). Ms. Lachance's education includes: B.A., Manhattanville College, Purchase, New York; J.D., Tulane University School of Law, New Orleans, Louisiana.

3. I would like to thank Commandant Lederer and General Romig for their hospitality. Also attending the lecture were two people from OPM, who I would like to recognize as well. The first is my senior policy advisor, Mark Hunker. The second is a neighbor of the JAG school. As one of her duties, Barbara Garvin Kester is the director of OPM's Federal Executive Institute (FEI). The FEI is the highly regarded proving ground for top civilian federal employees.

otherwise be just another show about lawyers . . . ."[4] Oh wait, that was the write up for JAG the TV series!

Seriously, The Judge Advocate General's Regiment (JAG) and the U.S. Office of Personnel Management[5] (OPM) are actually very similar in some ways. Just as JAG officers serve as a liaison between the military community and its real world legal needs, the OPM serves as the bridge between the federal workforce and its real world human resources needs. At the center of both of these relationships is the critical element of public trust.

With that in mind, I would like to start my discussion with you today by looking a little more closely at how the OPM came to inherit this trust. You all probably know the story of how the U.S. Civil Service Commission, which later became the OPM, was created in 1883 as a response to widespread political corruption and favoritism. When President James A. Garfield was shot and killed in 1881 by an angry office seeker, an enormous outpouring of public anger from the American people prompted Congress to pass the Civil Service Act of 1883.[6] The bill was introduced by a Democratic senator and signed into law by a Republican President– an indication of just how strong the bipartisan support was for this measure. If you follow Washington politics at all, you know how hard it is for

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4. *JAG* (CBS television broadcast series, 1999).

5. The U.S. Office of Personnel Management is the federal government's human resources agency. While daily providing the American public with up-to-date employment information, OPM ensures that the nation's civil service remains free of political influence and that federal employees are selected and treated fairly and on the basis of merit. OPM supports agencies with personnel services and policy leadership including staffing tools, guidance on labor-management relations, preparation of government's future leaders, compensation policy development, and programs to improve workforce performance. The agency manages the federal retirement system, as well as the world's largest employer-sponsored health insurance program serving more than nine million federal employees, retirees and their families. In addition, the agency oversees the Combined Federal Campaign (CFC) through which 4.2 million federal civilian employees and military personnel raise millions of dollars for thousands of charities every year.

As Director, Ms. Lachance oversees the agency's work force of 3700 employees and has an annual budgetary authority of approximately $27 billion composed of discretionary and mandatory requirements. She also has responsibility for the administration of the federal retirement, health, and insurance programs that total about $488 billion.

6. Civil Service Act, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. § 632 (1966)).

the two major political parties to agree on anything, which was just as true 115 years ago.

This law's basic principles–which have not changed in more than a century–have stood the test of time, and the transition from a rural, pioneer society to one of the most complex industrial societies in the world. Since that time, federal jobs are offered and filled based on *what* you know, not *who* you know.

By 1978, changes were needed if the merit system was to remain effective. As a result, the Civil Service Reform Act of 1978[7] abolished the Civil Service Commission and divided its functions and missions among three new organizations: the Merit Systems Protection Board; the Office of Special Counsel; and my personal favorite, the OPM. As the human resources agency for the federal government, the OPM takes its responsibility for administering the merit system very seriously. We know that the American people are relying upon us to make sure our federal employment system *is* fair and *stays* fair.

However, more than just merit is at stake here. We also have an obligation to build a workforce that is competitive in the next century. Thus, for me and for the federal government, it means we continue to take great care to select and develop employees who have the skills and expertise to lead our government into the changing world of the new millennium. People talk all the time about the impact of this change on our workforce and our society. I am here to tell you that the impact is already being felt–it is real, it is significant, and for those caught unaware, it will be catastrophic.

Lately, I have been talking about something that I call the "Dinosaur Killer"–and no I am not talking about some giant asteroid striking the planet, as recent movies have suggested. Instead, I am talking about an overwhelming, unavoidable force of nature that is changing the climate of the world's workforce and ushering in a new age–this time we are calling the Dinosaur Killer by the name of "The Information Revolution."

More and more information is becoming available to an ever-expanding number of people around the world at an ever increasing pace. New technologies, new work environments, new needs for skills and learning, all these changes are having a deep impact, at work and at home, in soci-

7. Civil Service Reform Act, Pub. L. No. 95-454, 1, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5, 10, 15, 28, 31, 39 & 42 U.S.C. (1994)).

eties around the globe. Rest assured, the demands of the Information Revolution will kill our twentieth century dinosaurs–those organizations that *cannot*, or *will not*, adapt to the new global realities of the next millennium.

At OPM, we have been working hard to fight off the Dinosaur Killer by anticipating the specific nature of work and the workforce of the twenty-first century, and by seeing what OPM can do now to create and sustain learning environments. We already see the trends for the next millennium–the theme is: "Adapt or be pushed aside."

Organizations are already learning that they must adapt to changing missions and become more diverse and more flexible. In the years ahead, organizations will no longer have a permanent workforce, or even a temporary workforce, instead they will have what I call a "situational workforce." Needed work will be done by a blend of core employees in cross-functional teams and by temporary employees, consultants, and contractors, when necessary.

Full-time, lifelong jobs and job descriptions are already disappearing, and instead, employees are increasingly being called upon to be generalists–omnivores in the new world order, with the tools to survive and flourish at many different tasks and in many different environments. Fewer jobs will fit into a neat job description, and our core government employees will be called upon to perform one role today and another tomorrow.

Obviously, this has significant implications for how skills are valued, how salaries are set, how performance is evaluated, and how learning needs are assessed and met. Organizations will have to look at the bottom line and weigh the cost of investing in specialists who can only do one thing very well, versus the benefit of using generalists who can perform multiple tasks and who are adaptable to changing organizational needs. The way work is organized is also being affected by the speed of change. Work processes are increasingly driven by what employees know–that is to say, how well the work is done is increasingly dependent upon the level of knowledge the employee brings to the job. The more knowledgeable an employee is across disciplines, the better job he can do, and the more valuable he becomes.

The result of this trend is that the distinction between working and learning is becoming blurred–so that part of every employee's job will be to keep learning about the ever-changing work to be performed. The Clin-

ton/Gore Administration realizes this, and has made lifelong learning a priority in its efforts to improve the federal workplace.[8]

Another trend we see is that federal government operations and decision-making authority will continue to be decentralized. For example, we are working to promote partnership and empower front-line employees to give them a greater say in problem-solving and workforce improvements. We must find ways to promote the *potential of our employees*–making them more knowledgeable, more adaptable, and better able to meet changing needs. The OPM remains committed to developing the full potential of our current workforce. It is good for the employees, good for morale, and good for the bottom line.

Another change we will see is that federal agencies will shift from the hierarchical, Industrial Era structures that we are familiar with to "internetworked" structures that improve and integrate service delivery and improve the design of government. We are moving from the ponderous organizational dinosaurs of the twentieth century to the fleet and nimble gazelles of the twenty-first. In the military, this is being seen not only in a new emphasis on more mobile fighting forces and "Rapid Deployment Forces," but also in leaner organizational structures and simplified lines of communication.

