Department of the Army Pamphlet 27-100-56

MILITARY LAW REVIEW VOL. 56

Articles

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Book Reviews

Headquarters, Department of the Army Spring 1972

DA PAMPHLET 27-100-56 MILITARY LAW REVIEW—1972

MILITARY LAW REVIEW

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SUBSCRIPTIONS AND BACK ISSUES: Interested persons should contact the Superintendent of Documents, United States Government Printing Office, Washington, DC 20402. Subscription price : $2.50 a year, $.75 for single copies. Foreign subscription, $3.25 per gear.

REPRINT PERMISSION : Contact Editor, *Military Law Review,* The Judge Advocate General's School, Charlottesville, Virginia 22901.

This Review may be cited as 56 MIL. L. REV. (number of page) (1972).

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 – Price 75 cents (single copy), Subscription Price : $2.50 per year; 75 cents additional for foreign mailing.

Pam 27-100-56

PAMPHLET
No. 27-100-56

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, DC, *Spring 1972*

MILITARY LAW REVIEW—VOL. 56

MILITARY LAWYERS, CIVILIAN COURTS, AND THE ORGANIZED BAR: A CASE STUDY OF THE UNAUTHORIZED PRACTICE DILEMMA

By F. Raymond Marks*

In 1971 the Department of Defense implemented a pilot program to provide full legal assistance to some of its lower paid members. A key factor in shaping the various state programs was the cooperation or non-cooperation of the local bar associations. The author examines the genesis of the Pilot Legal Assistance Program paying particular attention to military-local bar negotiations. He concludes that in many instances bar resistance was motivated more by economic than by professional concerns.

A recent experimental program of the Department of Defense, seeking to test the feasibility of expanding the nature and scope of legal assistance offered to servicemen and their dependents, has afforded us a unique opportunity to study varying views about delivery of legal services and varying conceptions of the license to practice law and professional responsibility. The experimental program, implemented by each military service through "pilot programs" at a few bases, envisions the delivery of "complete legal services" to certain eligible military personnel and their dependents, including "representation in criminal and civil matters in civilian courts."[1] Moreover, the military legal assistance program seeks to offer this service by having military lawyers appear in civilian

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[1] On October 26, 1970, Mr. Roger T. Kelley, Assistant Secretary of Defense for Manpower and Reserve Affairs, wrote a Memorandum to the Secretaries of the Military Departments:

> The Secretary of Defense desires that you establish a Pilot Program to ascertain the feasibility and desirability of expanding Legal Assistance Programs for military personnel and dependents to provide legal services, *including representation in criminal and civil matters* in *civilian courts*, to same extent as could be provided by the Office of Economic Opportunity . . .
>
> You are to have the widest possible latitude in conducting the Pilot Programs. Accordingly, only the necessary minimum guidelines have been established by the Office of the Secretary of Defense. . . .

courts on behalf of their clients. It is because of this feature that the unauthorized practice of law dilemma is brought into sharp focus; special permission was needed for "foreign lawyers" to practice in local courts.

In actuality, the new pilot programs represent not only an expansion of previously offered legal assistance but involves a contraction in conception as well. What mas expanded was the nature and scope of the legal services to be offered. Since 1943 the military has had a legal assistance program **(LAP),** a program which has given only advice and counseling, has engaged in limited drafting of documents—such as mills, and has offered notarial services.[2] The LAP (old program) does not involve the representation of the servicemen or their dependents; the military lawyer is nerer counsel of record, nor counsel in the meaningful sense that he can negotiate, plan litigation, litigate, or settle litigation on behalf of a client.[3] The legal assistance officer under the old program refers the client to the civilian bar in instances where full representation is indicated. The new program makes such referrals unnecessary, because the needed representation can be provided directly by the legal assistance officer. In brief, a true lawyer-client relationship is envisioned.

The conceptual contraction involved in the pilot programs is in the definition of those servicemen and dependents who are eligible for the new "fringe benefit" of complete legal service. It is a limited expansion concept. Cnder the old LAP legal assistance is extended to privates and generals, seamen and admirals alike. The sole test of eligibility has been that the member of the military services be on active duty or in a retired status. The eligibility of dependents follows the eligibility of the servicemen. The guidelines for the new program for the most part restrict eligibility for legal services to enlisted men (and their dependents) mho are in pay grade E 4 or below.' This restriction is due primarily to an assessment, made at the planning stage, of what was politically possible in terms of eliciting the maximum cooperation from the organized bar and limiting resistance to a minimum. The "compromise" over new pro-

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[2] For a summary of the historical background and the early operation of the old legal assistance program, **see** : M. BLAKE. LEGAL ASSISTANCE FOR SERVICEMEN (1951).

[3] Recently some of the services have allowed limited negotiation on behalf of clients under the LAP, but it is felt that this step is strongly related to the planning that went into the new pilot programs.

'Pay grade E 4 was selected by the military as representing the "poverty line," taking into account pay and the value of benefits. This will be more fully discussed in Part II. The Savy used an **E–3** cutoff.

gram eligibility is directly related to the focus of this article: We am concerned here with the way that the military and the organized bar have related to the planned expansion and extension of legal services to a defined group.

This article is about the varying "professional" conceptions of what the license to practice law means to the profession as a whole, the individual license holder, and the public. Because of the ways that the bar and the military have dealt with one another about the pilot programs, issues of who is capable of serving the public or specialized segments of the public, who ought to serve, and how the service should be offered or rendered are raised in clear terms. Unauthorized practice issues are particularly interesting when applied to people trained as lawyers. Data are available about a series of accommodations that remind us of earlier accommodations between the bar and the offerors of legal services to the poor—the legal aid movement and the OEO legal services program. They remind us, too, about the prolonged, recent, and continuing bar resistance to group legal services generally. Moreover, the uniqueness of the proposed military program and the nature of the specific negotiations between the military and several local bar associations enable us to see many of the unauthorized practice of law issues more clearly than in those previous situations.

The attempted expansion of the military legal assistance program—its conversion into a full-scale legal service program—represents the largest closed-panel group legal service in the country.[5] Beyond that, unlike the typical union or poverty group legal service, the professional members of an identifiable group are the designated servers of the nonprofessional members of the same group. In other words, by the new program the military is attempting to "serve its own" with its own. In its essential form the military program is an example of socialized legal services.

The form of implementation of the pilot programs, as has already been mentioned, affords us a good opportunity to isolate issues and

[5] It can be argued that the OEO Legal Services Program is the largest group practice in the country. In abstract terms this is true. But in terms of identifying "the clients," for either the serving lawyers or the lawyers who might have served the members of the group in the past, the OEO program lacks the clarity of defined beneficiaries which both the military and union programs have. The beneficiaries of the OEO Legal Services Programs are "the poor." In several instances of specific opposition to the OEO program, local community—neighborhood—lawyers thought they could perceive that the served group embraced "their clients." The general bar, however, did not see their clients involved. In the case of union groups or the military group, the general bar in several communities can identify their clients or potential clients among the beneficiaries of the group plan.

perspectives touching on the meaning of professional role and unauthorized practice. To begin with, the support and cooperation of the American Bar Association was sought—a factor I shall deal with more extensively. When it was received it was in a federated form:

> Resolved, that the American Bar Association ***supports the expansion*** of existing military legal assistance programs ***through the establishment*** *of* ***properly supported pilot, or test program(s) in such states as cooperate and agree with the objectives of giving complete legal services to members of the Armed Forces and their dependents*** through the expansion **of** existing military legal assistance programs, ***subject to such limitations,*** as to which the Department of Defense and the states and civilian bar associations may agree. . . ?

The ABA "approval" underscored the voluntary nature of the national bar—indicating that a statement of norms may be one thing and the power to implement is another. Negotiations between the military services and the bar had to occur with the local bar in those areas where the military desired to establish pilot programs. For our purposes this was fortuitous; we are afforded an opportunity to observe several smaller negotiations and conflicts rather than one symbolic—abstract–conflict. The Department of Defense also indirectly enriched the data base of the study by promulgating broad guidelines for the pilot programs.' The guidelines left considerable

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[6] ABA Board of Governors, Resolution, St. Louis, Missouri. August 13, 1970 (emphasis added).

[7] ***See*** note 1, ***supra.*** The Guidelines read :

1. Each military Department is to conduct a Pilot Program. The number and location of individual test programs will be at the discretion of the Secretary concerned.
2. The Military Departments should coordinate their plans to insure that test programs are not concentrated in one geographical area. The widest possible geographical coverage should be insured.
3. Standards of eligibility for recipients of expanded legal services should be coordinated between the Military Departments but such standards do not necessarily have to be identical for test purposes. The basic standard of eligibility is that the recipient of legal services is unable to pay a fee to a civilian lawyer for the services involved without substantial hardship to himself or his family.
4. At least one Military Department should conduct a test program at a location where a tax-supported Public Defender Program and/or a Public, Charitable or Bar supported Legal Aid or Legal Referral Agency is in operation. Working relationships should be established with the Public Defender with respect to the handling of criminal matters in which eligible military personnel and dependents need representation in civilian courts. To the extent feasible. cases involving military personnel and dependents should be referred to the Public Defender for handling.
5. At least one Military Department should conduct a test program at a location where there is the best possible combination of active duty military lawyers, reserve military lawyers, civil service lawyers, and a good climate of cooperation with the civilian bar. For purposes of comparison and evaluation at least one test should be conducted at a location where conditions are less ideal. In establishing such test program, however, it is to be borne in mind that ABA support extends only to the establishment of test programs ". . . in such states as cooperate and

flexibility for each program's ultimate form. Indeed, the forms of the pilot programs, the negotiations with the local bar, and the subsequent revisions of specific programs have been varied. So, too, have the responses of the involved local bars.

It may be that both the military and the local bars have frequently been disingenuous in assigning language and reasons for and against the expanded program, respectively, which obliterate or mask a real source of bar concern—fear of loss of income. Language and negotiations aside, however, the bar's concern about income and the military's awareness of that concern have been a central factor in the shaping and implementation of the new pilot programs for expanded legal assistance. Awareness of probable and actual bar response has permeated the pilot program from the planning stage (at the Pentagon) through the negotiation and implementation stages (at the level of staff judge advocates in the field), For example, in the Department, of Defense letter directing implementation we find:

> In all actions taken it should be made clear that the expanded military legal assistance program is not intended to deprive civilian attorneys of sources of income but, to the contrary, is intended to provide legal services for eligible personnel who cannot provide a source of income to the civilian bar.[8]

Notwithstanding the centrality of the income or market issue there are other important concerns which have been voiced and dealt with—on both sides of the bargaining table. Issues were raised about the best way (or the better way) of serving the client group, which in turn touched on the core of the unauthorized practice issue—who is ***qualified*** to serve the public? And who is not? As we observe these issues, we are afforded an opportunity to apply an analysis of competing professional and counter-professional motives. We are also afforded an opportunity to apply a scale of professionalism ranging from concern over gain to concern over service.[9] We can ask whether those involved see the monopoly granted by the license as a way of protecting the public or a way of advancing the interests of the profession.

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agree with the objectives of giving complete legal services to members of the Armed Forces and their dependents through the expansion of existing military legal assistance programs. . . ."

[Note: Guideline 3 is quite different—broader—than OEO standards. It may cover most of the military group. I will discuss the implications of this broader guideline in Part II.]

[8] *Bee* note 1, *supra,* at *2.*

[9] The allusion is to Karl Llewellyn's deflnition: A profession puts service ahead of gain. *See:* Llewellyn, *The Bar Specializes—With What Results?* 167 ANNALS 177 (1933). It map be an illusion as well as an allusion.

Another feature of this study assures us that an examination of military-bar negotiations will produce significant insights into the views of the legal profession—particularly the organized bar—about the license to practice. That is the following cluster of facts: licenses are required to practice law in most jurisdictions;[10] military lawyers are not usually licensed to practice law in the jurisdictions where they are based; in some jurisdictions the organized bar has autocratic power to determine who may practice in the courts, and, in other jurisdictions, the bar has substantial influence—principally with the courts—toward the same end.[11] In a significant way, then, this article is about the ways that the power to license—or influence licensing—is used and abused.

We examine first the deliberations of the military that led to the selection of the particular approach to expanded legal services for servicemen. This includes a view of the alternatives facing the military planners as well as a view both of the predictions made about the needs, positions, and possible objections of the organized bar and what initial steps were taken by the military to alleviate or ameliorate the "opposition"—i.e., to secure bar cooperation. We then examine the specific military-bar negotiations leading to or frustrating the implementation of pilot programs at particular bases and in particular jurisdictions. Finally, we view the process and the issues from an overall perspective.

I. THE PLANS OF THE MILITARY

While the Department of Defense, since 1967, had been considering the expansion of the military legal assistance program, no direct action toward that end was taken until after Congress, in December 1969, passed the Carey Amendment to the Economic Opportunity Act of 1964.[12] (The Carey Amendment provided for the extension

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[10] This is not universal. The Coast Guard, in seeking to implement its pilot program in the First Coast Guard District, found that no order of court would be required for cases where service lawyers represent servicemen in Sew Hampshire courts. Sec. 311:1 of the NEW HAMPSHIRE REVISED STATUTES (1966) provides: "A party in any cause or proceeding may appear, plead. prosecute, or defend, in his proper person *or* by *any citizen* of *good character."* (Emphasis supplied.)

[11] The medical program of the armed services, offering full range medical serrices to *all* members of the armed forces and their dependents. never has had to run the licensing gauntlet now faced by the legal service program. Most medical services are performed at federal facilities. beyond the jurisdiction of licensing authorities.

[12] S. **3016,** 91st Cong.. 1st Sess. (1969) (Carey Amendment). amended para. 222(a)(3) of the Economic Opportunity Act by adding:

> Members of the Armed Forces, and members of their Immediate families, shall be eligible to obtain legal services under such programs [OEO Programs] in cases

of legal services by the OEO to military "hardship" personnel and their dependents.) The military's earlier consideration had been prompted principally by concern over the inability to attract and retain lawyers. A Working Group on Military Lawyer Procurement, Utilization, and Retention saw an expanded legal assistance program as a way of offering attractive and competing professional career options to the military lawyer. That Group recommended that the Department of Defense:

> Study the feasibility and desirability of [seeking cooperation from the American Bar Association and State Bar Associations with a view toward] defining areas in which Legal Assistance Officers would be permitted to prepare and file pleadings in civilian courts, negotiate . . . in behalf of clients, and, in certain cases, make court appearances in behalf of clients.[13]

Congressional action, which was neither sought nor welcomed by the military,[14] forced at least a partial shift of emphasis in the approach to expanded service from consideration of the lawyers to a consideration of alternative ways of serving the clients. This did not mean, however, that subsequent discussion necessarily became client-centered, The military had its needs, too, and legal services continued to be discussed, in terms of these needs, as a tactical deployment of a fringe benefit—as an implementation of an overall strategy for the retention of personnel.[15] Delivery of legal service was discussed in a context of an all-volunteer force.

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of **extreme hardship (determined in accordance with regulations** of **the Director issued after consultation with the Secretary of Defense)** : ***Provided*, That nothing** in **this sentence shall be so construed as to require the Director to expand or enlarge existing programs** or **to initiate new programs** in **order to carry** out **the provisions** of **this sentence unless and until the Secretary** of **Defense assumes the cost** of **such services and has reached agreement with the Director** on **reimbursement** for **all such additional costs as may be incurred** in **carrying out** the provisions of **this sentence.**

[13] Report of Department of Defense Military Working Group on Expansion of Legal Assistance Programs [hereinafter referred to as "McCartin Report" after the group chairman, Colonel George J. McCartin, Jr.], Sec. IA1, which cites the earlier Working Group on Military Lawyer Procurement, Utilization and Retention; and McCartin Report, Enclosure 1.

[14] The military was not the only affected party left in the blind; the OEO did not seek and did not know of the Amendment until it was before the House-Senate Conference Committee. The history of the Carey Amendment is obscure.

[15] The shift in **focus** may have been somewhat illusory. The two concerns—desire to attract and hold the military lawyer and desire to find the best ways of serving the client group—are very much related to a single overall concern about the manpower base. There was a shift from reliance on the draft or, as in the case of the Navy, draft-induced enlistments, to considerations of a volunteer force. Earlier the Gates Commission had suggested that the keys to a volunteer military force were: attractive career options, competitive wages, including ***fringe benefits,*** and morale. Of course, the first two elements have an important bearing on the third—morale.

Congressional action had another effect, this one having profound and far-reaching consequences. By addressing only those servicemen and their dependents who were eligible for assistance from OEO Legal Services Programs—"the hardship cases"[16]—the Carey Amendment forced a fractionalized consideration of the client group; it had the effect of reinforcing an historical basis for a compromise with the civilian bar.[17] Group legal services might be tolerable to the bar to the extent that the extended service would not interfere with service that the bar was already rendering to an established clientele—its paying clients.

The Carey Amendment contained two harsh realities for the planners in the Pentagon: (1) there was the threat of a legislative finding that some members of the armed services were living below the "poverty line," and (2) there was also a threat of finding that the military was neither the exclusive nor necessarily the best resource for supplying its members with needed or desirable goods and services. Both findings had implications that the military could not or should not "take care of its own." The fact that both issues strongly related to adequacy of military pay scales and acceptance by Congress of the professional status of military careers was of small comfort. It was difficult to talk of careers and poverty at the same time.

Reactions to the Carey Amendment ranged from feelings of stigma[18] to feelings of intrusion. The official reaction was quick and singular. During the pendency of the amendment, letters were sent to key Congressmen by the Secretary of Defense[19] and by the Acting General Counsel of the Department of Defense[20] expressing opposition to the amendment on the grounds that the existing legal assistance program was the natural vehicle for meeting the need perceived by the amendment, even if that entailed an expanded or altered form of the assistance program. The letter written by the Acting General Counsel (at the request of Secretary Laird) is of particular note. Counsel said, in part :

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[16] 115 CONG. REC. 40101 (1969) (remarks of Senator Peter Dominick).

[17] By "force" I do not mean that the Carey Amendment foreclosed consideration of the entire military group.

[18] One military lawyer stated, in an interview with the author: "Although our lower grade enlisted people were eligible for charity services, we considered that it was demeaning to send a man in uniform to have him wait hours in the outside office of some charitable legal service and mingle with the desperately poor people."

[19] Letter from Melvin Laird to L. Mendel Rivers, Chairman, House Committee on Armed Services, Dec. 20, 1969.

[20] Letter from L. Niederlehner to Representative Albert H. Quie, Nov. 19, 1969.

> Admittedly [the existing programs] have certain limitations which impair their effectiveness and make it impossible for complete legal services to be provided. One of the more significant limitations is that the military legal officers in the main are limited to providing office advice, including preparation of some legal documents, and are unable to represent their clients in court proceedings or other legal proceedings or to negotiate fully in their behalf with adversaries. These ***limitations*** are due to a number of factors ***including the attitude of the organized civilian bar regarding such matters.*** These restrictions have been a source of concern and some frustration to military legal officers who would like to provide more complete legal services to their clients."

Citing the military lawyer procurement study, the letter went on:

> One of the recommendations of the study group proposed that efforts be made, in cooperation with civilian bar associations, to expand the military legal assistance programs so that military legal officers could provide more complete legal services to military personnel—in ***particular those in the lower enlisted pay grades.***[22]

The cited procurement study did not single out the lower **pay** grades! That suggestion appears for the *first* time in the letter of the Acting General Counsel. This letter thus represented the first adoption by the military of a fractionalized view of the client group. Was this a concession to the focus of the amendment or to the attitude of the civilian bar cited by Counsel? Or was there yet a third reason—the serious shortages of dollar and manpower reserves that would be needed if the old assistance program were converted to a full service program for *all?* The excuse given by Congress may have been welcomed. The thought of actually extending expanded service to all may have produced a willingness to fracture the group.

Shortly after the passage of the Carey Amendment, the Department of Defense notified the Director of the Bureau of the Budget that it would take *no* steps to implement the law—i.e., that it would not, under the proviso, make, arrangements with the OEO to reimburse that agency for legal services extended to military personnel—but that it would "continue to consider the problems to which [the Amendment] is addressed."[23]

The Working Group on Expansion of Legal Assistance, under the chairmanship of Colonel George J. McCartin, Jr. (Army Representative), was formed by directive from the Office of the Assistant Secretary of Defense on March **4,** 1970.[24] There were also representa-

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[21] *Id.* (emphasis added).
[22] *Id.* at *2* (emphasis added).
[23] Letter from **L.** Siederlehner to Robert Mayo, Dec. **24,** 1969.
[24] Memorandum from Roger T. Kelley to Assistant Secretaries of the Military Departments (Manpower and Reserve Affairs), Mar. **4, 1970.**

tives from the Navy, the Air Force, and the Coast Guard.[25] The DOD charge to the group was not as broad as the title of the group suggests :

> [S]tudy in depth the possible expansion of military legal assistance programs in keeping with [prior study group recommendations], *and in furtherance of the Department of Defense position taken in connection with the recent [Carey] amendment. . . .*[26]

This seems to be a directive that the amendment be forsworn and that the earlier directive—to consider the use of military lawyers in civilian courts—be pursued. The "Objectives and Suggested Areas of Study" accompanying the March 4, 1970 directive make it clear that the gloss of intervening political exchanga was added to any further consideration of expanded legal services. The objectives included :

> [T]o determine the extent to which such expansion of service is feasible; *to define* the types and scope of such expanded services and *persona who would be eligible . . .*[27]

The terms "eligible" and "eligibility" seemed embedded in the dialogue right from the start; the threat of outside legal service to military personnel on an organized basis and the "natural" limitations seen to derive from the attitudes of the civilian bar would limit the study group's efforts to a search for *tolerable alternatives.*

The areas of study and examination "suggested" by the Assistant Secretary of Defense included: (1) an estimate of the number of people mho would be served; (2) "the kind of legal service military personnel and dependents are eligible for through the Office of Economic Opportunity"; (3) the type of cases then handled by legal assistance officers and a review of the number and type of cases then being referred to the civilian bar by legal officers under the old legal assistance program and the pay grades of the military clients so referred; (4) the number of military lawyers required in "an expanded" program; (5) estimated effect of expanded legal services from the viewpoint of overall morale and retention rates; (6) "Desirability and feasibility of providing such expanded legal assistance with military attorneys compared to funding OEO, together with comparative costs"; (7) utilization of interservice exchange on a geographical basis to handle representation in civil courts;[28] (8)

[25] The Coast Guard here is treated as a military department, eren though its dominant mission is law enforcement and its organizational setting puts it in the Department of Transportation and not in the Department of Defense. *See also* 14 U.S.C. § 1 (1870).

[26] *See* note 24 *supra* (emphasis added).

[27] *Id.*, "Objectives and Suggested Areas of Study," sec. 1.

[28] Note that the term "civil court," as used by the military, means nonmilitary court and includes civil and criminal jurisdiction.

"Possibility of utilizing military and civilian attorneys under a joint participation or sponsorship program"; (9) *"The necessity and means of obtaining cooperation from the American Bar Association and State and local bars";* (10) the impact which adoption of the Gates Commission recommendations for an all volunteer Armed Force would have on an expanded legal assistance program; and (11) "the views of Staff Judge Adrocates, legal officers and legal assistance officers."[29]

The JlcCartin Report was submitted to the Assistant Secretary of Defense within four months of the original request, just in time for Colonel McCartin to seek the cooperation of the American Bar Association at its annual meeting in St. Louis in August 1970. It was an impressive review of the issues on often meager data. The records on the old legal assistance program, for example, were, when extant, incomplete or unreliable.[30] Other issues admittedly called for subjective judgments. The McCartin Report is in the form of answers to the questions implied by the "Objectives and Suggested Areas of Study." The findings and recommendations turned on three crucial issues: (a) availability of dollar and manpower resources for an expanded program; (b) a set of judgments as to whether the military lawyer or the civilian lawyer was in the best position to extend complete services to military personnel—this included an assessment of whether the civilian lawyer had in the past rendered such service or would in the future, and it included a view that service included understanding and empathy; and (c) assessments about the importance of obtaining civilian bar approral and the extent to which bar cooperation was possible—i.e., how far would civilian bar tolerance toward an expanded legal service program go?

The critical findings were:[31]

(a) The present program [old legal assistance program] was available to somewhere between **9.5** and 10 million people.[32]

(b) The old program had changed little since its inception in 1943, *except that there was no regular cooperation from the civilian bar* ***or*** *voluntary participation by the civilian bar as there* ***had*** *been at the* ***beginning.***. The program was too limited to provide desirable levels of service. . . .

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[29] *See* note **24,** *supra,* sec. **4** (emphasis added). The list either paraphrases or quotes of some of the items.

[30] Based on the author's personal observations.

[31] The findings are lettered according to the McCartin Report and are either paraphrased or quoted, as indicated with emphasis added.

[32] The notion of eligibility was present in the old program only on the fringes. All active duty personnel could receive the services by definition. There remained the problem of defining the secondary groups: "dependents," "retired" status (eligible), nonactive reservists (not eligible),

(d) There are 2,334,305 persons included in, and dependent on, active duty service in pay grade E–4 and below.

(e) There is no specific statutory basis for the present military Legal Assistance Programs beyond the needs of "welfare" and "efficiency"!

(q) The supply of the new lawyer requirements alone will not suffice to accomplish any appreciable expansion of the program. . . .

(r) (1) The estimated effects of expanded legal services on "overall" morale would be good, if "conservatively and carefully publicized as 'the services taking care of their own' *avoiding the impression that the military lawyers are taking business (and money) from the civilian bar."*

(2) The estimated effects on retention rates as a "fringe benefit" would be good.

(3) Specifically, the ability to hold onto trained men who might, because of debts and personal worries and inability to receive legal assistance for their relief, leave the service or **seek** administrative discharge, would be enhanced.

(s) (1) It is "more desirable to provide expanded legal assistance with military lawyers or a combination of military lawyers and service employed civilian lawyers than funding O.E.O. services." This finding is based on accessibility of lawyers—the military version of the outreach program, a base being the serviceman's neighborhood—and the effect such convenience would have on the lawyer-client relationship, on client and troop morale, and on costs to the military for time and travel away from the post.

(2) The feasibility of providing an expanded program of court appearances depends on the ability of the Department of Defense to support the program and *"the extent to which states, courts, and bar will permit its expansion."*

(t) There is not only a possibility hut a necessity of interserrice exchange of lawyers, both active duty and reservists, on a geographical basis.

(u) "The use of a combination of additional military and civilian lawyers who are non-active duty reservists would enhance the expansion of the program and' avoid some of the problems connected with the courts and bar objections and would lend assistance in obtaining necessary permissions.

(v) The program would render all types of services "to the extent the states, courts, and bar cooperate."

(y) *"The state courts and bar associations, together with the American Bar Association, must he persuaded of the need for, and the quality and extent of the program . . .* and of *the absence of any intent to take legitimate business from the civilian bar, indicating recognition of the need for the availability and expansion of legal services even beyond the poverty level recognized* by *the American Bar Association, its president and many writers."*

The "findings" of the McCartin group were indeed a **mixed** bag. They covered items of hard data, such as relative costs of delivering different types of legal service, numbers of people served by the legal assistance program in the past and expected to be served in the

future, and estimates of the numbers of people eligible for past and future services. The findings also embraced a wide range of matters which rested on opinion, such as philosophies about a volunteer army and personal services as fringe benefits; views about the impact of an expanded program on troop and lawyer morale; and judgments about the superiority or desirability of having military lawyers serve the civil legal needs of military personnel rather than having civilian lawyers serve those needs and the degree of cooperation that could be expected from both the organized bar and individual lawyers. The opinions in these areas often rested on personal preferences and professional outlook—i.e., the professional soldier's or sailor's outlook or the military lawyer's outlook. The element permeating these findings, however, is the view that bar cooperation was necessary and that it stopped at the water's edge of the economics of law practice. This permeating effect is most dramatically illustrated in finding (r)(i). There the finding concerns itself with the effect of the expanded program on troop morale and the importance of an adjunctive program of "conservative publicity." Then, as if an afterthought—but not really—the cautionary note is added, "avoiding the impression that military lawyers are taking business (and money) from the civilian bar." The central subject of the finding becomes strained, just as the overall findings themselves became strained, between the pulls of rendering a service—distributing a fringe benefit—and the "political" limitations deriving from the Working Group's views about the attitudes of the organized bar toward licensing and toward institutionalized offering of legal services. In finding (r)(i) the Group was saying that morale can be benefited by an expanded legal service program, *provided* the process does not awaken the sleeping giant—the organized bar.

On a broader level, the dissonance observed in finding (r)(i) was repeated many times—frequently more subtly—when questions of availability of legal counsel and access to the legal process had to be considered also in terms of the possibly conflicting interest—self-interest—of the bar as a whole. On the issue of eligibility alone, the predetermined nature of the findings is apparent. As Colonel McCartin, chairman of the Working Group, has stated:

> **If we gave it to everybody that would mean a sizable dent in the local bar's pocket. We knew we would never be able to get away with it. We knew we had to get the cooperation of the local bar. So, since it was OEO and its entering the picture that forced us into this position, we figured we would be able to furnish the service or comply with the Congressional mandate."**

[33] **Interview with Colonel George McCartin, May 4, 1971.**

In a way, the conflict, seen as affecting the considerations of the McCartin Committee and perhaps compelling its ultimate recommendation that expanded service be offered only to those under the poverty line, had been present for some time prior to any formal considration of expanded legal services. It simply had not been faced explicitly. The conflict can be seen as more basic, as a clash between two professional outlooks—those of the military profession and of the legal profession. Further, there was an element of identical interest which seemed to move conflict from the subtle to the aggravated form. Both professions would start to talk about legal services as either necessitous or desirable, and, as that necessity was assumed or was treated as apparent, issues of *who* should render service and *how* that service should be rendered would emerge as threats to each.

As early as **1943** a War Department Circular stated:

> Legal assistance offices will be established as soon as possible and wherever practicable, throughout the Army, so *that military personnel can obtain gratuitous legal service* from volunteer civilian lawyers and from lawyers who are in the military service. *Such gratuitous legal service should not be considered as charity but entirely as a service of the same nature as medical, welfare, or other similar services provided for military personnel. In any proper case the legal assistance office may refer the serviceman to civilian counsel for retention by the serviceman upon the usual civilian basis.*"

The directive is instructive. An attempt was made to analogize legal services to medical services, already socialized for members of lthe military profession, while at the same time recognizing that such status was aspirant rather than secure. There was also a recognition of the distinction between the military way of delivering these services and the "usual civilian basis" but as yet no recognition of a conflict regarding legal services. That would have to await events such as community discussion about the necessity of legal services which accompanied, for the poor at least, the advent of OEO Legal Services.

In sum, and to recapitulate, the recommendations of the McCartin group—which followed the "findings"—that military lawyers should be licensed to provide full-range legal service to military personnel under grades E–4, and their dependents, and that bar cooperation was both desirable and necessary seems to have been a foregone conclusion even before the Group met, even before they considered alternative ways of expanding services, and even before the Carey Amendment provided the excuse for fractionalizing that service.

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[34] *See* M. BLAKE. note **2** *supra.* at **62** (emphasis added)

The low level advice and counseling program which the military had operated since **1943** had not generated any substantial opposition, although both the unauthorized practice of law elements and the inexorable conflict between philosophies of delivering services to a group were present from the beginning. The fact that the supply of legal services had, in the past, been viewed by the offerors of the service as nonnecessitous—as extras—as distinct from the supply of services like medicine, helped to avoid the recognition of the conflict. So, too, did the relative invisibility and marginality of the services as viewed by outsiders[35]—particularly the legal profession as a whole and those within the profession. But, as the community and the profession began to debate supplying legal services as a necessity or a near necessity, the conflict became explicit—it involved competing views of institutionalized delivery of services. It was at this juncture that the military profession's view that goods and services ought to be distributed on a socialized basis could be Seen clearly and as a possible threat to the legal profession. It this context, the central question raised by the McCartin report is made clearer :

> The challenge now is: Will states and bar associations allow the military lawyer to do more for his military clients when they need it, and if *so,* how much?[36]

The split of the eligible group has already been seen as a concession to political reality, with some economic basis as well. Nevertheless, when it was recommended it drew a sharp dissent from Lieutenant Commander Charles Martin, the Coast Guard representative. His dissent further describes the conflict of professional outlooks that we have been discussing :

> [The recommendation that expanded legal services be limited to **pay** grades **E 4** and below is subject to some objections.] *The traditional concept of a military organization as a "band of brothers"* and **27** years of equal treatment in legal assistance for all officers and men and their dependents strongly contraindicates the adoption of the civilian concept **of** "Poverty" levels within the armed forces as a criteria for determining eligibility for *any* benefits which benefits thus become inescapably categorized as "Charity." The mere recognition **of** "poverty levels" in the military runs counter to that touchstone of *military professionalism,* the maxim: "The service looks after its own." . . . Suc-

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[35] The term "outsiders" will be helpful, We shall see it later: members **of** the military profession will be viewed as outsiders by the bar in a particular locale and vice versa, with the military lawyer being viewed as an outsider to both—**or** an insider, depending on the circumstances.

[36] McCartin Report, sec. II. **B, 3.**

> cess and motivation for the first time would result in being denied a fringe benefit. . . .
>
> The only appropriate standard for the administration of such benefits is to ask "Is he one of ours?" and if so we have a duty to look after him and his."

Commander Martin's remarks put the issue out front: "[It] would be best not to provide any expansion of legal service at all rather than limiting such expansion. . . .[38] In other words, how far would the military change its conception of the distribution of goods and services to accommodate the felt political realities of the organized bar?

The awkwardness of the squeeze between traditional military notions of how goods and services ought to be distributed and the political realities of bar "permission" or veto is illustrated by the dissonance between two "findings" in the McCartin report. On the one hand the Group found:

> Politically and practically it would be unwise for the Department to attempt any expansion which the bench and bar do not approve and then permit.[39]

At the very same time, however, speaking of the old program—LAP—the Group said:

> The continuation of our present program is a must, otherwise morale will suffer and the expansion would become a cause of dissension and discord. *To offer an expanded program to a few at the expense of the many career-oriented personnel who receive the present limited legal assistance would be most unwise and do harm rather than good.*"

A paradox is apparent. The subfinding regarding the old program is precisely the point that Commander Martin made in his comments about the new program. Where, then, in its planning for the expansion of a program which had existed since 1943, and about which there seems to have been a cohesive view, did the Working Group pick up a vulnerability to bar veto which caused an abandonment of this cohesive approach? Was it avoidable?

To answer the latter question first—Was vulnerability to bar veto and overdependence on bar cooperation avoidable?—one should first look at the history of the old legal assistance program. Regardless of what was said or regardless of the felt need to "cooperate with the

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[37] *Id.*, Expanded Coast Guard Comments. appended to sec. III, Findings and Recommendations (emphasis added).

[38] *Id.*

[39] McCartin Report. sec II, C, 6, a.

[40] *Id.* (emphasis added),

private bar"—arising perhaps out of the military lawyer's membership in two brotherhoods (the military profession and the legal profession)—the old program was not vulnerable. That does not mean, however, that there was not some exposure to unauthorized practice of law rules or charges that unauthorized practice was involved. The exposure was there.

The legal assistance officer who "advised" a general or private about a house purchase and examined papers pertaining to the purchase, or gave estate planning advice, including, in many instances, the drafting of a will, was frequently seen as practicing law without the necessary licenses in many jurisdictions.[41] Three factors of immunity, however, made this exposure minimal—merely technical. First, the "law offices" where the advice and counseling and sometimes drafting services were rendered were, for the most part, outside of the jurisdiction of most states—on federal military reservations. The United States Congress—and courts--have exclusive jurisdiction over such 'territory[42] unless there was a reservation of jurisdiction by agreement with a state at the time of cession or condemnation or unless Congress shall have subsequently relinquished exclusive jurisdiction.[43] There is no evidence that the states had ever reserved, or the Congress had ever relinquished, jurisdiction over the practice of law on military reservations. Nor is there evidence of any attempt by a state bar or a state court to attempt to exercise jurisdiction over the practice of law on military reservations—and other federal installations. The practice of law on military reservations has been, therefore, like the practice of medicine at such installations, free from state regulation and from meaningful regulation by the organized bar.[45]

"This same charge has been leveled at house counsel to large national corporations.

"Article I, Section 8, Clause 17 of the United States Constitution provides that Congress shall have the power:

> **To exercise exclusive Legislation** in **all Cases . . . over all Places purchased by the Consent of the Legislature of the State** in **which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other Needful Buildings; . . .**

See Paul v. United States, **371 U.S. 245** (1963). In subsequent discussion we shall see that the Leavenworth County bar in Kansas used the extraterritorial argument as a basis for attempting to block a Kansas lawyer in the Army JAG Corps from practicing in local Kansas courts.

[43] *See* James Stewart & Co., Inc. v. Sadrakula, **309** U.S. 94 **(1940).**

[44] This is not to say that Federal Courts do not review legal proceedings on federal property.

[45] At times when state medical licensing boards evidenced hostility to "foreign doctors," this exemption from state regulation enabled the Veterans Administration to staff its hospitals with foreign, unlicensed doctors.

Second, the law work done at inilitary reservations, as long as it did not involve court appearances by the military lawyer, was either invisible to the civilian bar or, where visible, it was viewed as adjunctive to the work of the civilian bar. By invariably referring court work, matters calling for direct representation, and matters needing services beyond the scope of the legal assistance officer's advice and counseling, the legal assistance officer insured a viev, by the private bar, that the old program was simply engaged in screening and workups of paying business. The civilian bar could view the military lawyer as brokers of business. In this context, the chance of anger or dismay over the drafting of wills or other intrusions into the domain of the private lawyer was both permissible and pardonable, particularly since it was in lieu of referral or solicitor's fees. The **LAP** was viewed as creating complementary dollar demand for legal sen-ices, not as competitive. To be sure, frequently the civilian bar was offered cases that did not generate fees. What happened when this occurred—when burdens and not benefits vere distributed—was an important but separate issue. The argument has been made that default on the part of the civilian bar to handle nonfee or reduced-fee cases was one of the factors that forced an expanded legal service program on the military.

The third reason why the old LAP was not vulnerable to bar veto is related to the first reason: Simply, bar permission was not needed to conduct the advice and counseling program. There was no affirmative action that was either necessary or desirable.

It is doubtful whether an expanded legal service program—involving full-scale representation of clients—per se involves greater vulnerability *to* bar veto or limitation. Vulnerability seems to turn on whether the three special factors of immunity—jurisdiction, invisibility, and bar permission not needed—are altered or abandoned. If an expanded program did not contemplate the use of military lawyers, or the escalation of the role of military lawyer from screener and referrer and, perhaps, counselor to that of advocate, representative, and more particularly counsel of record, there seems to be no basis for assuming that the organized bar would or could effectively object to or limit such program. Exposure then seems to turn on how an expanded legal service program affects the military lawyer's role. The Working Group considered several options which would not have affected the role of the military lawyer. These included:

A. Judicare—a plan whereby a serviceman or his dependents could go to a civilian lawyer of his choice and the plan would pay scheduled fees to that lawyer.

B. Direct contract with certain members of the civilian bar for the benefit of the eligible personnel, In this instance the military would choose the lawyer.
C. Acceptance of the Carey Amendment, letting OEO Legal Service Programs represent eligible military personnel, and making payments to the OEO for. the service rendered.
D. Employment of civilian lawyers, licensed in the jurisdiction of their service, as house legal assistance lawyers.
E. The use of locally admitted military reservists on a non-fee basis, where the reservist would earn active duty pay and retirement credit.
F. Continuation or expansion of the existing referral patterns, but without military intervention regarding fees.

It is doubtful whether the adoption of any of the options for *all* military and their dependents would have either aroused the civilian bar or would have required the degree of cooperation and agreement from the bar and bench that the plan adopted finally required. Not only would the role of the active-duty military lawyer remain exempt under each of the options—he would still be performing screening and referral services—but in each option a civilian attorney, already admitted to practice in the jurisdiction, would be counsel of record. To be sure, as the group was seen to include potential fee-generating matters, options B, D, and E would have greater political difficulty with the organized bar, because of their closed-panel or group legal service elements. But the greater "difficulty" would not amount to vulnerability because of three United States Supreme Court decisions[46] and the revision of the legal profession's code of professional responsibility.[47] The Code of Professional Responsibility, recommended by the American Bar Association in July 1969 and adopted as of December 31, 1971 in 41 states and approved in 7 more is directly in point. It provides, in Disciplinary Rule 2–103(D):

> A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of **his** partners or associates. *However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment* **is** *exercised in behalf of his client without interference or control by any organization or person:* . . .

[46] "NAACP v. Button, 371 U.S. **415** (1963), Brotherhood **of** Railroad Trainmen **v.** Virginia *ex rel.* Virginia State Bar, 377 U.S. **1** (1964); and United Mine Workers of America, District **12** v. Illinois State Bar Association, **389** U.S. **217** (1967). Since the JlcCartin Group met, there has been a fourth case which upholds the group offering **of** legal services. United Transportation Union **v.** State Bar of Michigan, 401 U.S. **576 (1971).**

[47] Code of Professional Responsibility, DR **2–103 (d) (2).**

(2) A military legal assistance office.[48]

The current professional or corporate view of the organized bar, in other words, contemplates and sanctions the cooperation of members of the civilian bar with military legal assistance programs. It exempts the military program from the general strictures regarding group service. To be sure, the drafters of the Code of Professional Responsibility did not contemplate the pilot program. Only the old L A P was contemplated. The language of the Code, however, is broad.

Option F, the continuation of the existing program, without government payment on account of the members of the group. is of course, nothing but a referral service, even if the scope of advice and counseling short of "representation" were expanded.[49] Option F, however, fell considerably short of the view that a fringe benefit ought to be distributed. It was nothing more than "we will help you find a lawyer who you can pay if you can afford it." Accordingly, the McCartin Group was able to dismiss this option easily; something more had to be given. Sote, however, that the chosen expansion had the effect of leaving option F in effect for those in pay grades higher than E 4 . For potential fee payers, the military legal assistance program would continue to operate as a screening and referral program.

Options A (judicare), B (contract payments), and D (use of government employed civilian lawyers as house counsel—staff legal service lawyers) were rejected by the JlcCartin Group principally on a cost basis. The Group found, not surprisingly, that military lawyers cost less than civilian lawyers.[50] There were, however, two additional reasons for the rejection : (1) the military lawyer would not benefit from an expanded role—as an intake and referring lawyer there would be no professional challenge, and (2) an effective counseling program, even short of court appearances, required an ability to directly negotiate for the client, an ability to close matters at the earliest and cheapest point. We must recall, when considering why the group rejected options which would not change the role of military lawyers, that both the Defense Department charge to the McCartin Group and the past consideration of expanded legal service posed the problem of lawyer morale and lewyer retention as well as troop morale and retention. It is not surprising that the McCartin Group altered the role of the military lawyers.

[48] Id. (emphasis added).

"Lawyers may, of course, cooperate with bar operated or bar approved lawyer referral services. See Code, DR 2–103(D)(4).

[50] McCartin Report, Section II, 6 (f).

The second point here has a bearing on both issues—there are real and psychological benefits to both troops and lawyers in being able to "solve problems" rapidly. The point regarding role is summarized in a letter to the Working Group from the Director of the Ohio State Legal Services Association :

> I agree with Colonel McCartin when he says that the legal assistance officers are in poor bargaining position due to the fact that they are not permitted to file any pleadings or make any court appearances.[51]

The ability to bargain and settle is enhanced by the ability to follow through. So, too, both the lawyer's and client's view of the military lawyer's role are enhanced by this ability to follow through. This has morale consequences.

Beyond these specific reasons for recommending against plans involving the use of the civilian bar, the McCartin Group also felt *n* disenchantment with the unevenness of service rendered by the civilian bar under the old legal assistance program. The Group felt that greater quality control and more stable service—free from the viscissitudes of acceptance or rejection of cases on an *ad hoc* basis—could be achieved by use of military lawyers. As we shall see later in more detail, this parochialism and confidence of the Judge Advocates in their own certification and selection process comes into sharp conflict with the parochialism of several local bars and their confidence in *their* certification process—i.e., licensing.

Concern about the evenness of service offered by OEO was also a factor in the McCartin Group's rejection of option C. The Group surveyed OEO eligibility standards around the country and found vast differences in income eligibility criteria. They also found that the OEO offices varied greatly from place to place in the scope of service rendered—the nature of cases and 'matters taken. From the military planner's viewpoint, this state of events left them with a problem as to how to dram nationwide guidelines for use of OEO legal services,[52] a problem seen to have morale consequences. Not only, then, would hardship distinguish eligibility for a fringe benefit within the military group, but there would be an additional dissonance around the question, "Who is a hardship case?" The military could not easily draw *n* differential standard. The Group suggested that an approach to the Director of OEO Legal Services for a directive to local projects could perhaps reduce the application of local differential rules to servicemen and their dependents.[53] How-

[51] *Id.*, enclosure 23.
[52] *Id.*, sec. 11, C, 2.
[53] *Id.*, sec. II, C, 2, i.

ever, this suggestion did not meet other concerns about OEO serving military personnel. While not explicit, the McCartin Group showed strong feelings about the OEO dispensing a largesse to servicemen, even if paid for under the Carey Amendment. Moreover, the Group had a serious question about whether servicemen and their dependents—not really members of the local community—would be treated, even by OEO, as second-class recipients of that service. Here, of course, it should be noted that some of the same feelings were expressed about the treatment received or expected by "outsider" military personnel at the hands of local private lawyers. There were feelings of strains or possible strains in military-community relations. These feelings were not new, but the military indicated a particular vulnerability.[54] Rejection of the OEO option rested, in part, with the Sense that the OEO could not possibly understand the needs of the military personnel as well as the military itself[55] and might be indifferent at best or hostile at worst. In part, this same sensitivity expressed about civilian lawyers explains the rejection of the other options involving the use of civilian lawyers:

> In a "popular war" or one involving the entire country and its resources, the cooperation and attitude of the civilian lawyer is a far different thing from that evidenced during time of peace or during an unpopular war."

The military planners also felt that the military lawyer was more accessible to the recipients of the service, both psychologically and physically. The base lawyer was the Servicemen's neighborhood lawyer. To some, however, this posed a special version of client reluctance to approach a lawyer—the possibility of an enlisted man's special reluctance to consult an officer about a personal problem.

The accessibility problem has also been discussed in terms of cost savings. In recommending the rejection of the use of OEO legal services, the McCartin group also indicated that the military could meet the "needs" of the same number of clients more cheaply by using military lawyers.[57] Their arithmetic for this conclusion was essentially simple: even using a conservative case per lawyer figure, the military lawyer's pay was substantially lower than the prevailing salary of a legal service program lawyer, and the supporting staff and other overhead costs were reckoned to be lower too.

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[54] *Id.*, sec. 11, C, 6, f.

[55] *Id.*, sec. II, C. 8. c: "The Group suspects that in most cases the serviceman's problem would get lost in the shuffle, even if he could get in the door."

[56] *Id.*, sec. II, C, 6, f.

[57] *Id.*, sec. II, C, 8, b.

In sum, comparative costs, a sense of loyalty to both the military lawyer and the military client—a sense of professional identity—and feelings about control of quality and evenness of service led to a rejection of all the options and alternatives for expanded service that would have avoided converting the role of the military lawyer from one that brought no vulnerability to the legal assistance program to one that did bring vulnerability. There remains option E—the use of nonactive reservists. This option was indeed treated by the Working Group as a viable option. It still remains a viable option, Observing that there are military reserve judge advocates practicing as civilian lawyers in every state, the Working Group included in its recommendations that an expanded program use the reserve JAGs wherever possible.[58] The important thing about use of reservists, however, is that even if they were used to obviate the necessity of seeking *pro hac vice* or limited licenses for nonresident military lawyers, the role of the Staff Judge Advocates would change; they would become more active cooperators in the representation of the clients. With the reservists, the military lawyers would be more than clerks. As the Working Group observed:

> [The Reservists] could be used, with military lawyers assisting, as if they were associates, in providing full legal services, with the cooperation of courts and bar, to a limited number of personnel.[59]

The two qualifying phrases are interesting. Why the "as if" and the "with the cooperation of courts and bar"? The associate role seen is quite clearly revealed as that of courtroom participation—sitting second chair. Something more than workup is involved. But there seems to be a hesitancy, a diffidence, a sense of a new exposure—the need or the felt need for permission. Hence, the tentative "as if" and the felt need for bar approval and cooperation as well as court approval. The McCartin Group reviewed the *pro hac vice* rules; most states allowed the courts to admit nonresident counsel for particular matters when a member of the local bar was associated as counsel and was the responsible party on the pleadings.[60] Insofar as the additional counsel duties military lawyers performed out of court were in cases where they associated with civilian lawyers—albeit reservists—there were no new exposures, nor were there any where the court admitted the associate military lawyer. I think that the

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[58] *Id.*, sec. II, C, 10, b.

[59] *Id.*

[60] *Id.*, sec. II, C, 8 (b). *See also* A. KATZ, ADMISSION OF NONRESIDENT ATTORNEYS "PRO HAC VICE" (Research Contributions of the American Bar Foundation, 1968, No. 5).

concern evidenced here amounted to circumspection about possible organized bar resentment over extending the group service concept to include some selected civilian lawyers, and a feeling that even the minimally changing role of the military lawyer in such an arrangement was threatening to the bar and brought on a new vulnerability. An observation of this sensitivity is an important clue to an effect that is even more apparent when the military lawyer's role is sought to be changed to that of principal attorney of record: The military seems to attribute to the bar a veto power that is broader than its actual power, and the attribution itself creates a greater power.

The principal recommendation of the McCartin Group took this form:

> The Group recommends the use of military lawyers, or a combination of military lawyers and service employed lawyers in any expanded program, particularly when full use of the non-active duty lawyer reservists and cooperating bar members is made, to obviate, to the extent possible, the problems involved in admission to practice where assigned. and objections to the bar to the ***dangers*** (sic) of nonadmitted attorneys acting for the client.[61]

Other key recommendations of the McCartin Group included: (1) assignment of military lawyers to bases located in the jurisdiction of their admission, wherever practicable, and use of interservice exchange of lawyers to reduce the bar admission problem; [62] and (2) the service rendered be the widest possible, consistent with budget and the "support of the legal profession in each state and bar." [63] Suits and disputes with the command were exempted. So, too, were class actions and other elements of a "law reform" program, as were suits against the Federal Government. The program recommendations, then, envisioned a substantial shift in the role of the military lawyer. If vulnerability to bar veto were theoretically possible, the option chosen by the Group did the least to avoid it. It is doubtful, however, that the Working Group could have avoided this option. The evidence is strong that the Group was aware of the route of the greatest difficulty but felt compelled to choose it anyway:

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[61] McCartin Report, sec. III, **A, 2,** i (emphasis added). The staff civilian lawyers referred to are already employed civilian lawyers. The thought of the Group was that frequently the civilian lawyer would be licensed in the jurisdiction of the base where he was employed.

[62] *Id.*, sec. 111, **A, 2,** c and e.

[63] ***Id.***, sec. 111, A, **2,** d. There were cutdowns here, along lines previously laid out during the time OEO programs were bidding for bar cooperation. Fee-generating matters, such as personal injury cases, were exempted from the scope of service offered.

> **The Group believes that the courts and bar most readily could be persuaded to accept a program which stopped short** of **court pleadings and appearances.**[64]

The choice having been consciously made, the McCartin Group turned to the political realities: **(1)** the need to hold the service eligible group to nonthreatening levels, and **(2)** the need to "sell" the program to the bar and bench. If approval was not needed before, but was sought, how much more dependence must have been felt when the mechanism chosen required affirmative permission, at least from the courts, in the form of licenses. In fact, from the language of the Working Group and subsequent developments to implement the pilot program, one wonders whether delivery of legal services to clients did not become a secondary target and the licensing exercise, accompanied by the selling job, a primary objective :

> **The cooperation of the** state **courts, the bench and the bar [is] vitally necessary to any expansion of the present programs.** ***The job*** **is to sell to the bar the need, and then the extent to which the expansion** should **grow.** ***The methods of implementation*** of ***allowable and supportable expaneion can be worked out with the bar association and courts, once the expansion idea is accepted.***"

In setting the original eligibility and scope of service guidelines, the Group went beyond setting income standards and, like the OEO, legal aid, and other institutional programs before them, carefully excised from the scope of service those matters which might produce fees, such as accident cases.[66] This, too, would be a price paid for obtaining bar cooperation.

In mapping the campaign for bar approval, the Working Group had the benefit of opinions solicited from both the field judge advocates and from the organized civilian bar. The issues ultimately faced by the negotiators at the local level were known to the planners; the pieces were in place. If the bar could be persuaded of the nonthreatening aspects of serving the poverty group, the military negotiators would still have to face a suspicion of creeping socialism. fear that the eligibility lines would ultimately encroach on fee-generating business. Just as important, in seeking the licenses, the parochial feelings of the local professional societies would come into play. Professional identification might, in the abstract, be to and with the men of the law, but in practice it was more strongly expressed as membership in the New **York** bar, the California bar, and

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[64] *Id.*, sec. II, C, 11.

[65] *Id.*, sec. II, C, **10,** c **(emphasis added)**

[66] *Id.*, sec. II, C, 11.

the Columbus or Chicago bars. There are no national licenses. The campaign to sell the bar, therefore, takes on an even more intriguing quality. How does a single entity—the armed forces—with plans for a national law program, and a nationwide, no, worldwide, organization of lawyers go about the problem of acquiring the necessary licenses when the authority to issue the licenses is federalized? Because of unified administration and the probable reliance on out-of-state lawyers, this was unlike the problems faced in the implementation of other national law programs, such as the OEO Legal Services Program.[67]

After the McCartin Report was submitted to the Department of Defense, DOD gave tentative approval to the Group recommendations, provided that ABA "approval" could be obtained. Colonel McCartin became the negotiator for that purpose. Prior to the Annual Meeting of the ABA in St. Louis during August 1970, Colonel McCartin sent copies of the Working Group Report to the Kational Legal Aid and Defender Association and to several standing committees of the ABA—Legal Aid and Indigent Defendants, Legal Assistance for Servicemen, Lawyer Referral Service, Unauthorized Practice of Law, and Ethics and Professional Responsibility.[68] The issues raised in this first-round effort for national bar approval were to be raised many times over in the several negotiations with state and local bar associations:

(1) What was the level of competence of the military lawyers?
(2) Were they, or could they be, qualified to practice competently or adequately before local courts where they were stationed?
(3) Were there available or preferable alternative ways of representing the "hardship" G.I.s and their families?
(4) Was the military plan an encroachment on established mechanisms—or established expectations?
(5) Would the military lawyer be subject to discipline in a "foreign state"?
(6) Would the military lawyer provide enough continuity and stability—particularly in duty assignments—to be able to handle a going caseload at a local level? (This involved questions of court dockets, status calls, and the longevity of litigated matters.)

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[67] Some OEO local programs had to face **the** issue of temporary licenses for out-of-state lawyers awaiting bar exams. *See* discussion of Sew Jersey and Alaska in Part II.

[68] Interview with Colonel George McCartin, May, 1971.

(7) Would the military lawyer in the service of his military clients be subject to command influence? (This is a particularly virulent version of the "problem" seen in practicing law through intermediaries.)

Although these issues were raised in the truncated negotiations between the military and the ABA committees—negotiations which lasted only two months—they were more or less abstract and muted versions of what would occur later. The ABA could not be expected to perceive the same degree of threat that several local bars would perceive when faced with pilot programs in their bailiwicks. The ABA is an amalgam of professional constituencies, speaking less for the practicing lawyers and more for overall professional interest than do the local and state bars. The ABA would have overall views on standards for the practice of law but little view on how law should in fact be practiced at the local level. Moreover, the ABA would have no say on the issuance of local licenses to practice law or on the question of *pro hac vice* admissions. It is not surprising, therefore, that the JlcCartin recommendations won quick approval. There was some hesitancy on the part of the Lawyer Referral Services Committee, a hesitancy based on a sense that adequate mechanisms existed for the referral of *all* comers to competent counsel, particularly those unable to pay full fees. The Standing Committee for Lawyer Referral Services ultimately gave its approval, as did the other committees that were approached. It must be kept in mind, however, that the main threat to the bar had been removed before negotiations were commenced. The program was "sold" as a poverty legal service program. This enabled the **ABA** to approach the issue as "settled" in advance on the major question of approving a group legal service program. The historical paradox was operating: bar approval of the group delivery of legal services where the beneficiaries could not pay—such as OEO and legal aid—and bar disapproval of group legal services where the beneficiaries could pay.

The ABA Standing Committee on Ethics and Professional Responsibility issued an Informal Opinion covering the expanded military legal assistance program on August 9, 1971.[69] The opinion, which found no ethical objections to the expanded program, is interesting in terms of its coverage. The Committee found it had no jurisdiction over the two central questions raised by the military: Did the program have to be limited to "hardship" cases? And should

[69] **ABA** Comm. on Ethics **and** Professional Responsibility, Informal **Opinion No.** 1166 **(1970).**

military lawyers have access to civilian courts? The opinion (Informal Opinion 1166) said:

> Apart from the general concept of expansion of service, the two areas of expansion which you seemed to urge particularly in your [Colonel McCartin's] letter were (1) availability of more complete legal services to members of the armed forces and their families who are *not* living at the poverty level (or "extreme hardship cases"); and (2) access of military lawyers to the courts.
>
> Neither of these two questions raises any question within our jurisdiction. ***Whatever may be the views*** of ***this Committee, the question of limitation*** of ***OEO legal services benefits to extreme hardship cases in the military family is one to be resolved*** by ***Congress.*** Access to the courts of the several states is a matter determined by the law of each state, and access to the federal courts is likewise a question of law. Questions of law are not within our scope."

The Committee finding of absence of jurisdiction over the question of who should be eligible for services offered through legal service programs—in this instance military legal assistance offices—is indeed puzzling, particularly in view of the "observations" that it then offers to "guide [the military's] expansion of services." The Committee Cited both DR-103 (D)(3) and DR 2-104(A)(3) to support the propositions that a lawyer "may cooperate in a dignified manner with the legal activities of a 'military legal assistance office' provided his independent judgment is exercised on behalf of his client without interference or control by any organization"; and that a lawyer who is furnished or paid by "a military legal assistance office" may represent a member or beneficiary thereof to the extent prescribed."[71] The Committee went on to observe that the extent of the group implied by the explicit coverage of "military legal assistance programs" in the Code of Professional Responsibility is "only . . . members of the military or their families."[72]

What the Committee seems to be doing, rather than finding "no jurisdiction," is registering dismay over the accidentally settled nature of the issues. There certainly is jurisdiction. By exempting "military legal assistance programs" from the strictures against the group offering of legal services and the third party payment for those services—and without any income test—the Code of Professional Responsibility had essentially provided that cooperation with such a program was ethical regardless whether the program was restricted to those servicemen or their families who could not afford

[70] *Id.*, at 1 (emphasis added)

[71] *Id.* at 1–2.

[72] *Id.* at 2.

to pay. To be sure, when the Code was written, the military legal assistance program looked to be limited to incidental service coupled with a lawyer referral service. There was, at the time the Code was drafted, no indication of possible expansion to full services to all military across the board. The Committee's "feelings" are then expressed in their guiding observations :

> **EC 2–16 provides that ". . . reasonable fees should be charged** in **appropriate eases to clients able to pay** for **them." . . ,** ***Accordingly, where a member of the military or his family is able to pay a reasonable fee for the desired legal services, the mutter should be referred to a lawyer in private practice and not handled by the military bgal assistance office at public expense."***

Does the Committee's conclusion follow correctly from EC 2–16? Or from their opening remarks that the eligibility criteria are a matter for Congress? Moreover, doesn't the exemption of military legal assistance programs in DR 2–103(d)**(3)** and DR 2–104 **(A)(3)** mean that if Congress or the military choose to provide services even for those who can afford to pay for them it would automatically *not* be "an appropriate case'' for the client to pay his own fee? The committee placed its own moral judgment on the question of socialized delivery of legal services. The Committee's difficulty and their puzzling denial of jurisdiction may have been forced by a realization that, at the time, over **20** states had already adopted the Code of Professional Responsibility.

The Committee suggested two other guidelines to the military. It cited EC 2–30 ("employment should not be accepted by a lawyer when he is unable to render competent service").[74] The issue of competence was asserted or inferred throughout the several negotiations with local and state **bar** associations. Was the military lawyer competent to represent his clients? The Committee also returned to DR **2–103**(D) (a lawyer shall exercise "independent professional judgement") **as** a way of saying: Beware of command influence.[75]

What may be more puzzling than the Committee's treatment of its jurisdiction coupled with its willingness to "suggest" about the ethics of payment and the like—was the military's quest for an opinion on how far beyond "hardship" their program could go. **This** is puzzling in view of the McCartin Report's circumspection about

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[73] ***Id.*** **at 2 (emphasis added).**

[74] ***Id.*** **at 2. Incorrectly cited by Committee as EC 2–3. Why** the **committee did not cite DR 6–101 for the same proposition raises an interesting question. That section makes it a disciplinary offense** for **a lawyer to handle a matter where he is not competent.**

[75] ***Id.*** **at 3.**

the political difficulties anticipated beyond the borders of poverty and in view of the fact that the actual request for program approval, at the time, was tied into OEO standards. At least that is the impression the military was seeking to convey. The puzzle can be understood if one remembers the military's own internal discomfort about splitting the group and if one looks more closely at the guidelines ultimately issued by the Department of Defense. As we shall see presently and more fully, the guidelines for eligibility under the expanded program were quite distinct from the guidelines for OEO legal services.

On August 13, 1970 the Board of Governors of the ABA approred the experimental expansion of the military legal assistance program.[76] The approval was for "pilot" or "test programs" in "such states as cooperate and agree with the objectives of ***giving*** complete legal service" in military personnel "subject to such limitations as to which the Department of Defense and the states and civilian bar associations may agree." [77] The ABA resolution provided that the data from the pilot programs be made available for evaluation to the ABA, the OEO, and the Department of Defense. The nature of the quick "approval" in some ways validates the military assumption in seeking it. Nothing was lost. But was anything gained? What was endorsed by the ABA was an experiment—that is all that the military requested and all that it would continue to request at the local level as part of the "sell." The ABA, in essence, approved an experiment which needed local implementation. In one way, then, the American Bar Association "approval" was like the encouragement given by the man who discovered his wife and a wildcat in a fight for survival—"go wife! go wildcat!" It has a posture of waiting to see what would happen; whether there were states which would "agree with the objectives of ***giving*** complete legal service" (third party payment), and would "cooperate"; and observing the form and scope of the limitations which would be applied. The selection of the term "giving" in the ABA Resolution is interesting and revealing. One questions whether the distribution of a fringe benefit in lieu of cash payment is ever "giving." The characterization is both incorrect and gratuitous.

The stage was set for the attempted implementation of the expanded program. It is here that the core of our study begins. The data principally relate to the ways in which the military and the local bars and courts went about reaching an accommodation or

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[76] For text of ABA Resolution, *see* text at Sote **6,** *supra.*

[77] ABA Board of **Governors.** Proceedings. August **1970** (emphasis added),

arriving at an impasse; the issues raised, settled, avoided, or found remaining; and the ways that the parties related to the power of granting or withholding access to civilian courts.[78] The next section deals more specifically with bar action and reaction.

