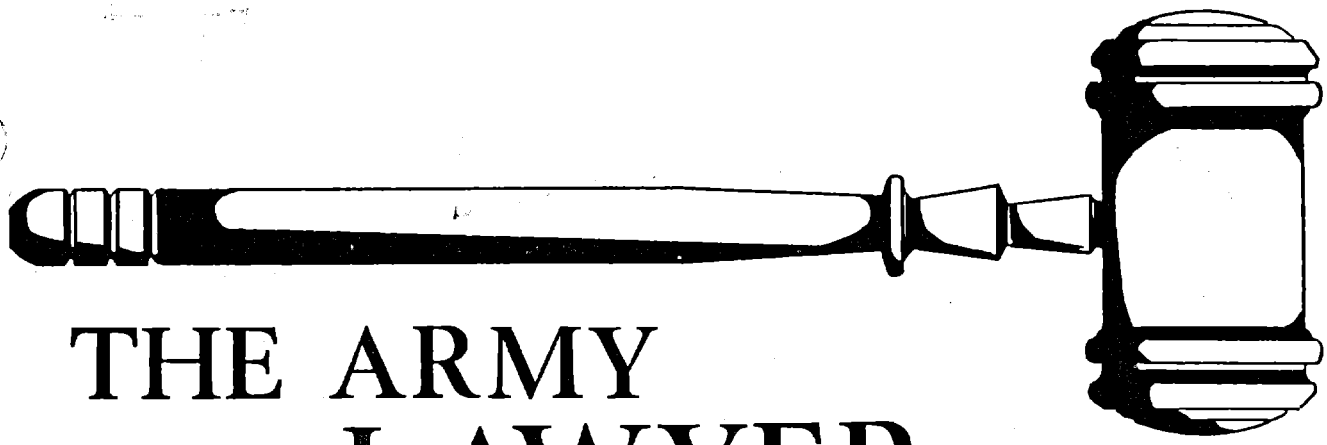

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Of Good Faith and Good Law: *United States v. Leon* and the Military Justice System

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On July 5, 1984, the United States Supreme Court decided a long-awaited issue and adopted a good faith exception to the exclusionary rule. The exception will allow the admissibility of evidence obtained in reliance upon a warrant duly, even if wrongly, issued by a neutral and detached magistrate. This article examines the background of the good faith exception, discusses the landmark cases of United States v. Leon *and* Massachusetts v. Sheppard, *and ponders the applicability of the exception to the military justice system.*

Introduction

No one can accuse the United States Supreme Court of lacking a flair for the dramatic. In the October 1982 Term, after raising expectations through its reargument order in *Illinois v. Gates*[1] that it would rule upon the constitu-

[1]After having heard argument on the issue of whether information provided by an anonymous informant was suf-

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310

REPLY TO ATTENTION OF

DAJA-LTT 25 SEP 1984

SUBJECT: Medical Care and Property Damage Recovery (UP Chapter 5, AR 27-40) -- 1984 Interim Report Statistics

ALL STAFF JUDGE ADVOCATES

1. I have recently reviewed the statistics on medical care and property damage recoveries from your interim report covering the first half of 1984. In 1983 the Army recovered record high amounts for both medical care and property damage. If each of you meets or surpasses your reported recoveries for the first half of 1984 during the second half, this year will also show good recoveries.

2. I commend the offices which are doing this important job well. Success in affirmative claims requires that you take the initiative, unlike the case with much of your work, which comes to you. I am concerned, however, with those offices which have not put sufficient emphasis or manpower on affirmative claims and have reported recoveries significantly lower than in 1983. The shortfall in these offices considerably undercuts the outstanding recoveries made by other offices.

3. Experience shows that the second half of the year presents an excellent opportunity to make recoveries as insurers move to conclude claims. If those of you who are doing well match or surpass your first half 1984 recoveries, and those who have reported a shortfall take the action necessary to at least match your 1983 recoveries, 1984 recoveries will be outstanding.

4. Increased efforts on affirmative claims translate directly into increased recovery of the taxpayer's dollars. You must insure that all claims are identified, asserted, followed up, and concluded in a timely manner.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

tionality of a "good faith" exception to the exclusionary rule, the Court, "with apologies to all,"[2] declined to do so. Proponents of the exception, however, were heartened by the inclusion of cases on the docket of the October 1983 Term in which a good faith exception could be adopted. Yet, it was not until the last day of that Term that the Court ruled, 6-3, that, in certain instances, illegally obtained evidence may be admissible in a criminal trial if the police had acted in good faith in obtaining it.[3] Alternatively praised as restoring respect for the criminal justice system[4] and condemned as a "strangulation" of the exclusionary rule,[5] the decision in *United States v. Leon*[6] represented a major breakthrough in the fourth amendment jurisprudence of the Supreme Court. This article will examine the underpinnings of the debate underlying the "good faith" exception to the exclusionary rule, discuss the recent Supreme Court decision, and analyze its potential impact upon the applicability to the military justice system.

The Source and Purpose of the Exclusionary Rule

Almost from its inception in 1914,[7] a debate has raged over the source and purpose of the exclusionary rule. Was the exclusionary rule implied in the language of the fourth amendment? If so, then only a constitutional amendment could alter it. Was the purpose of the exclusionary rule to preserve the integrity of the trial process, such that illegally obtained evidence should be forever barred from a legal proceeding? Or is the purpose of the exclusionary rule simply one of deterrence—that if the police were to know that the fruits of their illegal actions could not be used in court, they would be disinclined to engage in such activity? If the purpose was the former, then illegally obtained evidence should be barred from all judicial proceedings, civil and criminal. If the latter, then the applicability of the exclusionary rule to a particular situation should be measured by the efficacy of its deterrent value.

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ficient to constitute probable cause, the Court, on 29 November 1982, ordered that the issue be argued whether

> the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment. . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

103 S. Ct. 436 (1982) (citing Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914)). The Court heard such arguments on 1 March 1983.

[2]Illinois v. Gates, 103 S. Ct. 2317, 2321 (1983). The Court's demurral was greeted with both relief and disappointment. *See Supreme Court Eases Criteria for Approval of Search Warrants*, Wash. Post, June 9, 1983, at A-1, A-16.

[3]United States v. Leon, 52 U.S.L.W. 5155 (U.S. July 5, 1984); Massachusetts v. Sheppard, 52 U.S.L.W. 5177 (U.S. July 5, 1984).

[4]Barbash, *High Court Allows Illegally Obtained Evidence in Trials*, Wash. Post, July 6, 1984, at A-1, A-12 (quoting Attorney General William French Smith).

[5]United States v. Leon, 52 U.S.L.W. 5155, 5163 (U.S. July 5, 1984) (Brennan, J., dissenting).

[6]52 U.S.L.W. 5155 (U.S. July 5, 1984).

[7]Weeks v. United States, 232 U.S. 383 (1914). The rule had, however, first been invoked in 1886 to prohibit the introduction into evidence of compelled testimony. *See* Boyd v. United States, 116 U.S. 616 (1886).

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Captain Debra L. Boudreau

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From the outset of the exclusionary rule through the tenure of the Warren Court, a strong and precedentially secure argument could be made that the exclusionary rule was based upon the Constitution itself and was primarily designed to protect the integrity of the judicial process. In the original exclusionary rule case, *Weeks v. United States*,[8] support could be garnered for this position. In declining to permit the introduction into evidence of items illegally seized from the accused, a unanimous Supreme Court wrote that

> this Court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[9]

After declining to impose the exclusionary sanction on the states in *Wolf v. Colorado*,[10] the Court took that step in 1961 in *Mapp v. Ohio*.[11] *Mapp* was perhaps the zenith of the constitutional stature of the exclusionary rule. Justice Clark, writing for the Court, clearly stated that "our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense."[12] Although conceding that compelling respect for the law by law enforcement officials was *a* purpose of the exclusionary rule,[13] the Court also advanced "the imperative of judicial integrity" as a rationale for the rule.[14] Simply stated, regardless of the efficacy of the exclusionary remedy as a deterrent, "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[15] To sully a judicial proceeding with the fruits of illegal activity was thought to be a sure way to demean respect for the judicial process.

Beginning in 1974, however, a consistent majority of the Burger Court could be formed to both deny the constitutional stature of the exclusionary rule and to limit its purpose to the deterrence of police misconduct. In *United States v. Calandra*,[16] a case involving the applicability of the exclusionary rule to grand jury proceedings,[17] a majority of six forthrightly stated that

> the rule's primary purpose is to deter future unlawful police misconduct and thereby effectuate the guarantees of the Fourth Amendment against unreasonable searches and seizures. . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect. . . .[18]

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[8]232 U.S. 383 (1914). In *Weeks*, the accused had been arrested without a warrant while the police gained entry to his home. A search of the home led to the discovery of evidence which was used against the accused in obtaining his conviction for use of the mails to promote a lottery.

[9]*Id.* at 394.

[10]338 U.S. 25 (1949). The Court chose to relegate the aggrieved accused to state tort remedies and internal police disciplinary procedures. *Id.* at 31-33.

[11]367 U.S. 643 (1961). The facts of *Mapp* were particularly egregious. Mrs. Mapp and her daughter lived together in a home. The police, armed with "information" that people in that home might be connected with a recent bombing incident, proceeded to the Mapp home and requested entry. Mrs. Mapp demanded a search warrant. Three hours later, the three police officers who had originally arrived at the home were supplemented by four more. Together, they forcibly entered the home. Asked about a warrant by Mrs. Mapp, one police officer waved a piece of paper that he claimed to be a warrant. Mrs. Mapp grabbed the paper and placed it down the front of her blouse. The police struggled to retrieve it, handcuffed Mrs. Mapp, and searched the house. Obscene materials were discovered. Significantly, at trial, no warrant was produced by the government. *Id.* at 644-45.

[12]*Id.* at 657.

[13]*Id.* at 659.

[14]*Id. See also* United States v. Peltier, 422 U.S. 531, 536-39 (1975).

[15]367 U.S. at 659.

[16]414 U.S. 338 (1974).

[17]In *Calandra*, at issue was whether witnesses called to testify before a grand jury could refuse to answer questions which were based upon evidence obtained by means of an unlawful search or seizure. The Court concluded that they could not. *Id.* at 348.

[18]*Id.* The Court balanced the "potential injury to the historic function of the grand jury. . . against the potential contribution to the effectuation of the Fourth Amendment through deterrence of police misconduct" and found th

The subtle shift was not lost on three dissenters who insisted, quoting *Mapp*, that "the exclusionary rule is 'part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment upon individual privacy' . . . and 'an essential part of both the Fourth and Fourteenth Amendments. . . .'"[19]

In *United States v. Janis*,[20] a case allowing the Internal Revenue Service to utilize in a civil proceeding evidence illegally seized by state authorities,[21] a majority of five[22] proceeded one step beyond the language of *Calandra* and wrote that "the 'prime purpose' of the rule, *if not the sole one*, 'is to deter future unlawful police conduct.'"[23] Moreover, the language of *Calandra* that had insisted that the rule was one of judicial creation was quoted approvingly.[24]

Finally, in 1976, in *Stone v. Powell*,[25] six justices confronted the language of older opinions that had advanced the "imperative of judicial integrity" as a justification for the exclusionary rule. Citing the "limited role" which this justification has played in determinations whether to exclude evidence, the Court noted that, were judicial integrity a prime concern, illegally obtained evidence would have to be excluded even when an accused does not object to its admission, regardless of the standing of the objector, for impeachment as well as for the case-in-chief, and in civil as well as criminal trials.[26] Such drastic exclusions, of course, have never been adopted by the Court. Instead, the Court found that a concern for the preservation of judicial integrity "has limited force as a justification for the exclusion of highly probative evidence."[27]

"'[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.'" Stone v. Powell, 428 U.S. 465, 487 (1976) (quoting *Calandra*, 414 U.S. at 351-52 (footnote omitted)).

[19]414 U.S. at 360 (Brennan, Douglas, & Marshall, JJ., dissenting) (quoting Mapp v. Ohio, 367 U.S. 643, 657 (1961)).

[20]428 U.S. 433 (1976).

[21]In *Janis*, Los Angeles municipal authorities had obtained a search warrant, during the execution of which a sum of cash and certain wagering records were seized. At a state trial for bookmaking activity, the trial judge determined that the affidavit upon which the warrant had been issued was defective. The accused sought a refund of the seized cash and the Internal Revenue Service counterclaimed. *Id.* at 434-39. The Supreme Court ultimately held that the costs of excluding the fruit of the illegal activity was not outweighed by the "additional marginal deterrence provided by forbidding a different soverign from using the evidence in a civil proceeding. . . ." *Id.* at 453. Justices Brennan and Marshall dissented, basing their arguments upon those presented in the dissent in *Calandra* that the exclusionary rule "is a necessary and inherent ingredient of the protections of the Fourth Amendment." *Id.* at 460 (Brennan & Marshall, JJ, dissenting) (citing United States v. Calandra, 414 U.S. 338, 355-67 (1974) (Brennan, J., dissenting)). Justice Stewart dissented separately, finding that the doctrine announced in *Janis* was difficult to square with the rejection of the "silver platter doctrine" in Elkins v. United States, 364 U.S. 206 (1960).

[22]Between *Calandra* and *Janis*, Justice Douglas retired from the Court. Justice Stevens took no part in the consideration or decision of *Janis*.

[23]428 U.S. at 446 (quoting United States v. Calandra, 414 U.S. 338, 347 (1974) (emphasis added)).

[24]428 U.S. at 446 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

[25]428 U.S. 465 (1976). In *Stone*, the accused sought to collaterally attack, by writ of habeas corpus, the admission into evidence of certain allegedly illegally obtained evidence. The Supreme Court refused to permit federal courts to entertain such a petition where the state courts had permitted the accused an opportunity for a full and fair litigation of the fourth amendment claim in the state proceeding. *Id.* at 474-95.

[26]*Id.* at 485 (citing Henry v. Mississippi, 379 U.S. 443 (1965) (lack of objection by defendant); Gerstein v. Pugh, 420 U.S. 103 (1975); United States v. Calandra, 414 U.S. 338 (1974) (use of illegally seized evidence in grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969); Walder v. United States, 347 U.S. 62 (1954) (use of illegally seized evidence for impeachment); Frisbie v. Collins, 342 U.S. 519 (1952) (judicial power to proceed even when defendant's person has been unconstitutionally seized).

[27]428 U.S. at 485 (footnote omitted).

In two less dramatic cases, the Supreme Court also placed limits upon the exclusionary rule. In Michigan v. DiFillippo, 443 U.S. 31 (1979), an accused was arrested and searched pursuant to a Detroit city ordinance that was later determined to be unconstitutional. The search incident to the arrest, however, revealed a quantity of phencyclidine. The Court refused to permit the *post hoc* invalidation of the statute affect the admissibility of the evidence. The ordinance was "presumptively valid" at the time of the arrest and, had the police not acted, they would have been potentially subject to disciplinary action for dereliction of duty. *Id.* at 33-38.

In United States v. Payner, 447 U.S. 727 (1980), the Court signalled the continuing vitality of the standing requirement in fourth amendment jurisprudence. In *Payner*, the accused was prosecuted based upon evidence that had been discovered during an illegal search of a bank officer's briefcase. The Court refused to permit the accused to assert the violated rights of the bank officer: "But our cases. . . do

Thus, whatever the thinking of the unanimous 1914 *Weeks* Court or the majority in *Mapp*, the attitude of the contemporary Burger Court was clear: the exclusionary rule is a judicially created remedy, the purpose of which is to deter unlawful police conduct. By 1984, not even the dissenters of *Calandra*, *Janis*, and *Stone v. Powell* would press the arguments that they had made in the mid-1970s.[28]

A "Good Faith" Exception Evolves

If the purpose of the exclusionary rule is to deter unlawful police conduct, what purpose does the rule serve when police act illegally, yet believe that they are obeying the law? How does one deter that which the officer reasonably, if mistakenly, does not see as deterrable? Such is the dilemma of "good faith."

Although ruminations of the acceptability of a "good faith" exception to the exclusionary rule had peppered the opinions of four Supreme Court justices,[29] the Court had never so held. The first judicial adoption of a good faith exception took place in the Fifth Circuit's *en banc* opinion in *United States v. Williams.*[30]

In *Williams*, the accused had been apprehended by a federal drug enforcement agent for violating the terms of a court order releasing her pending the appeal of another conviction.[31] In a search incident to that apprehension and at a subsequent search authorized by a judicially-issued search warrant, a large amount of heroin was found on the accused's person and in the accused's luggage, respectively.[32] The trial court granted the accused's motion to suppress the heroin on the ground that the agent was without authority to arrest the accused and that the discovery of the heroin flowed from the unlawful arrest. Initially, a panel of the Fifth Circuit had affirmed the suppression,[33] but, at a rehearing *en banc*, the full court reversed that determination and found the heroin to be admissible at trial.[34]

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not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule." *Id.* at 734.

In Ybarra v. Illinois, 444 U.S. 85 (1979), however, the Court found invalid the fruits of a search of the accused, who had been a visitor to a tavern named in a search warrant. Although a state statute permitted the police to search, without a warrant, persons on the premises named in the warrant, the Court found that, absent probable cause to suspect the accused of having committed or possessing evidence of a crime or absent a reasonable suspicion of the accused's dangerousness to the police, the police had no right to conduct the search and the fruits of it would be excluded. *Id.* at 86-90.

[28]In Nix v. Williams, 104 S. Ct. 2501 (1984), the Supreme Court, 7-2, adopted an "inevitable discovery exception" to the exclusionary rule. Under this exception, notwithstanding that evidence had *in fact* been discovered as a result of unlawful police activity, the evidence could nonetheless be admitted if the government could establish by a preponderance of the evidence that the evidence *would* in any event been found by ongoing lawful activity. Justices Brennan and Marshall, the last remaining dissenters of *Calandra* on the Court, also dissented in *Nix v. Williams.* To be doctrinally consistent with their *Calandra* dissent, however, they should have argued that, as a purpose of the exclusionary rule is the preservation of the imperative of judicial integrity, the introduction of concededly illegally obtained evidence would violate the sanctity of a judicial proceeding. Instead, the dissenters did not argue with the acceptability of an inevitable discovery exception, but would have had the Court set the government's burden of admissibility at a "clear and convincing" standard. *See generally* Kaczynski, Nix v. Williams *and the Inevitable Discovery Exception to the Exclusionary Rule*, The Army Lawyer, Sept. 1984, at 1.

[29]*See* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting); Peltier v. United States, 422 U.S. 531 (1975) (Rehnquist, J.); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring); Michigan v. Tucker, 417 U.S. 433 (1974) (Rehnquist, J.); Bivins v. Six Unknown Named Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting). *See also* Burger, *Who Will Watch the Watchman?*, 14 Am. U.L. Rev. 1, 23 (1964); LawScope, *The Exclusionary Rule*, 69 A.B.A.J. 137, 139 (1983) (views of Justice O'Connor at confirmation hearings).

[30]622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), *discussed in* Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal, 1981-82*, 71 Geo. L.J. 339, 437 (1982); Recent Developments, *Criminal Procedure - Exclusionary Rule - "Good Faith" Exception—The Exclusionary Rule Will Not Operate in Circumstances Where the Officer's Violation Was Committed in the Reasonable Good Faith Belief That His Actions Were Legal*, 27 Vill. L. Rev. 211 (1981082).

[31]The accused had been convicted of possession of heroin in violation of 21 U.S.C. § 841(a)(1) (1976). She had been free pending appeal. 622 F.2d at 831.

[32]*Id.* at 834-35.

[33]594 F.2d 86 (5th Cir. 1980).

[34]622 F.2d 830 (5th Cir. 1980) (en banc).