Where and when work is accomplished will increasingly be driven by customer and employee needs. The growth in telecommuting and working from home will continue. As well as expanding traditional work hours to meet the needs of our customers–customers who have their own work schedule and family obligations. As Department of Defense employees, this is not news to you–DOD is always ready, twenty-four hours a day. Now the rest of us are learning what it's like to be on call 24-7!

Middle management will continue to experience shrinking ranks and changing roles. The manager's role will become more that of a leader, a coach, an enabler, and a teacher rather than a giver of assignments and

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8. Susan B. Rosenblum, *Retooling the Workforce: Poverty Reduction Must be Central, NLC President Tells National Audience*, NATION'S CITIES WEEKLY, Jan. 18, 1999, at 1 (discussing the Clinton Administration's education initiatives to include those in the federal government).

evaluator of performance. In other words, we either grow the wings we need to survive, *or we will become extinct.*

Through all of this, we must ensure that, as an organization, we never lose sight of the people involved. The business of government is still the business of people helping people, after all. With that said, let me offer some words of caution. We have to guard against work being divided into smart jobs and dumb jobs, thus dividing the workforce and society into "haves" and "have nots." We will have to cope with skill obsolescence that leads to job displacement and organizational restructuring. Our increased capability to monitor employees by computer may erode their rights to privacy. In addition, information technology also provides an example of a workforce learning need. Technology literacy is required in almost all occupations, and this constitutes a special challenge for us in keeping employees up-to-date on current applications. In fact, for the individual, survival and success in the distributed, high tech workplace depends on his ability to learn, unlearn, and relearn. That, in and of itself, is quite different from past workplace learning and development challenges.

Workers' values are also changing in America. Workers may be loyal to their profession, but as their employers become less loyal to them, they are also becoming far less loyal to the organizations they worked for than a generation ago.

One element of this phenomena is that workers have come to expect that their employer should address their learning needs. They will choose those employers that provide them with the most educational opportunities. Learning has become an economic and pocketbook issue for employees, and unions are increasingly interested in the training needs of employees.

As these trends become clearer, OPM is responding with new tools and strategies to provide agency managers with greater flexibilities for recruiting, managing, and retaining the workforce of the twenty-first century. We have already introduced many changes that have made a real difference in federal human resources management, these include: the delegation of examining to agencies, an automated database of all government jobs that is open around the clock, and a flexible framework for performance management that supports individual and team performance.

But, our job is not done. We need more human resources tools and strategies that meet the challenges of managing tomorrow's workforce.

At the beginning of this year, Vice President Gore announced his commitment to civil service improvements at the Global Forum on Reinventing Government.[9] The essential components of these improvements are twofold. First, we must have flexible performance and pay systems that support high performance, and encourage employees to do their best. Second, we have to create flexible recruitment and hiring systems that permit alternative selection procedures, authorize agencies to make direct job offers in critical areas–like information technology–and permit use of nonpermanent employees, with appropriate benefits, to expedite adapting to workload and mission shifts. We must do these things without losing sight of our merit principles and our commitment to our nation's veterans.

For the most part, these improvements are offered as options to agencies. Working with their employees, agencies can choose which new tools and strategies best fit their needs. Of course, each new tool or strategy is designed to work in the context of our merit principles, so that agencies can continue to ensure that the very best workers are hired, rewarded, and retained.

Along with these proposed flexibilities for managers to select and manage the high quality, diverse workforce they need, we are also introducing real accountability. This accountability translates into more emphasis on performance measurement, and ultimately, it also translates to improved recognition and rewards. Let me be frank. All stakeholders have an equal share in embracing these changes in the civil service. I can assure you that the merit system will remain the basis of all our improvements, but we cannot be afraid to try new things and experiment with new processes.

Thus, we must embrace increased labor-management partnership as a means of accomplishing these changes. With partnership comes more creativity and productivity, and ultimately, better service to the public. Our mission is too important, our opportunities too great, to accept anything less than full and constructive engagement and cooperation. In fact, in 1993, President Clinton issued an executive order to support the reinvention of government by improving federal labor-management relations.

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9. Office of the Vice President, *Vice President Gore Hosts Global Forum on Reinventing Government*, U.S. NEWSWIRE, Jan. 14, 1999.

The President called for the creation of labor-management partnerships throughout the government and established the National Partnership Council specifically to promote cooperative efforts in the Executive Branch.

Six years later, we see the value of these efforts. Partnerships between labor and management have cut costs, enhanced productivity, and improved the delivery of service to the American people at agencies like the IRS, the Veterans Administration, the Social Security Administration, the Customs Service, and the Army.

Just last month, I was privileged to give the John Sturdivant National Partnership Award to managers and union leaders from around the country for the work they are doing in partnership to provide better service and real cost savings to the American taxpayer. One of the winners was the U.S. Mint, where a partnership with the American Federation of Government Employees has brought dramatic gains in customer service and over $25 million dollars in annual cost savings. This is what can be accomplished when labor and management work together to solve the challenges that confront government today.

Both labor and management have a stake in making government work more effectively for citizens who demand and deserve more value for their tax dollars. That is why the President signed Executive Order 12,871[10] in 1993. He believed then–and continues to believe today–that by working together, labor and management can bring real change to government, like it has in every successful private-sector corporation that has remained competitive over the last decade. But for all the success we have had, the President also recognized that partnerships are struggling in some agencies and have yet to get off the ground in others. The fact is our work is far from over, and this Administration can do more–and should do more–to build on the success we have had and help spread partnerships more widely across the government.

We also know that discussions between labor and management over how many employees are assigned to a job, how that job gets done, and what kind of technology is used to get the job done right are essential elements to any conversation about better, more effective government. As

10. Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (1993).

lawyers, you will appreciate the fact that we refer to these fundamental issues as "(b)(1)" issues, named for their subsection in the U.S. Code.[11]

The President has recently released a memo to all agencies urging them to redouble their efforts to negotiate (b)(1) subjects. He wants to stimulate the creation of true workplace partnerships where labor and management work together to solve the problems that are critical to building a revitalized and reinvented government. He wants agencies and unions to work together to develop a plan for achieving *all* the important objectives that he established in the executive order, including the requirement to bargain over the (b)(1) subjects.

At the same time, any such plan should be designed to help federal agencies and federal workers deliver the highest quality service to the American people. In other words, neither partnership nor (b)(1) bargaining are goals in and of themselves, but rather the vehicles by which labor and management can help build a government that works better and costs less. Agencies and unions are being asked to report specifically on how their partnerships are helping to improve the performance of government. This unmistakable emphasis on bottom-line results is the most critical component of our efforts, and the very heart of labor-management partnerships.

Speaking of partnerships, another way we are promoting them in the government is through the increased use of alternative dispute resolution (ADR). Let's face it, in spite of the dramatic court room scenes on your TV series, our current formal administrative adjudicatory system in the federal government can be a very frustrating, very lengthy, very costly, and seemingly endless process for resolving issues.

Today, ADR offers us a better road–one that not only saves resources but also has the potential to lead to a more satisfied and productive workforce. One that might some day lead to my real dream–a television series called "OPM & ADR." Actually, OPM has a long history of encouraging the increased use of ADR in the resolution of workplace disputes, and I intend to carry on that tradition.