11. LOCAL IMPLEMENTATION OF THE PILOT PROGRAM

The directive for the implementation of pilot programs and the accompanying guidelines issued on October 26, 1970 by the Office of the Secretary of Defense to the Secretaries of the various Armed Forces gave considerable flexibility to each military service to shape its own approach and its own experiment.[79] The key Guideline read:

> Standards of eligibility for expanded legal services should be coordinated between the military departments but *such standards do not necessarily have to be identical for test purposes.* The basic standard of eligibility is that the *recipient of legal services is unable to pay a fee* to a civilian lawyer *for the services involved without substantial hardship to himself or his family.*[80]

The "basic standard" was anything but an OEO or a poverty standard. It may, in fact, for some or most of the problems that people take to lawyers, be more descriptive of the situation facing a majority of the population.[81] Legal costs, in other than the preventive mode, are viewed by significant segments of the population as "catastrophic," likely to cause "substantial hardship."

Was the Office of the Secretary of Defense evidencing the same ambivalence here about tying the standards for expanded legal services to a poverty test as had been evidenced throughout the study by the McCartin Group and as had been evidenced to the question posed to the ABA Committee on Ethics and Professional Responsibility? Since the military was in the process of seeking a dramatic pay

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[78] The data were gathered by the author in numerous field trips. I was granted access to all documents pertaining to negotiatibns about the pilot program by the Judge Advocates of the Army, Savy, Coast Guard, Air Force, and Marine Corps in Washington in July 1971. In addition, local military and local bar and court people were interviewed and specific local material was gathered—between May 4, 1971 and October 28, 1971—in San Diego, Cal.; Fort Monmouth, N.J.; Denver. Colo.; Shreveport, La.; Fort Riley, Kan.; Pearl Harbor and Honolulu, Hawaii; Elmendorf Air Force Base and Anchorage, Alas.; Richards-Gebaur Air Force Base, Mo.; Pensacola and Tallahasee, Fla.; and Camp Lejeune and Jacksonville, N.C. I attended two meetings of the ABA Standing Committee on Legal Assistance for Servicemen (Chairman Louis M. Brown was kind enough to invite me) May 3 and 4, 1971 and Sovember 15–17, 1971.

[79] *See* note 1, *supra.*

[80] *See* note 7, *supra,* Guideline 3 (emphasis added).

[81] *See* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970).

raise which would have the effect of placing all military personnel and their careers above the poverty line,[82] was the "basic standard" a way out of the political dilemma posed by tlie need to sell the experimental program to the civilian bar. on the one hand—assuring the civilian bar that there would be no loss of income—and the internal need to expand the legal services program to everyone, on the other hand? There was a double message: "Get the cooperation of the bar, do what yon have to, but see that the program is implemented, because its importance transcends intramural eligibility standards (which in the long-run are going *to* be uncomfortable anyway).-?The military departments, in their "selling job," did use some differential standards—the Savy used an overall E–3 and below standard, the Army used an E–4 cutoff, and in some specific negotiations even more stringent eligibility standards were set,

The other part of the *'sell"—and its application—is probably more important. Although the directive for the Department of Defense w s silent on tlie method of implementing, all of the military departments, through the implementing directions of the Judge Advocates General, adopted the gloss of the McCartin Report. The Command and Staff Judge Advocates at the bases where a pilot prograin was planned (who were given the actual responsibility of seeking to implement the program) were instructed to obtain "agreements" and "understandings" from the local bar.[83] The Kavy instructed its staff judge advocates to enter into written agreements with the local bar and the courts.[84] Only the Coast Guard, which is not a military departnient—it is under the Department of Transportation—did not require agreement with the local bars, but only "contact" with them "to obtain insofar as possible their support."[85] In addition to bar approval, the implementing directives in some instances asked that the approval of the courts be obtained, a conceptual approval that went beyond the implicit approval which would follow from the issuance of licenses or the amendments to rules.

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[82] The **pay** raise did in fact ensue, and, although temporarily caught in the wage-price freeze, it took effect November 15, 1971.

[83] The Military Departments issued their own guidelines to the staff judge advocates: Air Force, October 14, 1970: Sary. December 8, 1970; Army, January **4,** 1971.

[84] Navy Guidelines, Guideline **1.** The agreements did not hare to be formal. but they had to be reduced to writing.

[85] Commandant, U.S. Coast Guard, to Commanders First and Third Coast Guard Districts. December **3.** 1970. re: Establishment of Pilot Legal Assistance Program. at **2;** and U.S. Coast Guard, General Guidelines for Legal Assistance Pilot Programs. Guideline **1.**

As has been observed, the very act of arrogating to the bar and the bench an absolute power of veto over the expansion of the military legal services program may have created a more extensive power than existed in reality. We will be able to observe the effects of this strategy as we follow the specific negotiations. At the time that the implementing directives were issued, however, a "warning" was issued by Howard C. Westwood, a member of the Executive Committee of the Kational Legal Aid and Defender Association, who had been asked to comment on the Air Force and Navy Legal Assistance Guidelines. He said, in part:

> [T]here is a concept of securing "permission" from state and local bar associations. This is naive. . . . It is quite impractical and wrong for there to be a nationally adopted edict that there must be *permis-ewn* from underdefined "state and local bar associations" for essential elements in the pilot projects.
>
> Fifty years or more of legal aid experience teach that sometimes it is indispensible to proceed with a legal aid project even in the face of opposition from *some* bar association. And it would be all but absurd absolutely to require affirmative approval in all instances. . . . The requirement of agreement with "state and local bar associations" is entirely too unqualified and is dangerous. Sor is it clear that in all instances approval "by the local courts'' would be necessary on all aspects. . . .[86]

Westwood also observed that where licenses for out-of-state lawyers were needed bar approval might be necessary.

The Westwood comments not only question the military guidelines but also, by implication, raise questions about the form of the ABA Resolution which seemed to compel assent, approval, and cooperation by the state and local bar associations as a condition—subsequent—of ABA approval. In any event, warnings aside, the quest for bar "approval" was the dominant mode used by staff judge advocates in local negotiations. The pure conception of the pilot program called for licenses for nonresident lawyers. The military's view was that bar approval for this was necessary. We shall see that in instances where bar approval was not obtained—or was not as extensive as sought—most frequently the military tailored its program to match the extent of the "approval." This frequently meant that the idea of securing licenses for nonresident attorneys was abandoned.

The approach of and the results obtained by the United States

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[86]Howard C. Westwood, Tentative Comments on Air Force and Nary Legal Assistance Guidelines, at 3 and 7.

Coast Guard in its efforts to implement the pilot program were exceptional. Perhaps this was due to its abandonment of tlie need for "approval" from the bar; perhaps it was due to the personalities of the staff judge advocates: or perhaps it was due to the nature of the locales, regions, and jurisdictions where the Coast Guard sought to implement the program. At any rate, the experience was different It is here, then, where we will pick up our examination of the military lawyers, civilian courts, and the organized bar.[87]

The Coast Guard chose to implement the pilot program in the First and Third Coast Guard Districts, headquartered in Boston and New York, respectively. Because of its size, the uniqueness of its mission, and the dispersion of its personnel, the Coast Guard approached the expanded program on a regional—District Headquarter—basis, attempting to give its legal officers as much flexibility as possible. The Coast Guard has a strength of only 40,000. It has more law enforcement and marine safety functions than it has armed service functions. There are no heary concentrations of troops in any single locale. There are few lawyers. Accordingly, if the Coast Guard was going to offer more complete legal services to its personnel, it would have to rely on lawyers from the strictly military departments to supplement the efforts of Coast Guard lawyers. Accordingly, the Coast Guard undertook to obtain broad geographical approval of the pilot program in the regions of its two selected District headquarters—Boston and Sew Tork.

To conserve its manpower, the Coast Guard guidelines limited court representation to misdemeanois on the criminal side and excluded divorce from tlie civil side. For felonies and dirorce, however. permission was extended for "in office" work where deemed "necessary or desirable." [88]

The Legal Assistance Officer for the First Coast Guard District

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[87] Considerable attention was given to the question of whether the names of places, jurisdictions. and people discussed in Part II should be disguised. I felt that this was intellectually unsound: Disguises are frequently too thin if important inaterial is included. Moreover, the geography. the character of the communities. the nature of the local bars, the local laws and rules, and the community-bar-military relations are all important parts of the study. Beyond that. the obserrations made frequently require citation to unpublished but available reports, memoranda. and letters. The reader is entitled *to* these data for purposes of critically evaluating the matters presented. By openly citing the material I rest part of the dialogue which may ensue properly on those who would suggest its inaccuracies. By "blinding" the study. the facts would remain forever as I saw them. If this article in a few places takes on characteristics of an expose. it is because the erents and exchanges reported give it this character.

[88] U.S. Coast Guard. General Guidelines for Legal Assistance Pilot Programs, Guideline 4.

in Boston—Commander J. V. Flanagan—accepted the latitude given to him by the Coast Guard directive. He made no direct formal request of any bar association, but only made informal contact "to obtain insofar as possible their support," Commander Flanagan reserved his formal approaches for the courts. The approach was direct and simple:

> Here is what we are going to **do.** Give us the necessary tools.

The results were likewise direct, simple and fast.

Massachusetts: On February 19, 1971 the Coast Guard formally filed a request for limited licenses with the Clerk of the Supreme Judicial Court for the Commonwealth of Massachusetts. Prior to that time Commander Flanagan made informal contacts with members of the Massachusetts bar. He was informed that the pilot program would not threaten most lawyers practicing but that a formal debate within the bar associations would stir up the sense of displacement already felt by some lawyers after Massachusetts became the first state to adopt a no-fault automobile liability rule.

On March 1, 1971 the Massachusetts Supreme Court entered the following order:

> 1. Until the further order **of** this court, a member of the bar **of** any **State,** or **of the** District of Columbia, on active duty with any one of the armed services, may appear in any court **of** the Commonwealth with the written authorization (which may be general and not confined to a particular case) of the senior legal officer of such service on active duty within the service district which includes **the** Commonwealth, to represent in civil or criminal causes junior noncommissioned officers and enlisted personnel of such service who might not otherwise be able to afford proper legal assistance. **A** copy of each such written authorization shall be filed by the senior legal officer with the Clerk **of** the Supreme Judicial Court for Suffolk County [Boston].
> 2. [Copies **of** orders to be sent to chief judges and clerks of all inferior courts in the Commonwealth.] [80]

A model order. And a model "negotiation." There are few of these. The eligibility criteria is the basic standard and not pegged to the difficult to define OEO standard. The license to practice is general for the clientele in question. And future permission depends only upon the administrative decisions of senior legal officers responsible for servicing the clients.

In contrast to the Coast Guard approach, one should consider the

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[80] In the Matter of Legal Assistance for Certain Members of the Armed Services, Supreme Judicial Court for the Commonwealth **of** Massachusetts, March **1, 1971.**

Navy's position about implementing their own pilot program in Massachusetts even *nftcr* the March 1, 1971 order, which was not restricted to the Coast Guard, had been entered. The Navy directive required written agreements with the local bars. Because of this directive, notwithstanding the permission extended by the Massachusetts Supreme Court, the Navy's approach was gingerly. The District Legal Officer informed Washington on May 4, 1971 that it would "open negotiations with the local civilian bar," but that :

> [I]t will be delicate, inasmuch as the no-fault insurance law in Massachusetts has severely dented the local attorneys' incomes and n e envision that they will not give up any potential business gracefully."

For reasons of comity—growing out of either a more visible presence than the Coast Guard or the Savy lawyer's membership in two brotherhoods—or reasons of administrative inertia, the Navy stood ready to render homage to the local bar, even *after* the primary reason for doing so had been removed by the Court. Unlike the Coast Guard, the Navy appeared *to* be willing to render unto Caesar more than that which was Caesar's.

Rhode Island. The approach and the resnlt in Rhode Island was the same as Massachusetts. After the Massachusetts success. Commander Flanagan merely made application directly to the Supreme Court of Rhode Island. There is no indication of "negotiations" with the Rhode Island Bar Association. The Rhode Island Supreme Court entered the *same* order as did the Massachusetts Court.[91]

The Navy in Rhode Island had thoughts of implementing a pilot program at Sewport after the order was entered. It found the local (Newport County) bar "not happy with the Supreme Court order." willing to be '*appeased" somewhat by the eligibility criteria, but still sensing their "bread and butter" was involved.[92]

New Hampshire : Sew Hampshire surprised everyone, even the success-laden Coast Guard. Pursuing the same course as Massachusetts and Rhode Island, Commander Flanagan wrote to the Clerk

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[90] Report from First Naval District Legal Offices to Commander Robert Redding, May 4, 1971.

[91] *In re:* the Matter of Legal Assistance for Certain Members of the Armed Forces, Supreme Court of Rhode Island. *So.* 1380 M.P., April 6, **1971.** Sote also that the Suprenie Court of Iowa has entered a Massachusetts-Rhode Island type **of** order with no application from the military.

[92] Report from Staff Judge Advocate, Sewport to Judge Advocate General, United States Savy, June 9, 1971. The staff judge advocate also reported that the Sewport County Bar Association had been and was opposed to OEO Legal Service Programs.

of the New Hampshire Supreme Court and received a reply that any order of court was unnecessary—redundant—in view of Section 311:1 of the New Hampshire Revised Statutes, which provided:

> **A party in any cause** or **proceeding may appear, plead, prosecute** or **defend,** in **his proper** person **or *by any citizen* of good character."**

In other words, if military personnel wanted to be represented by military lawyers, that was their choice and consonant with public policy in the state. That is not to say that New Hampshire does not have an unauthorized practice of the law concept. They do. Section 311:7 provides that no person shall be "permitted to commonly practice as an attorney in court" unless he has been admitted to practice by the Court.[94] There are also provisions for holding out to the public as a lawyer.[95] And, as of 1968, New Hampshire was trying a three-year unified bar experiment, where in order to practice law in New Hampshire an attorney had to be a dues paying member of the New Hampshire Bar Association.[96]

The Clerk's response—surely with the assent of the New Hampshim Supreme Court—is doubly interesting in view of the unauthorized practice rules and the unified bar experiment. **A** distinction seems to be drawn between holding out to the public as a lawyer and serving the defined needs of a defined group—albeit self-defined. This is indeed a rare model for an approach to unauthorized practice of law.

Maine: No one's record is perfect. Commander Flanagan did run into problems in Maine. It is not altogether clear whether it was court or bar originated, but a very limited order was entered by the Maine Supreme Court allowing military lawyers to appear for lower grade military personnel in misdemeanor cases only—no other criminal cases and no civil cases.[97] The issue raised was concern over the quality and competence of representation by judge advocates in complex matters, particularly matters which might pose a problem of continuity of counsel if the lawyer in charge of the case were transferred from his duty station while the matter was pending. This, of course, is a real conoern. It is a problem not faced by the

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[93] NEW HAMPSHIRE REVISED STATUTES (1966, with 1971 Pocket parts) sec. 311:1.

[94] *Id.*, sec. 311:7.

[95] *Id.*, *secs.* 311:7a thru 311:7f.

[96] *In re* Unification of Sew Hampshire Bar, 109 N.H. 260, 248 A.2d 709 (1968). The New Hampshire Supreme Court as part of its inherent jurisdiction, adopted the trial unification rule.

[97] Order of Supreme Court of Maine, September 23, 1971.

legal aid offices and OEO legal services programs, because there is an assumed stability of assigninents. One commentator has observed that military lawyer assignments—two to four years—are as stable as OEO legal services lawyer tennres. It is a problem that the bench and bar properly raise, and one which needs attention from the program planners. An alternative appronch to a uniform rule. lion-ever, is both an application of and a modification of the rule about not accepting employment in cases where competent representation cannot be given: "Don't start anything you can't finish," Rut the limitation, as with most professional standards. is capable of self-application and self-limitation and does not need to be translated into admissions standards.

The Coast Guard and the Maine State Bar Association and local bars have worked out a cooperative arrangement for the excluded cases. They will be referred, as under the old legal assistance program; the local lawyers will be chief counsel and the military lawyers will be associate counsel.

New York: The First Coast Guard District in Sew Tork City has only approached one jurisdiction—the state of New York. Even this may not have been necessary, because the Coast Gnard had been satisfied with the representation afforded its personnel by the Legal Aid Society of New York City. Pursuant to the Department of Defense Guideline—advisory only as to the Coast Guard—the Coast Guard intended to maintain a working relationship with Legal Aid.[98] The Coast Guard lawyers would conduct interview and investigations, and prepare working papers, including pleadings, motions, and briefs, and the Legal Aid lawyers would make the court appearances. Coast Guard lawyers in court cases would, where permitted, act as associate counsel.

The Coast Guard sought a Massachusetts-type order from the New York Court of Appeals. The Court declined to change its admission rules but did explain its reasons to the Coast Guard. Associate Judge Adrian Burke called the District Legal Office and explained the Court's hesitancy to amend the admissions rule: (1) New Tork has a liberal *pro hac vice* admission rule, which, although discretionary with the trial courts, seldom results in petitions for *pro hac vice* being denied. *(2)* The Court felt that generally the Coast Guard would have at least one member of the New York bar assigned to the Third District Legal Office, and that "attorneys from other juris-

[98] Interview with Captain Henry A. Cretella, Washington, D.C., March 9 and July 8, 1971. *See* DOD Guideline 4 (note 7 *supra*) and note 4 *supra*.

dictions could, as is customarily done in New **York** law firms, sign papers, pleadings and motions in the name of the New **York** attorney appearing thereon.[99] We shall see the particular formula advanced in reason (2) followed in many instances in other jurisdictions: Notice is taken of the active role of the military legal assistance officer. He is allowed to function as counsel but not as counsel of record, and no formal action is taken with respect to his status. From the military's viewpoint there is an affirmative and a negative element. The out-of-state counsel is able to resolve conflicts by negotiation, as long as access to the courts is available. This remains the single most important program advance; a legal service program would indeed be in trouble if it needed to litigate a large percentage of its caseload. On the negative side, where the associate counsel formula is followed, the assignment of lawyers is limited by the external demand that at least one judge advocate assigned to duty be licensed in the jurisdiction—unless either cooperating reservists or other civilian counsel are used.

The Chief Judge of the New **York** Court of Appeals circulated to all members of the state judiciary a memorandum noting the nature of the expanded legal service program—"the armed services intend to supply legal counsel, in civil or criminal cases to junior noncommissioned officer and enlisted personnel who might not otherwise be able to afford proper legal assistance" (again the basic test!) —and called the judges attention to the rule and the liberal ***pro hac*** vice policy.[100] This memorandum had the effect of endorsing the pilot program and advancing the implementation, even though, for the most part, the Coast Guard lawyers would continue to cooperate with Legal Aid for court cases. Their role was now legitimated.

In large measure the Coast Guard "success" in obtaining broad orders was due to a direct approach made to courts. The courts, however, are all centered in the Northeast and may be idiosyncratic in their liberal attitude about group legal service, poverty law, and the issuance of either special licenses or the admission of nonresident lawyers ***pro hac vice.*** Also the organized bar raised few objections. Certainly the low visibility of the Coast Guard contributed to the successful implementation of the pilot programs. The Coast Guard recognized this and studiously avoided any public relations campaign

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[99] **"Memorandum** from **Third Coast Guard District Legal Office to Commandant, May 11, 1971.**

[100] *See* **29 CONSOLIDATED LAWS OF NEW YORK ANNOTATED 372 [Court** of **Appeals Rules** for **Admission** of **Attorneys and Counselorsat-Law, Rule VII–4]** (McKinney **1968)** ; *see also* Spanos v. **Skouras Theatres Corp., 364 F.2d 161 (2d. Cir. 1966).**

about the program or even about the fact of the favorable court orders or directives. When the Coast Guard lawyers appeared in court under one of the permissive orders or rules the fact "wasn't flaunted."[101] Beyond that, the Coast Guard practice was in big cities —Boston, Portsmouth, New Pork—which contributed to the program's relative invisibility. As ve leave the quiet precincts of the Coast Guard and the Sortheast we see that most of the other implementing negotiations did not go as smoothly.

The United States Army had a relatively easy tinie implementing the program at Forts Monmouth and Dix in Sew Jersey. But it was unexpected.[102] Contact was made with the Burlington County (Fort Dix) and Monmouth County (Fort Monmouth) Bar Associations. Both bars approred the program of service limited to the lower income troops and their dependents.[103] Both bars suggested that the state bar association be approached. This was done through a reserve judge advocate. (In Sew Jersey, as elsewhere, wherever possible, contact with bar groups—and courts—was made through reserve judge advocates, pursuant to the suggestions of the McCartin Report and the Department of Defense.) The Trustees of the Sew Jersey State Bar were approached at a regular meeting—in the Bahamas—and seemed to have been impressed by the ABA endorsement of the program. They, too, endorsed the program as limited to E 4 and below.[104] In a way, since the practice was going to be conducted in two counties where the local bars had already approved the pilot program, the State Bar endorsement was as free and abstract as the ABA endorsement—perhaps even more free, because a mechanism already existed in Sew Jersey for implementing the pilot program without bar approval, an existing court rule covering out-of-state lawyers employed by legal service programs.[105]

Before discussing that rule, however, it would be well here to relate the insight gained from discussion with sereral of the Army negotiators in New Jersey as to why they sought bar permission, even when it wasn't necessary. It was explained first as politeness, but then in

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[101] Interview with Captain Henry A. Cretella, July 8, 1971.

[102] Interview with Colonel John Zalonis. July 9. 1971.

[103] "The data here were derived from several interviews conducted at Fort Monmouth at a conference attended by the civilian and military bars in Mag 1971. The author is particularly indebted to Captain Elliot H. Vernon, the officer in charge of the Fort Jlonmouth pilot program and the Sew Jersey admitted supervising attorney for that office.

[104] The President of the Sew Jersey State Bar told the author that approval would not have been given if the program had covered those who could pay.

[105] S.J.R. 1:21-3(d).

terms of comfort in style, of working through a chain of command—from bottom to top—just as is done in the Army. The Staff Judge Advocate at Fort Monmouth explained that they didn't want to "ram the program down anyone's throat.': Upon analysis, though, it appears that the policy was dictated by the fact that the Army felt more visible at Forts Rfonmouth and Dix among smaller units of population and practicing lawyers. Whether the pilot program worked or not, they wanted to get along with the community—it was a matter of comity. Beyond Monmouth and Dix, this may have also shaped the Department directives, particularly for those services and at the particular posts that had a continuing problem of community relations. And now back to the court rule covering legal services programs.

Rule 1:21–3(d) of the New Jersey Supreme Court rules provides :

> A graduate of an approved law school who is a member of the bar of another state or of the District of Columbia and employed by or is associated with a legal services program approved by the Director of Legal Services, Department of Community Affairs shall be permitted to practice, under the supervision of a member of the bar of this State before all courts of this State on all causes in which he is associated with such legal services program, subject to the following conditions:
>
> (1) Permission . . . shall become effective [when evidence of graduation, membership in out of state bar (in good standing), and statement signed by Director of Legal Services (State) that attorney is employed in an approved program.]
>
> (2) [Permission ceases when employment by program ceases.]
>
> (3) [Notice of cessation of employment.]
>
> (4) Permission to practice in this State under this rule shall remain in effect no longer than 2½ years;
>
> (5) [Permission may be revoked or suspended at any time.]
>
> (6) Out of state attorneys permitted to practice under this rule are not, and shall not represent themselves to be, members of the bar of this State.[106]

With this rule, the Army's implementation was simple: Have the State Director of Legal Services, Department of Community Affairs, approve the pilot program. The Director, Carl Bianchi, was extremely cooperative, and the Army program was certified by his office as "an approved legal service program." For the Army, with a post the size of Fort Monmouth, the requirement that a New Jersey

[106] *Id.* The effective date of the Rule was July 1, 1970. The beginning sections of Rule 1:21–3 (a) thru (c), adopted earlier, relate to a similar model: allowing law students to practice before the courts in limited kinds of matters and under "supervision" of admitted attorneys and through the auspices of legal service programs. This can be seen in terms of the students' education. But it also can be Seen in terms of delivering more legal service to those who need it.

lawyer "supervise" the caseload did not appear to be too burdensome. The number of lawyers assigned *to* Fort Jlonmouth is usually large. At least one lawyer from populous New Jersey can be found. Let us, however. examine the requirement from the perspective of the bar and the bench: Why is this model of supervision or responsibility by a locally admitted attorney (followed in varying forms elsewhere) deemed necessary or desirable?

The reasons generally assigned for having supervision by responsible locally admitted lawyers have to do n-ith either protecting the client or protecting the integrity of the legal process. The reasons frequently rest on assumptions subsumed in the act of licensing lawyers in the first place. Two major reasons advanced—familiarity with local procedures and local rules of practice and amenability to court supervision of quality as well as process—are reasons which can soun'd both in terms of client protection and in terms of protecting the smooth operation of the judicial process. They are also reasons which can sound in terms of protection of those already admitted to practice in a jurisdiction—protecting the monopoly granted by the license. (The general arguments may be far less convincing in terms of public protection than the specific argument about continuity of representation—raised in Maine. That is an argument which runs to loyalty and commitment.) In terms of client protection and protection of judicial supervision over the bar, the standards are no better as applied to out-of-state attorneys than the level of standards realistically imposed and supervision actually imposed on locally admitted attorneys. Clients are ill **served** if they are represented by lawyers unfamiliar with either what they *are* doing or what they *should* do. What mechanisms, however, are used to assure an application of these standards to locally admitted lawyers? Clients may be ill served if they are represented by lawyers not amenable to the supervision or disciplinary processes of the courts before which they practice. What is the reality of supervision and discipline over locally admitted lawyers? **A** realistic assessment of these issues requires a dismal response: Damned little is done to assure quality representation by members of any local bar. Advancement of arguments and the incorporation of a standard calling for "supervision" by local lawyers are, unless the local attorneys are themselves supervised, disingenuous.

This is not to say that the reasons lack merit. We need mechanisms for assuring quality representation, court readiness, and professional scrutiny of performance. Too little real attention is paid to issues of competence. What is suggested here is that a double

standard is involved. Issues about competence are raised in questioning those outside but not those inside the club. It may be that the double standard was born of the local licensing process, itself, and the ensuing parochialism. Beyond that, however, the double standard fails to take into account some of the realities of legal education and legal practice. There are more similarities in the practice than dissimilarities when passing from locality to locality or from state to state. National standards are involved and are ignored. The perpetuation of fragmented standards bears close examination. What is suggested is that local licensing arguments may inhibit—by soothing—the search for national standards and national scrutiny.

The paradox of the "supervision" or "responsible" local attorney rule is that attorneys senior in service and more seasoned in terms of competence, by virtue of the accidents of their licensing and duty assignments, can be supervised by less able lawyers.

The Air Force ran into three variants of the supervision or principal counsel rule—as a result of the negotiations in Missouri, Illinois, and Louisiana. Unlike the New Jersey rule, however, the experience in these states did not provide for across-the-board special admission of nonresident military lawyers. They allowed them to assist counsel of record—locally admitted lawyers. But, unlike most *pro hac vice* rules, these jurisdictions did not allow nonresident counsel to take a primary responsibility.[107]

Missouri;[108] Richards-Gebaur Air Force Base and Headquarters Air Force Communications Service, at that base—located on the southern end of Kansas City, Missouri—were selected by the Air Force as a pilot program site. Approach was made to the Missouri Bar Administration Advisory Committee through a reserve judge advocate—a circuit judge. This agency, which reports directly to the Missouri Supreme Court, has supervisory powers over the Missouri Bar, which is an integrated bar. Aside from its disciplinary functions, the Missouri Bar Administration acts as a superbar agency in the consideration of court rule changes that affect the integrated bar rules. In this capacity they act as initiators and advisors. Colonel Joseph Lowry, Staff Judge Advocate for the Communications Serv-

[107] There are generally requirements that local counsel must be of record in rules for the admission of nonresident attorneys *pro hac vice.* There are, at least, reasons that relate to continuity of service to the client and availability, in the jurisdiction, for the acceptance of service of papers and the making of appearances for motions and status calls. Rarely do *pro hac vice* rules require that principal responsibility rest with local counsel. *See* KATZ, note 60 *supra.*

[108] The data here came from interviews with Fred Hulse, Chairman, Advisory Committee, Missouri Bar Administration ; judge advocates at Richards-Gebaur ; and several members of the Missouri bar.

ice, appeared before the Missouri Bar Administration Advisory Committee in January 1971 and outlined the pilot program. It is not clear whether Colonel Lowry initially asked for, or intended to ask for, a rule allowing the admission of nonresident lawyers on an across-the-board basis as in Massachusetts. From the discussion with the Advisory Committee, however, it is clear that the operation that Colonel Lowry ultimately described called for the "supervision" of all court cases by a Missouri lawyer on his staff. The Missouri lawyer would sign all pleadings and make all court appearances, requesting *pro hac vice* admission of out-of-state counsel where administratively desirable from the program's viewpoint. The nonresident lawyers would assist the Missouri lawyer. This ducked the hard question and left his request for approval of the pilot program as a request for general "approval" coupled with a "finding" that unauthorized practice of the law was not involved where nonresident laywers interviewed clients, worked on matters in the office, and "assisted" Missouri counsel in court. And that is what he got : general approval. The Minute adopted by the Advisory Committee stated :

> The Committee conferred with Colonel Joseph R. Lowry, **USAF,** Staff Judge Advocate at Richards-Gebaur Air Force Base in western Missouri in reference to the establishment of a Pilot Legal Assistance Program at said base. Colonel Lowry presented the method of operation of the pilot program in which Judge Advocate lawyers at the air base would represent needy *airmen* who had incomes of less than $3,000 and if civilians would qualify for legal assistance as provided by the Office of Economic Opportunity.
>
> The Committee gare careful consideration to the Matter and at the conclusion of its conference with Colonel Lowry it was the unanimous opinion of the Committee that no problems had been presented which might involve unauthorized practice of law by lawyers from other states *in the event the program uas followed as presented* by Colonel Lowry.[109]

The avowed intent to use Missouri lawyers in a supervisory capacity, then, became part of the gloss of the understanding.

The fixed dollar eligibility standards—$3,000 limit—set by the Advisory Committee were unsatisfactory to Colonel Lowry and he suggested an amendment to the Minute:

> [T]he Air Base would represent needy *military* personnel and their dependents who would otherwise meet [the OEO standards].

The pilot program, of course, called for representation of military personnel and dependents across service lines—not just airmen. And, the fixed dollar amonnt would he troublesome in view of Air Force

[109] Letter from Fred B. Hulse to Colonel Joseph Lowry, ,January 27. 1971 contains language of Minute (emphasis added).

guidelines.[110] What is more interesting, however, is the addition by the Committee and Colonel Lowry of the term "needy," which now joined "hardship," "extreme hardship," and "poverty" of recent vintage and bridges back to the older notions of "worthy poor." Much can be done in the name of charity.

The Richards-Gebaur program was welcomed by the local bars in the neighboring counties around Kansas City as a relief of a burden in criminal cases. Missouri has a limited public defender program for Kansas City and St. Louis and beyond that relies heavily on court appointments for indigents accused of crimes. There is no payment to appointed counsel. (The relief of the local bar can be contrasted to the hostility of the local bar in Jacksonville, North Carolina—outside of Camp Lejeune—where the State of North Carolina pays reasonable fees for the defense of indigent marines accused of crimes. This is more fully discussed below.) For criminal cases, therefore, the program was a welcome relief; judges and magistrates now appoint the judge advocates as counsel.[111] The local bar has been less sure about the program as applied to civil matters.

The judges and magistrates feel another plus from the ability to appoint military lawyers in criminal cases. They feel that the military lawyer can handle the command and red-tape problems frequently required to keep a military defendant in the jurisdiction pending trial—arranging for reassignment or detached duty. Such arrangements also facilitate release to the military in lieu of bond. Some would argue that this perceived plus from the perspective of the judges is a negative when considering the client and the lawyer-client relationship. Problems of divided loyalty are present. Command influences to keep a man in the jurisdiction may be inimical to the needs of the client. Further, the same office which defends him in the criminal case may later present the case against him in the matter of administrative discharge from the service. (These perceptions played a major role in bar opposition to the pilot program in Alaska discussed below.) This is not to say that there are not client advantages, too. The military client may feel better understood by a military lawyer.

One additional issue, considered at Richards-Gebaur and elsewhere, bears mention here. The Richards-Gebaur lawyers go into civilian courts in uniform; the Fort Monmouth lawyers do not—they wear civilian clothes. There is no fixed policy on this matter, but it is recognized that there are important symbols involved. The uniform

[110] Letter from Colonel Lowry to Fred Hulse, February 1, 1971.

[111] Interview with Thomas French, Magristrate for Cass County, July 30, 1971.

clearly indicates that the military takes care of its own. But, with possible hostility toward the military, does the symbol of brotherhood redound to the advantage or disadvantage of the client? There may be competing symbols. More important, what does the uniform say to the lawyer who is wearing it? Which roles is it reminding him of?

Louisiana:[112] In contrast to the initial state level approach used in Missouri, for the program at Barksdale Air Force Base, in Shreveport and Bossier City, Louisiana, the Air Force approach was more explicitly aimed at local support. It also drew on two important factors: (1) There was a history of good community-military relations; and (2) The Shreveport Bar Association had evidenced hospitality toward experimental programs—they were in the process of their own experiment with the country's first prepaid legal service plan. Letters were sent to both the Shreveport and Bossier City Bar Associations."A supper meeting was arranged at the base on January 18, 1971, which was attended by the Commandant of the Second Air Force, the Staff Judge Advocate, several judge advocates, the Executive Committees of both the Shreveport and Bossier City Bar Associations and three local judges—city judges. The Staff Judge Advocate outlined the pilot program, emphasizing that it covered ratings of E-4 and below, and then frankly asked his guests for "their cooperation, advice and suggestions" for allowing military lawyers into civilian court.

The style of this approach and the approach of Colonel Lowry in Missouri exemplify an in-service dual identity paralled to, but weaker than, that of the reserve judge advocates frequently used to make contacts with the local bar and bench. The reservists belonged to the inner club—the locally admitted lawyer, the active bar member, the sitting member of the bench—and the military "call" upon them contained a suggestion that other loyalties were involved. They were reminded of a once strong, but now perhaps faint, allegiance to the military. The active-duty judge advocate has a strong allegiance to the military and an ongoing identity—at least self-identity—as a lawyer and a member of the bar somewhere. When addressing local

[112] Sources for these data were reports and correspondence in the flles of the Legal Assistance Office, Cnited States Air Force, Washington, D.C., and an interview with Henry A. Politz, a member of the Executive Council of the Shreveport Bar Association.

[113] Barksdale Air Force Base is located on the Bossier City side of the Red River on land that was acquired for the government by the City of Shreveport. The main economic and residential orientation of the base is toward Shreveport.

bar groups, if the correct symbols are used, the judge advocate can remind the audience that he is entitled to some degree of comity. Where the bar has failed to cooperate with the pilot program, more frequently than not the presenting judge advocate has failed to convince the bar that he is a lawyer—and that he "employs" lawyers—as well as being a military man. In fact, the judge advocates who were successful negotiators were able to convince their lawyer audiences that they were lawyers first and only incidentally military men.[114] I am not suggesting that this would be the only factor affecting either outcome or how the military lawyer is perceived: Certainly the way that a local bar relates to the issue of licensing and their own lawyerness and the way the community at large relates to the military are operating factors.

The local bar people attending the dinner at Barksdale Air Force Base suggested that questions of whether out-of-state lawyers in the program were engaged in unauthorized practice of law could be avoided entirely by having a Louisiana lawyer in the case and involved in the supervision of both case preparations and other office work. This issue was discussed and two alternatives were posed, either use Louisiana reservists or have a Louisiana lawyer assigned to Barksdale. (The latter course was followed.) The Shreveport Bar Association raised the question of appearance in uniform and asked the Air Force to further consider this issue. Two of the three judges present indicated that nonresident military lawyers would be welcome in their courts, if Louisiana lawyers were also of record—informal and continuing ***pro hac vice*** admission, in other words.

Both local bar associations appointed liaison members of their executive committees to continue to work with the Air Force in implementing the program. Subsequently the executive committees of both associations passed resolutions "approving" the pilot program and pledging continuing cooperation. Nonresident lawyers have appeared on behalf of servicemen in local courts. The arrangement is informal. All parties agreed that there is no way for this to happen formally without a rule change by the Louisiana Supreme Court, which in turn would involve the Ethics and Grievance Committee of the State Bar Association. The President of the Shreveport Bar Association advised the Air Force to go no further—to leave well enough alone and proceed on the basis of the informal arrange-

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[114] The strength of the bargaining power from this dual position has been discussed, under a game theory, by Stephen Potter as the "Two Club Approach." S. POTTER, LIFEMANSHIP, OR THE ART OF GETTING AWAY WITH IT WITHOUT BEING AN ABSOLUTE PLONK (1951).

ment, there being little likelihood of approval of a rule change by the State Supreme Court.[115]

The fact that Louisiana has an integrated bar may have forced the local, informal arrangement. It also makes the local accommodation more interesting. A similar accommodation, but formal, was made locally in another integrated bar state (Texas) — for the Navy's pilot program at Corpus Christi (Nueces County). In Texas the Navy was in the process of informally approaching the State Bar. Meanwhile, the Nueces County Bar and the Navy have entered into a written agreement, approved by the local courts in the form of an order, which allowed out-of-state military lawyers to appear in court; there was no requirement that a Texas lawyer be involved. The order entered by the local court was a Massachusetts-type order. After the order was entered the President of the Texas bar suggested that the formal approach to the State Bar be omitted and that the Kavy make application for an order directly to the Texas Supreme Court. He advised that leaders of the Texas bar would support the petition. Corpus Christi, like Bnrksdale, had enjoyed good community — military relations and like Barksdale also has a locally admitted lawyer on its staff.

Before leaving Shreveport and Barksdale, it should be noted that the primary criticism that the Shreveport Bar Association leveled at the pilot program was that its eligibility standards were too rigid, being more restrictive than the local legal aid standards. This rather relaxed attitude about the military properly extending a service to a client group should be compared to the rigid supervision of standards in places like Jacksonville, North Carolina (Camp Lejeune Marine Corps Base), discussed below, supervision reflecting fear of diversion of fee-generating matters.

Illinois:[116] The Staff Judge Advocate for the pilot program at Scott Air Force Base, at Belleville, Illinois, first approached the President of the St. Clair County Bar Association and the Chairman of the Legal Aid and Referral Committee. Historically the relations between Scott Air Force Base and the local community and bar had not been as good as those at Barksdale. Referrals under the old military LAP had been made to the private practitioners through

[115] A copy of the Shreveport resolution approving the plan was sent to the President of the Louisiana State Bar Association and there was an undertaking to keep the officers of the state bar informed. Letter from Robert Pugh, President of the Shreveport Bar Association to Lt. Col. Charles O'Brien, USAF, March 30, 1971.

[116] Air Force Progress Report on the Pilot Legal Assistance Program, March 9, 1971, and interview with Colonel Jerry Conner. USAF, July 7, 1971.

the Legal Aid and Referral Committee, and the chairman of that Committee was concerned, notwithstanding the pilot program's eligibility criteria, that the new program would divert fee-paying business from the bar. The Air Force offered to let the Committee handle the burden of screening interviews: This offer, which was declined, seemed to turn the negotiations around. The St. Clair County Bar Association approved the concept of the program and the eligibility criteria but not the idea of using nonresident lawyers in Illinois courts. Arrangements were made to continue to refer fee generating matters to the Lawyer Referral Committee of the St. Clair County Bar Association and to consult on borderline cases. The pilot program proceeded at Scott Air Force base using only Illinois lawyers for court appearances—one judge advocate and an Illinois civilian lawyer employed by the Air Force at Scott. Subsequently meetings were held with the local judges who gave "informal blessings" for the program. There has been no approach to the Illinois Supreme Court and only tentative approach to the Illinois State Bar Association.

As has already been suggested, when one looks closely at approvals such as those given for the Scott Air Force Base program, one is convinced that the approval was unnecessary. By using only Illinois attorneys in court, the question of whatever other services are rendered to a military clientele on federal property is beyond the jurisdiction of either the courts or the bar associations. There is nothing that needs their approval. No nonresident is asking for the use of the hall—the courts. Moreover, DR 2–103(D) of the Code of Professional Responsibility makes this even more certain—there is no unethical conduct involved in the employment of a lawyer or corporation with a military legal assistance program. This also means, however, that the Scott program is essentially the old program, with referrals in some kinds of cases made to Illinois lawyers employed by the program rather than to the civilian bar.

A pattern is faintly discernible in the Missouri, Louisiana, Illinois, and Texas negotiations. It becomes more pronounced in some jurisdictions that have either rejected the pilot program outright or have long delayed its implementation—i.e., the courts seem to await approval or consent from the bar to make changes in rules of admission. If that approval is not forthcoming or there is an evidenced bar hostility toward amending the rules of admission, the courts, too, are hesitant. It is a kind of comity, not usually spelled out, but there nevertheless. In addition, in states where there is an integrated or unified bar, the reluctance of courts to act

without bar approval seems greater. In states where the bar is integrated, the courts seem to have vested a power of initiation or a power of veto in the state bar. The possibility of the exercise of this veto—possible objections raised within the bar--appears to have influenced the suggestion of the Shreveport Bar Association that approval not be sought from the Louisiana State Bar Association. There was a recognition that, if objections were raised in some quarters, the Louisiana Supreme Court would be compelled to disapprove the admission of nonresident lawyers. Similarly, the advice of the President of the State Bar of Texas about the direct approach to the Texas Supreme Court, coupled with the appearance of bar support, was to avoid a possible bar veto. Meanwhile local assent and local court accommodation works.

Our data suggest that the ways that rule changes *are* approached bargains into or away from the potential power of the bar to influence court action. Where the bar is hostile to change, the mere approach to the bar increases the risk that an inchoate power over admissions—or at least the desire to scrutinize admissions—will be converted to an active power. Direct application to the courts, however, does not always avoid the bar hostility. In the jurisdictions where the pilot programs have experienced the greatest difficulty, which we will examine next, frequently the bench, before it acts, will require assurance of bar support or at least evidence of nonhostility. That was the situation with the Army's pilot programs at Forts Leavenworth and Riley in Kansas and at Fort Carson in Colorado.

Kansas:[117] In Kansas the Army's efforts to implement the pilot program ran into resistance from the local bars—Geary and Riley Counties (Fort Riley) and Leavenworth County (Fort Leavenworth)—based on fear of loss of business and loss of market areas. It was also based on fear of "socialized" delivery of legal services. The local county bars expressed a view of the license to practice law which, taken at face value, would seem to indicate a concern for and control over the quality representation of clients—particularly indigent clients. Upon final analysis, however, as we shall see, the views of the county bars related more to a conception of the local license to practice law as containing a grant to a market area, like a market area which comes with a McDonald's Hamburger or

[117] Data on the Kansas negotiations were obtained from the files of the American Bar Association and the Army Legal Assistance Office: and from interviews with Colonel John A. Zalonis. July 9, 1971, in Washington. D.C.. and Colonel Henry Olk, October 22, 1971, at Fort Riley, Kansas.

a Fuller Brush franchise. These views were parochial and were fanned by economic dependence of the local communities on the large and highly visible Army posts. Further, they were supported by state laws which talked in terms of law practice and maintenance of a law office not only within the state but within the judicial district as well.[118] Even Kansas lawyers are viewed as outsiders in Kansas when they are distant from their homes and law offices. In the end, although the status of the pilot program was in doubt, the negotiations resulted in the creation of new civilian legal aid societies where none had existed before.

The Army opened the negotiations with the civilian bars at the local-county level. Negotiations were opened informally and early, even before the Army guidelines were promulgated, because Kansas was one of the first designated sites for a pilot program. It was erroneously assumed by the Army that Kansas would be easy and New Jersey would be hard—a 180 degree misapprehension of reality. Colonel Henry Olk, who handled the negotiations for both Forts Riley and Leavenworth understood the early directives from Washington to mean that the state bar associations in states selected for pilot programs had been apprised of the nature of the program and had endorsed the experiment. Accordingly, when the approach was made at the local level both the strength of the resistance and the appeal of the resisters to the uncommitted Kansas Bar Association came as a surprise to Colonel Olk.[119] After Colonel Olk's early November 1970 meeting with the Geary County Bar Association, one of its members, a Junction City lawyer, wrote to his United States Senator, Robert Dole:

> Dear Bob,
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> [Colonel Olk reported on a new development—the pilot program—scheduled for initiation in Kansas] By this program the **JAG** is to furnish legal counsel for military personnel and dependents in all civilian courts. The extent of the representation may be limited in some instances, but I understood Colonel Olk to say that lawyers from his department would, in fact, be representing military and military connected people in our civil courts in every kind of case except personal injury cases and large probate matters. By this I took him to mean that *Army lawyers would be handling everything civilian lawyers now handle* with one or two exceptions. *If this is true, it is the first attempt that I know about where the Government is undertaking socialized law practice.* [Have you and the other members of

[118] KANSAS STATUTES ANNOTATED (1964) 7-104, and Supreme Court Rule 109 requiring association, in any court case. of local Kansas attorney who is resident of and *maintains* his *lair office within* the *judicial district.*

[119] Interview with Colonel Olk, October *22.* 1971.

> the Kansas Congressional delegation been informed of this in advance of the program or in adrance of the selection of Kansas as an experimental site? Have you been consulted?] [120]

Apparently the nature of the OEO legal services program had not come to the writer's attention. Or perhaps the absence of the uniform for OEO legal service lawyers had enabled the Kansas lawyer, like the Kansas farmer, to deny the policy basis upon which institutionalized delivery of legal services and subsidized wheat prices rested—i.e., society has assumed all or some of the risk.

The question of institutionalized delivery or legal services *to* indigent members of the society seems not to have been considered by the Leavenworth County Bar Association, either, in adrance of their alert to the military program. This is evidenced by the then lack of any civilian legal aid program, and it is evidenced by the letters of a member of the Leavenworth County Bar Association. And it is evidenced by subsequent events. Upon reading for the first time about the program in the *American Bar News*. Edward Chapman **wrote** asking the ABA for further information, because "we intend to study this project in depth and to examine any alternatires that may be related to the project." [121] And then on January 19, 1971 he wrote to the ABA Standing Committee on Legal Assistance for Servicemen :

> *Our committee of the Leavenworth County Bar Association is strongly opposed to the pilot project as outlined to date.* It is our feeling that assistance should be given to civilians and military alike, and not to military alone, where the person is in need. We feel that there is no basis for distinction for granting legal services to needy persons. Therefore, we feel that the project should not be assigned to and run by the Department of Defense but should be something handled by the civilians for military and civilians. The type of legal services would be civilian legal services, regardless of the relationship of the needy person to a military branch.
>
> *We would like very much to have the names and addresses of persons to* ***whom*** *we can effectively make* our *views known* within *the* American *Bar Association.*
>
> I think it is significant that of all the publicity you hare mentioned, none of this publicity was directed toward those communities where pilot projects were to be set up.[122]

The Chapman letter points up an issue which runs in variants throughout our study. When bar associations act, how much do they

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[120] Letter from Howard Harper to Senator Robert Dole, Sorember 19, 1970 (emphasis added).

[121] Letter from Edward J. Chapman. Jr.. to American Bar Association. November 24, 1970.

[122] Letter from Edward J. Chapman, Jr. to Mrs. Elma Raske, Standing Committee on Legal Assistance for Servicemen. American Bar Association, January 19. 1971 (emphasis added).

take into account the feelings of those against whose interests, or for whose interests, they claim to act? The issue cuts both ways. At times, to avoid parochial discussion within the bar, the boards of bar associations have not put the question of approval of the pilot programs to the general membership. At times, as if to bargain for the display of parochialism, the question has been put to the general membership—as was the case in San Diego, California. There remain beyond this, however, the persistent questions: When the interest of the clients or the public may be in conflict with the interests of some of the members of a bar who should the association speak for?[123] Who do they speak for?

After the evidenced hostility of the local bars, Colonel Olk shifted to a search for approval at the state level. He rejected a legislative approach after there was some indication that the legislature felt that it was a matter for the state Supreme Court. Previously, however, a Justice, on that Courta reserve officer in the Army JAG Corps—had pointed out difficulties with the existing Kansas rules and had suggested that an approach be made to the Military Law Section of the Kansas Bar Association.[124] This was tantamount to inviting bar clearance before approaching the Court. The rules the Justice alluded to were the statute and the Court rule requiring the appearance of a local Kansas attorney who has his office in the judicial district.[125] Kansas court rules allow *pro hac vice* admissions, but only if Section 7–104 of the state statutes is followed, only if there is a local attorney of record. Thoughts of asking for a rule change from the Court without going to the state Bar Association were rejected; Colonel Olk, in addition to Army guidelines about seeking bar cooperation, had some doubts about his standing to petition the court without bar concurrence.[126]

The Kansas Bar Association was first approached through the Military Law Section, whch was hospitable to the pilot program, but also was beginning to feel intramural pressures. The Chairman of the Section, Harold Chase, former Lieutenant-Governor of Kansas, sent a memorandum to the president of the state bar, the presidents of local bars throughout the state that might be affected by the pilot program, the Chairman of the Kansas House Judiciary Committee, and the Chief Justice of the Kansas Supreme Court suggest-

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[123] *See* F. MARKS, with K. LESWING and B. FORTISSKY, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY (1972).

[124] Letter from Justice Earl E. O'Connor to Colonel Zalonis, November 23, 1970.

[125] See note 118 supra.

[126] Interview with Colonel Olk, October 22, 1971.

ing cooperation and some changes in the rules which would allow military lawyers "to defend" military personnel in civilian courts. The Section Chairman recognized that the restriction "to defend" was "half a loaf" and purposely suggested it as a compromise. He noted, in passing:

> To simply reply to the [military] request for assistance by saying "You can't do it in Kansas" without suggestion for providing legal service to a class who may be not only in **need** but are certainly deserving, would be unworthy of a lawyer's responsibility to the profession. Further, it must be remembered that military officer-lawyers . . . are "brothers at the bar." [127]

The military clients are seen as "deserving poor" and the military lawyer as deserving professionals.

On February 1, 1971 the president of the Kansas Bar Association asked one officer of the association and one member of the Executive Council to be an *ad hoc* committee to look into the question and make recommendations to the Executive Council. The member of the Executive Council vi-as Howard Harper, of Junction City, who had certainly been a steady, open, and avowed opponent of the pilot program from the time he wrote the "socialism" letter to Senator Dole and most likely before. The issues put to the two-man committee by the president were:

1. What will be the impact on our judicial and professional **system** of allowing a group of miiltary lawyers not permanently situated or regularly practicing in Kansas to render professional services and appear in court without examination or other qualification for admission and especially without being subject to the control that courts historically exercise over members of the Bar who continuously practice before them and must maintain their standing in thr local community by integrity and good professional work?
2. Will the members of the military service who depend on this group for advice and representation be better represented than they **now** are?
3. Is our system of requiring people with legal problems to be represented by independent practicing attorneys really threatened professionally or economically by this proposal for what really amounts to organized group legal aid; shortly put, is this a step toward government control or socialization of the profession?
4. Is there really a need for legal aid for members of **the** military service stationed in this state and if there is, is there a better way to deal with it than the one proposed? [128]

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[127] Chairman. Military Law Section. Kansas Bar Association, Memorandum re : Proposal by Department of Defense for Expanded Program of Legal Assistance **to** Military Personnel (January 11, 1971).

[128] Letter from Robert Martin to Marvin E, Thompson and Howard W. Harper, February 1, 1971.

The result: "Support" of the pilot program by the Kansas Bar Association, severely limited and subject to a power to veto vested in the local county bar associations; still no pilot program in Kansas; but one definite and one aborning legal aid society.

On June 18, 1971 the Executive Council of the Kansas Bar Association passed a resolution which announced support for the expanded military legal assistance program through the establishment of a "properly supported pilot or test program . . . subject to the limitations hereinafter set out.'! [129] The form of the abstract endorsement was faintly reminiscent of the ABA endorsement. And the limitations made it clear that the Kansas Bar, like the ABA, was going to let the decisions be made locally. The important limitations were :

> **2.** (a) Only available to enlisted grade of E-4 and below, "who file an affidavit to the effect that they have no funds or resources from which **to** pay civilian counsel." [130]
>
> (b) "The legal assistance officers assigned to the project shall consist only of those military personnel mho have been admitted to practice by the Supreme **Court** of Kansas . . . under Rules of the Supreme Court . . . as may be amended which comprise the following : [Reciprocity admission, examination, temporary admission, and association with attorney who is a member of the Kansas bar.]" [131]
>
> (d) The client shall be advised of the right to civilian counsel at his own expense, and shall sign a statement indicating his choice of the military or civilian counsel.[132]
>
> (e) **If** client chooses civilian counsel, the legal officer shall show client a telephone listing or legal directory of lawyers within or in the counties adjoining the military establishment.[133]
>
> (j) *"Prior to accepting a client under the program, the . . . legal assistance officer shalt refer the matter to civilian legal service agencies, such as a bgal aid society, lawyer referral or other similar type group, agency, organization or committee established by the bar association located in a county contiguous to the military establishment to which the client is assigned by military order."* [134]
>
> "3. This resolution shall not be or become effective as to military personnel stationed, or assigned to duty, at Fort Riley,

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[129] Executive Council, Kansas Bar Association, Resolution for the Implementation of an Expanded Program of Legal Assistance to Military Personnel Within the State of Kansas (June 18, 1971), sec. **1.**

[130] *Id.*, sec. 2(a).

[131] *Id.*, sec. 2(b).

[132] *Id.*, sec. 2(d).

[133] *Id.*, sec. 2(e).

[134] *Id.*, sec. 2(j).

> Kansas until its contents have been approved by a majority vote of the combined membership of the Geary and Riley County, Kansas, Bar Associations who are currently engaged in the active practice of law in their respective counties. [Similar provision for Fort Leavenworth and Leavenworth County Bar Association]." [135]

The Riley County Bar was already on record as rejecting the plan, because (1) military lawyers are unfamiliar with Kansas law and Kansas courts, (2) the court appointment system for felonies works for servicemen, (3) eligibility criteria are vague, and (4) after approval the scope of service would expand.[136] They continued to be opposed through October 1971 when the field work for this study was finished.

The Leavenworth County Bar Association has not as explicitly opposed the pilot program nor have they supported it. But their position has been more than silence. When the program at Fort Leavenworth considered going ahead with its Kansas-admitted judge advocate as the lawyer in charge of the office and the other lawyers "associated with him," the staff judge advocate there was told informally by some of the members of the local bar that the Kansas lawyer would not be eligible under Kansas rules, because he did not have this office within the judicial district—it being on federal territory.[137] Furthermore, the Leavenworth County Bar Association took an action which had the effect under the state bar Resolution of blocking the program: they formed a section (j) legal aid society. As a gesture they hare invited military lawyers from the fort to join with them on the board of the legal aid society.

The Geary County Bar Association has taken no action subsequent to the state bar resolution, but they, too, are considering a section (j) legal aid society.

In sum: The Army feels stymied in Kansas. "No" is the message. But nobody wants to say it plainly. There has been an abundance of committee consideration but no definitive action. The legislature is unlikely to act without Court acquiescence and Kansas Bar Association approval. And, meaningful state bar approval has already been blunted by the adoption of the local option formula.[138]

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[135] *Id.*, sec. 3.

[136] Letter from President of Riley County Bar Association to Chief Justice of Kansas Supreme Court, May 3, 1971.

[137] Report of Staff Judge Advocate at Fort Leavenworth, Lt. Col. Robert Royer. February 1, 1971.

[138] The Kansas experience should be contrasted with the Army's experience at Fort Huachuca. Arizona, where the local bar approved the admission of nonresident military officers for purposes of the pilot program, got the State Bar of

Colorado: [139] In Colorado, as in Kansas, the opposition came from a local bar—the El Paso County Association where the Army's pilot program site, Fort Carson, is located. The Denver Bar Association and the Colorado Bar Association have endorsed the pilot program. And the Colorado Supreme Court Seems to be open to the need for a program, but there has been hesitancy on the part of both the Court and the state bar association to face the El Paso bar with a *fait accompli.* At this writing a committee of the Supreme Court is attempting to work out a resolution of the problem satisfactory to all parties.

Although the Army's pilot program at Fort Carson was the basic program being sought, the Navy, too, sought a pilot operation in Colorado which would use Colorado reservists exclusively—Naval Reserve Law Company 9–3 of Denver, Colorado. Active duty, retirement, and other credits would be earned. The Commanding Officer of that Company, John Law, handled both the Navy and Army negotiations for rule changes that would be required for special licensing of nonresident lawyers. The Army wanted a Colorado lawyer to act as negotiator. On closer examination, however, only the Army's negotiations were important because Colorado lawyers agreeing to represent an indigent population or cooperating with a military legal assistance program toward that end would need no special approval. As a matter of fact, the Colorado Bar Association on April 24, 1971 did easily approve the Navy Law Company pilot program :

> The Board of Governors of the Colorado **Bar** Association approves the performance **of** legal services and assistance ***by members of the Bar of the State of Colorado*** who are performing such services as inactive duty members of reserve components of the **Armed** Services under the Department of Defense Legal Assistance Pilot Program for military personnel and their dependents, who are unable to **pay** the fee for **a** civilian lawyer, **on** the condition that such services may be provided only on the same basis and standards of eligibility as those presently extended by the Office of Economic Opportunity.'''

Perhaps because **of** the dual negotiations, the approach was made first to the Denver and Colorado Bar Associations. The Board of Trustees **of** the Denver Bar unanimously approved the use of out-of-state lawyers in the military pilot program. And the Lawyers Re-

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Arizona to go along, and the State Bar **is** now petitioning the Arizona Supreme Court for **those** special admissions.

'''The data from Colorado were obtained from reports and documents in both the Navy and Army **files** in Washington.

[140] Resolution **of** Colorado Bar Association, April **24,** 1971.

ferral Service Committee of the Colorado Bar Association approved a resolution which included :

> That the Board of Governors recommend to the Supreme **Court** of the State of Colorado the adoption of a rule of court permitting special admission to the Bar of this State of active duty Judge Advocates who have been admitted to the Bar of another state . . . for the special purpose of performing legal assistance to military personnel and their dependents . . . on the same basis as such services are being performed **by** [OEO].[141]

Meanwhile, however, the El Paso County Bar Association was taking a hard position : Absolutely not ! The El Paso opposition was not explicitly framed in terms of loss of business but rather in general terms that do not foreclose that view. The phrases "government encroachment" and "the government wants to get the camel's nose under the tent" were heard. Creeping socialism, in other words.

The opposition of the El Paso County Bar Association was communicated to the Board of Governors of the Colorado Bar Association, which in the face of the local opposition was disinclined to act. (This was at the same meeting that endorsed the Navy Law Company plan.) Similarly, the two-justice committee of the Supreme Court, which has the power to recommend rule changes, was initially disinclined to act unless the Colorado Bar Association were to indicate a disposition to move ahead on a rule change—this, eren though Colorado is not an integrated bar state. The Supreme Court committee is, however, actively seeking to bring the parties together on the issue of a hospitable rule change.

California:[142] Local opposition was only part of the story with the Navy's program in San Diego, California. The character of the local opposition, however, coupled with what seemed to be general opposition in the state to any admission of nonresident lawyers, led the Navy to revise the goals for its San Diego program. The local opposition was not *so* uniform or so intense as in Kansas and Colorado. There was, however, some attempt to make it *so.* In the end there was a stand-off "approral" of a modified program. The program is now operating in San Diego without a written agreement; California lawyers make all court appearances.

Letters advising of the pilot program were originally sent to the

[141] Draft Resolution of Colorado Bar Association, proposed by Lawyer Referral Service Committee, January 15, 1971.

[142] Data regarding this negotiation were obtained from reports and memoranda in the Kavy Legal Assistance Office, Washington, D.C., and from interviews with Charles Froelich, former President of the San Diego Bar Association, August **11,** 1971, and Lt. Commander Ervin Riddle, August **12,** 1971.

Presidents of the San Diego County Bar Association and the State Bar of California. Statements of position and comments on program were invited.[143] The president of the San Diego Bar Association referred the matter to the Military Liaison Committee. The Navy was informed of the need for study "because of the important implications for the local bar."[144] The Military Liaison Committee reported back to the President, closely divided on the issue, but technically in favor of endorsing the experiment. The Committee had divided into subcommittees which considered three "problem" areas: (1) qualifications of military lawyers to participate in the pilot program; (2) eligibility for services under the program; and (3) the scope of services offered. The report of the committee summarized these subcommittee findings and also included a discussion of "general policy considerations."[145] On the issue of qualifications, the committee concluded that lawyers appearing in court or on pleadings must be members of the California bar; that this requirement was statutory—being the enactment of the integrated bar rule.[146] Any change, according to the committee, had to come through the legislature; one member of the committee felt that the California Supreme Court had inherent power to change the rules or grant special licenses. The committee suggested the use of California reservists to augment the California lawyers who might be on active duty, "with local Judge Advocates associating with the attorney for the purposes of assisting in the preparation of cases."[147] After reaching its conclusions about California lawyers only, the committee curiously suggests that the whole issue be passed to the state bar association.

On the issue of eligibility, even though the Navy guidelines called for service to E–3 and below, the committee wanted the criteria more strictly drawn and more explicitly tied into OEO poverty standards. The chairman reported:

> Certain **members . . . were of the opinion that regardless of the guidelines adopted, the ultimate effect would be the elimination of some paying business."**

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[143] **Letters from Commandant, 11th Naval District to Charles W. Froelich, Jr., and Forrest A. Plant, January 18, 1971.**

[144] **Letter from Froelich to Commandant, January 29, 1971.**

[145] **Report from John R. Ringert, Chairman of Military Liaison Committee, to Froelich, February 4, 1971.**

[146] **CALIFORNIA BUSINESS AND PROFESSIONS CODE, *secs.* 6000 *et seq.*, specifically 6125.**

[147] **"'Report,** *supra* **note 145 at 4.**

[148] ***Id.*, at 6.**

This opinion was an amalgam of those who felt they mere presently deriving fees from those below the E–3 grade[149] and those who believed that the eligibility criteria would rise once the institutionalized delivery were accepted.

The committee's major comment on scope was the elimination of criminal matters because of the availability of the public defender. (The San Diego program did drop criminal defense in view of this recommendation and in view of the excellence of the public defender program in the area.) The committee also felt that because of available manpower in the 11th Naval District — military lawyers — the amount of service offered should be reduced.

Under the "General Policy Considerations" the committee report again raised the issue of an inadequate staff of lawyers to handle the array of matters contemplated by the pilot program. This time, however, the point was aimed more directly at the quality of representation. An additional point was made:

> It is generally believed that the junior Navy lawyer does not possess the practical experience required to successfully handle the civil matters contemplated. Few, if any Navy lawyers, whether senior or junior in rank, stationed in the Eleventh Naval District have had any actual experience in the civilian practice of law. Consequently, junior Navy lawyers would not be able to obtain any experienced guidance from their superiors. Likewise, Navy law clerks and associated civil service employees are probably unqualified by reason of lack of experience, to handle the clerical end of this program.[150]

The sincerity of this concern will have to be judged from the context. How serious is the concern may depend on how these same professional responsibilities are handled vis-a-vis the already admitted California lawyer. The following parts of the report came before and after the concern about quality and experience:

> One opinion held by a number of members of the Committee is that this program is simply another form of socialized legal services and will eliminate a valuable source of income from the private practitioner.
>
> One opinion expressed by sume members of the Committee was that the expanded legal assistance program, like other government supported legal offices rendering services to the poor, would concern itself more with class actions rather than representing the individual needs of the clients. It was also suggested that the percentage of civil cases appealed would increase because of this program, since no fee would

[149] One lawyer wrote, in part. "Over 50% of my practice and probably that of most lawyers in the area is with Savy families. I can assure you that many of my clients are in the pay grades contemplated to be covered by this program."

[150] Report. *supra* note 145.

> be charged to the serviceman or his dependent for the attorney's work in this regard.[151]

These statements reflect feelings about the client, the earnings of fellow lawyers—dilution of craft or market—and feelings about OEO legal services (opposed bitterly in San Diego) and concern about the increase of the appellate docket, all rolled into one.