Among the theories of admissibility which commanded a majority of the Fifth Circuit judges[35] was

> that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized.[36]

The panel noted two situations in which good faith might be present. In the first, an officer may have made a judgmental error concerning whether facts sufficient to constitute probable cause to arrest or search existed; this was called a "good faith mistake."[37] In the second situation, the officer may have acted in reliance upon a statute or judicially-issued search or arrest warrant that was later ruled invalid; this was called a "technical violation."[38] In either case, assuming that the conduct of the police officer was *objectively* reasonable as well as undertaken in *subjective* good faith,[39] exclusion of the evidence so discovered would have no deterrent effect on police behavior. Under the facts of *Williams*, the arresting agent had acted on a good faith and reasonable belief that the accused had committed a crime and that the agent possessed the authority to effect the apprehension. Accordingly, the evidence discovered as the fruit of the arrest was deemed admissible at trial.[40] The Supreme Court declined the opportunity to review *Williams*.[41]

The Court came tantalizingly close to ruling on the good faith exception in the October 1982 Term. In *Illinois v. Gates*,[42] the police had obtained a search warrant and discovered incriminatory evidence while executing it. At trial, the court suppressed the evidence, finding that the magistrate that had issued the warrant had not learned enough about the anonymous informant upon whose information it was issued. The initial issue before the Supreme Court solely concerned whether the warrant had been properly issued. After the case had been argued on this issue, the Court ordered and heard reargument on the issue of whether

> the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment. . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.[43]

In the end, however, noting that the issue had not been raised or argued in the courts below,

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[35]Twenty-four judges sat *en banc* to hear the case. Sixteen concurred in an opinion that found that the federal narcotics agent had possessed the requisite authority to arrest the accused. Under this theory, the searches incident to the arrest and pursuant to the warrant were lawful. *Id.* at 839. Thirteen judges joined in the opinion that recognized the good faith exception. *Id.* at 840.

[36]*Id.*

[37]*Id.* at 841 (quoting Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 638-39 (1974)).

[38]*Id.*

[39]The *Williams* court noted:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded on an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe tha he was acting lawfully. Thus, a series of broadcast breakins (sic) and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.

622 F.2d at 841 n.4a.

[40]*Id.* at 846. Soon after the decision, *Williams* was favorably noted, if not adopted, by several federal and state courts. *See, e.g.*, United States v. Cady, 651 F.2d 290 (5th Cir. 1981); United States v. Hill, 626 F.2d 1301 (5th Cir. 1980); United States v. Wilson, 528 F. Supp. 1129 (S.D. Fla. 1982); United States v. Nolan, 530 F. Supp. 386 (W.D. Pa. 1981); United States v. Pills, 522 F. Supp. 855 (M.D. Pa. 1981); United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980); State v. Settle, 447 A.2d 1284, 1288-89 (N.H. 1982) (Douglas, J., concurring); Jessie v. State, 640 P.2d 56, 67 (Wyo. 1982); State v. Lehnen, 403 So.2d 683 (La. 1981); People v. Eichelberger, 620 P.2d 1067 (Colo. 1980). Indeed, the Ninth Circuit's opinion in *Leon*, 701 F.2d 187 (9th Cir. 1983), "may even be read as inviting the Court to amend the 70-year-old [exclusionary] rule. . . ." Young, *Supreme Court Report*, A.B.A.J., Sept. 1984, at 122, 122.

[41]449 U.S. 1127 (1981).

[42]103 S. Ct. 2317 (1983).

[43]103 S. Ct. 436 (1982).

the Court instead opted to modify its test for determining whether information provided by an informant reached the level of probable cause.[44]

The confluence of the Fifth Circuit's decision in *Williams* and the Supreme Court's reargument order in *Gates* prompted an avalanche of scholarly debate concerning the desirability of a good faith exception to the exclusionary rule.[45] In the course of the debate, certain criticisms were leveled at the exception.

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[44]The Court had theretofore utilized the "two-pronged" test of Aguilar v. Texas, 378 U.S. 108 (1964), and v. United States, 393 U.S. 410 (1969), which had required that both the veracity and basis of knowledge of an informant be established. In *Gates*, the Court eschewed a mechanical application of the *Aguilar/Spinelli* test and substituted in its place one of common sense. Simply stated, based upon the totality of the circumstances, the magistrate would have to determine whether probable cause existed. As to the "two prongs," "a defiency in one may be compensated for, in determining the overall reliability. . . by a strong showing as to the other, or by some other indicia of reliability." 103 S. Ct. at 2329 (citations omitted). For discussions of the implications of *Gates, see, e.g.,* Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating From* Illinois v. Gates, 6 W. New Eng. L. Rev. 331 (1983); Reilley, Witlin, & Curran, Illinois v. Gates: *Probable Cause Redefined?*, 17 J. Mar. L. Rev. 335 (1984); Note, *Adoption of a Flexible Standard For Analyzing Informants' Tips* in Illinois v. Gates, 4 N. Ill. U.L. Rev. 179 (1983); Note, *Probable Cause: The Abandonment of the* Aguilar/Spinelli *Standard and Further Evisceration of the Fourth Amendment*, 1983 S. Ill. U.L.J. 261.

[45]*See, e.g.,* Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 S. Tex. L.J. 654 (1982); Burkoff, *Bad Faith Searches*, 57 N.Y.U.L. Rev. 70 (1982); Crump, *The "Tainted Evidence" Rationale: Does It Really Support the Exclusionary Rule?*, 23 So. Tex. L.J. 687 (1982); Goodpaster, *An Essay on the Exclusionary Rule*, 33 Hastings L.J. 1065 (1982); Hanscom, *Admissibility of Illegally Seized Evidence: Could This Be the Path Out of the Labyrinth of the Exclusionary Rule*, 9 Pepperdine L. Rev. 799 (1982); Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. Crim. L. & Criminology 916 (1982); Leonard, *Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice*, 4 Whittier L. Rev. 33 (1982); Mathias, *The Exclusionary Rule Revisited*, 28 Loy. L. Rev. 1 (1982); Rader, *Legislating a Remedy for the Fourth Amendment*, 23 So. Tex. L.J. 584 (1982); Teague, *Applications of the Exclusionary Rule*, 23 So. Tex. L.J. 632 (1982); Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 So. Tex. L.J. 530 (1982); Comment, *The Exclusionary Rule Revisited: Good Faith in Fourth Amendment Search and Seizure*, 70 Ky. L.J. 879 (1981-82); Comment, *Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule*, 23 So. Tex. L.J. 693 (1982); Note, *The Fourth Amendment and the Exclusionary Rule: The Desirability of a Good Faith Exception*, 32 Case W. Res. L. Rev. 443 (1982). *See also* White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 Mich. L. Rev. 1273 (1983).

The debate was not limited to scholarly journals. In the halls of Congress, as early as 1972, a bill was introduced by Senator Lloyd Bentsen, S. 2657, 92d Cong., 2d Sess. (1972), which would have codified the "substantiality test" of the American Law Institute. *See* American Law Institute, Model Code of Pre-Arraignment Procedure § 290.2 (1975). *Inter alia*, this test would have retained the exclusionary sanction for intentional or flagrant fourth amendment violations, such as those that occurred in Mapp v. Ohio, 367 U.S. 643 (1961), *see* supra note 11, but would have permitted evidence to be admitted where the constitutional violation was technical, unintentional, or insubstantial. *See generally* Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Rule*, 10 Ga. L. Rev. 1 (1975); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736 (1972). More recently, the Reagan Administration has twice entreated Congress to statutorily create a good faith exception to the exclusionary rule. *See* President's Message to Congress Transmitting the Comprehensive Crime Control Act of 1983 (Mar. 16, 1983); President's Message to Congress Transmitting the Criminal Justice Act of 1982 (Sept. 13, 1982). A bill designed to implement the Administration's proposal, S. 2903, 98th Cong., 1st Sess. (1983), was opposed by the American Bar Association, *see* CongresScan, 69 A.B.A.J. 153 (1983), and never reached a floor vote.

The debate over the desirability of an exclusionary rule was moreover not limited to the United States. The notion of a rule that excludes relevant and probative physical evidence because of the conduct of the police is uniquely American and has been criticized abroad as punishing "The community as a whole by giving unnecessarily wide protection to the criminal classes. . . ." Sholl, *Problems of Criminal Law Administration: An Australian Lawyer's Impressions in the U.S.A.*, 1 Austrl. & N.Z. J. Criminology 137, 145 (1968). *See generally* Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 Mil. L. Rev. 83, 130-65 (1983). Yet, the inclusionary rules of evidence of, for example, Canada and Australia, have recently been called to task. The Canadian rule of admission of evidence, however obtained, was established in Wray v. Regina, 11 D.L.R.3d 673 (1970). *See* Heydon, *Current Trends in the Law of Evidence*, 8 Sydney L. Rev. 305, 325 (1977); Katz, *Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States*, 3 Can.-U.S. L.J. 103, 104 (1980). The Canadian Law Reform Commission, however, proposed that

> evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute. . . . [under] all the circumstances surrounding the proceeding *and the manner in which the evidence was obtained.*

First, it has been argued that a good faith exception would reward the "dumb cop." Under this view, it would be far easier for the unschooled or unprofessional police officer to profess, for example, a "good faith mistake" than for the highly trained or conscientious officer: "Constitutional values would be ill-served by an extension of such a rule to officers with pure hearts but empty heads."[46] The *Williams* court, however, had already addressed this objection by requiring that police conduct be both *objectively* reasonable and subjectively sincere.[47] Thus, the poorly trained or intentionally ignorant officer would find no solace in a good faith exception.

A second view is grounded upon the belief that the exclusionary rule, for whatever its alleged drawbacks, has yielded two benefits. Police are thought to be more conscientious in seeking judicially-issued search and arrest warrants[48] and police training is asserted to have improved in response to the burdens imposed upon the police by the exclusionary rule.[49] Modification of the rule in any respect might be seen as a signal to law enforcement authorities that both practices were no longer necessary.

At least as regards the "good faith mistake" category of *Williams*, the former fear may be very real. Rather than risk the denial of an application for a warrant by a magistrate schooled in the law, the police officer, perhaps sincerely believing that he or she possesses probable cause, may act without benefit of the warrant. On the other hand, were the exception for "technical violations" recognized, police might be *encouraged* to seek search and arrest warrants; if a warrant issued, the police could rest secure in knowing that their activities undertaken in execution of that warrant would be validated even if a subsequent trial or appellate court were to find that the warrant should not have issued. In any event, one suggested solution to this conundrum would be for the courts to establish a heightened burden of proof of the good faith of the police officer guilty of the "good faith mistake" than for the officer who has presented his or her information to the magistrate.[50]

Finally, the argument that police training has increased since the inception of the exclusionary rule does not admit to statistical proof. One study reported a wide variation in the number of hours devoted to search and seizure training in the police departments of larger American cities.[51] Thus, while officer in Denver

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Law Reform Comm'n of Canada, Report on Evidence § 15(1) (1975) (emphasis added). Twelve factors were listed to assist the trial court in determining the admissibility of the evidence. *Id.* § 15(2). *See generally* Yeo, *The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches*, 13 Melbourne U.L. Rev. 31, 34, 46-51 (1981). Likewise, in 1975, the Australian Law Reform Commission endorsed a "reverse onus exclusionary rule," which would provide that

> evidence obtained in contravention of any statutory or common law rule. . . should not be admissible *unless* the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. The burden of satisfying the court that any illegally obtained evidence should be admitted should rest with the party seeking to have it admitted, *i.e.* normally the prosecution.

Report of the Australian Law Reform Comm'n #2, Criminal Investigations para. 298 (1975), *discussed in*, Heydon, *supra*, at 328. Thus, while an American debate raged over *limiting* the existing exclusionary rules, a similar discussion was conducted in other nations concerning *adoption* of exclusionary rules of evidence.

[46]United States v. Nolan, 530 F. Supp. 386, 399 (W.D. Pa. 1981).

[47]*See supra* note 39. Indeed, the First Circuit refused to adopt the exception when presented with a case in which the police conduct was not objectively reasonable. United States v. Downing, 665 F.2d 404, 408 n.2 (1st Cir. 1981). A federal district court refused to apply the exception where the police standard operating procedures were found to be unconstitutional. United States v. Santucci, 509 F. Supp. 177, 183 n.8 (N.D. Ill. 1981).

[48]Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 647-48 (1974).

[49]Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L. Bull, 5, 39 (1979).

[50]Kaczynski, *supra* note 45, at 115-16. This would mirror the Supreme Court's oft-stated rule that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." United States v. Ventresca, 380 U.S. 102, 103 (1965), *quoted in* United States v. Leon, 52 U.S.L.W. 5155, 5159 (U.S. July 5, 1984).

[51]Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243 (1973).

and Baltimore only received six hours of such training, officers in Phoenix received thirty, officers in Washington, D.C. received thirty-three, and officers in Houston received forty.[52] No demonstrable pattern of increased police training in the fourth amendment area could be observed.[53]

Thus, while a good faith exception was not universally desired, the objections to it were not insoluble. It remained for the Supreme Court to choose its path carefully when faced with the next "good faith" cases. They were not long in coming.

United States v. Leon and *Massachusetts v. Sheppard*

The Supreme Court adopted the good faith exception to the exclusionary rule in *United States v. Leon*[54] and quickly applied the exception the same day in *Massachusetts v. Sheppard*.[55] Like *Gates*, both cases might be termed "technical violation" cases within the terminology of *Williams*.

In *Leon*, based upon police surveillance and information provided by an informant, the police obtained a warrant, the execution of which resulted in the discovery of a large quantity of drugs.[56] The district court held a hearing on the motion to suppress and found that there was no question as to the reliability and credibility of the informant. However, the court indicated that, if the information was not stale, it was "awfully close to it" and suppressed the evidence.[57] The district court did find that the police officer had acted in good faith.[58] The court of appeals agreed that probable cause was lacking to search one of the residences, that the information was fatally stale, and that the affidavit did not establish the informant's credibility. Thus, the decision of the district court was affirmed.[59]

In seeking certiorari, the government did not seek a review of the lower court's determination as to the lack of probable cause but presented only the question "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable-good-faith reliance on a search warrant that is subsequently held to be defective."[60]

Writing for six members of the Court, Justice White indicated that it was "within our power to consider the question whether probable cause existed under the 'totality of circumstances' test announced last Term in *Illinois v. Gates*."[61] The Court chose instead to accept the conclusion of the court of appeals that probable cause was lacking and to use the *Leon* case to adopt the good faith exception. The Court initially noted that the fourth amendment itself contains no provision for the exclusion of evidence seized in violation of it. Quoting the now familiar refrain of *Calandra*, the Court reiterated the origin of the rule as a judicially created remedy.[62] Accordingly, the applicability of the rule to a particular case is to be determined by balancing the costs and benefits of denying the prosecution the use of "inherently trustworthy evidence."[63] The Court quickly resolved the balance: "Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."[64]

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[52]*Id.* at 275.

[53]*Accord* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

[54]52 U.S.L.W. 5155 (U.S. July 5, 1984).

[55]52 U.S.L.W. 5177 (U.S. July 5, 1984).

[56]52 U.S.L.W. at 5156. Drugs were found at three locations and other evidence was discovered in two automobiles.

[57]*Id.* n.2: "There is no question of the reliability and credibility of the informant as not being established."

Some details given tended to corroborate, maybe, the reliability of [the informant's] information about the previous transaction, but if it is not stale transaction, it comes awfully close to it. . . ."

[58]*Id.* n.4.

[59]701 F.2d 187 (9th Cir. 1983).

[60]52 U.S.L.W. at 5157. The Court granted certiorari "to consider the propriety of such a modification." 103 S. Ct. 3535 (1983).

[61]52 U.S.L.W. at 5157.

[62]*Id.* (quoting Calandra v. United States, 414 U.S. 338, 348 (1974)).

[63]52 U.S.L.W. at 5157.

[64]*Id.* at 5157-58 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

The Court was particularly comfortable in permitting the police to rely upon a judicially issued warrant. Harkening back to decisions that have expressed a strong preference for searches conducted pursuant to warrants,[65] the Court noted that magistrates are detached from the law enforcement establishment.[66] Exclusion of evidence obtained by police in a good faith reliance upon warrants issued by such neutral parties would serve no valid purpose. Police misconduct would not be deterred by punishing the police for the errors of magistrates and, as neutral judicial officers, there is no evidence that magistrates were in need of deterrence—either that they routinely ignored the requirements of the fourth amendment or that they had manifested a stake in the outcome of the criminal justice process.[67] Thus, if the purpose of the exclusionary rule is deterrence and the police could not be and the magistrate need not be deterred by exclusion of evidence in such circumstances, then to require exclusion would defeat the *raison d'etre* of the rule: "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objective reasonable reliance on a subsequently invalidated warrant cannot justify the substantial cost of exclusion."[68] In the absence of evidence that the magistrate had abandoned his or her judicial role, that the police were dishonest or reckless in their presentation to the magistrate, or that the police harbored a belief that probable cause was in fact lacking,[69] evidence obtained by objective good faith police reliance on a judicially authorized warrant would not be suppressed, even if the warrant were subsequently found to have been based upon less than probable cause: "Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate."[70]

The Court was sensitive to potential jurisprudential criticisms of the new rule. Particularly, the Court was concerned with the observation that a good faith exception to the exclusionary rule would prevent the development of the right to privacy.[71] Would the courts be permitted to stultify the fourth amendment by resolving cases at the threshold on the basis of the good faith of the police? In response, Justice White indicated that "nothing will prevent reviewing courts from deciding that question [question of coverage of the fourth amendment] before turning to the good faith issue."[72] The Court noted that the question of good faith may first be dependent on the issue of coverage or protection.[73] "Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officer's good-faith only after finding a violation."[74] But the Court was very careful to state that there did not have to be a decision as to coverage or protection under the fourth amendment before "turning to the good-faith issue."[75] In any event it saw "no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice."[76]

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[65]52 U.S.L.W. at 5159 (quoting United States v. Ventresca, 380 U.S. 102, 106 (1965)).

[66]52 U.S.L.W. at 5160: "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."

[67]*Id.*

[68]*Id.* at 5161.

[69]*Id.* at 5162.

[70]*Id.*

[71]*See* 3 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1978). *See also Leon*, 52 U.S.L.W. at 5162 n.25.

[72]52 U.S.L.W. at 5162 (footnote omitted).

[73]One might philosophically divide the fourth amendment issues into the areas of coverage and protection. There would be fourth amendment coverage when there has been a search or seizure within the meaning of the fourth amendment. Once coverage is determined, the issue turns to the protection of the amendment. Was there a valid warranted search? If not, was there an exception to the warrant requirement? There have also been other ways of looking at the fourth amendment. *See, e.g.*, E. Imwinkelried, P. Gianelli, F. Gilligan, & F. Lederer, Criminal Evidence 4 (1979).

[74]52 U.S.L.W. at 5162.

[75]*Id.*

[76]*Id.*

In any event, regardless of the analytical procedure employed, the good faith exception would be subject to certain limitations. First, the good faith of the officer must be based upon an objective rather than a subjective standard.[77] The objective standard "retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment."[78] It also requires the "officers to have a reasonable knowledge of what the law prohibits."[79] This would preclude officers from foregoing educational courses in order to increase their good faith; *Leon* thus continued the emphasis on police training programs. An issue for the future might become the reasonableness of the officer's action in light of a particular department's training program.[80] One might argue that the good faith exception will shift the emphasis to an examination of training programs.[81]

Second, the good faith exception will not apply when only a "bare bones" affidavit had been presented to the issuing magistrate.[82] The Court stated:

> It is necessary to consider the objective reasonableness, not only of the officer who eventually executed a warrant, but also the officers who originally obtained it or who provided information material to the probable cause determination. Nothing in our opinions suggest, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.[83]

Another limitation on the good faith exception is when the search goes beyond the scope of the search warrant. "Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that was reasonable to believe were covered by the warrant."[84]

Moreover, if the judge or magistrate is acting as an agent of law enforcement officials, then the good faith exception will not apply. For example, under current case law, if the "magistrate" is compensated on the basis of the number of warrants actually issued, instead of upon the number of applications considered, then the issuing official would not be considered neutral and detached.[85] Although this would also appear to be the case for the magistrate who is a rubber stamp,[86] "if a magistrate serves merely as a 'rubber stamp' for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule."[87] Thus, the police would not be penalized for the professional shortcomings of the magistrate; discipline or supervision within the judicial system was thought to be an adequate remedy.[88]

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[77] *Id.* at 5161-62.

[78] *Id.* at 5161 n.20 (citation omitted). "There is no reason to exclude the evidence when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within his scope." *Id.* at 5161 (footnote ommited).

[79] *Id.*

[80] *Id.* at 5162. "When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish subjective good faith without a substantial expenditure of judicial time."