One of the reasons that ADR works so well is that its impact is real and, in these times of the Government Performance and Results Act,[12] ADR results *can* be measured. Programs are taking advantage of this–

11. 5 U.S.C.S. § 7106 (LEXIS 2000).

more and more government agencies are now evaluating ADR's impact in terms of estimated cost avoidance. That is, the amount of money that would be saved by resolving a matter early without going through a formal process. One program estimated that, during a two-year pilot, it saved almost two million dollars on EEO and grievance cases! That same program resolved ninety-four percent of its cases using ADR within fifteen days as opposed to the more typical 180 days or more for the traditional processes. That is two weeks as opposed to five-and-a-half months!

The success of ADR can be measured in other ways as well, by conducting surveys of those who use ADR–the employees, supervisors, and employee representatives in a specific program–to determine how satisfied they were with the process. One agency recently found that *ninety percent* of the users of their ADR program said they were satisfied with the mediation process and their mediators. When was the last time that ninety percent of federal supervisors, employees, and their representatives agreed on anything? This program's evaluation efforts also showed that in locations where ADR was available, the number of formal EEO complaints declined by as much as forty-five percent from the year before.

These are real numbers and, again, it is good for our government. I know many of you here today have been involved in this effort. This is an example of good government in action. Alternative dispute resolution works, and it is here to stay. As lawyers, as dispute arbitrators, and as keepers of the public trust, we all must take advantage of ADR in the years ahead.

On another critical issue, the OPM has been working hard to improve performance management in the federal government. By deregulating performance management, the OPM has put the agencies in the driver's seat as they endeavor to manage their own employees. Within broad parameters, agencies can now design and implement performance management systems that are suited to their mission and workforce, and provide them with maximum opportunity to deal effectively with poor performers.

Meanwhile, the OPM has also greatly enhanced the tools it offers to agencies and agency managers in support of their efforts to deal with poor performance. These tools include a CD ROM to provide an "easy read" for managers who want to understand the process of counseling, assisting

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12. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified at 5 U.S.C. § 306 & 31 U.S.C. §§ 1115-19, 9703, 9704 (1999)).

and possibly taking action based on unacceptable performance. It provides practical tips on counseling, sample letters, and checklists to help managers as they work with employees who are not performing acceptably.

Last year, OPM also took another look at the conventional wisdom that there are vast numbers of poor performers in the federal government. The resulting report, *Poor Performers in Government: A Quest for the True Story,*[13] estimated that only 3.7% of the federal workforce can be termed "poor performers." While there are no good benchmarks in the private sector for comparing this finding, it is lower than what conventional wisdom – or late night talk-show hosts–would lead us to believe. While no level of poor performance is entirely acceptable, there is no evidence to show that this problem is unique or goes beyond what might be found in other large organizations.

Our study showed that, as a whole, the supervisors of poor performers have not surrendered to cynicism and despair. Many report that they are actively pursuing a solution through formal and informal means. They also report, however, that supervisors who have pursued formal performance-based personnel actions describe the experience in intensely emotional terms. The effort they put forth to overcome real and perceived obstacles may be honestly characterized as "heroic." Of particular concern is their frequent perception that top management did not welcome or support their efforts. This must change.

The legal protections available to employees in non-federal public and private organizations are often similar to the federal system, and the trend seems to be toward increasing these protections. Federal supervisors and managers may be yearning in vain for a dramatic easing of their burdens and responsibilities in this regard. Thus, I am extremely pleased to report that the federal work force is not a sanctuary for the chronically bad employee. In fact, my experiences with federal civil servants at all levels and across agency lines have reinforced the fact that they are conscientious, hard-working, and highly skilled. Without reservation, I can extol their virtues and am proud to do so.

At the same time, the federal government must maintain a policy of "zero tolerance" for poor performance. While the Administration has been a strong advocate of the proposition that federal employees know best how

13. OFFICE OF PERSONNEL MANAGEMENT, REPORT OF A SPECIAL STUDY, POOR PERFORMERS IN GOVERNMENT: A QUEST FOR THE TRUE STORY (1999).

to perform their jobs, we also believe taxpayers should not be shouldered with the costs of paying people who simply cannot or will not do their work at acceptable levels.

So, there it is. The future, as I see it. I realize that we cannot anticipate every change the future holds, but I also know that by emphasizing adaptability and innovation, we will be better able to adjust to any surprises the future may hold. At OPM, we are not afraid to try new things and experiment with new processes. I encourage you to do the same.

It's a new era. It's already begun. The Dinosaur Killer is upon us. I have one simple piece of advice for you: don't be an institutional dinosaur. Be nimble. Adapt. Don't be afraid to change. In the long-run, it is not only in the government's best interest, it is in *your* best interest.

I have enjoyed my time here and the opportunity to share ideas and innovations with you, as we each create a new, more global government–built on the lessons of the past, the innovations of the present, and the needs of the future–to help our nation move successfully into the twenty-first century.

HONOR BOUND[1]

REVIEWED BY COLONEL FRED L. BORCH[2]

This is truly the definitive work on the American prisoner of war (POW) experience in Southeast Asia, and no book could have been more thoroughly researched or provided more detail on American men (and women) held captive by the North Vietnamese, Viet Cong, Pathet Lao, and Communist Chinese between 1961 and 1973. The authors, Stuart Rochester, a professional historian at the Office of the Secretary of Defense, and Fred Kiley, a retired Air Force officer who teaches at the Air Force Academy, wrote *Honor Bound* as part of their official duties at the Department of Defense. The official nature of their research and writing meant not only that they had virtually unlimited access to official POW records (classified and unclassified), but also meant that they had ready access to the soldiers, sailors, airmen, marines, and civilians held as POWs during the Vietnam conflict.

Despite the tremendous volume of factual information in *Honor Bound*, the book is never tedious or boring. On the contrary, it is both riveting and compelling. Riveting because the dispassionate writing in *Honor Bound* has the opposite affect; the stories it tells of terrible suffering and incredible courage catch hold of the reader and do not let go. Compelling because what Stuart Rochester and Fred Kiley have written has a powerful and irresistible affect on the reader. Thus, for example, while many who read this book know that retired vice admiral and former vice presidential candidate Jim Stockdale was horribly brutalized by the North Vietnamese, the pages of *Honor Bound* leave no doubt why Stockdale was awarded the Medal of Honor after more than seven years as a POW. Stockdale's experiences–and those of men like John McCain, Bud Day, Nick Rowe, and others described in the book–are simply electrifying.

While much of *Honor Bound*'s narrative focuses on the experiences of individual combat captives–which is more than enough reason to read the book–what really makes the monograph important is the "big picture" view it presents of the POW experience in Southeast Asia. For example,

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1. STUART I. ROCHESTER & FREDERICK KILEY, HONOR BOUND (1999); published in Annapolis, Md. by the Naval Institute Press, 706 pages, $46.00.

2. Judge Advocate General's Corps, U.S. Army. Currently serving as Staff Judge Advocate, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia.