While the report of the Military Liaison Committee was being awaited, the president of the State Bar of California had referred the Kavy request to the Board of Governors. He later reported the action of the Board, informing the Navy of the restrictions in the Business and Professions Code against nonadmitted lawyers appearing in California, and stated:

> Because of conflict with laws of State, the State Bar is unable to enter into any agreement which would recognize the propriety of the practice of law in this State by persons who are not members of the California Bar.
> . . .
> In addition to the problem of probable unauthorized practice of law, it has been observed that other problems, analogous to those which have arisen during the inception of other programs providing legal services for the poor, may also arise in connection with the pilot programs. These problems too should be considered in any such discussions.[152]

Again, comes the reference to the California Rural Legal Assistance Program, and other OEO programs in California—a concern centering around "law reform" issues. By informal communication, the Navy tried to distinguish their program from the "law reform" programs by pointing to the basic reasons for the enlargement of the legal assistance program in the first place—the felt need to serve the legal needs of their troops. This would be consistent with an individual service model of a legal service program and not a law reform model.[153] The McCartin Report, too, was ample authority—the military felt as threatened by class actions and affirmative litigation as did the California and San Diego base. (In fact, the program excluded a law reform approach.) The Navy went further, however, in the informal negotiations, and suggested that Navy officer-lawyers were not as phrenetic as their colleagues in OEO and besides they were more subject to discipline. Hair style comparisons were made in these reassuring remarks. This argument may have been satisfactory and comforting to the San Diego bar, but the possibilities of such control and the flattening of the law reform urge was a negative, as we shall see, for the Alaska bar.

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[151] Id., at 8.

[152] Letter from Plant to Commandant, 11th Naval District, February 23, 1971.

[153] *See* F. R. MARKS, THE LEGAL NEEDS OF THE POOR : A CRITICAL ANALYSIS (American Bar Foundation Legal Services for the Poor Series., 1971).

When the San Diego Bar Association Board of Governors met on February 8,1971 to consider the report of the Military Liaison Committee, they rejected even the possibility of endorsing the pilot program in principle, concluding that the bar "was not in favor of implementation of the proposed program."[154] The reasons assigned were primarily opposition to non-California lawyers appearing in California courts. However, the thread of concern about the military services spreading themselves too thin remained, as did concern about legal service programs generally.[155] The Navy appealed from this position by asking for an opportunity for its Judge Advocate General—Rear Admiral Joseph B. McDevitt—to address the general membership of the San Diego Bar Association; to explain the Navy's program, and to "reassure" them of the nonthreatening nature of the program.

Admiral McDevitt addressed a luncheon meeting of the San Diego County Bar Association on March 19, 1971, attended by between 250 and 300 lawyers, which is a huge turnout for that Association. The story behind the turnout is illuminating. The announcement of the meeting, in leaflet-handbill style, was sent to all lawyers in the area.[156] On the top was a cartoon depicting a small ship with a crew labeled "Navy lawyers" on one side of an island—apparently the old legal assistance program—and a large battleship on the other side of the island. The battleship was named "U.S.S. Navy Lawship." On the island was a depiction of the San Diego County Courthouse. In bold type at the top of the announcement (under the Bar letterhead) :

> NAVY LAWYERS IN CIVILIAN COURTS?
> Excursion or Invasion?
> It Depends On Your Point Of View.

There followed :

> So come listen to Rear Adm. Joseph B. McDevitt . . .
> If your practice includes family, probate, criminal, personal injury or bankruptcy, this program is of *great interest* to you.
> DON'T MISS THIS JOINT MEETING . . .
>
> This Room seats only 350. Meeting is first come, first serve. Don't wait for radio, television and

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[154] Letter from Froelich to Commandant 11th Naval District, February 11, 1971.

[155] Id.

[156] Announcement of March 19, 1971, monthly meeting of the San Diego County Bar Association.

> newspaper coverage. Find out for yourself what's going on.

Come, let us reason together! The large turnout is hardly surprising. Neither is the refusal of the San Diego bar to change its position after the post-meeting reconsideration. This time, however, the reasons assigned for refusal sounded more concern about the caliber of law practice by military lawyers: military lawyers would be unfamiliar with California laws and with how things were done in the local courts. This time the Board of the San Diego County Bar Association also suggested that the funds for such a program be used to augment OEO services.

A stalemate developed, until the Navy felt that it needed to proceed with the San Diego pilot program. A written agreement embodying a modified plan was proffered to the San Diego County Bar Association.[157] It contained 15 points, including assurances of no threat to sources of income to the civilian bar, agreement to offer cases to the public defender and legal aid before taking cases, and, most important:

> All appearances in California courts will be made by a military lawyer who is an active member of California State Bar in compliance with the Business and Professions Code."[158]

In response, the President of the San Diego County Bar Association wrote:

> As a personal matter I find nothing objectionable about any of the 15 points contained in your letter. Having consulted with the Executive Committee of our Board of Directors, however, I am impressed with the fact that this is a matter of *some* delicacy. There is reluctance by certain of our members to enter into any "agreement" even though the precise terms of same may be quite acceptable. . . . It will be necessary to bring the matter before the Board on June 14, 1971.[159]

On June 23, 1971 the President of the San Diego County Bar Association ended the "negotiations" with a report of the Board Action, which was to decline execution of any agreement. The president indicated that the formal action was not a disapproval of any of the various items—most of which were "appropriate." He said:

> [We have] little or no jurisdiction. . . . The program as presented is not subject to the Bar's criticism; neither is it, in the Bar's opinion, appropriate for ita approval or ratification.
>
> The details and mechanisms of your program remain to be implemented

[157] Letter from Commandant, 11th Naval District, to Froelich, May 20, 1971.
[158] *Id.*
[159] Letter from Froelich to Commandant, 11th Naval District, June 2, 1971.

> by military lawyers who are licensed to practice in California. While the Bar is reluctant to take a position as an organization in support of this overall program, it nevertheless remains the Bar's responsibility to assist all California lawyers, including military lawyers, in the performance of their professional responsibilities. If, therefore, the Bar or any of its committees, including our Military Liaison Committee, can be of any aid in specific problems or procedures, please feel free to call upon us.[160]

This was neither a victory nor a defeat for the Navy. It was unable to use out-of-state lawyers in its program. The Navy did have to compromise, and it ended up with the program it could have had without approaching the bar. But tacit blessings were bestowed by the local bar—in the last paragraph of the bar president's letter. The Navy program is now in operation at San Diego along the lines of the proffered 15-point agreement.

The bars of Riley, Geary, and Leavenworth Counties, Kansas, and El Paso County, Colorado, rejected the pilot program without serious attention paid to what was or was not in the clients' interests. The clients were not considered as central. Not so in the case of the San Diego County Bar Association. Clients may not have been central to the deliberations, but issues of quality representation, experience, and competence were at least raised, as was the issue of who could better serve the clients. The charge of inexperience merits closer examination. The committee had suggested that Navy lawyers would be inexperienced in the type of matters being handled. The assertion has merit. But, again, the double standard; the context of the assertion raises questions about its weight. All lawyers, whether they be admitted to the California bar or elsewhere, at the beginning, and continuing for new matters, are inexperienced. Law practice consists of representing clients in the handling of their problems. New clients, new demands, new situations, and new laws are continually placing the lawyer in the position of being inexperienced. From the clients' viewpoint, and from the higher interests of the profession, the issues are more properly: Under what circumstances will a lawyer become experienced? What will be his supervision during the period of acquiring the experience? What training will he receive after he receives his license? For that point is the beginning, not the end, of a lawyer's acquisition of skill. To substitute the magic of a bar examination and the magic of a local law license for these harder questions is to mask the true meaning of inexperience and incompetence. For a profession that still lets its general practitioners do the equivalent of delicate brain surgery,

[160] Letter from Froelich to Commandant, 11th Naval District, June 23, 1971.

it ill behooves a local guild to say: Our perhaps inexperienced lawyers are better than your perhaps inexperienced lawyers. Though from guild identification the first "perhaps" would usually read "most assuredly." The point is well exemplified by the San Diego lawyer who interposed the probable unfamiliarity of nonresident lawyers with the California no fault divorce law; a law which postdates the admission of about 97 percent of the lawyers admitted to practice in California. There is irony to the suggestion, when one considers that the no-fault law simplified procedures for divorce, even to the point of stimulating *pro se* appearances.

The problems of relative inexperience are questions of training, supervision, and exposure—familiarity with either the array of problems of particular clients or the specific problems of an array of clients. For initial training—law school—the Judge Advocates General say they screen applicants, accepting lawyers from the top quarter of their class. They insist on training in courts martial and other problems of military justice, a training they formally apply. And, in connection with the pilot program, the military services have taken the view that the judge advocates must be trained and supervised in connection with the matters they will be handling. Short of a law office practice, is there a similar mechanism—a similar requirement—for locally admitted lawyers? Even California, with one of the better continuing education programs, has no way of supervising the application of the post-admission training. It is optional for the individual attorney. In some instances, as at Forts Monmouth and Dix, the local OEO lawyers are assisting in the training, augmented by local members of the bar. The Legal Aid Society is doing the training in Hawaii, too. In other instances, as in Florida, reserve judge advocates will conduct the training sessions and help develop the training materials. To the extent the military program fails to adequately supervise or train the pilot program lawyers in local law and practice, the legitimate fears of the local bar are indeed justified.

The remaining element is: Who is in the best position to communicate with and understand the military client and his problems, the military lawyer or the civilian lawyer? Surely, this is important. And it is by no means simple. There is the question of command influence, which was raised seriously in the Alaska negotiations. There also is the question of how the military client feels about his lawyer when he is also a superior officer. Such questions are important, but they are not answered by facile reference to license. In sum: The issues of competence, experience, preparation, and training are separate from the issue of license. The blurring of the

lines between the issues during negotiations, such as those conducted in California, raise questions about whether the discussants have substituted rhetoric for reason and whether they have, even for themselves and their own—members of the local bar—defined what a lawyer is and what his role should be.

Alaska: [161] The Alaska Bar Association opposed the joint Air Force-Army pilot program at Elmendorf Air Force Base and Fort Richardson, Anchorage, Alaska. The opposition seemed atypical. It was based, for the most part, on distrust of the military and fear of an intrusion by the military into the lawyer-client relationship. There was a feeling that the privileged nature of client communications and the integrity of the lawyer-client relationship would be compromised by command influence and by the record keeping requirementd of the pilot program. Market intrusion did not appear to play a major role, as it had in other jurisdictions. But long-run views about protecting the Alaska Bar from too easy admission by "outsider& probably played some part in the rejection of the program. Alaska, an integrated bar state, offered a striking example of the abdication of judicial authority over the issue of admission.

There was precedent for special admission to the Alaska courts, although there was no formally recognized procedure. It was bar and not court supervised. For years a lawyer on the staff of a federal or state agency, who had been admitted to the bars of other states, had been granted waiver of strict admission standards by the Board of Governors of the Alaska Bar Association so that he could practice until the next bar examination. This waiver was similarly accorded to OEO and VISTA lawyers. The military relied on this practice in Alaska when developing the site selections for the pilot program. There was no reason to assume that the full-scale program, with admission of all judge advocates, could not be launched in Alaska. What was not understood was the recent sharp and rapid departure from this relaxed standard in Alaska. The discovery of oil on the North Slope and the resulting surge of enterprise was reflected in the increase in the number of lawyers. Five years ago approximately 150 lawyers held licenses in Alaska. Today there are over 500. Easy admission has been replaced by rigid requirements, including the

[161] The data on the Alaska negotiations were gathered from reports and correspondence in Washington. D.C., and from interviews with Colonels Arnold C. Castle and Robert Frasier, USAF; Col. John Webb and Lt. Col. George Harrison, U.S.A.; Peter LaBate. President, Mary La Follette, Executive Director, and Ralph Crews, Chairman of the Military Legal Assistance Program Committee, Alaska Bar Association; and Chief Justice George F. Boney and Associate Justice John H. Dimond. the Supreme Court of Alaska.

giving—by contract—of the California Bar Examination. And there was open hostility to further waivers. This change affected, in advance, the way that the Alaska Bar dealt with the military program. A collateral change also had an effect on the character of the objections raised. Because of the rapid growth of the bar and the frontier quality of life in Alaska, the new arrivals had brought the average age of Alaska lawyer to *below 30.* It followed that the bar had a somewhat liberal outlook. An antipathy to the military was encountered. But it was a different hostility than had been encountered from the organized bar elsewhere, It was a hostility based on distrust, a distrust tutored by the war in Southeast Asia and the draft.

The Air Force presumably was in charge of negotiations for the program. Its approach was directly to the President of the Alaska Bar Association, by letter, outlining the pilot program and asking for advice. Meanwhile, the Army, following its own guidelines, but not coordinating efforts with the Air Force, was seeking "the cooperation of local bars." Before the Alaska Bar Association had had an opportunity to meet and consider the Air Force request, the Army had appeared before the Anchorage Bar Association and the Federal Bar Association, at Anchorage, and the Fairbanks Bar Association. The Fairbanks area, at the time, was depressed because of "temporary" stoppage of the Alaska pipe line. The town was experiencing a 25 percent unemployment rate. While the lawyers in Anchorage did not appear threatened by possible encroachments on fee-generating business, their colleagues in Fairbanks did. (The Air Force planned a second pilot program at Eilson Air Force Base at Fairbanks.) The Fairbanks bar was shown the McCartin Report and seized upon the Martin (Coast Guard) Comments to document their concern that the military program would not be kept to the poverty level airmen. But, more important, and perhaps to better argue their cause, the Fairbanks bar seized upon another issue and gave it wide currency: The record keeping and command supervision over the program would compromise the integrity of the lawyer-client relationship. An unfortunate draft release form contributed to the making of this issue. The release form, to be signed by clients, allowed reports of the matter to be sent to Washington. The form seemed to go beyond the statistical needs of the experimental pilot program, which are really the same as any other legal service program. The overbreadth of the form was unintentional, but the damage had been done; a major issue was framed.

The Fairbanks bar sent letters to the Alaska Bar Association featuring this issue. In addition, several Fairbanks lawyers attended

the Federal and Anchorage bar association meetings, raising the issue of command influence, and citing the release form. The Anchorage Bar Association passed a resolution against the pilot program. The following reasons for that action have been cited:

> (1) There would be no control by the Alaska Bar over the military lawyer's representation of clients.
> (2) There would be no confidentiality of client records. The lawyer-client privilege would be breached.
> (3) There was suspicion of the military with respect to its concern over the rights of individual clients; there would be other (intermediary) influences affecting the defense of criminal causes, for example.
> (4) The pay of military people should be raised.'"

The first reason cited has to do with both admissions and discipline questions; the quality of the lawyers in the first place and their amenability to discipline. Disciplinary jurisdiction problems have been raised in many states. Uncertainty has rested on a paucity of literature and case material. Nobody has suggested, however, that an admitting court, even one admitting a lawyer *pro hac vice*. lacks authority over the lawyer admitted. The power to supervise and discipline is inherent, even though the practice is not prevalent. The admission can be withdrawn. Further, nobody has suggested that a court admitting a nonresident lawyer is in a worse position than a client in the state of a lawyer's admission to raise, by complaint, issues of professional misconduct or breach of professional standards. The issue is not standing. It is comity. The concern over disciplinary powers like the concern over quality of representation may embody a double standard. Is there a bar association or a disciplinary agency that has been so outstanding in its exercise of self-regulation of the local bar that it can concern itself with the issue of "perfecting jurisdiction" over the standards of outside lawyers? I have yet to find one. Rather, one discerns a reprise of the experience and quality refrains: ours we can and do *not* regulate, yours we have questions about.

The Alaska Bar Association took no action on the Air Force-Army request at its January 24, 1971 quarterly meeting at Juneau. There was a discussion, however, and during its course the Air Force agreed to have judge advocates take a special examination on Alaska law as a way of assuring the bar and bench that adequate training about local rules and practices will have occurred. The President of the Alaska Bar, Millard Ingram, appointed a special committee to

[162] These reasons were advanced by Peter LaBate in an interview on September 27, 1971.

study the expanded program. The special committee, chaired by an Air Force reserve officer, had five members: the public defender, a representative from Alaska Legal Services Corporation (the OEO program), a Fairbanks lawyer, and an Anchorage lawyer. The committee chairman reported to the President of the Alaska Bar Association :

> The majority of the committee feels that although such a program has been shown to be necessary, that it should be handled by organizations already in existence and performing that type of work, such as the Alaska Legal Services, Public Defender, etc.[163]

This position was urged by the public defender and the OEO program representative on the committee. The report went on to deal with the concern about command influence:

> [If the program is implemented], the majority feels that military lawyers representing indigents should physically office in the facilities housing the agencies already in this type of work, such as OEO, Public Defender, etc. The general feeling underlying this recommendation was, that there would be more integrity in the attorney-client relationship as opposed to command influence that might be exercised over lawyers handling the program were they officing on a military reservation. My *personal* feeling is that there is no danger of command influence in such an area as this, because of my past experience as a JAG officer and long-time observations of JAG activities as a Reserve Officer. However, the majority of the committee felt this way. I further feel, *personally*, that such a suggestion would be impractical because of the inconvenience of these offices to military personnel who mostly live on base. There is also some feeling that there might be some antagonism between attorneys working for OEO, Public Defender, etc., and a career military officer."[164]

The committee, with its chairman dissenting, went on to recommend that no civil matters be handled, and that the program use Alaska lawyers, only; recommending that ***no*** waivers be granted on account of the military program,

The Board of Governors of the Alaska Bar Association adopted the report of the committee at its May **24,** 1971 meeting. The following is an excerpt from the minutes of that meeting:

> Following agreement **by** the Board that approval of the majority report meant, as a practical matter, that a program would not be implemented without further action from the Board of Governors [the report was adopted].[165]

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[163] Letter from Ralph Crews to Millard Ingram, May **4,** 1971.

[164] *Id.*, at 2.

[165] Minutes, Meeting of Board of Governors, Alaska Bar Association, May ***24,*** **1971.**

And they were right. Although the Air Force subsequently made a direct request to the Alaska Supreme Court for a special rule, no action has been taken, because in Alaska no action can be taken without the assent of the organized bar. The Air Force request was referred by the Court to the Alaska bar for formal recommendations. Further, the Court, which appeared disposed toward implementing the program, invited the parties to a conference in October.[166] Nothing came of this conference. Nothing will unless the bar recedes from its position. The Alaska Supreme Court is willing to mediate but unwilling to enter an order in the face of bar opposition.[167] There is a history to this position. As a result of an open and acrimonious fight between the Supreme Court of Alaska and the Alaska bar over who had the ultimate right to initiate and terminate disciplinary proceedings and who had the right to amend the rules of admission and discipline—a fight which saw the assets of the Alaska Bar Association impounded by the Court—a compact between the bench and the bar was entered into. It provided that there would be no change in rules pertaining to admission and discipline *unless initiated* by the bar association and approved by the Court. While many, including some of the justices, believe this compact is an invalid delegation of judicial authority, nobody feels that the test of the compact will come over the military legal assistance program.

Hawaii:[168] In Hawaii, the Navy's experience was the reverse of the Air Force experience in Alaska: A written agreement, providing for a Massachusetts-type order, was agreed to by the Navy, the Bar Association of Hawaii, and the Legal Aid Society of Hawaii, but the Supreme Court of Hawaii refused to either enter into any agreement or entertain the entry of an order which would facilitate court appearances by nonresident legal assistance officers. The negotiations with the bar ran smoothly. The Legal Aid Society supported and forwarded the Navy's position in the negotiations—another contrast to Alaska.

The agreement between the Navy, the Bar Association, and the Legal Aid Society eliminated criminal case. It was felt that the

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[166] Letter from Chief Justice George F. Boney to Colonel Arnold Castle, September 15, 1971.

[167] Interview with Chief Justice George F. Boney, September 27, 1971.

[168] The data for the negotiations in Hawaii were gathered from reports and letters in the Legal Assistance Office, U.S. Navy, Washington, D.C., and from interviews with Commander Herbert Woolley, at Pearl Harbor; Leslie Lum. President of the Bar Association of Hawaii; J. M. Rolls, Chairman of Bar Association Committee on Pilot Program; and, Ronald Y. C. Yee, General Counsel, Legal Aid Society of Hawaii, all of Honolulu.

Public Defender covered this area well. As already indicated, it originally provided for a Massachusetts-type order. And it provided for joint supervision of the eligibility standards, which were pegged to "the standards from time to time utilized by the Legal Aid Society." The agreement provides that the screening interview will be conducted by a judge advocate, who shall, in the first. instance, apply the eligibility standards. He will then send the information to the Legal Aid Society for their concurrence on eligibility. There is a provision for Bar Association review if the Navy and Legal Aid do not concur. In actual practice, the screenings provisions have been operated with less formality, by telephone conversations and mutual trust.

At an early bar meeting on the Navy plan, Chief Justice Richardson of the Supreme Court of Hawaii was present and indicated a disinclination to amend or alter Supreme Court Rule 15 (the admissions rule),[169] even though the bar might favor such a rule. Unlike Alaska, the Hawaii Court is jealous of its prerogatives. Previously the Court had rejected an integrated bar rule suggested by the bar. Too, it had rejected a rule that would have enabled nonlawyers, clerks, to attend calendar calls for lawyers. The Chief Justice was of the opinion that either Navy lawyers should take the bar examination in Hawaii or the Navy should proceed with Hawaiian lawyers only. That is what the Navy has done, commenced the pilot program with Navy lawyers who were locally admitted. Further, the Navy and the Bar submitted to the Court a formal petition for the Amendment of Rule 15. That petition is currently pending.

Florida:[170] The Florida Supreme Court, like the Alaska Supreme Court, felt that bar initiative and approval were essential to any amendment of the integrated bar rule or any order facilitating the administration of the pilot program. Unlike the Air Force negotiation in Alaska, however, there were special factors which contributed to the fact that a pilot program is now operating at Pensacola Naval Air Station. The Navy negotiator, Commander Robert Newton, was sensitive to the felt needs of the bar and sought to accommodate his requests for bar approval to those needs. The initial draft of the proposed written agreement sought the appearance of out-of-state lawyers in Florida courts, but only when Florida lawyers appeared

[169] 43 Reports, Supreme Court Rule 15b.

[170] "The data on the Florida pilot program were gathered from documents in the Navy Legal Assistance Office in Washington, D.C. and from interviews with Commander Robert Newton, at Pensacola, October 27, 1971, and Wilfred C. Varn, at Tallahassee, Florida, October 28, 1971.

in the case and "supervised" the work: The initial draft contained a more definitive eligibility rule—it was more stringent than OEO standards and consequently less threatening to the bar; even approval of nonconrt work by out-of-state lawyers was sought. This was the only place this feature was sought. Beyond the accommodation of the Kavy negotiator, the Florida Bar, for its part, immensely assuaged by strict eligibility standards, seemed to rise above parochial influences from both within that association and from the local bar associations in the area of the Naval Air Station, which felt most directly affected by the Navy program—the Escanbia-Santa Rosa County and the First Judicial Circuit Bar Associations. This, however, may hare been an illusion. The Florida Bar negotiators recognized, from the outset, that Commander Newton was trying to work within the framework of the Integrated Bar Rule,[171] and that he thought people who were able to should pay.

Formal and first application was made directly to the state Bar.[172] There were extensive committee discussions, not just within the Military Liaison Committee, to which consideration of the pilot program was formally referred, but in other committees as well. There was more committee work in Florida than other states. Initial feelings and issues raised were not too different than those raised by the San Diego County Bar Association and others; the need for the program was questioned, as was the competence of military lawyers and the adequacy of their training to appear in Florida courts. The sincerity of the outer limits of eligibility was also questioned. There mas a sense of accusation from the fact of the program itself, i.e., a sense that the bar was being accused of not discharging its past responsibilities *to* indigents, including servicemen. These feelings were aired and the Florida Bar ended its deliberations—which took nine months—by formally petitioning the Florida Supreme Court "For an Order to Allow a Member of a Bar, on Active Duty as a Judge Advocate of U.S. Kavy, To Provide Legal Assistance to Certain Members of the Armed Services in the Pensacola, Florida Area."[173] It was felt that anything less than this action, in view of the integrated bar rule, would have produced an impasse.

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[171] Report of Wilfred Varn, Chairman, Military Liaison Committee, Florida State Bar Association, January 29, 1971. See Article II.2 of the Integration Rule of the Florida Bar.

[172] Letter from Commander R.B. Sewton to Burton Young, President, the Florida State Bar Association, January 4, 1971. A similar letter was sent to the Chief Justice of the Florida Supreme Court, but that was viewed by Commander Sewton as advisory only. He was proceeding through channels. Interview with Commander Sewton, October 27, 1971.

[173] In re: The Matter of Legal Assistance for Certain Members of the Armed

The Brief in Support of the Bas Petition said, in part:

> The new Program is desirable and beneficial to all parties in interest as follows:
>
> 1. ***The client*** will deal with only one attorney with a common military background with resultant improved morale. There will be more rapid resolution of problems with a single attorney involved. Personal problems of eligible personnel will be resolved before these problems become disciplinary problems. Military personnel will be made aware that their parent service does have an interest in their well-being.
>
> 2. ***The*** *Military Services* will benefit by improved morale of its personnel, by reduction **of** potential disciplinary cases, and **by** less frustration on the part of military attorneys who may follow a case through to completion. Consequently, improved career retention rates should be realized on the part of personnel trained in military specialties, and the law, with more effective and efficient military forces resulting to the benefit of the United States.
>
> 3. ***The*** *Florida Bar* will benefit by removal of indigent charity cases concerning military personnel from its sphere **of** direct responsibility with a resultant increase in time available to devote to more productive cases and to local indigent cases. Clients mho may not always be indigent but are presently eligible for assistance will be made aware **of** the legal services available in our complex society and will continue to appreciate the value of those services. Finally, the productive legal services within Florida will be increased."[174]

The brief appeared, in part, to be addressed to broad interests. However, when one considers the language in light of eligibility standards, it was not free from self-interest—indigency and eligibility explicitly appear to have been liberating factors. But, it cannot be said to rest entirely on self-interest. From discussions with members of the Florida Bar, it is apparent that the Bar—the Board of Governors, at least—was aware of implications of this petition that went beyond indigency and beyond the military program. The blanket approval of out-of-state lawyers for the military program, of course, sets precedent for OEO programs (New Jersey in reverse), What about out-of-state lawyers for approved group legal services (Florida has a group practice rule)? What about house counsel for Florida-based companies?

On October 13, 1971 the Florida Supreme Count entered the sought-for order, which provided in part:

> Until June **30, 1973,** a member of a Bar on active duty as a Judge Advocate of the United States Navy may act as attorney for and

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Services, the Supreme Court of Florida, Case No. 41, **697,** July Term, Order entered October 13, **1971.**

[174] *Id.*

render legal assistance to certain enlisted personnel of the military services of the United States Armed Forces who might not otherwise be able to afford proper legal assistance subject to the *Rule Governing the Pilot Legal Assistance Program for Military Personnel* attached to and made a part of this Order.[175]

The "Eligibility" standards contained in the adopted Governing Rule provided :

B. The Basic Eligibility Standard for military personnel receiving legal assistance under this rule will be:

Is the applicant for legal service reasonably able to pay either set or contingent attorney's fees? If so, that applicant is not eligible for those services under this Legal Assistance Program.

C. Net Income Test:

1. Applicants whose net income shows a surplus in excess of Twenty-Five dollars *($25.00)* per month, computed by deduction of all expenses from gross income, will be considered as providing an affirmative answer to the Basic Eligibility Standard . . . and *will not* be eligible for legal services under this Rule.

2. Applicants whose net income may be adjusted through counselling, reasonable budgeting methods, and purchase **of** basic **needs** only, to show a surplus in excess of Twenty-five Dollars . . . *will* ***not*** be eligible . . .

3. Married applicants in pay grades E-4 and below and single applicants in pay grades **E-3** and below whose net income **does** not show and may not be adjusted to show a surplus in excess of Twenty-five Dollars *($25.00)* per month . . . *will be* eligible . . .

[D. is a mechanism for appealing special cases to the Florida Bar]

E. Military personnel will not be eligible for legal services under the Rule if they possess the means to pay attorney's fees from personal sources outside of salaries paid by the Military Services . . .

F. A selected representative of The Society of the Bar of the First Judicial Circuit will have authority to pass on and veto the eligibility of applicants for the Program and no Navy lawyer may appear in court without first showing written evidence of approval of an applicant's eligibility by [such representative].[176]

The last provision is a close cousin to the local option in Kansas, but it applies on a case by case basis rather than to the program as a whole. (It is interesting that the term "veto" was used.) A look at the "eligibility standards" will tell the reader why the Navy in Washington and the other services are not happy with the Florida test. Moreover, with the recent pay raises, nobody is eligible for pilot program full services. Further, a look at the eligibility stand-

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[175] *Id.*

[176] *Id.*, Rule Governing the Pilot Legal Assistance Program for Military Personnel. sec. IIB–IIF.

ards indicates what a high price was paid for the "approval" of "representation" by out-of-state lawyers—for the following:

> *IV* ***Legal Aseistance Officers***
>
> Clients receiving legal services pursuant to this Rule will receive full representation including, but not limited to, writing of letters, negotiations, preparation of documents and pleadings, and representation in litigation. Such full representation will be accomplished as follows:
>
> A. All representation, except appearances as attorney of record in Florida Courts, will be accomplished by [any lawyer designated by the Director of the law center as the "Florida Legal Assistance Offlcer.]
>
> B. Where appearance as attorney of record in Florida Courts is necessary, the applicant [sic] will be represented as follows:
>
> **1.** If the Florida Legal Assistance Officer is a member of the Florida Bar, he will act as attorney of record.
>
> **2.** If the Florida Legal Assistance Offlcer is not a member of the Florida Bar, ***he will act as assistant counsel in association with a member of the Florida Bar,*** who will appear as attorney of record. . . .[177]

When the court order is analyzed, the apparent bar cooperation Seems to be an illusion. How seriously do the Rule's provisions about service models and eligibility standards reflect the statements made by the Florida Bar about the benefits of the program to the clients? The Florida rule (which in view of that state's integrated bar rule, its adoption of the Code of Professional Responsibility, and the extraterritorial status of the Naval Air Station may not have conferred anything) is a classic illustration of the double standards addressed in this study: Unauthorized practice of the law is perceived only in the precincts of professional economics. What is "full representation" to a poor client risks being called "inadequate repmentation" for those who can pay. What can be learned by the nonresident lawyer to assist the indigent serviceman,[178] or what can be supervised by Florida counsel, loses its efficacy if the client can pay. The order here is confusing, but so too is the unauthorized practice dilemma.

North Carolina:[179] The pilot program at Camp Lejeune does not exist. But, the local bar says that it does. This is not an illusion, as

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[177] *Id., secs.* IVA and IVB, 1 and 2.

[178] The training of legal assistance officers in Florida has been undertaken by reservists and the faculties of several Florida law schools.

[179] The data on North Carolina negotiations were gathered from reports in Washington, D.C., and interviews with Glenn L. Hooper, President of the Onslow County Bar Association, and Lt. Colonel Raymond W. Edwards, the Legal Assistance Offlcer at Camp Lejeune (Marine Corps Base). Both interviews were held on October 29, 1971 at Jacksonville, North Carolina.

in Florida. It is a delusion. What exists is a new legal aid society—the Onslow Legal Aid Association—where none existed before. The legal aid society takes special notice of military cases and military lawyers, allowing a little less cumbersome procedure for acceptance of military cases and a little "assistance" from the legal assistance officers.

The Onslow County Bar Association has 20 lawyer members. There are approximately 50 lawyers at the Marine Base. It is no surprise, therefore, that the local bar reacted negatively when confronted with the possibility of the pilot program. Military-community and military-bar relations had been strained before the suggestion of the pilot program. It did not help to have Marine negotiations conducted from Washington—from outside. Fear of economic loss was evident from the beginning as was the feeling that this was a "something for nothing program." Any thought of a pilot program handling criminal cases was quickly dispelled. In North'Carolina indigent criminal cases are handled by appointment, with the state paying the fees. In 1969–1970, 69 indigent criminal defense appointments were made in Onslow County, and the lawyers handling the appointments received $9,160 in fees. It mas estimated that well over 90% of these cases involved military defendants.[180] Brigadier General Duane Faw, former Director of the Judge Advocate Division of the U.S. Marine Corps, agreed early in January 1971 to drop any request for criminal case coverage.

The Onslow County Bar Association met as a committee of the whole in February 1971 and considered three basic problem areas: (1) scope of service—i.e., type of cases, (2) definition of eligibility, and (3) the structure of the entity to handle the **work.** Committees mere appointed for each area. The last problem area is central here—at no time did the Onslow County Bar Association consider that they would let the Marine Corps run its own program. The search was for an alternate way of handling the need, if any existed. The Onslow Legal Aid Association, a creature of the Onslow County Bar Association, was born. Its membership was restricted to County Bar members. It covered both civilian and military indigents. There appears to be some confusion as to whether it is a lawyer referral service or a legal aid society. In the "Policy" statements the by-lams state:

> No person other than a person who is without sufficient income or resources to employ private counsel shall be referred through the Association.'"[181]

[180] Interview with Glenn L. Hooper, October **29,** 1971.
[181] Onslow Legal Aid Association, **By-Laws,** Article IV, sec. **2.**

And Article V provides :

> In the event that it is decided that the person is without sufficient income or resources to employ private counsel, but is in a position to pay part of the fee, said person shall be required to make such payment on terms to be determined by the Association, to the attorney who handles the case.[182]

The mechanism for furnishing legal aid first requires that an applicant file an affidavit, which includes a statement of financial condition and an "agreement that if the applicant is assigned a legal aid attorney that the assigned attorney is not under any obligation to pursue the applicant's matter or case beyond the state that the same may be in at the time of such assignment." [183] The applicant must then contact *two* members of the Association requesting them each "to sign a statement that in his opinion the matter or case is a proper one for legal aid." [184] Then, the applicant shall deliver the affidavit and the two "certifications" "to the chairman of the Assignment Committee, and if the Assignment Committee shall agree that the matter or case is a proper one for legal aid it shall assign a member the same." [185] A high social cost and burden of entry is imposed on those seeking legal aid.

For the military indigent, the cost of entry is only slightly cheapened. A certification from the Marine Base legal assistance officer shall count for one sign-off—the military applicant still needs one more certification from a civilian lawyer before he can be assigned a civilian lawyer.[186]

Section 4 of the by-laws guards against the certification process being cheapened by paraprofessionals. It takes a lawyer—a member of the club—to operate the tests for eligibility. No one else can guard against diversion of bar income:

> No member of the Armed Services other than . . . an attorney . . . shall in any way directly or indirectly function, control or influence or attempt to do the same as to any or all of the certification procedural steps herein provided on any other matter or thing connected with the same.[187]

Article VII recognizes a role for the military lawyers:

> The assigned [civilian attorney] shall make use of the certifying military attorney to the extent that he shall determine in the handling of the matter or case.[188]

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[182] *Id*, Article V.
[183] *Id*., Article VI, Section 1.
[184] *Id*., Article VI, Section 2.
[185] *Id*., Article VI, Section 2.
[186] *Id*., Article VI, Section 3.
[187] *Id*., Article VI, Section 4.
[188] *Id*., Article VII.

Presumably the "he" is the civilian lawyer. The delusion is complete—a pilot program which isn't, and a bar administered legal aid program which leaves considerable doubt about attachment to the model of service ahead of gain.

III. CONCLUSIONS

The military-bar negotiations in the several jurisdictions offered a unique opportunity for the organized bar to come to grips with the crucial questions implicit in the professional monopoly: Who is capable of representing a specific group of clients, for what kinds of matters, and under what circumstances? Unfortunately, as has bean true too often, the opportunity was squandered. Preconceptions and pretense about competence and qualification frequently displaced meaningful concerns about "the clients." The holders of local licenses were treated to presumptions about their skills and capacities that were utterly absent from considerations of the skills and capacities of lawyers who held licenses in other jurisdictions. A double standard was involved. Issues of familiarity with local rules and practice, familiarity with the kinds of client problems encountered, availability of practical training and supervision, and amenability to discipline were hopelessly intertwined with concern about market protection and loss of income. The issue raised most persistently throughout the negotiations had to do with the economic level of the group to be served—about their ability to pay—and not the quality of the service that any client, rich or poor, would receive from any lawyer.

The local organized bars, for the most part, acted out the historical paradox: group legal services furnished by a group of young staff lawyers may be tolerable—albeit barely tolerable—to the organized bar for those clients who cannot afford to pay, but they are intolerable when distributed to the present paying clients of the organized bar. It is a paradox which has evident roots. But even where the organized bar is aoncerned about the well-being of 'the clients—here the military clients—that paradox hides a critical question: Has the organized bar's approach to the issues of training, competence, qualification, availability, supervision, and scrutiny of performance by professional peers assured any client, rich or poor, that he will be safeguarded against incompetence or misdirected services by locally admitted lawyers? Parochial concerns about license and about unauthorized practice of law have too often masked either the answers to that question, or, indeed, even the framing of

the question. The present military-bar negotiations illustrate the process.

The strength of resistance to the pilot program was greater the closer the program came to a bar that considered that its livelihood was threatened. In some instances this resistance was assuaged by assurances of noncompetition; assurances which curiously also assuaged concern for the well-being of clients.

Principal representation by military lawyers often became more tolerable to the organized bar when it was coupled with arrangements for the appearance of locally admitted lawyers. That the role of the locally admitted counsel was in reality a secondary role—often analogous to that of Mr. Petrillo's stand-by musicians—was of little concern if words like "supervise," and "responsible" were used to describe the role. The assertion of the jurisdiction was important. More than face saving was involved. It was the maintenance of control over entry.

The organized bar exerts considerable control over the entire question of admissions—even temporary or special admissions. The courts, which have the inherent power to admit, have frequently surrendered much of that power to the bar. Presumably this partnership evolved so that the bar could exercise a stewardship over the profession, in the name of the public and in the name of the clients. It seems from our study that the bar's perception of this responsibility is by no means clear or central. Where client interest is involved there is confusion. In the case of indigent clients there may have even been abdication—witness the new legal aid societies which have been created in the wake of the threatened military legal assistance program. Frequently the confusion gave way to clarity—an unpleasant clarity: The client was not central at all; the profession was. Too often we saw a naked or barely disguised view that the law license is, or ought to be, a guarantee of income from a certified market area.

The military program is threatening. It is a socialized system for the delivery of legal services. The fractionalization of the group is unnatural. Accordingly, it does not cause actual dislocation of the present marketing arrangements for the distribution of legal services. There is no assurance that a group system is or can be the best way to deliver services, even to those who can pay. But, a review of that issue, from the viewpoint of the client, the society, and even the profession requires a thoughtful dialogue. The power of the legal profession to block that dialogue by veto is felt. If it is not real, at least the prestige element of the power—the presumed power—is

enough to alter the dialogue. The military altered its plans for services to its group partly out of an analysis of bar power. Interests of clients must be balanced against interests of the profession, and if "profession" means anything, the interests of the client must be given greater weight. Lawyer dislocation is always possible—and probable.[189] There is a serious question, however, as to how a profession should react to that possibility: As a profession or as a trade union?

During the negotiations in the several pilot program jurisdictions the charge "creeping socialism" was frequently leveled at the military program as a way of ending thoughtful debate. The context of its use is descriptire of a view of lawyer role and license which I will typify by calling "creeping professionalism." This is a state of mind that disassociates the public utility aspects of the legal profession from the purpose and the function of the law license. It is a state of mind that paradoxically leaves the individual lawyer in a weaker position to independently render service to his client, free from outside influence, because he, too, looks to or is asked to look to a collective—the bar association—to protect him from the vicissitudes of the market. It is a state of mind that views the law license as analogous to a protective tariff, Seither pejorative usage is truly helpful. There is still the question of how best to meet the legal needs of the indigent military personnel and the nonindigent military personnel. For that matter, there remains the question: How are the legal needs of the public best met by the legal profession? Is the legal profession ready to face this question free from the pulls of parochialism, as a true profession—accepting the model of service ahead of gain?

[189] On the other side of the coin, client dislocation has not only **been** possible. it has been evident.

PRESUMPTIONS AND INFERENCES IN CRIMINAL LAW*

By Major **Jack** P. Hug**

Recent constitutional challenges to the federal drug laws have focused attention on the use of presumptions and inferences in the criminal law. The author reexamines the often confusing terminology in this area and studies the leading civilian and military cases. Among the presumptions and inferences examined are the presumption of sanity, the inference of unlawful possession of drugs, and the five-day rule in bad check cases under UCMJ, 123a.

I. INTRODUCTION

Professor Morgan once wrote of presumptions, "Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic with a sense of helplessness and has left it with a feeling of despair." [1] It is apparent, however, that much, if not most, of the confusion in the field could be dispelled if two basic facts were recognized. First, differences in terminology have created difficult problems in this abstruse area of the law. Second, the differences among contemporary commentators are largely grounded in the dispute between Thayer [2] and his followers, notably Wigmore [3] on one side and Morgan [4] and his followers on the other.

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*This article was adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author **was** a member of the Nineteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Morgan, ***Presumptions,*** **12** WASH. L. REV. **255 (1937).**

*James Bradley Thayer was author of PRELIMINARY TREATISE ON EVIDENCE (1895) and numerous other **works** on evidence.

[3] John H. Wigmore was author of the leading treatise in the field, EVIDENCE. The third edition (1940) is hereafter cited **as** WIGMORE.

[4] Edmund M. Morgan was author of many writings in the field **of** evidence and Chairman, Committee to Draft Pniform Code of Military Justice, 1948-1949.

The reasons for the controversies and confusion over terminology are largely historical, Presumptions arose in early English practice to overcome the difficulties inherent in primitive systems of trial where the opportunity to hear evidence and arrive at rational decisions were largely lacking. Presumptions became and remained expedients designed to serve a variety of purposes. They usually arose when other means of effectuating the purpose sought were cumbersome, inconvenient, or not in accord with existing theory or practice.[5] By the last third of the nineteenth century legal writers were using the terms presumption and inference interchangeably to apply to a logical deduction that could be drawn from a set of facts.[6]

As analysis became more refined, the courts and commentators adopted new language to describe the legal and practical effects of presumptions, inferences, and other devices used to allocate burdens and assist triers of fact in meeting their responsibilities. Unfortunately, at least until recently judges and commentators were generally unable to agree on terminology or felt compelled to invent their own. Contemporary writings and case law indicate that this situation is gradually being corrected. It is now possible to dispel some of the confusion inherent in the area of presumptions through more rigorous analysis and more accurate terminology than was previously employed.

II. TERMINOLOGY

Presumptions must be defined in terms of their legal effect. Where controversy exists regarding the legal effect of presumptions, it is self-evident that disagreement as to definitions will be inevitable. Generally speaking, most writers agree that a presumption is a legal mechanism which deems one fact to be true when the truth of another fact has been established, unless sufficient evidence is introduced to render the presumption inoperative.? Presumptions are generally divided into three types: conclusive presumptions, rebut-

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[5] 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW, 142-45 (3d ed. 1966 reprint). The history of the law of presumptions is traced by Professor McBaine in *Presumptions; Are They Evidence?*, 26 CALIF. L. REV. 519 at 521–27 (1938). *See generally* WIGMORE § 2491.

[6] Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16 (1942), Traynor, J., (dissenting opinion); *see* McBaine, *supra* note 5; WIGMORE §§ 2490–2493.

[7] Ashford and Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases, A Theoretical Overview*, 79 PALE L. J. 165 (1969) [hereafter cited as ASHFORD AND RISINGER].

table presumptions and permissive inferences.[8] The conclusive presumption is in reality a rule of substantive law! It is not a presumption at all,[10] and is beyond the scope of this article.

The difference between a rebuttable presumption and a permissive inference is usually held to be that a presumption is a mandatory deduction, born as a matter of law, while an inference is a permissive deduction which the jury may or may not draw, as they see fit.[11] To illustrate, where there exists a rebuttable presumption of P from base fact B, if the jury finds B they *must* find P. If there exists a permissive inference of I from B, if the jury finds B they *may*, but need not, find I.

If *no* evidence of not-P or not-I is introduced, the jury will be instructed that they must find P from B if they find B and that they may find I from B, but need not do so, if they find B. If *some* evidence of not-I is introduced, the jury will be instructed that they may weigh the evidence on both sides and determine the issue as they see fit. It is where the law speaks in terms of rebuttable presumptions, not inferences,[12] and some evidence of not-P is introduced, that problems arise.[13]

Most commentators now agree that rebuttable presumptions may

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[8] Other terminology has been used, ***See*** COKE *ON* **LITTLETON**, 6b (1835 reprint). Lord Denning uses the terminology of provisional presumptions, compelling presumptions, and conclusive presumptions. Denning, ***Preaumptiona and Burdens***, 61 L. &. REV. 379 (1945).

[9] **WIGMORE** § 2492. ***See*** Bohlen, ***The Effect of Rebuttable Preeumptione of Law Upon the Burden of Proof***, 68 U. PA. L. REV. 307, 311, 312 (1920).

[10] *See* Kusior v. Silver, 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d **657 (1960)**, a paternity action. An interesting application of the rule regarding conclusive presumptions occurred in Hess v. Whitsett, 257 Cal. App.2d 552, 65 Cal. Rptr. 45 (1967). The court correctly applied California's conclusive presumption of legitimacy of a child born to cohabiting spouses (CAL. CODE CIV. PROC. § 621 (West 1966)) in favor of a child with "features generally characteristic of the Negro race" born to Caucasian parents where the mother admitted numerous acta of intercourse with the Negro defendant prior to and subsequent to conception of the child, although she continued to cohabit with her husband. The court refused to create a "racial exception" to the conclusive presumption and refused to follow dicta to the contrary in an earlier case, Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919). The ***Hese*** case illustrates that although earlier courts could sometimes be led astray by the term conclusive presumption, modern courts will treat the term in its proper Sense as a rule of substantive law which allows no room for discretion as to the fact "presumed." ***Compare*** Kusior v. Silver, 54 Cal.2d 603, 7 Cal. Rptr. 129; 354 P.2d 657 **(1960)**.

[11] State v. Corby, 28 N.J. 106, 114, 145 A.2d 289, 293 (1958).

[12] C. MCCORMICK, EVIDENCE 640 (1954) [hereafter cited as MCCORMICK]. McCormick argues that most presumptions do no more than take the case to the jury. Id. at 649–50.

[13] It will be noted at this point that the presumptions of sanity and innocence, ***inter alia,*** nowhere fit this discussion, as they do not depend on the establishment of a base fact B.

be separated definitionally into two types, the Thayer type and the Morgan type, so termed after their leading proponents.[14] In the Thayer view, the existence of the presumed fact must be found by the fact finder unless evidence is introduced which would justify a jury in finding the non-existence of the presumed fact. When such evidence is introduced the existence or nonexistence of the presumed fact is determined exactly as though no presumption ever operated. No instruction regarding the presumption is given the jury. It is to be noted that whether the judge or jury believes the opposing evidence is entirely immaterial, so long as the opposing evidence is admitted into the trial. The presumption has no further function beyond allocation of the burden of producing evidence.[15]

Three variants exist in the Morgan type of presumption. Under all three, the presumed fact must be found if the base fact is found, unless evidence has been introduced which, as in the Thayer type, would justify a jury in finding the nonexistence of the presumed fact. However, in the Morgan presumptions the presumption remains and the fact finder is so instructed even when some evidence is introduced which would allow the jury to find the nonexistence of the presumed fact.[16] The differences among the Morgan types lie in the quantum of evidence necessary to allow the jury to find against the existence of the presumed fact. Requirements vary from substantial evidence of the nonexistence of the presumed fact, through evidence which makes the nonexistence of the presumed fact at least as probable as its existence, to a requirement that the existence of the presumed fnct be found unless the jury finds that the nonexistence of the presumed fact is more probable than its existence.

In the Thayer type of presumption the opponent merely has the burden of producing some evidence as to the nonexistence of the presumed fact P, in order to eliminate an instruction on the presumption and defeat a finding of P based solely on the presumption. On the other hand, the last variant of the Morgan type also reallocates the burden of persuasion as to P, since the opponent must convince the jury that it is more probable that the presumed fact does not exist, in order to prevail. In all three Morgan types the opponent

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[14] *See* nates 2–4, *supra.* and accompanying text. "he American Law Institute majority and minority positions contained in Draft No. **4**, Model Penal Code, and discussed by ASHFORD AND RISINGER are analytically variants of the Thayer and Morgan views.

[15] J. THAYER, PRELIMINARY TREATISE ON EVIDENCE **339** (1898). ***See*** *generally* Morgan, FORWARD TO MODEL CODE OF EVIDENCE 55 [American Law Institute **1942**).

[16] "Morgan, *supra* note **15.** *See generally Morgan, Instructing the Jury on Presumptwns and Burdens* ***of Proof.*** 47 HARV. L. REV. 59, **60-62** (1933).

bears a heavier burden than under the Thayer type.

It is appropriate at this juncture to describe and define the various burdens placed upon the parties in an Anglo-American trial. The term "burden of proof," as with other terms encountered in the area of presumptions, is multi-faceted. It is usually separated into two parts, the burden of persuasion and the burden of producing evidence.[17] In order to analyze these burdens it is necessary to examine the course of a trial in a common-law court.

One party, in a criminal case, the sovereign, starts with the burden of persuasion[18] of establishing facts in issue. There may be one fact in issue, or several. When the law gives a party the burden of establishing a certain fact in issue as a condition of giving him judgment, the burden never shifts, and he must discharge it or fail. In a trial, the burden of persuasion is discharged by the production of evidence sufficient to convince the trier of fact that the fact sought to be proved is indeed proved. As the trial proceeds the evidence may weigh first in favor of the party who has the persuasion burden, then against him, depending on what develops. Either side may introduce evidence in turn, or rely upon a combination of evidence and presumptions and inferences drawn from the evidence to persuade the finder of fact of the existence or nonexistence of the facts in issue.

As the case develops, the posture of the case may be such that it becomes incumbent upon one party to produce evidence to prove or disprove a particular fact in issue, or to counteract the opponent's evidence. This burden is termed the burden of production. This burden operates provisionally, that is, it can shift back and forth during a case until one party fails to meet it. He then loses on that issue. If that issue also is one of the ultimate facts upon which a burden of persuasion rests, he loses the case.

In a criminal case the ultimate facts are called elements of the offense, and the burden of persuasion as to each of them is upon the Government. The Government also starts with the production burden as to each element. If the Government establishes a *prima facie* case the production burden then shifts to the defense. At this point the Government will be able to defeat a motion for a directed verdict of acquittal. The defendant may, of course, introduce no evidence and simply rely on the fact finder's disbelief of the witnesses making the

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"Morgan, ***How to Approach Burden of Proof and Presumptions,*** **25** ROCKY MT. L. REV. **34, 35** (1952); WIGMORE §§ 2485–2487, MCCORMICK, §§ **306, 307.**

[18] *See* F. JAMES, CIVIL **PROCEDURE** § **7.6 (1965).** ***See also*** Denning, ***Presumptions and Burdens,*** **61 L.** Q. REV. 379 (1945), **and** Stone, ***Burden of Proof and the Political Procees,*** **60** L. *Q.* REV. **263–65** (1944).

prim facie case or even its rationally unfounded belief in defendant's innocence to acquit him. More likely, however, the defendant will attempt to meet the production burden by submitting evidence at least sufficient to raise a reasonable doubt as to the existence of one of the elements. If the defense does, the production burden then shifts back to the Government to re-establish its case beyond a reasonable doubt as to each element. The case continues in this manner until both sides have rested. Note that the persuasion burden began and remained with the Government. The production burden, which also began with the Government, shifted back and forth until one side failed to discharge it. This production burden attaches to each element, just as does the persuasion burden. The devices used to fix and discharge these separate burdens will now be examined.

It is already evident that different considerations are inherent in fixing persuasion burdens and fixing production burdens. It has been demonstrated that a presumption operates when a base fact is found, and as a consequence establishes, at least *prima facie,* a presumed fact.[19] Numerous so-called presumptions, however, affect a legal proceeding without any base fact being established at all. The presumption of innocence and the presumption of sanity are illustrative. It follows that a term other than presumption should be used to describe these persuasion burden-establishing devices. As suggested by Fisk,[20] the term assumption lends itself admirably to this task. The difference between assumptions and presumptions is that what is assumed is not proved; what is presumed is proved. Neither party need prove anything assumed. On the contrary, presumptions are rules of law whereby a fact is deemed proved by other facts already introduced voluntarily by one of the parties.[21] A presumption really operates to assist the party having the production burden on a particular issue. It does so by imposing on the party's opponent the duty of producing evidence as to that issue. Consequently, two very different legal tools are often both described as presumptions. As used here, an assumption affects the persuasion burden; a presumption affects the production burden. The difference between the two devices must be kept in mind and understood.

III. ASSUMPTIONS AND PRESUMPTIONS IN CRIMINAL LAW

In criminal law the difference between assumptions and presumptions is vital. To take a simplified example, assume a criminal charge,

[19] See note 13, *supra,* and accompanying text.
[20] O. FISK, THE LAW OF PROOF IN JUDICIAL PROCEEDINGS 26 (1928)
[21] *Id.*

the elements of which are A, B, and C. The law of the jurisdiction recognizes affirmative defenses **X** and **Y.** Assume further that the law of the jurisdiction states that if the jury finds A and B to be true beyond a reasonable doubt, they may find C. We therefore have operating a *presumption* of C, if the jury finds A and B. We have at the outset *assumptions* of not-A, not-B, and not-C, because to prevail the prosecution must establish A, B, and C.[22] We similarly have assumptions of not-X and not-Y, since the accused has the legal burden of establishing these. Again, note that all the assumptions appear and operate by law, while the only presumption depends upon the introduction of evidence. It is also evident that the assumption of innocence is merely a shorthand description of the assumptions not-A, not-B, and not-C, but it has nothing to do with not-X or not-Y.

The assumption of innocence is fixed by law,[23] and operates not in the Sense of an inference deduced from given facts but rather as an assumption which places the burden of producing evidence upon the prosecution, which is asserting in the charge deviation from accepted rules of conduct by the accused.[24] This point, however, has not always been clear to the courts. In one case,[25] the court asserted that the presumption of innocence is a legal presumption which the jury must consider along with the evidence and presumptions arising from the evidence. This sort of oversimplification must have been confusing to juries, to say the least. In fairness to the author judge, the language of his opinion reflects the tenor of the times, dates back at least to Greenleaf's *Evidence* of **1834,** and resulted in reversal of the case for failure of the trial judge adequately to explain the assumption of innocence to the jury.

IV. THE CONSTITUTIONALITY OF PRESUMPTIONS

Because it may eliminate difficult problems of proof, the true presumption can be a powerful weapon for the party in whose favor it runs. Courts have long recognized this fact and its constitutional concomitant that the improper use of a presumption to impair the rights of an opponent may deprive the opponent of due process of law. Although other tests have been briefly used and then discarded,

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[22] **N.B. We have a *presumption* of C if the jury finds A and B. We have an *assumption* of not-C.**

[23] **WIGMORE § 2611. Although the origins of the term and the principle are the subject of some historical debate, they became fixed in Anglo-American practice by the late eighteenth century.**

[24] ***See* Carr v. State, 192 Miss. 152, 4 So.2d 887 (1941).**

[25] **Dodson v. I'nited States, 23 F.2d 401 (4th Cir. 1928).**

the test which the United States Supreme Court has evolved for determining the constitutional validity of a presumption has been termed the rational-basis test. The line of cases begins with *Mobile, Jackson, and Kansas City Railroad v. Turnipseed*,[26] a civil negligence case. There the Court held that a presumption is constitutional so long as a rational connection exists between the base fact and the fact presumed from the base fact.[27] The Court added that the inference of one fact from proof of another must not be so unreasonable as to be a purely arbitrary mandate.[28] Following *Turnipseed* came a line of cases applying the rational-basis test in the criminal field. In *Yee Hem v. United States*,[29] the Court, quoting *Turnipseed*, upheld a statute presuming importation of opium from its possession. Justice Sutherland, for the Court, considered it not violative of due process to require the defendant to show the circumstances which rebut the not "illogical inference" that opium found in the United States fourteen years after its importation had been prohibited, was unlawfully imported.[30] Two years later, in *Ferry v. Ramsey*,[31] the court postulated the "greater includes the lesser" test which held that when Congress constitutionally created a crime which would have included an omitted element, a presumption supplying that element would pass muster. The case was never followed, and impliedly overruled in *United States v. Romano*.[32] The Court found the required rational connection between the presumed element and the proved facts lacking (thus adhering to the rational connection test) and stated that the test in criminal cases, at least, is not whether Congress could have created the greater offense, but rather whether what they in fact did is constitutionally valid.[33] Another minor deviation occurred in *Morrison*. v. *California*.[34] There the Court stated in essence that if on the whole it is easier for the defendant to disprove the presumed fact than it is for the Government to prove it, the presumption will be upheld. In *Tot v. Cnited States*.[35] still the leading case, the Court held that the rational connection test is paramount and the *Morrison* comparative convenience test is a corollary thereof.[36] The presump-

[26] 219 U.S. 35 (1910).
[27] *Id.* at 43.
[28] *Id.*
[29] 268 U.S. 178 (1925).
[30] *Id.* at 184. The Court also approved finding a "presumption of guilt" from unexplained possession. This language is no longer permissible. *See, e.g.*, United States v. Troutt. 8 U.S.C.M.A. 436, 24 C.M.R. 246 (1957).
[31] 277 U.S. 88 (1928) *per* Holmes. J.
[32] 382 U.S. 136 (1965).
[33] *Id.* at 144.
[34] 291 U.S. 82 (1934).
[35] 319 U.S. 463 (1943).
[36] *Id.* at 467.

tion in issue was that the firearm Tot had used during an armed robbery had previously been shipped in interstate commerce.[37] The Court found no rational connection between the base fact and the presumed fact. It further qualified the comparative convenience test by stating that in every criminal case the defendant has at least an equal familiarity with the facts, and that it might therefore be sound to put upon the defendant the burden of going forward with the evidence.[38] As the Court pointed out, if this contention were accepted, serious and impermissible inroads would be made into the assumption of innocence. Although it may be a convenience to the prosecution to shift certain burdens to the accused, the Court held it may do so only when the inference is a permissible one as determined by other tests, the defendant has in fact more convenient access to the proof, and requiring him to go forward with proof will not subject him to unfairness or hardship.[39]

In *United States v. Gainey*,[40] the Court upheld a presumption that presence at an unbonded still was sufficient evidence upon which to base a conviction for carrying on the business of an unbonded distiller. The Court specifically reaffirmed *Tot*. A strong dissent by Justice Black contended that when Congress allows a presumption to supply an element of an offense it violates public policy, denies due process, and usurps the function of the court.[41] In *Leary v. United States*,[42] the Court reformulated the test, while specifically adhering to *Tot*. They stated that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, "unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* [emphasis added] to flow from the base fact."[43] The Court added that in the judicial assessment the Congressional determination favoring the particular presumption must weigh heavily.[44] Finally, in *Turner v. United*

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[37] 15 U.S.C. § 902 (F) (52 Stat. 1250) (1938) was the Federal Firearms statute under which Tot was convicted. Tot, according to the opinion of the Court, was a twice-convicted felon prohibited by the Act from receiving any firearm shipped in interstate commerce.

[38] Tot v. United States, 319 U.S. 463, 469-70 (1943).

[39] *Id.*

[40] 380 U.S. 63 (1965).

[41] 380 U.S. 63, 74-88. In *Romano*, another presence-at-a-still case, the Court overturned a presumption that presence at the still could be deemed possession of the still, finding an insufficient rational connection between the fact presumed and the fact proved.

[42] 395 U.S. 6 (1969).

[43] *Id.* at 36.

[44] *Id.*

States,[45] decided in **1970,** the Court restated much of the language found in previous presumption cases and again adhered to the rational connection test.

In the criminal field it would appear that most of the constitutional problems concerning presumptions have arisen when courts are allowed to find elements of a criminal offense only because of presumptions (and inferences) operating in favor of the prosecution. It has recently been argued that the rational basis test standing alone permits approval of statutory criminal presumptions which should be held unconstitutionally violative of due process.[46] These arguments will not be repeated here. However, some points must be made. It cannot be forgotten that the presumptions under attack as furnishing elements are ones which affect the burden of producing evidence. The burden of persuasion is placed upon the Government by the assumption of innocence. The presumption operates to place a certain burden of production on the accused by deeming the Government's evidence of B, the base fact, as sufficient evidence of P, the presumed fact, as well, unless the defense can satisfy the trier of fact that such is not the case. The question of validity thus focuses on whether a jury can or should be permitted to find P when B is established.

It is necessary in this context to return to a basic consideration of presumptions. If the presumption is treated under the Thayer rationale and some evidence to the contrary is presented by the accused, the presumption will drop out of the case and the Government will fail if it stands an the presumption alone. If it is a Morgan presumption, the accused may attack B or P, as he chooses. Assuming the Government has established B, the production burden as to both B and P shift to the defense. If it attacks both or B, the jury will be told that before they may find P they must find B beyond a reasonable doubt. If it attacks P only, the jury will be told that they may find P if they are convinced of its existence beyond a reasonable doubt—that is, unless the evidence of not-P has raised a reasonable doubt in the jury's mind. With this in mind it is difficult to see how any standard other than reasonable doubt can be applied to test the validity of a criminal presumption on due process grounds. If the jury is required to find P and B both beyond a reasonable doubt, and it is only more-likely-than-not that P exists when B does, obviously the jury lacks sufficient probative evidence upon which to base its finding of the existence of P beyond a reasonable doubt.

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[45] **396** U.S. **398** (1970).

[46] **Comment,** *The Constitutionality of Statutory Criminal Presumptions*, **34** U. CHI. L. REV. 141 (1966).

There is an indication in *Turner* that the Court is preparing to address this problem. The Court stated that:

> [T]he overwhelming evidence is that the heroin consumed in the United States is illegally imported. To possess heroin *is* [emphasis in original] to possess imported heroin. Whether judged by the more-likely-than-not standard applied in *Leary v. United States*, or by the more exacting reasonable-doubt standard normally applicable in criminal cases, [the presumption] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.[47]

The Court went on to hold that, even under the *Leary* more-likely-than-not test, a similar presumption regarding cocaine was invalid.[48] The question now open is what happens when the Court finds a presumption valid under the *Leary* test but invalid if a reasonable doubt test is applied? One can only speculate, but, as stated above, the Court may have extreme difficulty in sustaining such a presumption. To this end the *Turner* language may be a signal of things to come.[49]

The above discussion is of course applicable to those presumptions which allow the jury to find facts essential to proof of the prosecution's case. Presumptions which operate solely as rules of evidence are another matter. For example, there is generally a presumption in the law that official records are genuine, allowing their introduction into evidence as an exception to the hearsay rule. This presumption and others of similar operation may well be tested by a more-likely-than-not standard, because the question goes to admissibility of the evidence, rather than elements or ultimate facts.

V. PRESUMPTIONS IN MILITARY LAW

A. *IN GENERAL*

There are few specifically defined presumptions in the current Uniform Code of Military Justice and the Manual for Courts-Martial.[50] Most of what formerly were presumptions in military law have been accorded the status of permissible inferences in the current manual.[51] Whereas the 1951 Manual's language regarding presump-

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[47] 396 U.S. at 415–16.

[48] *Id.* at 418.

[49] *See* Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L. J. 919, in which the authors contend that the Supreme Court adopted the reasonable doubt test in *Turner*.

[50] UNIFORM CODE OF MILITARY JUSTICE art. 123*a* [hereafter cited as UCMJ]; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION) [hereafter cited as MCM 1969 (REV.)] para. 202A.