[81] *See* Kamisar, *supra* note 49, at 35 n.115.

[82] 52 U.S.L.W. at 5162: "Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it valid."

"Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable causes as to render official belief in its existence entirely unreasonable.'" *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring)).

[83] 52 U.S.L.W. at 5161-62 at n.24.

[84] *Id.* at 5160 n.19.

[85] *See, e.g.*, Connally v. Georgia, 429 U.S. 245 (1977).

[86] 52 U.S.L.W. at 5160.

[87] *Id.* n.18.

[88] *Id.* at 5160. The Court noted that magistrates are subject to the supervision of the district courts and may statutorily be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability." *Id.* n.18 (quoting 28

Finally, where the magistrate fails to read the affidavit supporting the application for the warrant or where the information furnished therein is either false or in reckless disregard for the truth, the good faith exception will not apply.[89]

Justice White promptly applied the good faith exception in the factually stronger case of *Massachusetts v. Sheppard*.[90] Sheppard was tried for murder. At approximately five o'clock Saturday morning, the burned body of the victim was discovered in a vacant lot. The autopsy revealed that she had died of multiple compound fractures caused by blows to the head. A brief investigation led the police to question the accused, one of the victim's boyfriends. He told the police he had last seen the victim on Tuesday night and that he had been at a local gaming house from nine p.m., Friday until five a.m. on Saturday. He identified several people who would be willing to substantiate the latter claim.[91]

When the police interviewed the alibi witnesses, they learned that Sheppard was at the gaming house that night, but had borrowed an automobile at three a.m. to give two men a ride home. Even though this trip should have taken only fifteen minutes, he did not return until nearly five a.m.

On Sunday morning, the police officers visited the owner of the car that the accused had borrowed. The owner consented to inspection of the vehicle; blood stains and pieces of hair were found on the rear bumper and in the trunk. In addition, the officers noted that some strands of wire in the trunk were similar to wire strands found on or near the body of the victim. The owner of the car told the officers that he had placed articles in the truck on Friday night and had not noticed the blood stains in the trunk or the stains on the bumper.[92]

On the basis of this evidence, Detective O'Malley drafted an affidavit designed to support an application for an arrest warrant and a search warrant authorizing a search of Sheppard's residence. The affidavit set forth the results of the investigation and stated that the police wished to search for a number of specified items.[93] Detective O'Malley showed the affidavit to another police officer and three prosecutors who concluded that there was sufficient probable cause for search and arrest warrants. Because this review had not been completed until Sunday morning and the local court was closed, the police had a difficult time finding a warrant application form. As a result, O'Malley modified a warrant application designed for use in cases involving controlled substances. He made some changes to the application, for example, deleting the subtitle with a typewriter and changing the district in which the warrant was to be executed. However, the reference to controlled substances was inad-

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U.S.C. § 631(i) (1982)). This submission of the errant magistrate to hierarchical discipline is similar to the civil law system's procedures of admitting illegally obtained evidence while retaining the option of reprimanding the official offender. In such systems, such as those of France and the Federal Republic of Germany, both the police and the prosecutors are part of a unified civil service. A requirement that police promotions, at least formally, be approved by a parliamentary minister, coupled with an extensive review and appeal procedure for citizen complaints against the police, is thought to be a suitable substitute for the exclusionary rule. *See generally* Clements, *The Exclusionary Rule Under Foreign Law: Germany*, 52 J. Crim. L., Criminology, & Police Sci. 277, 287 (1961); Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549, 1557 (France), 1560 (Germany) (1978). *But see* Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 Yale L.J. 240 (1977) (questioning efficacy of system).

[89]52 U.S.L.W. at 5159: "It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was made."

"Suppression, therefore, remains an appropriate remedy if the magistrate or judge in issuing the warrant was misled by the information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 5162 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

[90]52 U.S.L.W. 5177 (U.S. July 5, 1984).

[91]*Id.* at 5177-78.

[92]*Id.* at 5178.

[93]The affidavit described the objects of the search as a bottle of liquor, two bags of marijuana, a woman's jacket, personal possessions of the victim, wire and rope similar to that found on the victim or in the car, a blunt instrument, bloodstained or gasoline burned clothing, and any items that might have the fingerprints of the victim on them. *Id.* at 5178.

vertently not deleted from the warrant application itself. Detective O'Malley took the affidavit and warrant form to the residence of a judge who had consented to consider the warrant application and told the judge what he had done. The judge examined the affidavit and stated that he would authorize a search as requested. After the judge unsuccessfully searched for a more suitable form, he informed O'Malley that he would make the necessary changes so as to provide a proper search warrant. The judge then took the form, made some changes on it in O'Malley's presence, dated and signed it.[94] However, he did not change the substantive portion of the warrant which continued to authorize a search for controlled substances rather than for the items set forth in the affidavit. Nor did he alter the form so as to incorporate the affidavit by reference. The judge returned the affidavit and warrant to O'Malley and informed him that the warrant was sufficient authority in form and content to carry out the search as requested. O'Malley took the two documents and, accompanied by other officers, proceeded to the accused's residence where a search was executed. Several incriminating pieces of evidence were discovered.[95] On appeal of Sheppard's conviction for murder, the Supreme Judicial Court of Massachusetts concluded that the police had acted on a good faith reliance upon the warrant issued by the judge, but ordered suppression of the evidence so discovered because the warrant had insufficiently described the items to be seized and a good faith exception to the exclusionary rule had not been recognized by the Supreme Court.[96] The Supreme Court granted certiorari.[97]

In *Sheppard*, the same six justices as in *Leon* held that the actions of Detective O'Malley had been undertaken in good faith.[98] They rejected the accused's argument that, since O'Malley knew the warrant was defective, he should have examined it after it was returned by the judge:

> However, that argument is based on the premise that O'Malley had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made. . . [W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the sarch he has requested.[99]

The Court indicated in dictum, although, that if another officer was to execute the warrant, he would normally read it in order to determine the object of the search.[100]

> Whether an officer who is less familiar with the warrant application who has unalleviated concerns about the proper scope of the search would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had reqeusted.[101]

The Court noted state law which indicated that the "determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside. . . ."[102] Again, the Court indicated that "[a]n error of constitutional dimensions *may* have been committed with respect to the issuance of the warrant. . . ."[103]

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[94]*Id.*

[95]The police found several bloodstained items of clothing and personal property, and other items identified as belonging to the victim. *Id.* n.4.

[96]Commonwealth v. Sheppard, 387 Mass. 488, 500-01, 503, 441 N.E.2d 725, 731-32, 733 (1982).

[97]103 S. Ct. 3534 (1983).

[98]52 U.S.L.W. at 5179.

[99]*Id.*

[100]*Id.* n.6.

[101]*Id.*

[102]*Id.* at 5179 (citing Streeter v. City of Worcester, 336 Mass. 469, 472, 146 N.E.2d 514, 517 (1957); Moll v. Township of Wakefield, 274 Mass. 505, 507, 175 N.E.2d 81, 82 (1983). The Court noted the anomoly posed in the appellant's position: if an officer should not be able to rely upon a magistrate's determination that probable cause *exists*, then why should not an officer be free to second guess the magistrate who finds that probable cause is *lacking*. 52 U.S.L.W. at 5179.

[103]*Id.* (emphasis added).

In sum, the good faith exception will apply in situations like *Leon*, where there is a good faith lack of probable cause, or, like *Sheppard*, where there is a good faith lack of specificity in the warrant. By logical extensions, it may also apply when there are other "technical" violations, such as lack of notice, failure to state the time of execution, violation of the directions to the executing officer, failure to conduct or to return the results of an inventory. At one point the Court stated: "In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant."[104] They also stated: "We. . . conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which the exclusion will further the purposes of the exclusionary rule."[105]

Justice Stevens and Justices Brennan and Marshall dissented separately in *Leon*; Justices Brennan and Marshall dissented in *Sheppard*.[106] In *Leon*, Justice Stevens presented the majority with an interesting doctrinal enigma: if the language of the fourth amendment itself requires that "no Warrants shall issue, but upon probable cause," and probable cause is defined in terms of what a reasonable person would decide, then any warrant that would issue based upon less than probable cause would be definition run afoul of the express prohibitions of the fourth amendment.[107] Moreover, as a historical note, Justice Stevens opined that the Framers of the Constitution would not have been enamored at permitting official reliance upon duly issued, but defective, warrants:

> In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not based upon probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable."[108]

To Justice Stevens, the failings of *Leon* were two: it would promote deficient applications to the magistrate "on the chance that he may take the bait"[109] and create the anomoly of a *right* to be free from unreasonable searches and seizures without a corresponding *remedy*, and "convert the Bill of Rights into an unenforceable honor code that the police may follow in their discretion. . . . If the Court's new rule is to be followed, the Bill of Rights should be renamed."[110]

In *Sheppard*, Justice Stevens agreed with the majority that the evidence should not have been suppressed. Criticizing the Court for reaching out for a particular result, he reasoned that the affidavit, warrant, and search, taken together, were not unconstitutional under the standard of probable cause set forth the previous Term in *Illinois v. Gates*:[111]

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him. . . there is a fair probability that contraband or evidence of a crime will be found in a particular peace.[112]

Under this test, and giving "substantial deference to the magistrate's determination,"[113]

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[104] *Leon*, 52 U.S.L.W. at 5162.

[105] *Id.* at 5160 (footnote omitted).

[106] Justice Blackmun concurred in both cases "because I believe that the rule announced today advances the legitimate interests of the criminal justice system without sacrificing the individual rights protected by the Fourth Amendment." *Id.* at 5163 (Blackmun, J., concurring). He cautioned, however, that, should the dire warnings of the dissenters come to pass, the Court could "reconsider what we have undertaken here." *Id.*

[107] "We cannot intelligibly assume *arguendo* that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable." *Id.* at 5172 (Stevens, J., dissenting in *Leon*).

[108] *Id.* at 5175. This oversight on the part of the majority was attributed to "constitutional amnesia." *Id.*

[109] *Id.* Doubtful cases would be submitted to the magistrate instead of being fortified by the acquisition of additional evidence. *Id.*

[110] *Id.* at 5176 (citations omitted).

[111] 103 S. Ct. 2317 (1983).

[112] *Id.* at 2332 (quoted at 52 U.S.L.W. at 5173 (Stevens, J., concurring in *Sheppard*)).

[113] 52 U.S.L.W. at 5173.

Justice Stevens concluded that the decision of the state court to order suppression of the evidence was "clearly wrong."[114] Thus, the issue of "good faith" need never have been reached.

Justice Brennan, with whom Justice Marshall joined, chose to return to *Calandra* to attack the fourth amendment jurisprudence of the Burger Court:

> Ten years ago in *United States v. Calandra*, . . . I expressed the fear that the Court's decision "may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search and seizure cases". . . . Since then, in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete.[115]

In support of their opposition to the good faith exception, the dissenters embraced a variation of the "imperative of judicial integrity" basis for the exclusionary rule.[116] Although not neglecting to quote the language of *Weeks* and *Mapp* that had implied that crucial reasons other than deterrence underlie the rule,[117] the dissenters turned to a "unitary model" of constitutional jurisprudence. This model posits that the fourth amendment restrains alike the activities of the police and the courts. Just as the police are enjoined from engaging in unlawful searches and seizures, so, too, are the courts forbidden from lending their assistance to the illegality by permitting the introduction into a judicial proceeding of the fruits of the illegality.[118] A foundation for this view was found in language of *Weeks* that "expressly recognized that the commands of the Fourth Amendment were addressed to both the courts and the executive branch. . . ."[119] Having established this governmental, albeit not prosecutorial, partnership between the police and the courts, it was a short step for the dissenters to find that "an individual's Fourth Amendment rights may be undermined as completely by one as by the other."[120]

Finally, after taking issue with the majority's empirical evidence of the costs of enforcing the exclusionary remedy,[121] but accepting, *arguendo*, the majority's deterrence rationale, the dissenters noted that the rule of *Leon* may still have some unwelcome effects. It was thought that the decision would reduce the incentive

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[114]*Id.* at 5172. Justice Stevens reasoned that the purpose of the warrant clause was to prevent general searches. In *Sheppard*, the contents of the affidavit, which particularly described the place to be searched and the items to be seized, were known to the police officers and the magistrate was available for a *post hoc* review by the trial judge and appellate authorities to determine whether the police exceeded their authority in executing the warrant. In any case, there was no danger of a general search. *Id.* at 5172-73.

[115]*Id.* at 5163 (Brennan, J., dissenting) (citation omitted).

[116]*See supra* text accompanying notes 9, 14.

[117]52 U.S.L.W. at 5165 (quoting Weeks v. United States, 232 U.S. 383, 393, 391-92, 393-94 (1914), 5166 (quoting Mapp v. Ohio, 367 U.S. 643, 651-53, 655, 657, 651 (1961)).

[118]The antithesis of this model—and one which the dissenters accuse the majority of espousing—would draw an artificial distinction between the activity of the police in violating the rights of the individual and the activity of the courts in admitting the fruits of the illegal activity. The dissenters claim that the majority has focused too narrowly upon the initial violation, such that, once the violation has occurred, the protections of the fourth amendment are "wholly exhausted." The dissenters would call the attention of the majority to the fact that the sole purpose of the illegal activity had been for ultimate use *at trial* and that admission of tainted evidence would encourage trimming of the rules by the police. Therefore, the dissenters would carry the protections of the fourth amendment through to the trial and exclude from the courts that which had in any event been seized with the objective of being used in court. 52 U.S.L.W. at 5165.

[119]*Id.* The dissenters pointed to language in *Weeks* that stated that the "effect of the Fourth Amendment is to put *the courts of the United States and Federal officials*. . . under limitations and restraints as to the exercise of. . . power and authority. . . *and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws*. . . ." *Id.* (quoting Weeks v. United States, 232 U.S. 383, 389-91 (1914) (former emphasis added; latter emphasis in opinion)).

[120]52 U.S.L.W. at 5166.

[121]*Id.* at 5169. Justice Brennan cited myriad studies that would tend to indicate that "the 'costs' of the exclusionary rule—calculated in terms of dropped prosecutions and lost convictions—are quite low." *Id.*

for police departments to highly train their officers and instead "put a premium on police ignorance of the law."[122] The effect on the magistrate would be no less detrimental: "A chief consequence of today's decision will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review."[123] If the police have relied in good faith on their warrants, the errors of the magistrates will be labelled constitutionally insignificant and carelessness will thereby be promoted.[124]

Application to the Military

Sources of the Military Law of Evidence

In determining the application of *Leon* to the military, one must examine the sources of the military law of evidence. The hierarchy for the sources of law in the military are the United States Constitution, federal statutes, federal regulations, executive orders, and federal common law. If a rule based upon a higher source conflicts with one based upon an inferior source, the former will prevail. From the perspective of individual rights, the source of law that is most protective will prevail. For example, if an executive order, such as the Military Rules of Evidence, unambiguously sets forth a more protective rule than is constitutionally required, that rule will prevail.[125] Contrariwise, if the Military Rules of Evidence set forth a rule that is unconstitutional, the constitutional rule will prevail. If a rule is ambiguous, the rule for a criminal proceeding in a federal court would prevail.[126]

Military Rule of Evidence 101(b) provides:

> If not otherwise prescribed in this manual or these rules, and insofar as practicable and not inconsistent with or contrary to the Code or this manual, courts-martial shall apply: (1) First, the rules of evidence generally recognize in the trial of criminal cases in the United States district courts; and (2) Second, when not inconsistent with subdivision (b)(1) the rules of evidence at common law.[127]

Military Rule of Evidence 311 provides that "evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible" against an accused who has a "reasonable expectation of privacy in the person, place or property searched" and has made a "timely motion to suppress or an objection to the evidence."[128] Rule 311(c) provides: "A search or seizure is 'unlawful' if it was conducted, instigated, or participated in by: (1) *Military Personnel.* Military personnel or their agents and was in violation of the Constitution. . . or Mil. R. Evid. 312-317. . . ."[129] Rule 314(k) provides: "A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when per-

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[122]*Id.* at 5170.

[123]*Id.* The magistrate will presumably be confronted with a "no-lose" situation: if the warrant had been properly issued, the evidence would naturally be admitted. On the other hand, if the warrant had been improperly issued, the evidence would still be admitted. *Id.* This view, of course, implicitly assumes that the magistrate's only interest is admission of the evidence and neglects the disciplinary sanctions available to a supervising district court for the case of the habitually negligent magistrate. *See supra* note 88 and accompanying text.

[124]52 U.S.L.W. at 5170. Justice Brennan also foresaw that the good faith exception would encourage the police to "provide only the bare minimum of information in future warrant applications. . . The long-run effect unquestionably will be to undermine the integrity of the warrant process." *Id.* at 5171. Finally, given the flexibility afforded the magistrate under the now year-old test of Ilinois v. Gates, 103 S. Ct. 2317 (1983), the dissenters found inconceivable that a warrant could fail the *Gates* test of reasonableness and yet still constitute a basis for "reasonable" reliance by law enforcement authorities, "otherwise, we would have to entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." 52 U.S.L.W. at 5171.

[125]*See e.g.*, Mil. R. Evid. 305(e) (regarding notice to counsel).

[126]Mil. R. Evid. 101(b). The question of ambiguity lies in a number of rules of evidence. *See, e.g.*, Mil. R. Evid. 304(a) (concerning the question of voluntariness of statements); Mil. R. Evid. 305(d)(1)(A) (what constitutes custody); Mil. R. Evid. 305(f) (when an interrogator may question the suspect after the suspect has invoked his or her rights).

[127]Mil. R. Evid. 101(b).

[128]Mil. R. Evid. 311(a).

[129]Mil. R. Evid. 311(c).

missible under the Constitution of the United States as applied to members of the Armed Forces."[130] Rule 315(a) provides: "Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules."[131] Rule 315(g) provides: "*Exigencies.* A search warrant or search authorization is not required under this rule for a search based on probable cause when:. . . . (4) A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the Armed Forces."[132] Finally, Rule 316(h) provides: "A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States as applied to members of the Armed Forces."[133]

These rules have been set forth in detail to show that only Rule 316(h) is ambiguous. Rule 315(g)(4) would be ambiguous if the word "exigencies" is omitted. Rule 314 seems to be very explicit in that it applies to searches "not requiring probable cause under Mil. R. Evid. 315." The Supreme Court has in the past made a distinction between a search and a seizure[134] and the Military Rules of Evidence have made the same distinction in Rules 314, 315, and 316. There are some other areas dealing with *technical* requirements not set forth in the rules. If the good faith exception was meant to apply to these, it would apply to the military, for example, in the areas of directions as to executions, time of execution, and specificity as to person and place.

The Military Rules of Evidence v. the Constitution

One might argue that the Court of Military Appeals could apply *Leon* and *Sheppard* as a matter of policy. The Military Rules of Evidence were meant to "express the manner in which the Constitution" applies to courtsmartial.[135] The Analysis also indicates that "Military Rules of Evidence 301-306, 311-317, 321 are new and have no equivalent in the Federal Rules of Evidence. They represent a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification."[136] When referring to Rule 311(a), the drafters stated that this Rule "restates the basic exclusionary rule for evidence obtained from an unlawful search or seizure. . . ."[137]

Without citing Rules 314 and 315, the Court of Military Appeals has on at least one occasion adopted a rule announced by the Supreme Court which favored societal interests over individual rights. In *United States v. Tipton*,[138] the Court of Military Appeals applied the more relaxed standard of *Illinois v. Gates*[139] in determining whether probable cause existed for an apprehension.

In *Tipton*, several weeks prior to the accused's charged possession of marijuana, a marijuana "smoking bowl" was found in Boyd's shaving kit during a health and welfare inspection. Boyd denied that the smoking bowl belonged to him and vowed to get even with the person who had planted it in his property.[140] After Boyd had been offered nonjudicial punishment for possession of the bowl, he began cooperating with law enforcement officials. During the month of March 1981, Boyd called a

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[130]Mil. R. Evid. 314(k).
[131]Mil. R. Evid. 315(a).
[132]Mil. R. Evid. 315(g).
[133]Mil. R. Evid. 316(h).
[134]*See, e.g.*, United States v. Jacobsen, 104 S. Ct. 1652 (1984); Segura v. United States, 104 S. Ct. 3380 (1984); Texas v. Brown, 103 St. Ct. 1535 (1983).