Rochester and Kiley demonstrate conclusively that those Americans held in Laos and South Vietnam suffered more–and had markedly lower rates of survival–than those Americans held in Hanoi. It was better to be held by the North Vietnamese than suffer the "peculiar blend of bondage and vagabondage"[3] that was the lot of POWs held in South Vietnam. But it was still better to be held prisoner by the Viet Cong rather than the Pathet Lao, whose poor treatment of American captives, combined with the "hostile environment"[4] of Laos, made survival difficult at best.

Similarly, *Honor Bound* shows that American civilians taken prisoner in Southeast Asia suffered the same deprivations and brutal mistreatment as their military colleagues. For example, civilian pilot Ernest Brace, taken prisoner by the Pathet Lao in 1965, became "the longest-held civilian prisoner of war and the longest-held survivor, civilian or military, to return from Laos."[5] Finally, to ensure that the reader understands the full ramifications of life as a POW, *Honor Bound* includes a line drawing[6] in explaining how the North Vietnamese tortured Americans in their custody.

Judge advocates will be particularly interested in the legal aspects of the POW experience in Southeast Asia. While *Honor Bound* does discuss the applicability of the Geneva Prisoners of War Convention, some readers will wish that Rochester and Kiley had explained more fully the evolution of American and South Vietnamese thinking about the legal status of POWs. Early in the Vietnam conflict, there was little interest in POWs or in the laws of war relating to combat captives. This was because the South Vietnamese took the view that the Viet Cong were bandits deserving prosecution and punishment as criminals. The decision to afford POW status to combat captives came only when large numbers of Americans began to be captured by the enemy.

Recognizing that Americans were not going to survive as POWs unless they obtained the protections of the Geneva Conventions, Army lawyers like Colonel George Prugh, the Military Assistance Command, Vietnam (MACV) Staff Judge Advocate from 1964 to 1966, led efforts to persuade the South Vietnamese that their conflict with the Viet Cong and North Vietnamese was no longer an internal civil disorder. As a direct result of Prugh's work, the military, and later the Government of South

3. ROCHESTER & KILEY, *supra* note 1, at 478.
4. *Id.* at 278.
5. *Id.* at 283.
6. *Id.* at 147.

Vietnam, acceded to the American view that the insurgency was an armed conflict of an international character, and that the benefits of the 1949 Geneva Prisoners of War Convention should be given all captured Viet Cong and North Vietnamese soldiers. This was a public relations coup for the South Vietnamese.

At the same time, applying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of a change in the law.

But, while *Honor Bound* might have benefited from more legal history, that arguably is specialized information that goes beyond the scope of the monograph. In any event, in the first eighty-five pages of their monograph, Rochester and Kiley do examine the experiences of French (and American) POWs held by the Viet Minh from 1946 to 1954, and also discuss the fate of prisoners held by the Viet Cong from 1961 to 1964. Consequently, the reader gets more than enough of a historical setting for the 500 pages that follow.

Honor Bound has received rave reviews in *The Washington Post* and other widely read newspapers and journals.[7] The only criticism of note is worth mentioning if only to demonstrate its foolish character. After conceding that the book "contains just about any detail that a careful researcher could want," the reviewer in the respected *Journal of Military History* complains that Rochester and Kiley fail to include information about deserters who, after absenting themselves from the American forces, remained in South Vietnam after hostilities ended.[8] Certainly, it would have been interesting to learn what happened to the unknown number of Americans who intentionally were "Missing in Action." But to criticize

7. *See, e.g.*, Duane E. Frederic, *Official History Records the Valor of American POWs in Southeast Asia*, ARMY MAG., May 1999, at 61 (reviewing *Honor Bound*).

8. Merrill L. Bartlett, Book Review, *Honor Bound*, 63 J. MILITARY HISTORY 1043-44 (Oct. 1999).

Honor Bound for failing to examine this issue is misplaced. The clear focus of *Honor Bound* is on POWs–those held as combat captives against their will–and not on criminals.

Worth mentioning are the three appendices in *Honor Bound*. The first provides useful comparative data on POW numbers in World Wars I and II, Korea, Vietnam, and the Persian Gulf. Appendix 2 provides locations of all POW camps in North Vietnam. While both are valuable, Appendix 3 is a treasure: a twenty-page alphabetical list of all U.S. personnel captured between 1961 and 1973. The list includes data on time spent as a prisoner and, where applicable, whether the POW died in captivity, escaped, or was eventually released. The reader will refer frequently to this appendix to discover the fate of each person discussed.

As Jim Stockdale writes in his Afterword to *Honor Bound*, the American POW experience in Southeast Asia was a "grim, sustained, and bloody struggle."[9] The irony is that while hundreds of thousands of American men and women could not prevail against the North Vietnamese and their allies, the POWs won their war through sheer determination. As the story of their fight, *Honor Bound* belongs in every library. It deserves the widest possible readership. It belongs on the bookshelf of everyone interested in the triumph of the human spirit–and the war in Vietnam.

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9. ROCHESTER & KILEY, *supra* note 1, at 593.

A BETTER WAR:

UNEXAMINED VICTORIES AND FINAL TRAGEDY OF AMERICA'S LAST YEARS IN VIETNAM

REVIEWED BY CAPTAIN JEANNE M. MEYER[1]

Scientists have proven the existence of synergism, whereby "the combined action of two or more substances or agencies achieve an effect greater than that of which each is individually capable."[2] Lewis Sorley has proven the opposite—that two good ideas combined together can achieve a result with *less* effect than each is individually capable of. In his new book *A Better War: The Unexamined Victories and Final Tragedy of America's Last Years in Vietnam*,[3] Sorley inartfully attempts to combine into one book what would have been excellent material for two separate books. The result is a book with an identity crisis, constantly fighting within itself to find its focus. At times the book seems to be a history of the last years of the Vietnam War. At other times, it seems to be a biography of the commander of the United States forces during those years, General Creighton W. Abrams.[4] Unfortunately, neither subject matter comes out a clear winner, leaving the reader unsatisfied as to both.

A Better War is at its best when Sorley focuses on either the war or General Abrams. Sorley's discussions focusing on the last years of the war are particularly informative and thought provoking. As he points out in his

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1. United States Air Force. Written while assigned as a student, 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

2. WEBSTER'S II NEW RIVERSIDE DICTIONARY 698 (1984).

3. LEWIS SORLEY, A BETTER WAR: THE UNEXAMINED VICTORIES AND FINAL TRAGEDY OF AMERICA'S LAST YEARS IN VIETNAM (1999).

4. Although not obvious on its face, even the title of the book exemplifies this confusing battle for focus. At first glance, the title, *A Better War: The Unexamined Victories and Final Tragedy of America's Last Years in Vietnam*, seems to clearly indicate that the author: (1) wrote a book about the finals years of the Vietnam War, and (2) for reasons the book will explain, believes that those years were fought as a "better" war than the previous years. Yet upon opening the book, the first thing one sees is a quote from Robert Shaplen, a correspondent for *New Yorker Magazine* during the war: "You know, it's too bad. Abrams is good. He deserves a better war." *Id.* at unnumbered page following Table of Contents (quoting Robert Shaplen, *quoted in* Kevin Buckley, *General Abrams Deserves a Better War*, N.Y. TIMES MAG., 5 Oct. 1969). One then begins to wonder if the book is actually about General Abrams and why he deserved a "better war."