[51] U.S. DEP'T OF ARMY, PAMPHLET NO. 27–2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, REVISED EDITION (July 1970) [hereafter cited as DA PAM 27–21.

tions was confusing at best and resulted in errors of interpretation, primarily due to its failure to distinguish between differing types and effects of presumptions, the 1969 Manual applies the term presumption only to those things which the court is bound to assume in the absence of adequate evidence to the contrary.[52] It lists two such "presumptions," innocence and sanity,[53] and states that these presumptions are procedural rules governing the production of evidence and do not themselves supply evidence.[54] This discussion is followed by a nonexclusive list of permissible inferences which the court may draw if it sees fit. The Manual [55] states that these are not presumptions at all, but merely well recognized examples of the use of circumstantial evidence. The drawing of these inferences is not mandatory and their weight or effect is to be measured only in terms of their logical value.[56] The Manual goes on to state:

> [T]he fact that evidence is introduced to show the nonexistence of a fact which might be inferred from proof of the facts does not, if the evidence can reasonably be disbelieved, necessarily destroy the logical value of the inference, but the rebutting evidence must be weighed against the inference. The same is true if evidence is introduced to show the nonexistence of the facts upon which the evidence is based."

These inferences are, using the terminology developed in Part I herein, Morgan presumptions. The devices the Manual refers to as presumptions are assumptions; the language of the Manual so states.[58] The assumption of innocence is handled no differently in military law than anywhere else—the Government must establish the guilt of the accused as to each element of the offense charged by lawful and competent evidence beyond a reasonable doubt.[59] Accord-

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[52] DA PAM 27-2. *Compare* para. 138*a*, MCM, 1951, *with* para. 138*a*, MCM, 1969 (REV.). On the prospective effect of the 1969 Manual on the law of presumptions in the military *see generally* Birnbaum, *Evidence in the 1969 Manual*, 10 AFJAG L. REV. (So. 6) 39 (1968). Birnbaum, a member of the committee which drafted the 1969 Manual provisions, states that the language regarding presumptions reflects decisional law since 1961 and operates to clarify and adjust the misleading language of the 1951 Manual in the area of presumptions.

[53] Para. 138*a*(1), MCM, 1969 (REV.). A third presumption, competency of witnesses, is mentioned elsewhere. *See* note *58, infra*.

[54] *Id.* Paragraph *a*(2) has no such statement with reference to permissive inferences supplying evidence.

[55] MCM, 1969 (REV.) para. 138*a*(2).

[56] *Id.*

[57] *Id.*

[58] MCM, 1969 (REV.), para. 138*a*(1) (sanity and innocence); para. 148*a* (competency of witnesses aged fourteen years or over is presumed, and clear and convincing evidence is required to rebut the presumption).

[59] Manual provisions not in conflict with the Uniform Code of Military Justice or the U. S. Constitution, or inconsistent therewith or with other Manual provisions or principles of military justice, have the force of law. United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

ingly, analytical problems regarding the assumption of innocence are the same in courts-martial as they are in civilian courts and may be treated in the same way. It is with the presumption (assumption) of sanity and certain representative inferences [Morgan presumptions] that the remainder of this section will be concerned.

B. *ARTICLE 123a*

The evidentiary portion of Article 123*a*, UCMJ, provides that failure to redeem a check returned for insufficient funds within five days after receipt of notice that it was not paid upon presentment will be *p r i m facie* evidence that the accused drawer of the check intended to defraud or deceive the payee and that the accused knew he had insufficient funds on hand to pay the check. The Manual defines *prima facie* evidence as that proof which, if unrebutted, is sufficient to establish the accused's intent to defraud or deceive and his knowledge of insufficient funds in or credit with the bank or other depository.[60] Article 123*a* had its genesis in bad check statutes in the District of Columbia,[61] Missouri,[62] and New York,[63] and the language is taken from these enactments, particularly the District of Columbia's statutes.[64] It appears that the military five-day rule was taken directly from the District of Columbia statute.[65]

No case appears in any of the above-mentioned jurisdictions, or in the military, challenging the five-day rule. It clearly operates in both its aspects (knowledge and intent) as a presumption, rather than an assumption, both in the military version[66] and the civilian versions upon which it is based.[67] In *United States v. Dipietrantonio*[68] the

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[60] MCM, 1969 (REV.) para. 202A. The term *prima facie* is often used in the sense which equates it to a presumption. WIGMORE § 2494.

[61] DISTRICT OF COLUMBIA CODE § 22-1410 (42 Stat. 820) (1922).

[62] VERNON'S ANNOTATED MISSOURI STATUTES 561.470 (Laws 1917 p. 244). The period of redemption was raised to ten days in 1963. Prior to that it was five days.

[63] N. Y. PENAL LAW §§ 190.00—190-15 (McKinney 1967).

[64] The background and origins of article 123*a* are exhaustively discussed in United States v. Margelony, 14 U.S.C.M.A. 55, 33 C.M.R. 267 (1963).

[65] *Hearing on H.R. 7637 before the Senate Committee on Armed Services.* 87th Cong., 1st Sess. 10 (1961). Testimony is that of Major General A. M. Kuhfeld, Judge Advocate General, United States Air Force.

[66] United States v. Dipietrantonio, 16 U.S.C.M.A. 386, 37 C.M.R. 6 (1966); United States v. Margelony, 19 U.S.C.M.A. 55, 33 C.M.R. 267 (1963); United States v. Chancelor, 25 C.M.R. 897 (AFRR 1965).

[67] McGuiness v. United States, 77 A.2d 22 (D.C. Mun. App. Ct. 1950); State v. Phillips, 430 S.W.2d 635 (Mo. Ct. App. 1968); People v. Parker, 51 Misc.2d 843, 274 N.Y.S.2d 38 (1966).

[68] 16 U.S.C.M.A. 386, 37 C.M.R. 6 (1966).

court admonished the staff judge advocate who reviewed the case [69] for having confused the terms presumption, presumption in law, and inference, in the area of the operation of Article 123*a*. The SJA's review carried the astonishing language that the requirement upon the Government to show intent to defraud is satisfied by a presumption, in law, that a person is presumed to know the natural and probable consequences of his acts. It then went on to mention the statutory five-day rule.[70] The court discussed the presumption of innocence and its application in the review process, and concluded by stating that the staff judge advocate had really only used the term "presumption in law" to make a legal assessment of the prosecution's case. The court then cautioned against indiscriminate use of the term "presumption," found no prejudicial error and affirmed.

Although the five-day rule has never been questioned as to its validity, it stands on a very shaky base and could well be termed arbitrary. Military personnel are paid either monthly or twice monthly. Many of them live from payday to payday as the long lines in commissaries and exchanges on payday show. Such savings as they may have are often in distant financial institutions.[71] To allow a finding of intent to defraud from the five-day rule, standing alone, under these circumstances could well be found lacking in a rational basis and hence unconstitutional as a matter of due process.

C. INSANITY

The military rules on insanity are contained in Chapter XXIV, MCM, 1969 (Rer.). Procedurally, the accused is assumed to be sane at the time of the offense charged, and to be sane at the time of the trial, until evidence which could reasonably cast doubt as to his sanity at the time in question is introduced.[72] If such evidence is introduced by any party, the prosecution musk establish the accused's sanity beyond reasonable doubt.[73] However, the Manual provides that since most persons are sane, it may be inferred that an accused was sane at the time of the offense and the time of trial.[74] Thus we have

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[69] UCMJ art. 61; MCM, 1969 (REV.) para. 85.

[70] 16 U.S.C.M.A. at 387, 31 C.M.R. at 7 (1967). Unless fraud is a natural consequence of check cashing, the statement is clearly inapposite in the context in which it was made.

[71] *See Hearings, supra,* note 65 at 13.

[72] MCM, 1969 (REV.) paras. 122*a*, 138*a*.

[73] MCM, 1969 (REV.) para. 122*a*.

[74] MCM, 1969 (REV.) para. 138*a*. The Manual states that this rule permits consideration of the evidence in light of the general human experience that most persons are sane.

initially an assumption of sanity which requires that some evidence of lack of sanity be produced to avoid a finding of sanity, and a Morgan presumption of sanity which apparently continues in the case until decision regardless of any other evidence. Insanity in the military has a "preferred" status as a defense in that it is something apart from an affirmative defense.[75] However, the extent to which the inference of sanity operates has confused many people and is not yet settled.

The 1951 Manual termed the inference of sanity a presumption[76] giving rise to much confusion. The Court of Military Appeals attempted to dispel some of the confusion in *United States v. Biesak*,[77] which remains the leading military case in the area. There the court characterized the presumption of sanity as a permissible inference and created the presumption-inference dichotomy which appears in the 1969 Manual. The court has attempted, with some success, to explain and simplify the military rule on insanity in later cases. It is apparent that the 1969 Manual rule (stated as a presumption) operates merely as a burden-assigning device and adds nothing to resolution of the question of sanity once it is raised. The court has so indicated in other cases.[78] However, the function of the *inference* of sanity which remains after introduction of evidence of insanity remains as nebulous today as it was in 1954 when *Biesak* was decided. It has been stated that the 1969 Manual restates existing law in the area, including *Biesak*,[79] although the language of the section was rewritten to emphasize the differences between that which the 1969 Manual terms the presumption of sanity and that which it terms the inference of sanity.[80] Accordingly, cases decided under the 1951 Manual are still valid precedents in this area. The oases illustrate continuing differences of opinion and interpretation, both at the trial and appellate level.

It appears that lay testimony along with the inference of sanity can be sufficient to satisfy the prosecution's burden, even though

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[75] United States v. Babbidge, 18 C.S.C.M.A. 327, 40 C.M.R. 39 (1969). Some lower courts have had difficulty with the idea of preference and have treated insanity as an affirmative defense. *E.g.*, United States v. Enzor, 40 C.M.R. 707 (ABR 1969).

[76] MCM, 1951, para. 122*a*.

[77] 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).

[78] United States v. Oakley. 11 U.S.C.M.A. 187, 29 C.M.R. 3 (1960); *cf.* United States v. Biesak, 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).

[79] Birnbaum, *supra*, note 52.

[80] DA PAM 27-2. pp. 27-1, 27-2.

there is expert testimony to the contrary.[81] While the testimony of an expert witness cannot be arbitrarily ignored, the credibility and weight to be given it are jury questions.[82] Accordingly, it appears that although expert testimony is to be accorded great weight, under the usual expert testimony instructions, it can be offset and overcome by other evidence, even lay testimony. It is not clear, however, how much other evidence is required.

To begin with, the language of *Biesak* was susceptible of differing interpretations in key areas. The unfortunate term "evidence supplied by the presumption" continued to plague the court. Judges were admonished that they should omit the term presumption from instruotions to court members,[83] but they continued to include it nonetheless.[84] It is settled that the *assumption* of sanity does not supply evidence. The treatment of the military rule on the *inference* of sanity is a different matter. The Court of Military Appeals has repeatedly stated that triers of fact may utilize their commonsense and knowledge of human nature and the ways of the world in determining sanity, as well as determining every other controverted point.[85] Accordingly, the court held in *United States* v. *Johnson* that the human experience that most people are sane and the consequent rational probability that a particular man is sane, can be deemed by a jury to outweigh, in evidential value, even expert testimony that the accused is or mas insane.[86] It would appear that standing alone, this language would justify affirmance of a finding of sanity based solely on the inference of sanity, without any evidence being introduced by the Government once the issue is deemed raised. This is true because the *Biesak* opinion and the Manual language both base the inference of sanity solely on the above-mentioned human experience that most persons are sane.[87] It is further settled that the Gov-

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[81] United States v. Carey, 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960) (COMA noted that the expert witnesses had disagreed as to the basis of their opinions); United States v. Schlomann, 36 C.M.R. 622 (ABR 1966), *aff'd*, 16 C.M.R. 414, 37 C.M.R. 34 (1966).

[82] United States v. Wilson. 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969).

[83] United States v. Oakley, 11 U.S.C.M.A. 187, 29 C.M.R. 3 (1960), Ferguson. J. (concurring opinion).

"United States v. Higgins. 37 C.M.R. 337 (ABR 1966).

"United States v. Carey. 11 U.S.C.M.A. 443; 29 C.M.R. 259 (1960); United States v. Oakley. 11 U.S.C.M.A. 187, 29 C.M.R. 3 (1960); United States v. Biesak. 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).

[86] United States v. Johnson. 3 U.S.C.M.A. 726, 14 C.M.R. 143 (1954), decided the same day as Biesak.

[87] The *Biesak* opinion also stated that the belief that insanity is easily feigned was another basis for its holding. The court later disavowed this proposition

ernment must prove sanity beyond a reasonable doubt once the issue is raised. Accordingly, if the Government attempts to rely solely on the inference, the inference must hold beyond a reasonable doubt. While a moment's reflection indicates that the rational basis test for the validity of a presumption is met because most people are really sane, the same reflection indicates that standing alone, the inference cannot possibly meet the reasonable doubt test, because the accused is not necessarily one of "most people." Consequently, the only test which may be validly applied in light of *Gainey*, *Turner*, *Tot*, and other cases in the area is the reasonable-doubt test, so long as the Government relies solely on the inference. This is self-evident; otherwise the court would be able to find a fact (sanity beyond a reasonable doubt) that otherwise may only be more-likely-than-not to be true. To say that since most people are sane the accused is sane beyond a reasonable doubt removes, it is submitted, the question of sanity from consideration at all. On the other hand, the inference usually arises in connection with independent evidence favorable to the Government, so that what it appears to be is really an instruction to treat evidence of the accused's lack of sanity with skepticism. Although the presumption-as-evidence problem is not yet dead, the view of the vast majority of commentators is that presumptions are not evidence and cannot be treated as such. The reason was succinctly stated by Justice Traynor:

> It is a mental impossibility to weigh a presumption as evidence. Juries can decide **upon** the probable existence of a fact only by a consideration of actual probative evidence thereon. **A** rule of law that the fact will be presumed to exist in the absence of evidence cannot assist them in determining from an examination of evidence whether **or** not the fact exists. It is impossible to weigh a rule of law on the one hand against physical objects and personal observation on the other to determine which would more probably establish the existence or nonexistence of a fact.[88]

The assumption of sanity operates to place the persuasion burden as to that issue upon the Government once the issue is raised. The presumption of sanity, which military law terms as inference, operates

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entirely (United States v. Richards, 10 U.S.C.M.A. 475, 28 C.M.R. **41** (1959)). As stated in the ***Richards*** opinion, the proposal is "doubtful and controversial." It has been rejected impliedly in at least one leading jurisdiction (People v. Kroeger, 61 Cal.2d 256, 37 Cal. Rptr. 593, 390 P.2d 369 (1964)).

[88] Speck **v.** Sarver, 20 Cal.2d 585, 589, 128 P.2d 16, 21 (1942), Traynor, J. (dissenting opinion). Morgan states that the mental gymnastics involved in treating **a** presumption as evidence are almost impossible to perform. Morgan, ***Further Observations on Presumptions,*** **16** So. CAL. L. REV. 245 **(1943).** ***Bee generally*** WIGMORE § 2491.

to put upon the accused the burden of producing evidence as to his lack of sanity once the issue is raised.[89] The burden may be satisfied by the same evidence which raised the issue in the first place, if the evidence is compelling enough. However, further evidence is usually always presented by both sides.

For these reasons it is submitted that the Manual reference to the inference of sanity is surplusage. As the inference of sanity will not withstand a reasonable-doubt test it should not be deemed, standing alone, sufficient to support a finding of sanity once the issue is raised. The inference of sanity cannot be weighed along with the evidence to assist the court in finding sanity, or lack thereof, once conflicting evidence on the point has been introduced. The most a mention of the inference can do is allow the Government to bootstrap a weak case. As stated above, instructing the jury that since most men are sane this accused is inferably sane can only have the effect of denigrating the evidence that the accused is not sane, which has been found sufficiently compelling at least to raise the issue, if not to decide it. The inference of sanity rule will survive the rational basis test, but not a reasonable-doubt standard, standing alone. Consequently, although the material about human experience is arguably covered as well in the general instruction on circumstantial evidence[90] as it would be in a properly drafted instruction on the inference,[91] giving the instruction does not appear to be error. It is apparent, however, that a case where the Government relied solely, or very heavily, on the inference of sanity to support a finding of sanity by the trial court would be open to attack as not based upon substantial evidence. A more difficult problem is presented where the Government attempts to rely upon lay testimony, plus the inference, to rebut expert defense testimony that the accused is or was insane. As we have seen, as a matter of law the Court of Military Appeals holds that lay testimony, if credible, is sufficient to enable the trier of fact to reject expert testimony to the contrary. In this situation there is a risk that if the inference of sanity instruction is given, it may unduly sway the jury in their factual determination. It is submitted that in this instance, since the determination of the issue by

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[89] Tnited States v. Rabbidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969). One reason why insanity is more than an affirmative defense is that it is a defense to all lesser-included offenses as well as the offense charged. Procedurally. however. it operates in much the same manner as an affirmative defense.

[90] *See, e.g.*, DA PAM 27–9, MILITARY JUDGES' GUIDE, 1969, p. 9–16, para. 9–13.

[91] *Id.* at para. 7–4, p. 7–7. The model instruction contained therein tells the court that they may take the general experience of mankind into account in weighing the evidence pointing to the issue of the sanity of the accused.

laymen is fraught with difficulty in any case, the judge should rely on the standard circumstantial evidence instruction, and should remove any reference to the inference of sanity from his specific instruction on sanity.

In a recent case,[92] the Court of Military Appeals considered some of these issues. The accused was charged with robbery and assault. The two victims, female Navy officers, were the Government's only witnesses. The only defense witness was a Navy psychiatrist who testified extensively on the accused's mental condition, and apparently was of the professional opinion that the accused could not adhere to the right at the time of commission of the offense. Judge Ferguson, for the court, held that the Government's evidence was insufficient upon which to base a finding of sanity. While in dictum he stated that the court did not hold that in every case the Government must present psychiatric testimony to overcome defense evidence on the issue of mental responsibility, he went, on to state that, "When, however, the record is devoid of any evidence permitting an inference of sanity, and reliable expert testimony is permitted by the Government to stand unrebutted and unimpeached, it is clear that, as here, a case exists in which reasonable men are not entitled arbitrarily to find the accused sane."[93] In dissent, Judge Quinn stated that he believed the military judge rejected the psychiatric testimony on the crucial point, and that the record supported this rejection. He cited no legal authority for his position on this point.

Nowhere in either opinion is the paragraph 138*a*, MCM, inference of sanity mentioned. The majority cites paragraph 122*a* for the proposition that the burden of proof of sanity is on the Government once it is raised. Paragraph 122*a* contains a cross-reference to paragraph 138*a*. It must, therefore, be concluded that if the court has not *sub silentio* overruled the 138*a* inference, at least they have held that the Government may not rely on the inference alone to support a finding of sanity. As the inference only arises when the presumption of sanity is eliminated due to evidence raising the issue, there will always be at least some eridence of lack of sanity in a case where the question arises at all. While it would appear that lay testimony plus the inference, or even lay testimony alone, will be sufficient as a matter of law to sustain a finding of sanity in spite of expert —timony to the contrary, the Government may no longer rely on the inference alone.

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[92] United States v. Morris, 20 U.S.C.M.A.446, 43 C.M.R. 286 (1971).
[93] *Id.* at 449, 43 C.M.R. at 289.

D. *THE PRESUMPTION OF WRONGFUL POSSESSION OR USE OF DRUGS*

The current Manual provides that possession or use of marihuana or a habit-forming narcotic drug may be inferred to be wrongful unless the contrary appears.[94] This provision is a restatement of the like provision in the 1951 Manual, except that the 1951 Manual termed the inference a presumption.[95] The 1951 Manual provision was upheld by the Court of Military Appeals in a series of cases,[96] and its validity was never seriously questioned by the court. The current provision casts upon the accused the burden of producing evidence as to the legality of his possession of either marihuana or a habit-forming narcotic drug.[97] It is only necessary that the accused reasonably place the question in issue; resolution of the question is then the responsibility of the trier of fact.[98] The court has recognized and approved the fact that this presumption casts the burden of producing evidence upon the accused. In *United States v. Greenwood*,[99] the Court stated that the presumption is based upon title 21, United States Code, section 174.[100] It went on to state that the framers of the Manual sought to enunciate a rule which would require one accused of the wrongful possession of drugs to present facts sufficient to raise any defense he may have for submission to a court-martial.[101] In this and subsequent cases the court has recognized the difficulty of forcing the Gorernment to prove by extrinsic evidence that the accused did not come within one of the exceptions to the rule which would make his possession lawful. They have recognized that these drugs are contraband, the possession of which is normally unlawful.[102] More importantly, they have recognized the difficulty in proving a negative. It has long been recognized by the

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[94] MCM, 1969 (REV.) para. 213*b*.

[95] MCM, 1951, para. 213*b*.

[96] United States v. West, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964); United States v. Holloway, 10 U.S.C.M.A. 595, 28 C.M.R. 161 (1959); United States v. Grier, 6 U.S.C.M.A. 218, 19 C.M.R. 344 (1955); United States v. Greenwood: 7 U.S.C.M.A. 209, 19 C.M.R. 335 (1963).

[97] United States v. West, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964); United States v. Grier, 6 U.S.C.M.A. 128, 19 C.M.R. 344 (1955); United States v. Skwarek, 37 C.M.R. 944 (ABR 1967).

[98] United States v. West, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964); United States v. Reese, 5 U.S.C.M.A. 560, 18 C.M.R. 184 (1955); United States v. Hughes, 5 U.S.C.M.A. 374, 17 C.M.R. 374 (1954).

[99] 6 U.S.C.M.A. 209, 19 C.M.R. 333 (1955).

[100] United States v. Turner, 18 U.S.C.M.A. 55, 39 C.M.R. 55 (1968) adhered to this position.

[101] *Id.* at 213, 19 C.M.R. at 339 (1955).

[102] United States v. West, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964).

court that where an exception does not constitute part of the offense, but operates merely to remove the taint of criminality from an act otherwise prohibited by law, the burden rests upon one charged with a violation of the statute to bring himself within the exception.[103]

Until quite recently, it would have seemed that any attack upon the presumption of wrongfulness was doomed to failure, because the rationales for the presumption appear sound. Certainly possession or use of either marihuana or habit-forming narcotics is permissible only under certain clearly-defined and extremely narrow circumstance~. The difficulties inherent in forcing the Government to prove that the accused did not come within any of the exceptions and the likelihood that, if the accused's possession is lawful, he will be able to explain why it was lawful, appear to fall well within the comparative convenience corollary to the rational basis test. Section **174** has been approved in a leading presumptions case, *Yee Rem v. United States*,[105] and has been upheld in literally hundreds of reported cases since its enactment.[106] However, in *Turner* v. *United States*[107] the Supreme Court took a new look at section **174.** The Court went behind the blanket statements contained in section **174** and made a factual determination as to the validity of the **174** presumption as applied to both heroin and cocaine. They found the presumption valid as to the former but invalid as to the latter.

While the **174** presumption deals with importation and is thus narrower than the Manual provision of paragraph **2136,** the fact that the Court of Military Appeals has consistently held that the Manual provision is based on section **174** indicates that the Court of Military Appeals must now consider *Turner*, a constitutional construction of section **174,** in determining the validity of any application of the Manual provision before the court. As the court has held that the provision applies only to marihuana and habit-forming narcotic drugs[108] they should have little difficulty in the context of

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[103] **United States v. Rose, 19 U.S.C.M.A3, 41 C.M.R. 3 (1969) ; United States v. Blau, 5 U.S.C.M.A. 232, 17 C.M.R. 232 (1954). Of course, the burden of proving guilt is at all times on the Government, and an instruction which suggests that it may shift to the accused is erroneous. United States v. Crawford, 6 U.S.C.M.A. 517, 20 C.M.R. 633 (19%).**

[104] **Comprehensive Drug Abuse Prevention and Control Act of 1970, Public LAW 91–513; 84 Stat. 1236, 1970 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 5263–5334.**

[105] **268 U.S. 178 (1928).**

[106] **21 U.S.C.A. § 174 (1988).**

[107] **396 U.S. 398 (1970).**

[108] **United States v. Turner, 18 U.S.C.M.A. 55, 39 C.M.R. 55 (1968) ; United States v. Peoples, 40 C.M.R. 1001 (AFBR 1969).**

present drug laws, in holding the provision valid as applied. However, future legislation could complicate the matter. What is clear in light of *Turner* is that courts and judges must now evaluate the application of the presumption of wrongfulness in terms of the facts in each area in which the Government seeks to use it.[109] As new, pervasive legislation and regulations appear in the field of marihuana and habit-forming narcotics,[110] these offenses may be better prosecuted under article 92, UCMJ, as violations of lawful general regulations, than as violations of article 134, UCMJ.

E. *POSSESSION OF RECENTLY STOLEN PROPERTY*

It has long been the rule in both civilian and military courts that evidence that a person is in possession of recently stolen property is admissible to show that he stole the property. The United States Supreme Court has upheld the drawing of this inference repeatedly,[111] as have lower courts[112] and commentators.[113] Justice Black states that it Seems to have been the rule since "time immemorial" that the unexplained possession of recently stolen property is sufficient to justify a finding not only that the possessor knew that the property was stolen but also that he was the thief.[114] Wigmore is

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[109] In a recent case, United States v. Tee, 20 U.S.C.M.A. 406, 43 C.M.R. 246 (1971), the Court of Military Appeals sustained a conviction for violation of a regulation prohibiting the possession of narcotics paraphernalia, to include syringes, with certain enumerated exceptions. The court held that the interest of the armed forces in prohibiting wrongful narcotic use is enough reasonably to justify the transfer of the burden of production to the accused. This is fair enough. A troublesome sentence follows. The court stated, "Here the regulatory presumption is valid, for 'the presumed fact is more likely than not to flow from the proved fact on which it is made to depend' . . . ," citing *Leary* and *Tot*. It is apparent that the court itself was tripped up on the presumption-inference dichotomy. The device they termed a presumption is clearly nothing more than that which they had so carefully described as an inference in earlier cases. Secondly, the court at first glance may be thought to have adopted the more-likely-than-not test of *Leary*, rather than the arguably more stringent standard laid down in *Turner*. However, it is doubtful that the court considered the problem, and the rather offhand reference to *Leary* should not be taken as having settled the issue.

[110] *See, e.g.*, Army Regulation No. 600-32, 23 Sep. 1970; Comprehensive Drug Abuse Prevention and Control Act of 1970. Public Law 91-513, 84 Stat. 1236.

[111] Rugendorf v. United States, 376 U.S. 528 (1964) : Wilson v. United States, 162 U.S. 613 (1896).

[112] *E.g.*, McAbee v. United States, 434 F.2d 361 (9th Cir. 1970).

[113] 1 WIGMORE § 152; 9 WIGMORE § 2513; 1 WHARTON'S CRIMINAL EVIDENCE (12th ed. 1956) § 135.

[114] "Bollenbach v. United States, 326 U.S. 607 (1946), Black, J. (dissenting opinion). Although Justice Black states that the majority in *Bollenbach* questions the validity of the proposition, it is submitted that they did not. In any event, it was upheld in *Rugendorf*.

equally emphatic, stating that although the rule has been the source of "troublesome and fruitless controversies" [115] the controversies have been over whether or not the accused's possession raises a presumption (in the classic sense), or merely an inference, that the accused stole the goods in question. He states that the authorities are divided on the presumption question but that "there has never been any question" that the hypothesis of theft is a sufficiently natural one to allow the fact of possession to be considered evidentiary.[116]

The inference view is preferred today. In a recent case., McAbee *v.* United *States*,[117] the inference was attacked on Leary and *Turner* grounds. The Ninth Circuit, applying the more-likely-than-not test, affirmed the appellant's conviction for interstate transportation of stolen firearms and sale of stolen firearms transported in interstate commerce. **After** examining the authorities, the court stated that the proposition in issue is an inference, not a presumption, and that an inference is "no more than a logical tool enabling the trier of fact to proceed from one fact to another if the trier believes that the weight of the evidence and the experiential accuracy of the inference warrant so doing." [118] The court went on to state that an inference does not shift the burden of going forward to the defendant, for the trier of fact is free to reject the inference in part or in whole.[119] **As** has been seen, this is questionable, particularly if the accused does nothing to rebut the inference. Nevertheless, the court's characterization of the inference as being in close conformity with human experience is sound, as is their statement that when the overall weight of the evidence or the compellingly reasonable nature of the inference make the defendant feel compelled to speak it does so not by operation of law but only by close conformity with human observation. As the court points out, a defendant has no more right to complain of a properly instructed and rational inference than he does to complain of the laws of physics.[120] **It** is notable that although the *McAbee* court applied the more-likely-than-not test to determine the validity of the inference in terms of Leary and *Turner*, they stated that the inferences involved in McAbee were no less compelling than those upheld in *Turner*. Accordingly, it appears that the McAbee court would sustain them even under a reasonable-doubt test.

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[115] 9 WIOMORE § 2513.

[116] 1 WIGMORE § 152.

[117] 434 F.2d 361 (9th Cir. 1970).

[118] *Id.* at 363.

[119] *Id.*

[120] *Id.*

In the military, the leading case is *United States v. Hairston*,[121] decided in 1968. The Court of Military Appeals stated that while the inference of theft from possession is basically sound, other facts must exist before the inference is justified. The evidence must show that the possession was recent, personal, conscious, and unexplained. When these exist, as the court pointed out, the accused may feel compelled to attempt to explain his role to avoid the adverse effect of the evidence. If he does so, this in no way shifts the burden of proof, or the legal burden to him. The inference is nothing more than a rational conclusion drawn from certain facts. Lower courts have as in other areas not always made a proper analysis of this inference. Cases exist wherein it was termed a presumption by the law officer, resulting in ultimate reversal.[122]

In light of *McAbee* and *Hairston* it does not appear that the inference of guilt which may be drawn from unexplained personal and conscious possession of recently stolen property will be subjected to serious attack. It is based on reason and experience, and is almost universally accepted. Accordingly, even applying a reasonable-doubt test under the *Turner* case, the instruction on the inference will doubtless withstand judicial scrutiny.

VI. CONCLUSION

The Court of Military Appeals has expressed its views on presumptions, assumptions and inferences in a series of cases.[123] Several propositions are apparent from the court's opinions. First, it was obvious to the Court that the language of the 1951 Manual, coupled with the general confusion in the area, had resulted in numerous misunderstandings and misapplications of the law of presumptions at the trial level. Second, the court eventually recognized the assumption-presumption dichotomy while rouching it in terms of presumption-inference language. Third; guidance is still necessary in the area and cases, even recent ones, illustrate continuing confusion in the area.[124]

In order to rectify the situation once and for all, a method of

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[121] 9 U.S.C.M.A. 554, 26 C.M.R. 334 (1958). The Supreme Conrt decision in *Rugendorf* would authorize a **less** strict inferential standard. However, it does not appear that **the** military has fully adopted the *Rugendorf* holding. The current Military Judges' Guide is phrased in terms of the *Hairston* rule.

[122] *E.g.*, United States v. Jlorgan. 14 U.S.C.M.A. **364. 34 C.M.R. 144 (1964).**

[123] *See, e.g.*, United States v. Patrick. 2 U.S.C.M.A. 189. 7 C.M.R. 66 (1953) : United States v. Biesak, **3** U.S.C.M.A. 714, 14 C.M.R. **132** (1954) : and Vnited States v. Ball, 8 U.S.C.M.A. 25, *23* C.M.R. 249 (1957).

[124] *See, e.g.*, United States v. Griffin, 17 U.S.C.M.A. **387**, 38 C.M.R. **185 (1968).**

analysis is suggested. Whenever the word presumption or inference is encountered in the Manual or in military cases, it must be examined as stated in Part 11. Presumptions are analyzed in terms of their legal effect. Accordingly, the particular device must be examined to determine why it appears and what its effect on the trial is. This will illustrate whether the device is an assumption or a presumption, as these terms are defined above. If the device is an assumption, its validity will nearly always be self-evident. If it is a presumption, the test is more difficult, As indicated, presumptions usually are first examined in terms of the reasons and bases for their origin. The rational-basis test has been derived as a means to assist in the determination of whether the presumption actually performs the function for which it was designed. If so, the remaining problem in the criminal area is to determine whether the presumption [125] is procedural or substantive. This will probably have been done when its effect was considered. If the presumption is substantive, that is, an element-supplying presumption, the line of cases culminating in *Turner* [126] suggests strongly that the analyst should determine whether it can be said beyond a reasonable doubt that the presumed fact follows from the base fact. If the presumption is procedural, as for example the presumption of regularity of official records [127] the above analysis should be followed except that the presumption is valid if the presumed fact is more likely than not to follow from the basic fact. If this analysis is used, and the terminology advocated herein is adopted, the lam of presumptions will be easier of application, and reversals fewer. The term presumption has been abused and over-used for too long in our law. Clarity, reason, and the application of due-process standards to test the validity of methods of proof often accepted uncritically in the past, are long overdue.

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[125] Of course. it mill almost always be termed a permissive inference in current usage. It is suggested that the terms assumption and inference be adopted in lieu of the terms presumption and inference.

[126] 396 U.S. 398 (1970).

[127] MCM, 1969 (Rev.) para. 144b.

WARRANTY AND DISCLAIMER IN GOVERNMENT PERSONAL PROPERTY SALES CONTRACTS*

By Major Curtis L. Tracy**

The sale of surplus government property has long been a stronghold of the doctrine of caveat emptor. Assumptions regarding the inexperience of government sales personnel and the government's need for rapid and certain disposal of its surplus have encouraged courts and boards to strictly honor "as is" sales contract clauses. The author examines the liability disclaimer clauses and the cases interpreting them, He concludes that a government attitude of "disclaim all responsibility for variances" may actually disserve broader government interests.

I. INTRODUCTION

Over a decade ago the Court of Appeals for the Tenth Circuit of the United States was asked to render judgment to the United States Government for damages for breach of a sales contract between the Standard Magnesium Corporation and the Government.[1] The United States Air Force had advertised "[w]heels, misc. aircraft (salvage) where is, as is, 30,000 lbs." Standard Magnesium Corporation was the high bidder, received the contract award, and under the terms of the contract agreed to purchase and remove "all quantities of wheels . . . generated during the life the contract, where is, as is." Apparently, some wheels were on hand at the time of the issuance of the invitation for bids as the case states that the buyer made an inspection just as the invitation, and subsequent contract, invited bidders to do.[2] Upon inspection the buyer found that no more than 15 per cent of the wheels on hand had steel brake drums and almost

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***The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other agency.**

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[1] **Standard Magnesium Corp. v. Cnited States, 241 F.2d 677 (10th Cir. 1957).**

[2] *Id.* **at 678.**

none had aluminum rims attached. The rest of the metal was determined to be of magnesium content, the element the buyer was actually interested in. Shortly after the award the buyer picked up 15,470 pounds of wheels which were on hand and paid for them by the pound as required by the contract. Later the buyer was notified that **25,730** more pounds had been "generated."[3] Upon picking up this quantity the buyer determined that all the wheels had steel brake drums and aluminum tire rims constituting **35** per cent of the total weight of the wheels. The buyer then refused to accept delivery of any more wheels, offered to return the 25,730 pounds which he had just picked up and refused to pay for that amount. Subsequently, the Government resold the wheels which were generated during the term of the contract, which amounted to 107,690 pounds, and then asked the court to grant as damages the difference between the price under the Standard Magnesium Corporation contract and the price upon resale plus the contract price on the amount delivered but not paid for by the buyer. In defense the buyer urged that the Government had breached the contract by delivering and tendering for delivery an item which was not purchased and by tendering for delivery an amount of the item purchased which was far in excess of a reasonable variance from the estimated amount. The court held against the buyer on both arguments. In the process of doing so the court stated:

> It is apparent from the authorities that the usual Government surplus goods contract is not governed by the usual niceties of rontract law. They are "where is, as is" sales with warranties and representations expressly negatived. Inspection prior to bidding is urged. The rule of caveat emptor in such sales "was certainly intended to be applied to the furthest limit that contract stipulations could accomplish it."[4]

It is not readily apparent from the report of the case what the court meant by the statement that "the usual Government surplus goods contract is not governed by the usual niceties of contract law." Perhaps he was of the opinion that the sale of Government surplus goods is sui generis and because of its peculiarities a "federal common law"[5] has developed to fit those peculiarities.[6] If this is the basis for the court's statement that the "niceties of contract law"

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[3] The meaning of the term "generated" is obscure. In the subject contract the parties agreed that: "Items are for an indefinite quantity. however, amounts advertised are quantities anticipated aad purchaser agrees to take all quantities generated during the period of this contract." Standard Magnesium Corp. v I'nited States, 241 F.2d **677.** 680 n. 6. (10th Cir. **1957**).

[4] *Id.* at **679.**

[5] The source of law applicable to Government surplus sales contracts is discussed at Section III *infra.*

[6] *See* **1** S. WILLISTON ON SALES Sec. 213 (rev. ed. **1948).** "The parties may by

do not govern, it is not articulated in the case nor is any other justification expounded. Thus, questions are raised as to whether there is a special body of lam which the federal courts and administrative bodies apply to Government sales of surplus property and, if so, whether there is a valid basis in law or reason for special treatment. Traditionally cases and commentaries have said that when the Government "steps down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there."[7] It is now generally conceded that this statement represents a rather naive view in relation to purchase contracts of the Government. The concept that the public interest must be protected even if it is at the expense of some individual or corporate contractor has been expressed in many different ways. In *Whiteside* v. *United States* the Supreme Court expressed the view "that it is better that an individual should occasionally suffer from the mistakes of public officials or agents, than to adopt a rule which, through improper combinations, or collusion, might be turned to the detriment and injury of the public."[8] In addition, federal procurement is now viewed by legislators and courts as a vehicle for advancing public social and economic policies and fulfilling public needs.[9] The surplus sales contract cases are not nearly as explicit in

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agreement limit the effect of language which would otherwise be construed as amounting to an express warranty. The most common illustration of this is where the seller makes statements in regards to the goods, but refuses to warrant the truth of the statements."

[7] Cooke v. United States, 91 U.S. 389, 398 (1875); R. SHEALEY, THE LAW OF GOVERNMENT CONTRACTS, Sec. 3 (3d ed. 1938).

[8] 93 U.S. 247, 257 (1876). *See also* Rock Island A. & L. R. Co. v. United States, 254 U.S. 141, 143 (1920) (persons must "turn square corners when dealing with the Government"); hfontana Power Co. v. Federal Power Comm., 185 F.2d 491, 497 (D.C. Cir. 1950) *cert. denied, 340* U.S. 947 (1950) ('The Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials.").

[9] *See generally* Stover, *The Government Contract System As a Problem in Public Policy,* 32 GEO. WASH. L. REV. 701 (1964); Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies with Other Governmental Policies,* 29 LAW & CONTEMP. PROB. 277 (1964). Social Policy has been advanced through executive action such as Executive Order 11246, Sept. 24, 1967 which prohibits discrimination and economic policy through legislative acts such as the Buy American Act, 41 C.S.C. 10a–10d (1964). The courts have joined the bandwagon by rulings such as that found in G. L. Christian & Associates v. United States, 312 F.2d 418, *motion for rehearing denied,* 320 F.2d 345 (Ct. Cl. 1963), *cert. denied.* 375 U.S. 954 (1963), *rehearing denied,* 376 U.S. 929 (1964). Under the ruling of this case not only are standard clauses now required to be incorporated into each and every Government contract, but also all mandatory contractual regulations are incorporated regardless of the desires, acts and intentions of the contracting officer and the contractor.

expressing any underlying policy reason why such contracts should receive different judicial treatment than contracts between private parties. In a 1961 case the Second Circuit hinted at a purpose designed to protect the public purse when it said:

> By way of preliminary it is to be noted that this is no ordinary contract between buyer and seller for the purchase and sale of a valuable commodity. When the Government sells surplus goods it is trying to dispose of a vast miscellany of used and unused property in an effort, so far as may under the circumstances be possible, to minimize its loss.[10]

However, the court quickly obscures this possible basis for variance from contract rules governing sales between private parties by hastening on to explain that it is merely giving effect tu the risk allocation agreed on by the parties and observes that "the government very properly has protected itself by formulating its contract for the sale of such surplus property so as to shift the risk from itself to the buyer." [11] The use of the term "ordinary contract" makes the reader suspect that although the court throughout the opinion emphasizes it is applying the ordinary law of sales between private parties it is leaning in favor of the Government because of some unexpressed policy which sets apart a Government surplus sales contract. A federal district court in California was even less subtle in *Ellis Bros., Znc.* v. *United States* when it made a conclusion of lam "That surplus contracts are of a peculiar nature and are to be treated differently than other Government contracts." [12]

The *Standard Magnesium* and *Ellis* cases are only illustrative of scores of cases decided by the courts, boards and the Comptroller General. The purchaser-litigants are representative of a continuing stream of Government surplus purchasers who thought they had bought an item with certain characteristics but received something quite different and found no redress because of a standard surplus property sales contract liberally laced with liability disclaimer provisions. A maximum effort has been made by the Government to use every legal device available to allocate all risk to the customer. One case aptly described a Government surplus sale as a "grab bag'! affair.[13] Another judge expressed the viev that under the terms of the standard surplus sales contract "*caveat emptor* was certainly

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[10] Dadourian Export Corp. v. United States, **291** F.2d 158, 182 (2d. Cir. 1961).

[11] ***Id.***

[12] Ellis Bros., **Inc., v.** United States, 197 F. Supp. 891, 893 (S.D. Cal. 1961) (Conclusion of law IV).

[13] United States v. Hoffman. 219 F. **Supp** 895, 905 (E.D. N.Y. 1963).

intended to be applied to the furthest limit that contract stipulations could accomplish it."[14] The purpose of this article is to analyze the two major risk shifting provisions of the personal property surplus sales contract[15] and the cases dealing with such provisions to determine :

(1) The meaning of the court advanced proposition "that surplus contracts are of a peculiar nature"" and thus to be afforded different treatment ;

(2) Whether there has been in actuality a different treatment and, if so, whether there is any valid basis for application of different legal principles to the purchaser of Government surplus than to a purchaser from any commercial vendor;

(3) Whether exculpatory clauses in surplus sales contracts have been afforded the same treatment as similar provisions in Government purchase contracts and, if not, whether a rational basis exists for distinguishing sales and purchase contracts in this context;

(4) Whether the Government has been disclaiming itself out of an economic surplus sales operation, and;

(5) Whether the choice of the applicable law has or has not ignored the Uniform Commercial Code as a source of "federal common law" and what difference in result would apply if that Code were followed.

II. BACKGROUND

In order fairly to assess the meaning and intent of court statements that Government surplus sales contracts are of a "peculiar nature," not "ordinary" contracts and not "governed by the niceties of contract law" a brief examination of the statutory basis of the govern-

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"United States v. Silverton, 200 F.2d 824, 827 (1st Cir. 1952) (emphasis supplied).

[15] The two major risk shifting provisions to be examined are General Sale Terms and Conditions (hereafter referred to as GST&C) Sumbers 1 and 2, Standard Form 114C, Jan. 1970 edition, General Services Administration Federal Property Management Regulation (41 C.F.R.) 101–45.3. The provisions read as follows:

"1. INSPECTION.

The Bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specifled in the Invitation."

"2. CONDITION AND LOCATION OF PROPERTY.

Unless otherwise specifIcally provided in the Invitation, all property listed therein is offered for sale 'as is' and 'where is.' The description of the property is based on the best information available to the sales office. However, unless otherwise specifIcally provided In the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose and except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered. *This is* not *a sale* by *sample."*

"Ellis Rros., Inc. v. United States, 197 F. Supp. 891, 893 (S.D. Cal. 1961).

ment surplus property program and its actual operational magnitude is helpful.

A. *STATUTORY BACKGROUND*

The fact that the Federal Constitution provided that "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; , . . ." [17] demonstrates that disposal of surplus is not a transitory or minor operation. The most recent exercise of this Congressional power is embodied in the Federal Property and Administrative Service Act of 1949.[18] Title II of that Act, as amended, deals with the disposal of surplus property [19] and appoints the General Services Administration as the supervisor of disposal actions with some exceptions.[20] One exception that should be noted is the exclusion of the public domain and lands reserved or dedicated for national forest or national park purposes.[21] Thus, for example, sale of timber from national forests is regulated by the Department of Agriculture and one of its divisions, the Forest Service.[22] However, with this exception and a few others of minor impontance [23] all surplus property of the federal Government is disposed under the supervision and direction of the Administrator of the General Services

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[17] U.S. CONST. art IV, section 3, clause 2.

[18] Act of 30 June 1949, ch. 288, 63 Stat. 378, *as amended* (40 U.S.C. sections 471 *et seq.* (1964)).

[19] 40 U.S.C. Sec. 472(g) defines "surplus property" as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator." The term "excess property" is defined at 40 U.S.C. Sec. 472(e) as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."

[20] The principal provisions of Title II, as amended, may be found in 40 U.S.C. sections 481–92 (1964).

"40 U.S.C. Sec. 484 states that "Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property." However, 40 U.S.C. Sec. 472(d) provides in pertinent part that "The term 'property' means any interest in property except (1) The public domain; lands reserved or dedicated for national forest or national park purposes. . . ."

[22] *See* 16 U.S.C. Sec. 476 where the sale of timber from national forests is placed under the authority and control of the Secretary of Agriculture under such rules and regulations as he should prescribe. These regulations are found at 36 C.F.R. Part 221. It is noted that those regulations do not prescribe a specific sales contract form nor do they dictate anything concerning disclaimer provisions. However, the Chief, Forest Service has to approve conditions of sales.

[23] *See, e.g.*, 40 U.S.C. Sec. 474 (10) and 12 U.S.C. Sec. 640*l*(b) (Farm Credit Administration).

Administration [24] (hereafter sometimes referred to as GSA). The scope of this article generally will be limited to sales contracts prescribed by that agency.

The Administrator of GSA has the power to delegate or authorize successive redelegation of any authority given him under the act.[25] This disposal authority in regard to personal property has been delegated to certain agencies including the Atomic Energy Commission, the Tennessee Valley Authority, and the Department of Defense.[26] In addition each executive agency has authority to dispose of "foreign excess property" under its own regulations.[27] Congress has provided minimal guidelines on the procedures of sale. One guideline of particular interest, is that both "surplus property" and "foreign excess property" may be disposed of by sale, exchange, or transfer for cash, credit, or ather property "with or without warranty, and upon such other terms and conditions as the [administrator in the case of surplus property and the head of the executive agency in the case of foreign excess property] deems proper . . ." [28] The statutorily preferred method for selling surplus property is by publicly advertising for bids.[29] As in procurement there are certain exceptions allowing negotiated sales.[30] But regardless of the method of sale the

[24] 40 U.S.C. Sec. 484(a) (1964). Title IV of the Federal Property and Administrative Services Act grants to the executive agency holding "foreign excess property" the authority and responsibility for disposing of it. 40 U.S.C. sections 511–514 (1964). "Foreign excess" property means "any excess property located outside the States of the Union, the District of Columbia, Puerto Rico, and the Virgin Islands." 40 U.S.C. Sec. 472(f). Foreign excess property doesn't need to be determined to be surplus property, as defined in the Act, to be disposed. Compare 40 U.S.C. Sec. 484(c) with 40 U.S.C. Sec. 512. It may be disposed of in accordance with the regulations of the agency concerned. 40 U.S.C. Sec. 511.

[25] 40 U.S.C. Sec. 486(d) (1964). General Services Administration (hereafter referred to as GSA) regulations for the sale of surplus property are set forth in 41 C.F.R. Part 101–45 (1970).

[26] Delegations of authority are contained in GSA Delegation of Authority Manual, ADM—P. 5450, 5 May 1964 and supplements thereto.

[27] *See* notes 19 and 24 ***supra.***

[28] 40 U.S.C. sections 484(c) and 512.

"40 U.S.C. Sec. 484(e) (1) and (2) (1964). The sale of foreign excess property can be accomplished by negotiation upon a blanket determination by the head of the agency that negotiation is most practicable and advantageous to the Government. 40 U.S.C. Sec. 512 (1964).

"40 U.S.C. Sec. 484(e) (3), (4) and (5) (1964). Examples of situations authorizing negotiation are Sec. 484(e) (3) (A) (necessary in the public interest during the period of a national emergency declared by the President or Congress with respect to a particular lot or lots of personal property); Sec. 484(e) (3) (C) (public exigency will not admit of the delay incident to advertising); Sec. 484(e) (3) (D) (personal property of a nature and quantity that if disposed of by advertising would have an adverse effect on the national economy); Sec. 484(e) (3) (E) (the estimated fair market value doesn't exceed $1,000); Sec. 484(e) (3) (F) (bid prices after advertising are not reasonable or have not been independently arrived at in open competition).

clear intent of Congress is that there shall be full and free competition, award to the responsible bidder entering the highest bid, price and other factors considered, all to the end that the Government receive the fair market value of its surplus and foreign excess property.[31] Within the parameters of advertising requirements, the Administrator of GSA, and the heads of all executive agencies in regard to foreign excess property, have considerable latitude in prescribing terms and conditions of sales contracts including the inclusion or exclusion of warranties. This should be of considerable importance in the interpretation of sales contracts. To be noted here in passing, and reserved for more detailed discussion, is the fact that the exclusion of warranties may not be the best way to achieve the Congressional intent to obtain fair market value of property or the maximum return on sales. It requires no citation of authorities or statistics to establish the proposition that the competitive business man will deduct from his bid an amount for risk contingencies which the Government allocates by contract terms to the purchaser.

B. *OPERATIONAL BACKGROUND*

The General Services Administration's attempt to completely exclude any warranties by prescribing General Sale Terms and Conditions Numbers 1 and 2,[32] "Inspection" and "Condition and Location of Property" respectively, may be partly responsible for the apparent attitude of the courts and administrative boards that the sales program is small, incidental, and conducted by transitory personnel without any expertise in the products they handle or the methods of selling. Court opinions often betray this attitude and its corollary that under such circumstances the Government needs all the protection it can get from sharp, shrewd dealers in junk and *caveat emptor* must be applied to its furthest limit. For example, the Second Circuit Court in *Dadourian Export Corporation v. United States* in 1961 expressed the view that :

> When the Government sells surplus goods it is trying to dispose of a vast miscellany of used and unused property in an effort, so far as may under the circumstances be possible, to minimize its loss. Sales of

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[31] 40 U.S.C. Sec. 484(e) especially, Sec. 484(e) *(5)*.

[32] The General Services Administration prescribes the use of General Sale Terms and Conditions currently set forth in GSA Standard Form 114C, Jan. 1970 edition, GST&C No. 1 and 2 are set forth in note 15 supra. Use of the Jan. 1970 edition is prescribed by Federal Property Management Regulation Sec. 101-45.304-8, 35 Fed. Reg. 12119, 29 July 1970. Deviations may be granted by the Commissioner, Property Management and Disposal Service, GSA.

> this character are processed on a man quantity basis by members of the armed forces who seldom if ever have any expertise in the particular items which come to their warehouses and depots. Buyers of such surplus property known perfectly well that there is always the chance of buying property that may turn out to be of little value, or may develop into a great bargain with a huge windfall of profit. Accordingly, the government very properly has protected itself by formulating its contract for the sale of such surplus property so as to shift the risk from itself to the buyer."

This attitude gives birth to the further reasoning that Government sales personnel lack the expertise to adequately determine the characteristics and quality of goods to be sold so as to describe such goods in sales material with confidence that only minimal claims will arise due to misdescription.[34] If this does correctly portray the attitude of many 'judicial and quasi-judicial functionaries, the magnitude of Government sales and the scope and quality of the organization operating the program becomes pertinent.

During fiscal year 1970 the United States Government sold personal property which had a total acquisition value of $1,047,872,272. The gross proceeds of such sales totalled $94,327,000.[35] Although these figures are only a small fraction of what the Government spends each fiscal year they still illustrate that an operation of considerable size is involved. This is further amplified by the fact that one agency, the Department of Defense, had an inventory of surplus and foreign excess property at the end of fiscal year 1970 with an acquisition value of $3,923,000,000 awaiting sale.[36]

The property disposal program has evolved considerably since the immediate post World War II days when a '(vast miscellany" of property may have been sold "by members of the armed forces who seldom if ever [had] any expertise."[37] The extent and significance of this evolution can be demonstrated by a brief resume of recent developments in the sales organization of the Department of Defense and

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[33] Dadourian Export Corp. v. United States, 291 F.2d 178, 182 (2d Cir. 1961).

[34] *Id.*

[35] These statistics were provided the author by Mr. Howard L. Burns, Sales Division, Office of Personal Property, Property Management and Disposal Service, GSA and were contained in a Standard Form 121 report compiled from reports which GSA required of each federal agency under the Federal Property and Administrative Services Act of 1949. See Federal Property Management Regulation, 41 C.F.R. Sec. 101-45.308 (1970).

[36] Chart No. 18, pp. 4243, Defense Supply Agency, Defense Materiel Utilization and Disposal Programs, Program Administrators Progress Report, Statistical Review and Management Evaluation, 4th Quarter-FY 70, August 1970. Equivalent figures are not kept by GSA for the entire US. Government. The inventory figure after exclusion of aircraft and ships was $1,543,000,000.

[37] Dadourian Export Corp. v. United States, 291 F.2d 178, 182 (2d Cir. 1961).

a short word picture of the current organization. Prior to 1961 sales of surplus property in the Department of Defense were handled by 315 separate military holding activities in the United States. In 1961 the Defense Supply Agency was established as a separate agency within the Department of Defense and, among other things, given full responsibility for administration of the property disposal program.[38] Initially the Defense Supply Agency consolidated all 315 United States sales outlets into 35 Consolidated Surplus Sales Offices which were later reduced further until today there are 10 regional offices located throughout the United States.[39] A major subdivision of the Defense Supply Agency, the Defense Logistics Services Center located in Battle Creek, Michigan, administers the disposal program through its Directorate of Marketing. The Marketing Director is a civilian with a civil service rating of GS–15. His deputy is a GS–14. The three major divisions under the Marketing Director are headed by two civil servants with GS–14 ratings and one mith a GS–13 rating. Of more significance than position grades is the experience level of these managers. Although a complete statistical analysis of the sales personnel is beyond the scope of this paper a rough survey of the ten key individuals in the Directorate of Marketing indicated an average of 15 years in surplus property sales ranging up to approximately 30 years of experience in two instances. Each regional office is managed by a civilian occupying a GS–13 position having two major subdivisions each headed by a GS–12. It is estimated that the occupants of these 30 key divisions average 15 years experience in the sale of Government surplus property.[40]

The General Services Administration also conducts its sales through 10 regional offices placed throughout the United States.[41] No attempt was made to surrey the grade structure and experience

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[38] *See* Task Force Report on DOD Management and Disposal of Surplus Property, Secretary of Defense Project 26, Part 1, *Analyses, Conclusions and Recommendations*, December 1962, pp. 23 and 56.

[39] Information concerning the regional offices was obtained from a Defense Supply Agency pamphlet entitled, How to Buy . . . SURPLUS PERSONAL PROPERTY from the DEPARTMENT OF DEFESSE. JUNE 1969, prepared by the Defense Logistics Services Center. Federal Center, Battle Creek, Michigan, 49016. There are also 28 other DOD sales offices scattered throughout the rest of the world.

[40] Organization and grade structure inforniation was obtained from the Defense Logistics Services Center Joint Table of Distribution dated April 21, 1971. Information concerning the experience of personnel within DLSC was obtained from employees within the Disposal Division, Technical and Logistical Services Directorate, Defense Supply Agency.

[41] Information obtained from Mr. Howard L. Burns. *See* note 35 ***supra.*** Offices are listed at 41 C.F.R. Sec. 101–43.4903 (1970).

factor of the General Services Administration disposal organization. However, the statistics quoted are considered sufficient to dispel the notion that the disposal operation consists of soldiers commandeered to function in an area where they have no expertise and handle items of which they have no knowledge. On the contrary the statistics demonstrate that the Government is in a large sales business conducted by men who for the most part are seasoned from years of experience.

III. WARRANTY AND DISCLAIMER: CHOICE OF LAW APPLICABLE TO GOVERNMENT SURPLUS SALES CONTRACTS

Prior to considering the actual application of warranty and disclaimer principles to surplus property sales contracts it is pertinent to analyze the sources of the law and the rules enunciated by the courts and boards governing their choice of the legal rules and theories to be applied.

A. *CHOICE OF SOURCE*

Since World War II the validity and construction of contracts of the United States have been governed by federal law where a sufficient federal interest is present.[42] A federal interest generally is considered present where the outcome of the case would have a financial effect on the United States.[43] It hardly needs stating that a contract for the sale of surplus personal property of the United States is a Government contract which has a financial effect on the United States; yet perhaps the statement is not superfluous in light of the statements that such contracts are "peculiar," not "ordinary," and "not governed by the usual niceties of contract law."[44] That these are not just phrases without real substance seems evident from, (1) the fact that the source of the law being applied is never discussed, and (2) the fact that courts considering cases on sales contracts have never been concerned with the posture of the law in analogous Government procurement contract situations.

The sources of the federal common law have been identified as follows: (1) judicial decisions in the absence of federal statutes; (2) state laws elevated to the status of federal law; (3) administrative rulings or regulations; and (4) uniform opinions of treatise

[42] United States v. County of Allegheny, 322 U.S. 174, 183 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[43] United States v. Somerrille, 324 F.2d 712 (3d Cir. 1964).

[44] *See* Section I *supra* and footnotes thereto.

writers.[45] As there are no federal statutes such as the Uniform Sales Act or the Uniform Commercial Code the courts resort almost exclusively to decisions of federal courts as the source of the federal law of sales of surplus property. Later in this article the proposition will be advanced and defended that those federal court decisions, although bottomed on the common law of sales, have not recognized or chosen to apply some common law disclaimer defenses nor recognized certain current liberalizing trends in the application of disclaimers. Of course, this is not in contradiction to the expressed concept of the United States Supreme Court that "in the absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of lam according to their own standards."[46] But the uncertainty of (1) when the federal common law will be applied and (2) when it is applied what source will be looked to has caused one author to characterize it as a "brooding omnipresence."[47] In groping for the ethereal federal common law, federal tribunals profess to look for the rule that "comports best with general notions of equity,"[48] that mill "develop and establish just and practicable principles of contract law for the Federal Government,"[49] and that reflects "the best in modern decision and discussion."[50] In the context of a sale *to* the Government, the Armed Services Board of Contract Appeals (hereafter referred to as ASBCA) has stated their belief that the Uniform Commercial Code (hereafter referred to as the UCC) reflects the best in modern decision and discussion and, in the implied warranty area, reflects "a long-term trend toward expansion of implied warranties."[51]

As the courts and boards look to federal court decisions as the source of the federal law of sales and, in turn, the federal courts select the "best law" from both the common lam and the UCC, a summary of warranty and disclaimer principles from those sources follows as a prelude to an examination of the application of the law to the actual sales contract.

"Weeks, *Choice* of *Law in Prime-Sub Government Disputes,* 48 B.C.L. REV. 613, 618 (1968) and articles cited at 618.

[46] Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

"Weeks, note 45 *supra* at 623. The author admits lifting the words from Justice Holmes dissent in Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1916).

"Board of Commissioners v. United States, 308 U.S. 343, 350 (1939).

[49] National Presto Industries, Inc. v. United States, 338 F.2d 99, 111 (Ct. Cl. 1964).

[50] Padbloc v. United States, 161 Ct. Cl. 369, 377 (1963).

[51] Reeves Soundcraft *Corp.,* ASBCA Nos. 9030 and 9130, 1964 BCA para. 4317.

B. *SALES WARRANTIES AND DISCLAIMER AT COMMON LAW*

The Court of Claims has stated that "in essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the ather party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue. . . ." [52] This definition illustrates that an express warranty can be viewed as a device initiated by the parties to a contract to allocate certain risks between or among themselves. **Also** under the definition, such risk allocation may not actually have been the intent of the party making the affirmation of fact but the courts have allocated that risk in recognition of the natural expectation of the buyer and his reliance on the affirmation. From this it was a short step under the common law to imply a warranty from the nature of the sales transaction itself rather than from any specific affirmation of fact. An implied warranty is a court device to allocate certain risks nat expressly allocated by the parties. It is an inference of law; a presumption by the court that the vendor agrees to accept the risk that the goods he is selling are merchantable or fit for the purpose intended.[53] Implied warranties were imposed as an exception to the rule of *caveat emptor* to prevent the harshness of that common law concept.[54] Where used goods were sold the implied warranty was not of the same scope as pertained to new goods but nevertheless implied warranties were nat ruled out just because it was a sale of used goods.[55] In this connection, it is interesting to note that under Section 15 of the Uniform Sales Act second hand goods are not excluded from the general provisions of warranty.[56]

The law continued to recognize the contractual freedom of the

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[52] Dale Constr. Co. v. United States, 168 Ct. Cl. 692, 699 (1964). This definition of what would be classified as an express warranty corresponds to the UNIFORM SALES ACT Sec. 12 which provides that "any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of the affirmation or promise is to induce the buyer to purchase the goods and if the purchase is in fact made in reliance on them."

[53] For the development of the common law of implied warranty see 1 S. WILLISTON ON SALES Sections 227–36 and cases cited therein. See also UNIFORM SALES ACT Sec. 15.

[54] C.I.T. *Corp.* v. Shagren, 176 Okla. 388, 55 P.2d 956 (1936).

[55] *See* 1 S. WILLISTON ON SALES Sec. 232 (rev. ed. 1948) and Annot., 151 A.L.R. 446 (1944). But see 28 Comp. Gen. 306, 311 (1948).

[56] Moss v. Yount, 290 Ky. 415, 177 S.W.2d 372 (1944). *Bee* Annot., 151 A.L.R. 446 (1944).

parties to the extent that the parties could expressly agree that all implied as well as express warranties are negated.[57] In addition, under the common lam warranties were not implied where the buyer had an opportunity to inspect the goods and the seller was guilty of no fraud and was neither the manufacturer nor the grower of the article for sale. In 1870 the United States Supreme Court [58] noted that this rule was accepted by all states of the Union where the common law prevailed except South Carolina, and in 1932 the Court of Claims [59] held the common law rule equally applicable to the federal government. However, neither inspection nor the opportunity for inspection barred an express warranty; [60] nor did it bar an implied warranty where the defect was not such that it ought to have been revealed by an examination [61] nor, in many cases, where no practical examination of the item at the time was possible.[62] In relation to express warranties, even though the natural tendency of an affirmation of fact would induce purchase in reliance the parties could negate such by expressions which showed a contrary intent of the parties.[63] This negation could be accomplished by stating that the sale was made "as is, where is." [64] The same expression was held

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[57] Shafer v. Reo Motors, 205 F.2d 685 (3d Cir. 1953); Lachman v. Hercules Powder Co., Inc., 79 F. Supp. 206, 207 (E.D. Pa. 1948). See also UNIFORM SALES ACT Sec. 71; Lumbrazo v. Woodruff, 246 N.P. 92, 174 S.E.525 (1931) (parties can by contract language negate an implied warranty of description).

[58] Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 384 (1870). Accord, Advance-Pumely Thresher Co. v. Jackson, 287 U.S. 283 (1932); *See* also Carson v. Braille, 19 Pa. 375, 57 Am. Dec. 659 (1852) which held that sale on inspection repudiates a warranty of description. ***But*** see Gould v. Stein, 149 Mass. 570, 22 N.E. 47 (1889) (however, in this case the goods were prepared and presented so as to deceive).

[59] General Textile Corp. v. United States, 76 Ct. Cl. 442 (1932).