[135]Manual for Courts-Martial, United States, 1969 (Rev. ed.), Mil. R. Evid. 311 analysis (C3, 1 Sept. 1980), *reprinted in* Manual for Courts-Martial, 1984, App. 22 [hereinafter cited as Mil. R. Evid. analysis 1984)].
[136]Mil. R. Evid. sec. III analysis (1980).
[137]Mil. R. Evid. 311(a) analysis (1980). It should be noted that the Analysis from which these quotes are taken states: "This analysis is not, however, part of the Executive Order modifying the present Manual nor does it constitute the official views of the Department of Defense, the Department of Transportation, the Military Departments, or the United States Court of Military Appeals." Mil. R. Evid. analysis (1980).
[138]16 M.J. 283 (C.M.A. 1983).
[139]103 S. Ct. 2317 (1983).
[140]16 M.J. at 284.

military police investigator, Turner, on several occasions and informed him that Tipton was planning to purchase marijuana on or about payday, 31 March 1981. On that date, the accused displayed his newly acquired stock of hashish to Boyd. After sampling some of the merchandise, Boyd called Turner and told him that he had seen the accused with the drugs, but could not be certain if the drugs were still on Tipson's person. Turner contacted the authorizing official and requested permission to search Tipton in his assigned area in the barracks. Turner told the authorizing official that Boyd had provided no major information in the past. The authorizing official nonetheless authorized the search of Tipton's person, room, and personal effects. The apprehension of the accused led to the charge against him.[141]

In focusing on the reliability of Boyd, the informant, the Court of Military Appeals stated: "Our analysis begins—and until recently might have ended—with the well known 'two-prong test' of *Aguilar v. Texas*. . . and *Spinelli v. United States*. . . ."[142] The court noted that the Supreme Court had rejected the rigid two-prong test, but indicated that the test was still relevant in determining whether probable cause existed. However, *Aguilar-Spinelli* aside, the court stated: "Under the totality-of-the-circumstances test announced in *Gates*, we have no hesitancy in sustaining the military judge's decision to admit the evidence."[143] While citing a number of cases that made mention of the reliability of "identified servicemembers"[144] and the "degree of accountability in the military environment,"[145] the court did not rely upon these factors to satisfy the reliability test. Instead, "taking a 'common-sense' approach to probable cause, we find in the totality of the circumstances that Boyd's 'accountability' was sufficient to overcome his lack of proven reliability."[146] Even so, the court noted "a growing body of jurisdictions have concluded that the *Aguilar-Spinelli* test applied only in cases of unknown or 'professional' informants."[147]

It seems quite clear that the reliance on *Gates* was not necessary to reach the judgment in the case. Thus, the acceptance of *Gates*, without citing Rules 314 or 315, may be seen as purely dictum.

Additionally, *Tipton* was concerned with probable cause to apprehend rather than probable cause to search. The distinction is important because probable cause to search based upon a search authorization is covered by Rule 315. Probable cause to apprehend is covered by Rule 314. Significantly, while Rule 315 was meant to adopt *Aguilar-Spinelli*, Rule 314 was silent on the issue. Thus, while an argument could be mounted that the Court of Military Appeals did not ignore the Military Rules of Evidence in *Tipton*, it is equally clear that the court did not highlight the distinction between the two rules. Indeed, the express language of *Tipton* seemed instead to have disregarded the rules.[148]

Murray v. Haldeman[149] is a good example of the court's upholding of urinalysis on constitutional grounds rather than analyzing the procedure in light of the Military Rules of Evidence. In so doing, the court eschewed judicial restraint by reaching for a higher source of the law (the Constitution), when an inferior authority (Rule 313(b)) might have sufficed.

In *Murray*, the accused had been convicted of wrongful use of marijuana based solely upon the results of compulsory urinalysis testing.[150]

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[141] *Id.*

[142] *Id.* at 285.

[143] *Id.* at 287.

[144] *Id.* (citing United States v. Land, 10 M.J. 103, 107 (C.M.A. 1980)).

[145] 16 M.J. at 285 (citing United States v. Schneider, 14 M.J. 189, 192-93 (C.M.A. 1982)); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

[146] 16 M.J. at 287.

[147] *Id.* (citations omitted).

[148] *Id.* at 285-87.

[149] 16 M.J. 74 (C.M.A. 1983).

[150] Navy policy required that each attendee at the school at which Murray had arrived provide a urine sample within forty-eight hours of reporting. *Id.* at 76. The test that had been performed on Murray's sample indicated the presence of Delta-9-Tetrahydroxycannabinal (THC), a metabolite or active ingredient of marijuana. "Apparently, the Government's only evidence that Murray had used marijuana was provided by compulsory urinalysis." *Id.*

Inter alia,[151] on a petition for extraordinary relief,[152] the Court of Military Appeals was called upon to decide the admissibility of the results of this compulsory testing. The court indicated that urinalysis of service members for screening purposes did not violate either the Military Rules of Evidence or the Constitution. The court stated: "We have made clear that a search may be reasonable even though it does not fit neatly into a category specifically authorized by the Military Rules of Evidence."[153] The court further concluded "that the draftsmen of the rules also did not intend to invalidate that procedure [compulsory urinalysis] *sub silentio* by their failure to authorize it specifically."[154] Moreover, as to the technical application of Rule 313(b), governing inspections,[155] to the compulsory urinalysis testing, the court demurred:

> However, it is not necessary—or even profitable—to try to fit compulsory urinalysis within the specific terms of that Rule. We have made clear that a search may be reasonable even though it does not fit neatly into a category specifically authorized by a Military Rule of Evidence.[156]

The same might be said of the good faith exception to the exclusionary rule.

Practical Considerations

Were *Leon* and *Sheppard* to be applied to the military, what would the implications be for military practice? Certain scenarios may be confidently posited.

If a law enforcement officer consulted a judge advocate to determine whether probable cause existed *before* presenting the information to a magistrate or commander, such action would support the good faith of the officer's action.[157] If, however, the judge advocate advised the officer that probable cause was lacking, yet the officer nonetheless presented the information to a commander, this action would detract from the good faith of the officer. If a law enforcement officer first presented the information to a military judge or magistrate who refused to authorize the search, but then proceeded to a commander to obtain an authorization, this act would reflect a lack of good faith on the part of the officer.

In the latter two situations noted above, the law enforcement official would have been ignoring the judgment of one trained in the law in the hope of obtaining a more favorable hearing from a layperson. In both cases, a good faith doubt as to probable cause will have been imparted to the officer by the attorney.

What of the reverse scenario? Having been refused a search authorization by a commander, the officer proceeded to a military judge or magistrate and provided the judge with the same information. In this case, the trail leads

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[151]Murray also attacked the subject matter jurisdiction of the court-martial to try him. *Id.* at 78-80. *See generally* Kaczynski, *America At War: Combating Drugs in the Military*, 19 New Eng. L. Rev. 287, 310-11 (1983-84).

[152]16 M.J. at 76-77. The court determined this threshold issue by deciding that there was no "likelihood that the interest of the Government can be prejudiced by our determining at this time the merits of the two issues now before us on Murray's petition." *Id.*

[153]*Id.* at 82.

[154]*Id.*

[155]The Military Rule of Evidence in effect at the time provided in part:

> An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.

The Rule further permitted an inspection to be targeted to locate contraband and permitted the use of any natural or technological aid to assist the inspector. Manual for Courts-Martial, United States, 1969 (Rev. ed.), Mil. R. Evid. 313(b) (C3, 1 Sept. 1980).

[156]16 M.J. at 82.

[157]In *Leon*, the warrant application had been reviewed by "several Deputy District Attorneys," 52 U.S.L.W. at 5156; in *Sheppard*, the affidavit was shown to "the district attorney, the district attorney's first assistant, and a sergeant." 52 U.S.L.W. at 5178. *Cf.* United States v. Land, 10 M.J. 103, 104 (C.M.A. 1980) (commander sought legal advice prior to authorizing search; not disqualified to issue authorization so long as ultimate judgment was his own).

from the layperson to the attorney and a strong argument could be made that, despite the appearance and possible actuality of "forum shopping," the officer was merely seeking an expert ruling on the probable cause issues.

On the appellate level, importation of *Leon* and *Sheppard* into the military could lead to a revitalization of the commander-as-magistrate analogy of *United States v. Ezell.*[158] In *Ezell*, the Court of Military Appeals sanctioned the practice of command-issued search authorizations provided that the commander met the standard of being neutral and detached.[159] In *United States v. Fimmano,*[160] the court extended the commander-as-magistrate analogy so as to require that the information upon which the authorization is to be based be provided the commander under oath.[161] A year later, however, in *United States v. Stucky,*[162] the court deleted the analogy, noting that, unlike the civilian magistrate, the commander issues no warrants and "no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict sense" as he will always be relying, at least in part, upon information known to him about the target of the search. Instead, the power to issue search authorizations was found to be a reasonable incident of the responsibility of command.[163]

The heavy reliance in *Leon* and *Sheppard* upon the interposed judgment of the neutral and detached magistrate as a guarantor of the good faith of the police officer might have alternative effects upon the search authorization process. At the very least, the Court of Military Appeals could feel comfortable in applying the good faith exception to cases in which the warrant was issued by a military judge or magistrate. The requisite degree of detachment could presumably be found.[164] In addition, however, were the court to extend the rule to authorizations issued by commanders, the magistral neutrality required by *Ezell* might be strictly required. Thus, while the commander would be required to demonstrate facial neutrality, *i.e.*, that the commander weighed the information provided and ruled upon it, an additional hurdle of "good faith" might reasonably be imposed, *i.e.*, that other facts about the accused, although inevitably known to the commander, played no role in the decision to authorize the search.

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[158]6 M.J. 307 (C.M.A. 1979).

[159]*Id.* at 315, 319. The specific provision upon which the court ruled was Manual for Courts-Martial, United States, 1969 (Rev. ed), para. 152, which permitted the commanding officer to authorize searches, based upon probable cause, of persons, places, and property located in an area over which the commander had control. The current version is located in Mil. R. Evid. 315.

[160]8 M.J. 197 (C.M.A. 1980).

[161]*Id.* at 202. The court was unable to divine a justification for the military to deviate from the express requirement of the fourth amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." The concept of "military necessity," in the court's opinion, could be adequately addressed by the exigency exception to the warrant requirement. *Id.* In concurring, Judge Fletcher was more severe in attacking what had been an accepted military practice:

> I suggest. . . that what this Court finally has done is to examine the dictates of the Constitution of the United States in this one regard and to measure it against the realities of the requirements of military life and the military mission, as opposed to certain talismanic myths, and to find military practice wanting.

Id. at 203 (Fletcher, J., concurring).

[162]10 M.J. 347 (C.M.A. 1981).

[163]*Id.* at 361. Indeed, were the commander-as-magistrate analogy taken to its logical extreme, "Presumably the commander of Company A could be even more neutral and detached in evaluating a request to conduct a search in Company B than in ruling on a request to search within the area of his own Company." *Id.* at 360.

[164]*See, e.g.*, United States v. Stuckey, 10 M.J. 347, 365 (C.M.A., 1981) (preference for authorization by military judge); United States v. Ezell, 6 M.J. 307, 325 n.62 (C.M.A. 1979) (pointedly noting the existence in three services of systems of military magistrates who are competent to authorize searches); *Id.* at 330 (Fletcher, J., concurring) (would consider commander's failure to refer request for search authorization to an available military judge or magistrate when ruling upon reasonableness of search). Courts would undoubtedly find solace in the separate evaluation system for military judges as increasing the likelihood of their detachment from the command that they service. *See* Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, chs. 8 (military judge program), 9 (military magistrate program) (1 July 1984).

Conclusion

In conclusion, it might be stated that the analysis of the application of *Leon* and *Sheppard* to the military is complicated. Certainly, if the military rules are unambiguous and apply to all searches, *Leon* and *Sheppard* could not be applied. If we are correct in our analysis and Rule 316 is ambiguous as to seizures, *Leon* and *Sheppard* would apply. *Leon* and *Sheppard* would also apply if the Court of Military Appeals as a policy matter were to adopt the rationale of the Supreme Court. The court could also apply *Leon* and *Sheppard* to those technical requirements not spelled out in the rules. Even if the court does apply the exception, there are some cautions of which counsel should be aware. It is advisable for law enforcement agents to seek the advice of a judge advocate before applying for a search authorization. It would seem that, where such search authorizations are rejected by a military judge or magistrate, but later issued by a commander, the actions would be deemed unreasonable. It would also seem that the court may limit *Ezell* and apply *Leon* and *Sheppard* only to authorizations by military judges and magistrates. On the other hand, it could strictly construe *Ezell* and apply the good faith exception to all search authorizations in the military where the commander has met the neutral and detached standard. A cautious prosecutor advising law enforcement officials should assume that *Leon* and *Sheppard* do not apply. However, when a trial counsel receives a file that a commander wants to prosecute, but the trial counsel has not been involved in the advisory stage and no other arguments are available to support the reasonableness of the police action, the fall-back position would be reliance upon *Leon* and *Sheppard*.

From a doctrinal point of view, it may be necessary to revise the existing Military Rules of Evidence to fully take advantage of the holdings of *Leon* and *Sheppard*. A simple option might be to include a savings clause in Section III of the Rules to the effect that where the Rules are more restrictive than is constitutionally required, the rule will be inapplicable as of the date of the relevant Supreme Court decision.

On the other hand, the President may desire to refrain from an immediate change to the Rules. A requirement for affirmative action to revise the Rules allows the services a period of reflection to determine the best approach for the armed forces. The military is permitted the time to examine all the implications of the decision in light of the scholarly debate that will inevitably ensue. Finally, in the particular case of the good faith exception, the military might desire to retain the current "bright line" rule rather than engage in the uncertainties that a good faith exception might bring. In any event, hard choices will have to be made, both by the courts and the President, to determine the extent to which *Leon* and *Sheppard* will be imported to military jurisprudence.

Judicial Review of Federal Sector Adverse Action Arbitration Awards: A Novel Approach

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Introduction

Arbitration as a method of settling disputes between parties probably predates most established judicial systems. It has been used throughout history and its basic elements are fully understood by both lawyers and laypeople. As the oldest known method of settling disputes,[1] one would think that no new ap-

[1] *See* McAmis v. Panhandle Pipeline Co., 23 Lab. Arb. (BNA) 570, 574 (Kan. City Ct. App. 1954).

proaches or novel problems could be raised at this late date. However, the recent application of private sector arbitration concepts to grievance arbitration in the federal sector[2] seems to have raised just such a problem.

The Civil Service Reform Act of 1978[3] mandates that all collective bargaining agreements contain procedures to settle grievances[4] and that all grievance procedures include binding arbitration.[5] These provisions essentially create a form of compulsory arbitration of grievances in the federal sector.

Before expanding on the ramifications of these requirements, it is necessary to put the concept of arbitration into perspective by defining it in its broadest sense. Arbitration is

> a contractual proceeding whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and *by consent* submit their controversy to such judges for determination, in place of the tribunals provided by the ordinary process of law. . . .[6]

From this definition one sees several essential elements to the concept of arbitration. First, it is based on contract. Second, the parties select their own judges and submit their controversies to them. Third, the judge's disposition of the matter is final and binding on the parties. Finally, settlement of disputes by an arbitrator is in lieu of taking them before judicial tribunals. It is the first element described above that is the gravamen of the problem of grievance arbitration in the federal sector and the one that will be examined at length in this article.

As early as 1855 the United States Supreme Court recognized the consensual and contractual nature of the arbitral process and indicated at that time that an award based on consent should not be displaced by a court except for serious reasons.[7] Because a fundamental purpose of arbitration is the summary and extra-judicial settlement of controversies,[8] one can see the importance of a voluntary agreement by both parties to the dispute to effect a settlement. Consent as an element of arbitration has never been seriously disputed and is, in a contractual sense, a required element.[9]

Most writers and reporters on the subject of arbitration seem to agree that speed, expertise, low cost, and catharsis are major reasons for the preference generally given to arbitration. More specifically, in the field of labor relations arbitration has evolved as a substitute for strikes,[10] although it is also seen as a valuable tool to avoid litigation, promote self-government, increase management efficiency and labor participation in the industry, and provide justice for employees.[11] The system works well when the judge selected issues an objective, reasonable decision based on the circumstances of the dispute which the parties feel compelled to accept based on their agreement. It is primarily for these reasons that arbitration in labor-management relations has been statutorily designated as the preferred method of settling disputes.[12] Consistent with its acceptance as a dispute resolution mechanism, the contractual quality of the arbitral process is continually stressed. In their separate concurring opinion to the *Steelworkers Trilogy*,[13]

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[2]Devine v. White, 697 F.2d 421 (D.C. Cir. 1983).
[3]Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C. § 1101 (1982)).
[4]5 U.S.C. § 7121(a)(1) (1982).
[5]*Id.* § 7121(b)(3)(C).
[6]Gates v. Arizona Brewing Co., 54 Ariz. 266, 269, 95 P.2d 49, 50 (Ariz. 1939) (emphasis added).
[7]Burchell v. Marsh, 58 U.S. (17 How.) 344 (1855).
[8]Gold, *Considerations in Equity in Vacatur of Arbitral Awards*, 15 Arb. J. 70 (1960).
[9]*See* 18 Williston on Contracts § 1918 (W. Jaeger 3d ed. 1976).
[10]Elkouri & Elkouri, How Arbitration Works 3 (3d ed. 1973) [hereinafter cited as Elkouri].
[11]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955) [hereinafter cited as Shulman].
[12]Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 173(d) (1982)).
[13]The *Steelworkers Trilogy* is a series of three cases decided on 20 June 1960 by the U.S. Supreme Court: United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

Justices Brennan and Harlan state: "[T]he arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement."[14]

One additional general concept of labor-management arbitration is that the decisions of an arbitrator are not considered precedential for other arbitrators in other disputes. Because of the specific issue orientation of arbitration, precedent is not always relevant even though, however, consistency in the underlying rationale of decisions is important. There being no detailed body of arbitral law, the arbitrator generally fashions an award by an *ad hoc* application of the Constitution, statutes, judge-made law, and decisions of precedential administrative boards and other arbitrators, in descending order of importance.[15]

History of the Arbitral Process

Arbitration in labor-management relations began in England early in the nineteenth century and immigrated to the United States during the 1860s.[16] Early in the twentieth century, however, arbitration and the arbitrator's award were viewed by the courts as a limitation on their jurisdiction. Not much judicial deference was granted even though as early as 1896 Judge Oliver Wendell Holmes recognized that workers organizing for better pay and working conditions, while management attempted to keep costs at a minimum, created disputes which should be settled privately by the parties.[17] The reasoning was that settlements agreed upon by the parties would be fairer and last longer because state or federal intervention would create an unequal struggle between labor and management.[18] This position was a minority view, though, until passage of the National Labor Relations Act of 1935.[19] The use and acceptability of arbitration increased tremendously as a result of the decisions of the World War II National War Labor Board. Since then it has been an accepted principle that arbitration, resting on the voluntary agreement of the parties to submit disputes to a neutral third party, is preferred to litigation. Once the federal government entered the field of labor-management relations, it was not long until state statutes which countered the concept of arbitration were pre-empted in so far as they professed to regulate industries covered under the federal acts.[20] Section 203(d) of the Labor Management Relations Act of 1947 states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[21]

In 1960, the U.S. Supreme Court reinforced the use of arbitration as the preferred method of settling disputes with its decisions in the *Steelworkers Trilogy* by limiting judicial review of arbitral awards. The Court stated in *Warrior & Gulf Navigation Co.* that arbitration promotes the joint goal of management and labor that production under the collective bargaining agreement be uninterrupted. Judges, the Court felt, could not settle disputes as well as an arbitrator for want of experience and competence in labor relations.[22]

In 1962, the Supreme Court in *Lucas Flour Co.* reiterated its preference for voluntary arbitration by stating, "The basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare."[23] Even the dissent in that case agreed

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[14]363 U.S. at 570 (Brennan, Harlan, JJ., concurring).

[15]*See* Gold, *supra* note 8.