prologue, little is written about the last years of the Vietnam War, from the Tet Offensive of 1968 until the signing of the Paris peace accords in 1973. *A Better War* expertly fills that gap, detailing areas generally glossed over in other discussions of the war.[5] For example, in the chapter on intelligence, Sorley describes the efforts of the United States to intercept and decode North Vietnamese messages passed along the Ho Chi Minh trail.[6] He relates in an understandable and interesting manner the complexity of the North Vietnamese intelligence system and how the United States was able to break it. Sorley then analyzes and explains the tremendous value of this breakthrough—the ability for the United States to track and predict enemy movement along the Ho Chi Minh trail.[7]

Similarly, in various chapters describing military conflicts that took place during the last few years of the war, Sorley provides clear, interesting descriptions of on-going battles and their military significance. Each of these chapters provides helpful maps and descriptions, allowing the reader to easily visualize the conflicts. It is here, in describing military battles during the war, that Sorley shines. His background as an Army commander in Vietnam is evident, as he provides cogent descriptions that draw the reader in and describe the significance of different maneuvers, strategies, and tactics. In the chapter on the Cambodian incursion,[8] before discussing the battle, Sorley spends time explaining the importance of cutting off the previously protected enemy base camps and supply lines located in Cambodia.[9] Analysis such as this provides valuable context to understand the strategy behind the war we fought during those years.

Obviously, a book on the last years of the Vietnam War would not be complete without some discussion of the leaders during that time period. Sorley discusses several influential people during the time of the war, but focuses primarily on the leader of Military Assistance Command, Vietnam (MACV), General Abrams. When discussing General Abrams' reaction or conduct during a specific event in the war, Sorley rightly fits this information in as part of the war history he is writing. By citing several examples, Sorley paints a picture of the leadership skills and management style of the MACV commander during the war. For example, one of the first things

5. *See, e.g*, EARL H. TILFORD, JR., CROSSWINDS: THE AIR FORCE'S SET-UP IN VIETNAM (1993); MARK CLODFELTER, THE LIMITS OF AIR POWER: THE AMERICAN BOMBING OF NORTH VIETNAM (1989).

6. SORLEY, *supra* note 3, at 45-58.

7. *Id.* at 49.

8. *Id.* at 191-216.

9. *Id.* at 200-03.

Abrams did as commander was direct his subordinates to always provide him with bad news first during meetings, and only provide good news if there was time left over.[10] Abrams also demanded that his command provide an accurate and balanced picture of their successes and failures. He insisted that any errors and bad news were to be reported and admitted as soon as possible.[11]

Abrams's leadership style was to command with integrity, putting the mission first and his troops a very close second. His main objective was to have his troops ready to fight. If they were properly trained and motivated to fight, whether they happened to have shaved that morning or needed a haircut was not important.[12] Abrams was very concerned about the morale of the troops under his command, as evidenced by his statement that "the most powerful thing we've got here is the attitude of the Americans who are assigned here . . . if that ever deteriorates substantially, that'll be worse than any goddamn thing that Giap or any of the rest of them can think of."[13] Abrams traveled extensively, visiting and interacting with his troops on a daily basis.[14] By doing so, he set the example for his subordinate commanders. He empowered his subordinates to take care of their troops, with the concurrent expectation that they would carry out their responsibilities. As Abrams noted, "All of us [the military commanders], we've got to see that it is done right. That's what we stand for, and that's the way it's going to be."[15] Sorley best sums up Abrams's leadership in Vietnam as that of "stewardship." As a leader, Abrams did the best he could with what he had to work with, and did it with selflessness, dignity, and integrity.[16]

When Sorley discusses General Abrams in the context of his position as MACV commander, the discussions fit nicely as one piece of the puzzle that is the history of the last years of the war. Sorley's analysis of the war, however, is soon overshadowed by his increasing focus on Abrams.[17]

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10. *Id.* at 33.
11. *Id.* at 23-24.
12. *Id.* at 300.
13. *Id.* at 290.
14. *Id.* at 294.
15. *Id.* at 296.
16. *Id.* at 387.
17. One of the first symptoms of this changing focus is the inclusion of numerous direct quotes from Abrams. The quotes are occasionally interesting, and provide insight into the man and his thinking. However, the sheer number of quotes quickly becomes annoying and detracts from the discussion of the war. The reader soon begins to wonder if

When writing about Abrams, Sorley seems to lose the objectivity he initially displayed when discussing military aspects of the war. His uncritical support of Abrams begins to creep into his discussions of the war, undercutting his ability to accurately balance, analyze, and criticize events of the time.

From the beginning of the book, Sorley credits Abrams with bringing a new military strategy to the war, that of fighting "one war." Under this concept, Abrams's troops focused not only on military battles, but also on pacification[18] and working with the people of South Vietnam to defeat Viet Cong guerillas.[19] Sorley believes without question that Abrams's shift in focus to the guerilla war ultimately defeated the enemy's guerilla war effort and forced them to fight a conventional war.[20] Sorley goes so far as to harshly criticize the former MACV commander, General William C. Westmoreland for daring to suggest that Abrams's shift in strategy was not fully responsible for the defeat of the enemy.[21] Sorley's desire to place all credit at Abrams's feet ignores an excellent point made by Westmoreland and others. Abrams came to command shortly after the enemy's Tet Offensive of 1968. There is no doubt, as even Sorely notes, that the Tet Offensive was a turning point in the war.[22] The North Vietnamese suffered enormous losses, including the loss of a large majority of the guerilla fighters in South Vietnam.[23] By necessity, then, the North Vietnamese turned towards conventional warfare.[24] Not surprisingly, as they began to fight a war that fit more comfortably within the United States war-fighting strategy, the United States began to have more success fighting the war. The conventional war waged by the North Vietnamese required heavier logistics and supply lines, as well as more open maneuvering. These changes in the enemy's war-fighting strategy provided a more target-rich environment for U.S. land and air forces to destroy.

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17. (continued) Sorley included so many quotes to justify the amount of time he spent researching and listening to audiotapes. Sorley explains in his Acknowledgement that he listened to 455 tapes made of various meetings Abrams attended while in Vietnam. Based on these tapes, Sorley made nearly 3200 pages of notes. *Id.* at 390-91.

18. Pacification, or Vietnamization, was a program of working with the South Vietnamese population to provide programs of self-government, self-aid, and self-defense. The primary role of the military was to provide territorial security and protection from the Viet Cong. *Id.* at 63-64.

19. *Id.* at 18-19.

20. *Id.* at 30, 407-08 n.1.

21. *Id.*

22. *Id.* at 12.

23. *Id.* at 14; CLODFELTER, *supra* note 5, at 139.

24. CLODFELTER, *supra* note 5, at 139.

JUS PACIARII:

EMERGENT LEGAL PARADIGMS FOR PEACE OPERATIONS IN THE 21ST CENTURY[1]

REVIEWED BY COLONEL JAMES P. TERRY[2]

The recent conflict in the former Yugoslavia provides an important vehicle for Gary Sharp as he explores the emergence of three international law paradigms critical to successful future humanitarian and peacekeeping operations. The author, an international law scholar and retired senior Marine Corps judge advocate whose previous books include the highly regarded *United Nations Peace Operations* (1995) and *CyberSpace and the Use of Force* (1999), carefully presents legal arguments and rationale that support paradigms to afford peacekeepers greater legal protection, to impose an obligation on all states to search for and arrest war criminals, and to grant the United Nations (UN), states, and peacekeepers a greater range of legal authority to use armed force for humanitarian intervention.