[60] Morrow v. Bonehroke, 84 Ran. 724, 115 P. 585 (1911) (sale of diamond where the buyer was not acquainted with the grades and values of such property and relied on the representations of the seller); Northwestern Cordage Co. v. Rice, 5 S.D. 432. 67 N.W. 298 (1896) (a buyer does not owe a duty of careful inspection to one who has expressly warranted an article). See also 1 S. WILLISTON ON SALES Sec. 208 (rev. ed. 1948).

[61] Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931). *See* also UNIFORM SALES ACT Sec. 15(3) which agrees with the common law general rule than an implied warranty is negatived where there is an inspection or opportunity to inspect but there is an exception where the defect is not such that it ought to have been revealed by an inspection. 1 S. WILLISTON ON SALES Sec. 234 (rev. ed. 1948).

[62] Hawkins v. Pemberton, 51 N.Y. 198, 10 Am. Dec. 595 (1872) (item sold as "blue vitriol" was "saltzhurger vitriol," held to be a warranty of blue vitriol regardless of opportunity for inspection. *See also* 1 S. WILLISTON ON SALES Sec. 234 (rev. ed. 1948).

[63] 1 S. WILLISTON ON SALES Sec. 213 (rev. ed. 1948).

[64] Furman v. United States, 135 Ct. Cl. 202, 140 F. Supp. 781 (1956); *See*

to be a valid disclaimer of all implied warranties in addition to express warranties.[65] However, this applied more specifically to the "express warranty" implied from an affirmation of fact and not the express warranty created by words of warrant or guarantee. In the latter case, the "as is" disclaimer might not be given effect as being inconsistent in which case the inconsistency would be resolved against the drafter of the document unless a contrary intent of the parties was evidenced by other circumstances.

In summary it appears that those who formulated the common law struggled to balance the concept of complete freedom of contract with a desire to soften the harshness of a strict rule of *caveat emptor*. This was demonstrated early by a finding of warranty where the foreseeable result of an affirmation of fact would be a sale in reliance on that affirmation even though the seller had no intention to warrant and no words of warrant were employed. From an express warranty inferred in this manner from affirmation of fact it was only a small step to the implied warranty where the court inferred that, without an affirmation, the seller agrees to warrant that the goods he sells are merchantable and fit for their intended purpose. Having gone this far to break down the bastion of *caveat emptor* the courts allowed the pendulum to swing the other way by recognizing that the parties could negate any implied warranty through an opportunity to inspect or an actual inspection by the buyer, the reasoning being that after looking at the product the buyer could knowledgeably bargain for a warranty to protect himself or agree to accept the risk.[66] Also, any express warranties inferred from an affirmation of fact could be negated by language such as "as is, where is," evidencing such negative intent.

However, the swing of the pendulum in favor of the seller by allowing complete freedom to negate all warranties was impeded by exceptions which gave tacit recognition to certain equities accruing to the buyer who was often in an unequal bargaining position in the exchange of goods. Some of these exceptions, such as those involving fraud and latent defects have been mentioned briefly[67] and will be discussed in more detail along with other exceptions in the next section.

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also Annot., 151 A.L.R. 446, 460 (1944). *But* see Meyer v. Mack Motor Trucks, Inc. (La. App) 141 So.2d 427 (1962).

[65] General Textile *Corp.* v. United States, 76 Ct. Cl. 442 (1932); Snyder Corp. v. United States, 68 Ct. Cl. 667 (1930). *Bee also* UNIFORM SALES ACT Sec. 71; 1 S. WILLISTON ON SALES Sec. 239 (rev. *ed.* 1948).

[66] Barnard v. Kellogg, 77 U.S. (10 Wall.) *383,* 384 (1870).

[67] *See* discussion in notes 60–62 *supra.*

Thus, whether the courts have recognized it or not, they have been involved in the risk allocation business along with the parties to the contract. Those courts that emphasize that their quest in all cases is merely to find the contractual intent of the parties ignore the devices employed by common law judges to "equalize" the starting positions of the parties.

The common law of sales has been replaced in forty-nine states, the District of Columbia and the Virgin Islands by statutory enactment of the UCC. Although the United States Congress has not enacted it into federal law, predictably more frequent reference to it in the future as a source of law can be expected.[68] Accordingly, at this point a brief summary of the UCC sales warranty and disclaimer provisions is relevant.

C. *SALES WARRANTIES AND DISCLAIMER UNDER THE UNIFORM COMMERCIAL CODE*

Under the UCC a warranty of merchantability is implied in a sales contract where the seller is considered a merchant of goods sold. A warranty of fitness for a particular purpose is implied where the seller has reason to know the purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment.[69] Other implied warranties may arise from a course of dealing or usage of the trade.[70] Also, "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[71] In addition, an *express* warranty that goods will conform to the description is created by any description of the goods which is made part of the basis of the bargain.[72] All warranties, both implied and

[68] *See, e.g.*, General Electric Co., IBCA No. 422–6–64, 65–2 BCA pp. 23,454, 23,457–58 (citing Sec. 2–317 in support of cumulation of warranties) ; Mazur Bros. & Jaffe Fish Co.. VACAB So. 512, 65–2 BCA pp. 23.303, 23,305 (Sections 2–602, 6–607 held decisive on the question as to whether goods have been accepted) ; Reeves Soundcraft Corp., ASBCA Nos. 9030 and 9130, 1964 BCA para. 4317 (applying Sec. 2–315 on implied warranty of fitness and Sec. 2–316(3) on negation) ; Federal Pacific Electric Co., IBCA No. 334, 1964 BCA pp. 21,582, 21,585; Goodyear Tire & Rubber Co., ASBCA No. 9647, 1964 BCA pp. 21,240, 21,245; Noonan Constr. Co., ASRCA No. 8320, 1963 BCA pp. 18,282, 18,285. *But see* Republic Aviation *Corp.*. ASBCA Nos. 9934 and 10101, 66–1 BCA para. 5482 where the ASBCA doesn't feel bound to follow the UCC. However, this is a case where the UCC is contrary to a mandatory inspection article currently prescribed by ASPR Sec. 7–103.5 (d) (1969); *see* 66–1 BCA pp. 25,694.

[69] UNIFORM COMMERCIAL CODE §§ 2–314 and 2–315 [hereafter cited as UCC].

[70] *Id.* at 2–314(3).

[71] *Id.* at 2–313(1)(a).

[72] *Id.* at 2–313(1)(b).

express, may be modified or excluded by contract if certain conditions are met.[73] To exclude or modify the implied warranty of merchantability the language must mention merchantability and, if in writing, must be "conspicuous." [74] The implied warranty of fitness for a particular purpose need not be so explicitly referred to and may be disclaimed by conspicuous general language.[75] However, all implied warranties are excluded by expressions such as "as is" and "with all faults." [76] Also, where the buyer "before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." [77] If "words or conduct relevant to the creation of an express warranty" arise in the same contractual situation they "shall be construed whenever reasonable as consistent with each other; but subject [to UCC rules on parol and extrinsic evidence] negation or limitation is inoperative to the extent that such construction is unreasonable." [78] The disclaimer rules also have to be interpreted in context with the general UCC rule that "the effect of provisions of the Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, and reasonableness and care prescribed by this Act may not be disclaimed by agreement. . . ." [79] The Sales Article of the UCC also generally declares that "if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . . ." [80]

IV. APPLICATION OF THE "INSPECTION" AND "AS IS" DISCLAIMER CLAUSES

The intent of the above discussion was to make more meaningful an examination of the cases which have considered warranties and disclaimers in Government surplus property sales contracts. The following analysis of cases applying the "Inspection" and "Condition and Location of Property" clauses is designed to contrast the treat-

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[73] *Id.* at 2–314 and 2–316. *See also* Sec. 1–102(3).
[74] *Id.* at 2–316(2).
[75] *Id.* at Sec. 2–316(2).
[76] *Id.* at 2–316(3)(a). Express warranties are not disclaimed by "as is" language. Leveridge v. Notaras, 433 P.2d 936 (Okla. 1967).
[77] *Id.* at 2–316(3)(b).
[78] *Id.* at Sec. 2–316(1).
[79] *Id.* at 1–102(3).
[80] *Id.* at 2–302(1).

ment of exculpatory language in the surplus sales contract with that afforded similar language in Government purchase contracts as well as sales contracts in the private sector.[81]

A. *INVITATION TO INSPECT*

1. The Clause.

The standard Government surplus sales contract contains the following provision :

> The Bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation."

In all cases discussed herein involving a United States surplus property sale if an inspection clause was included in the contract it was either identical to the above or had no material variation.

The attitude of the federal courts to the above quoted inspection clause is well expressed in *United States* v. *Hoffman* where it was said :

> It is clear that what the case comes down to is that the defendant disregarded repeated warnings in the brochure, catalog and bid form to fully inspect the property and has only himself to blame for the predicament in which he finds himself. . . . The express language of the contract clearly states that the Government would not bear the responsibility of failure to inspect. Clearly the risk of any disparity between the description and the fact is, by the contract, imposed on the purchaser. . . . The defendant bought on a grab bag basis. The very terms "as is" and "where is" tell the buyer to investigate. . . . the law provides no remedy for bad bargains willingly risked with wide-open eyes. . . . This particular form of contract, commonly used in Government surplus sales, has often been said to apply the rule of caveat emptor to its fullest limits. E.g. *Standard Magnesium Corp. v. US.*, 241 F.2d 677 (10 Cir. 1957). . . ." [83]

[81] It is noted at this point that no effort will be made in the discussion of the cases to point out whether the sale vias by sealed bid, spot bid, local spot bid, or auction because the two major disclaimer provisions discussed herein are incorporated into the resultant contract regardless of method of sale. This is accomplished in the Department of Defense by putting the bidder on notice that the conditions of Standard Form 114C are necessarily a part of the bidder's offer (bid). Snch notice is accomplished by flyer. by posting of notice at the sale site and by requiring all bidders to register prior to being permitted to bid at which time there is agreement that the General Sale Terms and Conditions (SF 114C) constitute part of the offer. *See e.g.*, Defense Disposal Manual, DOD 4160.21–M, April 1967, as changed, Part 3, Chapters V anti TI and particularly, paragraphs F and G. Part 3. Chapter T ; paragraphs F and G, Part 3, Chapter VI ; and Attachments 4, 5, and 11, Part 3, Chapter T'II.

[82] GST&C *So.* 1, Standard Form 114C, .Tan. 1970 edition, GSA, Federal Property Management Regulation (41 C.F.R.) 101–45.3.

[83] United States v. Hoffman. 219 F. Supp. 895, 904–05 (E.D.N.Y. 1963).

The strictness of the language quoted would give the impression that the bidder negligently failed to make any inspection whatsoever. In actuality the buyer's representative did inspect some of the jackets, which were the subject of the purchase and described as "unused" and listed under "UNUSED CLOTHING" in the sales brochure. However, the buyer did not inspect all the jackets in the 185 to 200 wooden crates wherein they were packed. In fact 15 per cent to 20 per cent were used. This "grab bag" cost the purchaser a $15,296 loss as the Government resold the jackets for that amount less than the first purchaser had bid.

The courts consistently have held that where there is an opportunity to inspect, the risk that a partial inspection does not reveal a defect is placed on the purchaser.[84] This approach requires either that the purchaser go to ridiculous inspection extremes or lower his bid to cover the risk contingency. For example, the purchaser of cloth advertised on a price per pound basis, in order to protect himself in a market where cloth is always sold by the yard (except by the Government, apparently), must weigh the cloth to insure he gets the number of yards specified in the item description.[85] The buyer's inspection must even extend to goods not yet ascertained under the law as the Tenth Circuit perceives it,[86] to film which must be exposed from the roll under the holding of the Court of Claims in the *Varkell* case,[87] to thousands of feet of steel cable rolled on four rolls,[88] to radioactive material buried beneath the earth even though actual inspection of such material was admitted by the Court of Claims to be an impossible task,[89] and to the inside of a mobile unit even though it was locked and boarded up during the inspection period.[90]

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[84] Ellis Bros., Inc., v. United States, 197 F. Supp. 891 (S.D., Cal 1961) (examination of one differential didn't reveal that 73 differentials described as unused were in fact used).

"Samuel Furman v. United States, 140 F. Supp. 781, 135 Ct. Cl. 202 (1956), *cert. denied* 352 U.S. 847 (1956).

[86] Standard Magnesium Corp. v. United States, 241 F.2d 677 (10th Cir. 1957). The 2d Circuit decided similarly in a contract for sale of gas masks with elaetic pieces accumulated during a 90 dag term represented to be clean but delivered dirty. American Elastics v. Cnited States, 187 F.2d 109 (2d Cir. 1950) *cert. denied,* 342 U.S. 829 (1950).

[87] 334 F.2d 653, 167 Ct. Cl. 522 (1964).

[88] Commercial Iron & Metal Co., ASBCA No. 6494, 61-1 BCA para. 3014; Remy, Schmidt & Pleissner v. Healy, 161 Mich. 266, 126 N.W. 202 (1910) (inconvenience or difficulty on the part of the buyer to make an inspection of the article sold, as for instance, where it is contained in casks or bales, does not alter the general rule and raise a warranty of quantity).

"Alloys & Chemicals Corp. v. United States, 324 F.2d 509 (1963).

[90] 32 Comp. Gen. 181 (1952).

The remarkable thing about these cases is not that tlie disclaimer is enforced, even though in many of them there are obvious justifications for exceptions, but that the Government insists on shifting the risk to the purchaser and selling its property €or what often amounts to a pittance.[91] This appears completely opposed, without apparent justification, to the Government'.: approach in procurement of construction work where the mandatory "Differing Site Conditions"[92] clause is used to advance the "long trnn interest of the Government" by assuming a portion of the risk concerning subsurface conditions which in turn eliminates excessive contingency allowances from bid prices.[93]

In the analysis of the "Inspection" clause it should always be kept in mind that in all Government surplus property sales cases that clause is paired with the "Condition and Location of Property" clause. more commonly known as the "as is, where is" clause.[94] As will appear later, the latter clause is a much more extensive disclaimer. Undoubtedly, its coupling with tlie "Inspection" clause contributes considerably to the strictness **of** application of the inspection warning. It is quite probable that many of the opinions discussed in this section would have reached different conclusions if tlie "Inspection" clause stood alone.

2. Extent to Which the Risk is Shifted to the Purchaser By the Inspection Clause.

As was discussed previously, the common law recognized certain exceptions where inspection or opportunity to inspect would not negate warranties such as where a defeat was not such that it could have been revealed by an examination.[95] The federal courts and boards handling Government surplus sales contracts have at times also applied exceptions but not with the same degree of liberality. Not surprisingly the cases give no quarter where the purchaser made

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[91] *E.g.*, The Atomic Energy Commission in **FT** 1970 **realized a** return on sale of usable property of 8% of the acquisition cost. *See also* Chart ***So.*** 24, pg. 55. Defense Supply Agency pamphlet. **Defense** Material Utilization and Disposal Programs, Program Administrators Progress Report. Statistical Review and Management Evaluation, 4th Quarter—FY *70.*

[92] Armed Services Procurement Reg. 7-602.4 (1969) : Federal Procurement Keg. 1-7.601-3. The contractor is allowed an equitable adjustment for subsurface or latent physical conditions differing materially from those indicated in the contract and for unknown physical conditions at a site of an unusual nature differing materially from those ordinarily encountered.

[93] *See* Promacs, Inc.. IBCA **317.** 1964 BCA para. 4016.

[94] GST&C ***So.*** 3. Standard Form 114C, reproduced at note 15 *supra.*

[95] *See* test accompanying notes 60–62 *supra.*

no attempt to inspect as invited even though inspection was not practical. Thus where the Government advertised "Steel, Scrap, Cast Steel" which turned out to be 39.7 percent malleable iron, a cheaper item which differs from steel due to carbon content which can only be discovered by microscopic examination or chemical analysis, the purchaser was "held to his bargain." This was so even though a state court precedent was available where a warranty mas found in the description of blue vitriol which turned out to be saltzburger vitriol regardless of the opportunity for inspection.[96] The Court of Claims was not sympathetic to the steel purchaser who made no inspection, holding that he was required to "make the sort of inspection that was effectual" and having not even made a visual inspection he was left with "no room to complain."[97] This same sentiment had been expressed many years before by the Court of Claims when it observed that "if plaintiff neglected to embrace the opportunity offered it to inspect and purchased the property without doing so, with notice that it bought at its own risk, it created by its own negligence the situation from which it now seeks relief."[98]

(a). Hidden Defects and Impossibility. Although there is much authority to the contrary outside the Government surplus sales area,[99] federal courts and boards have refused to relax the rigors of the inspection rulings just because a defect is hidden. In the appeal of ***John*** *Gullotta*[100] the Armed Services Board of Contract Appeals conceded that inspection would not have revealed a defect in a tractor sold by the Government but refused a remedy to the purchaser. The Court of Claims made the same admission in ***Alloys*** & *Chemical Corp. v. United States*[101] where buried radioactive material was sold on a lot basis and only 55 per cent of the estimate was delivered. The court construed the inspection and "as is" clauses together and said:

> Nor may this consequence [negation of warranty **of** quantity] of an "as is" sale be avoided because inspection was impossible. The wastes here, highly radioactive when generated, admittedly lay buried

[96] Hawkins v. Pemberton, 51 N.Y. 198, 10 Am. Dec. 595 (1872).

[97] Paxton-Mitchell Co. v. United States, **145** Ct. Cl. 502, 504, 172 F. Supp., **463,** 464 (1959).

[98] Triad Corp. v. United States, 63 Ct. Cl. 151.156 (1927) ; See also Dadourian Export Corp. v. United States, 291 F.2d 178 **(1961)** (where rescission of sale was refused on a purchase **of** rope described as manila rope in the IFB, a substantial amount of which turned out to be fiber rope).

[99] See notes 61 and 62 *supra. Contra,* Oil Well Supply Co. v. Watson. 168 Ind. 608, 80 N.E. 157 (1907).

[100] John Gullotta, ASBCA No. 10426, 65–1 BCA para. 4691.

[101] 324 F.2d 509 (1963).

> beneath the earth. Prospect of an inspection such as might have been of any value to the erstwhile bidder in confirming [the Government's] estimate was nonexistent. Nevertheless, a vendee in an "as is" sale may not secure recovery premised on a variance between estimate and actual quantities because inspection prior to conclusion of the contract was an absolute physical impossibility.'''

If, in fact, the sales contract is completely unambiguous and the buyer realizes he is buying on a "grab bag" basis and can protect himself by a price contingency in his bid, the *John Gwllotta* and *Alloys* cases cannot be faulted. However, the contracts are not that clear. The bidder generally is confronted with a detailed description, often containing estimates which go far beyond the need for identification, In those situations where there is variance between the descriptions and estimates and the Government is in the superior position to make an accurate description or estimate, the natural expectation engendered in the buyer is that the Government warrants conformance. Admittedly, nonrecognition of warranty negation in such a situation might not change the results of such cases as *Alloys* as the seller was probably in no better position than the buyer to ascertain the true facts. However, application of such a rule can cause a different result where the Government does hare the means of ascertaining the true facts at its disposal. Conversely. no different result would be reached by application of the rule expressed in *Alloys* that because of the disclaimers a buyer can never recover even though reasonable inspection for the buyer is impossible or would not reveal the complained of defects.

(b). Cases Where Inspection is Impracticable or Denied. Having cited and discussed cases where a plea that inspection was impossible did not suffice to counter that disclaimer, it hardly seems necessary to state that where inspection is inconvenient or even extremely impracticable the disclaimer still stands in full force. Without finding a remedy, one administrative board expressed sympathy for a purchaser of lithium hydride inclosed in welded shut metal containers which turned out to be heavier than the Government estimate and thus yielded only a fraction of the estimated weight of the fluid.[103] In *Varkell* the Court of Claims apparently harbored no similar sentiment while enforcing the inspection clause even though inspection would hare ruined the film product.[104]

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[102] *Id.* at 511.

[103] Lithium *Corp* of America, AEC BCA *So.* 31–2–68, 68–1, BCA para. **7058.** The Board suggested the purchaser might try to obtain relief under PI,. 85–804. (Act of 28 Aug. 1958 *72* Stat. 972. **30** U.S.C. 1431–35 (1964).

[104] Varkell v. United States. 334 F.2d 653, **167** Ct. Cl. **522** (1964).

Two federal district courts have indicated that where a full and complete inspection is denied the inspection clause is ineffective.[105] However, the Comptroller General, without a trace of feeling, had taken the position that even if the Government agency does prevent a bidder from inspecting, the bidder nonetheless bears the risk of loss due to misdescription by the Government.[106] It is unlikely that this extreme position will stand the scrutiny of any federal court. Such a Government action is a breach of a Government obligation to disclose, if not bad faith conduct and tantamount to fraud.

(c). Fraud, *Bad* Faith, and ***Superior*** Knowledge. The fact that fraudulent representations relied on by a buyer are actionable in the face of an inspection disclaimer hardly requires citation of authority[107] and no discussion. Whether or not bad faith on the part of the Government will have the same result is more conjectural than might be supposed. Dicta contained in one United States Supreme Court surplus sale case indicates that good faith in making estimates is required.[108] In United States *v.* Hathaway the Ninth Circuit Court of Appeals cites that Supreme Court case in stating, also in dicta, that "fraud, overbearing, superior knowledge or . . , unfairness" would make a Government surplus sales contract voidable.[109] The Comptroller General has expressed the opinion that in the absence of bad faith, disclaimer provisions will be applied.[110] Interestingly, no Government surplus sales contract cases where the defense of bad faith has been successfully raised have been found. However, because of the frequency of the mention of a good faith requirement there seems little doubt that given the right fact situation relief would be afforded. There is some basis for expecting that the fact situation would have to depict an unavoidable conclusion of bad faith in light of *Panama v.* United *States.*[111] There a warehouse employee displayed towel samples which were new and clean just as advertised and split open six or seven bales in such a manner as not to disclose

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[105] **Ellis Bros., Inc., v. United States, 197 F. Supp. 891** (S.D. **Cal. 1961) ; United States v. Hoffman, 219** F. **Supp. 895 (E.D. N.Y. 1963).**

[106] **Unpublished Comp. Gen. Dec. B–157722, 18 Oct. 1965, 11 CCF 80,081.**

[107] **Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388 (1870) ; United States v. Hoffman, 219 F. Supp. 895, 902** (E.D. **N.P. 1963).**

[108] **Lipshitz & Cohen v. United States, 269 U.S. 90, 92 (1925) ("The naming of quantities cannot be regarded in the nature of a warranty, but merely as an estimate of the probable amounts in reference to which good faith only could be** required **of the party making it."). *See also*, McGuire & Co. V. United States, 273 U.S. 67 (1927) ; 41 Comp. Gen. 185 (1961).**

[109] **'"United States** v. **Hathaway, 242 F.2d 897 (9th Cir. 1957).**

[110] **41 Comp. Gen. 185 (1961) ; Unpublished Comp. Gen. Dec. B–169518, 21 July 1970.**

[111] **63 Ct. Cl. 283 (1927).**

that the edges were stained by the tar paper they were wrapped in. When the bidder asked to celect unopened bales at random for inspection he was told that the contracting officer would have to authorize it. The issue of bad faith was not even discussed as the Court of Claims decided the case on the issue of lack of authority in the warehouse employee to make a sale by sample. The facts paint a picture of bad faith which should have been imputed to the contracting officer through the act of his agent.

Good faith, or the lack of it, is an issue that is often intertwined with that of superior knowledge. The duty to disclose information known to the Government but not reasonably available to the contractor is the basis for the concept of superior knowledge. A breach of such a duty can also be considered an act of bad faith. But, as in the case of bad faith, while the concept of superior knowledge is mouthed, no surplus sales cases applying it have been found. In the *Panama* case the issue of failure to disclose was present in that some of the towels were mildewed by a water overflow that the warehouse employees were aware of but the court would not impute this knowledge to the officer in charge of the sale. However, that issue was not squarely raised by the purchaser.

This issue of superior knowledge will be treated further in the section of this article dealing with the "as is" clause. Suffice it to say at this point that the issue of superior knowledge has not been adequately raised by purchasers or discussed by courts or boards. It deserves a much more thorough consideration.

(d). Alteration After Inspection. Under the current standard surplus sales contract the Gor-ernment specifically assumes the risk of loss subsequent to the goods being made available for inspection and prior to removal after award.[112] This has not always been the case. For example, the March 1960 edition of the standard form did not impose such a risk on the Government until award.[113] This raised the issue as to whether the buyer assumed the risk of alteration of

[112] GST&C *So.* 14, Standard Form 114C, Jan. 1970 edition, which reads as follows:

"Unless otherwise provided in the Invitation, the Government will be responsible for the care and protection of the property subsequent to it being available for inspection and prior to it.; renioral. Any loss, damage. or destruction occurring during such period will tie adjusted by the Contracting Officer to the extent that it was nnt caused directly or indirectly by the Purchaser, its agents. or its employees. With respect to losses only, in the event the property is offered for sale by the 'lot' no adjustment will be authorized under this provision unless the Governnient **is** notified of the loss prior *to* removal from the installation of any portion of the lot. with respect to which the loss is claimed"

[113] GST&C *So.* 10. SF 114–C, March 1960 edition, prescribed by GSA Rep. 1–IT–302.00.

the property between his inspection and award of the contract. A federal district court in North Carolina in 1958 dismissed a Government suit, against a purchaser who refused to pay for rope which was purchased by the pound and was dry when inspected but was made substantially heavier later by heavy rains.[114] The court did not discuss whether the disclaimers required the buyer to take the property in the condition existing at time of sale vis à vis time of inspection but instead found an implied warranty by the Government that material would be delivered in the same condition as inspected, apparently overlooking the fact that the inspection clause coupled with the "as is" disclaimer is generally viewed as negating all warranties. Whether or not the reasoning fits into a neat legal pigeon hole, the result is reasonable and equitable. The same result could be reached by applying a good faith requirement or merely interpreting an ambiguity against the drafter of the contract. However, regardless of how reasonable the rule is, it most often has been of no help to the purchaser because of the extreme difficulty experienced by purchasers in carrying the burden of proof placed on them. For example, where automotive parts mere sold as sets and the invitation for bids stated some parts would be missing it was necessary that the purchaser produce substantial evidence as to what items were present when he inspected. Without a complete inspection he was unable to do this.[115] This burden becomes even more onerous in the cases where complete inspection is commercially impracticable such as where large amounts of cable, wire, or film is sold by the roll. The ASBCA also applies strict evidentiary standards against the purchaser of machinery and vehicles that are being sold as scrap. Often these items have some usable components which are not listed in the sales literature but nevertheless are visible to the purchaser when he inspects. When he subsequently finds such items have been removed prior to delivery, his burden of proof is horrendous. The attitude of the ASBCA, although not verbally expressed, seems to be that inasmuch as the purchaser is buying scrap by the pound or lot the purchaser's intent is to obtain so much of a basic metal or metals. Thus, the reasoning is that the purchaser is not hurt at all by removal of some small items if the sale is by pound and hurt very little where it is a lot sale. Accordingly, a heavy burden should be imposed.[116] This ignores the realities of the "junk" business. It may

[114] **Cnited States v. Blake, 161 F. Supp. 76** (E.D. **N.C. 1958).**

[115] **American Auto Parts** Co., **Inc., v. United States, 162** Ct. Cl. **23 (1963).**

[116] **Aircraft Associates and** Manufacturing *Corp.*, **ASBCA** No. **6187, 61–1 BCA para. 3092,** *affm'd* **on** *reconsideration*, **61–2 BCA para. 3212. (The purchaser alleged that after inspection and before award certain parts were removed**

have been the components that caught the purchaser's eye upon inspection and made him willing to risk a high bid. It is not inconceivable that the components were left on as a "sweetener" to get a buyer. In fact, it is the personal experience of the author that this was done by the U.S. Army Disposal Agency in the Republic of Vietnam and bitter complaints were generated when such "goodies" later came up missing, a very common occurrence due to extensive looting.

This problem has not been mooted by the present "Risk of Loss" clause because the remedy provided is merely an adjustment in the purchase price. Predictably, this adjustment would be based on the unit price and the unit price being based on weight would yield an adjustment which would not correspond to the value placed on the missing or damaged component by the purchaser when computing his bid. In addition the burden will still be on the purchaser to prove the actual condition of the property at the time of inspection. Although it cannot be contended that the ASBCA refuses to recognize that alteration after inspection of a sale item merits an adjustment to the purchaser even absent the current "Risk of Loss" clause, it can be validly observed that seldom does a purchaser meet the evidentiary standard required by the Board.[117]

3. *Protecting the Public Treasury? Inspection Clauses in Non-Personal Property Contracts.*

The First Circuit Court of Appeals in *Krupp* v. *FHA*, a case involving a sale by the Federal Housing Administration emphatically denied the application of different rules to surplus sales than those applied to private litigants. In holding in favor of a purchaser suing in the face of inspeotion provisions similar to those in surplus personal property sales on a breach of warranty theory where the **FHA** had advertised that a garden type apartment project contained 100 garages and, in fact, only contained half that many, the court stated :

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from scrap aircraft and refused to pay; however, he later agreed to remove the items and sought a reduction in price based on a weight reduction. The **ASBCA** denied simply on the ground that the purchaser had inspected the aircraft and that the weight estimate, if a warranty. was negated.) ; Ellis D. Weiner, ASBCA No. 5383, **59–2** BCA para. **2448.**

[117] The purchaser obtained a price adjustment in Auto Chemical Co., Inc. **ASBCA** No. 3395, **57–2** BCA para. **1363** where the Government agreed with the contractor that **266** boxes of dye were contained in a lot (sold as a lot) upon inspection and that the contractor only received **200** boxes. Without the Government admission it is predictable that the case would have been treated as a variation in quantity, liability for which was disclaimed by the "as is" provision. *See* Skyway Air Parts Co., Inc., **ASBCA** No. **11811, 67–1 BCA** para. **6306.**

> The district court appeared to have some feeling that disclaimer provisions in a government contract were to be more favorably construed because "imposed to protect the public treasury." When the government goes into the market place it must go as everyone else. The public treasury may be protected by conditions imposed by Congress, or by lawful regulations, ... but if the matter is left to contractual provisions and to the courts, all parties there must stand alike, We cannot recognize one rule for the government and another for private litigants.[118]

In reply to the Government's argument [119] that the statement that the project contained 100 garages was an estimate and not a warranty based on the *Maguire* [120] and *Lipshitz* [121] cases, which involved surplus personal property sales, the court said :

> We doubt whether the sale of a single piece of real estate by the FHA, whose regular business must necessarily include disposing of property, is in the category of a surplus sale. But, more important, the proper test is not surplus versus some other kind of sale, but the more general one of how it is reasonable, under all the circumstances, to understand what is, arguably, an affirmation of fact. While the nature of the sale is no doubt included among the relevant factors, so also are the definiteness of the language used and the apparent ability, or inability, of the seller to ascertain the actual facts. There is a wide, obvious difference, for example, between the government's statement of the "approximate" total weight of surplus junk metal located at a number of forts. . . . and the flat statement that a certain structure has rentable garage space for 100 cars. We cannot regard the latter on its face as anything but a positive statement of **known** fact."

While the First Circuit purports to reject any "protect the public treasury" concept in relation to Government sales, it is hard to dispel the suspicion that most federal courts have that or some similar element in mind when applying the law to surplus sales. It also seems apparent that the courts and boards agree wholeheartedly that the sale of surplus personal property is in a special category. The disclaimer provisions of the *Krupp* case do not substantially differ from the standard surplus personal property sales contract. The inspection clause stated that "those interested are expected to acquaint themselves with the property and to develop their own expectations as to rental income, operating expenses, etc." [123] The "as is" equivalent

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[118] Krupp v. Federal Housing Administration, 285 F.2d **833,** 836 (1st Cir. 1961).
[119] *Id.* at 834.
[120] **Maguire** & Co. v. United States, 273 U.S. 67 (1927).
[121] Lipshita & Cohen v. United States, 269 U.S. 90 **(1925).**
[122] **Krupp** v. Federal Housing Administration, ***285*** F.2d 833, 834–35 (1st Cir. 1961).
[123] *Id.* at 835.

stated that "the purchaser will be expected to accept the property in its present condition without warranty by FHA as to physical condition. . . . Information provided herein is all to be made available by FHA and is furnished without representation on the part of FHA." [124] The court interpreted this wording against the drafter and determined it negated only a warranty of quality (state of repair or condition) and not one of quantity. It is admitted that the language isn't as explicit as that contained in General Sales Terms and Conditions Sumbers 1 and 2 of the standard surplus personal property sales contract but the opinion as a whole evidences a greater Fillingness to avoid the exculpatory provisions than is found in the cases on personal property. For example, the court in footnote three points out that *Krupp* is not a case where the purchaser knew or should have known the true facts. This comment has more applicability to the *Varkell* [125] situation where the sales description stated that rolls of film contained a certain named footage. In *Krupp* the purchaser easily could have measured the double garages and determined that they would only house one standard sized American car instead of two as advertised. Similarly in *Furman v. United States* [126] the literature stated that a certain yardage of cloth was present but because the sale was on a weight basis the buyer had no remedy for a drastic difference between the stated yardage and that delivered. In the one case the purchaser could have measured one garage and reasonably assumed the other ninety-nine were tlie same as easily as the cloth purchaser could have weighed one pound of cloth and assumed the yardage therein was representative of the rest of the cloth.

There is also another line of cases with a similar inspection provision that merits study. Government construction contracts have generally contained a "Site Investigation" or "Site Visitation" clause in various forms. In 1964 the Interior Board of Contract Appeals considered a clause which stated that failure to visit the site would in no way relieve the contractor from performing the work as required by the specifications.[127] The clause did not prevent the Court of Claims from finding a breach of varranty where a site inspection would not have revealed tlie location of connecting mater

[124] *Id.*

[125] Varkell v. United States. 334 F.2d 653, 167 Ct. Cl. *522* (1964).

[126] Samuel Furman v. United States, 140 F. Supp. 781, 135 Ct. Cl. *202, cert. denied*, 352 U.S. 847 (1956).

[127] Promacs, Inc., IBCA **317,** 1964 BCA para. 4016. The clause was a standard clause contained at that time in Standard Form *22.* The wording of the current clauses are somew hat different. *See* Article *2,* SF 22, **ASPR** App. F–100.22 (1969) Art 13. SF 2.3-A ASPR App. F–100 23A (1969) and **ASPR** 7–602.33 (1969).

mains because such mains were not in existence at the time and there were no specifications and drawings available to the contractor. This situation seems to be no different from that in term sale contracts where future generations have not yet been ascertained and cannot be inspected. Although a construction contractor cannot recover for his miscalculated cost where a duty to visit the site was imposed and that visit would have revealed conditions which formed the basis for the cost figure,[128] he is not similarly "out of court" if the Government prevents him from examining the site[129] or if the investigation would not have revealed the true condition.[130]

It is submitted that there should be no difference in legal consequences due to a property description in a surplus sales contract and a site condition description in a construction contract where an inspection clause is included in the former and a site inspection clause in the latter. In *Dunbar & Sullivan Dredging Company* v. *United States*[131] a contractor signed a contract to do certain dredging in the Kiagara River at a certain price per cubic yard. The specifications described the character of the materials to be removed as follows:

> The material to be removed is believed to be sand, clay, gravel, and boulders, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.[132]

In spite of the exculpatory language, the Court of Claims allowed the contractor to recover additional costs for dredging hardpan which was almost two-fifths of the total amount excavated. The site investigation language did not negate the warranty that the description mas accurate because the short bidding period rendered an investigation by the contractor impracticable if not impossible due to the "prohibitive" cost to get equipment to the site in the dead of wink ~ -Cases on surplus sales never talk about prohibitive cost of determining the length of steel cable rolled up on numerous rolls or of determining the condition of numerous bales of towels or jackets. The impossibility and impracticability cases in the surplus sales area have been accorded much different treatment. Whether or not the

[128] Blauner Constr. Co. v. United States, 94 Ct. Cl. 603 (1941).
[129] Boland & Martin, Inc.. ASBCA No. 8603, 1963 BCA para. 3706.
[130] Arthur Painting Co., ASBCA *So.* 6726. 1962 BCA para. 3419.
[131] 65 Ct. Cl. 567 (1928).
[132] *Id.* at 569.
[133] The Dunbar case also involved facts giving rise to a duty to disclose as Army engineers had knowledge from previous excarations in the area that hardpan would be encountered.

"as is" clause so bolsters the inspection clause as to make the difference will be considered during the discussion of that clause. It will be noted at this point that the Government has successfully limited its liability for defective specifications by actions that indicate to the potential contractor that there are discrepancies and the risk is on the contractor.[134] The ASBCA has held that an exculpatory clause protected the Government from liability for defective specifications when they were furnished for information only and the contract language very clearly stated that the Government would not be responsible for their accuracy.[135] However, the courts sometimes tend to strictly construe broad provisions which try to allocate more risk to the contractor than the court thinks fair under the circumstances. In *Morrison-Knudsen* Co. *v. United States*[136] the specifications provided that the submission of a bid would be prima facie evidence that the bidder had examined the site and was "satisfied as to the conditions to be encountered in performing the work as scheduled . . ." The Court of Claims stated that:[137]

> . . . this court has frequently held in comparable circumstances that broad provisions of this kind—stating that the government does not guarantee the statements of fact contained in the specifications or drawings or requiring the bidder to investigate the site and satisfy himself **of** conditions, etc.—cannot **be** given their full literal reach and do not relieve the government from liability.[138]

Such restriction of the inspection and "as is" clauses in the Government surplus sales contract has not yet made its appearance. The question remains, whether there is a basic difference in the type of contract. The author feels that the courts have not yet articulated one although they are quick to refer to the "peculiar" nature of the sales contract.

B. *"CONDITION AND LOCATION OF PROPERTY" CLAUSE*

1. The Clause.

The standard "as is" disclaimer used in Government surplus sales

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[134] Wunderlich Contracting Co. v. United States, **173** Ct. Cl. **180, 351** F.2d **956,** (1965) (discussions at a bidder's conference indicated there were numerous mistakes in the drawings),

[135] "Bethlehem Steel Co., ASBCA So. 10058, **65–2** BCA para. **4869.**

[136] 184 Ct. Cl. 661 (1968).

[137] *Id.* at 685–86.

[138] The court cites the following cases as examples where exculpatory clauses have not been afforded their full reach: United Contractors v. United States. **177** Ct. Cl. 151, 165–66, **368** F.2d 585, 598 (1966); Flippin Materials Co. v. United States. **160** Ct. Cl. **337. 365, 312** F.2d **408, 413 (1963)**; Fehlhaber Corp. v. Vnited States, **138** Ct. Cl. **571**, 584, **151 F.** Supp. **817, 825 (1957)** ***cert. denied.*** **355** U.S. **877.**

contracts is entitled "Condition and Location of Property" and reads as follows:

> Unless otherwise specifically provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." The description of the property is based on the best information available to the sales office. However, unless otherwise specifically provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered. ***This** is not a **sale by sample.**"*

Essentially the same clause has been used in Government surplus sales contracts for the past twenty years.[140] All surplus sales cases discussed herein unless otherwise noted contain the above or substantially identical clauses.

2. Validity and Scope of Clause.

(a). Quantity and Weight. Whether the expression of a weight or quantity in a contract constitutes a warranty depends on the circumstances and to some extent the method of sale. The property may be sold per piece or lotted and sold on a price per lot or on a price per unit within the lot basis, The practice is to lot similar items together when expected returns for individual items are too low to warrant individual offering, or where transportation rates or peculiarities of the particular trade lotting will enhance the sales value of the property. The Department of Defense instructs its sales personnel to sell by price per unit to the extent practicable and in conformance with trade practices of the relevant area and that sales on a price per lot basis will be held to a minimum and only when quantities and dollar values are so small that the administrative cost of segregation and sale as individual items will exceed the anticipated proceeds of sale.[141] When sales are made on a price per lot basis the sales office is directed to state the approximate quantity of the material in the lot.[142] Because of this practice a purchaser who receives less material

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[139] Standard Form 114C, Jan. 1970 Edition. GSA, Federal Property Management Regulation (41 C.F.R.) 101–45.3, GST&C So. 2.

[140] *See* United States v. Silverton, 200 F.2d 824, 825 (1st Cir. 1952); See *also* Snyder Corp. v. United States. 68 Ct. Cl. 667, 671, (1930) (this case shows that even 40 years ago substantially the same clause was used). General Textile Corp. v. United States, 76 Ct. Cl. 442 (1932).

[141] Defense Disposal Manual, DOD 4160.21–M, April 1967, as changed. Part 3, Chap. 11, para. F. 1.g.

[142] *Id.*

in the lot than specified in the estimate sometimes seeks to recover for breach of an alleged warranty of weight or quantity. In one price per lot sale where the invitation stated that the weights were approximate and "must be accepted as correct by the bidder" the Supreme Court held the purchaser was not entitled to lost profits where the items were short of the estimate because the naming of weights under such circumstances could not be regarded as a warranty, "but merely as an estimate of the probable amounts in reference to which good faith only could be required of the party making it."[143] This rule is invariably applied to lot price sales.[144] It is reasonable to interpret such statements as opinion rather than an affirmation of fact upon which warranty is based.[145] However, some cases indicate that even in such a sale estimated weights cannot be arrived at arbitrarily or unreasonably.[146] The reason for the rule on lot price sales would seem to be that the basis of the parties bargain is the lot unit and there can be no reasonable reliance on the stated estimated weight. This reasoning apparently has justified the extension of the rule to all cases where the unit for pricing purposes is other than the lot but an estimated number of pricing units is stated in the invitation in any event. This apparent extension of the lot price rule helps to explain the cases where (1) rolls of film were bought which yielded one quarter of the stated footage;[147] (2) thread was sold by the tube

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[143] Lipshitz & Cohen v. United States, 269 U.S. 90. 92 (1925).

[144] Cleveland Iron & Metal Co., NASA BCA No. 11, 61-2 BCA para. 3102; Alan-Barr Aluminum Co., Inc., ASBCA No. 2771, 30 Mar. 1956; Unpublished Comp. Gen. Dec. No. B-169518, July 21, 1970.

[145] Ordinarily a statement of weight or quantity is regarded as a statement of opinion rather than an assertion of fact and not a warranty. This is especially true where words like "about" or "or the like" are used. *See* M.W. Kellogg Co. v. Standard Steel Fabricating Co., 189 F.2d 629 (10th Cir. 1951); Maguire & Co. v. United States. *273* U.S. 67 (1927). Representations which merely express an opinion or judgment on a matter of which the seller has no superior knowledge and on which the buyer may be expected also to hare an opinion and to exercise a judgment is no warranty. Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 61 Utah 503, 215 P. 995 (1923). *See also* UNIFORM SALES ACT Sec. 12; Unpublished Comp. Gen. So. B-161469, May 26, 1967.

[146] Aircraft Associates & Mfg. Co., Inc., v. United States. 174 Ct. Cl. 886, 357 F.2d 373 (1966); Hardwick Aircraft Co., GSBCA No. 2044, 66-2 BCA para. 6012: *See also* Sheldon Aircraft Products Corp., ASBCA No. 12905, 68-2 BCA para. 7163. (This case indicates that in case of a gross discrepancy between estimated and actual weight a difference in identity would be found which would be a breach of contract and not just a breach of warranty). In Unpublished Comp. Gen. Dec. So. B-167926, 15 July 1970 the Comptroller General said the weight estimate must be on the best information available and held the contracting officer to have constructive knowledge of better information on which to base his estimate.

[147] Varkell v. United States. 334 F. 2d 653, 167 Ct. Cl. 522 (1964).

with an estimated 4800 yards per tube but yielded 4,000 yards; [148] (3) cloth was sold by weight and the estimated yardage figure was grossly overestimated.[149] Thus it is that even in the absence of a disclaimer it is often difficult to convince a court that the expression of a quantity amounts to a varranty. If the sale is by a definite quantity then the Government must deliver that quantity or adjust the purchase price.[150] Accordingly, in the above cases there is good authority that, absent a "Variation in Quantity" clause or the words "about" or "more or less" or the like,[151] the Government would have to deliver the stated number of rolls, tubes, and pounds and where the contractor and the Government made a precise count before delivery and then failed to deliver that amount the purchaser would be entitled to a price adjustment.[152] However, where an "as is" disclaimer is included which specifically mentions quantity and weight the Government can deliver far less than the estimated weight and the permitted percentage of variation in a sale on a price per unit of weight basis and still be liable only for a refund of any payment received which exceeds that amount computed by multiplying the amount delivered by the unit purchase price.[153] The more logical approach is that warranty disclaimers do not reach such a case. The delivery of a quantity which is more than an accidental variation arising from slight and unimportant excesses or deficiencies, or which do not come within stated percentages in a variation of quantity clause, is equivalent to tendering an item that differs in identity from that bargained for and a breach of contract.[154]

(b). Description. The standard clause purports to disclaim all

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[148] Bertner Thread Co., ASBCA *So.* 3846, 57–1 BCA para. 1193.

[149] Furman v. United States. 135 Ct. Cl. 202, 140 F. Supp. 781 (1956).

[150] Brody v. United States. 64 Ct. Cl. 538 (1928).

[151] Words such as "about" or "more or less" which modify a named quantity negate a warranty of quantity. All that is required is a good faith estimate if the amount of goods sold is identified to an independent circumstance such as all the needs of the purchaser in a certain period. If no independent circumstances are referred to the words "about" or "more or less" provide only against accidental variations arising from slight and unimportant excesses or deficiencies. Brawley v. United States. 96 U.S. 168 (1877); M. W. Kellogg Co. v. Standard Steel Fabricating Co., 189 F. 2d 629 (10th Cir. 1951). *Contra,* Franklin Metals Co., ASBCA So. 9034, 1964 BCA para. 4231 (in a definitely erroneous opinion the Board refused damages to a purchaser on a price per pound basis of an estimated 50 000 pound of "Naval Brass Turnings" where 18,100 pounds mere delivered and the variation in quantity clause only provided for a 10% variation).

[152] Aceto Chemical Co., Inc.. ASBCA So. 3396. 57–2 BCA para. 1363; Duddy's Tire Distributors, ASBCA So. €327, 60–2 BCA para. 2801. *See also* note 151 *supra.*

[153] Franklin Metals Co., ASBCA So. 9034, 1964 BCA 4261. See note 151 *supra.*

[154] *Cf.*, Tulsa Army & Savy Store. ASBCA No. 6449, 60–2 BCA para. 2785.

warranties of kind, character, quality, size, and description. The latter term is broad enough to include all the preceding. At common law, absent a disclaimer, the sale of goods by a particular description of quality imported a warranty that the goods are or shall be of that description.[155] However, the descriptive statements had to be affirmations of fact and not expression of opinion. Also, parties could by express provision in the contract relieve the seller from liability on any warranty of conformity to description.[156] In addition a warranty of description was held to be repudiated by a sale on inspection with certain exceptions as discussed in Section III B. In line with these principles the "as is" clause coupled with the inspection clause in surplus sales contracts have been strictly applied to successfully resist suits based on misdescription. Recovery has been denied for jeeps admittedly misdescribed as being in good condition;[157] for cloth advertised as moleskin which was actually cotton drill;[158] for automobile differentials described as unused which in fact were used;[159] for aircraft described as including a great number of component parts where some minor parts such as a clock and intercom phone were not delivered;[160] for bandages described as white which turned out to be brown:[161] and on and on, ad infinitum.[162]

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[155] Morse v. Moore, 83 Me. 473, 22 A. 362 (1891) (holding that a contract to deliver ice of a certain described quality and thickness was an express warranty that the ice when delivered would be of such quality and thickness). The UNIFORM SALES ACT Sec. 12 treats a sale of goods by description as an implied warranty.

[156] Burntisland Shipbuilding Co. v. Barde Steel Products Corp., 278 F.2d 552 (D. Del. 1922).

[157] James P. Wohl, ASBCA No. 10556, 65-1 BCA para. 4835.

[158] 3 Comp. Gen. 649 (1924).

[159] Ellis Bros., Inc., v. United States, 197 F. Supp. 891 (S.D. Cal. 1961).

[160] George A. Buchanan, ASBCA No. 4417, 58-2 BCA para. 1923; *Contra*, S & S Machinery Co., ASBCA No. 5707, 60-2 BCA para. 2720 (the Board apparently will find a difference in identity between that bought and that delivered where the missing parts are more than minor in nature, essential to the functioning of the item purchased and thus part of the basis of the bargain). *See also*, Unpublished Comp. Gen. Dec. B-157206, July 19, 1965, where the disclaimers were unsuccessful in a case where the condition of propenty described as fair but in fact was junk. This appears to be an identity case also.

[161] M. Berger Company v. United States, 199 F. Supp. 22 (W.D. Pa. 1961).

[162] *See* American Elastics v. Vnited States, 187 F.2d 109 (2d Cir. 1950) *cert. denied*, 342 U.S. 829 (condition; soiled elastic scrap advertised as "clean, dry & straight"); John Gullotta, ASBCA No. 10426, 65-1 BCA 4691 (condition; tractor advertised as used and in poor condition but said nothing about a cracked main block, camshaft and timing gears broken and connecting rods scored beyond repair); United States v. Hoffman, 219 F. Supp. 895, (E.D. N.Y. 1963) (condition; jackets advertised as unused and 15-20% were used); Paxton-Mitchell v. United States, 145 Ct. Cl. 502, 172 F. Supp. 463 (1959) (kind; characteristics; sale of "Steel, Scrap, Cast Steel" which turned out to be 49.7% malleable iron).

3. *Extent to Which Risk is Shifted to the Purchaser by the "As Is" Disclaimer.*

Just as there are cases which refuse to enforce the inspection clause as a blanket, impregnable, bastion against warranty so are there circumstances under which the "as is" disclaimer coupled with the inspection clause will not be enforced. However, the tremendous burden of the purchaser in obtaining such a decision is illustrated by a Comptroller General opinion wherein the purchaser paraded a number of defenses and then had to quickly dodge as they were glibly knocked down.[163] The invitation in the case contained a chemical analysis of a metal product which proved erroneous. To the argument that the surplus sales contract was unconscionable, the Comptroller General replied there was nothing in the solicitation to show the Government was attempting to clandestinely take advantage of the unwary. The instant case fell short of unequal bargaining position cases where it was clear the seller attempted to hide the warranty disclaimer from those who couldn't match wits with the seller. Secondly, the purchaser contended the metal was so defective as to constitute a failure of consideration. Not so, said the watch dog of the Government purse and the cases cited by the purchaser to support this argument were dismissed because their facts showed delivery of a product different in identity from that bought. This was not such a case. Section 2–316 of the Uniform Commercial Code[164] was held not applicable because it was interpreted to protect a purchaser from unexpected and unbargained for language of disclaimer by denying application of the disclaimer where the language was inconsistent with an express warranty. Here, according to the Comptroller General, the descriptive language was not an express warranty. This appears to be bootstrapping, as the opinion seems to say that the reason the descriptive language was not an express warranty was that there was a disclaimer saying it was not. The UCC provision has no meaning at all if this reasoning is followed because there never would be an incon-

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[163] "Unpublished Comp. Gen. Dec. B–163003, 2 April 1968, *aff'm'd on reconsideration*, Unpublished Comp. Gen. Dec. B–163005, 30 Sept. 1968. *Bee also* Philipp Brothers. GSBCA So. 3039, 70–2 BCA para. 8463 and 70–2 BCA para. 8366 (tungsten concentrate described as containing 73.41% tungsten trioxide and contained 10% less; purchaser, who failed to make any inspection, was denied relief).

[164] UCC Sec. 2–316(1) provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this Act on parol or extrinsic evidence (Section 2–202) negation or limitation is inoperative to the extent that such construction is unreasonable.

sistency between a disclaimer and an express warranty if the disclaimer is held conclusive that no express warranties exit. As to the purchaser's contention of "commercial impracticability," [165] (no merchant could analyze the 10 million pounds of metal and still make a reasonable bid) the opinion summarily states that where there is an express disclaimer there is no implied warranty that the property will correspond to the description.

Although the purchaser in the case discussed immediately above found no weakness in the "as is" and inspection armor rare exceptions are recognized. For discussion purposes the possible exceptions are categorized as : mistake, identity, "ridiculous discrepancy," hidden defect, superior knowledge and "best available information." As mill become clear, there is considerable overlap within the classification scheme.

(a). Mistake. The Court of Claims adamantly has applied the rule that mutual mistake of fact has no merit in defending against the surplus sales contract disclaimers. In *United States v. Hathaway* [166] the Court of Claims considered a contention of mutual mistake in that both the purchaser and the Government had thought that all the steel from huge underwater dam locks could be salvaged whereas only half actually could be salvaged. In refusing reformation the court said:

> Mutual mistake renders a sales contract voidable only if the parties have not agreed among themselves that the risk of such mistake shall be assumed by the purchaser . . . It cannot be doubted that the parties can control the matter by agreement. **A** party to a contract may assume the risk of every chance occurrence?"

The court concluded that the parties had shifted the risk to the purchaser by the "as is" and inspection clauses.[168] The Boards of Con-

[165] An interesting comparison can be made with cases where supply contractors **seek** equitable adjustments for attempting to comply with Gorernment specifications where performance turns out to be "commercially impracticable." See. *e.g.*, Spencer Explosives. Inc., ASBCA No. 4800, 60–2 BCA Para. **2793:** Morrison-Knudsen-Perini-Hardeman, Inc., ESGBA No. *2857,* 68–2 RCA para. 7106; RESTATEMENT OF CONTRACTS Sec. **454;** UCC Sec. 2–615.

[166] 242 F.2d 897 (9th Cir. 1967). *Accord.* American Elastics v. United States, 187 F.2d 109 **(2d** Cir. 1950) *cert. denied,* **342** U.S. 829 (1931); American Sanitary Rag Co. v. United States, 142 Ct. Cl. **293.** 161 F. Supp. 414 (1958). ***But see*** Industrial Salvage Corp. v. United States. 122 **Ct.** Cl. 611 (1952) (both the Government and the purchaser were mistaken as to the amount of buried copper cable and the purchaser recovered the purchase price on a misrepresentation theory based on defective drawings).

[167] United States v. Hathaway. **212** F.2d 897, 899 (9th Cir. **1957).**

[168] In the comparable situation where supply contractors seek reformation for performing to deficient specifications on the basis of mutual mistake the Court of Claims assumes the same position. In Sational Presto Industries v. United States, 167 Ct. Cl. 749. 764. **338** F.2d 99, 108 (1964) the court said, "In denying a claim for increased compensation tied to a mutual mistake, we recently

tract Appeal refuse to consider mutual mistake contentions on the basis that they do not have jurisdiction to afford equitable relief.[169] The Comptroller General, on the other hand, recognizes no similar impediment in considering requests for rescission or reformation. As recently as March 1970 that office has refused rescission for mutual mistake of fact where a purchaser bought a crane and found out later he could not remove it from the agency yard without dismantling it, which fact neither the buyer nor the Government knew at the time of sale.[170] The opinion held that the "as is" clause shifted that risk to the purchaser.

While recognizing that the surplus sales disclaimers bar any relief to the purchaser on the ground of mutual mistake, the Comptroller General has granted relief in mistake in bid cases asserted after award where the Government either knew or should have known of the mistake.[171] Of course, in these cases the disclaimer never becomes operative. The result of Government knowledge that the bidder is laboring under a mistake is that acceptance will not result in the formation of an enforceable contract.[172]

The refusal to allow mutual mistake of a material fact as a defense to the surplus sales contract cannot be faulted. Except in bad faith cases almost every misdescription case involves a mutual mistake; the contracting officer thinks that the description does describe the item sold and the purchaser, often through failure to inspect, assumes the description is accurate. The expectation of the parties as to allocation of risk would be completely frustrated by any other result.

(b). Identity vis à vis Description. As early as 1931 the Court of Claims recognized a rule in *Blue Ribbon Products Co.* v. *United States,* that the standard inspection and "as is" disclaimers have no application where goods different in identity from those described

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pointed out that a 'mutual mistake as to a fact or factor, even a material one, mill not support relief if the contract puts the risk of such a mistake on the party asking reformation . . . or normally if the other party, though aware of the correct facts, mould not have agreed at the outset to the change now sought. . . .' Flippin Materials Co. v. United States, . . . 312 F.2d 408, 415."

[169] Metropolitan Metals, Inc., ASBCA No. 6741, 59–2 BCA para. 2374; Wessex, Inc., ASBCA So. 5003, 59–2 BCA para. 2282; Albert Ohralik, GSBCA No. 2745, 69–1 BCA para. 7633.

[170] Unpublished Comp. Gen. Dec. No. B–168635, 20 March 1970.

[171] Unpublished Comp. Gen. Dec. No. B–170955, 10 Nov. 1970, (bid was 55 times as high as the next highest bid because the purchaser thought the item identification number referred to a mercury type battery and not alkaline); Unpublished Comp. Gen. Dec. No. B–158145, 25 Nov. 1966 (high bid was in line with the price for a higher quality of scrap).

[172] Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373 (1900); 42 Comp. Gen. 723. 724 (1963).

in the invitation are delivered to the buyer.[173] The buyer was allowed to rescind and recover his deposit. This rule was followed by a federal district court in *United States* v. *Silverton* wherein the judge likened the situation before him to ordering apples and getting oranges. The First Circuit Court of Appeals reversed, not thinking the facts fit the rule, but nevertheless approved the rule which has since been picked up by other courts and boards and labelled the "oranges for apples" rule.[174] Several district courts and the Second Circuit have indicated they will not follow the "oranges for apples" rule. The latter court considers the lack of identity as nothing more than mutual mistake and in such a case the disclaimers clearly shift the risk.[175] However, it must be observed that the courts rejecting the identity exception have done so in cases where the court could have reasonably decided there was no essential difference between the description and the delivered item. In *United States* v. *Hoffman*[176] jackets were described as "unused" and 15–20 per cent were used. A California federal district court[177] rejected the rule in a case where auto differentials were also described as "unused" but in fact were used. In *Dadourian Export Corp. v. United States*[178] where the Second Circuit disfavored the "oranges for apples" rule, the item delivered was rope which could not be used for the same purpose as the rope described. An earlier California federal district court case was more perceptive in distinguishing a true identity case and holding for a purchaser where Benicia Arsenal personnel tried

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"'Blue Ribbon Products Co. v. United States, 71 Ct. Cl. 393 (1931) (The IFB described "I" beams by sizes and weight, but also stated, "Approximate sizes and quantities, total." The quantity and sizes as they actually existed at the depot were incorrectly stated and the court held that the purchaser did not have to accept different "I" beams than those described). *See also* Ellis v. United States. 68 Ct. Cl. 11 (1929). *cert. denied,* 282 U.S. 846 (1930).

[174] United States v. Silverton, 200 F.2d 824, 826 (1st Cir. 1952). An item advertised as "webbing, scrap, mixed" was delivered with metal attached. No inspection was made but on the basis that in the trade such a description meant no metal would be attached the district judge held for the buyer. At 828 the First Circuit said: "We would not press this idea [*caveat emptor*] if item 79–A had consisted wholly of scrap metal, it might be that the bidder, even though he had failed to make an inspection before submitting his bid, could hare rejected the shipment as not conforming to the contract. By no stretch could a load of scrap metal be construed in good faith, as being within the description 'scrap nebbing mixed,' a subhead under 'Textile, Cotton.'"

[175] Dadourian Export *Corp.* v. United States, 291 F.2d 178 (2d Cir. 1961); The 10th Circuit expressed approval of the "oranges for apples" rule in Standard Magnesium Corp. v. United States, 241 F.2d 677, 679 (10th Cir. 1957) but distinguished.

[176] 219 F. Supp. 895 (E.D. N.Y. 1963).

[177] Ellis Bros., Inc.. v. United States, 197 F. Supp. 891 (S.D. Cal. 1961).

[178] Dadourian Export *Corp.* v. United States. 291 F.2d 178 (2d Cir. 1961).

to require him to take *gun* carriage wheels for wheels described as "Wheels, GP 1015, 16" drop center" which, as admitted by the Government, commonly was understood as describing jeep wheels.[179] Interestingly, the court observed that :

> While a mere misdescription may not vitiate the contract where warranty has been disclaimed and the purchaser was invited to inspect [the court knows of no authorities that hold the purchaser bound] when an item is very specifically described in a bid invitation and varies so much from what the Government had intended to place on sale that its own officers, . . . cannot locate [it] in the yard.[180]

The Armed Services Board of Contract Appeals has held both ways without any apparent attempt to distinguish on the facts. In the later opinion, by a 2–1 vote, the Board denied relief to a purchaser where the invitation for bid described rear wheel assemblies and 300 of 444 delivered had the basic casting only.[181] The Board seemed to have rejected the identity theory as they cited as authority the Second Circuit *Dadourian* case which does reject the theory. The dissenting member of the Board in the case just mentioned pointed out that hub assemblies by definition are a collection of parts and when only one part of the assembly is delivered that is simply delivery of "oranges for apples" and not a warranty matter. This reasoning is consistent with a 1960 ASBCA opinion where padded plywood seats were delivered in a sale of an item advertised as "CUSHION, leatherette."[182] This Board was not impressed by the fact that the buyer had made no inspection. It said:

> As for the appellant to make an inspection, we are of the opinion that the Government may not rely on its invitation to inspect to avoid accepting responsibility for accuracy as to identity of the thing offered for sale. While the bidder must accept the risk as to "quantity, kind, character, quality, weight, size, or description," he is not required to accept the risk as to identity. He is not required to accept oranges when he bid on apples. Neither is he required to accept padded plywood seats when he offered to buy, and the Government agreed to sell, cushions.'"

In view of the 2–1 vote in the 1964 appeal,[184] a 1960 opinion[185] that

[179] United States v. Alexander, 115 F. Supp. 240 (S.D. Cal. 1953).
[180] *Id.* at 242.
[181] Houck Manufacturing Co., ASBCA No. 9438, 1964 BCA para. 4143.
[182] Tulsa Army & Navy Store, ASBCA No. 6449, 60-2 BCA para. 2785.
[183] *Id.* at page 14,282. A trend away from this view is portended by Hamburg Machinery Co., ASBCA No. 8010, 1962 BCA para. 3455 where a motor was delivered without a motor winding and the Board didn't accept the argument that a motor without a winding was scrap metal only and constituted a change of identity. Accord, 30 Comp. Gen. 188 (1950) (compressor advertised with motor but delivered without).
[184] Houck Manufacturing Co., ASBCA No. 9438, 1964 BCA para. 4143.
[185] Erman-Howell Div., ASBCA No. 6149, 60-2 BCA para. 2783.

a purchaser who buys scrap metal by weight does not have to accept the dirt or cinders in or beneath the pile and a 1965 opinion [186] that a purchaser doesn't have to pay for fluid in aircraft wing tanks, the ASBCA might not have entirely abandoned an identity rule.

(c). Ridiculous Discrepancy. A number of opinions mention a "ridiculous discrepancy'' rule which would avoid the application of the surplus sales contract disclaimers.[187] This is just another name for the identity or "oranges for apples" rule. The appellation is taken from the *Silverton* [188] case where the First Circuit after setting up the hypothetical of getting scrap metal when scrap webbing was described found that "no such ridiculous discrepancy is presented here." It therefore 'seems that the term "ridiculous discrepancy" is used when a court or board desires not to apply the identity rule insisting that only a ridiculous discrepancy will meet the identity standards.

A more logical approach to the identity and ridiculous discrepancy language would be to apply an objective intent test to the disclaimer clauses, i.e., what risk would a reasonable buyer expect to assume after a reading of the disclaimer. Such a buyer should expect that he assumes any risk of misdescription which a diligent inspection under all the circumstances would reveal. The buyer would also expect that the Government would deliver that which he inspected providing that reasonable men would agree, that what he was shown upon inspection was similar enough to the sales description that any reasonable man would have thought he was inspecting the described property. This approach simplifies the issues of mutual mistake, identity, and ridiculous discrepancy.