[16]*See* 34 Lab. Arb. (BNA) 949 (Report of Sub-Committee on Labor Relations Law of the American Bar Association, 1960).

[17]Vegelahn v. Gunter, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting).

[18]Shulman, *supra* note 11, at 999.

[19]49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

[20]*See* Amalgamated Assoc. of Street, Elec., Ry. & Motor Coach Employees of Am. v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).

[21]Pub. L. No. 80-101, § 203(d), 61 Stat. 154 (1947). *See also* Nolde Bros., Inc. v. Local 358, Bakery & Confectionary Workers Union, 430 U.S. 243 (1977).

[22]363 U.S. at 582.

[23]Local 174, International Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962), which is regularly

that while arbitration was a stabilizing influence, it could not be compelled or imposed upon the parties.[24] Two years later, the Court recognized the importance of expedient resolution of labor disputes and that arbitration was the key.[25]

In 1962, President Kennedy signed Executive Order 10,988, which granted limited organizational and bargaining rights to federal employees but did not authorize arbitration as a dispute settlement mechanism since adverse actions were at the time subject to a limited review before the Civil Service Commission.[26] In 1969, President Nixon issued Executive Order 11,491 which states that "arbitration or third party fact-finding may be used to resolve negotiation impasses," thus bringing the concept of arbitration into the federal sector.[27] Passage of the Civil Service Reform Act of 1978, *inter alia*, created for the first time a statutory requirement for binding arbitration as the final step in all collective bargaining agreement grievance procedures.[28]

In sum, we have seen the rise of voluntary arbitration in labor-management relations from a tolerated status to a preferred status with extremely limited judicial review. The collective bargaining agreement is now mutually enforceable and advantageous. Voluntary arbitration shares that same status.

Because a collective bargaining agreement cannot anticipate every circumstance which may come up during its term, it has been called a unique legal document subject to special rules "which only members of the cult can fully understand."[29] Although unique, its basic strength is that it is a contract. It is reasonable to bind a person, without review, to that which he or she agreed to voluntarily. The narrow scope of judicial review of arbitration enunciated in the *Steelworkers Trilogy* evidences this philosophy. Quite directly, the Court in *Warrior & Gulf Navigation Co.* stated:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties....[30]

As we shall see, these words have largely been ignored when reviewing arbitrators' awards in the federal sector.

Contractual Basis of Arbitration

Before we go on, it is important to review the contractual basis of arbitration since that basis is not only the legal root of arbitration, but also its greatest strength.[31] The most popular definition of "contract" is, "A promise or set of promises which the law will enforce. . . . Every agreement and promise enforceable by law is a contract."[32]

This general definition indicates that there must be some sort of an exchange of equivalents or a *quid pro quo*. An agreement in the broadest sense of the word is mutual assent by two or more people. In a more narrow sense it is the manifestation of that assent which affects the legal relationship between the parties. It is a bargained-for agreement, an exchange of promises supported by consideration. Consideration is something which the law regards as valuable and which was bargained for in exchange for a promise; if a promise is not bargained for, there is no consideration. If there is no consideration,

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cited for the proposition that a strike violates a contract where there is a compulsory arbitration clause and the dispute over which the strike occurred is arbitrable, regardless of whether the contract contains an express no-strike clause.

[24]*Id.* at 110 (Black, J., dissenting).

[25]John Wiley & Son, Inc. v. Livingstone, 376 U.S. 543 (1964).

[26]Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962).

[27]Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Compilation).

[28]5 U.S.C. § 7121(b)(3)(C) (1982).

[29]Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489 (1959) [hereinafter cited as Cox].

[30]363 U.S. at 581.

[31]Jones, *Compulsion and the Consensual in Labor Arbitration*, 51 Va. L. Rev. 369 (1965) [hereinafter cited as Jones].

[32]1 Corbin on Contracts § 3 (1963).

there is no agreement; where there is no agreement, there is no contract. A bargained-for agreement requires a choice. A person must be able to say upon entering into a contract, "I can," or, "I need not." This voluntary, free choice is the essence of an agreement. The parties to a contract express themselves in harmony, there is a "meeting of the minds," a mutual consent.[33]

In accordance with the current state of affairs in private sector labor-management relations, the collective bargaining agreement is the ultimate source of rights.[34] If it were not for the voluntary promises on the part of the parties to the agreement, the individual employee would have little or no rights, no fringe benefits, and would be employed at the employer's will.

Even though we have seen a preference for arbitration, courts cannot impose an agreement to arbitrate on a union or management where they have not agreed to do so.[35] Such is the basis of the responsibility to arbitrate: a voluntary, free choice to agree, or refrain from agreement, resulting in the mutual consent of the parties to take disputes under the contract before an agreed upon third party who will decide the issues and grant an award. Implicit in the Supreme Court's decisions on the narrowness of judicial review seems to be the philosophy that no one made the parties agree to be bound, they did agree, and they will not be heard to complain when they are dissatisfied with the award. On the other hand, courts will not enforce an arbitration award against a party who had not agreed to be bound.[36] This concept of nonenforcement of an arbitral award in the face of no agreement to be bound was enunciated by the Supreme Court in *Nolde Brothers, Inc.* where, in dicta, the court stated: "[O]ur prior decisions have indeed held that the arbitration duty is a creature of the collective bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so."[37]

Although *Nolde Brothers, Inc.* is generally cited for another proposition (*i.e.*, the duty to arbitrate a dispute arising under the contract, but based on events occurring after termination of the contract, survives the contract's termination) it is clear that the Court's underlying rationale was based on a voluntary agreement by the parties to do something for which there was no compulsion. The dissent in *Nolde Brothers, Inc.* was also clear on the concept of agreement when it stated that the arbitral duty arose only from agreement.[38] Even the National Labor Relations Board (NLRB) views arbitration as an obligation arising solely out of contract.[39] Justice Brennan's separate opinion in the 1960 landmark *Steelworkers Trilogy* cases stated that the words of the contract "can be understood only by reference to the background which gives rise to their inclusion."[40] It is clear, then, that the courts apply the law of contract to a collective bargaining agreement when determining whether or not rights exist and whether or not there was agreement by the parties to be bound.

Consistent with Corbin's *Thesis on Contracts, i.e.*, it is more the bodily manifestations of the parties which determine the existence of an agreement rather than a true and absolute meeting of the minds. Justice Cardozo held that the intention of the parties to a labor agreement is to be ascertained by "the same tests that are applied to contracts generally," and that no one has a duty to arbitrate "except to the extent that he has signified his willingness. . . ."[41]

Justice Whittaker, in his separate dissenting opinion to *Warrior & Gulf Navigation Co.*, accepted the concept of the contractual basis of

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[33]*Id.* at § 9.
[34]Cox, *supra* note 29, at 1493.
[35]363 U.S. at 570 (Brennan, Harlan, JJ., concurring).
[36]Local 11, IBEW v. Jandon Electric Co., 429 F.2d 584 (9th Cir. 1970).
[37]*Nolde Bros., Inc.*, 430 U.S. at 250-51.
[38]*Id.* at 256 (Stewart, J., dissenting).
[39]The NLRB decisions cited in *Nolde Bros., Inc.* for this proposition were Gateway Coal Co. v. Mineworkers, 414 U.S 368 (1975) and Hilton-Davis Chemical Co., 185 N.U.R.B. 241 (1970). 430 U.S. at 257 (Stewart, J., dissenting).
[40]363 U.S. at 570 (Brennan, Harlan, JJ. concurring).
[41]Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 299, 169 N.E. 386, 391 (N.Y. 1929), *quoted in Warrior & Gulf Navigation Co.*, 363 U.S. at 587 n.6.

arbitration[42] and believed that the contract was the source and limitation of the arbitrator's authority and power.[43] He stated that absent a "clear and definitive agreement" between the parties, an arbitrator would have no power.[44] Not only did the dissenting justice in *Warrior & Gulf Navigation Co.* rest his opinion on contract, the majority also recognized that "arbitration is a matter of contract" and that no dispute could be submitted to a neutral third party unless both parties to the agreement consented.[45]

The voluntary contractual essence of arbitration was recognized time and time again throughout the *Steelworkers Trilogy*. Since one of the primary purposes of a collective bargaining agreement is to erect a system of self-government, arbitration would not enhance that purpose if agreement was compelled. If it were not for the voluntary agreement to settle disputes swiftly, efficiently, and between the parties, the *Warrior & Gulf Navigation Co.* Court felt that both union and management would be relegated to depending on their comparative economic strength at any given time in deciding all matters between them.[46] This philosophy of compulsion would not promote labor peace and self-government.

Although the courts have used the law of contract to determine rights and duties under a collective bargaining agreement concerning arbitration, a collective labor agreement is still considered to be *sui generis*.[47] It is an agreement dictated to a great extent by external circumstances over which the parties have little or no control. Economics, national policies, and the NLRB are but three of the pressures exerted on union and management in the private sector. The resulting agreement then is more complex than the comparatively simple mutual consent exhibited by the parties to an ordinary commercial contract.[48] Nevertheless, the concept of voluntary agreement, *i.e.*, the right to say no, has continued to play an important role in determining the scope of judicial review of arbitral decisions in the private sector.

Voluntary Arbitration in the Private Sector

Building on its determined dedication to self-government in labor relations and the correlated concept of voluntariness, the U.S. Supreme Court in *Carbon Fuel Co. v. UMW* stated:

> [A]nd to make crystal clear the intention to leave parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added § 8(d) [to the Taft-Hartley Act] defining 'to bargain collectively' as 'not [to] compel either party to agree to a proposal or require the making of a concession.' 29 U.S.C. § 158(d). . . . It follows that the parties' agreement primarily determines their relationship.[49]

Even though *Carbon Fuel Co.* is more often cited for the proposition that an international union is not liable for wildcat strikes it did not authorize where it has no contractual duty to avoid or end strikes, it is interesting to again see the Court's use of contract to support its decision. Whenever the Court considered an issue under the Taft-Hartley Act, it discussed Congress' intent to bring about industrial peace through voluntary rather than compelled agreements.[50]

Voluntary arbitration under a collective bargaining agreement is meant to promote management efficiency, union leadership, and employee justice in private enterprise.[51] It is a dispute resolution mechanism essential in a system such as ours in which the individual employee has few substantive rights outside the four corners of the collective bargaining agreement. It is also a promise to substitute peaceful settlement for industrial chaos and violence in

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[42]363 U.S. at 590 (Whittaker, J., dissenting).
[43]*Id.* at 586.
[44]*Id.*
[45]*Id.* at 582.
[46]*Id.* at 580.
47 NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984).
[48]*See* Jones, *supra* note 31.

[49]444 U.S. 212, 219 (1979) (footnote omitted).
[50]*See, e.g., Lucas Flour Co.*, 369 U.S. at 109 (Black, J., dissenting).
[51]Shulman, *supra* note 11, at 1024.

the form of strikes, lockouts, and litigation. Additionally, it is consideration, in a contractual sense, for a promise to refrain from striking.[52]

For the past three decades, the NLRB has been loath to interfere with or supplant the decisions of an arbitrator unless there has been some egregious irregularity in the proceedings or award.[53] With few exceptions, which will be discussed later, the scope of judicial review of arbitral awards also seems to have narrowed. It is not, however, the purpose of this article to analyze exactly what that scope is. Rather, it is to concentrate on the philosophy and underlying rationale courts have used to determine the outer limits of the scope of judicial review and its transference to adverse action arbitration in the federal sector. To place that rationale in perspective, briefly consider the holdings in the *Steelworkers Trilogy* cases.

In *American Manufacturing Co.*, the Court held that it was error for a lower court to weigh the merits of a grievance and the equities of an employee's claim in view of the fact that the arbitration clause involved called for submission of all grievances to arbitration, not merely those a court deemed meritorious.[54] *Warrior & Gulf Navigation Co.* resolved a different aspect of voluntary arbitration. It is generally cited for the proposition that where an employee's grievance is not expressly excluded from arbitration by the terms of the collective bargaining agreement, arbitration is compellable.[55] Finally, *Enterprise Wheel & Car Corp.* settled the issue of a court's review function: it is a court's function to determine whether or not a specific grievance is arbitrable, and if so, to abstain from determining the merits of that grievance.[56] With that said, let us now turn to the underpinnings of those decisions and their progeny.

Because voluntary labor grievance arbitration is valuable in promoting industrial peace only so long as it serves to settle any and all disputes under the collective bargaining agreement, it is essential that the parties *agree* to submit to all questions involving contract interpretation to the arbitrator if courts are to defer to the arbitral award and grant it the necessary finality. Arbitration as a stabilizing influence requires that awards be final and binding on the parties. The essential philosophy here is that it is the arbitrator's judgment which was bargained for, and a party to that bargain will not be heard later to dispute the product of that mutual consent.[57] The national policy, as expressed by Congress in the Labor Management Relations Act of 1947, is viable only so long as third party resolution of disputes can be freely chosen by both parties.[58] In addition to the finality resulting from the contractual concept of being bound by the terms of the agreement, a more practical aspect promoting the concept of voluntary arbitration is the fact that arbitrators are more expert in the law of the workplace than are judges.[59]

The final and binding attributes of the arbitral award, as well as its nonprecedential nature, work particularly well in our labor-management system since an employee's rights largely depend on the collective bargaining agreement. The totality of these rights is also the product of the free and voluntary choice of the parties.[60] There is not, nor should there be, an alternative or inconsistent forum where the union or management can gain a conflicting award so long as courts defer to the arbitral award. As Justice Whittaker noted in his dissenting opinion in *Enterprise Wheel & Car Corp.*, "After the agreement expired the [employees'] employment status was terminable at the will of the employer."[61] As one can see, the national policy of labor peace

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[52]Elkouri, *supra* note 10, at 13.
[53]*See* Speilberg Mfg. Co., 112 N.L.R.B. 1080 (1955) (the board will defer to an arbitral award so long as the proceedings were fair and regular, the parties agreed to be bound, and the award is not repugnant to the policies underlying the National Labor Relations Act).
[54]363 U.S. at 567-68.
[55]*Id.* at 589.
[56]*Id.* at 599.
[57]*Id.* at 567-68.
[58]*Id.* at 566.
[59]*Id.* at 567.
[60]*See id.* at 600-01 (Whittaker, J., dissenting) (separate dissenting opinion).
[61]*Id.* at 601. *See supra* text accompanying note 56.

would be undermined were the courts to fashion alternative and inconsistent remedies in grievance arbitration by allowing full scope review on appeal.

A grievance is based on the contract, the contract is a product of mutual consent, and the interpretation of it by an arbitrator is that which was bargained for. A court's disagreement with the arbitrator's interpretation is thus improper.[62] the arbitrator's informed judgment is valued more by the parties than a court's opinion on appeal. The nature of the court's inquiry, assuming regularity of the arbitration proceedings and propriety of the award, is limited to a determination that there was, in fact, an agreement to arbitrate the dispute.[63] A court should not interfere with the consensual jurisdiction of the arbitrator unless it is to protect the employee from the exercise of powers not actually granted.[64] It is consistent with national policy that the grievance procedure culminating in voluntary arbitrations, rather than industrial discord and violence, be the termination point of industrial disputes.[65] Any other method, such a broad judicial review of arbitral awards, may indeed be in derogation of the national policy because of the courts' lack of competence in the intricacies of the parties' labor system.[66]

Since management and union rights are generally molded at the local level, many times, without regard to the concerns of other enterprises or other geographic locations, the result is a system of truly private law embodied in each individual collective bargaining agreement.[67] The U.S. labor relations system is a decentralized system allowing the parties to an agreement to wholly determine their employment relationship.[68] Within each employment relationship, a common law of the shop is created, furnishing the context within which the collective bargaining agreement is to be interpreted.[69] A court's function in this decentralized scheme is to insure the maintenance of general industrial peace on a national plane to support public policy.[70]

The importance of maintaining the individuality of dispute resolution by severely limiting the opportunity for judicial review has been the subject of comment on numerous occasions in the past. In his oft-cited article on labor relations, the late Dean Harry Shulman of Yale Law School made the following statement concerning the apparently inconsistent variations among arbitrators in their use of the judicial concepts of burden of proof and burden of going forward, both normally binding on all in a formal judicial proceeding:

> But a collective agreement—the arbitrator's law—rarely states any burden of proof; and the presentation to the arbitrator is not always in the hands of skilled advocates having the same training for the work and operating on common premises. A court's erroneous findings of fact in a particular litigation may work an injustice to the litigants but rarely disturb the future; similar error by an arbitrator may cause more harm by disturbing the parties continuing relationship than by the injustice in the particular case.[71]

A particular arbitrator's decision applies only to the parties. Justice and their satisfaction with the award are the ultimate goals. It matters not what an arbitrator in another enterprise, another location, or under other circumstances would have decided. Therefore, there is no precedent or *stare decisis* set for future arbitrations. However, the arbitral awards in a given company or, more specifically, under a single collective bargaining agreement, must contain a uniform rationale which will be useful to the parties in the future. An approach, a line of argument, or the character of evidence used must be consistent with the past use to promote future peaceful relations between the parties.[72]

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[62]*Id.* at 599.
[63]*Id.* at 570 (Brennan & Harlan, JJ., concurring).
[64]*Id.* at 592.
[65]*Id.* at 581.
[66]*Id.*
[67]*Id.*
[68]*Id.* at 578-79.
[69]Cox, *supra* note 29, at 1499.
[70]*See* 363 U.S. at 585.
[71]Shulman, *supra* note 11, at 1017-18.
[72]*Id* at 1020.

The lack of expertise in courts of general jurisdiction, the decentralized nature of U.S. labor relations, and the fact that the vast majority of employee rights are found solely in the collective bargaining agreement make final and binding voluntary arbitration the better, if not the best way of promoting the national goals of industrial peace and stability. In other countries, where the employee's substantive rights are mainly statutory, or where labor relations law is highly centralized, the alternate method of a labor court system seems to work well. Where employees and management are organized in large, but few, organizations capable of speaking in one voice for their respective groups, and where national agreements combine with statutory law to govern fundamental issues such as employee rights upon discharge, management rights, and union security, the U.S. concept of voluntary, nonprecedential labor arbitration loses much of its value.[73]

The Concept of Compulsory Arbitration

Thus far we have considered the contractual basis for voluntary grievance arbitration in U.S. labor-management relations. There is another approach to requiring peaceful settlement of disputes known as compulsory arbitration. Compulsory arbitration has been defined as a "a term of art describing a system of settling serious collective bargaining disputes through adjudication by a governmentally imposed board or panel."[74] Examples of this concept are the statutorily created governmental panels such as the National Labor Relations Board, the Federal Labor Relations Authority, and the U.S. Merit Systems Protection Board. The latter two were created for, and function solely in, the federal sector to resolve disputes concerning interests, grievances under the contract, and serious adverse actions. A second and more general definition of compulsory arbitration is "any situation in which a party is compelled to submit a dispute to arbitration."[75]

Compulsory arbitration is generally held in contempt by labor and management alike. It seems that its only reason for existence is situations where employees for one reason or another are not free to engage in collective bargaining to its fullest extent, such as employees working in the public sector.[76] State and municipal employees' rights and their duty to arbitrate disputes vary widely from state to state. For state and municipal employees there exists both voluntary and compulsory as well as binding and advisory arbitration.[77]

Compulsory arbitration is also useful where neither party wishes to agree to third party resolution of disputes and where such disagreement would harm others or the general public.[78] Protection of the public welfare seems to be the prime rationale for compulsory arbitration. Only where a strike resulting from a labor dispute could cause serious damage to the public is compulsory arbitration grudgingly accepted.[79] The arguments against compulsory arbitration are:

1. It is the antithesis of free collective bargaining;
2. It is a dictatorial and imitative process rather than a democratic and creative one;
3. The compulsion generates resistance and is a source of further conflict;
4. If compulsory arbitration proliferates, the government will end up controlling all aspects of labor-management relations and, therefore, it is inconsistent with a free market and enterprise system.[80]

To evaluate compulsory arbitration in its simplest terms would be to say that in a free

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[73]*See* Aaron, *Labor Courts: Western European Models and their Significance for the United States*, 16 U.C.L.A. L. Rev. 847 (1969).

[74]Feller, *Compulsory Arbitration—A Union Lawyer's View*, 51 Va. L. Rev. 410, 411 (1965).