As his mode of proving these paradigms, Sharp, in Parts I and II, reviews existing international law protections for all military forces, details the evolution of UN peace operations, and examines the decade of state practice that has most changed the international community's attitude toward its peacekeepers. These parts conclude that military forces serving under a UN Charter, Chapter VII mandate (authorizing the use of necessary means) should enjoy absolute immunity from any receiving state authority against which the Security Counsel has directed coercive action. The draft protocol advocated by the author and included within this part, if accepted by the community of nations, would protect all personnel who serve under the authority of the United Nations, and make them unlawful targets under all circumstances.

In Part III of the text, Sharp examines the history of a state's obligation to search for and arrest suspected war criminals, details the obligations of states to search for and arrest persons suspected of war crimes in Bosnia

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1. W. GARY SHARP, SR., JUS PACIARII: EMERGENT LEGAL PARADIGMS FOR PEACE OPERATIONS IN THE 21ST CENTURY (1999); 392 pages, $24.95.

2. United States Marine Corps (Retired). Former Legal Counsel to the Chairman of the Joint Chiefs of Staff 1992-1995. Currently serves as a senior official in a government agency. Widely published in the areas of coercion control and national security law.

and Kosovo, and concludes that customary international law imposes an obligation on all states to search for and arrest persons suspected of grave breaches in all territories where they have been authorized by international law to exercise jurisdiction.

Part IV of the text is by far the most important, in the view of this reviewer. For the first time, a scholarly examination is undertaken of the right of nations to intervene for humanitarian reasons where they have neither their own nationals at risk nor a UN resolution authorizing military action to rely upon. The determination by the United States to support a military response by the North Atlantic Treaty Organization (NATO) in Kosovo, despite the lack of Security Council approval, was severely criticized in the international legal circles as *ultra vires*. In carefully reviewing the key issue of whether NATO can exercise its regional prerogative under Chapter VIII of the UN Charter (addressing the authority of Regional Organizations), using all necessary means under Chapter VII, without Security Council authorization, the author makes the case that state practice and customary international law have developed sufficiently to condone humanitarian intervention to prevent genocide and other widespread arbitrary deprivation of human life in violation of international law. In Kosovo, moreover, the reasonable fear of the conflict spreading into neighboring NATO states such as Hungary, gave NATO legal justification in using reasonable and proportional force in collective self-defense to prevent the civil war from reaching beyond Serbia-Montenegro. We may rightly conclude, as did Sharp, that existing law and state practice permit a state or collective of states in a regional organization like NATO to use armed force to prevent genocide and other widespread abuses of human life within its regional boundaries whether Security Council authorization is present or not.

In this comprehensive volume, Sharp demonstrates through state practice that the international community desires to adhere to the principles embraced by the Charter of the United Nations. He concludes that the international community must now embrace the legal paradigms that embody and enable these principles.

This volume leaves for another day resolution of the conflict between the exercise of a nation's inherent right of self-defense (beyond that provided by the Charter) *as judged by that nation*, and the concomitant right of peace enforcement units, operating under the aegis of the UN Security Council, to exercise their charter free from obstruction in that nation's territory. Where these rights collide, there has always been agreement, his-

torically, that the forces involved in national self-defense would not be held liable and could not be prosecuted criminally for their participation, despite the lack of moral suasion in their nation's cause. Under the peacekeeper protection regime advocated by the author, however, all this could change, as the peacekeepers and peace enforcers would enjoy complete immunity from any attacks, whether in self-defense or otherwise, when operating under UN authority. Nevertheless, the principled discussion within this text concerning humanitarian intervention and the authority of regional organizations to exercise their authority separate from Security Council approval makes this one of the most important legal treatises published in years. This volume is a welcome addition to the literature and will be considered a valued resource of every serious international practitioner.

AGENT OF DESTINY:
THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT[1]

REVIEWED BY MAJOR E. A. HARPER[2]

General Winfield Scott is widely remembered as Old Fuss and Feathers, a worn out general who, at the beginning of the Civil War, was so obese and decrepit that he could not even mount his horse.[3] John S. D. Eisenhower laments this memory and seeks to change it in *Agent of Destiny: The Life and Times of General Winfield Scott.* Eisenhower portrays Scott as a gallant, courageous, and vain man; a master of military art and science but a naïve and fumbling politician. The painting that graces the dust jacket of the book is telling in the author's view of his subject. He starts his book with an emphatic sentence: "He was an astonishing man, one of the most astonishing in American history."[4] Eisenhower's goal in writing *Agent of Destiny* is clearly to rehabilitate Scott's reputation in the modern American mind. He meets that goal admirably, though a lack of documentation calls into question the work's scholarly value. A second, though by no means secondary, effect comes from telling Scott's story. Eisenhower also tells the story of the youth of the United States of America. *Agent of Destiny* is valuable to the military officer as a study in successful military leadership, and in the evolution of the U.S. Armed Forces and the nation itself.

Eisenhower breaks no new ground with this work, but rather retells Scott's story with a fresh, positive spin. Unfortunately, his documentation is scant and inconsistent. He relies heavily on secondary sources, especially two biographies of Scott[5] and histories of the army and the nation. He also draws heavily from the general's own memoirs.[6] Eisenhower

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1. JOHN S.D. EISENHOWER, AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT (1997).

2. United States Marine Corps. Written while assigned as a student, 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. One of several photographs of Scott, along with pictures and portraits of his contemporaries, included in the book bears the caption: "Winfield Scott in 1861. This image, showing Scott in his old age, is unfortunately the one that has most frequently characterized him in the public mind." EISHENHOWER, *supra* note 1, at 243.

4. *Id*. at xiii.

5. CHARLES ELLIOT WINSLOW, WINFIELD SCOTT, THE SOLDIER AND THE MAN (1937); EDWARD D. MANSFIELD, THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT (1852).

attributes opinions and judgments to the historical figures that march through the story, usually without the slightest documentation as to authenticity. When he does cite to an authoritative, primary source, it is too often through one of the secondary sources. For instance, notes 3, 6, and 7, in chapter seven cite original letters from participants in the event in question, but only through the secondary sources of Elliot's biography and Henry Adams's history[7]. Notes 1, 4, 8, and 9, of that same chapter are informational footnotes, rather than source citations, and even these offer unproved facts.

Elsewhere, Eisenhower gives casualty statistics for many battles, but rarely cites their sources.[8] In criticizing the conduct of one of Scott's rivals, General Edmund Gaines, during the Second Seminole War, Eisenhower asserts that the garrison Gaines commanded was relieved when the Seminole enemy treated for peace, "despite their later bravado."[9] Eisenhower uses this episode to attack his subject's antagonist, yet offers no authority for the assertion. This habit leaves the reader concerned with the authenticity of the facts from which Eisenhower's often insightful conclusions are drawn. Eisenhower's haphazard documentation and heavy reliance on secondary sources call into question the credibility of his work. That said, this review is of the General Scott whom Eisenhower creates, a skilled and popular commander who played a pivotal role in the development of America.