(d). Hidden Defects. Inasmuch as the "as is" disclaimer as to any warranty of "quantity, kind, character, quality, weight, size, or description" is always coupled with the inspection clause the previous discussion concerning hidden defects and the relation of that defense to the inspection clause will not be repeated. It is a fair statement that courts and boards in general hare not afforded relief to a purchaser claiming that a reasonable inspection would not have revealed the defect later surfacing [189] unless bad faith on the part of the Government was evident such as where inspection was prevented.[190]

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[186] Nor. Cal Scrap Metals, ASBCA *So.* 10348, 65–1 BCA para. 4693.

[187] *See, e.g.*, Standard Magnesium Corp. v. United States, 241 F.2d 677, 679 (10th Cir. 1957); 41 Comp. Gen. 185 (1961).

[188] 200 F.2d 824. 827 (1st Cir. 1952).

[189] *See, e.g.*, John Gullotta, ASBCA So. 10426. 65-1 BCA para. 4691; *Cf.*, Alloys & Chemicals Corp. v. United States, 324 F.2d 509, 154 Ct. Cl. 122 (1963).

[190] *See* note 105 *supra* and accompanying test.

However, the Court of Claims decided in *Industrial Salvage* **Corp.** v. *United States*,[191] a case which might be characterized as one of inspection impracticability, that an unintentional misrepresentation on Government drawings and in the invitation for bids of the amount of buried copper cable, entitled the purchaser to recover fair market value of the actual cable deficiency. The purchaser did make an inspection and found the cable ends as represented but unknown to either party the cable didn't exist along the course and in the length shown, This case may have been impliedly overruled by *Alloys & Chemicals Corp. v. United States*,[192] the Court of Claims case involving the sale of buried radioactive material. However, in a future case the court may distinguish *Alloys* on the basis that the parties knew that neither party could actually inspect the material and the purchaser with eyes open assumed that risk. In *Industrial Salvage* the furnishing of the drawings could be construed as an express warranty of the length of cable which was given precedent over the inconsistent standard general provision disclaimer.[193]

(e). "Best Information Available" and Superior Knowledge. On many occasions purchasers of property which turned out to be different than that described have sought recovery based on the second sentence of the "as is" clause which reads:

> The description of the property is based on the best information available to the sales office.

This possible disclaimer defense is discussed here with that of superior knowledge although it is recognized that the "best information available" defense involves both a duty to disclose and a possible duty to ascertain whereas superior knowledge generally involves merely a duty to disclose. In both cases the subject of imputed knowledge or constructive knowledge is pertinent and both have warranty undertones.

A decade ago two federal courts refused to construe the "best information available" language **as** a warranty that the Government had ascertained the best information and was disclosing the information obtained.[194] One court thought it would be clearly "erroneous to interpret the provision as obligating the [Government] to make any

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[191] Industrial Salvage Corp. v. United States, 122 Ct. Cl. 611 (1952).

[192] Alloys & Chemicals Corp. v. United States, 324 F.2d 509, 154 Ct. Cl. 122 (1963).

[193] This conclusion would find reinforcement in Uniform Commercial Code Sec. 2-316(1). *See* discussion Section III C.

[194] Dadourian Export Corp. v. United States, 291 F.2d 178 (2d Cir. 1961); Western Son-Ferrous Metals Corp. v. United States, 192 F. Supp. 774 **(S.D. Cal.** 1961).

efforts whatever to obtain reliable information, or to interpret it as a warranty that the information supplied is the best information that can be obtained" and that good faith only was required.[195] Both courts read the provision as a further disclaimer which warned that the description might not be accurate or complete and that the Government is merely saying that it is trying "to do our best but don't count on it."[196] This line of reasoning also was advanced in 1961 by the Comptroller General in denying relief to a purchaser of a 42 inch chucking type turbine wheel grinder advertised as a "GRINDING MACHINE, external, cylindrical, universal, traveling table type."[197] There was evidence in the case that due to negligent conduct on the part of Air Force personnel erroneous information had been provided the Government's agent seller. However, the Comptroller General found this did not amount to bad faith and in the absence of bad faith the disclaimers mere enforced, In all of these cases it is likely the discrepancy in description could have been discovered upon inspection and inspection was not made. A few years later the ASBCA in the appeal of *John Gullotta*[198] followed the same road. The Government admitted that inspection would have not revealed the true condition of the item. However, although the office that had prepared the description had a document showing the discrepancy and failed to use it in preparation of the IFB, the Board strictly applied the disclaimers. On the basis of the *Alloys & Chemical Corp.* case[199] the Board refused to apply an impossibility of inspection doctrine although the cases were readily distinguishable. The *Alloys* case involved a discrepancy in an estimated quantity where the Government had no better way of ascertaining the quantity of buried radioactive material than the purchaser did. *John Gullotta* was a case of superior knowledge where the contracting officer should have been held to have constructive knowledge of the discrepancy and to have breached a duty to disclose. Admittedly, this is a different theory than one of warranty based on the "best information available" language but the failure to recognize the presence of such an issue in the case is illustrative of the blind following of distinguishable precedent that is typical in the area of surplus sales.

Although the Comptroller General continues to pay lip service to

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[195] "'Western Non-Ferrous Metals *Corp.* v. United States, 192 F. Supp. 774, 775 (N.D. Cal. 1961).

[196] Dadourian Export *Corp.* v. United States, 291 F.2d 178, 183. (2 Cir. 1961).

[197] 41 Comp. Gen. 1S5 (1961).

[198] ASBCA No. 10426, 65–1 BCA para 4691.

[199] 324 F.2d 509, 154 Ct. Cl. 122 (1963).

the rulings that the "best information available" language does not constitute a warranty [200] there are opinions which have interpreted that language as a warranty without calling it such. A 1965 opinion [201] to the Defense Supply Agency allowed cancellation of a misdescribed item where the turn-in inspection report available to and reviewed by the equipment specialist who prepared the description did reveal the discrepancy. The situation was distinguished from prior opinions in that visual inspection would not have revealed the discrepancy. "Under these circumstances," the Comptroller General said, "we feel that the description of item 156 was not based, to the fullest extent, on the best available information." That seems simply and directly to say that the Government warrants that the description is based on the best available information where the purchaser's visual inspection could not reveal the defect. Strangely enough less than a month later the Comptroller General, in a case where the evidence wasn't convincing that the purchaser actually made an inspection, said in diota that "where a bidder fails to make an inspection under [a surplus sale]—whether such failure was due to the bidder's opinion that inspection was not necessary or whether the inspection was impractical, if not impossible—the bidder has elected to assume any risk which might exist by reason of a variance" between property described and delivered.[202] The majority of Comptroller General opinions seem to require an inspection attempt to take advantage of a plea of warranty as to best available information or superior knowledge.[203] Perhaps that office has been influenced by the courts that will not find a duty to disclose where a contractor could and should have known the facts through reasonable diligent inquiry.[204] But those cases do not *go* to the extent of holding that if the contractor makes no attempt to find out he is precluded from

[200] *See, e.g.*, Unpublished Comp. Gen. Dec. B–152938, 10 Feb. 1964.

[201] Unpublished Comp. Gen. Dec. No. B–157465, 22 Sept. 1965.

[202] Unpublished Comp. Gen. Dec. No. B–157722, 18 Oct. 1965.

"However, in Unpublished Comp. Gen. Dec. No. B–128774, 28 Aug. 1956, the Comptroller General allowed a purchaser who *failed to inspect* a refund for a misdescription due to a clerical error in typing from turn in data which correctly described the item. The basis for the holding is obscure but the opinion did state that "it may be held that the erroneous description did not furnish 'the best available information.'"

"Elements of recovery are: (a) Knowledge by the Government agency (actual or imputed) (b) *The* contractor neither knew or should have known and (c) The Government was or should have been aware of the contractor's ignorance but failed to disclose. J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 390 F.2d 886 (1968); Natus Corp. v. United States, 178 Ct. Cl. 1, 13, 371 F.2d 450, 458 (1967); Robertson Elec. Co. v. United States, 176 Ct. Cl. 1287, 1295–96 (1966).

recovering under a breach of duty to disclose where such inquiry would have been futile if attempted.

The Comptroller General may recently have abandoned his position that the "best information available" language is no marranty. In September of 1969 a purchaser of a burned out bus, described by the Army as "used," was allowed a refund of the bid price. Even though the purchaser attempted no inspection, the Comptroller General found the bus should have been described as scrap as evidenced by information available to the Army.[205] A year later the Comptroller General allowed rescission where the invitation for bids failed to mention that copper fins were soldered to certain tubes, a condition readily discernible by a visual inspection, on the basis that the holding activity had supplied accurate information to the sales contracting officer who had failed to utilize this "best information available."[206] The former case may be explained as an identity case in that scrap is different from usable property but the latter case seems to unequivocally reverse the previous position of the Comptroller General.

A 1964 opinion of the Comptroller General indicates that a "good faith" test and not one of warranty or duty to disclose always applies. It said:

> An exception to the application of the rule of *caveat emptor* in government surplus sales situations is made in cases where it can be shown that the description objected to was not based upon the best available information. This exception amounts to no more than a requirement that sales personnel act in good faith and not deliberately, or through careless conduct, mislead. Thus when, as here, it can be demonstrated that the holding activity and not the sales activity was the source of the misdescription, and that the sales activity merely transcribed the misdescription in compiling the catalogue, it is generally held that the best information arailable has been utilized in the invitation in recognition of the heavy workload placed upon sales personnel which necessarily precludes the possibility of inspection by them in most cases.[207]

However, as has been shown what is or is not "bad faith" varies even where the facts are essentially similar. One opinion indicates that there is never bad faith by the Government There the purchaser failed to inspect. Opinions in other cases where personnel in the sales office had better information available and failed to use it apparently find "bad faith" if a visual inspection by the purchaser would not

[205] Unpublished Comp. Gen. Dec. So. B-167905, 29 Sept. 1969.

[206] Unpublished Comp. Gen. Dec. So. B-170310, 24 Sept. 1970.

[207] Unpublished Comp. Gen. Dec So. B-152938, 10 Feb. 1964.

have revealed the true condition of the property. It seems that the concept of good faith is stretched or restricted according to the opinion writer's concept of the equities of the particular case and his visceral reaction to varranty disclaimers in Government surplus sales contracts.

The most recent Comptroller General opinions, although still speaking in terms of "good faith" have allowed relief to purchasers in misdescription cases not only where the sales office had actual knowledge and either knowingly or inadvertently failed to use it [208] but also where the sales officeshould have known by reasonable diligence.[209] For example, during 1970 two buyers were allowed relief where described weight estimates were substantially less than actual weights and better information was available. In one case it was held that the contracting officer had constructive knowledge of the misdescription because a better method of making the estimate was available to the sales office.[210] This goes beyond the previous cases where available information was inadvertently overlooked. It imposes a duty to ascertain facts where the sales office has reason to know that better information might be obtained upon diligent inquiry.[211]

No cases in this area, yet, impute knowledge of those outside the sales activity to the contraoting officer. This position seems indefensible when contrasted with the analogous situation presented by the Court of Claims decision in ***J. A. Jones Construction*** Co. *v.* ***United States*** [212] where knowledge of the Air Force was imputed to its construction agency, the Army *Corps* of Engineers. No perceptible difference appears between the relationship between a construction agency and the department for whom it is acting as contracting officer and that which exists between an activity of one department which is holding the surplus property and the activity which is acting as a sales agent. If it is urged that the surplus sales contract differs from the *Jones* situation in that no similar warranty dis-

[208] Unpublished Comp. Gen. Dec. So. B-170310, 24 Sept. 1970.

[209] Unpublished Comp. Gen. Dec. No. B-167926, 16 July 1970; Unpublished Comp. Gen. Dec. **So.** B-167926, 16 January 1970.

[210] *Id.*

[211] In Alloys Chemical the Court of Claims held that the purchaser has to **do** more than show the Government didn't **seek** out better information or keep better records to show **bad** faith. This seems consistent with the Comptroller General position as no Comptroller General opinions have been found requiring the contracting officer to **seek** out information unless there was some factor which might have flagged the contracting officer's attention to better information and he ignored it.

[212] 182 **Ct.** Cl. 615, **390** F.2d 886 (1968).

claimers were present in the latter case, then reference is made to two other procurement contract situations which do raise the issue of enforceability of exculpatory clauses directed specifically at disclosure of information. The first somewhat analogous situation is presented by construction contracts containing "site visitation" and other exculpatory clauses. In *Fehlhaber Corp.* v. *United States*[213] the contractor recovered costs resulting from subsurface conditions differing materially from those in the Government specifications despite the existence of the usual site visitation clause and other contract language which said that the information and data provided was not intended as a warranty or representation and that the Government wouldn't be responsible for its accuracy. The Court of Claims held that the contractor had a right to rely on the specifications and drawings and was not bound by the caveatory and exculpatory provisions. Admittedly, the contract had a "Changed Conditions" clause[214] which shifts some of the risk of subsurface and unknown phyhical conditions from the contractor[215] and is to an extent inconsistent with the exculpatory provisions under discussion. By the same token, but not to the same extent, the "best information available" language can reasonably be interpreted as placing the responsibility on the Government reasonably to obtain and disclose all pertinent information available to it and not available to the purchaser. If it is not meant as a representation or a warranty then it is completely superfluous.

The second analogous situation involves Government attempts to disclaim the warranty that if Government furnished drawings and specifications are followed the specified product will result.[216] In a recent supply contract case[217] the **ASBCA** refused to give effect to

[213] 138 Ct. Cl. 571, 151 **F.** Supp. 817 (1957).

[214] The Changed Conditions clause provided that: "Should the contractor encounter, or the Government discover, during the progress of the **work** subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifIcations, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in **work** of the character provided in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall . . , be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions." 338 Ct. Cl. **571,** 589 (1957). The current clause is entitled "Differing Site Conditions." Armed Services Procurement Regulation Sec. 7–602.4 (1969).

[215] ***See*** Promacs, Inc., IBCA **No.** 317, 1964 BCA para. 4016.

[216] Electro-Suclear Laboratories, Inc., ASBCA No. 9863, 65–1 BCA para. **4682;** J. W. Hurst & Son Awnings, Inc., ASBCA No. **4167,** 59–1 BCA para 2095.

[217] **Transdyne** Corp., ASBCA **So.** 13198. 70–2 BCA para, 8365.

such language of disclaimer where the Government failed to disclose specialized knowledge which the contractor neither had nor reasonably could have obtained. This situation is much closer to that of the surplus sales disclaimer. The "Changed Conditions" clause can be interpreted as an express warranty whereas the adequacy of specifications and drawings is an implied warranty which is similar to the implied warranty of description. Accordingly, even if the "best information available" phrase is not an express warranty, it has long been held that a sales description impliedly warrants conformity of the item sold.[218] The comparable situation in the sales area would be where the Government reasonably has available material information which cannot be obtained by the purchaser through reasonable efforts. A consistency in approach with supply contracts and surplus sales contracts would require abandonment, in appropriate cases, of the exclusive "*good* faith" test in favor of the more analytical and logical rules pertaining to "superior knowledge" and "duty to disclose." Application of the *Jones* rule on imputing knowledge in a duty to disclose situation plus application of the superior knowledge versus disclaimer rules of construction and supply contracts would justifiably relax the strict *caveat emptor* position of federal courts, administrative boards, and the Comptroller General.

V. GUARANTEED DESCRIPTION CLAUSE

To proceed now to conclusions and recommendations would leave the erroneous impression that the Government has not been concerned about the policy and economic considerations involved in usage of liability disclaimers. Such concern is evidenced by the "Guaranteed Description Clause" now utilized by the Defense Supply Agency. The history of the development and adoption of that clause is interesting. In 1964 the Defense Supply Agency sold an Air Force bus located at Brandywine, Maryland. It was described in the invitation for bids and resultant contract as being complete with a six cylinder motor just as the records reflected. A Mr. Coffield from Texas bought the bus for the motor. Fully expecting to find a motor he opened up the appropriate compartment and found none. After complaining through Defense Supply Agency channels and having "as is, where is" thrown in his face up through the

[218] Interestingly, the Court of Claims has recently recognized the validity of an analogy between a sales description in a sales contract and plans and specifications in purchase contracts and expressed the desirability of consistency in analysis and conclusions in the application of warranty and disclaimer provisions. Everett Plywood & Door *Corp.* v. United States, 190 Ct. Cl. 80, 419 F.2d 425 (1969).

ASBCA [219] he went to his Congressman. The Congressman undoubtedly understood the rigors of *caveat emptor* and that his constituent quite easily could hare protected himself by inspecting or having an agent inspect the bus prior to bid. What the Congressman found difficult to understand was how the Government could live for decades with a reputation equal to the most avaricious used car salesman. This unfortunate event, which has been reenacted countless times, helped to push the adoption of a "Guaranteed Descriptions" clause [220] by the Defense Supply Agency which has the responsibility for the sale of all surplus personal property of the Department of Defense within the United States. The clause is a limited warranty that the goods as delivered will conform to the contract description.

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[219] H. H. Coffield, ASBCA No. 10002 1964 BCA para. 4124. Further details on the case were obtained from a transcript of a speech delivered by a representative of the Defense Logistics Services Center at San Diego, California, at meetings of that activity held from 30 July 1964 through 11 August 1964.

[220] The "Guaranteed Descriptions" clause provides in pertinent part as follows:

> "Except as provided in subparagraphs a and b of this clause, and notwithstanding any other terms and conditions of the Invitation for Bids to the contrary, the Government hereby warrants and guarantees that the property to be delivered to the Purchaser under any contract resulting from the Invitation for Bids will be as described. In the event the property delivered or offered for delivery does not correspond to the description set out in the Invitation for Bids, the Government, will make an adjustment in the purchase price paid for the property. . . . In the event it is determined by the Government to be in its best interest, the misdescribed item may be deleted from the contract in lieu of an adjustment in the purchase price.
>
> "a THE ABOVE GUARAKTEE IS SPECIFICALLY SUBJECT TO THE FOLLOWIKG LIMITATIOSS AKD COSDITIOKS WHICH ARE OF THE ESSEKCE ASD WHICH ARE COKDITIOSS PRECEDEST TO THE APPLICATION OF THE GUARAKTEE OR LIMITATIONS ON ITS APPLICATION.
>
> (1) The contract price will not be adjusted or property deleted from the contract pursuant to this clause unless the Purchaser malls or otherwise furnishes to the Sales Contracting Officer a written notice, within 20 calendar days from date of removal of the property, that he considers the property to have been misdescribed, further the property must be held sufficiently Intact to permit identification of the property by the Government.
>
> (2) No adjustment for shortages of property sold by the 'lot' shall be allowed unless the Purchaser shall notify the Government of such shortage prior to removal of the property from the installation.
>
> * * * * * * *
>
> "b. THE GOVERNMENT DOES NOT WARRANT OR GUARANTEE ANY OF THE FOLLOWING:
>
> (1) That the item description contains all specific characteristics or performance data pertaining to the item described
>
> (2) Stated condition of the property, the total cost of the property, the estimated total weight, the estimated shipping dimensions, suggested uses of the property. and its fitness for any use or purpose are not guaranteed
>
> (3) Estimates as to the 'weight' of property offered for sale by the 'unit' are not guaranteed
>
> (4) Estimates as to the number of units of property offered for sale by 'weight' are not guaranteed''
>
> * * * * * * *

It is limited in scope, in the remedy available, and in the period of effectiveness. An adjustment in purchase price limited to a refund of the total purchase price is specified as a remedy but the claimant must complain in writing to the contracting officer within twenty calendar days from the date of removal of the property. As to scope, the major limitations are: (1) No adjustments for shortages of property sold by the lot are allowed unless notification is received prior to removal of the property from the installation; (2) Excluded are warranties: (a) that the item description contains all characteristic and performance data; (b) as to condition, estimated total weight, estimated shipping dimensions, or fitness for purpose; and (c) as to estimated unit quantity when sold on a weight basis or estimated weight when sold on a unit basis. By no means can the "Guaranteed Description" clause be called a bonanza to the purchaser. If it is a step forward, it is certainly no giant step. It probably can best be characterized as taking three steps forward and two and one-half back because what it hands out with two hands in the first paragraph it pulls back to Uncle Sam's bosom throughout the remainder of the print. The clause helps in that grey area of identity and kind. A "Purolator PR–122" cannot be delivered for an item described as a "Purolator–T20 or interchangeable." [221] Items described as having certain components as a bus with a motor must be delivered with the components or an adjustment is in order. However, it is still ***caveat emptor*** all the way with weights. The purchaser who buys scrap by the pound, calculating his bid on transportation costs discounted for higher volume, has no remedy under the clause if the Government delivers only a small fraction of the estimated weight.[222] On the other hand the purchaser on a unit basis is guaranteed that the number of units described will be delivered subject to the variations specified in the contract. It is doubtful that the clause would be interpreted to guarantee the estimated number of yards of wire, cable, or thread on a spool where the purchase price unit was per spool. The twenty day time limitation has been strictly enforced by the ASBCA as a condition precedent to any warranty.[223] The Comptroller General has taken the same strict view and cannot find room for a waiver even though for example, testing to verify the described chemical content is alleged to be a lengthy process.[224] As to latent defects, most would seem to pertain to condition and be excluded

[221] Marion Iron & Metal Co., ASBCA No. 10969, 65–2 BCA para. 5299.

[222] *See, e.g.*, Surplus Tire Sales, ASBCA *So.* 14274, 69–2 BCA para 7992; American Nickel Alloy Mfg. Corp., ASBCA No. 10513, 65–1 BCA para. 4781.

[223] Metropolitan Metals *Co.*, ASBCA No. 10100, 65–1 BCA para. 4573.

[224] Unpublished Comp. Gen. Dec. No. B–163929. 29 July 1968.

under the clause initially, but if a latent defect in kind is possible the twenty day limitation would likely severely limit any remedy. In this regard it is interesting to note that the **ASBCA** apparently considers the description of "unused" as one of kind rather than condition inasmuch as in one such case in 1966 they resorted to the twenty day limitation to deny recovery.[225] The Board must have forgotten its opinion in the *Reeves Soundcraft* appeal decided **2** years before that the **UCC** reflects[226] "the best in modern decision and discussion." The same year that the *Reeves* appeal was decided a Pennsylvania state court considered an agreed upon eight day time limitation on warranties on flower bulbs and held that period unreasonable as to latent defects under **UCC** Sections 1–204 and **2–607** which require time limitations to be reasonable.[227]

Adoption of the Guaranteed Description clause by the Defense Supply Agency was justified by one representative of that agency on three bases.[228] First it was felt that the Government had a moral responsibility to deliver what it describes and there was no need to continue to foster the idea that the Government didn't have anyone capable of writing a description. Secondly, no reason was perceived why the Government in the sale of its surplus property could not or should not engage in business in the same manner as other businessmen. Thirdly, it was felt that the overall monetary return to the Government would be increased if the bidder knew he did not have to lower his bid to protect himself against misdescriptions. As the first two motives are intangibles no discussion will be undertaken here. Suffice it to say that this writer agrees that the Cnited States Government needs to create and maintain a posture that is fair and equitable and believes, perhaps naively, that in this case what benefits the purchasing public benefits the nation. Whether or not this benefit

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[225] Brunswick Automotive Surplus, Inc., ASBCA No. **11134,** 66–1 BCA para. **5428** (purchaser of **200** cases of jeep engine cooling pumps described as unused, inspected 10–12 cases and finding them as described shipped the whole purchase on to customers in Southeast Asia and Europe where many were found to be second hand).

[226] ASBCA Nos. **9030** and **9130,** 1964 BCA para. **4317.**

[227] G. Vanderberg & Sons. N.V. v. Siter, 204 Pa. Super. **392, 204** A.2d **494 (1964); *Accord.*** Neville Chemical Co. v. Union Carbide *Corp.*, **294** F. Supp. **649** (W.D. Pa. 1968) (15 dav time limitation held unreasonable as to a latent defect in resin).

[228] This information is contained in a transcript of a speech of an unidentified representative of the Defense Logistics Service Center. Battle Creek, Michigan, which was delivered at San Diego at **a** meeting of representatives from Defense Surplus Sales Regional Offices Sumbers 1, **3,** and **4** during the period **30** July–14 August **1964.** The material was supplied to the author by the Defense Logistics Service Center. Rattle Creek, Michigan.

to the Government is a monetary one is the point of the third justification, The Defense Supply Agency conclusion that the government would be monetarily benefitted was based on a test run in one of their regions from 1 July 1963 to 31 December 1963. During that period the percentage of return on the sale of usable property based on acquisition cost was 1.49 percent greater than the return during the comparable period of the previous year. During the same period in 1963 all other regions but one showed a decrease in percentage return. In the one other region showing an increase the increase was less than that experienced in the region using the guaranteed description clause. Assuming that the increase was due solely to the use of the clause, and such assumption appears somewhat reasonable, the dollar gain after deduction of extra costs attributable to usage of the clause including claim settlements was over $614,000 in that region.[229] Shortly after the end of the test period the entire agency adapted the clause for use. Therefore comparative figures within the Defense Supply Agency for subsequent years are unavailable. Comparison with other federal agencies which do not utilize the limited warranty clause or any other would not paint an accurate picture because of varying factors including the nature of the property being sold. For example, the Department of Defense sells many items specially adapted to military uses which have little or no civilian use. This results in a much lower return on acquisition cost.[230]

The successful test run of the Defense Supply Agency in 1963 sufficiently demonstrated that the Government has much to gain and little to lose by utilizing the guaranteed description clause. However, the one presently in use is too limited to fully achieve its purposes. Too many of the inequities of the laissez faire attitude of the "as is — warning to inspect" twins of the surplus sales contract continue to exist. Judge Davis of the Court of Claims seemed to find the burden of the *caveat emptor* twins onerous in a 1964 case when he commented that 'this is another in the long series of suits by dissatisfied purchasers of surplus Government property." That "long series" hasn't yet ceased.

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[229] *Id.*

[230] The acquisition value of usable property sold in fiscal year 1970 by the Defense Logistics Service Center for all of DOD was $975,436,000; amount of proceeds received on usable property sold was $43,850,000; this computes to a return of 4.5%. These statistics were supplied by the Director of Marketing, Defense Supply Agency, Defense Logistics Service Center, Battle Creek, Michigan. See *also*, Part IV, DSA pamphlet, Defense Materiel Utilization and Disposal Programs, Statistical Review and Management Evaluation, 4th Quarter, FY 70, August 1970.

VI. CONCLUSIONS AND RECOMMENDATIONS

Some general conclusions have been stated as the various principles concerning sales warranty and disclaimer have been discussed. Those will not be restated here. Howerer, comment on the desirability of across the board application of the UCC and the results of such application has been postponed to this point and merits discussion in some detail.

A. *POSSIBLE RESULTS OF APPLICATION OF THE UCC TO SURPLUS SALES CONTRACTS*

One writer has stated that "the most interesting questions raised by the [UCC] and by recent government-procurement cases involve the modification or limitation of a seller's warranties by disclaimer clauses." [231] Another writer observed that the Sales Article of the UCC, with one exception, probably will effect a greater change in existing law than any other article of the UCC.[232] Whether application of the UCC to surplus sales contracts would effect any great changes is somewhat conjectural. The most radical change of the UCC from the prior law of warranty is the classification of a warranty of description as express rather than implied.[233] Application of this to surplus sales contracts containing descriptions (and all do) would throw every case of misdescription within the province of Section 2–316 which makes disclaimers inoperative if they cannot be construed as consistent with the express warranty. Accordingly, although the "as is" expression successfully negates all implied warranties and, absent Section 2–316, would leave the present law of surplus sales contracts intact, there arises a serious question because of that section concerning the consistency of an express description warranty and the language that the Government "makes no warranty, express or implied, as to. . . . description. . . ." The conclusion seems inescapable that there is inconsistency. However, the following approach is suggested as one that a court might reasonably take. Section 2–316(1) directs that the disclaimer be given effect where a reasonable construction can be given in the face of the

[231] Gusman, *Article 2 of the U.C.C. and Government Procurement: Selected Areas of Discussion.* 9 B.C. IND. & COM. L. REV. 1, 13 (1967).

[232] Krieplie, *The Principles Underlying the Drafting of the Uniform Commercial Code,* 1971 U. ILL. L. F. 321, 327–28. The one exception noted was Article 9 dealing with secured transactions.

[233] UCC Sec. 2–313(1) (b). For contrast *see* 1 S. WILLISTON ON SALES Sec. 223 (rev. ed. 1948) and UNIFORM SALES ACT Sec. 14.

express warranty.[234] In context with the inspection clause it is reasonable that the parties anticipate that the purchaser will assume the risk of all defects that an examination ought to reveal to him under all the circumstances. Under such an interpretation the purchaser will not be required to make an inspection or held to an inspection if impossible or commercially impracticable except in those situations as the *Alloy* case where both parties have equal inability to inspect. The Government would have a duty to disclose information where the purchaser cannot with reasonable diligence obtain it and the Government is aware of the purchaser's situation. The obligation of "good faith, diligence, reasonableness and care" dictated by UCC Section 1–102(3) regardless of disclaimer coupled with the "best information available'' language of the "as is" clause would impose a further duty upon a holding activity to convey all pertinent description information to the selling activity and a duty upon the selling activity to carefully utilize it when describing property. There would still remain questions as to whether certain language constitutes a description or whether the Government is merely trying to identify the subject of \$he sale. This problem is nothing more than application of the language of Section 2–313(1) (a) that the description must be made part of the basis of the bargain. The contract can be written to show the Government's intent not to describe property in the sense of a warranty of description and still prevent a possible plea that no contract arose due to indefiniteness of the subject matter. This can be done without describing the quality, character or condition of an item or estimating its weight. It may be necessary to specify kind and size but this oan be kept to a minimum by specifying the location. This approach simply recognizes the natural expeotancy of the average purchaser when a description of goods is included in sales literature which natural expectancy has been given expression in the UCC.

Another possible change that would occur if the UCC were applied to surplus sales contracts is that involving conspicuousness of the disclaimer language. Section **2–316(2)** requires that language

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[234] One commentator interprets Sec. **2–316 (1)** as saying that if there **is** no parol evidence problem, an express warranty will be given as much effect against a disclaimer as reasonable interpretation will permit and in any event the warranty will not be limited or negated if that result is unreasonable; Courts are instructed to use their best efforts to salvage an express warranty, or at least some significant aspect **of** it by reconciling it, in some reasonable manner, with language of negation or limitation and if not reasonable to so reconcile the disclaimer must give way. Cudahy, *Limitation* of *Warranty* ***Under the*** *Uniform Commercial Code,* **47** MARQ. **L. REV. 127, 131** (1963).

purporting to exclude or modify implied warranties of merchantability or fitness for purpose must be conspicuous. Section 1–201(10) states that, "Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." The present standard forms for surplus sales do not meet this requirement although the sales literature put out by individual agencies or sales offices might. However, even if it is assumed that the UCC mill be applied, two questions arise which cast some doubt on whether section 2–316(2) is applicable to the "as is" language. That section states that it is subject to subsection (3) which states that notwithstanding subsection (2) "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is' . . . ." At least one commentator is of the opinion that this does not mean that the "as is" language is not subject to the conspicuous requirement of section 2–316(2).[235] In support of this it could reasonably be argued that the "notwithstanding" only refers to the specific wording requirements of the previous subsection and not to the physical characteristics of the print. In other words the "as is" wording can be used in lieu of any phraseology required by section 2–316(2) bnt the "conspicuous" requirement applies to any phraseology used. A question equally as difficult is whether, even absent disclaimers, implied warranties of merchantability or fitness for purpose arise in a surplus property sale by the Gorernment. UCC Section 2–315 requires a reliance by the purchaser on the skill and judgment of the seller in selection and furnishing of the goods before a warranty of fitness for purpose arises. It is extremely doubtful that any tribunal would find that such reliance exists in surplus property sales. In order for an implied warranty of merchantability to arise UCC Section 2–314(1) requires that the seller be a "merchant with respect to goods of that kind." UCC Section 2–104(1) defines a merchant as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

A court might be convinced that the Government does hold itself

[235] Comment, *The Contractual Aspects of Consumer Protection: Recent Decelopments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430, 1457 (May 1966). For application of the conspicuous requirement *see* Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964) ; Hunt v. Perkins Machinery Co., 352 Mass. *633,* 226 N.E.2d 228 (1967).

out as having knowledge or skill through its civil servants and career military personnel. But even if this burden were met it could be anticipated that the scope of any implied warranty of merchantability would be more limited in the case of a merchant in surplus new and used property than in the case of a merchant of new articles.

In summary, it is doubtful that application of the UCC would be deemed by the courts to require any change of posture concerning implied warranties of merchantability or fitness for purpose. Conversion of the implied warranty of conformity to description to an express warranty would definitely effect some changes in the law.

B. *SHOULD THE UCC BE APPLIED TO SURPLUS SALES CONTRACTS?*

Judge Friendly of the Second Circuit Court of Appeals recently gave the UCC a boost as a source of the federal common law of sales:[236]

> We find persuasive the defendant's suggestion of looking to the Uniform Commercial Code as a source for the "federal" law of sales. The Code has been adopted by Congress for the District of Columbia, 77 Stat. 630 (1963), has been enacted in over forty states, and thus is well on its way to becoming a truly national law of commerce, which, as Judge L. Hand said of the Negotiable Instruments Law, is "more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of *Swift* v. *Tyson* [citation omitted]." When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.

The court applied the UCC provision on practical impossibility to a sale of a computer system to the Government.[237] Judge Friendly's remarks are equally persuasive that the UCC should be the primary source of federal law pertaining to sales *by* the Government. The UCC now has been enacted as law in fifty-one jurisdictions. It is becoming a more frequent source of law relating to sales to the Government[238] and has recently been applied by the Court of Claims to a sale of timber by the United States.[239] It is of special interest that the section of the UCC applied in the timber sale case is that which contains the subsection which makes a "description of the goods

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[236] United States v. Wegematic Corp., 360 F2d. 674, 676 (2d Cir. 1966).
[237] UCC Sec. 2-615.
[238] See note 68 *supra.*
[239] Everett Plywood & Door Corp. v. United States, 190 Ct. Cl. 80, 419 F.2d

which is made a part of the bargain" an express warranty.[240] This should serve as the foundation for a strong argument that the UCC be used consistently and uniformly by the Court of Claims, the administrative boards and the Comptroller General as the dominant source of the federal common law of sales. hpplication of the UCC will create more uniformity with commercial practice and the expectation of businessmen.

C. *SUMMARY*

Although the cases have formulated the expressions that Government surplus sales contracts are peculiar and the "niceties" of contract law are inapplicable they have not articulated the basis for those conclusions. No incidental social or economic programs of the Government are involved vhich bear any relationship to warranty and disclaimer. Indeed the statute specifically authorizes sale with or without warranty.[241] The purpose of the pertinent statute is stated by its own provisions to be "to minimize expenditures for property" and "to promote the maximum utilization of excess property."[242] These statements of statutory policy are directed solely at the protection of the public purse. In this regard the First Circuit Court of Appeals has said that "when the government goes into the market place it must go as everyone else. The public treasury may be protected by conditions imposed by Congress or by lawful regulations, . . . but if the matter is left to contractual provisions and to the courts, all parties there must stand alike. We cannot recognize one rule for the government and another for private litigants."[243] However, contrary to this declaration, the judicial and administrative tribunals have applied a stricter rule of *caveat emptor* than that applied to private litigants. The magnitude, organization and permanency of the Government surplus sales program demonstrate that this approach has no rational basis and is outmoded. That there has been a different application of warranty and disclaimer rules is

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426 (1969). The court adopted the Commissioner's report stating: "It is my conclusion that the fair and just law applicable in the instant case is [the UCC]." Also. the language of Judge Friendly in I'nited States v. Wegematic Corp. **360** F.2d 674, **676** (2d Cir. 1966) set out in Sertion VI B was quoted with approval.

[240] UCC Sec. **2–313.**

[241] 40 U.S.C. Sec. 484 (c) ; **40** U.S.C. Sec. 512 (foreign excess).

[242] Sec. 202(a), Title II, Act of **30** June 1949, Ch. 288, **63** Stat. **378,** Federal Property and Administrative Services Act of 1949.

[243] Krupp v. Federal Housing Administration, 285 F.2d **833, 636** (1st Cir. **1961**).

evident in a number of ways. Contrary to the common law, the inspection provision has been applied to bar any warranties as to unascertained goods. Although a test of good faith is uniformly applied as a prerequisite to enforcement of disclaimers this has not kept pace with developments in its "sister" field of procurement In the Government construction contnact situation the site visitation disclaimer has been softened in those cases where inspection would not have revealed true conditions. Any attempt to distinguish the cases on the ground that the construction contract usually contains special provisions akin to express warranty should not be successful until the express warranty nature of descriptions and the "best information available" language of the surplus sales contracts is fully analyzed. Disclaimers of warranty of accuracy and completeness of specifications and drawings in Government supply contracts have been closely scrutinized under the light of "duty to disclose" and "superior knowledge" exceptions. The more difficult burden of proving lack of good faith is usually placed on the purchaser **of** surplus property.

The UCC has been praised as "reflecting the best in modern decision and discussion"[244] but only occasionally applied.[245] The ramifications of its conversion of a warranty of description from an implied warranty to an express warranty, perhaps its most significant change in the warranty field, have not been explored.[246] The requirement of conspicuousness of disclaimers imposed by the UCC is a fertile and pertinent field of inquiry.[247] It can hardly be challenged that a Government surplus sales contract is a contract of adhesion.[248] Conditions and clauses are on a take-it-or-leave-it basis; *the* businessman has only one alternative to submission and that is to forgo doing business with the Government. Accordingly, there is great justification to apply those rules of the UCC which have softened the harshness of *caveat emptor*. If the business community through its legislators have seen the need to prevent unfair surprise and advance the concept of conscionability among private parties

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[244] **Reeves Soundcraft** *Corp.,* **ASBCA Nos. 9030 and 9130, 1964 BCA para. 4317.**

[245] *See* **Republic Aviation Corp., ASBCA Kos. 9934 and 10104, 66-1 BCA para. 5482, (where the ASBCA indicates it doesn't feel bound to apply the UCC).**

[246] UCC Sec. 2-313 (1) (b).

[247] **UCC Sections 2-316 (2) and 1-201 (10).**

[248] **For more detailed discussions on the Government contract as** *a* **contract of adhesion** *see,* **Cuneo & Crowell,** *Impossibility of Performance, Assumption* of *Risk or Act* **of** *Submission?,* **29 Law & CONTEMP. PROB. 531,** 548 (1964) **; Pasley,** *The Interpretation of Government Contracts: Appeal* for *Better Understanding,* **25 FORDHAM L. REV. 211, 213 (1956).**

there is an even greater need to fetter the overwhelming power of the federal government.

Whether or not the courts and boards use available sources of law to allocate contractual risks in such a manner as to meet the natural and reasonable expectations of the parties to a surplus property sales contract the Government should recognize a need to stand behind its sales descriptions. Even if the need for Government credibility is rejected as a valid reason for the warranty of description the 1963 test run by the Defense Supply Agency of its "Guaranteed Descriptions" clause provided sufficient justification for further tests, with a view to Government wide adoption, of a similar but much less restrictive clause. In the meantime a continuation of "the long series of suits by dissatisfied purchasers of surplus Government property [249] can be expected and the words of Judge Madden dissenting in the case of *Samuel Furman v. United States* will continue to ring true in speaking of successful Government resistance to claims of disgruntled purchasers:

> These victories for the Government are Pyrrhic victories indeed. If it wins enough of them it will not be able to sell its surplus [property] at all.[250]

[249] Montreal Securities. Inc.. v. Cnited States, 329 F.2d 956, 957 (Ct. Cl. 1964).
[250] 140 F. Supp. 781, 784. 135 Ct. Cl. 202, 206 (1956).

ARMY NERVE GAS DUMPING: INTERNATIONAL ATROPINE"

By Captain Ronald P. Cundick**

At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be losers.'

Richard M. Nixon

I. INTRODUCTION

The dumping of Army nerve gas into the Atlantic ocean in August 1970 set a turbulent stage for venting feelings of environmentalists, pacifists, scientists, politicians, other deeply-concerned individuals, states, and organizations, both domestic and international, who felt mistrust and uneasiness with our national policy toward disposal of obsolete chemical weapons. While domestic and international repercussion could have been anticipated, they perhaps exceeded expectations, sharpened issues, and rather forcefully reminded us that our use of the oceans, especially in international waters, is of world concern.

But why was the nerve gas dumping of such wide concern? Who or what will be affected by it? Will more people ultimately be endangered than if the gas had remained within the continental United States? Does the benefit of having removed this hazard from the United States outweigh possible injury to Ocean resources? To appreciate the scope of these questions it is helpful if we glance at what certain other chemicals have done to our oceans. Pesticides,

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*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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'President Nixon's Announcement on United States Ocean's Policy, 116 CONG. REC. S-7747 (daily ed. May 25, 1970).

for example, have already contaminated the majority of our estuaries.[2] Residues of pesticides (which are not rapidly neutralized by sea water) have been found in the oil of fish inhabiting the seas off North America, South America, Europe and Asia,[3] and in cormorants and pelicans in Canada.[4] Residual DDT has been found in penguins and seals indigenous to the Antarctic, where such pesticides have never been known to have been used.[5] Dust containing mineral and biological material originated in Africa or Europe and traveled 3,000 miles or more across the open Atlantic via the northeasterly trade winds to the West Indies and from the United States to the United Kingdom.[6] Steel drums containing broken test tubes and other laboratory junk dumped in the Atlantic by the Atomic Energy Commission (AEC) were later trawled up by startled fishermen off the coast of Oregon.?

Seeing how widespread the effects of pesticides are, and recognizing that too little is known of how deep ocean as well as wind currents move about the earth,[8] the prospect of harm from the deadly nerve gas becomes a reality. It is abundantly clear that effects need not necessarily be local, nor can the possibility of their widespread dispersion be ignored. For example, what dangers does the gas pose to those who derive their daily fresh water from the nearly 700 desalination plants around the world producing more than 250

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[2] OCEANOLOGY INTERNATIONAL 11, (Mar–Apr 1968).

[3] Nicholson, Pesticide *Pollution Control*, 158 SCIENCE 871, note 231 at 873 (17 Kov. 1967).

[4] Anderson, Hickey, Risebrough, Hughes and Christensen, The Significance of Chlorinated Hydrocarbon Residues to Breeding Pelicans and Cormorants, 83:2 CAKADIAS FIELD-NATURALIST 89 (Apr.–Jun. 1969).

[5] Frost, *Earth*, Air, Water, 11:6 ENVIRONMENT 14–23 (Jul.–Aug. 1969).

'Results suggest that the dust itself did not represent the original source of the pesticides. but rather the vapors in the atmosphere were picked up by whaterer dust particles were present there. Pesticides originating in the United States, for example, were found in British rain water during tests made in Aug. 1966 through Jul. 1967. Id. at 17.

'The renewal of the deep and bottom waters in the oceans is an extremely slow process probably involving hundreds of years for even a single cycle. Since chlorinated hydrocarbon pesticides hare been used for only 20–25 Fears, "this aspect of cirrulation in the ocean cannot account for present transportation of pestirides to remote areas." Surfacing currents. on the other hand, are fairly rapid and move enormous volumes of water. The Gulf Stream carries 33 times as much water northward as flows in all rivers and glaciers on land. "Its fastest rate is 100 miles per day, but it is quite capable of moving pesticides from coastal areas of the United States to Iceland and the Arctic, probably in the form of contaminated plankton. In fact. . . . endrin residues in British cod liver oil suggest this map be happening." *Id.* at 19.

[6] 116 CONG REC. S–13220 (daily ed. hug. 12, 1970).

million gallons per day, and which, according to current projections, plan tremendous expansion to meet increasing consumptive demands for fresh water?[9]

The foregoing illustrations demonstrate why there is such international concern when a state dumps deadly pollutants into the ocean. But concern not founded in facts is of little benefit. In this particular dumping, the intense emotionalism and public reaction distorted many of the relevant facts and, in most instances, resulted in failure to recognize the real issues. Under such circumstances, the panacea could be ill-conceived legislation,[10] executive policy, or even international agreement, which may be totally impractical, even though the objectives laudable.[11]

The public is generally acquainted with the summary facts which were disclosed in August 1970, when the Army made public its plans to dispose of 12,540 M-55 rockets encased in 418 concrete vaults.[12] 416 of these vaults contained rockets filled with the deadly "GB" nerve agent, one contained 104 pounds of the far more lethal liquid nerve agent "VX"[13] and another contained something other than

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[9] Wong, *Fresh Water Supplies Through Desalination* 6.11 WATER WASTES ENQINEEBINQ E–7 (Nov. 1969). Mr. Chung-Ming Wong is the Director of the Office of Saline Water.

Desalination is taking on an international perspective. In the United Kingdom the first phase of the Sational Desalination Program was initiated in 1965 with 3 million dollars appropriated for a 3-year period. A second 3-year appropriation in 1968 was made for 9.6 million. Emphasis will be given to extend work on conjunctive use of desalination and conventional water supply to specific problems of such use in other countries. See Preprint of Paper SM–113/71, Kornberger, United Kingdom Approach to Desalination and Nuclear Power, presented at IAEA Symposium on Nuclear Desalination at Madrid, Spain (Nov. 1968). Compare those expenditures to the cumulative United States investment in desalination research totaling 130 million. *Id.* SM–113/53, Edwards, Future Tears of Progress.

[10] See remarks on the bill introduced by Rep. Brotzman of Colorado to ban waste disposal in the ocean. 116 CONG. REC. E–7703 (daily ed. Aug. 13, 1970).

[11] Senator Proxmire introduced an amendment to a military appropriation bill (H.R. 17123) which would have required the Department of Defense to file an Environmental Impact Report with the Council on Environmental Quality as a condition precedent to receiving monies to conduct the "major Federal activity" affecting the environment. *Id.* at S–13363.

[12] Washington Post, Aug. 8, 1970, at A4, Col. 3. *Id.* Aug. 17, 1970, at A1, Col. 4.

[13] *Id.* Aug. 17, 1970 at A1, Col. 7. Some 5,000 sheep were killed as a result of exposure to VX nerve gas which escaped accidentally from testing grounds in Utah. 116 CONG. REC. S–13322 (daily ed. Aug. 12, 1970). On land and against humans and other mammals, VX is 200 to 400 times faster and more effective than GB nerve agent. In sea water, however, it is considerably less toxic than GB gas to marine life, but retains its power much longer, up to 20 years. *Id.* at S–13338.

gas.[14] The rockets had been determined unserviceable during 1968 and thus marked for elimination from the United States's deterrent stockpile of chemical munitions, whereupon they were placed in cement and hermetically sealed in quarter-inch steel plate vaults,[15] in accord with then standard procedures for disposal at sea.[16] Pursuant to the detailed plans of "Operation Chase," the 305 vaults located at Anniston Army Depot, Alabama, and the 113 located at Lexington-Blue Grass Army Depot, Kentucky, were loaded aboard gondola rail cars and moved by special trains to the military ocean terminal at Sunny Point, Forth Carolina.[17] Once at port they were loaded aboard a rusting 442-foot Liberty Ship, the *LeBaron Russell Briggs*,[18] towed by the C.S. Navy under escort of the U.S. Coast Guard to an international dumping area[19] 282 miles east of Cape Kennedy, Florida,[20] and sunk 16,000 feet to the ocean floor. Millions breathed easier as the 67 tons of nerve gas settled down to what is hoped to be its final resting place, while the United States apologetically assured the world it would never again dump chemical weapons into the seas.[21]

The dumping itself is now history, but its effect on future approaches to acceptable uses of the world's oceans could be significant. The purpose of this article is to provide both a domestic and an international law perspective from which to consider some of the probing legal questions raised by deep-ocean disposal, to look beyond the summary facts to all the relevant facts necessary to analyze the

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[14] *Hearings on Ocean Disposal of Cnserviceable Chemical Munitions (Operation Chase) Before the* ***Subcomm.*** *on Oceanography* of *the House Comm. on Merchant Marine and Fisheries*, 91st Cong. 2nd Sess. (Aug. 3, 1970) [Hereinafter cited as *Hearings]* at 431.

[15] Press Briefing: Operation Chase, presented by Col. S. M. Burney, at Anniston **Army** Depot, Anniston, Ala. (Aug. 7, 1970) at Tab D.

"*Hearings*, at 15.

"Press Briefing, *supra*, note 15, at 6.

"Washington Post, Aug. **17,** 1970, at A1, Col. **7.**

"Press Briefing, *supra* note 15, at 7. The exact dumping area is located at 29°20′ Sorth Longitude and 76°0′ West Latitude, and designated on current navigational charts. The fact that it was an existing international disposal area was of concern to Under Secretary of Army Beal, who said, "This is an international disposal site, we do not know what items other nations may hare discarded in it." *Hearings*, at 70.

There are some 123 approved dumping areas off the coasts of the United States, 40 in the Pacific, 49 in the Atlantic, and 34 in the Gulf of Mexico. 117 CONG. REC. S–13338 (daily ed. Aug. 13, 1970).

[20] Washington Post, Aug. 8, 1970. at A4, Col. **3.** The burial ground for the gas rockets mas also 150 miles northeast of Great Abaco Island and 250 miles northeast of Nassau. *Id.* Aug. 16, 1970, at A1, Col. 7.

[21] Id. Aug. 19, 1970, at A1, Col. 2.

legality of this particular dumping, and to identify the tools available to cope with future problems of this nature. The wide range of interests represented makes it a particularly appropriate topic to focus on the interrelation of domestic and international legal tools to achieve both national and international goals. Moreover, it is an area where policy guidance consistent with principles of international law is badly needed to promote judicious use of our ocean treasures.

The incident also lends itself especially well to analysis because it involves the role of change in domestic law and policy as it affects, or is affected by, international law. Whereas changes in the government or internal policy of a state do not, as a rule, affect its position in international law,[22] it is apparent that changes in internal policy can and do affect a state's international policies. In the event such changes receive wide acceptance, they can change international law.[23] It is also important to recognize that just as a state's internal laws and policies are not static, neither is international law. While the latter's changes may be less perceptible in a short-range perspective, they are nonetheless real. Moreover, with the increased activity in conventional law, change on the international scene has become more frequent. This capacity to effect change provides increasing flexibility in reaching appropriate solutions for contemporary problems; but if not wisely employed, it can be detrimental to the world community in general and the United States in particular.

For the very reason that problems such as the nerve gas dumping can have long term effects, failure to consider law and policy from both a domestic and international law perspective and to consider their interrelation, can result in confusion and frustration of desirable goals. By focusing on the nerve gas incident—the claimants, their objectives, their claims and counterclaims, and the decision-making process in both the domestic and international arenas—it is hoped that we might obtain a more rational and intelligent understanding of the legal process and its ability to meet comparable problems. Such an understanding is essential if we are to formulate a mature, effective approach to safeguard our water resources from needless pollution and, perhaps more important, to preserve the health and safety of not only the people of the United States but the peoples of the world.

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[22] I MOORE, DIGEST OF INTERNATIONAL LAW, 249 (1906).
[23] *See* The Scotia, 81 U.S. (14 Wall.) 170, 186-88 (1871).

II. DOMESTIC LAW PERSPECTIVE

A. *CLAIMANTS*

In a society as open and heterogeneous as the United States, it is difficult to predict all interests which will come to bear on a particular question. Some claimants may align themselves for just one particular issue and then diffuse or disband immediately thereafter. Some claimants may be more permanent in nature, but decline or assert their influence as best serves their interests. Generally, the more directly they are affected by an issue, the more intense their participation. Disposal of nerve gas off the coast of Yew Jersey may evoke little interest in California, just as on the international scene, disposal off the coast of Florida may excite no one in Africa, but cause the Bahamas to make their first protest ever lodged with another sovereign power.[24] In the background is always the question of how involved the sovereign, as claimant, will become and the extent to which it will use its political, economic, or other bases of power to enhance that position. For convenience of discussion. the domestic claimants which surfaced on the nerve gas disposal are categorized as follows: **(1)** federal agencies (executive), **(2)** Congress (legislative), **(3)** states and political subdivisions thereof, and **(4)** private organizations and individual citizens.

1. *Federal Agencies.* Of particular interest is that the sovereign, as executive, was divided against itself on the issue of whether it should dispose of the gas in the Ocean or on land. It shifted blame, asserted accusations and generally undermined public confidence in its ability to conduct the operation safely and in the best interests of the people. The Department of Defense and Department of the Army, as well as the AEC, came under fire from the Council on Environmental Quality and, tu a lesser extent, from each other in an attempt to affix or absolve responsibility.[25]

2. *Congress.* Southern congressmen representing those states through which the nerve gas rail shipment would pass, as well as those on the House Subcommittee on Oceanography and its Senate counterpart, conducted extensive hearings to investigate involvement of the DOD and AEC.[26]

3. *States and Political Subdivisions.* Governors, mayors and other local government officials, particularly of the southern states, exerted

[24] Washington Post, hug. **16, 1970, at** *hl,* Col. **7.**
[25] *See Hearings.*
[26] *Id. See also* Washington **Post,** Aug 8, **1970,** at **A4, Col. 3.**

pressure either for or against the transporting of the gas through their states.[27] Florida, acting through its governor, sought to enjoin the actual dumping but was unsuccessful in obtaining an injunction in both the U.S. District Court and the U.S. Court of Appeals; an appeal to the Supreme Court was not entered.[28]

4. *Private Organizations and Individual Citizens.* Perhaps the most active private organization was the Environmental Defense Fund, Inc., an organ of leading environmental protectionists, which, together with the governor of Florida, obtained standing and enough momentum to pursue the injunction request as far as the U.S. Court of Appeals.[29] In a lesser role, a Quaker Action Group staged a protest on the steps of the nation's capitol[30] and citizen scientists[31] and other concerned individuals expressed differing views.[32]

B. *OBJECTIVES*

Aside from the Quaker Action Group and some Congressmen who took advantage of the issue to push anti-war movements and obtain support for United States ratification of the **1925** Geneva Protocol,[33] the diverse claimants were almost unanimous in seeking two major objectives: **(1)** protecting the well-being and safety of citizens, during storage, transportation and ultimate disposal of the gas, including dangers subsequent to the dumping should the gas escape; and **(2)** minimizing or preventing pollution of the ocean which might affect both marine life and consumptive uses of the ocean's resources.[34] Thus, the contention centered around the means by which these ob-

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"Mayor Thompson, of Macon, Ga., decided not to block the train after observing the safety procedures employed at Anniston, Ala. Similarly, Governor Maddox of Georgia insisted that the shipment was safe and offered to ride along with it. Washington Post, ***supra*** note 26.

[28] Washington Post, Aug. 17, 1970, at A1, Col. 3. Shipment of the same gas through Earle, N.J., was cancelled after an outcry was raised by Rep. McCarthy (D-N.Y.) and other opponents of chemical apd biological warfare research. Washington Post, ***supra*** note 26.

[29] Washington Post, ***supra*** note 24.

"Washington Post, Aug. 8, 1970, at A4, Col. **3.** About 20 members of the Quaker Action Group's "Project CBW" staged skits on the Capitol steps. In one skit, people labeled "Utah Sheep," "Vietnamese," "farmworker" and "North Carolina citizen" were symbolically strangled by a player representing nerve gas. ***Id.***

[31] Hearings, at 79.

"***Id.*** at 500.

"Washington Post, ***supra*** note 24.

[34] Under Secretary of Army Beal testified before the House Subcommittee on Oceanography that the **Army** was guided by two criteria: to avoid hazard to people and minimize damage to the environment. ***Hearings,*** at 15.

jectives could be attained rather than whether the objectives were desirable or others were more desirable.

But were the objectives compatible? One proposed method of disposal was to destroy the rockets by nuclear blast. This would have precluded pollution of the sea, but posed hazards in storing the gas until such disposal could be made. Disposal at sea would remove the immediate hazard to life through gas leakage on land, but might endanger marine ecology. In denying a temporary injunction against the dumping, the U.S. District Court balanced the interests in favor of public well-being and safety, expressing that, "We are all here for the same purpose—to see that no tragedy will take place." [35]

C. *CLAIMS AND COUNTERCLAIMS*

Claims and counterclaims of the various parties in interest are categorized into four major areas: (1)total prohibition against ocean disposal (comprehensive claim), (2) right to dump only if there is no other reasonable alternative (limited claim), (3) right to dump if such dumping is reasonable under the circumstances, whether or not there. are other reasonable alternatives available (limited claim), (4) unqualified right to dump (comprehensive claim).

1. *Total Prohibition Against Ocean Disposal.* Claimants appearing to assert a total prohibition against this type of dumping were the Quaker Action Group, the State of Florida, the Environmental Defense Fund, Inc., and various Congressmen and private citizens.[36] It is a comprehensive claim, allowing no exceptions. If the claim that there is no right to dump the nerve gas, and in a broader sense, similar toxic chemical agents, into the ocean is to derive support, it must contravene some lam or policy.

Laws can only be effective where jurisdiction attaches. Because the dumping involved international waters, the jurisdiction question was paramount. Moreover, any time a state attempts to extend its jurisdiction to the point of claiming extraterritorial competence, it raises serious questions domestically, and, *a fortiori*, internationally. Thus, in ascertaining the applicability of domestic statutes dealing

[35] Washington Post, Aug. 17, 1970, at A1, Col. 7.

[36] Although the Environmental Defense Fund, Inc., sought a permanent injunction against the dumping. its counsel argued that the gorernment should, as an alternative measure. send the gas to a shallower site off Earle. S.J., where the Army had dumped 1706 containers of nerve gas in 1967–1968. Washington Post, *supra* note 35. Rep. Brotzman of Colorado introduced "a bill to make illegal the dumping of agents, by products. and wastes of chemical, biological and radiological warfare into Oceans and other bodies of water." 116 CONG. REC. E-7703 (daily ed. Aug. 14, 1970).

with proscribed conduct on the high seas, some discussion of international law is necessary. Recognizing that the tests for lawfulness may be different under international law as opposed to domestic law, the former will be discussed subsequently, except as necessary at this juncture to clarify the scope of domestic law.

Under customary international law, states do not have political jurisdiction beyond their territorial sea or a narrow zone contiguous to the territorial sea. Thus, there would be no right for officials of a coastal state to interfere with foreign vessels causing pollution on the high seas. Only the polluting vessel's flag state could subject it to jurisdiction in the absence of an international agreement. Such agreement would effect a limited extension of the coastal state's jurisdiction on the high seas through the medium of the surrender of the flag state's jurisdiction to the coastal state for the limited purpose of preventing pollution.[37] That is not to say that a state, for purposes of its domestic law, cannot, under any circumstances, unilaterally extend its jurisdiction beyond territorial waters. Nor is it to say that there is no criteria by which jurisdiction may be extended to apply to nationals and vessels of other states. But, in fact, the United States has been reluctant unilaterally to enact anti-pollution statutes extending jurisdiction beyond its territorial waters even for purposes of regulating the activities of its own nationals. Rather, the most accepted method of extending such jurisdiction has been by treaty, and, to the extent that such treaty was not self-executing, implementing it by subsequent legislation. In practice, the United States has not exercised its unquestioned sovereign power over its own flag vessels in the area of Ocean pollution beyond that which it can reasonably sustain over foreign vessels.

Professor Myres S. McDougal argues that jurisdiction would be permissible in those cases where the conduct proscribed, occurring outside territorial waters, has an admitted impact on coastal interests. Therefore, the treaty route is adopted not because the United States has no authority over foreign vessels beyond its territorial limits, but because "apprehension of offenders on a unilateral basis is not an effective way of meeting the problem."[38] There must be some mutuality of obligation and reciprocity for effective enforcement. A treaty provides the best guarantee of such. The problem has always been, however, to induce the maritime powers to agree to *effective*

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[37] Sweeney, Oil *Pollution of the* Oceans, 37 FORDHAM L. REV. 155, 186 (1968).
[38] MCDOUGAL AND BURKE, THE PUBLIC ORDER OF THE OCEANS, note 380 at 850 (1962).

international regulation. This has made prospects for such treaties somewhat limited, especially where there are conflicting state interests.

Notwithstanding, domestic jurisdictional extension has been effected by treaty. For example, an International Convention for the Prevention of Pollution of the Sea by Oil was held in London during 1954.[39] The resultant agreement, as amended,[40] prohibited discharges of oil from vessels within fifty nautical miles of the nearest land, subject to extensions or reductions in accordance with the terms of the convention; [41] violators could be punished by the flag state. The treaty was not self-executing, but was, subsequent to ratification, implemented by domestic legislation under the present Oil Pollution Act of 1961, as amended.[42] Thus, although limited to oil pollution, one of the farthest modern-day extensions of domestic jurisdiction on the high seas was effected through the international convention tool.

A second example goes a step further and illustrates how wholly domestic law, (that having no origin or sanction under international law), when combined with treaty-implementing domestic law, can effect a jurisdictional extension of the former. In the case of *United States* v. *Ray* [43] the defendant, a private entrepreneur, attempted by dredging operations to create an artificial island on reefs about four and one-half miles off the Florida coast. The United States alleged that a permit issued by the Secretary of the Army under authority of the Rivers and Harbors Act of 1899[44] (Refuse Act) was required,

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[39] 12 U.S.T. 2989 (1961). T.I.A.S. So. 4900.

[40] 13 U.S.T. 2313 (1962). T.I.A.S. So. 5200.

[41] Annex A to the Convention currently lists 16 zones greater than 50 nautical miles, such as the Canadian Western Zone (100 miles off the west coast of Canada) and the Sorth Atlantic Zone (100 miles off certain portions of Eastern Canada and the United States). For United States implementation of these exceptions, *see* 33 U.S.C. § 1001 (i) (1) (1970).

[42] 33 U.S.C. § 1001 *et seq.*, (1970), 75 Stat. 402 (1961); 80 Stat. 372 (1966).

[43] United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969).

"33 U.S.C. § 403 (1970). Section 10 of the Act gives the Secretary of the Army authority to prohibit the creation of obstructions to the "navigable capacity of waters of the United States," which extends to a "harbor," navigable river, or other water "outside established harbor lines, or where no harbor lines have been established." Notwithstanding the broad language defining "navigable capacity of waters of the United States," traditional United States claims place the territorial waters at a width of only 3 miles from its coasts. The Refuse Act was the first broad federal legislation used to control water pollution. It was designed primarily, however, to ensure navigability of the nation's developing waterways, not as a major anti-pollution tool. Ironically, its broad language has been relied upon recently to fill gaps in jurisdiction of more modern statutes allegedly considered more effective to deal

and intervened to halt the dredging, claiming that it was an obstruction to navigation. Defendant argued that the authority of the Secretary of the Army under the Act did not extend beyond the territorial waters, which had always been only three miles from the coast.[45] The court enjoined the dredging, holding that the Outer Continental Shelf Lands Act[46] (treaty-implementing domestic law), which asserted United States jurisdiction over the natural resources of the subsoil and seabed of the continental shelf, extended the authority of the Secretary of the Army to the continental shelf. The court concluded that "whatever proprietary interest exists with respect to these reefs belongs to the United States under both national (Shelf Act) and international (Shelf Convention) law."[47] Further, when "read together," these statutes, and the policy announced by Presi-

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with contemporary environmental pollution problems. *See* United States v. Republic Steep Corp., 362 U.S. 452 (1960).

It does not appear that dumping per se is an "obstruction" to navigation, and, jurisdiction problems aside, it may be difficult to construe as within the Act dumping which is so deep as to cause no actual or significant potential obstruction to navigation, especially when such dumping is outside the contiguous zone.

[45] For development of the 3-mile rule, *see* Commonwealth v. Manchester, 152 Mass. 230, 240 (1890), 139 U.S. 240, 255 (1591); Cunard Steamship Co. v. Mellon, 262 U.S. 100, 102 (1923); 1 MOORE, INTERNATIONAL LAW 699–703 (1906).