[75]*Id.*

[76]Elkouri, *supra* note 10, at 18. *See also* Schwartz, *Is Compulsory Arbitration Necessary*, 15 Arb. J. 189, 200 (1960) [hereinafter cited as Schwartz].

[77]Elkouri, *supra* note 10, at 12. *See also* Staudohar, *Voluntary Binding Arbitration in Public Employment*, 25 Arb. J. 30 (1970).

[78]Elkouri, *supra* note 10, at 17. *See also* Warren & Bernstein, *A Profile of Labor Arbitration*, 16 Lab. Arb. (BNA) 970, 972-73 (1951).

[79]Elkouri, *supra* note 10, at 17.

[80]*Id.* at 18.

enterprise system, free collective bargaining and compulsory arbitration are, in practice, incompatible.[81] In the private sector, efforts should continue to support and promote free collective bargaining and voluntary arbitration, since to do otherwise would be inimical to its essential concept of voluntariness. Compulsory arbitration is detrimental to free collective bargaining. Compulsory arbitration removes the power of decision from the parties, whereas, in voluntary arbitration, third party resolution is the creation of the parties who agree that the third party should decide.[82]

It may seem that when a court today considers an issue of arbitrability and decides that arbitration is proper, it is, in a sense, compulsory arbitration. It really is not because the essential basis of the question of arbitrability is in the voluntary agreement to submit certain issues to arbitration. The law is not imposing the system upon the parties. Rather, it is assisting them in deciding whether a particular issue is covered by their original, voluntary choice to arbitrate. That is not compulsory arbitration.

Just as a court's intervention to determine the arbitrability of a dispute does not defeat the basic voluntariness of the original, consensual agreement to arbitrate, a statutory mandate to submit all grievances covered by the collective bargaining agreement to binding arbitration does not, when arbitration is "agreed upon" in the collective bargaining agreement, create voluntary arbitration in its pristine sense. The compulsive mandate to arbitrate remains, removing the power of self-determination and self-government from both parties. Congress and the courts, with isolated exceptions, have steadfastly refused to require or even to allow compulsory arbitration in the private sector[83]

Labor Arbitration in the Public Sector

As seen from the above discussion and comparison of voluntary and compulsory arbitration, compulsory arbitration exists in the federal sector in two forms. First, the Civil Service Reform Act of 1978 created an appellate review body, the U.S. Merit Systems Protection Board (MSPB), with the power to decide issues within its jurisdiction.[84] Included within its jurisdiction are serious adverse actions such as discharges, suspensions for more than fourteen days, reductions in pay or grade based on cause,[85] and discharges and reductions in grade for unacceptable performance.[86]

A second and competing form of compulsory arbitration in the federal sector had its genesis in Executive Order 11,491. The Order for the first time allowed the use of binding arbitration in the settlement of labor-management disputes.[87] The Order contained no requirement to submit disputes to arbitration; rather, it was merely a formal recognition that the arbitral forum was available when the parties so agreed. Also, the ability to arbitrate was limited to the resolution of interest disputes. With the passage of the Civil Service Reform Act of 1978, a statutory requirement was created that all collective bargaining agreements contain a grievance procedure which must culminate in binding arbitration.[88] This requirement to arbitrate was the single substantive departure of the Act from Executive Order 11,491.[89] The Act also gives employees a choice of appellate procedures to pursue, *i.e.*, an appeal to the MSPB or binding arbitration under the collective bargaining agreement.[90]

Although the specific, serious adverse actions and performance matters to be included within the scope of collective bargaining agreement grievance procedures are negotiable, the Federal Service Impasses Panel applies a presumption in favor of a broad-scope grievance procedure and places the burden on the employer to justify its proposal to exclude matters from

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[81] Farmer, *Compulsory Arbitration—A Management Lawyers View*, 51 Va. L. Rev. 396, 409 (1965).
[82] *Id.*
[83] *See* Jones, *supra* note 31; Schwartz, *supra* note 76.
[84] 5 U.S.C. § 1205(a)(1) (1982).
[85] *Id.* § 7513(d).
[86] *Id.* § 5303(e).
[87] 3 C.F.R. 83 (1966-1970 Compilation).
[88] 5 U.S.C. § 7121 (1982).
[89] 124 Cong. Rec. S14270 (daily ed. Aug. 24, 1978).
[90] 5 U.S.C. § 7121(e) (1982).

the negotiated procedure.[91] As a result, almost all collective bargaining agreements in the federal sector allow the employee to proceed through either binding arbitration or the more formal appeal to the MSPB.

The arbitration provisions, then, in the federal sector lack the essential element of voluntariness which characterizes arbitration in the private sector. Even so, the resultant agreement to arbitrate in the federal sector is far from unenforceable. The contract cannot be described as void or voidable since under a contract theory it operates to create a power in the promisee and the promisor has no power of avoidance. It is not the thesis of this article that a federal sector collective bargaining agreement is void or unenforceable because of fraud, illegality, duress, or any other recognized contractual infirmity. Rather, it is that the basic lack of free and voluntary mutual consent to arbitrate should be considered as a factor during judicial review of an arbitral award granted in the federal sector. To merely assail a given instance of statutory compulsion to arbitrate as contrary to voluntary consent, however, is not sufficient. The questions must be, is the governmental compulsion necessary to maintain public order, and, does the government mandate to arbitrate achieve the goals desired by Congress?[92]

It is an accepted labor relations theory that there is a stronger case for compulsory arbitration where, for some reason, employees cannot bargain over the full panoply of industrial workplace issues and are, therefore, more or less under the unilateral control of management.[93] In the federal sector, as a combined result of the inability to strike and the fact that most significant issues pertaining to wages, hours, and conditions of employment are statutorily set, Congress created a form of compulsory arbitration with the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board. The latter body gives all employees a forum to which they can appeal certain disciplinary and discharge actions, whether or not they are organized to bargain collectively. This employee right is external to, and independent of, any collective bargaining agreement. The alternate right of organized civil servants under the statute to grieve an adverse action and submit it to binding arbitration establishes a basic inequity within the workplace, since all nonbargaining unit employees, even though located at the same worksite, only have recourse to appellate review by the MSPB. This may be contrasted to the private sector employee's contractual right to grieve management actions. If it were not for the mutual consent agreement to arbitrate, the private sector employee may have no remedy at all to correct unwarranted unilateral actions by management.

Grievance arbitration involves subjecting given facts to a set of standards upon which the arbitrator makes an informed, sympathetic, and knowledgeable judgment. Where the only available remedial procedure is consensual arbitration, the goals of self-government, avoidance of industrial unrest, and catharsis are promoted. Where, however, arbitration awards, nonbinding except as between the parties and nonprecedential in nature, compete with standards developed by a quasi-judicial board designated by law to hear those same matters and whose decisions are both binding and precedential across the federal employment spectrum, the results are incongruity, inequity, and tension within the workplace. Arbitration of adverse actions in the federal sector, then, may not result in the mutually accepted application of standards which is the basic premise of arbitration in the private sector.

Another essential concept in grievance arbitration is that neutral third parties must understand the industrial problem. Where they do not, arbitrators may be tempted to rigidly apply the literal meaning of the language of the agreement or law and may feel that a case must turn on some legal doctrine rather than the law of the workshop.[94] Awards under these circum-

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[91] *See* AFGE, Locals 225, 1504 & 3723 v. FLRA, 712 F.2d 640 (D.C. Cir. 1983); Bureau of Land Management, Phoenix, 83 F.L.R.R. 1-6536.

[92] *See* Jones, *supra* note 31, at 374.

[93] *See* Schwartz, *supra* note 76, at 93.

[94] *See* Cox, *supra* note 29, at 1488.

stances, although technically nonprecedential in nature, do a disservice to the system since they must necessarily be based on rationale useful in deciding recurring cases and provide guidance for the future to relate decision and reasoning to principles.[95] Decisions which depart from established standards of the workshop without explanation erode the parties' confidence in arbitration and are subject to being viewed as random judgments. The MSPB has the power of precedential decision-making to insure uniformity of action throughout the federal sector; this power greatly reduces the possibility of arbitrary decisions or personal discretion by federal managers in discipline and discharge matters.

To further lessen the chances of random judgments and inconsistent application of standards, Congress, in view of its decision to require binding arbitration as an alternate procedure, has declared that there should be a wider scope of judicial review of arbitrators' decisions in the federal sector than is allowed under the common law of private sector arbitration. The Office of Personnel Management (OPM), the executive agency designated by the President to oversee the federal personnel system, may, in the discretion of the OPM Director, seek judicial review of an arbitrator's decision where the arbitrator "erred in interpreting a civil service law, rule, or regulation. . . and the decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[96] One may say at this juncture that Congress has sufficiently recognized the essential difference between consensual private sector arbitration and the compulsory nature of its federal sector cousin. This theory is supported by the fact that Congress, in determining the scope of review by exceptions to the FLRA for arbitral awards concerning issues not appealable to the MSPB, designated a different scope of review by declaring that the FLRA may take action only where it finds the award deficient "because it is contrary to any law, rule or regulation; or on other grounds *similar to those applied by Federal courts in private sector labor-management relations.*"[97]

Congress apparently intends to provide a wider scope of review of arbitral decisions where the arbitrator stands in the place of the MSPB in discipline and discharge matters under 5 U.S.C. § 7121(e). This special, wide scope judicial review would seem to go far to insure consistency in decisions between arbitrators and the MSPB except that there is no legislative provision for exceptions to be brought to the MSPB, as there is for the FLRA, and the courts of appeals have applied the common law and deferred to arbitral awards concerning issues otherwise appealable to the MSPB. Congress has arguably applied a *Steelworkers Trilogy*-type philosophy to arbitral awards on issues not appealable to the MSPB, and, at the same time, has established a wider scope of review by allowing judicial review of an arbitrator's award under 5 U.S.C. § 7121(e) "under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board."[98]

Use of Private Sector Concepts in Judicial Review of Federal Sector Arbitral Awards

One of the primary reasons underlying the Supreme Court's almost total deferral to arbitral awards in the private sector is that "[t]he collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant."[99]

The specialized knowledge of the arbitrator in labor-management relations as well as the concommitant absence of labor expertise in judges has resulted in a very narrow scope of judicial review of U.S. arbitral decisions. European labor courts, by comparison, exercise a much wider scope of authority since they are special-

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[95]Shulman, *supra* note 11, at 1021.
[96]5 U.S.C. §§ 7121(f), 7703(d) (1982).
[97]*Id.* § 7122(a)(1), (2) (emphasis added).
[98]*Id.* § 7121(f).
[99]363 U.S. at 567.

ized courts possessing the requisite expertise in the field. The European labor court system serves essentially the same function as the U.S. arbitration system since those courts are presumed to be familiar with the law of the workshop, the techniques of labor-management relations, and, therefore, will issue decisions with which both parties will be able to live.[100] Writers in labor relations have stated that, generally, the labor court system does not offer a ready alternative to the U.S. judicial practice of deferring to arbitral awards.[101] However, a specialized court system is both desirable and feasible where certain conditions exist, such as statutory employment rights and just cause for discipline and discharge.[102] These conditions exist in public sector labor-management relations where the majority of substantive employee rights are based on law and are independent of the collective bargaining agreement. The Federal Courts Improvement Act of 1982[103] established such a "labor court" in the form of the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit is a court of specialized jurisdiction and is the exclusive judicial forum in which federal employees and management may seek judicial review of discharge and discipline matters in the federal sector. As a result, there is now less reason to defer to federal sector arbitral awards since this court possesses the requisite expertise in federal labor-management relations. This approach is not novel; when state courts review arbitral decisions in state sector discipline and discharge matters, they rarely allude to the common law of arbitration or apply the principles of the *Steelworkers Trilogy*.[104] There is also precedent for courts not to defer where the right grieved has a basis in law independent of the collective bargaining agreement since "[t]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[105] Fair Labor Standards Act[106] questions and 42 U.S.C. § 1983 have also provided bases for *de novo* actions in court where arbitral awards have conflicted with statutorily-secured employee rights.[107]

The landmark decision involving review of an arbitrator's award in an adverse action case arising under the Civil Service Reform Act of 1978 is *Devine v. White*.[108] Among the issues presented were the scope of reviewability of an arbitrator's award and the amount of deference due arbitral decisions under the Act. *White* arose prior to the Federal Courts Improvement Act and was one of the first arbitral decisions under the Civil Service Reform Act reviewed by a federal court of appeals, as well as one of the last decided by a court other than the Court of Appeals for the Federal Circuit. In his opinion in *White*, Judge Harry T. Edwards considered the legislative history of the Act and concluded that the choice of procedural routes available to the employee cannot affect the standard of review applicable to adverse action arbitration because it would tend to thwart the congressional intentions to promote consistency and discourage forum shopping.[109] Judge Edwards reiterated that the scope of review of such actions was the same whether the dispute was settled by an arbitrator or by the MSPB, and would be scrutinized "in the same manner and under the same conditions. . . ."[110] Additionally, the court determined that the OPM Director would have to show both the required error *and* substantial impact to gain judicial review of the award.[111]

Initially, then it seemed as if Judge Edwards recognized the *sui generis* nature of federal sector adverse action arbitration along with the special rules established by Congress for re-

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[100]Elkouri, *supra* note 10, at 9.
[101]*See* Aaron, *Labor Courts: Western European Models and Their Significance for the United States*, 16 U.C.L.A. L. Rev. 847 (1969).
[102]*Id.* at 882.
[103]Pub. L. No. 97-164, 96 Stat. 25 (1982).
[104]White, *The Review Process for Labor Arbitration in the Federal Sector*, 35 Lab. L. J. 35 (1984) [hereinafter cited as White].
[105]Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[106]29 U.S.C. §§ 201-219 (1982).
[107]McDonald v. City of West Branch, 104 S. Ct. 1799 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).
[108]697 F.2d 421 (D.C. Cir. 1983).
[109]*Id.* at 428.
[110]*Id.* at 429.
[111]*Id.* at 431.

viewability. This unique method of analysis, however, was short lived in the opinion when Judge Edwards stated: "At this late date, the federal policy favoring arbitration of labor disputes enunciated by the Supreme Court in *Textile Workers Union v. Lincoln Mills*. . . and the *Steelworkers Trilogy* is so well established as to need little defense."[112] With this statement, the court's analysis seemingly left behind the congressional intent to provide at least a different, if not wider, scope of review for federal sector arbitral awards.

Judge Edwards then discussed the common law of private sector labor arbitration, concluding that one of its principle characteristics is judicial deference.[113] He noted that national labor goals could only be facilitated where arbitration results are final and binding and the disputes conclusively resolved in a private manner.[114] He made no mention of the unique nature of the federal personnel system, its history as separate and apart from the national private sector labor movement, or its wide scope substantive rights based on statute instead of the individual collective bargaining agreement. In his opinion, Judge Edwards accepted the premise that the majority of union and management officials prefer arbitration to judicial consideration of the dispute.[115] His opinion seems to technically accept the essential differences between private sector arbitration and arbitration in the federal sector, "In the federal sector. . . arbitration is intended not only to ensure compliance with collective bargaining agreements, but also 'to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike;'"[116] and,

> Congress did. . . provide that almost all "pure grievance" cases could be appealed only to the Federal Labor Relations Authority and only if the decision is "contrary to any law, rule, or regulation," or otherwise deficient on "grounds similar to those applied by Federal courts in private sector labor-management relations."[117]

Judge Edwards, however, concludes his analysis by stating that the need for review must be balanced against the traditional policy of deference to private sector arbitrators' decisions.[118] He termed arbitration in the federal sector to be a "bargained-for part of a system of self-government created by and confined to the parties,"[119] thereby embracing the essentially different private sector concept of voluntary arbitration as the basis for analyzing an award by an arbitrator in the federal sector whose presence in the system results from a statutory mandate rather than the voluntary, mutual consent of the parties. Judge Edwards also concluded that despite the expressed statutory guidance, there is no support for expanded judicial review in a federal sector adverse action arbitration as compared to the traditional role of the arbitrator in interpreting contractual language. He stated, "The typical adverse action case presents issues identical to those with which labor arbitrators deal on an everyday basis."[120]

This analysis neglected the mandates of the Lloyd-LaFollette Act of 1912,[121] as well as more than half a century of Civil Service Commission guidance and judicial *stare decisis*. The private sector arbitrator rules as he or she wishes with regard to the particular facts and circumstances at hand; there is no competing forum in which a union or an employer can obtain a different opinion. On the other hand, in the federal sector, first the Civil Service Commission and now the Merit Systems Protection Board has been regularly deciding disputes as an arbitral body. The competing arbitrator can at best rule as would the MSPB, at worst, in disregard of and

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[112] *Id.* at 435.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 435. *See also* Jones & Smith, *Management and Labor Appraisals of the Arbitration Process: A Report With Comments*, 62 Mich. L. Rev. 1115 (1964).
[116] 697 F.2d at 438 (footnote omitted).
[117] *Id.* at 439 (citation omitted).
[118] *Id.* at 436.
[119] *Id.* at 432 (footnote omitted).
[120] *Id.* at 439.
[121] Pub. L. No. 62-336, 37 Stat. 539, § 6 (1912).

inconsistent with the MSPB's prior opinions and policies. Normally, the arbitral awards lie somewhere inbetween, creating, among other things, confusion and inefficiency.

The court in *Devine v. White* concluded that there was no reason for "treating arbitral decisions in the federal sector less deferentially than private sector decisions."[122] This conclusion, presented by the eminent jurist and labor law professional Judge Harry T. Edwards, was to prove very persuasive to the new Court of Appeals for the Federal Circuit, where Judge Edwards now sits.

On 22 September 1983, less than nine months after *Devine v. White*, the Federal Circuit decided the case of *Devine v. Nutt.*[123] Following the lead of the District of Columbia Circuit, although not bound by its precedent, the Federal Circuit held that an arbitrator's award in an adverse action matter is entitled to finality so long as "[t]he award draws its essence from the collective bargaining agreement. . . and is not in conflict with civil service statutory or regulatory authority. . . ."[124] It is obvious that the underlying rationale for this statement was the *Steelworkers Trilogy* and Judge Edward's opinion in *White*. The Federal Circuit, a court of specialized jurisdiction, essentially announced in *Nutt* that an arbitrator's award which draws its essence from the applicable collective bargaining agreement and which is not inconsistent with the Civil Service Reform Act will receive the same deference given to arbitral awards in the private sector.

In neither *White* nor *Nutt* was any mention made by the court that different treatment of the award may be appropriate as a result of the statutory mandate to arbitrate. Both courts seemed to apply to their decisions an unexpressed presumption of a voluntary and mutual consent to arbitrate, this presumption being the basic prerequisite and underpinning for the deference traditionally given to private sector arbitral awards by reviewing courts.

Shortly after the Federal Circuit's decision in *Nutt*, the court again had the opportunity to review an adverse action arbitration award in the case of *Devine v. Sutermeister*.[125] In *Sutermeister*, the Federal Circuit reaffirmed its philosophy of the narrow scope of review of arbitral awards that it had established in *Nutt* based on the private sector principles enunciated in *United Steelworkers of America v. Enterprise Wheel & Car* and *United Steelworkers of America v. American Manufacturing Co.*, and applied to the federal sector by *White*. As before, the issue of the basic voluntariness of the agreement to arbitrate was neither raised nor discussed.

Despite the clarity of the Civil Service Reform Act provisions mandating arbitration as the final step in dispute resolution, at least one other writer on the subject of federal sector adverse action arbitration has stated, "The Act. . . *allows binding arbitration* in the event of a failure to reach a settlement. . . ."[126] This misreading or misinterpretation of 5 U.S.C. § 7121(b)(3)(C), which states that "any grievance not satisfactorily settled. . . shall be subject to binding arbitration. . .," has been largely followed by most opponents of a wider scope of review of federal sector arbitral awards who base their arguments on the voluntariness of the arbitral process and its exact similarity with private sector arbitration.

The problems involved in applying private sector concepts to the essentially different theory of arbitration in the federal sector transcend the inequities and inconsistencies involved when comparing a precedential opinion and order of the MSPB to an arbitral award concerning a matter also within its jurisdiction. An adverse action submitted to either body is a mutual problem which will affect the future relations of both the agency and its employees, as well as the smooth functioning of the government. The objective must be not only to win the immediate issue at hand but also to achieve the best solution to the problem. If the best solution is not achieved, the apparent victory may

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[122] *Id.*

[123] Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983).