The shortcomings in authority aside, *Agent of Destiny* is a well-written, enlightening, and entertaining book. Eisenhower tells his story with flair. He is skilled at concisely explaining historical events and succinctly placing them in perspective. Eisenhower relates the battles and campaigns–military, political, and social–with an obvious knowledge of the subject. He translates the action into a clear picture for the reader; there is enough detail for depth, but not so much as to wallow in a quagmire of minutiae. Eisenhower provides useful, often unique, maps and sketches.

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6. WINFIELD SCOTT, LIEUTENANT GENERAL, LLD, MEMOIRS (1864). Of course, Scott's memoirs are a primary source, but they must be viewed skeptically, as they were written at the end of his life, with his memory fading and a tendency towards aggrandizement.

7. Henry Adams, History of the United States during the Administrations of Jefferson and Madison (1890).

8. For example, on page 94, in describing the results of the Battle of Lundy's Lane, at which Scott was wounded and became a hero and nationally prominent figure, he puts the number of British killed, wounded, and missing at 876 and American losses at 861. No sources for these statistics are given.

9. EISENHOWER, *supra* note 1, at 156.

The illustration of the growth of America during Scott's military service is particularly creative and insightful.[10] However, as with almost any work of history, more maps would have been helpful, especially in the portion regarding the Mexican-American War.

If America was born on 4 July 1776, its infancy lasted until the Louisiana Purchase in 1803. Puberty took place from 1803-1865 and the Civil War, adolescence from 1865 until 1914 and World War I, when America came of age as a young adult. The United States reached full maturity in 1945, following World War II, and enjoys its greatest strength at present. More than any single person, Scott was responsible for shepherding the young state through its formative, pubescent years. He served on active duty under fourteen presidents, thirteen as a general officer.[11] He was a hero in one war, a conqueror in another, and an elder statesman in his last. The very title of the book illustrates that Scott was instrumental in the growth and maturation of America. Eisenhower equates the presidents, collectively, to the architect of the nation, while Scott served as the builder, the one who carried out the master plans.[12]

One of the key threads of the book's nation building theme is the development of the Army as a professional force and as a cradle of political leaders. As America matured, so did its armed forces. An examination of Scott's life illustrates his own growth and that of the military and the nation.

Scott was perhaps the nation's first regular, professional soldier. As such, he disdained the militia forces that were then so prevalent in national defense. Ironically, his first military service was with the Virginia militia, when he joined, but was never mustered into, a troop of cavalry from Petersburg in 1807. Scott served as a corporal, leading a small detachment of men and eventually making prisoners of a group of British sailors illegally ashore at Lynnhaven Bay. He was soon ordered home, and he left the troop of which he had never been an official part.[13] Such was the embryonic nature of the armed forces at that time, an ambitious young man could lead a detachment against the enemy without ever really joining up!

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10. *Id*. at 7.
11. *Id*. at 14.
12. *Id*. at 13.
13. *Id*. at 8.

Due to hostilities with Great Britain, which would eventually ripen into the War of 1812, the Army's authorized strength grew significantly in 1808. Among the first to seek a commission was Winfield Scott. The way in which he went about it is truly telling of the infant state of both the Army and the country. Scott sought an interview with President Thomas Jefferson himself, requesting an appointment in the 2d Light Artillery Regiment, as a captain, no less. He received his commission and proceeded to make rank at a meteoric pace. At the outbreak of hostilities in 1812, Scott was a lieutenant colonel, commanding a good portion of the 2d Light Artillery on the Canadian frontier of Western New York. He achieved this despite near dismissal from the service for insubordination the year before. In March 1814, Scott was promoted to brigadier general and commanded at the Battles of Chippewa and Lundy's Lane.

Following the war, Scott was one of only three general officers selected to remain on the list of regular officers, and he was charged with the Eastern Command. In the space of seven years, he had risen from company grade officer to the third (or second, it was always a point of contention for the vainglorious general) ranking officer in the entire Army. Scott's exploits supported rapid advancement. It was the chaotic state of the Army that supplied the opportunity. There were so few capable military leaders that Scott could become a hero and be promoted in rank at an extraordinary rate. The "Old Guard" of officer-veterans of the Revolutionary War was no longer up to the effort. Young Turks like Scott eventually replaced them. Scott found himself on the other end of that cycle in 1861, when he was pushed aside by younger, more able officers.

The distinction of regular soldier was important. Regulars were trained professionals, while volunteer militiamen usually had only rudimentary drill and tactics training. Regulars could be counted on to stand in formation in the face of the often-murderous musket fire of the day. By contrast, though often brave individuals, the militia units were not so reliable during a battle. When Scott's troops faced British regulars at the Battle of Chippewa, they were mistaken for militia by the British commander. When he realized his mistake, the Englishman is said to have exclaimed: "Those are regulars, by God!"[14] Scott's troops defeated the British, in one of the few victorious engagements of the war.

For the rest of his career, Scott would command a core of regular soldiers augmented by volunteers. In the Black Hawk and Seminole Wars of

14. *Id*. at 84.

the 1830s, militia swelled the austere regular forces. Many of these volunteers would go on to fame and fortune,[15] but until then they were just militia to the regulars. Scott had to abandon a campaign in the Second Seminole War because the term of enlistment of his volunteers was up, and they preferred to return home to their families and farms rather than continue to slog through the swamps of Florida.

Scott's crowning military achievement could easily have never occurred, because of the nature of his largely militia army. On 13 May 1847, the one-year term of service for seven regiments of militia expired. These seven regiments comprised over half of Scott's force, which had just taken Veracruz, Mexico and was half way to Mexico City, and the Halls of Montezuma. Scott was forced to send these men home to Tennessee, Illinois, Georgia, and Alabama. He was left with only 7000 troops, in the middle of the country with which he was at war. Scott was eventually reinforced and took Mexico City, ending the Mexican-American War. The very fact that a conquering army could melt away on the verge of ultimate victory illustrates that this country, while capable of foreign campaigning, still had an immature military system.

The Mexican-American War was Scott's defining moment, but a vast array of the men who served under him, both as regulars and militia, would go on to even greater fame. Zachary Taylor and Franklin Pierce both served as Scott's subordinate commanders, and later were elected President of the United States. James Buchanan was Secretary of State and would also later hold the nation's highest office. Of course, many of the great generals of the Civil War served under Scott, and even on his staff, including Ulysses S. Grant (another eventual president), Robert E. Lee, George Meade, Joe Johnston, and P.G.T. Beauregard. Scott commanded, mentored, crossed paths, and occasionally crossed swords, with an extraordinary number of the nation's political and military elite.

One of Scott's final important decisions regarding the militia seemed innocuous enough, but had immense consequences. He was determined to use the regular forces to their utmost abilities at the outbreak of the Civil War. As General in Chief, he ordered all regular soldiers and officers to be concentrated in regular units, and denied permission to transfer to the state militia forces being raised. Commands and high rank were much easier to obtain in the new units, and the regular officers were eager to take advan-

15. Among the militia in the Black Hawk War was a young captain of the Illinois Mounted Volunteers named Abraham Lincoln. EISENHOWER, *supra* note 1, at 417 n.2.

tage. Scott's order had the unfortunate effect of stagnating the regular officers and placing less experienced soldiers in positions of high command. Rather than take command of a regiment or brigade of a state militia, a captain who had been in the service for many years was forced to remain as a company commander in the quiescent regular units. Ironically, Scott's well-intentioned order closed the window of opportunity through which he had rushed forty-five years earlier. It also bequeathed to the Union Army the command structure that proved so ineffective during the first part of the Civil War.