Defendant in the Ray case argued that what the dredging involved really was a question of use of the submerged lands, which title, if ever vested in the United States, had been relinquished to the states in 1964 under the Submerged Lands Act, 43 U.S.C. § 311 (b) (1). Therefore, jurisdiction, if any, was a state as opposed to a federal question, the United States having waived any further interest in the matter. The court found that whatever interest had been conveyed to the states under the Submerged Lands Act did not affect the authority of the United States to control navigable waters above such lands.

[46] Perhaps the major breakthrough in dealing with contemporary problems in areas immediately seaward of the territorial waters was the adoption of the Convention on the Continental Shelf. In 1958 the United States Conference on the Law of the Sea at Geneva drafted the Convention which became effective April 12, 1961, 15 U.S.T. 471, T.I.A.S. No. 5578. Following the theory of the Truman Proclamation on the Continental Shelf, it reserved jurisdiction and control of the shelf to the contiguous nation. 10 Fed. Reg. 12303 (1945). In 1964 the treaty was ratified and implemented by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–43 (1964) which was "enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the continental shelf." Guess v. Read, 290 F. 2d 622, 625 (5th Cir. 1961), *cert. den.*, 368 U.S. 957 (1962).

The Act defines the Outer Continental Shelf as all submerged lands lying seaward and outside of the area given to the States under the Submerged Lands Act, of which the subsoil and seabed are subject to its jurisdiction and control. 43 U.S.C. § 1331 (a) (1970). *See generally,* Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished,* 52 AM. J. INT. L., 607 (1958).

[47] United States v. Ray, 294 F. Supp. 532, 542 (S.D. Fla. 1969).

dent Truman with regard to the Continental Shelf [48] provided authority for the injunction, in view of the "great public interest," involving "preservation of rare natural resources" and the security of the nation.[49]

A significant reason that the jurisdictional claim was upheld in *United States v. Ray* is that it was a limited, special purpose claim. The United States never claimed exclusive jurisdiction over the continental shelf, but only that the natural resources of the subsoil and seabed therein were regarded as "appertaining to the United States, subject to its jurisdiction and control." Moreover, "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way affected." [50] Although the exact extension of such jurisdiction is not clear, especially in those cases not involving an obstacle to navigation or an implacement on the bed of the continental shelf, it reflects a definite juridical recognition of extension, at least for some purposes, beyond territorial waters. The significance of the case, then, for the purposes of this analysis, is, that given a limited claim of competence to extend jurisdiction for a particular purpose to the high seas or ocean floor which is reasonable and sanctioned under international law, such claim may, under appropriate facts, provide the basis for extending domestic jurisdiction beyond territorial waters to protect a limited, but related interest.

With that brief background we can now consider major domestic legislation or policy governing pollution, whether it applies to the gas dumping, and the extent to which it has been or might be strengthened by international legal tools. The most comprehensive statute currently enacted is the Water Quality Improvement Act of 1970 [51] which amends the Federal Water Pollution Control Act of

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[48] See, ***supra*** note **46.**

[49] United States v. Ray, 294 F. Supp **532, 542** (S.D. Fla. 1969).

[50] *See, supra* note 46. That the interest claimed by the United States in **the** continental shelf is somewhat less than fee simple has been judicially recognized. In United States v. Rag, the United States alleged a second cause of action for trespass. The court dismissed that action on the grounds that Congress intended to claim a "less comprehensive interest" in the area covered by The Outer Continental Shelf Lands Act than the property right it bestowed upon the States under The Submerged Lands Act where it relinquished all "right, title. and interest" to the lands beneath narigable waters within the boundaries of the United States (43 U.S.C. § **1311** (b) **(1) (1970).**

"Water Quality Improvement Act of 1970, Pub. L. 91-224, **33** U.S.C. § **1151** ***et seq.*** **(1970).**

1956[52] and the Water Quality Act of 1965.[53] It prohibits discharges of harmful quantities of sewage, oil and other hazardous substances upon navigable waters of the United States. That portion of the statute governing oil and other hazardous substances extends jurisdiction to encompass a twelve-mile contiguous zone, an area nine miles beyond traditional United States territorial sea claims. Obviously, the 12 mile claim is strengthened if it is in accordance with international law, especially if it is supported by treaty-implementing domestic law. Such treaty-implementing authority has been asserted under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone,[54] among others.[55]

Section 12 of the Water Quality Improvement Act proscribes pollution from hazardous substances, and therefore, is the most germane tu the nerve gas. It permits the President to promulgate regulations designating as "hazardous" substances other than oil that, when discharged, present an "imminent and substantial danger to the public health or welfare." [56]

Inasmuch as the dumping of the nerve gas was carried out by the Department of Defense, it is appropriate to consider to what extent the Federal Water Pollution Control Act, as amended, prohibits polluting activities of the sovereign.[57] It is apparent that the general provisions of the Act do *not* apply to the federal government, since a "person" under the Act includes only an "individual, corporation, partnership, association, State, municipality, and political subdivision of a State." [58] That portion dealing with pollution by oil and hazardous substances is even less comprehensive, excluding a State, municipality, and political subdivision of a State.[59] Further, a "vessel" prohibited from unlawfully depositing oil or hazardous subsfances means "other than a public vessel" (one operated by the United States or a State or a political subdivision).[60] The exemption of federal

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[52] Federal Water Pollution Control Act of 1956, 33 U.S.C. § 466g (1964).

[53] 33 U.S.C. § 466g (1968 Supp.).

[54] 15 U.S.T. 1606 (1964). There is, however, an opposite view that "sanitary regulations" under Article 24 do not include pollution control measures.

[55] Section 25 (2) of the United Sations Convention on the High Seas, 13 U.S.T. 2313 (1962), provides that "All States shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or *other harmful agents.*"

[56] 33 U.S.C. § 1162(a) (1970).

[57] *See id.* at 1162(g). Some action should be forthcoming by the Environmental Protection Agency in identifying and regulating hazardous substances.

[58] *Id.* at 1160(j).

[59] *Id.* at 1161(a)(7).

[60] *Id.* at 1161(a)(3) and (4).

instrumentalities appears intentional, leaving them to be controlled by regulations promulgated by the executive. In the opinion of the writer, this is the preferred method of regulating sovereign activities, especially when criminal sanctions are imposed under the legislative act.[61] By contrast, Section 13, which governs control of sewage from vessels, expressly applies to vessels owned and operated by the United States unless the Secretary of Defense finds that compliance would not be in the interest of national security.[62] Section 13 does not, however, apply to the contiguous zone.[63]

The statutory immunity of the federal government under Section 12 raises the question of Cnited States policy toward federal polluting activities,[64] and the restraints, if any, which have been self-imposed.[65] Shortly after passage of the Water Quality Improvement Act of 1970, President Nixon ordered that the Federal Government provide leadership to protect and enhance the quality of our air and water resources in the design, operation and maintenance of its facilities,[66] and defined such facilities to include "vessels . . . owned by . . , the Federal Government." Most significantly, the order required that all federal facilities adopt the standards required by the Federal

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[61] *Id.* at 1161(b)(4), *e.g.*, makes punishable by not more than $10,000 fine or imprisonment for not more than one year or both, an act of any person in charge of a vessel or of an offshore facility who, with knowledge of a discharge of oil in violation of the Act, does not immediately notify the appropriate agency of the United States of such discharge.

[62] *Id.* at 1163(d).

[63] Section 11, dealing with oil pollution, and Section 12, dealing with pollution from hazardous substances other than oil expressly apply to "navigable waters of the contiguous zone." *Id.* at 1161(b)(1) and 1162(a). Section 13, hon-ever, applies to the "navigable waters of the United States," and makes no mention of the adjoining shorelines or contiguous zone.

[64] Ironically. the federal government is one of the country's worst pollution offenders. An estimated 46.1 million gallons of untreated sewage are discharged into ground and surface waters each day from more than 17,000 federal installations. Much of this pollution flows from the nation's military establishment. Comment, *Legal Control of Water Pollution*, 1 U.C.D.L. REV. 55, 99 (1969). The total cost of cleaning up federal sources of pollution is estimated at 130 million. *Id.*

[65] In 1966, President Johnson ordered that each federal department equip itself with secondary treatment facilities and develop a plan for water pollution control, and further, that project plans of the Department of Army be reviewed by the Secretary of Interior. Query, does this extend to projects to dispose of nerve gas? Exec. Order *So.* 11288, 3 CF.R. 628 (1968).

[66] Exec. Order *So.* 11,507, 36 Fed. Reg. 2573 (1970).

Water Pollution Control Act, as amended,[67] and that the use, storage, and handling of all materials, including *chemical and biological agents* should be carried out so as to avoid or minimize khe possibility for water and air pollution.[68] Temporary relief from this order may be obtained when the respective Secretary (under the Act) finds that it is in the interest of national security, or in the extraordinary cases when it is in the national interest.

Proponents of the nerve gas dumping might well argue that, if the executive order applies to deep ocean dumping, relief from the order would obtain under the facts of this particular disposal. The relief portions of the order certainly require a situation in which almost no other reasonable alternative exists. That escape valve seems desirable to prevent the executive branch from cementing itself into a position where no alternatives remain, much as the Department of the **Army** discovered that by encasing the nerve gas rockets in cement there were few, if any, reasonable alternate means of disposal within the time frame.[69]

The United States policy then, is to enhance khe quality of our air and water resources. While the Federal Water Pollution Control Act, as amended, significantly extends jurisdiction over hazardous substances to the contiguous zone, the nerve gas dumping did not violate the Act because the Defense Department was not subject to

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[67] *Id.* at para 2(d) and 4(a)(1). The command of the executive to bring federal facilities under standards of the Act does not affect the states and municipal subdivisions thereof in the areas of pollution by oil or other hazardous substances. The Act is considered the most extensive legislation dealing with pollution, yet, as to pollution **by** oil, it is less comprehensive than the Oil Pollution Act of 1961, as amended. The latter is still in force and extends to all vessels except those expressly exempted *(see supra* note 41), covering all *state and federal vessels.* Its jurisdiction **is** much broader, but criminal sanctions not as severe as the former. To the extent that vessels excepted by the latter are covered under the former, the exception would be superseded for purposes of domestic law. As to vessels of signatory states to the Convention itself, other than those of the United States, it is questionable if the exceptions mould be superseded beyond the territorial waters of the United States. "hat is because the extension of jurisdiction to control pollution in the first instance was pursuant to international agreement which provided for the exceptions. In practical effect, there are few vessels not under some type of oil pollution control at least as to the contiguous zone, but as to dangerous substances, all state and municipal vessels do not appear to be regulated under federal statute.

[68] *Supra* note **66.**

[69] Under Secretary of Army Beal testified that there was no feeling **at** the time the rockets were encased in concrete that sea disposal, which had been used in the identical manner before in 1967 and 1968, was not a satisfactory may of handling the munitions and that other alternatives **needed** serious consideration. *Hearings,* at 25.

it, nerve gas had not been defined as a hazardous substance, and the deep Ocean dumping site was far beyond the contiguous zone which is the outer limit of jurisdiction under the Act. Moreover, as a matter of policy, the dumping was permissible as being in the interest of national security or in the national interest. Hence, to the claim that such dumping was absolutely prohibited, by either lam or policy, at least from a domestic perspective, the answer must be in the negative.

2. *Right to Dump Only If There Is No Other Reasonable Alternative.* In aligning the proponents of this claim, it is perhaps justifiable to suggest that the contemporary crusade to preserve and enhance our environment, whether speaking domestically or internationally, has given considerable impetus to claimants who might well have taken a less aggressive position on an identical matter a few years ago.[70] Claimants appearing to assert this claim are the Council on Environmental Quality and various Congressmen. Although the Department of Defense insisted that there was no other reasonable alternative, this position does not appear to be the claim it espouses, and certainly has not been the claim it has espoused in the past.[71] The hearings conducted by the House Subcommittee on Oceanography under the direction of Chairman Alton Lennon (in whose constituency the gas was loaded aboard ship) reflected an intense inquiry into how thoroughly the Department of Defense had investigated alternative methods of disposal, rather than creating the impression that wean disposal was unacceptable under any circumstances.[72] The Subcommittee essentially implied that the dumping should not be sanctioned because there was another alternative. On the Senate floor one senator criticized the Army for failing to pursue land disposal,[73] and both the Army and AEC were also criticized for rejecting underground nuclear destruction of the gas rockets.

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[70] The 706 vaults of M-55 nerve gas previously sunk off the coast of New Jersey were sunk at depths of 7.000 feet at the suggestion of a special ad hoc committee created and named by the President of the National Academy of Sciences known as the Ad Hoc Committee to Investigate the Disposal of Certain Chemical Munitions, headed by Dr. Paul M. Gross, the same man who headed the committee in the instant case which, by contrast, recommended disposal by nuclear explosion first, and deep water disposal of at least 15,000 feet as a second alternative. *Hearings* at 3.

[71] *Supra* note 69.

[72] *See, generally, Hearings.*

[73] *See* remarks of Senator Hollings, 116 CONG. REC. S–13336 (daily ed. Aug 13, 1970).

Mr. Russell Train, chairman of the newly creaked Council on Environmental Quality, and former Under Secretary of Interior, said that it was "clearly inappropriate to use the oceans for disposal of any toxic material." But on further questioning he said that *"with regard to Operation Chase, the Council did not know of any more desirable means* of *disposal."* However, he concluded, "Time not being an element, I feel very strongly against ocean disposition.''[74]

The merits of this very limited claim certainly require careful evaluation of the facts, and ultimate appraisal of its validity must be weighed more in terms of policy than actual law. Yet, as we shall examine, there is legal machinery already in existence in the form of the Council on Environmental Quality. The Council, through the environmental reporting requirement placed on federal agencies, can properly focus on those reported facts and implement national policy through executive discretion. This is the heart of the National Environmental Policy Act,[75] and the forum through which facts may be gathered, opinions expressed, and national environmental policy effected. The Council is a major claimant, since under Section 204(3) of the National Environmental Policy Act,[76] it is charged with the responsibility of verifying that the various programs and activities of the federal government are consonant with the Water Quality Improvement Act of 1970.[77] To assist the Council in this responsibility, Section 102(c) of the Act requires that

> *All agencies* of the Federal Government shall . . , include in every recommendation or report on proposals for legislation and other ***major Federal actions significantly affecting the quality of the human environment,*** a detailed statement by the responsible official on the environmental impact of the proposed action.[78]

Query: is the Department of Defense within the purview of this section?

Pressures were put on the Department of Defense by various senators and the Council until the Department of the Army did file an environmental impact statement with the Council on July 7, 1970, in draft form and a final report on July 30, 1970.[79] However, that

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"Hearings at **433, 435** (emphasis added).

[75] Pub. L. 91–190 (1969); 42 U.S.C. **4321** *et. seq.* **(1970).**

[76] *Id.* at 4344(3).

"Pub. L. **91–224; 33 U.S.C. § 1151** *et. seq.* **(1970).**

[78] **42 U.S.C.§** 4332(c) **(1970).**

"Hearings at **431.** The report did make full disclosure of the nerve gas shipment, including reference to the VX agent. The President of the Senate

statement referred only to the dumping aspect of the project, not the transportation by rail to the port. The Army apparently did not consider the latter a major action requiring a report, but in any event refused to file one on policy grounds.[80] Senator Muskie lamented that, "There are no sanctions for failing to file a report other than the prestige of the Council and the backing of Presidential authority." [81] He later commented, "Someone has to decide what is a major action requiring compliance with the law." [82] It is reasonably clear that the sentiment in Congress is that the Department of Defense must file under the Act. What considerations will be worked out because of national security or other policy considerations remain to be seen,[83] but Mr. Train said, "I believe that we are working out between our agencies satisfactory answers to these problems." [84]

Given the proper filing of reports with the Council, was there any other reasonable alternative means of disposing of the gas? Consider the facts: During 1968 the rockets in question were determined unserviceable and were marked for elimination from the deterrent stockpile of chemical munitions. In accord with then-standard procedures for disposal at sea, the rockets were encased in concrete and steel vaults to assure they would sink to the bottom of the ocean, to minimize hazards of transportation and to eliminate danger of leakage. Public concern prompted the Department of the Army, in May 1969, to request the Kational hcademy of Sciences to study disposal of the vaults. From the outset the concrete and steel vaults

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and Speaker of the House were notified more than 10 days prior to planned movement and governors of states concerned were formally advised and briefed. *Id.* at **73.** Rather heated debate resulted, however, when the Army refused to file a report on that phase of the project involving transportation of the nerve gas to the ocean port. 116 CONG. REC. **S–13322** (daily ed. Aug. 13, **1970).** Mr. Train testified before the House Subcomm. on Oceanography that "We make clear our conviction (to the Department of the Amy) that the transportation aspect of the project is of a naure requiring an environmental impact statement under the National Environmental Policy Act." *Hearings* at **436.**

The Proxmire amendment ***So.*** 808 to H.R. **17123** which would have required the military to file such a report before receiving monies for projects requiring such reports found strong support in principle, i.e., that the Department of Defense was required to file reports under the Act. hut deemed administratively unfeasible and was defeated 59 to **26.** 116 CONG. REC. **S–13363** (daily ed. **Bug. 13, 1970).** *See also supra* note **11.**

[80] **116** CONG. **REC.** S–13349 (daily ed. Aug. **13, 1970).**

[81] *Id.* at S–13348.

[82] ***Id.***

[83] Rep. Dante Fascell, Fla.. asserted that ". . . . . the Council ought to have at the civilian level in government the final approval on the question" (of nerve gas disposal). *Hearings* at **336.**

[84] ***Id.*** at 453.

presented an almost intractable problem, severely limiting alternative methods of disposal. The Kational Academy of Sciences recommended destroying the vaults by nuclear explosion if this could be done safely, and requested that a group of munitions experts be convened to determine if there was any other feasible alternative for disposal. Such a committee was headed by Dr. Paul Gross, and it recommended disposal by nuclear explosion or, as less desirable, sea-dumping the vaults in water at least 15,000 feet deep. The committee further counseled that August 1, 1970, was the estimated date after which the rockets would not be considered safe because of the gradual deterioration of the nerve agent itself and its corrosive effects on the rocket warheads.[85]

After receiving the report of the Gross Committee, the Army requested that the AEC evaluate the feasibility of disposal by nuclear explosion. The AEC's Lawrence Radiation Laboratory concluded that, "These obsolete chemical munitions can be reliably destroyed by an underground nuclear explosion. This operation can be conducted with no undue or unusual on-site and off-site safety hazard if the structural integrity of the steel shipping vaults can be assumed through the time of implacement hole stemming."[86] The AEC overruled that recommendation in October 1969. Under fire to defend the AEC action, Mr. Tresche, Deputy Director, Division of Military Applications, AEC, testified that notwithstanding the Lawrence Radiation Laboratory's report, it was merely a feasibility study, and that "merely because such an operation is feasible does not necessarily mean it is safe."[87] An exhaustive study of the safety of the operation would yet have to be made, and the AEC could not within any comfortable margin of time meet the August 1 deadline.[88] Under

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[85] *Id.* at 9, 17, 18, 29.

[86] *Supra* note 80, at S-13336.

[87] *Hearings* at 369.

[88] *Id.* at 370. Mr. Tresche further testified that "It is feasible to destroy in a cavern the quantity of munition proposed but not the specific munition that is in the possession of the Army at this particular time. That is the crucial point . . . the first study made was a feasibility study, not a safety study . . . we knew what type of munitions were to be destroyed. It was a question of the condition of the munitions which was the critical issue. . . . It is feasible, it is indeed feasible to destroy this munition. But the question, quite a separate matter, is the question of safety when we learned of the condition of these vaults, when we were told that dug. 1 was the deadline . . . we could not in any comfortable margin of time meet the Army's requirement. Furthermore, it was expected that there would be a strike in the Nevada test site on the first of July because contracts ran out." (The strike did occur and was still in effect on the date of the hearing. *Id.* at 364.) *Id.* at 363, 364.

Secretary of the Army Beal testified that there was no way to detoxify the encased munitions safely on land inasmuch as a nuclear blast was not possible under the circumstances.[89] Mr. Train shared that opinion, stating:

> The ultimate deleterious impact of this operation on the environment is uncertain, but it is less uncertain than the potential deleterious impact of the alternative actions that now appear possible. Put another way, given the present situation — the need to dispose of a large number of armed and ready rockets filled with GB agent, sealed within steel covered concrete raults, with possibility of the explosives aging and becoming unstable, and the rockets corroding and releasing the nerve agent, — the proposed Ocean dumping appears to pose a lesser risk to the environment than any other course.[90]

Thus, whatever might have been the alternatives before the time the rockets were first encased in concrete, those alternatives were rapidly narrowed until, as the time for disposal approached, it appeared that public safety was too important to chance further study and evaluation of other alternatives. Hence, given that the claim to a right to dump only if there is no other reasonable alternative available is valid (and such claim is founded primarily on policy because there is no substantive law in point), the charge that the dumping was in contravention is difficult to sustain.

3. *Right to Dump If Such Dumping Is Reasonable Under the Circumstances, Whether or Not There Are Other Reasonable Alternatives Available.* Claimants adopting this view appear to be the Department of Defense and possibly the AEC, although the position of the latter is unclear. It is well known that the mean has long

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[89] Mr. Beal testified that "We know of no way to detosify these encased munitions safely on land, under the circumstances. It is agreed that immersing them in sea mater will dilute and detoxify the chemical agent when it escapes from the vaults. We cannot guarantee that there will be absolutely no effect on the environment at the disposal site . . . Based on best scientific data available we believe this effect will be inconsequential. Therefore, it seems clear to us that this disposal operation is the only reasonably feasible course of action to dispose of these vaults." *Id.* at **32.**

[90] *Id.* at **436.** Mr. Train further told the House Subcomm., "Could I complete one answer because I think perhaps the record is left unclear. While the judgment which we made on the basis of the Army Environmental Impact Statement was made without the benefit originally of the AEC report of Sept. 15, the later reading of that report by myself on the 4th of Aug. did not change my view that the proposed Ocean disposal is the best alternative amongst a lot of poor ones because of the Aug. 1 date." *Id.* at **446.** Like its Senate counterpart, the House Subcomm. on Oceanography concluded reluctantly that "the disposal of nerve gas containers in the ocean is the only alternative available, due to the hazard to human life through continued storage." Washington Post, Aug. 8, 1970, at A4, Col. **3.**

been used as a disposal area for obsolete munitions and other war material, Not only that, but it has been used in the past to dispose **of** nerve gas in rockets.[91] Since disposal at sea was considered safe and reasonable, until intense public reaction opposed it, no other alternatives were considered realistic.[92] If several alternatives are deemed safe, and cost is a factor, particularly in light of huge defense expenditures in recent years, Ocean disposal is a desirable alternative because it is relatively inexpensive.[93] Additionally, the nerve gas rockets were only a very small part of a very large amount **of** obsolete munitions requiring disposal. The sheer immensity of the overall operation, the safety factors, costs, and recognized practice **of** sanctioning the use of the oceans for reasonable dumping made ocean disposal a very practical solution.[94]

Where there is a little or no toxicity to marine life, it is argued that the vast assimilative capacity of the ocean waters should be used in solving burdensome waste problems.[95] But always it is a question of the reasonableness of the particular dumping involved, weighing possible harm to the Ocean ecology against all other factors deemed important. The more harmful the use, the less reasonable it becomes.

Limited harmful use, such as the dumping of nerve gas, is considered reasonable under some circumstances by some persons [96] and unreasonable per se by others.[97] However, reasonableness must always be viewed in light of factors extant at the time the decision is made.

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[91] *Supra* note 70.

[92] *Supra* note 69.

"Whereas no figures are readily available as to the cost **of** ocean disposal, the estimated cost of disposal by nuclear explosion was estimated between $3,415,000 and $7,445,000, depending on the site selected. ***Hearings*** at 16.

[94] *Id.*

[95] A 5-year study by researchers at Harvard University's School of Public Health (HUSPH) and the University of Rhode Island's Graduate School of Oceanography (URIGSO) was conducted on the feasibility of high-seas incineration and dumping of garbage and other wastes. It concluded that disposal at depths of 100-200 feet would not cause significant damage to flsh, beaches, ships or traffic. Further, that there was little or no toxicity to a series **of** representative marine organisms. A researcher told the Senate Subcomm. on Air and Water Pollution that ". . . It appears, therefore, to utilize the vast assimilative capacity of ocean waters and the wean atmosphere to solve a troublesome urban problem. Studies show this can be done without polluting the environment, decreasing the recreational use of the waters **or** interfering with commercial and sport fishing." 116 CONG. REC. S-2067 (daily ed. Feb. 20, 1970).

[96] MCDOUGAL, *supra* note **38,** at 657, 660.

[97] Margolis, *The Hydrogen Bomb Experiments and International Law,* 64 YALE L. J. 636 (1955).

Certainly with advances in technology and awareness of changes in relevant factors, what might have been reasonable ten years ago might be unreasonable today. Hence, a decision to favor ocean disposal under present conditions has no binding effect on future decisions and each case must be judged on the reasonableness of ocean dumping under its own unique, particular circumstances. This approach is the most rational, flexible and least emotional of any of those taken toward the problem. A more comprehensive discussion is made of this important claim in the subsequent portion on the International Perspective. For the present analysis, we may say that this claim does not violate any domestic law or policy and appears well founded because the dumping was in fact reasonable under the circumstances.[98] It is further enhanced because of the unavailability of other reasonable alternatives.

4. *Unqualified Right to Dump.* This comprehensive claim recognizes no limitation on use of international waters as a haven for refuse. The Ocean belongs to no one, hence no restriction extends to its use or abuse. This claim has never received general acceptance as a matter of domestic policy or law, nor does it derive support from international law.[99] In the case of the nerve gas dumping no claimants have advanced it. It is mentioned generally to distinguish the types of claims involved, and, particularly, to discredit much of the criticism which suggests that this was the executive policy, as administered through the Department of Defense, that its entire approach departed from any rule of reasonableness, failed to consider the impact on marine ecology,[100] was inexcusable conduct, and

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"It was estimated the GB agent would contaminate only one cubic mile of ocean, at most, and that contamination would hare essentially disappeared within ten days. Dr. Cheek, chemical oceanographer at the Naval Research Laboratory, stated that the ocean afforded two safety features, (1) decomposition of the gas by hydrolysis, and *(2)* tremendous dilution, and that the "maximum adverse environmental impact would be temporary contamination of approximately 1 cubic mile of water. but this would occur only if all vaults ruptured simultaneously, which is extremely unlikely." Contaminated volumes would be much smaller probably in view of expected slow release of the agent at the ocean bottom. *Hearings* at 71. Further, that "GB agent in sea water will disappear with a half life of about 12 hours, 10 to 12 hours. Less than 1,000th of it is left after 10 half lives, or 5 days. This means that this compound would have disappeared by more than a factor of a million in about ten days . . . When it hydrolizes it goes into the completely innocous products like floride iron which goes into your drinking water and some other products . . . if there were 135,000 lbs. of this material to start with, in ten days only about .135 lbs. would be left. a little over two ounces." *Id.* at S6, 87.

[98] *See* McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security.* 64 TALE L. J. 648 (1955).

[100] 116 CONG. REC. S–13338 (daily ed. Aug. 13, 1970).

"an act of almost unbelievable negligence."[101] To the contrary, high-level coordination of all pertinent government agencies was effected, and alternatives carefully weighed as part of the decision-making process.[102] It is a relief that this claim receives no endorsement in law or policy of the United States.

III. INTERNATIONAL LAW PERSPECTIVE

Having discussed many of the factors influencing United States internal policy, and the legality of the dumping from a domestic perspective, we still face the question of whether the dumping violated international law. Meaningful inquiry necessitates first, a careful identification of the real parties in interest—those parties besides the United States whose interests were and will be in the future enhanced or impaired by the action. Consideration must be given to value deprivations, their severity, the benefits to be gained from the dumping, and whether such benefits are inclusive to the world community or exclusive to the United States.

Once the real parties in interest are identified, it must then be determined whether they are to be recognized as bona fide claimants in the international arena for purposes of officially asserting their claims. If they are not recognized participants of international status, it must be determined what weight, if any, should be accorded their claims. Their claims must then be identified and appraised objectively under international law.

A. *CLAIMANTS*

Just as the participants in the domestic decision-making process were many, so also are those in the international decision-making process. Only the more important claimants are identified, but their claims are sufficiently representative to provide a meaningful analysis.

For convenience of discussion, the claimants are categorized as follows: (1) states, (2) protectorates, (3) international organizations.

1. *States.* The United States and Great Britain emerged as claimants.. Great Britain had an interest, first, because she herself disposed of sixty-seven tons of captured German nerve gas in the Atlantic be-

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[101] Washington Post, Aug. 8, 1970, at 64, Col. 3.

[102] A meeting was held on Dec. 5, 1969, by the Department of the Army in which representatives of the Departments of State, Interior, Transportation, and HEW, and Office of Science and Technology in the White House were present at which time they discussed conclusions in existence up to that point in time not only from the AEC report but from the initial Gross Report (the second Gross Report of course had not been written). *Hearings* at 529.

tween 1955 and 1957,[103] and secondly, because of her capacity as protector of the Bahamas.

It is significant that no state objected to the proposed dumping as of early August, 1970.[104] Subsequently, however, the USSR, supported by twelve non-aligned nations, presented a draft to the Disarmament Conference in Geneva to ban poison gas and germ weapons. The American and British delegations, together with the other NATO nations, rejected that draft less than two weeks after the actual nerve gas dumping.[105] No clear position appears to have been taken by the USSR as to the sea disposal, rather its interest seemed to be the banning of the weapons themselves. Consequently, the USSR and the other nations who acted with it are not considered as claimants on the narrow issue of disposal at sea.

2. *Protectorates.* Both the Bahamas and the Bermuda islands informed Great Britain of their concern surrounding the nerve gas disposal at such proximity to their shores, but requested no delay in the dumping.[106] Prime Minister Arthur D. Hanna said, "The United States has already made up its mind to dump the nerve gas near the Bahamas, but I am surprised that they who are the champions in the cause of anti-pollution decided to dump the rockets in the ocean, must less on the doorstep of a friendly nation."[107] hlthough the protest was delivered to a visiting delegation of the United States in Nassau, a spokesman for the U.S. Department of State said that the United States could not respond unless the British government

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[103] Washington Post, Aug. **12,** 1970, at A19, Col. 3. The British defense ministry disclosed that between 1955 and 1937 it dumped about 67 tons of captured German nerve gas and 8,000 tuns of British mustard gas into the Atlantic 250 miles west of Scotland. Bombs containing the gas were packed into the holds of obsolete nary ships which were then sunk. Since **1957** Britain has dumped no deadly gas at sea. ***Id.***

[104] Mr. Herman Pollack, Director of International Scientific and Technological Affairs, Department of State, told the House Subcomm. on Oceanography that the United States had been informed by both the Bahamas and Bermuda of the concern of those islands and had in turn supplied them some of the information on the disposal made available to the Committee. He also stated that (as of hug. ***6.*** 1970) no other states objected to the proposed dumping. ***Hearings*** at 472, 483.

[105] The United States ruled out a Soviet draft convention to ban poison gas and germ weapons in a single composite agreement. The ***Soviet*** draft was unclear as to what would be prohibited and failed to provide sufficient verification of violations. The American delegation to the 25-nation disarmament conference supported a British draft which would outlaw germ weapons separately, leaving chemical weapons for a separate treaty. Washington Post, Aug. **28,** 1970, at A20, Col. **1.**

[106] *Hearings* at 472.

[107] Washington Post, **hug.** 16. 1970. at A1, Col. 7.

agreed to formally lodge the protest.[108] Operating under the protectorship of Great Britain, the Bahamas look to it for official representation in the international community. Accordingly, they asked Britain to protest to the United States, but instead the British Embassy in Washington only forwarded an expression of the Bahamas' views to American authorities—three days after the dumping. Thus, although the courtesies of protocol were extended, the United Kingdom impliedly did not agree with the views of its protectorate.[109] Notwithstanding, the Bahamas and Bermudas are considered claimants, though officially unrecognized, because they are still states in their own right, and had a direct and substantial interest in the disposal proximate to their shores.

3. *International Organizations.* The United Nations, as a body, took no action through the Security Council or General Assembly condemning or endorsing this particular disposal operation. Secretary General U Thant, however, speaking for the United Nations, said the problem required further study at the international level by prominent international scientists so that safe and effective methods of destroying deadly weapons could be evolved for the future.[110] Moreover, he openly charged the United States with violating international law.[111] Subsequent to the dumping, a statement adopted in Geneva by a 42-nation United Nations committee on peaceful uses of the seabed appealed to all governments to refrain from using the ocean floor as a dumping ground for toxic, radioactive or other noxious materials.[112]

B. *OBJECTIVES*

The nerve gas dumping had the potential of causing immediate and substantial harm, even to the extent of killing human beings, had the gas escaped from its containers through mishap prior to settling on the ocean floor. What effect it will have on ocean ecology in the long run is as yet unknown. Moreover, what cumulative effect the repetition of such disposals would have is more portentous. It is little wonder that the primary objectives of all claimants were first, to avoid hazard to people, and second, to minimize damage to the

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[108] *Id.*

[109] **Washington Post, Aug. 25, 1970, at A8, Col. 7.**

[110] **Telegram USUN 1616 from USMISSIOS USUN, NY, to Secretary of State, Wash., D.C., Aug. 7, 1970.**

[111] *Id.*

[112] **Washington Post, Aug. 21, 1970, at A16, Col. 3.**

environment.[113] Nevertheless, there was an intense dispute over just what measures would accomplish those objectives. A third objective, at least of the United Nations, was to make the matter one of international concern and thereby obtain support for the Geneva Protocol, which bars the use of nerve gas and other gasses in time of war. Secretary General Thant called for a study by international scientists and specialists even though eminent United States scientists had made very thorough studies.[114] He perhaps hoped that referring the problem to an international study group might establish precedents for handling similar problems in the future, perhaps where domestic studies of a less thorough nature had been made. Whatever the other United Nations objectives, the desire to add the United States to the eighty-four signatory nations of the Geneva Protocol appeared paramount.[115] This was implicitly recognized by the United States.[116] Finally, as noted, there were some states which, although not claim-

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[113] *Hearings* at 17.

[114] At least seven reports are of record. They are, respectively: 1. Report of the Ad Hoc Advisory Comm. of the Sational Academy of Sciences (June 25, 1969); 2. Initial Report of the Gross Comm. (July 25. 1969); 3. Follow-up Report of the Gross Comm. (Nay 15, 1970); 4. "The Properties of GB and H in Sea Rater." by Dr. Joseph Epstein and Mr. James W. Wood; 5. "Study of Effect of Concrete on GB Stability," by Analytical Chemical Department, Chemical Research Laboratory, Research Laboratories (April 30, 1970); 6. Report on Estimated Contamination Possible from Sea Water Explosion of the Concrete Vaults, prepared by personnel at Edgewood Arsenal (Nov. 26, 1969); Memorandum by F. H. Crist concerning the Probability of Initiating a Detonation of Entombed M55 Rockets (June 15, 1970); 7. Second Report of the United States Dept. of Interior Working Group on Ocean Dumping of Chemical Munitions (Nov. 13, 1969). *Hearings* at 33.

[115] 116 CONG. REC. S–13506 (daily ed. Aug. 17, 1970). As of Aug. 17, 1970. 84 nations had ratified the Protocol. *Id.*

[116] On Aug. 19, 1970, the day the nerve gas mas safely scuttled at sea, President Nixon announced that he would send the 1926 Geneva Protocol to the Senate for ratification. The United Sations General Assembly was scheduled to meet in September where renewed criticism of the long failure to ratify was anticipated. Washington Post, Aug. 19, 1970 at A1, Col. 7. President Nixon interprets the Protocol as not barring either defoliating herbicides or tear gas, as now employed in the Indochina war, apparently on the theory that the ban on "gasses" means only those harmful to man, thus exempting tear gas, and that defoliants were not known in 1925 and therefore not covered by the Protocol. *Id.* It appears reasonable that the Protocol was designed to ban all gases within its purview, whether such were known or not at the time, otherwise its purpose would be frustrated. The language is very broad, prohibiting the use in war of "asphyxiating, poisonous or other gases, and all analogous liquids, materials, or devices." If the position taken by the United States be correct. a reservation to the Protocol clarifying the United States' interpretation of the language would be in order, rather than relying upon the unqualified wording. It must be remembered that the Protocol bars only the use of gases, not their manufacture. storage. or disposal.

ants in the sense of taking a position on the dumping, seized the occasion to urge a ban on chemical and biological weapons.[117] Their objectives might have been to gain a tactical advantage by inducing the United States and other nations to reduce or eliminate their stockpiles of existing weapons of this type, and to eliminate research on future weapons.

C. *CLAIMS AND COUNTERCLAIM8*

The principal claim, at least that of the United States and apparently of Great Britain, is a limited claim that the use of the ocean for nerve gas disposal is a lawful use, qualified by the requirement that precautions consistent with present technology be implemented. In response to the statement of Secretary General U Thant that the nerve gas dumping mould violate international law, the Department of State said that the disposal "will not violate the 1958 Convention On the High Seas, any other provision of international law or any obligation to the United Nations or any other international organization. The disposal plan will not interfere in any way with the freedoms of the high seas which are protected by international law."[118]

The counterclaim of the Bahamas and the Bermudas appears not so much to oppose Ocean disposal as to oppose the selection of a dumping site unreasonably close to them.

The counterclaim of the United Nations, at least of the Secretary General, appears to be a very comprehensive claim that contamination of the Ocean by nerve gas is violative of international law and impermissible regardless of precautions adopted. The Secretary General said,

> It is evident that the safety problems and adverse environmental effects resulting from dumping nerve gasses in the Atlantic Ocean are far from clear. There is, *so* far, no established evidence that the Ocean can easily assimilate or dilute these gasses beyond their capacity to **be** harmful.'"

He then charged that the decision of the United States Army to dump the nerve gasses in the Atlantic Ocean clearly contravened the

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[117] Since the dumping a proposal was made by the **12** non-aligned nations at the disarmament conference in Genera to jointly ban the use of gas and biological weapons. **This** met with disapproval by the United States and the NATO countries who pressed for a ban first on biological weapons only, since they are in only limited use at present and, therefore, easier to control. Washington Post, Aug. **26,** 1970, at A18, Col. **4.**

[118] **Telegram 128547** from Secretary of State, Wash., **D.C., to** all diplomatic posts, Aug. **8, 1970.**

[119] Telegram, ***supra*** note 110.

General Assembly Resolution 2340 (XXII) which points out, *inter alia*, "the importance of preserving the seabed and the ocean floor and the subsoil thereof . . . from action and uses which might be detrimental to the common interests of mankind." Finally, he states that the decision runs counter to the provision of Clause B of Article 25 of the 1958 Geneva Convention on the High Seas which reads: "All states shall cooperate with the competent international organization in taking measures for the prevention of pollution of the seas or air space above resulting from any activities with radioactive materials or other harmful agents." [120] Because of the imprecise meaning of "uses which might be detrimental to the common interests of mankind" and the non-existent explicit standards for "taking measures for the prevention of pollution of the seas . . . resulting from . . . other harmful agents," this language should be interpreted in a total context of reasonableness. However, whether the Secretary General is saying that the dumping was unreasonable under the circumstances because it will violate these respective provisions of international convention, or suggesting that because of the noxious nature of the gas, the dumping is unreasonable per se, is not clear. The important thing is that he opposed the dumping and that his opposition inferentially is based on one of these two arguments, both of which shall be considered on their respective merits.

The United Nations 42-nation committee on peaceful uses of the seabed apparently does not accede to what appears to be the comprehensive claim of Secretary General Thant in that it urges all governments to refrain from such use of the Ocean floor, rather than alleging that it is violative per se of international law.[121]

D. *APPRAISAL*

In appraising limited or comprehensive claims with respect to the use of international resources, it is important that the law under which such claims are weighed be viewed in terms of what values it protects or destroys, and what ultimate beneficial uses of shared resources it promotes or restricts. If nerve gas in fact harms fish or other sea life, who has been deprived by such action! Is not the dumping of nerve gas a "taking" of at least some portion of the seabed? If so, is that which is taken considered a *res nullius* and available for the taking with impunity, or a *res communis* and not subject to national appropriation or sovereignty? Or should such taking be

[120] *Id.*
[121] *Supra* note 112.

considered temporary, to the extent that no permanent harm is done? Moreover, whether such taking be temporary or permanent, does it unreasonably interfere with traditional freedoms on the high seas which international law seeks to preserve?

All approaches to the above questions cannot be discussed herein. However, certain principles are helpful in suggesting answers: **(1)** The law governing the high seas is not static; **(2)** The lawfulness of a particular use is to be measured not by a rigid standard prohibiting any and all harm, but instead, by assessing its reasonableness in terms of impact on the interests of others whose uses are also protected by freedom of the seas;[122] **(3)** Any adequate doctrine governing freedom of the seas must be flexible enough to accommodate necessary measures of occasional, exclusive competence for limited purposes;[123] **(4)** The over-riding policy which infuses the whole international law decision-making process is the encouragement of peaceful, beneficial use by all peoples of common international resources.[124]

The law of the high seas is a—

> living, growing, customary law, grounded in the claims, practices, and sanctioning expectations **of** nation-states, and changing as the demands and expectations of decision-makers are changed by the exigencies of new social and economic interests, by the imperatives of an ever developing technology and **by** other continually evolving conditions in the world arena.'"

In this continuous process of interaction the decision-makers of the particular states unilaterally assert diverse and conflicting claims as to the lawful use of the world's oceans. These are weighed by other decision-makers, national and international, who appraise these competing claims in terms of rival claims and world community interests. Once the decision is made, it is honored not just by explicit agreement or convention, but by mutual tolerances, which create expectations that force will be restrained and power exercised with some uniformity of pattern.

The recognized claims to use of the high seas vary widely in the type of interest sought to be secured, their comprehensiveness of purpose, their duration, their exclusivity or inclusivity. Such claims

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[122] *See* McDOUGAL, *supra* note 38, at 869.
[123] Burke, Contemporary Legal Problems in Ocean Development, paper presented to the International Institute for Peace and Conflict Research (SIPRI), Stockholm (1968), [hereinafter SIPRI,] at **140.**
[124] *See* McDOUGAL, *supra* note *38,* at **657.**
[125] *Id.* at 658.

range in degree from comprehensive, absolute sovereignty, as in the territorial waters (with the exception of the right of innocent passage), to rather traditional, but limited claims to navigation, fishing, and cable-laying upon the high seas. Special-purpose claims have been extended even beyond the contiguous zone for such national purposes as customs, health, military exercises, air defense warning zones, security, fisheries, and control of oil pollution. Yet, while such claims are, with few exceptions, universally recognized, each impinges upon the concept of an unrestricted freedom upon the high seas. The doctrines of the territorial sea, the contiguous zone and continental shelf in particular impose limited restrictions on freedom upon the high seas.

The success of the law of the high seas has been largely due to the states having been able to accomplish their objectives to project national interests without unreasonably interfering with rights of other states. As new interests must be protected or new measures adopted to protect established interests, each claim must be weighed according to the values in question, Clearly, some values have been sacrificed or permitted to prevail to justify compromise between competing claims. Its success, too, owes much to the policy of seeking full utilization of the oceans and encouraging wide use, rather than imposing unreasonable restrictions—provided such use is beneficial. While the precise position of each claimant as to the nerve gas dumping is certainly an open question, for purposes of this analysis, claims are grouped into two general classifications: (1) Contamination of the ocean by nerve gas is unreasonable per se and, hence, unlawful. (2) The use of the ocean for nerve gas disposal is a reasonable use and, hence, lawful. Implicit in the latter claim is, of course, the proposition that where such use is not unreasonable per se, it may be unreasonable under the circumstances.

1. *Contamination of the Ocean by Nerve* Gas *is Unreasonable Per Se.* If this claim is to find support it must establish that the harm or risk of harm, or interference with freedom of the high seas which might be perpetrated by the nerre gas is so grave and disproportionate that under no circumstances would its disposal at sea be lawful. We must consider, then, the lethal nature of the gas, the safety measures implemented to minimize harm, the effects of either the gas or the safety measures on freedom of the high seas, and the likely environmental effect on the marine ecology.

Lethal nature of the gas. The GB nerve gas is extremely deadly. It is estimated that 3/1,000 of a gram, a drop so tiny as to be invis-

ible to the naked eye, can kill a man in one minute.[126] Some estimates are that only 3/1,000,000 of a gram, if inhaled, may be lethal.[127] If 200 pounds of gas were distributed evenly through one square mile of air space, it could cause as much as 50 percent fatality.[128] The Army shipment contained not 200, but 135,432 pounds of gas![129] (The VX nerve agent, which comprised 104 pounds of the shipment,[130] is 200 to 400 times more powerful than GB.)[131] Fortunately, the GB agent is a material much like water in that it will not evaporate instantly and blow downwind as a vapor.[132] Contact normally can kill in less than two minutes without an atropine injection,[133] meaning that an individual would have to be carrying atropine on his person and be capable of making a self-injection if he were to counteract the gas in time to save his life. On land, then, if the gas should be released into the atmosphere, the only means of limiting its effect would be by dilution with the air which, even with its slow evaporation rate, is completely unsatisfactory. The 5,000 sheep killed in Utah when gas accidently escaped is a sobering reminder of this fact.[134]

How deadly, then, is the gas in sea water? Two factors affect its toxity in sea water—neutralization and dilution. Scientists maintain that the GB agent will disappear through neutralization with sea water by a process of hydrolysis (simply reacting with sea water) with a half life of about 12 hours. Thus, in about 10 days, or 20 half lives, the 135,000 pounds would be reduced to a little over 2 ounces, with the products produced by such hydrolysis being completely innocous.[135] In addition to the disappearance by hydrolysis, the gas would be subject to tremendous dilution. Dr. Conrad Cheek estimated that, at most, 1 cubic mile of ocean would be contaminated,

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[126] 116 CONG. REC. S-13337 (daily ed. Aug. 13, 1970).
[127] *Hearings* at 3.
[128] *Id.*
[129] Each vault weighed 6.4 tons and contained 30 M-55 rockets. Each rocket contained a charge of 10.8 pounds of GB nerve gas and about 2.6 pounds of a burster charge, as well as a rocket propellant and a fuse. In addition to the 135,432 pounds of nerve gas there were at least 32,604 pounds of explosives. *Hearings* at 37.
[130] *Supra* note 13.
[131] *Id.*
[132] *Hearings* at 40.
[133] *Id.* at 43.
[134] *Supra* note 13.
[135] *Supra* note 98. 1 molecule sea water neutralizes 1 mole of GB, GB has a molecular weight of 140, water has a molecular weight of 18. A gal. of water is 8.3 lbs., so about 8.3 lbs. of water, or 1 gal., would detoxify about 1 lb. of nerve agent. *Id.*

and that if the gas were uniformly dissolved and dispersed in this area, it would be so diluted as to not be dangerous to life. This would be the maximum contamination if all the gas were released at once—an unlikely possibility under the circumstances.[136]

Xafety measures implemented. Concern for safety cannot be overemphasized in dealing with deadly weapons. How, for example, could the Army guarantee that the rockets would not explode when the ship hit the Ocean floor, as had happened with similar ships laden with obsolete munitions scuttled off the Atlantic Seaboard?[137] Or, after they hit the bottom, what would have prevented the vaults from bursting at the tremendous depths, or from being thrust to the surface by the wean currents? The Army maintained that the speed at which the ship would hit the Ocean bottom would not produce a sufficient impact to detonate the explosives which, unlike the other munitions which had exploded, were in concrete containers encased in steel.[138] Likewise, the containers were designed to have a compressive strength approximately equal to that to which they would be subjected at those depths.[139] As to the possibility of the material rising to the surface, the Army maintained that in the ocean in that area the structure of the water column above the sunken ship was very stable and there was no likelihood whatever that currents would push the material to the surface.[140] Dr. Kistiakovsky, chairman of a committee established under the direction of the National

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[136] If the 135,000 lbs. of GB agent were uniformly dissolved and dispersed in 1 cubic mile of sea water it would only correspond to about 0.14 parts per million, or a little over 1/100th of a part per million. *Hearings* at 88.

[137] In 1964, a munitions-laden liberty ship was scuttled off the coast of New Jersey. Five minutes later it exploded and the Army did not know if this was from the impact on the Ocean bottom or the tremendous pressure at the more than one mile depth. That blast was so severe it registered on seismic instruments all over the world. 116 CONG. REC. S-13338 (daily ed. Aug. 13, 1970). Three days after the nerve gas mas dumped off the coast of Florida a similar ship was sunk 135 miles off the Maryland coast and detonated when the vessel hit the Ocean floor at a depth of 7,200 feet. The vessel contained 5,000 tons of explosives which were to have been deposited off the New Jersey coast near two sunken ships filled with mustard gas. The Navy shifted the site because of public concern, but maintained that even if the old bombs had exploded near the poison gas there would have been no danger. Washington Post, Aug. 21, 1970, at C4, Col. 1.

[138] The estimated speed of the sinking vessel was 40 feet per second or about 27 miles per hour. *Hearings* at 89. The actual speed was about 25 miles per hour. Washington Post, Aug. 19, 1970, at A1, Col. 2.

[139] The concrete containers have a compressive strength of about 7,000 lbs. per square inch. Being encased in quarter-inch steel, it is unlikely they would break under just that pressure. *Hearings* at 90.

[140] *Id.* at 84.

Academy of Sciences, said the dumping area "is probably the most tranquil depth of Ocean in existence."[141]

Effects on *freedom of the high* seas. A state certainly has a duty to warn ships of other nations that they will be endangered if they operate proximate to where that state is conducting a dangerous operation. The greater the degree of precaution a state takes, the greater the interference with the freedom of navigation and fishing on the high seas. The United States did find it necessary to warn mariners to steer clear of the dumping site. Warnings were issued by the Coast Guard that all vessels should remain clear of the site until after the disposal had been completed. Hence, for the limited time of approximately two days, vessels navigating in that area were inconvenienced by having to change course or delay their voyage. Fishermen, if any, had to try their luck elsewhere. But is a warning zone so restricted in size and duration, a violation per se of international law?[142]

Article 2 of the Convention on the High Seas gives a broad range of permissible uses envisaged by authoritative international principles, mentioning among others the freedoms of navigation, fishing, laying submarine cables and pipelines, and flying over the high seas.[143] These freedoms, however, are not absolute, but relative. Article 2 recognizes that uses protected by freedom of the seas may themselves come into conflict and that no rigid standard prohibiting any and all "prejudice" or "harm" is adopted or to be employed. The test, rather, is "reasonableness," since all freedoms recognized by international law "shall be exercised by all States with reasonable regard to the interests of other States."

The purport of this community prescription, which merely codifies customary international law in terms of use of the oceans, is strongly in the direction of recognizing that occasional instances of temporary, exclusive use for some purposes may be regarded lawful if the adverse impact on others is reasonable in the context.[144] For example, the United States, Great Britain, USSR and others, in practice, affirm that naval operations, such as for gunnery and torpedo practice, are fully compatible with the freedom of the seas even though there be some temporary displacement of, or interference with, other uses of the area. Therefore, to the extent these general

[141] Id. at 351.

[142] The restrictions on freedom of the seas resulting from extensive warning areas designated by the United States in conducting its hydrogen bomb experiments in the Pacific were criticized by some as unreasonable per se. See Margolis, *supra* note 97.

[143] 13 U.S.T. 2312, entered into force for the United States Sep. 30, 1962.

[144] SIPRI at 141.

community prescriptions are applicable to the ocean for purposes of nerve gas dumping, a military use, they are in accord with international law if reasonable in their relation to the interests of others making use of the area.[145] The freedoms of navigation and fishing appear to have been the only freedoms temporarily restricted by the nerve gas disposal. However, the degree of restriction vas in actuality much smaller than that imposed for naval exercises, which have never been held unreasonable per se by the maritime nations of the world.

Environmental effect on marine ecology. Concern was expressed on the Senate floor as to damage to marine life inasmuch as "the deep ocean harbors a rich and varied animal life, the diverse marine environment at those depths is finely tuned, and the various life forms have a narrow range of tolerances." Further, it was stated that the dumping poses a "potentially serious although unmeasured threat to the marine environment."[146] In his report to the General Assembly, on Chemical and Biological Warfare, Secretary General Thant said, however,

> There is no eridence to suggest that nerve agents affect food chains in the way that DDT and other pesticides of the chlorinated hydrocarbon type do. They hydrolize in water, some of them slowly, so that there could be no long-term contamination of natural or artificial bodies of water. Nevertheless, . . . inasmuch as these agents are toxic to all forms of animal life, it is to be expected that if high concentrations were disseminated over large areas and if certain species were virtually exterminated, the dynamic ecological equilibrium of the region might be changed."'

More knovledge as to enviornmental effects would have been available had earlier nerve gas disposals been monitored and the resting site of those ships not lost.[148]

In its report to the Council on Environmental Quality, the Army said that the dumping site was "much deeper than any at which fish **are** caught for human consumption" and that animal species at this

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[146] For an excellent discussion of limited use of the seabed for military purposes, see. *generally*. SIPRI.

[146] 116 CONG. REC. S–13338 (daily ed. Aug. 13, 1970)

[147] Telegram, *supra* note 110.

[148] "The Army admitted that it had completely lost track of two large lethal gas shipments sunk off the coast of Sew Jersey in 1967 and 1968 (more than 50,000 rockets) because the scuttled cargo contained no instruments to pinpoint the location of the hulks and that it had made no subsequent surveillance of marine biology life at those dump sites. 116 CONG. REC. S–13337 (daily ed. hug. 13. 1970) Instruments necessary for tracking and pinpointing the present dumping were used. however. and environmental studies planned. Washington Post, Aug. 18. 1970 at A1. Col. 2. Id.. Aug. 19, 1970 at A1, Col. 2.

depth are scavengers, not used as a food source for man.[149] More than 90 percent of the seafood consumed by man is derived from the waters of the continental shelves and nearly 66 percent of that total is taken from estuarine waters.[150] The dumping site was approximately 225 miles off the continental shelf of the United States and approximately 3 miles deep.

It is evident that a more thorough study will be required by scientists before the exact effects of nerve gas on marine ecology may be predicted. This does not, however, preclude a determination based on present technology, that under the circumstances such affects would be minimal. Moreover, in appraising the claim that contamination of the ocean by nerve gas is unreasonable per se and therefore violative of international law, it is difficult to sustain the proposition that temporary contamination of approximately on0 cubic mile of ocean, accompanied by minimal interference with freedom of the seas and minimal harm to sources of food or marine life, is unreasonable per se. We turn, then, to an examination of whether the dumping, although not unreasonable per se, was unreasonable under the circumstances.

2. *Use* of *the Ocean* for *Nerve* Gas ***Disposal*** *is a Reasonable Use.* **The** validity of this claim turns on many factors, all of which must be viewed in light of this particular dumping under these particular circumstances. What might be reasonable if accomplished 500 miles from the nearest land might be completely unreasonable at 10 or even 100 miles. To assist in the analysis a brief consideration of pertinent customary and conventional international law is appropriate, after which the exact nature of the claim, the existence of other alternatives, and its ultimate reasonableness may be appraised in light of all the facts and circumstances.

Customary international law. The use of the oceans and great rivers flowing into them for waste disposal is perhaps as old as man himself. For our purposes, we are concerned with those uses which exceed the assimilative capacity of the ocean and result in some detriment or harm which is unacceptable by the international community. Exactly what standard should be adopted to define ocean pollution is not clear, but as a starting point, it is suggested that the danger to be avoided is such pollution as unreasonably alters, or

[149] *Hearings* at **76.**

[150] Comment, *Legal Control* ***of*** *Water Pollution,* 1 U.C.D.L. REV. *55,* note **237 at** 197 (1969). Estuarine waters are those found where there is a tidal opening **or** inlet through which an arm of the sea indents the land. **An** estuary, more specifically, is the tidal mouth of a great river where the tide meets the current of fresh water.

threaten to alter, the marine environment or causes, or threaten to cause, harm to man or marine resources used by man. Nerve gas is, of course, an unusual substance which is quite unlike anything else regularly nianufactured or dumped into the ocean. Yet, in the broader sense, pollutants are unaroidable by-products of modern industrialization and must be disposed of safely. One means, under current technology, is to utilize the great assimilative capacity of the sea for such wastes. With little doubt, use of the sea as a receptacle might alter marine environment, but in view of benefits derived from disposing of wastes at sea, mere alteration, however undesirable, should not be the sole criteria to evaluate its lawfulness. Rather, the test should be whether the waste might be injurious to beneficial uses. In reality, "the thing forbidden is the injury. The quantity introduced is immaterial." [151]

In discussing accepted uses of the ocean floor, Professor W.T. Burke has observed that a contemporary means of utilizing the Ocean floor is as a place for disposing of solid wastes, and that some isolated areas of the deep Ocean floor have been the locale for depositing dangerous or no longer useful materials. In the former category may be "obsolete ordnance and low level nuclear wastes stored in containers." The latter includes a large variety of objects for which marine dumping is an economical procedure, such as bulky equipment and miscellaneous solid wastes. Though no formal decisions exist about the lawfulness of this activity, Professor Burke says, "It appears to be so prevalent, especially in the more adjacent regions, that it is common expectation that the activity is a permissible one." [152] The more than 100 dumping areas off the coasts of the United States attest to a rather extensive practice of such use.[153]

But does this use contemplate the disposal of nerve gas in the ocean? The unusual nature of the substance renders it unique. Notwithstanding, those states which have admittedly disposed of obsolete gas have chosen the deep sea in which to do so. The most publicized disposals were by Great Britain, during the period 1957–1959 [154] and the United States almost annually since 1967. Is the practice of two states sufficient to establish customary law? Should only those states possessing nerve gas have the right to establish lam as to how it will be disposed!

Perhaps a brief reference to experience in another related area of

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[151] Wilmore v. Chain O'Mines, Inc., 86 Colo. 319, 331; 44 P. 2d 1024, 1029 (1934).
[152] SIPRI at 143.
[153] *See supra* note 19.
[154] *See supra* note 103.

international concern, the regulation of nuclear testing, might prove helpful in answering these difficult questions. Like the nerve gas, the use of nuclear device8 has no long, established cnstomary use. The United States, United Kingdom and USSR conducted nuclear tests in the ocean, to which actions many nations not having nuclear capabilities protested. The immense warning zones required for conducting such experiments did restrict navigation on the high seas. Some analysts feel that causing radioactivity of extensive areas of seas and air space may by analogy fall within rules which have been emerging under the inchoate doctrine of "pollution" in international law.[155] Desiring to limit nuclear testing (probably more to preclude entry into the nuclear arena by other nations than to prevent pollution), these nuclear powers and many non-nuclear powers entered into the Nuclear Test Ban Treaty which became effective in October 1963. The Treaty prohibits the testing (as opposed to the use) of nuclear weapons in the atmosphere or underwater, including "territorial waters or high seas."[156] France and China, both fledgling nuclear powers, have refused to accede to the test ban and have conducted independent tests. Many authorities on the subject argue that whatever may have, been the status of customary international law prior to the treaty, the almost universal acceptance of the test ban, as evidenced by the multi-lateral treaty, demonstrates an international consensus that nuclear testing in the Ocean is prohibited. Does the treaty indicate that this consensus has developed into a customary international law principle?[157] If so, any claim to test which is contrary must be a claim of special interest against community interests.[158] As in any area of customary international law, the important measuring rod is the overwhelming expectations of the peoples of the world (not necessarily the universal or unanimous expectations).

Although less dramatic and extensive in its present development, the nerve gas situation is not totally unlike that of nuclear testing. The 1925 Geneva Protocol, prohibiting the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, had been ratified by eighty-four nations, not including the

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[154] Margolis, *supra* note 97, at 640.

[155] Article I, Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, done at Moscow Aug. 5, 1963, entered into force Oct. 10, 1963; 14 U.S.T. 1313, T.I.A.S. No. 5433.

[156] *See* arguments advanced *by* Professor W. T. Burke, SIPRI, *supra note* at 133. *See, also,* D'Amato, *Legal Aspects* of *the French Nuclear Tests,* 61 AM. J. INT'L. L. 66, 76, 77 (1967).

[157] *Supra* note 119 and 120.

United States. Has the overwhelming ratification of this protocol created a customary principle of international law by which all nations, including the United States, should be deemed bound? If the United States asserts that France and China are bound by the Test Ban Treaty, it may be difficult to argue that it is not, in turn, bound to the Geneva Protocol.

Unfortunately, for purposes of this analysis, the Protocol does not address itself to the manufacture, testing or disposal of nerve gas. Hence, given the development of a customary principle of international lam proscribing use of the gas, there is no comparable principle (at least having origin in the Protocol) prohibiting its disposal at sea. Accordingly, if resolution of the lawfulness of the disposal must be made by reference to customary international law, it must not be to a rule treating nerve gas or chemical weapons in particular, but rather, to those principles which govern use of the seas generally.

Conventional international law. Article 1 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, effective March 20, 1966, provides that "All states have the duty to adopt or to cooperate with other states in adopting such measures for their respective nations as may be necessary for the conservation of the living resources of the High Seas.,' Article 25 of the 1958 Convention on the High Seas imposes a duty on states to prevent "pollution of the seas" resulting from "harmful agents."[159] These provisions, together with the I'nited Nations General Assembly resolution to preserve the seabed and ocean floor from detrimental uses,[160] certainly may be viewed as declaratory of a duty to prevent pollution of international waters. But is this merely a codification of a duty already existing under customary international law, or the creation of a new duty!

It is apparent that, even in the absence of these international agreements, the injurious, or potentially injurious, effects of nerve gas may be viewed within the juridical context of a duty of states to prevent pollution of international waters. While the problem of pollution has been primarily due to discharges of oil by ships or, to a more limited extent, to effects of thermonuclear explosions, general principles of law and equity should apply, and courts have not been reluctant to apply such principles in resolving pollution problems of an international character.[161] Thus, whether by the route of convention-

[159] ***Supra*** notes **120** and **143.**

[160] ***Telegram,*** supra note 110.

[161] *See, **generally,*** The Trail Smelter Case. in which an arbitral tribunal awarded the United States an indemnity of $78,000 for damages caused by the emission of sulphur dioxide from a Canadian Smelting Co. to crops, trees, and land in Washington State. The tribunal rules that "no State has the

made law or customary law, the governing principles in this situation seem to converge on the duty, if any, of a state to prevent pollution. What, however, is the extent of such duty? Under what circumstances does it apply? What constitutes a breach? What sanctions exist?

Test of *reasonableness.* Risking an oversimplification, it is suggested that the duty to prevent pollution and to refrain from injurious uses of the sea, however inchoate it may be at this time, does exist. Whether a particular use or claim would break that duty, however, depends on a contextual evaluation of all pertinent factors, and on weighing the reasonableness of measures taken against the interests of others seeking to use the sea.[162] There can be no breach when a state lawfully asserts temporary exclusive jurisdiction or control over portions of the high seas, as incident to an exclusive use of a particular region, provided such use does not unreasonably interfere with rights of others. In weighing the reasonableness of such a use, it is necessary to take into account the importance of the "inclusive uses affected and the significance of the exclusive interest at stake." And in most contexts, "such uses should be regarded as reasonable, subject to the requirement of relative or slight interference with navigation."[163] In the case of dangerous substances like nerve gas, it also should take into account the availability of other alternatives.