[124] *Id.* at 1055.

[125] Devine v. Sutermeister, 724 F.2d 1588 (Fed. Cir. 1983).

[126] White, *supra* note 104, at 36 (emphasis added).

become a long term defeat. An award which exacerbates a problem with inconsistency and uncertainty rather than solving it is bound to remain as a future irritant to both parties. The Federal Circuit cannot be indifferent to the actual intentions of Congress or the parties, or to the legal effects which they produce by applying, in whole cloth, the private sector principles of arbitration to the federal sector while technically stating that Congress intended a different result.

Result of Application of Private Sector Concepts to Federal Sector Arbitration

It is fortunate that the law is not a complete and perfect system of preexisting and unchangeable rules. Every legislative act and judicial decision creates a new and better system than that which was replaced. This is especially true in the law of judicial reviewability of federal sector arbitral awards. It must be recognized that in the private sector the arbitrator's function is basic and that he is not a public tribunal placed before the parties by legislative fiat. Conversely, in the federal sector the arbitrator has duty to administer justice for a community which transcends the parties. The federal arbitrator is not confined merely to the parties and not only administers law as established by the particular collective bargaining agreement, but must interpret external laws, rules, regulations, and policy as it has developed since the inception of the merit system in 1882. Thus far, as seen in *White* and *Nutt*, the federal arbitrator has been held to be bound only by the statutory provisions of the Civil Service Reform Act. An unanswered question is whether, in the absence of any statutory support, an arbitrator is bound by MSPB precedents. The *Sutermeister* court stated that since there is no statutory support for that proposition, "a negative inference is thus produced."[127] If the Federal Circuit continues to grant private sector-type deference to arbitral awards by applying common law principles, a future decision may hold that the arbitrator is bound only by statute and that federal sector arbitration is an *ad hoc* procedure indistinguishable from that in the private sector. This result would, paraphrasing the words of Judge Edwards in *White*, produce more ambiguities and pepper the provisions of the Civil Service Reform Act with more cross purposes than are already present. *De facto* schemes of deferral in the face of legislative intent to produce consistency and avoid forum shopping, will produce the opposite result.

Congress envisioned a consistent and uniform body of law binding on the federal sector which can only be accomplished through the precedent setting authority of the MSPB. This task should not be left to the imagination of private decision-makers. Public policy demands a higher standard for the federal arbitrator than merely drawing the essence of his or her award from the contract and consistency with law. Judge Edwards recognized that in specialized and important areas of public law, *e.g.*, civil rights legislation, the arbitrator may not be sufficiently informed or qualified to deserve the grant of judicial deference normally extended by the courts, stating,

> There is no reason to believe that the arbitration-selection process, as they presently exist, are designed to screen out persons who are not professionally qualified to decide legal issues in cases involving claims of employment discrimination. . . [D]ata. . . would suggest that many arbitrators are potentially, but not actually, well qualified to decide legal issues in [these type of] cases at the present time.[128]

Through analogy, Judge Edwards' concept is fully applicable to federal sector labor-management relations and deserves to be addressed by the Federal Circuit in future cases.

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[127]724 F.2d at 1565.

[128]Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators 59, 70-89 (BNA, 1976), *reprinted in* Rothschild, Merrifield & Edwards, Collective Bargaining and Labor Arbitration 1049, 1052 (2d ed. 1979).

Conclusion

The above analysis of federal sector adverse action arbitration as lacking the basic underlying prerequisite of mutual consent leads to the conclusion that the reviewing court should not automatically apply common law principles of deference to the arbitral decision. To so continue will produce inequity, inconsistency, and blatant forum shopping. For example, organized employees with the right to elect arbitration may do so exclusively if the chances of reversing agency action or mitigating the penalty differ greatly from those available before the Merit Systems Protection Board. It is not suggested that legislation be enacted to rescind the employee's right to elect arbitration. There are far too many benefits derived from the speed and informality which characterizes the arbitral process. It is suggested, however, that legislation be enacted to insure that adverse action arbitration under 5 U.S.C. § 7121(e) comes into closer consonance with the opinions and orders of the statutorily-designated appellate authority, the Merit Systems Protection Board. The procedure through which this congressional goal can be accomplished should include requiring arbitrators to follow and apply precedent established by the MSPB since, in reality, it is "the law of the shop," and should allow for exceptions to be taken from the award by a petition for review to the MSPB.

A pattern for this modification currently exists in the federal sector and is called "appeals arbitration."[129] This procedure, established by the MSPB to expedite less complex cases, utilizes specially trained presiding officials, *i.e.*, attorneys who would normally hear a serious adverse action case if appealed to the MSPB, as arbitrators. These arbitrators have special expertise in federal sector labor-management relations, including the "prior practices" of the Civil Service Commission and opinions and orders of the MSPB. The presiding official/arbitrator is bound by MSPB precedent and either party to the dispute may petition the MSPB for review of the arbitral award.[130] The board will grant the petition where it is established that there was "demonstrated harmful procedural irregularity in the proceeding before the arbitrator" or "clear error of law."[131] Consistent with the concept of private sector arbitration, this standard of review of agency actions is more narrow than that utilized under the formal appeals process where review may be granted if the initial decision is "based on an erroneous interpretation of statute or regulation."[132] Upon the MSPB's final decision, or on the thirty-sixth day following the issuance of the award, a petition for judicial review may be filed.[133] There is no difference in the criteria for judicial review between appeals arbitration and the formal MSPB appeals process.

A legislated, tailored arbitration procedure, similar to that described above, would provide consistency in awards and prevent forum shopping. At the same time, the efficiency, speed, and informality of the arbitral process would not be lost. Additionally, the enforcement structure currently in place to support the orders of the MSPB[134] would be available to the prevailing party in arbitration to gain compliance with the award, without recourse to a judicial forum.

Legislative action in this area must recognize the unique qualities of public employment and the essential differences between it and private sector employment. A comprehensive, statutory arbitration procedure would release the reviewing court from the necessity of torturing concepts and using fiction to apply the law of the essentially different form of arbitration traditionally found in the private sector.

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[129] 48 Fed. Reg. 11,399-403 (1983) (to be codified at 5 C.F.R. § 1201).

[130] *Id.* at 11,403.

[131] *Id.*

[132] *Compare* 5 C.F.R. § 1201.219 *with* 5 C.F.R. § 1201.115(b) (1983).

[133] 5 U.S.C. § 7703(b)(1) (1982).

[134] *See Id.* § 1205(d)(2).

Training the Combat Soldier in the Law of War

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Introduction

A judge advocate's obligation to instruct in the law of war is more important than ever. Training the combat soldier in the law of war can be especially difficult. First, a service member in the combat arms often believes that laws have no place during combat and actually inhibit mission success. If a soldier subscribes to Cicero's belief that *inter arma silent legis* (in time of war, the laws are silent), he is likely to mentally resist instruction in the Hague and Geneva Conventions. Second, a soldier in a fighting unit often perceives a judge advocate teaching the law of war to be ill-informed of the "realities" of combat and ignorant of military tactics.

As the lawyer assigned to the 4th Battalion (Airborne), 325th Infantry Regiment Battalion Combat Team (4/325 ABCT), a fighting unit, my primary responsibility is to provide legal counsel in the law of war. Its three light infantry companies, 105 mm howitzer battery, combat support company with engineer, anti-tank, and anti-aircraft platoons, and headquarters company with communication, medical, and parachute rigger platoons are designed to operate during war apart from normal logistical support. As the 4/325 ABCT is configured to be utilized against the enemy in a politically sensitive environment, each individual soldier, not only the troop leader, must know his rights and obligations under the Hague and Geneva Conventions. Furthermore, casualties on the modern battlefield could eliminate the traditional, existing leadership quickly, and propel a young 11B (Infantryman) corporal into a responsible position, *e.g.*, platoon or first sergeant, in a matter of days. Accordingly, this unit's law of war training program is aimed specifically at the individual soldier. This article shows in practical terms a way to accomplish this training in garrison and in the field.

Preparation

When teaching the combat soldier, it is important to project a good soldierly bearing. If the audience is in BCUs, wear the same. Do you need a haircut? Look like an officer. Also, it is helpful to read the appropriate Military Occupational Specialty Skill Manual to understand the soldier's skills and duty requirements.[1] Knowledge of the soldier's MOS can only aid a judge advocate's ability to instruct in the law of war and to answer the soldier's questions.

Garrison Training

Law of war training for the soldier in garrison should begin with a one to one-and-one-half hour period of instruction. It is difficult to present more than 40 minutes of this class as a lecture because the soldier's concentration and interest will probably deteriorate markedly after 35 minutes. Beginning, however, with a 20-50 minute film, followed by a 30-minute lecture and a 10-minute question and answer period has proven very successful in presenting law of war instruction.

A movie is an outstanding teaching tool if it heightens the soldier's interest in the role of the law in war and captures his attention. *The Geneva Conventions and the Soldier*[2] is a useful

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[1] *E.g.*, Dep't of Army, Field Manual No. 7-11B/TG, Trainer's Guide: 11B Infantryman (Sep. 1982); Dep't of Army, Field Manual No. 6-13B/TG, Trainer's Guide: 13B Cannon Crewman (Aug. 1982).

[2] Army Training Film 21-4228 (1971, 28 min). *See also* Army Training Film 21-4229, *When the Enemy Is My Prisoner* (1971, 30 min.); Army Training Film 27-4249, *The Geneva Conventions and the Military Policeman* (1971, 29 min.); Army Training Film 21-4719, *The Geneva Conventions and the Medic* (1975, 28 min.); Army Training Film 21-4550, *The*

film to teach the law of war. The key is to use the visual medium to illustrate important points and to prick the conscience of the individual soldier.

Additionally, a film can be used to underscore required topics in law of war training. Army Regulation 350-216,[3] which implements the DOD Law of War Program, requires, in part, that a judge advocate teaching the law of war stress a soldier's rights and obligations regarding enemy soldiers, civilians, and property, his rights and duties as a prisoner of war (PW), and the consequences of mistreating civilians and PWs. Accordingly, a film can underscore the duty to disobey an illegal order, *e.g.*, the order to summarily execute PWs, the requirement to report any shooting of PWs as a war crime, and the possible punishment for violating the law of war. Select a film which stresses the moral responsiblity of the soldier in modern warfare, including the concept that a soldier who obeys an illegal order bears a degree of personal responsibility for executing the order.

In addition, design law of war training for a soldier that can be done by the unit. Each company-size unit has a monthly and a quarterly training schedule and usually will welcome instruction on the Hague and Geneva Conventions. Programs of instruction (POIs) are excellent for concentrating on areas of particular importance to combat personnel, such as the status and treatment of enemy wounded and medical personnel, and rights and obligations as a PW. A useful format for a POI is to provide the unit doing the training with a 10-12 minute lecture with references to Army regulations, field manuals, and training circulars, accompanied by a scenario utilizing several soldiers as actors. For example, a POI[4] in which the status and treatment to be afforded the wounded and medical personnel should begin with a short lecture on the applicable Geneva Convention. The accompanying scenario can have

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Geneva Conventions and the Chaplain (1973, 30 min.); Army Training Film 21-4720, *The Geneva Conventions and the Civilian* (1975, 28 min).

[3]Dep't of Army, Reg. No. 350-216, Training—The Geneva Conventions of 1949 and Hague Convention No. IV of 1907 (1975).

[4]An example POI format is:

Task: Individual soldier learns the status and treatment of wounded and medical personnel under international law of war.

Conditions: Subsequent to 15-30 minute period of instruction (Lecture, POI #2), soldiers, while in a field environment, make visual contact with enemy wounded and medical personnel. In day or night operation, one unarmed wounded enemy soldier, lying on a litter, and two armed enemy soldiers wearing armbands with a red crescent on a white background are introduced into the Area of Operations (AO). Platoon-size friendly element must take action IAW law of war.

Standards: Within the time specified, platoon-size element must:

(1) Recognize the enemy soldiers as wounded and medical personnel from their use of a distinctive, protective emblem designating a medical service;

(2) Allow the enemy wounded and medical personnel to act unattacked and unharmed so long as the enemy soldiers are recovering wounded and not trying to gain a tactical advantage or otherwise improve their position;

(3) Know that the enemy rescue effort does not require a general cease fire. Military targets (other soldiers engaged in combat) may be fired upon, even if the recovery efforts are jeopardized; and

(4) Know that enemy doctors and medics do not lose their protected status under the law of war. If armed, however, weapons may be used only in self-defense. Medical personnel who participate in combat activities lose their protected status and are treated as any other enemy soldier would be treated.

Training:

(1) Conduct wounded and medical personnel insertion into AO as follows:

(a) One unarmed enemy soldier with obvious wounds (bandaged) is on litter and being carried toward enemy lines by two armed enemy soldiers. The lead soldier is carrying a flag with a red crescent on a white background, and both soldiers are wearing armbands with the same symbol.

(b) Insertion is made so that friendly unit has visual (not physical) contact with the three enemy soldiers.

(c) Friendly forces should permit the enemy wounded and medical personnel to proceed unmolested back to their own lines. However, other enemy combatants may be fired upon.

The accompanying 10-15 minute lecture covers Articles, 3, 13, 15, 19-25 and 28-32 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, T.I.A.S. 3362, *reprinted in* Dep't of Army, Pamphlet No. 27-1, Treaties Governing Land Warfare, ch. 4 (Dec. 1956). The focus is on the humane treatment of wounded or sick enemy personnel, the special status of medical personnel when ministering to or treating the sick and wounded, the use of protective emblems to aid in the recognition of medical personnel, and the carrying and use of weapons by medical personnel.

two armed enemy soldiers wearing armbands with a red crescent on a white background carrying a litter on which an unarmed enemy soldier is lying. The instruction requires the soldier being trained to recognize the emblem displayed as indicating a medically trained individual. Furthermore, the soldier must know that enemy medical personnel are permitted to move about unharmed as long as they are recovering the wounded and not trying to gain a tactical advantage.

The best POI is keyed to its audience. For example, an in-garrison POI for a medic should focus on items particularly relevant to medical personnel, such as the right to carry weapons and the right to use them in self-defense or in the defense of others in their care. On the other hand, an in-garrison POI for a paratrooper should focus more on treatment of enemy civilians and property. A POI should be designed to permit training anywhere and anytime, particularly in inclement weather.

Field Training

It is paramount that law of war instruction given in a field environment be as realistic as possible and tailored to the combat unit being instructed. A medic in an infantry company needs to know that he can carry a weapon, use it in self-defense, and use it in the defense of the wounded or sick in his charge. Useful field training might be designed around the fact that a medic does not lose his special status under the law of war merely for carrying a weapon (as long as it is a defensive weapon, such as a side arm) or because the medic defends himself against an enemy who attacks the medic or the sick and wounded in his care.

A practical example in law of war training is the instruction given to the 4/325 ABCT during its March 1984 field exercises in the town of Bonnland, Federal Republic of Germany. Bonnland is an uninhabited town in Bavaria, used by the Germany Army (Bundeswehr) for training. A US infantry soldier who is fortunate enough to receive training there learns how to fight advancing along city streets, fighting room-to-room and floor-to-floor. He learns how to breach wire obstacles, how to construct fighting positions in an urban area, and is instructed on how to prepare defensively from inside a building. The training is enthusiastically received because each soldier knows that combat in Europe would involve fighting in urban areas in close combat with enemy forces. This urban warfare area is ideal for law of war instruction because it will be in close combat that a soldier will be confronted with capturing enemy personnel and processing them to the rear, or may himself be taken as a PW. In either situation, the teaching focuses on the Geneva Convention Relative to the Treatment of Prisoners of War.[5]

Instruction in Bonnland was given to each of the six company-size units in the 4/325 ABCT. Using the battalion legal clerk and four other soldiers as actors, the practical exercise began with a short lecture underscoring that each man who seeks a career as an infantryman may be faced with the situation where he will take enemy soldiers prisoner. Five soldiers were used as demonstrators to show how captured enemy personnel should be treated in accordance with the Geneva Convention. The legal clerk and a second soldier played the roles of US personnel who had just captured three enemy combatants. While one soldier covered, the other disarmed. Basic training for an infantryman emphasizes the five S's in dealing with PWs: search, silence, segregate, safeguard, and speed to the Rear. Therefore, the five S's were incorporated in the law of war training. It was emphasized that protective equipment, *e.g.*, helmet, protective mask, and first aid pouch, may not be seized. Nor may items of a personal or sentimental nature, *e.g.*, rings, watches, family letters and photographs, be taken, except that an item of value, such as currency, may be taken if ordered by an officer and if a receipt is given the PW.

In demonstrating search techniques, the soldier was taught to use either the method in which the enemy soldier is placed on hands and knees on the ground or where he is "spread-

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[5]T.I.A.S. 3364 (1949), *reprinted in* Dep't of Army, Pamphlet No. 27-1, Treaties Governing Land Warfare, ch. 6 (Dec. 1956).

eagled" against a wall. Either method is acceptable as long as security is maximized. The training emphasized that the soldier searching the enemy must never be in the line of fire between the enemy PW and the covering friendly soldier. Naturally, weapons such as rifles, pistols, and knives are seized, but even ball point pens and keys can be dangerous, so the soldier was told to confiscate them as well. Items of interest to military intelligence, *e.g.*, maps, plans, operation orders, should also be taken. The demonstration concluded with a reminder that there is a duty to shield PWs from ongoing hostilities, *i.e.*, no use of an enemy PW as "point man" on patrol, while moving them to the rear and that there are limitations on interrogation methods under the law of war (only name, rank, service number, and date of birth need be given).

At the close of the formal demonstration, two soldiers from the audience were chosen at random to search and disarm the remaining two demonstrators. Realism was heightened by hiding a switchblade in the helmet liner or boot of the "enemy" soldier. This weapon usually was not found during the initial search, and its disclosure after the search illustrated the need to be thorough.

After this hands-on training, a short 15-20 minute lecture was presented on the rights and duties of a US soldier if captured by the enemy. Included in this lecture was a discussion of the Code of Conduct, its applicability to US personnel in captivity, and its importance to morale and discipline. Additionally, the audience was reminded that there are criminal sanctions under the Uniform Code of Military Justice for aiding the enemy or acting to the detriment of fellow PWs while a PW.

Conclusion

Training in the Hague and Geneva Conventions is more meaningful for a combat soldier when it occurs both in the classroom and in the field. Begin with the basic requirements of AR 350-216, but address the moral responsibility of the combatant in modern warfare as well. Use a film to heighten interest and capture attention. Finally create practical, hands-on law of war instruction, like the training used at Bonnland, to demonstrate to the soldier that the law does have a place during combat. The law of war trainer who adopts this approach is sure to have positive results.[6]

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[6]For further guidance in preparing law of war instruction, *see generally* Elliot, *Theory and Practice: Some Suggestions for the Law of War Trainer*, The Army Lawyer, July 1983, at 1; Meyer, *Training the Army in Military Justice and Law of War*, The Army Lawyer, Mar. 1984, at 1.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Tax News—Sale of Residence

Section 1053(a) of the Tax Reform Act of 1984 provides some service members up to eight years to reinvest proceeds from the sale of a personal residence in a second residence and defer payment of taxes on the gain. I.R.C. section 1034 generally permits all taxpayers to reinvest the proceeds from the sale of a personal residence within the period beginning two years before and ending two years after the date of sale and potentially defer payment of tax on the gain realized by the sale.