The need to raise so many new units showed that America still lacked a truly capable professional military force. However, that so many regular officers were frustrated with remaining in their units is evidence that, though not yet a major power, the United States was developing into one. From the birth of the nation to its adolescence, Scott led the military from a fledgling force in 1812 to an expeditionary power in Mexico to the brink of a true military machine during the Civil War.

Eisenhower's portrait of Scott is one of unparalleled military success, a brilliant and courageous officer who cared deeply for his men. It is also one of a pompous and vain general with political ambitions but lacking the skill and savvy to bring them to fruition. Eisenhower examines both sides of Scott's personality with an even hand. However, in his zeal to rehabilitate Scott, Eisenhower gives short treatment to Scott's part in failures and dwells on his successes.

An excellent example of Eisenhower's heavy pro-Scott bias lies in his treatment of Scott's command of the mission to remove the Cherokee nation from its homeland in the Southeast to the Oklahoma Territory. The entire ordeal is dealt with in a ten-page chapter, entitled *Along the Trail of Tears, A Sympathetic Scott Fails to Alleviate the Pain of the Cherokee as they Head West*.[16] This speaks volumes as to Eisenhower's slant on Scott's role. Eisenhower takes pains to point out Scott's instructions ordering decent and humane treatment, including that "collection points were to be provided with shade, water, and security."[17] He then blames the misery of the expatriated Indians on the excesses of the militia policing the movement. Scott exercised ultimate control over the operation, so he bears responsibility for its infamy. There is no little irony in the fact that while

16. *Id*. at 184.
17. *Id.* at 190.

Scott is not well remembered for his tremendous successes, neither is he remembered for his notorious failures.

Perhaps the most useful aspect of *Agent of Destiny* is Eisenhower's discussion of Scott as a superb soldier and leader. Courageous in battle, Scott led from the front during the War of 1812. His courage was not limited to facing enemy fire. When an outbreak of cholera struck his men during the Blackhawk War in 1831, Scott personally visited and cared for every one of his sick men daily, risking infection himself. Eisenhower states, in richly deserved, glowing admiration, "[I]f Scott had never accomplished another thing, he could be remembered for his conduct at this time. Combating a hidden force that could strike a man down without warning and subject him to excruciating death, Scott never wavered in seeing to the welfare of his men."[18] Similarly, when the term of service ended for his militia in Mexico in 1847, he not only released them, but he expedited their departure so as to avoid the *vermito* (a tropical illness) season at Veracruz.

Courageous and caring, Scott also possessed the third attribute of a great military leader–boldness. Extremely well versed in military art and science, he was also an innovator. He was one of the first American officers to understand and employ the relatively new concept of light, or flying, artillery. Perhaps Scott's boldest stroke was to move inland from Veracruz through Jalapa and Puebla to Mexico City in 1847, without securing his supply line to the sea. In an era where travel was difficult and logistical support critical, secure lines to ensure ready resupply were considered essential. It was the rare general, such as Napoleon, who ventured beyond his lines of communication. Scott's daring gambit enabled him to advance on his ultimate objective in ample strength, despite his limited manpower resources. Ulysses S. Grant, a company commander in Scott's army, later used a similar strategy in his Vicksburg Campaign during the Civil War.[19] Ultimately, of course, Scott was vindicated through conquest of Mexico City and victory in the Mexican-American War. He thereby refuted the aging Duke of Wellington, who had exclaimed: "Scott is lost. He has been carried away by success! He cannot take the city and he cannot fall back on his bases."[20]

Eisenhower also recognizes the less flattering side of Scott's character. He explores in depth the general's greatest liabilities, his vanity and

18. *Id*. at 128.
19. RUSSELL F. WIEGLEY, THE AMERICAN WAY OF WAR 140 (1973).
20. EISENHOWER, *supra* note 1, at 261.

his carelessness in expressing himself. Scott always wore full dress uniform and fastidiously stood on the ceremony of rank. He challenged and was challenged to several duels over supposed insults to his pride and honor. At the outset of the Mexican-American War, Scott committed a blunder that exemplifies these two weaknesses. He addressed a letter to Secretary of War William Marcy regarding command of American forces on the Texas frontier. He complained that he, as the senior officer, should have command rather than the hero of several recent battles, and eventual president, Zachary Taylor. Marcy and President James K. Polk published the letter. Not only was Scott's vanity chided, his choice of words was derided. He began his letter, "As I sit down to a hasty plate of soup."[21]

While Scott was respected and admired as a soldier and a gentleman, he was never embraced by the public as a political figure. Perhaps it was his lack of guile, his opinionated manner, or his peacock air. When the Whig party nominated Scott as its candidate for president, a prominent Whig expressed concern. He conceded Scott's superiority as a soldier over other former military men who had become president, but he worried that Scott lacked "those attributes and qualities which make the people love him as they loved Harrison, Taylor, and Jackson."[22]

Agent of Destiny achieves Eisenhower's goal of reminding the world that there is more to General Winfield Scott than his decrepit condition in 1861. But perhaps, in the end, it is exactly that memory which most accurately and most completely describes Scott. America's first professional officer remained loyal to the Union he had so long served, despite vicious attacks in his native Virginia.[23] He designed and advocated a militarily sound strategic concept, the Anaconda Plan,[24] that ultimately proved successful, but which was not politically feasible or acceptable at the time. Scott's long years of service and campaigning, along with the cares of command, had taken its toll. He suffered from several maladies contracted in Mexico, as well as from wounds received on the Canadian Frontier. General Winfield Scott was a gallant warrior, serving well past his prime, because nobody else could do the job.

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21. *Id*. at 225.

22. *Id*. at 327.

23. Scott was burned in effigy by students at the University of Virginia and citizens in several cities in the Old Dominion. EISENHOWER, *supra* note 1, at 391.

24. The Anaconda Plan called for a Union blockade of the Confederacy. It relied on patience to bring to bear the overwhelming superiority in population and industrial base enjoyed by the Union. Neither the people nor the politicians of the North were willing to wait that long for victory. *See generally* WEIGLEY, *supra* note 19.

There are valuable lessons to be learned from Eisenhower's fresh look at this astonishing man. *Agent of Destiny* is a case study in immensely successful military leadership and abundant political failure. It is also the story of growth, of Scott and of the nation. The United States and its army toddled, walked, and then ran towards adolescence, suffering growing pains along the way. General Winfield Scott, with all his abilities and liabilities, was there for every step.

Another star has faded, we will miss its brilliant glow
For the veteran Scott has ceased to be a soldier here below.
And the country which he honored, now feels a heart-felt woe,
As we toast his name in reverence, at Benny Haven's. Oh!

-- A traditional West Point song[25]

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25. EISENHOWER, *supra* note 1, at vii.