The Tax Reform Act of 1984 amended I.R.C. section 1034(h) and provides special treatment for service members in two circumstances. The amendment retains the old rule that the reinvestment period is suspended while the taxpayer serves on extended active duty, for a maximum period of four years. The amendment extends the period for service members who are either stationed overseas, or who, following overseas assignment, are required to reside in government quarters. First, the new rule provides that if the service member is stationed

outside the United States during a period of suspension, the suspension period will not expire while the service member is stationed overseas, except that the total period in which to reinvest is limited to eight years from the date of sale. Second, if a service member, upon return from overseas assignment, is required to live in on-base government quarters, the period of suspension will not expire while the service member is living in the government quarters, except that the period in which to reinvest is again limited to a maximum of eight years from the date of sale. There is one limitation on the last rule. For the section to apply, the service member must be required to live in government quarters pursuant to a determination by the Secretary of Defense that adequate off-base housing is not available. It is not known how this requirement will be interpreted. Additionally, it should be noted that the portion of the section concerning personnel required to live in on-base housing only applies if the service member is required to reside in on-base housing after return from overseas assignment. Thus, it would not apply to a soldier who sells a residence in the United States and is thereafter reassigned within the United States and required to live on post. The general suspension of the period for up to four years would apply, however, while the soldier was on active duty.

The new provisions are not retroactive and apply only to residences sold after the date of the enactment of the law (sales after 18 July 1984).

Idaho Reinstates Military Pension Rule

The Idaho Supreme Court, in *Griggs v. Griggs*, 10 Fam. L. Rptr. (BNA) 1586 (Aug. 4, 1984), grappled with the treatment of military disability benefit payments under the Uniform Services Former Spouses' Protection Act. Although the court concluded that such benefits, because of congressional intent, could not be considered a divisible asset among the parties to a divorce action, it took the opportunity to reinstate its prior ruling in *Ramsey v. Ramsey*, 535 P.2d 53 (1975) concerning treatment of military retired pay.

In *Ramsey*, the court held that military retirement benefits are community property to the extent that they are earned during the marriage. The court was forced to overrule this holding in *Rice v. Rice*, 645 P.2d. 319 (1982), because of the U.S. Supreme Court holding in *McCarty v. McCarty*, 453 U.S. 210 (1981). As the Former Spouses' Act legislatively overruled *McCarty*, the Idaho court announced that, because its ruling in *Rice* had been premised solely on *McCarty*, it was overruling *Rice* and reinstating *Ramsey* as the rule of law in Idaho.

The court acknowledged the complexities involved when attempting to sort through situations where a retiree is entitled to longevity retirement pay and also to disability pay. The court noted that when disability benefits alone are considered, these payments are the separate property of the disabled person. The court analogized disability pay to worker's compensation, which is not considered compensation for one's labors, but money to make good for a loss or impairment in earning power.

Where a retiree is entitled to receive both disability and reitrement benefits, the court noted that only one total sum is received to compensate both interests. Due to the manner in which the laws are drafted for computing disability benefits, and because of provisions in federal tax laws concerning excludability from gross income of disability benefits, the court grudgingly concluded that the entire amount would have to be considered the separate property of the retiree.

Revised LSC Poverty Guidelines

The Legal Services Corporations (LSC) has issued revised guidelines establishing maximum income levels for individuals eligible for legal assistance from LSC offices.

These guidelines are of interest to military legal assistance attorneys because it is occasionally necessary to refer a military member or family member to an LSC office. Additionally, under the expanded provisions for court representation by Army legal assistance attorneys in AR 27-3, staff judge advocates may want to adopt the LSC standards to determine indigency. AR 27-3 provides that staff judge advocates will determine whether a client satis-

fies a substantial financial hardship test on a case-by-case basis.

The revised figures, reproduced below, are equivalent to 125% of the "official poverty threshhold" established by the Department of Health and Human Services:

Size of family unit	Poverty guide-line
For all states except Alaska and Hawaii: size of family unit[1]	
1	$6,225
2	8,400
3	10,575
4	12,750
5	14,925
6	17,100
7	19,275
8	21,450
For Alaska: size of family unit[2]	
1	7,800
2	10,512
3	13,225
4	15,937
5	18,650
6	21,362
7	24,075
8	26,787
For Hawaii: size of family unit[3]	
1	7,162
2	9,662
3	12,162
4	14,662
5	17,162
6	19,662
7	22,162
8	24,662

[1]For family units with more than eight members, add $2,175 for each additional member in a family.

[2]For family units with more than eight members, add $2,712 for each additional member in a family.

[3]For family units with more than eight members, add $2,500 for each additional member in a family.

The revised guidelines were effective June 15, 1984, and are published at 49 Fed. Reg. 24733 (June 15, 1984).

Military Pension Not Divisible Property in Kansas

The Kansas Court of Appeals became the second court since passage of the Uniform Services Former Spouses' Protection Act to rule that a military pension may not be divided upon divorce. In *Grant v. Grant*, 10 Fam. L. Rptr. (BNA) 1585 (Aug. 4, 1984), the court found that military pensions have none of the qualities commonly attributable to marital assets, such as cash surrender value, loan value, or lump-sum value.

The court stated that the lack of such attributes made the pension similar to good will in a professional practice, which the Kansas Supreme Court had previously declared not to be a marital asset subject to division. The court announced that military retired pay is "nothing more than a future stream of income" which ceases upon a retiree's death. 10 Fam. L. Rptr. (BNA) at 1586.

The Kansas Court of Appeals thus joins the South Carolina Supreme Court, which found in *Brown v. Brown*, 302 S.E.2d 860 (S.C. 1983), that military retired pay was not subject to division as marital property upon divorce. The South Carolina court did not engage in the detailed analysis undertaken by the Kansas Court of Appeals. Both courts, however, agreed that the military retired pay could be considered as income which could serve as a source for payment of alimony and child support.

Survivor Benefit Plan Videotape Available

Another in a continuing series of videotapes developed by the Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA, has been completed and is ready for distribution to the field.

The production, entitled "The Survivor Benefit Plan," runs approximately 20 minutes and is designed to be shown to senior service members nearing retirement. The videotape is suitable for showing at either pre-retirement

counselling programs sponsored by Installation Retirement Services Officers or in a legal assistance waiting room.

To order the videotape, send a blank ¾" videocassette *of the appropriate length* to: The Judge Advocate General's School, US Army, ATTN: Television Operations, Charlottesville, Virginia 22903-1781 and request tape number 297-5, "The Survivor Benefit Plan," running time 19:54, September 1984.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Dates for Reserve Component Training Announced

Judge Advocate Triennial Training (JATT)

Judge Advocate Triennial Training (JATT-previously JAGSO Triennial Training) for international law/claims and contract law teams will be conducted at The Judge Advocate General's School from 17-28 June 1985. Inprocessing will take place on Sunday, 16 June 1985. Attendance is limited to commissioned officers; alternate AT should be scheduled for warrant officers and enlisted members. The 1036th U.S. Army Reserve School, Farrell, PA, will host the training; orders should reflect assignment to the 1036th USAR School with duty station at TJAGSA. Units must forward a tentative list of members attending this AT to The Judge Advocate General's School, ATTN: JAGS-RA (Mrs. Park), Charlottesville, VA 22903-1781, as soon as possible. Final lists of attendees must be furnished by 15 April 1985. Commanders are welcome to observe the training but must coordinate their visits in advance with either Mrs. Park or Captain McShane of the Reserve Affairs Department at (FTS) 938-1301 or (805) 293-6121. ARNG judge advocates are invited to attend this training and may obtain course quotas through channels from the ARNG Military Education Branch, ARNG Operating Activity Center, Aberdeen Proving Grounds, MD 21010.

JATT is mandatory for all JAGSO international law/claims and contract law teams. Individuals belonging to these units may be excused only by their CONUS staff judge advocate, with the concurrence of the Director, Reserve Affairs Department, TJAGSA. Due to administrative problems in past years, units will be required to explain any "no-shows," and unregistered students who report to TJAGSA will be sent home. Students must comply with Army height/weight and Army Physical Readiness Test (APRT) standards while at TJAGSA.

Judge Advocate Officer Advanced Course (JAOAC), Phase VI

The Judge Advocate Officer Advanced Course (JAOAC), Phase VI, will be offered at TJAGSA from 17-28 June 1985. This course, run in conjunction with JATT, is also administered by the 1036th USAR School. The same policies with regard to "no-shows" and unregistered students will be in effect. JAOAC students must also meet Army height/weight and APRT standards while at TJAGSA. Course quotas are available through channels from the ARNG Military Education Branch for ARNG personnel, or through channels from the JAGC Personnel Management Officer, U.S. Army Reserve Personnel Center, ATTN: DARP-OPS-JA (MAJ Hamilton), 9700 Page Boulevard, St. Louis, MO 63132 for USAR personnel. Requests for quotas must be received at NGB or ARPERCEN by 15 April 1985.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

November 26-December 7: 101st Contract Attorneys Course (5F-F10).

December 3-7: 28th Law of War Workshop (5F-F42).

December 10-14: 8th Administrative Law for Military Installations (5F-F24).

January 7-11: 1985 Government Contract Law Symposium (5F-F11).

January 14-18: 26th Federal Labor Relations Course (5F-F22).

January 21-25: 14th Criminal Trial Advocacy Course (5F-F32).

January 21-March 29: 106th Basic Course (5-27-C20).

February 4-8: 77th Senior Officer Legal Orientation Course (5F-F1).

February 11-15: 5th Commercial Activities Program Course (5F-F16).

February 25-March 8: 102nd Contract Attorneys Course (5F-F10).

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys Course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JAGSO Team Training.

June 17-28: BOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

February

1: IICLE, Family Business in Dissolution of Marriage, Chicago, IL.

8: IICLE, Commercial Leases, Chicago, IL.

11-12: PLI, Computer Litigation, New York, NY.

12: IICLE, Medical Experts in Civil Litigation, Springfield, IL.

14-15: PLI, Preparation of Annual Disclosure Documents, Denver, CO.

14-15: IICLE, Women Lawyers Conference, Chicago, IL.

14-16: ALIABA/ELI, Environmental Law, Washington, DC.

15-16: SBT, Legal Assistants Seminar, San Antonio, TX.

15-16: KCLE, Securities Law, Lexington, KY.

20: IICLE, How to Close a Real Estate Deal, Springfield, IL.

20: IICLE, Medical Experts in Civil Litigation, Chicago, IL.

21-22: ABA, Importers Civil & Criminal Liability, Washington, DC.

22: IICLE, How to Close a Real Estate Deal, Chicago, IL.

22-23: SBT, Legal Assistants Seminar, Dallas, TX.

23: SBT, Saturday Morning in Court, Austin, TX.

28: IICLE, Advising Financial Institutions, Springfield, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the October 1984 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fische copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD B077550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
AD B077551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD B077552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD B077553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD B077554	Criminal Law, Evidence/JAGS-ADC-83-11
AD B077555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD B078201	Criminal Law, Index/JAGS-ADC-83-13
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1
AD B077739	All States Consumer Law Guide/JAGS-ADA-83-1
AD B079729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2
AD B077738	All States Will Guide/JAGS-ADA-83-2
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1
AD B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	Title	Change	Date
AR 27-1	Judge Advocate Legal Service		1 Aug 84
AR 601-100	Personnel Procurement	I04	10 Sep 84

3. Articles

Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227 (1984).

Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. Ill. U.L. Rev. 1 (1983).

Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 Fam. L.Q. 1 (1984).

Blain & Erne, *Creditors' Committees Under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties*, 67 Marq. L. Rev. 491 (1984).

Holmes, *The Preparation of an Environmental Opinion Letter: A Practitioner's Guide*, 11 B.C. Envtl. Aff. L. Rev. 413 (1984).

Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984).

Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 Va. J. Int'l L. 259 (1984).

Kenny, *Structures and Methods of International and Regional Cooperation in Penal Matters*, 29 N.Y.L. Sch. L. Rev. 39 (1984).

Reynolds, *Trial Tactics and Strategy in Adequacy of Counsel Claims*, 1 Am. J. Crim. L. 321 (1983).

Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. Pa. L. Rev. 289 (1984).

Sargentick, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 Wis. L. Rev. 385.

Sneed, *The Art of Statutory Interpretation*, 62 Tex. L. Rev. 665 (1983).

Sward & Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 Am. U.L. Rev. 385 (1984).

Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119 (1984).

Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4—Process, Jurisdiction and* Erie *Principles Revisited*, 19 Wake Forest L. Rev. 957 (1983).

Comment, *Federal Injunctive Relief Against Pending State Civil Proceedings:* Younger

Days Are Here Again, 44 La. L. Rev. 967 (1984).

Comment, *The Use of Depro-Provera in the Treatment of Sex Offenders: The Legal Issues*, 5 J. Lega Med. 295 (1984).

Comment, *Weight Versus Sufficiency of Evidence*, 32 Buffalo L. Rev. 759 (1983).

Note, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. Int'l L. & Pol. 415 (1984).

Note, *Child Snatching: Remedies in the Federal Courts*, 41 Wash. & Lee L. Rev. 185 (1984).

Note, *Judicial Review of Informal Administrative Rulemaking*, 1984 Duke L.J. 347.

Note, *Jurisdiction in the Ex Parte Divorce: Do Absent Spouses Have Protected Due Process Interest in Their Marital Status*?, 13 Mem. St. U.L. Rev. 205 (1983).

Note, *Stop and Identify Statutes After* Kolender v. Lawson: *Exploring the Fourth and Fifth Amendment Issues*, 69 Iowa L. Rev. 1057 (1984).

Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 Brooklyn L. Rev. 301 (1984).

Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931 (1984).

Selected Topics on Texas Property Law, 15 Tex. Tech. L. Rev. 517 (1984).

Supreme Court Advocacy, 33 Cath. U.L. Rev. 525 (1984).

The Kentucky Law Survey, 72 Ky. L.J. 263 (1983-84).

The War Powers Resolution, 17 Loy. L.A.L. Rev. 579 (1984).

4. Videocassettes

The Media Services Office of The Judge Advocate General's School announces that videotapes from the Eighth Criminal Law New Developments Course, held from 20 to 24 August 1984, are available to the field. Listed below are the running times, speakers, and synopses for each program. If you would like to obtain copies of any of these programs, please send a blank ¾" videocassette to: The Judge Advocate General's School, U.S. Army, ATTN: Media Services Office (JAGS-ADN-T), Charlottesville, Virginia 22903-1781.

Tape #	Speaker/Synposis	Running Time
JA-373-1	**COMA Watch, Part I** Speaker: Major Kenneth H. Clevenger, Instructor, Criminal Law Division, TJAGSA. Presentation deals with the interrelationship between judicial philosophies and recent cases decided by the Court of Military Appeals. The period covered encompasses approximately one year, beginning at 16 M.J. 164.	52:16
JA-373-2	**COMA Watch, Part II** A continuation of JA-373-1.	44:39
JA-373-3	**Article 32/Professional Responsibility** Speaker: Major Lawrence A. Gaydos, Instructor, Criminal Law Division, TJAGSA. This presentation deals with the potential impact of recent changes in the areas of pretrial investigations, pretrial advices, and professional ethics. Specific topics covered include the impact of the ABA Model Rules for Professional Conduct on Military Practice; witness and evidence production at the pretrial investigation; treatment of defects in the pre-trial investigation; and the new short form pretrial advice.	51:07
JA-373-4	**Discovery/Inchoate Crimes** Speaker: Major David W. Boucher, Instructor, Criminal Law Division, TJAGSA. Disclosure under RCM 701 and 914 is discussed and recent cases concerning conspiracy and attempts are analyzed.	37:20
JA-373-5	**Crimes and Defenses** Speaker: Major Alan K. Hahn, Instructor, Criminal Law Division, TJAGSA. This presentation covers 1984 Manual and case law developments in military and common law crimes and affirmative defenses.	49:54

Tape #	Speaker/Synposis	Running Time
JA-373-6	**Evidence, Part I** Speaker: Major Paul A. Capofari, Instructor, Criminal Law Division, TJAGSA. Presentation deals with recent case law, both military and civilian, and its impact upon the Military Rules of Evidence.	51:05
JA-373-7	**Evidence, Part II** A continuation of JA-373-6.	48:17
JA-373-8	**Recent U.S. Supreme Court Decisions, Part I** Guest Speaker: Professor Stephen A. Saltzburg, University of Virginia School of Law, discusses recent Supreme Court decisions involving the IV and V Amendment.	52:32
JA-373-9	**Recent U.S. Supreme Court Decisions, Part II** A continuation of JA-373-8.	35:30
JA-373-10	**Jurisdiction** Speaker: Major Kenneth H. Clevenger, Instructor, Criminal Law Division, TJAGSA. This presentation covers significant decisions of the Court of Military Appeals concerning court-martial jurisdiction over persons and offenses. Emphasis is placed upon the broadened view of service-connection.	53:49
JA-373-11	**V Amendment** Speaker: Major Patrick Finnegan, Instructor, Criminal Law Division, TJAGSA. Presentation deals with recent case law in the area of self-incrimination. Discusses Supreme Court cases in addition to military case law.	53:52
JA-373-12	**VI Amendment/Lineups** Speaker: Major Alan K. Hahn, Instructor, Criminal Law Division, TJAGSA. Presentation discusses new witness request procedures, confrontation problems in using hearsay, and effective assistance of counsel.	49:00
JA-373-13	**Command Control/Multiplicity** Speaker: Major Craig Schwender, Senior Instructor, Criminal Law Division, TJAGSA. Recent issues in the area of command influence are discussed with an emphasis on legal alternative methods of handling issues of legitimtate command control. Presentation also deals with recent substantive law concerning multiplicity for both findings and sentence, and the procedures for disposing of such issues at trial.	43:33
JA-373-14	**Pretrial Confinement** Speaker: Major Patrick Finnegan, Instructor, Criminal Law Division, TJAGSA. This presentation covers the new rules and procedures governing pretrial confinement in R.C.M. 304 and 305 of the 1984 Manual for Courts-Martial. Credit for pretrial confinement is also discussed.	32:07
JA-373-15	**Nonjudicial Punishment** Speaker: Major Kenneth H. Clevenger, Instructor, Criminal Law Division, TJAGSA. Presentation deals with the changes in nonjudicial punishment made by the MCM, 1984, and with recent COMA decisions concerning admissibility of records of nonjudicial punishment.	17:33
JA-373-16	**Pleas/Pretrial Agreements** Speaker: Major Paul C. Capofari, Instructor, Criminal Law Division, TJAGSA. Discussion of recent developments in the area of pleas and pre-trial agreements, with emphasis on changes brought about by MCM 84.	41:43
JA-373-17	**Findings and Sentence** Speaker: Major Lawrence A. Gaydos, Instructor, Criminal Law Division, TJAGSA. This presentation covers major changes in case law and the 1984 Manual for Courts-Martial impacting on the findings and sentencing phases of trial. Specific topics covered include reconsideration procedures; impeachment of verdicts; aggravation evidence; and permissible punishments.	49:23

Tape #	Speaker/Synposis	Running Time
JA-373-18	**Urinalysis** Speaker: Major Alan K. Hahn, Instructor, Criminal Law Division, TJAGSA. Discussion of legal and scientific urinalysis issues including reliability of the tests, improvements at laboratories, and involuntary ingestion.	50:10
JA-373-19	**Speedy Trial** Speaker: Major Patrick Finnegan, Criminal Law Division, TJAGSA. This presentation covers the various speedy trial rules in the military, with particular emphasis on the impact of the 120-day rule in R.C.M. 707 of the 1984 Manual for Courts-Martial. Other topics include case law updates of *Burton* rules and constitutional speedy trial rules.	24:35
JA-373-20	**Instructions** Speaker: Major Craig S. Schwender, Senior Instructor, Criminal Law Division, TJAGSA. Recent case law is analyzed from the perspective of what instructions have changed and what new instructions are needed.	19:24
JA-373-21	**Post-Trial Procedure and Appeals, Part I** Speaker: Major Kenneth H. Clevenger, Instructor, Criminal Law Division, TJAGSA. The changes in the requirements for post-trial processing of courts-martial and the changes in military appellate procedures effected by the Military Justice Act of 1983 and the MCM, 1984, are discussed.	52:33
JA-373-22	**Post-Trial Procedure and Appeals, Part II** A continuation of JA-373-21.	34:00
JA-373-23	**Drugged and Drunk Driving** Speaker: Major Phillip L. Kennerly, Instructor, Administrative and Civil Law Division, TJAGSA. A discussion of the procedures for the administrative withdrawal of driving privileges and the general officer letter of reprimand.	37:27
JA-373-24	**COMA Recent Opinions, Part I** Guest Speaker: Chief Judge Robinson O. Everett, U.S. Court of Military Appeals.	51:21
JA-373-25	**COMA Recent Opinions, Part II** A continuation of JA-373-24.	41:02

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