The possibility of other alternatives was considered in the domestic portion of this article. The crux of the problem was that alternatives were limited because of hazards due to the deteriorating inter-action of the nerve agent with the propellants and explosives sealed in the concrete vaults, and the short time available in which to dispose of them safely. The Gross Committee recommended disposal of the vaults "without delay,"[164] and estimated that, after August 1, 1970, the rockets would be unsafe.[165] Any alternative would have to be safe to neighboring populations, and positive in

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right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence (emphasis added) and the injury is established by clear and convincing evidence." Award of Apr. 16, 1938. and Mar. 11, 1941, 3 *U.N. Rep. Int's* ***Arbitral Awards*** 1905. Whether such a rule extends to contamination of high seas where there is no damage to a particular sovereign or its subjects is another question.

[162] SIPRI at 133.

[163] McDougal, supra note 38 at 129. The above was subsequently modified to say that such use "should not unreasonably interfere with any inclusive use." SIPRI at 130.

[164] Hearings at 32.

[165] *Id.* at 9.

the sense that the toxic and explosive contents of the vaults could be destroyed within a predictable time. After numerous studies,[166] all study groups and agencies which reviewed the matter supported the conclusion that there was no feasible alternative to dumping at sea other than use of a nuclear explosion.[167] However, the AEC could not meet the required time schedule. Speaking for the AEC, Mr. Tresche said, "I think in view of the strike [contemplated by AEC contractor's employees] and in view of the sensitivity of the munitions that it would have posed a most dangerous operation to imagine." [168] Temporary storage of the gas beyond the estimated deadline was likewise considered unsafe due to the condition of tho munitions.[169] Perhaps the strongest expression of a lack of alternatives was that issued by the Department of State. After saying that the United States regretted the necessity of proceeding with the ocean dumping and would not do so unless convinced it would constitute no hazard to life, the Department declared that ocean disposal was approved only after it was "clear that there was no other safe alternative that could be followed." [170]

The claim of the Cnited States to dump the nerve gas in the ocean was extremely limited. There was no assertion of a right to claim any portion of the high seas or to subject it to United States jurisdiction or control. The effects of the gas on marine ecology are temporary and confined to a relatively small area of ocean space. Interference with interests of other states and freedom on the high seas has been minimal. Moreover, in appraising this claim in contexts of high expectations of destruction or death, the decision-makers, whether in the United States or external to it, must accord a high deference to public health and security, as against claims to unhampered navigation and fishing. The choice mas to risk death or serious injury to many persons within the United States by some type of land disposal, the best of which was deemed unsafe, or to dispose in the ocean where hazard to human life was minimal. These factors, together with the absence of other reasonable alternatives, are such

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[166] *Supra* note 114.

[167] *Hearings* at 18.

[168] *Id.* at 368. The AEC plan required excavation of earth resulting in a hole 1600 ft. deep, 7% in. in diameter, and cased with steel. At the bottom would be a 50 ft. by 50 ft. by 50 ft. cavern in which the rockets would be detonated at a temperature of 500 deg. centigrade. The time estimated to complete the project was based on working three shifts per day for approximately fifteen months, three months longer than the estimated safe disposal date.

[169] *Id.*

[170] Telegram, *supra* note 118.

that the claim of temporary, exclusive use for this purpose is reasonable, and hence, lawful in the regime of the high seas.

IV. RECOMMENDATIONS

In charting policy for future use of the oceans in general, and disposal of noxious chemicals in particular, it is possible to avoid many of the pitfalls surrounding the nerve gas dilemma. There should be practically unanimous agreement, that the unrestrained disposal of wastes, whether chemical or otherwise, is not desirable. Certainly, large quantities of deadly chemicals or other highly dangerous waste materials should not be part of our waste disposal program if there are other reasonable alternatives available. The case for their large-scale disposal at sea increasingly weakens as we begin to realize that the vast oceans do have an exhaustion point to their assimilative capacity as receptacles for the world's wastes. The nerve gas controversy has had its positive effects. Claimants such as the environmental defense groups accomplished a major objective of creating an awareness of "the need for adequately informing the public and the Congress beforehand of contemplated actions which involve hazards to the environment."[171] The military has devised safer techniques for future disposal of nerve gas which will not require use of the ocean, but will utilize equipment which will take the nerve agent out of the rockets and decontaminate it in a perfectly safe method of remote control.[172] Diplomatic representatives have assured the world that the United States does not foresee any circumstances in which it would again have to dump chemical weapons into the ocean.[173]

The nerve gas experience has revealed several areas where action is needed. More extended study certainly might reveal others, but at a minimum the following recommendations should be made:

1. *Tighten domestic pollution controls within the United States.* Two means could prove extremely useful in meeting future problems of a similar nature. The first is the effective use of existing executive agencies and of the newly created Council on Environmental Quality. It is clear from the gas incident alone that judicious use of the

[171] Washington Post, Aug. 17, 1970, at A1, Col. 4.

[172] *Hearings* at 31. The natural life of a rocket is 15 to 20 years. Many of these will have to be disposed of as they reach the end of their useful life, but already a method is being used to demilitarize the rockets by puncturing the round and draining the nerve agent into a decontaminating solution. Finally, after all the agent is out of the round, the round is destroyed by burning. *Id.* at 31 and 63.

[173] Washington Post, Aug 19, 1970, at A1, Col. 2.

Council by all federal agencies, military or non-military, before taking action on major projects which could significantly affect the environment, should provide an adequate forum for exploring all relevant facts and alternatives as part of the decision-making process. The Council. if properly used to administer policy of the environmental quality control statutes, (for example, the Water Pollution Control Act), has the capacity to deal with varied domestic pollution problems and the flexibility to meet those problems having an international impact as they are recognized and require resolution. It will permit augmentation of executive controls on a rational policy-oriented basis with intelligent use of domestic and international principles of law. Where, for reasons of national security, the Department of Defense can not prudently use this forum, a waiver might be granted, or another approach consistent with security implemented. Timely designation of those substances which are considered hazardous will accelerate the process. Moreover, prudent implementation of this existing procedure will avoid a rash of spurious legislative or executive proposals which reflect ignorance of, or disregard for, the present tools.[174]

As a second means of tightening domestic pollution control, new legislation or executive policy should be effected to require a demilitarization plan as a condition precedent to the development and production of any new weapons and possibly before future extensive manufacture of existing ones. Such a plan would consider the effects of demilitarization of weapons on the health and safety of our people as well as on the environment, whether land or sea, and would assure that the best scientific minds in the particular field of expertise that develops the weapons would devote their creativity and genius to minimize harm. Again, waivers could be permitted where national security or the national interest might be jeopardized.

2. *Tighten domestic pollution controls in international waters.* If pollution from hazardous substances arises outside Cnited States territorial waters, but within contiguous waters, the competence to control it can be asserted through the already existing international agreements which permit treaty-implementing domestic law to extend 12 miles through the contiguous zone for such purposes. The real problem now is early identification of the pollution, bringing it within the definition of hazardous substances regulated by statute, and policing the activity. The problem is not and should not be one of jurisdiction. Of course, enforcement in such a vast area of coastal waters could prove burdensome, but any significant pollution could

[174] *Supra*, notes 10 and 11.

be reasonably controlled. With this approach, domestic anti-pollution policies need not be frustrated by off-shore offenders. Should repeated pollution occur on the high seas outside the contiguous zone and have a material impact on our national health or welfare, an agreement with the pertinent foreign states might be obtained and implementing domestic measures taken. Or, if such agreement be impossible or impractical, the United States may unilaterally extend jurisdiction for protection of its impaired interests through domestic legislation founded in principles of international law.

3. *Encourage ocean pollution control through an international body.* While it may be possible for individual states to formulate disposal programs for noxious materials, the ocean is an international resource used by, and affecting to some degree, practically all states of the world. The cumulative impact of individually conceived programs designed without regard to those of other states, and without their cooperative efforts, could possibly endanger future safe uses of the oceans. A unilateral approach may meet with some success, but very few states have sought protection from pollution, at least in the field of oil and radio-active materials, by extending authority to ocean areas beyond their territorial seas. There has rather been a "clear recognition of a need for inclusive prescription." [175] At a minimum, there is a common interest of states, if not in precluding disposal of certain materials, then at least in prescribing the conditions of such disposal.

4. *Recognize impacts on all claimants affected.* Policy decisions reflect value judgments. Political niceties may be useful and clever when dealing with purely political problems whose value impacts are minimal, but an inquiry limited to claims of recognized participants, when there are unrecognized claimants who may in fact suffer Severe deprivations, is unsatisfactory. The idea that the United States could not respond to the protest of the Bahamas unless the British government agreed to pass it on to Washington [176] may be technically in accord with established protocol. But certainly concern could have been more openly expressed and assurances made that health and safety considerations were paramount and would be protected, rather than turning a seemingly indifferent shoulder against legitimate, if unrecognized, claims. The question of what weight should be accorded such unrecognized participants is a separate issue, but any decision-making process which ignores such claims can hardly be said to operate in the international community interest, and must

[175] McDougal, *supra* **note 38,** at **848.**
[176] ***Supra* note 108.**

therefore be even more susceptible to criticism for promoting exclusive as opposed to inclusive interests.

5. *Preserve the customary international law principle of "reasonable use."* The beginning of a reappraisal of our policy towards the use of the Oceans as a world garbage dump, however belated, has already led to beneficial mechanisms at the domestic as well as the international level through which many critical problems may be mitigated or resolved. But pollution does continue, and perhaps the risk of permanent contamination of the Ocean is great unless it is greatly curtailed. Nonetheless, a policy which measures each type of pollution on its own merits, weighing the benefits against the risks and looking closely at other alternatives to ocean disposal is more realistic than one which prohibits any and all pollution under any circumstances. We must recognize that it is difficult to gauge precisely the specific effect of many pollutants introduced into the sea, difficult to assess effects of waste discharge either with respect to the over-all marine ecology or to a particular species. Further, it is difficult to relate ecology situations and values to particular discharges. Then, too, many products harmful to marine life often originate from activities beneficial in other ways. Pesticides, for example, are needed in agriculture to prevent starvation, but starvation could result if marine life were destroyed by particles of pesticide flowing into the sea in significant amounts.[177]

As to the GB nerve agent in particular, Ocean disposal need not be a problem in the future. But while the policy of the United States is not to initiate the use of lethal chemical weapons,[178] current stockpiles are large and research continues.[179] Query: Does their value as a deterrent justify the continuation of their manufacture in the interest of national security? Whatever the precise reasoning or justification, production of chemical agents continues to be a part of national policy. What approach, then, should govern their disposal? As mentioned earlier, one method would be to require a plan of

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[177] *"See At Sea About Chemical Wastes,* CHEMICAL WEEK, Oct. 14, 1957 at 133.

[178] 116 CONG. REC. S-13506 (daily ed. Aug. 17, 1970). In 1943 President Roosevelt responded to rumors of plans for German gas warfare by saying, "Use of such weapons has been outlawed by the general opinion of civilized mankind. This country has not used them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies." One of the prime reasons for the continuation of the CBW program is that other nations are doing the same—Japan, West Germany, USSR, England. *Id.* at 13740.

[179] The current nerve gas shipment represents only a small percentage of lethal gases stockpiled around the world in 51-53 rockets, howitzer shells, land mines, aircraft spray tanks, aerial bombs. and ground-to-ground missiles. 116 CONG. REC. S-13338 (daily ed. Aug. 13, 1970).

demilitarization as a condition precedent to their production. But in formulating policy guidelines we must recognize that so long as research continues new weapons may be anticipated. They will have to be appraised in their respective context just as nuclear and nerve gas weapons were in theirs. The only practical rule to effectively deal with these future situations is the rule of reasonableness.

In retrospect, the emotionalism surrounding the nerve gas incident undoubtedly was a primary motivator in leading scientific research to a better means of disposal. **Kow,** because of the improved methods of disposal, a future dumping at sea, at least of the GB nerve agent, would be difficult to sustain as lawful. Why? Because the principle of reasonableness is a self-policing one. As conditions change, new and better methods are developed. Actions which might have been reasonable perhaps only a few years ago may no longer be reasonable. The self-policing argument assumes, of course, that there will be diligence in research for improved methods of disposal, but such diligence should not be difficult to implement, at least in national policy. Moreover, once any nation develops the technology to abate a particular pollutant, and makes it available to the international community, the rule of reasonableness must take such technology into account.

We may anticipate future situations of potentially graver consequence as nations develop and experiment with devastating weapons. The judicious use of the international convention tool combined with effective domestic leadership is a responsibility we must not evade if we are to avoid destruction, not only of ocean resources, but of the human race. Banning the use of such weapons in war is a start, but banning their manufacture under conditions of adequate mutual inspection would be more desirable. Until such time, ocean disposal of inherently hazardous substances remains, and ought to remain, permissible under proper conditions, those conditions finding their root in the rule of reasonableness.

COMMENTS

Much of the history of the Judge Advocate General's Corps is written in the records of its famous courts-martial. This comment examines one of the Corps' most improbable incidents, the court-martial of Judge Advocate General David Swaim. The author examines the extensive litigation from both a legal and historical point of view. Subsequent issues of the Military Law Review will examine additional historic courts-martial in the two centuries of the Corps' existence.

THE COURT-MARTIAL OF A JUDGE ADVOCATE GENERAL: BRIGADIER GENERAL DAVID G. SWAIM (1884)*

By Captain William R. Robie**

I. GENERAL SWAIM

On 1 December 1880, President-elect James A. Garfield (native of Ohio) wrote President Rutherford B. Hayes (native of Ohio) to support the appointment of Major David G. Swaim, Judge Advocate (and also native of Ohio), as the Judge Advocate General. Garfield's letter also expressed regret that his desire to have Swaim serve as his private secretary would draw him away from his "strictly professional duties," thus creating "antagonisms . . . which would make his promotion more difficult." Garfield's praise of Swaim was almost unbridled :

*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. The author wishes to gratefully acknowledge research assistance provided by 1LT Roger M. Beverage, AGC, U. S. Army, Assistant Chief, Plans Division, The Judge Advocate General's School, U. S. Army; B.A., 1967, J.D., 1970, University of Nebraska, admitted to practice before the Supreme Court of Nebraska, the United States District Court for Nebraska, and the United States Court of Appeals for the Eighth Circuit.

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> If therefore you find it convenient to retire the Judge Advocate General, and appoint Major Swain [sic], I shall be very glad to have you do so. I would not make, nor ask to hare such an appointment made, merely on personal grounds. Eut I know that Major S. is eminently fitted by ability & experience for that place—Before Judge McCrary [George W. McCrary, Secretary of War from **1877** to 1879] left the War Office, he wrote a letter commending the Major in the strongest terms for the headship of the Corps—and I think it has been the quite general expectation in the army he would succeed to the vacancy.'

In an addendum to the letter, Garfield sketched Swaim's biography in as succinct a manner as possible:

1. D. *G.* Swain [sic] was born in Salem Colurnbiana Co. **O.** of an old Abolition family—and has always been an earnest and thorough going Republican. He was admitted to the bar in 1859, and had been three years in active practice of the law, when the War broke out-—
2. He enlisted in what was known as the Sherman Brigade—and in the autumn of 1861 [4 October 1861 to be exact] was appointed a [Second] Lieutenant of the 65th O.V.I. [Ohio Volunteer Infantry]. He served through the War with great credit, was several times promoted—was retained in the Service on Staff duty more than a year after the actual close of War, and was mustered out in October 1866, as Asst. Adjt. General, with the rank of Major, and Brevet Colonel of Volunteers—
3. In February 1867 he was appointed 2nd Lieutenant in the 34th Regular Infantry—and, on account of his legal abilities, and his successful service on courts martial, he was assigned to duty as Acting Judge Advocate of the **4th** Military Dist. at Vicksburg—where, during the period of reconstruction, he made a fine record in the conduct of trials before court martials, Military Commissions—and the Civil Courts—The Habeas Corpus Case of McAndle [sic] [Ea *parte McCardle*, 7 Wali. 506] he argued ably & successfully before the U. S. Circuit Court—and in the Supreme Court at Washington—against eminent counsel—
4. In 1869 [9 December], he was appointed to his present rank in the Corps of Judge Advocates—and his service of eleven years forms a very conspicuous and honorable part of the record of that Corps-—Ten years of that time he has served at the H'd Qur's of the Military Department of The Missouri— For his services there, and by special detail of the Secry of War, reference is made to the letters of Gen Pope, and the late Secy of War—Judge McCrary—His opinions on many subjects of military and civil law attest the soundness of the judgment for few, if any **of** them have been reversed by his superior officers—'

Whether pursuant to Garfield's urgings or not, David G. Swaim was promoted to Brigadier General and appointed Judge Advocate General on 18 February 1881.

'Letter from James **A.** Garfield to Rutherford B. Hayes dated **1** December 1880, original in Indiana Historical Society, copy in Rutherford B. Hayes Library, Frenionf. Ohio.

[2] *Id.*, "Memorandum" of three pages attached tu letter from Garfield to Hayes.

On 3 February 1881, two weeks prior to Swaim's appointment, an emotion-charged court-martial had begun in New York City. Cadet Johnson Chesnut Whittaker, the only black then at West Point, was being tried for conduct unbecoming an officer and a gentleman for violating United States Military Academy regulations and for conduct prejudicial to good order and discipline. These charges resulted from an incident at the Academy in which Whittaker was found strapped to his bed, beaten unconscious, and cut on the ears and left foot. Because of the racial overtones of the incident, a court of inquiry had been appointed by Major General John M. Schofield, Superintendent of West Point, and duly found that Whittaker had tied himself up and mutilated his own body.

The court-martial which followed was desired both by Whittaker to clear his record and by his superiors (including General Schofield, who had been relieved of command at West Point on 21 January 1881 because of the furor created by the Whittaker incident) to vindicate the reputation of West Point. The Judge Advocate (prosecutor) in this trial was Major Asa Bird Gardiner, formerly a West Point professor and the most famous Army lawyer of his day; the president of the court was Brigadier General Nelson A. Miles. Schofield, Gardiner, and Miles were to play important roles in General Swaim's court-martial three years later.

After a lengthy trial culminating in a vehement argument by Gardiner, the court found Whittaker guilty as charged on 10 June 1881, with exceptions tantamount to a rejection of the key motives alleged by the prosecution at the court of inquiry and the court-martial. Whittaker was sentenced to a dishonorable discharge from the Academy, a one-dollar fine, and confinement at hard labor for one year. The court, however, recommended that the fine and imprisonment be remitted. The transcript of the trial was then sent to General Swaim for his review as Judge Advocate General. His report to Secretary of War Robert T. Lincoln, son of the President, was dated 1 December 1881 and constituted a blistering attack on the conduct of the court-martial. "In 101 pages of minute dissection," one commentator notes, "he riddled the prosecution's case and held the court-martial decision up to ill-disguised contempt." [3] Swaim recommended disapproval of "the proceedings, findings, and sentence." [4] After concurrences with Swaim's judgment by the Attorney General and Secretary of War, President Chester A. Arthur on

[3] Marszalek, *A Black Cadet At West Point,* XXII AMERICAN HERITAGE, (1971) at 106.
[4] *Id.*

22 March 1882 ordered Whittaker's release and voided his sentence. Swaim had hardly won Gardiner's acclaim by his incisive legal destruction of Gardiner's conduct of the Whittaker court-martial.

II. THE CASE AGAINST SWAIM

On 15 October 1881, a Mr. J. Stanley Brown had entered as a partner in the firm of Bateman and Company, bankers and stock brokers with offices in Sew York and Washington. In May, 1882, Brown borron-ed $5,000 from General Swaim in order to increase his share in the firm. Swaim was to receive six per cent interest on his money plus ten per cent of Brown's profits from the firm as long as Brown held Swaim's funds. Three months later, Brown terminated his interest in the firm and announced his intention to repay Swaim, expressing "regret that his action would put General Swaim to the inconvenience of a reinvestment." [5] After some negotiations between the General, Brown, and Mr. Arthur E. Bateman, Swaim requested and received from Bateman (for the firm of Bateman and Company) a "due-bill," "an acknon-ledgment of the indebtedness of Bateman & Co. to General Swaim on account of the deposit with them of the $5,000 repaid by Mr. Brown." [6]

The nature of Bateman and Company's business was such that a customer could. in one account, buy stocks and bonds on margin and at the same time maintain a normal checking account. General Swaim's account was one of these all-inclusive accounts, which would today be legally impossible to maintain. From 1881 to 1883 General Swaim bought and sold stocks on margin, drew checks on the account, and carried on other monetary dealings through this account, including the deposit of the $5,000 "due-bill." Disagreements occurred between Swaim and the bank on several occasions as to the balance in his account and bank statements were furnished to him several times in an attempt to explain the status of his account. A consolidated statement of his account furnished to him in November 1883 showed a balance in his favor of $83.89. General Swaim hired his own accountants to prepare statements of his account, but they failed to include all of his transactions and were unable to prepare an accurate statement as a result.

In an attempt to recoup what he felt was owed to him, General Swaim assigned the $5,000 "due-bill" on 15 February 1884 to the

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[5] *Swaim* ***Court*** of ***Inquiry.*** 1884. JAGO. at 238. The printed records of the Swaim Court of Inquiry are kept in the Office of The Judge Advocate General, Army, Washington. D.C.

[6] *Id.*

building firm of Bright, Humphrey and Company for the purpose of having them bring suit against Bateman and Company for the amount due on the note, crediting the proceeds to Swaim's account with Bright, Humphrey and Company. Bateman and Company refused payment on the "due-bill" and, on Swaim's instigation, Bright, Humphrey and Company brought suit on 15 April 1884 against the Bateman firm for $5,000 plus interest and costs, with Swaim promising to defray the costs of litigation. Up to this point, the dispute remained a relatively simple matter of commercial law which could have been decided in the civil courts.

On 16 April 1884, A. E. Bateman chose to channel the dispute into a different forum. He sent a letter to Secretary of War Lincoln preferring charges of fraud and conduct unbecoming an officer and gentleman against General Swaim. In addition to the alleged fraud created by Swaim's assignment and attempted collection of the full amount of the due-bill, Bateman claimed :

> I am further ready to prove the said D. G. Swaim assisted to negotiate with this firm Army pay-vouchers which he knew to be fraudulent and triplicates of outstanding accounts.
>
> I ask that a court-martial be ordered for the trial of the D. G. Swaim on charges preferred. I desire when ordered, to amend this by presenting other charges under the head of conduct unbecoming an officer and a gentleman.'

Presumably in an attempt to impress upon the Secretary of War the seriousness of his charges, Bateman also distributed copies of his letter to the press and received coverage in the Washington newspapers.

The next day, Mr. Myron M. Parker, a mutual friend of both Bateman and Swaim, brought them together and an arrangement for the settlement of their differences was made. General Swaim agreed to surrender the due-bill to Parker and both Swaim and Bateman agreed to submit their financial differences to the arbitration of the Honorable Benjamin Butterworth. These agreements, however, did not touch upon the pay voucher issue or the "other charges" raised by Bateman's letter to Secretary Lincoln. Nevertheless, that same day Bateman wrote again to the Secretary noting that "the differences between General Swaim and myself (have been) satisfactorily settled" and unequivocally withdrawing "the charges contained in my letter of April 16th against said Gen. D. G. Swaim, he claiming they were made under a misapprehension of facts, which

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'*Id*. at 241-242

I concede."[8] Had the matter been dropped at this point, it is probable that General Swaim would have continued unmolested in his position as Judge Advocate General and that Mr. Bateman would have eventually received a just settlement of Swaim's account with his firm, including the due-bill.

For reasons about which he never enlightened those who followed him, the Secretary of War on 18 April 1884 forwarded by indorsement both of Bateman's letters to General Swaim

> for such remarks as he may desire to submit upon the allegations made in the within communication, and for any application he may desire to make.'

On that same day, Genera! Swaim replied to the Secretary claiming that, the due-bill was

> a negotiable promissory note according to all the authorities on the subject, and mas transferred in due course of business and payment demanded, but refused."

He emphasized that he had attempted to settle the account to no avail and that Bateman and Company had finally agreed to submit the matter to arbitration. Thus the suit against the firm on the due-bill had been withdrawn. With regard t~ the pay voucher issue, Swaim claimed to have merely referred a Lieutenant Colonel A. P. Morrow, then an aide-de-camp to General Sherman, Commanding General of the Army, to brokers in Washington (including Bateman and Company to whom he might have written a note of introduction, according to his version) after denying Morrow's request to borrow money directly from him. His innocence on this particular count was paraded before the Secretary:

> It will be seen that I had no concern or interest in these pay-accounts whatever, and all I did was the friendly act of introducing a brother officer to those who were in the habit of doing what I could not do for him. I have no knowledge of any other pay-account transaction with Bateman & Co.[11]

Swaim's only request was that his reply be given the same publicity "that the within false accusations received."[12] His reply was duly released and received "equal time" in the Washington newspapers.

Bateman did not respond kindly to the General's explanations. In

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[8] *Id.* at 242.
[9] *Id.*
[10] *Id.* at 242–243.
[11] *Id.* at 243.
[12] *Id.*

a personal interview with Swaim shortly thereafter, he announced that the reply was untrue and declared that the reply had put an end to their agreement regarding the due-bill and withdrawal of the charges he had originally preferred.

By this time, however, Bateman would have become inextricably committed to his original charges even if he had not been angered by the General's reply and ended the agreement himself. On 22 April 1884, Secretary Lincoln wrote a lengthy explanation of the entire affair to President Arthur, expressing his vexation with General Swaim for his handling of the matter as follows:

> [T]he integrity and uprightness of the officer of the Army who reports upon every court-martial proceeding which it is the duty of the Secretary of War to submit to the President for his final action, is a matter of the deepest concern to the President, and to every one of his military subordinates. . . .
>
> It is a matter of deep regret to me, therefore, that when the Judge-Advocate-General was given an opportunity to comment upon the charges in question he, in respect to the first charge, either was not able, or did not see fit, to make an explicit denial of its essential part, or to give in detail such facts and circumstances as would show the falsity of the charge. Instead of doing so he has contented himself with a statement which contains nothing to which Mr. Bateman's allegations might not possibly be a truthful supplement.
>
> So in respect to the second charge . . . , Mr. Bateman refers . . . to a negotiation of pay accounts alleged to have been known to General Swaim as fraudulent; and to that element of the charge no allusion is made in his response. . . .
>
> *It is not a personal, but an official and public matter.* [Emphasis added.] He has not, in my view, recognized this necessity, and as he has not done so, I am compelled to recommend to you the appointment of a Court of Inquiry. . . .[13]

And so the issue was joined. It may be that the true basis for the court of inquiry and the subsequent court martial lay in the difference of opinion between General Swaim and the Secretary as to the official versus personal nature of Swaim's financial dealings. Swaim obviously believed, and urgently pleaded that his financial dealings, while they might be rightfully subject to the civil courts when conflicts arose, were not the business of a military court unless they specifically involved the misuse of government funds or of his office for private gain. The Secretary, on the other hand, took the broader and stricter view that, when the dealings of a high military official become the subject of public scrutiny and when the character and reputation of that official are called into question, every possible

[13] *Id.* at 245–246.

effort must be made to expunge such accusations to the satisfaction of all concerned in order to maintain the public's confidence in its government. To that extent, Swaim's financial dealings were no longer "personal" in the Secretary's mind, but became "official and public" and demanded complete and detailed explanation to assure the rapid demise of any charges preferred by Bateman. Had General Swaim been aware of Lincoln's concern with the "official" nature of the affair and responded to Bateman's letters in that vein, the matter might again have been dropped at that point without further investigation and with Swaim vindicated (at least to the extent that reasonable men might at least believe that he did not fully understand his own financial arrangements with Bateman and Company and thus did not intend to defraud the firm by assigning the due-bill). Neither awareness nor the proper response were forthcoming, however, and General Swaim reached the final point from which there was no turning back without a complete repudiation of all he had done to this point.

III. THE COURT OF INQUIRY

President Arthur through his private secretary directed the appointment of the Court of Inquiry on 22 April 1884. On that same date, Lincoln appointed Major General John Pope (Civil War Commander of the Army of Virginia which was defeated at the second Battle of Bull Run) and Brigadier Generals Christopher C. Augur and Delos B. Sackett (Inspector General) as members of the Court of Inquiry.[14] Major Robert N. Scott, Third Artillery, acted as Judge Advocate and Recorder, although his role was not one of prosecutor. Bateman's attorney, Mr. Jefferson Chandler, presented evidence to substantiate the charges presented by Bateman as the accuser. General Swaim had his own attorneys, the Honorable W. H. Calkins and Judge S. W. Johnston, who cross-examined Bateman's witnesses and presented witnesses on General Swaim's behalf. The Judge Advocate's role apparently was limited to advising the Court on legal matters when requested to do so, authenticating exhibits for the record, and subpoenaing witnesses for either side. The Court was in session from 5 May to 21 May 1884.

In 448 pages of testimony plus several written briefs, the commercial law aspects of the due-bill were hotly debated by counsel. Calkins and Johnston obtained a legal opinion from a distinguished firm of lawyers in Washington, D.C., Shellabarger and Wilson, to

[14] Spec. Order *So.* **93,** para. 9, HQ *of* the Army. **22** April 1884.

support General Swaim's thesis (as originally expressed in his reply to the Secretary) that the due-bill was a negotiable instrument subject to assignment of the owner's rights therein just as with any other piece of negotiable paper. Financial statements and accounts were introduced by Bateman's attorney to show the draw-down of funds represented by the due-bill. Witnesses to all conversations and events in the affair were oalled—from mutual friend Parker to clerks in the War Department. All of the public letters between Bateman and the Secretary, the Secretary and General Swaim, and the Secretary and the President were received in evidence. In addition, Bateman submitted as his only "other charge" a statement that some time after Colonel Morrow had made his financial arrangements with several brokers (including Bateman and Company), General Swaim intimated to Bateman that if he and the other brokers didn't make arrangements to allow Swaim credit for money owed him by Morrow, he (Swaim) would "squeeze him [Morrow] so at the Department that you won't any of you get your money."[15] The Court decided that some remark had been made by General Swaim containing a warning or intimation, but because of the conflicting testimony they were unable to determine exactly what was said.

While the Court of Inquiry functioned much as an Article 32 investigation might today, it did not make a specific recommendation as to the advisability of a court-martial in the particular case. That was for the appointing authority to determine for himself without advice from the Court. The Court did, however, draw conclusions, synthesize the ascertainable facts after hearing both sides (their main function), and give their opinion as to General Swaim's conduct:

> [W]hile it [the Court] is not prepared to say that any specific act developed by the evidence is actually fradulent, yet the evidence does show a series of transactions discreditable to any ofacer of the Army, and which especially demands the severest condemnation when engaged in by an officer holding the highest position and peculiar relations to the administration of justice in the Army held by Brigadier General Swaim."

IV. THE FIRST COURT-MARTIAL

As a result of the Court of Inquiry, the charges and specifications against General Swaim were drawn up and signed by Major Scott, the Judge Advocate and Recorder of the Court of Inquiry. On 30 June 1884, they were referred for trial by Secretary of War

[15] *Swaim Court of Inquiry,* 1884, JAGO, p. 240.
[16] *Id.*

Lincoln "by direction of the President." [17] Subsequent orders dated 27 August and 27 September 1884 included changes in the makeup of the court.[18] The final list of court members included: Major General John M. Schofield, Superintendent of the Military Academy during the Whittaker incident in 1881 and now President of the Court; Brigadier General Alfred H. Terry, Custer's commander at the time of the Battle of Little Big Horn; Brigadier General Nelson A. Miles, who became Commanding General of the Army in 1888; Brigadier General William B. Rochester, the Paymaster General; Brigadier General Samuel B. Holabird, the Quartermaster General for whom Fort Holabird was named; Brigadier General Robert Murray, the Surgeon General; Brigadier General John Newton, the Chief of Engineers; and six colonels.[19] In addition, on 15 September 1884, Major Asa Bird Gardiner, still the most famous Army lawyer of the time in spite of his rebuke by Swaim for the Whittaker court-martial, was appointed as Judge Advocate and thus prosecutor in the case. The firm of Shellabarger and Wilson and General Charles H. Grosvenor of Ohio represented General Swaim with Judge Shellabarger as chief counsel.

Two charges were made against General Swaim. The first charged him with "conduct unbecoming an officer and a gentleman in violation of the 61st Article of War." [20] Article 61 stated that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." [21] Its present-day counterpart is Article 133 of the UCMJ with the vital exception that dismissal is not required upon conviction today. Four specifications were noted claiming (1) fraud against Bateman and Company by assignment of the due-bill to Bright, Humphrey and Company for collection, (2) an attempt by Swaim to prevent any official inquiry into Bateman's original charges by getting Bateman to write another letter to Secretary Lincoln withdrawing the charges, (3) an evasive, uncandid, and false reply by Swaim to the Secretary's request for an explanation of Bateman's charge, which reply was intended to de-

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[17] Spec. Order *So.* 151, Hq. of the Army, 30 June 1884.

[18] Spec. Order *So.* 201, Hq. of the Army, 27 August 1684; and Spec. Order No. 227, Hq. of the Army, 27 September 1884.

[19] Charles H. Smith, 19th Infantry; George L. Andrew, 25th Infantry; John R. Brooke, 3rd Infantry; Luther P. Bradley, 13th Infantry; Romeyn B. Ayres, 2nd Artillery; and Henry M. Black, 23rd Infantry.

[20] Gen. Ct. Martial Order *So.* 19, Hq. of the Army, 24 February 1885.

[21] *Court-Martial of Brig. Gen. Swaim*, "Argument Before The General Court-Martial on Behalf of the Accused In The Trial of Brigadier General D. G. Swaim," by Hon. S. Shellabarger, printed privately and delivered in 1886, at 9.

ceive the Secretary, and (4) the threat by Swaim to use his official position to cause the dismissal of Colonel Morrow from the Army, thus jeopardizing repayment of loans to Morrow from a group of bankers and brokers, if that group did not pay a claim Swaim had against Morrow in the amount of $115.

The second charge against Swaim was "neglect of duty, in violation of the 62nd Article of War." [**] Article 62 stated,

> **All crimes not capital, and all disorders and neglect, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general** or **regimental garrison or field** officers' **court-martial, according to the nature and degree of the offense, and punished at the discretion of the court.."**

This charge is the equivalent of today's Article 134 of the UCMJ except that the proper punishment then was left to the discretion of the court with no maximum punishment set for a specific crime. The specification here referred to General Swaim's inducing Bateman and Company to purchase from Lieutenant Colonel Morrow Army pay accounts owing to him when in fact the accounts had already been paid to Colonel Morrow. General Swaim was not charged with knowledge at the time of the inducement or at the time of the payments to Morrow but rather with neglect of duty in not reporting the facts to the proper authorities once they were known to him.

The court-martial convened on 15 November 1884. The trial began with General Swaim's counsel challenging the jurisdiction of the Court over the case. Counsel argued that Article 72 [24] of the Articles of War prescribed that a general court-martial could be convened by the President only when the accused's commanding officer was the accuser, that General Swaim's commanding officer, Lieutenant General Sheridan who was the Commanding General of the Army at the time, had not convened the court martial and appointed the members of the court, but rather the President through the Secretary of War had done so and, therefore, that the court so convened and appointed had no jurisdiction over the case. Counsel further argued that the

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[**] *Id.* at 109.

[23] *Id.*

[24] W. WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, WITH NOTES, (1880) at 53 quotes Article 72 as follows:

> Any general ofacer commanding the army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any ofacer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders In the case.

Constitution in Article I, Section 8, provided for Congress alone to make rules for the government and regulation of the land and naval forces, that these rules and regulations were embodied in the Articles of War, and that, if the present case were not specifically allowed by the Articles of War and specifically Article 72 to be tried by a general court-martial convened and appointed by the President, the maxim *expressio unius est exclusio alterius* applied and the court had no jurisdiction over the case.

Major Gardiner argued that the basis for allowing the Secretary of War to conrene the court and appoint its members "by direction of the President" lay in the President's inherent powers as Commander-in-Chief of the armed forces. Major Gardiner then traced the origin of Article 72 to a case tried in 1830 in which the General-in-Chief had preferred charges against the Adjutant General, had appointed the court, reviewed the proceeding, and confirmed the sentence. The revulsion of Congress at this procedure resulted in Article 72 giving the President power to appoint courts martial in such instances. Before citing an opinion prepared by former Judge Advocate General Holt and contained in the *Digest of Opinions of the Judge Advocate General,* Gardiner noted, "I will quote from a volume from which I do not often quote." [25] He then summarized the opinion to the effect that the President was authorized to convene general courts-martial not only in cases under Article 72 but in any case by virtue of his authority as Commander-in-Chief,[26] i.e., a general court-martial convened by the Secretary of War is in law convened by the President. He then cited an opinion of the Attorney General [27] which noted with approval a list of 12 prominent cases that had been convened by the President through the Secretary of War.[28] Upon completion of the arguments, the court voted not to sustain the defendant's motion to dismiss for lack of jurisdiction.

The defense was then given the opportunity to object to the members of the court. General Rochester, the Paymaster General, was objected to because he had given testimony at the Court of Inquiry

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Record of The Trial of Brig. Gen'l David G. Swaim, Judge-Advocate General, U. S. Army (on charges preferred by Major R. N. Scott, U. S. Army), 1885, The National Archives, Washington, D. C. (hereinafter referred to as RECORD I), at *24.*

[26] WINTHROP, *supra* note *24* at 53 (the opinion referred to appeared originally in 33 *Official Records of the Bureau of Military Justice 603* (December, 1872)).

[27] 15 OP. ATT'Y GEN. 291.

[28] *Id.* at 389 (the opinion referred to appeared originally in *9 Official Records of the Bureau of Military Justice* 44 (May, 1864)).

in this same case regarding Colonel Morrow's pay accounts and thus might be a material witness in the case. In addition, Swaim's counsel argued that he was personally prejudiced against the defendant because Swaim had favored the appointment of someone else as Paymaster General. The motion objecting to General Rochester was sustained and he was excused from the court. The next objection was to General Schofield, president of the court, on the following grounds: (1) that Schofield had been president of the court in the case of Fitz-John Porter in which General Pope, before appearing as a witness, had been counseled on his statement to the court by the defendant; (2) Swaim had made severe criticisms of Schofield's actions at various times, in particular when he was Commandant of the Military Academy (the Whittaker case appears again), and (3) Swaim had been extremely caustic in his criticisms of the court martial proceedings in the case of General Schofield's brother. The defense conclusion was that Schofield could not sit as an unbiased judge, but the court overruled the motion. The defendant's third objection was aimed at General Terry, who had also been on the Fitz-John Porter court, because of criticisms leveled by Terry at Swaim. General Terry took the stand and testified that he thought he could be objective but felt that he should be excused, which request was granted. Swaim's final objection was to General Murray, the Surgeon General, because he had strongly supported someone other than General Swaim for the position of Judge Advocate General and thus was prejudiced against Swaim. After some discussion, however, the defendant withdrew the objection, and the court, consisting of eleven members, was assembled.

After these preliminaries, General Swaim was arraigned and pleaded "not guilty" to all charges.

Early in the trial, the defendant's demurrer to the second specification of the first charge (alleging Swaim's attempt to prevent official inquiry into the charges in Bateman's original letter by having Bateman withdraw the charges) was sustained after defense counsel drew an analogy between Swaim seeking an interview with Bateman to persuade him to withdraw the charges and settle their differences and the admonitions of the Sermon on the Mount.[29] He argued that if Swaim were guilty of the crime of attempting to prevent an official inquiry by seeking a reconciliation with Bateman, the Sermon on

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[29] RECORD I at 242–265. The author finds the following references in *Matthew*, 5:22–24:

> . . . whosoever is angry with his brother without a cause shall be in danger of the judgment. . . . Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath aught against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift.

the Mount would be repealed and the preference that the law has for private solutions to problems rather than court-directed or official solutions would be abrogated.

In addition to the introduction of all of the documents and accounts that had been presented at the Court of Inquiry, the defense counsel requested that a *subpoena duces tecum* be issued for the Bateman and Company account books containing the original entries from which General Swaim's statements of account were prepared. However, that request was denied.

The Judge Advocate succeeded in having Mr. Chandler, who had represented Bateman at the Court of Inquiry, approved as associate counsel for the Government. He did not succeed, however, in reintroducing Specification 2 of Charge I, after it had been dismissed, in an amended form because it was ruled to be an entirely new charge and specification requiring a new arraignment and reference to a court by the convening authority.

The testimony and evidence at the trial did not alter the basic facts that were established at the Court of Inquiry nor did they reveal any secret machinations by either Swaim or Bateman that had not already been discovered.

On the 52d working day of the trial, after 2811 pages of transcript had been compiled, numerous witnesses heard, dozens of exhibits examined, and the printed briefs (dealing in great detail with commercial law) and oral arguments of counsel absorbed, the court delivered its findings on 2 February 1885. The second specification of Charge I had already been overruled; in addition, the court found Swaim "not guilty" of the fourth specification of Charge I (threatening to cause dismissal of Morrow if his claim against Morrow were not paid by the group of bankers) and of both the charge and the specification in Charge II (neglecting his duty by not reporting Morrow's fraudulent pay accounts to the proper authorities when they became known to him). Two specifications remained and of these Swaim was found guilty but they were so altered by exceptions (consuming four full pages of transcript) which eliminated all aspects of fraud that the Court found Swaim "not guilty" of Charge I (Article 61 charge of "conduct unbecoming an officer and a gentleman" requiring dismissal from the Army) "but guilty of Conduct to the prejudice of good order and military discipline in violation of the 62d Article of War." [30] Since the court had freed itself of the required Article 61 sentence of dismissal by convicting

[30] RECORD I at 2817.

Swaim of an Article 62 violation, it proceeded to sentence him to be "suspended from rank, duty and pay for the period of three years." [31]

There followed one of the most unique exchanges of official correspondence in the history of military justice. After the record of trial had been forwarded to President Arthur for his approval before execution of the sentence, he returned the record to the court-martial on 11 February 1885

> for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offenses as found by the Court in the first and third specifications under the first charge?'

He enclosed an opinion from Attorney General Benjamin Harris Brewster on the case. The Attorney General upheld the Court's right to make the legal finding that they made, but felt that the charge under Article 61 should have been upheld especially in view of evidence that General Swaim had made false written statements to the Secretary of War, a specification of which Brigadier General George Talcott had been convicted in 1851 and for which he was dismissed from the service.[33] He summarized his objections as follows:

> The objection to the finding of the court in General Swaim's case is therefore based upon the obvious inconsistency between the findings of fact as contained in the specifications and the graduation of the offense in the substituted charge. The action of the court as a whole seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and the glory of our military service, and which was expressed on a memorable occasion by the great commander in chief of our Revolutionary armies, when reluctantly compelled to reprimand a brother officer, in these words: "Our profession is the chastest of all; even the shadow of a fault tarnishes the luster of our finest achievements." [34]

On 13 February 1885, the Court met again, revoked its original finding on the first charge as well as the sentence, deliberated again in view of the Attorney General's opinion and the President's letter, and again found Swaim guilty not of an Article 61 but of an Article 62 violation. The sentence, however, was changed to "suspension from rank and duty for one year with forfeiture of all pay for the same period, and at the end of that period to be reduced to the grade of judge advocate with the rank of major in the Judge Advocate

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[31] *Id.*

[32] RECORD I at 2819.

[33] RECORD I, appended after 2831 at 7-8 (unnumbered)

[34] *Id.*

General's Department." [35] The Court added a note of explanation:

> **The** Court, upon mature reconsideration, has not found the accused guilty of such degree of wrongful or deceitful conduct as to justify a finding of guilty of conduct unbecoming an officer and a gentleman and **has,** therefore, respectfully adhered to its finding upon the first charge."

The record of trial was again forwarded to the President.

The next day, President Arthur returned the record to the Court for a reconsideration of the sentence because it created an office (major) and then filled it, a function which at that time required congressional action for the former and Presidential nomination and Senate approval for the latter. The President's mounting annoyance was evidenced by his analysis of the "Catch–22" aspects of the sentence:

> 'It is a necessary element of sentences of courts-martial that they shall, on approval of the appointing power, be capable of enforcement by The Executive authority charged with that duty. **So** much of the amended sentence as relates to changing the accused from one office to another is not of that character. At the termination of the period of suspension indicated, the accused could only be put into the office of a Judge Advocate in the manner hereinbefore indicated, and by a new commission which he might accept or decline, but if there should be no vacancy, he could not be put into it at all, and his present office could not be filled until after it should have been vacated."

Accordingly, on 16 February 1885, the Court met for a third try at the sentence and sentenced Swaim "to be suspended from rank and duty for twelve years and to forfeit one half his monthly pay every month for the same period." [38]

President Arthur's disgust with, but reluctant approval of, this final sentence deserves quotation in full:

> EXECUTIVE MANSION, February **24,** 1885.
>
> The opinion of the President as to the proper consequence of the findings of fact made by the court in the within record has already been given, and no further comment will be made upon the final sentence than to say that it is difficult to understand how the court could be willing to have the officer tried retained as a pensioner upon the Army register while it expressed its sense of his unfitness to perform the duties of his important office by the imposition of two different sentences, under either of which he would be deprived permanently of his functions. The idea that an office like that of Judge-Advocate-

[35] **RECORD** I at 2822–2823.

[36] *Id.*

[37] *Id.* at **2823–2826.**

[38] *Id.* at **2828.**

> General should remain vacant in effect for twelve years, merely to save a part of its emoluments to its incumbent under such circumstances, would seem to come from an inversion of the proper relation of public offices and those holding them, and is an idea not suited to our institutions.
>
> While holding the views now and heretofore expressed, it is deemed to be for the public interest that the proceedings in this case be not without result, and therefore the proceedings, findings, and sentence in the foregoing case of Brigadier-General David G. Swaim, Judge-Advocate-General, United States Army, are approved, and the sentence will be duly executed.
>
> **CHESTER** A. ARTHUR."

V. THE SECOND COURT-MARTIAL

Even while this unique exchange was occurring, the same Court had already begun hearing a second court martial of General Swaim on 7 February 1885.[40] The charges against Swaim in this case were preferred by Lieutenant Colonel R. N. Batchelder, the Deputy Quartermaster General (General Holabird, the Quartermaster General, was still sitting on the Court). Two charges were presented. The first involved a violation of Article 61, the "conduct unbecoming" Article, with dismissal a required sentence. Five specifications were included, each charging Swaim with requisitioning forage and straw from the Quartermaster Department for two private horses that were not owned and kept by him but which he falsely swore were so owned and kept by him in the performance of his official duty. The five specifications were for requisitions in each of the months of January through May, 1883. The second charge alleged a violation of Article 60 of the Articles of War, which read in pertinent part:

> Any person in the military service of the United States Who . . . knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof . . . Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge."

The five specifications alleged that Swaim had sold the forage and straw he had unlawfully obtained in Charge I in each of the months of January to May 1883.

" *Id.* at 2830–2831; Gen. Ct. Martial Order No. 19, Hq. of the Army, 24 February 1885.

[40] Colonels William P. Carlin, 4th Infantry, and Thomas G. Baylor, Ordnance, had been added to the Court to bring its membership back to the original thirteen.

[41] WINTHROP, *supra* note 24 at 31-32.

By this point in time, General Swaim was physically ill and his counsel from the first trial, Judge Shellabarger, was committed to another. Therefore, on 9 February 1885, Swaim requested a week's delay so Shellabarger could be present. Judge Advocate Gardiner, perhaps still sulking from his lack of an outright victory in the first trial, claimed an intentional delay and recommended only one day's delay because he was ready for trial. He indicated that he was managing counsel for an important case in the New York Supreme Court at that time but that his inability to attend because of the courts martial of General Swaim had availed him nothing "in (his) own professional private practice," [42] thus indicating that judge advocates of the period may have been allowed to engage in private practice as well as perform their official functions. Swaim was given two days to return with counsel. He returned on 11 February 1885 with George S. Boutwell and Crammond Kennedy as his counsel and the trial proceeded.

The defense presented again its motion seeking dismissal for lack of jurisdiction but, as in the first trial, was unsuccessful.

Challenges were then to be presented individually against each of the members of the Court who had served on the Court trying the first case, but the Court would not allow Mr. Boutwell to ask its members the following question :

> **Have you not by expression, or assent to remarks made by others, severely criticized, in substance, the character and conduct of General Swaim as an officer?** [43]

After making one individual challenge on this basis that was denied, the challenges against the remaining members were withdrawn.

The defense went on, however, to challenge all of the colonels on the Court because they were inferior in rank and commission to General Swaim and because the order convening the Court did not indicate that the detail of officers of inferior rank could not have been avoided as required by Article 79 of the Articles of War. Article 79 stated:

> **Officers shall be tried only by general courts-martial; and no officer shall, when it can be aroided, be tried by officers inferior to him in rank."**

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[42] *Record of The Trial of Brig.-Gen'l David G. Swaim, Judge-Advocate General, U. S. Army (on charges preferred by Lieut.-Col. R. N. Batchelder, U. S. Army)*, 1885. The Sational Archives, Washington, D.C. (hereinafter referred to as RECORD II), at 13.

[43] *Id.* at 36.

[44] WINTHROP, *supra* note 24 at 60.

The last half of Article 79 is similar to Article 25(d)(1) of the UCMJ, although it is no longer limited to officers. Boutwell argued that the reasoning behind Article 79 was that an officer may not be tried by men who may ultimately profit from his dismissal from office, He contended that the same reason explained why the Vice President may not preside over the Senate at the trial of the President on impeachment. Major Gardiner opposed each of the defense arguments in turn: (1) the opinion of the Judge Advocate General as to the interpretation of Article 79 clearly indicated that the officer convening a court will determine whether or not the trial of an officer by officers of an inferior rank can be avoided and that his determination, not that of the court itself, is conclusive;[45] (2) another opinion of the Judge Advocate General on the same article indicated that it was "unnecessary and superfluous" to add a statement in the convening orders to the effect that "no officers other than those named can be detailed without injury to the service,"[46] and (3) a further opinion stated that the mere fact that a court member was junior to the accused or that the member would gain a step in the line of promotion if the accused were dismissed was not sufficient ground to challenge a member unless the member "will be forthwith entitled to promotion" if the accused were convicted and sentenced to be dismissed.[47] The Judge Advocate noted that the third argument in particular applied here because only a member of the Judge Advocate General's Department could be promoted on the conviction and dismissal of General Swaim and there were no members of that Department on the court. Accordingly, the count did not sustain the challenge to Colonel Smith, the first colonel specifically challenged, and no further challenges were presented.

The arraignment followed, during which General Swaim pleaded "not guilty" to all charges and specifications.

Early in the trial, defense counsel objected to the introduction of testimony and evidence indicating the value of the forage allegedly converted to Swaim's private gain when there was no indication in the specifications as to such value. The Judge Advocate replied:

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[45] *Id.* (the opinion referred to appeared originally in 3 *Official Records of the Bureau of Military Justice 82* (June, 1863)); RECORD II at 48.

[46] WINTHROP, *supra* note 24 at 61 (the opinion referred to appeared originally in 9 *Official Records of the Bureau of Military Justice* 208 (December, 1864)); RECORD II at 48.

[47] WINTHROP, *supra* note 24 at 71 (the opinions referred to originally appeared in 33 *Official Records of the Bureau of Military Justice* 137 (July, 1872), 37 *Official Records of the Bureau of Military Justice* 189 (December, 1875), and 38 *Official Records of the Bureau of Military Justice* 366 and 376 (October and November. 1876)); RECORD II at 49.

> In court-martial practice we do not set forth in detail as we do in an indictment. We rely on the proof to show exactly what it was . . . . [o]f course in court-martial practice we set forth merely a bald specification, leaving the proof that is offered and presented to determine thereunder the nature and degree of the particular offense."

Such unspecific specifications today might easily have resulted in their dismissal for want of specificity, although those preferring charges today at least have form specifications as guidelines for the preparation of charges. In the subsequent testimony of numerous witnesses, the government could not establish that General Swaim had signed any of the orders for forage or that he had ordered the delivery of the forage to a specific location or that he had signed any of the receipts for the forage when delivered. Further, none of the servants who did sign the receipts when the forage was delivered could say that he was specifically authorized by Swaim to sign for the deliveries.

It is interesting to note that the horses for whom the straw and forage were being provided were located in a stable owned by Mr. Arthur E. Bateman (instigator of the previous court martial), an arrangement made when he and Swaim were closer friends. When Bateman was called to the stand, he testified that he had sold Swaim "on trial" the two horses that Swaim kept at his stable but agreed to take the horses back in January when Swaim said he didn't want them. He subsequently paid Swaim thirty or thirty-five dollars for forage for the horses. Bateman said he had received no consideration for the horses, although the bill of sale said "for value received." Bateman never saw any forage actually delivered and had no receipt or check or account entry to establish he had paid Swaim for the forage, saying that he had paid in cash. During the course of Bateman's testimony, in an attempt to challenge his credibility, Boutwell had elicited from him that he once served as a Second Lieutenant in the U. S. Revenue Marine on the Revenue Steamer "George S. Boutwell" (named for the present defense counsel) and questioned him about receiving travel pay for orders addressed to him in New York but which he had actually received in Washington and on which no travel pay was due.

The defense, in its case, called the accuser, Lieutenant Colonel Batchelder, to the stand and then Richard Brown, who drove General Swaim's carriage and was dining room servant for Bateman. During the course of Brown's testimony and again afterward, several clashes occurred between Gardiner and Boutwell. The first dealt with the nature of government witnesses:

'' RECORD II at 65–66

Mr. BOUTWELL: . . . We do not bring witnesses here without having some idea of what they are going to say.

The JUDGE ADVOCATE: I do not know. You had one here a moment ago and did not get anything out of him.

Mr. BOUTWELL: Well, he came from the War Department."

The second dealt with the Judge Advocate's badgering and demeaning of Brown, one of several blacks to testify:

Mr. BOUTWELL: I notice that the Judge Advocate in referring to the testimony of a witness taken yesterday used the words "colored man." I should like to inquire what is the reason for that? Why should you say colored man, rather than, if he was an Irishman, that fact should be mentioned?

The JUDGE ADVOCATE: The record says "Richard Brown (colored)."

Mr. BOUTWELL: I would like to know what the object of that is? As far as this Government is concerned there is no distinction among citizens, and I object to the record saying "colored man." I move that that be stricken from the record.

The JUDGE ADVOCATE: If the Court please, there is no distinction as to rights at all, but I know distinctly that we have statutes for the military service which provide for the enlistment in two regiments of infantry and two regiments of cavalry of colored men.

Mr. BOUTWELL: This man is not in either.

The JUDGE ADVOCATE: There is that distinction which we find in the statutes, and I see no objection to it.

Mr. BOUTWELL: Mr. President it may be a matter of not very great importance—

The JUDGE ADVOCATE: It is a matter of no importance.

Mr. BOUTWELL: I do not know about that. Inasmuch as the question is presented by the record, I would like to have it appear from the judgment of this court, that it recognizes here and now in this matter the supremacy of the fundamental law of the land which places all citizens, without reference to race or color, upon an equality. It may be no disparagement to this man, but he is no soldier of the United States, he is a citizen, and in his ignorance and simplicity he has been here as a witness. But after all I think it is due to him, and it is due to the character of the Government under which we are living, that there should be no statement upon the record as to whether this witness was colored or white, whether he was born in Ireland or Jamaica. If he is a citizen of the Republic, and competent to testify and come here, there should be nothing which any man under the canopy of Heaven can construe as any disparagement as to his right and title to be a citizen of the Republic.

The JUDGE ADVOCATE: It seems to me, may it please the Court that the remarks of the gentleman are very much out of place under the circumstances of the case. I admit that the last witness whose cross examination is still proceeding, did come here in his simplicity

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"*Id.* at 193.

and ignorance, particularly in his ignorance as the learned counsel has stated.

As to the witnesses who came here for the prosecution, while I gave no directions on the subject one way of the other, when I noticed that the Reporter had stated, in regard to the fire or six witnesses for the prosecution who were colored men, opposite their names the same word "colored" as we find here with reference to this one witness for the defense, I did not consider it necessary to ask for a change in the record on the subject, because it was simply a matter of identification, just as much as if it were stated "Irishman" or anything else. But as the record is that way with reference to the five or six witnesses for the prosecution, simply **as** a matter of identification, and has been done by the Reporter without any instructions one way or the other, and we have passed and accepted the record already as to those, I see no reason for the change.

Mr. BOUTWELL: You had better go back, and correct them all.

The **PRESIDEST**: The court will take that matter under consideration in due time. It is certainly not now necessary to raise the question here of the equal rights of witnesses before this court. Nobody would entertain the possibility of any such distinction.[50]

Near the end of the trial, the defense attempted to introduce three Treasury documents regarding Bateman's allegedly illegal travel pay referred to earlier. Gardiner objected that no nev evidence could be admitted on collateral matters not covered in the testimony of the witness. Boutwell argued that the Judge Advocate had introduced one Treasury document to substantiate Bateman's right to the travel pay and that the defense should be allowed to introduce the remaining Treasury documents on the same issue. The repartee between Judge Advocate and defense counsel was characteristic:

The JUDGE ADVOCATE: If the court please, I hare always found in the trial of a cause that the easiest and the best way was to follow the rules of evidence and the rules of procedure. The moment the court departs from those in any particular instance, there is no knowing where the matter may go.

One thing is fixed in the rules of evidence as a cardinal principle, so thoroughly fixed that I have never had occasion to argue it in twenty years. I argued it twenty years ago in one case but nerer since although it has frequently been referred to, and that principle is this:

If a witness is produced by either party, and the other side in cross examining ask him questions as to matters outside of the particular trial, as for example to test his credibility as to outside transactions concerning himself, or for the purpose of degrading him. the answers of that witness upon those collateral matters conclude the side that inquire into them; they are bound by his answers whaterer they may be; they can only come in to contradict any answer that is made by

[50] *Id.* at 194–196.

the witness on cross examination when that answer is with reference to something pertinent to the issue. . . .

The gentleman who has been referred to as a witness here by the learned counsel, was asked certain questions as to his former service in connection with the Government, in the Treasury Department, as a commissioned officer. He answered those questions and went on and described a particular order that he had received to go to a particular place, and how it was dated and where and how it was addressed to him. Then on re-direct examination, as that was new matter, I had a right to produce the document that had been referred to if I want to, subject of course to any objection that it had not been properly developed in the original questions. I produced the document and it was entered upon the record and I rested the matter.

A court never knows where it will go if it undertakes to permit new evidence to be offered on a collateral issue. That was wholly collateral, as the court can see from the statement of the learned counsel. He was absolutely concluded by answers of the witness. He can go no further, he can introduce nothing further on the subject. He is bound by it. That is a cardinal principle.

Mr. BOUTWELL: A single word upon each one of two points. First as to law, which the Judge Advocate said he had occasion to contemplate twenty years ago. It would almost need an affidavit to prove that he was old enough to be around in a case twenty years ago. But we will take that for granted.

The JUDGE ADVOCATE: It was a case of a capital offense.

Mr. BOUTWELL: . . . Now as to the fact. He was our witness when we put the question to him, and if the Judge Advocate had rested there and had made no inquiry, then his theory as to our rights would have been true. But he opens the case himself still further by going to the Department and taking one part of the record, and that not the essential part which was the judgment of the authorities of the Treasury Department, as to the character of the transaction in which Mr. Bateman had been engaged. . . .

If the Judge Advocate had left the matter just where it was left by the counsel for the accused on the cross examination, I suppose his theory of the law and the consequent inability on our part to proceed further, would have been true. But he opened the case by going to the Treasury Department and bringing here a part of the record for the purpose of explaining the answer which the witness had given upon cross examination.

We have other papers relating to the same subject matter. We have the judgment. And those papers we ask the court to look at."

The objection of the Judge Advocate to the introduction of the documents was sustained. Today, however, the result might have been different if paragraph 153(b)(2)(b) of the *Manual for Courts-Martial, United States, 1969 (Rev. ed.)* were applied. Although it speaks from the point of view of impeaching a defense witness, the

"*Id.* at 253–256.

rule that once evidence denying a certain offense has been introduced, contradictory evidence may also be introduced for the purpose of impeaching the credibility of the witness must also apply to a prosecution witness or hostile defense witness.

To simplify matters at the end, Major Gardiner proposed that no arguments be made :

> It is not a case involving any questions of law, and very few of fact. . . . Before courts-martial, arguments are not of the same degree of potency as they are in civil tribunals, and for my part I do not propose to make any argument at all.[52]

The Court decided not to hear any arguments and on that same day, 21 February 1885, returned a verdict of "not guilty" to all charges and specifications.

On 24 February 1885, approximately ten days before the end of his term as President and the same day that he approved the final sentence in Swaim's first court martial, President Arthur approved the findings in the second case.[53] At the same time, he approved the conviction of Colonel Morrow for his manipulation of fraudulent pay accounts.[54] Morrow was charged with Article 13 (signing false certificates) and Article 61 (conduct unbecoming an officer) violations, but was found guilty of an Article 62 violation in the former charge and "not guilty" of the second charge. He was sentenced to remain in rank for two years "so that at the end of that time he shall still be the junior lieutenant colonel of cavalry."[55]

The order directing the execution of Morrow's sentence and Swaim's acquittal at the second trial finally dissolved the general court-martial of which Major General Schofield had been president. That court-martial had heard only three cases since it had convened—the two courts martial of General Swaim and the one of Colonel Morrow, all three cases inextricably intertwined.

Colonel Guido Norman Lieber, the Assistant Judge Advocate General, had been appointed Acting Judge Advocate General on 22 July 1884. The approval of Swaim's suspension for 12 years merely made that appointment a permanent one.

VI. POST-TRIAL PROCEEDINGS

At this point, most courts martial would have reached their conclusion; after all, review by the Judge Advocate General and the

[52] *Id.* at 272.
[53] Gen. Ct. Martial Order So. 20, paras. III and IV, Hq. of the Army, 24 February 1885.
[54] *Id.* at paras. I and II.
[55] *Id.*

Secretary of War and approval of the sentence by the President, the convening authority, had been completed. There was no Court of Military Review, no Court of Military Appeals, and no appeal to the Supreme Court.

General Swaim, however, was not to be dislodged from his attempts to rectify the attacks made on him officially. He might have been well advised to follow the message of the Sermon on the Mount which his own counsel had cited in his behalf during his trial,[56] but instead he chose to regain that which had been taken from him.

On 29 April 1885, he requested a copy of the record of trial from Colonel Lieber; on 29 June 1885, he received the record of trial. Later that year, he requested that the Secretary of War (now the Honorable William C. Endicott, who served under Democratic President Grover C. Cleveland from 1885 until 1889) remit the unexpired portion of his sentence. Secretary Endicott asked that Swaim submit his reasons in writing and on 30 December 1885 he did so in a letter that was later printed in 18 pages. In the letter, Swaim was righteous in his wrath against the court that found him guilty:

> **You** will pardon the earnestness with which I entreat you to give them careful consideration, when you reflect, that for myself and my family, that which is to me, and to them, more than life is involved.
>
> In this connection I do not ask mercy. What I want is plain justice, of no higher order than would be accorded a tramp in the humblest tribunal of **our** country, where a desire to deal justly rises above all other desires, and puts aside all other considerations.
>
> Judge me according to the highest standard of moral rectitude and the most exacting rules of official conduct.
>
> I shall refer to the technical disregard of law and regulations in my case only to show what seemed *to* be an absence of disposition to deal fairly with me. If there was a *color* or justification for the charges against me, the fact that I was convicted without proper regard to the technical rules of law would not disturb me greatly, or induce me to occupy your time with this request."

He repeated the arguments presented at the trial about the President, through the Secretary of War, convening and appointing the court and about appointing junior officers to the court. Then he added further arguments about (1) the court taking jurisdiction of the collection of a private debt from a civilian in no way connected with the military, (2) the use of Bateman's civilian lawyer as an associate counsel for the Government without being sworn as an officer of the

[56] At one point, in *Matthew*, 5:40 the Sermon on the Mount continued: **And if any man will sue thee at the law, and take away thy coat, let him have *thy* cloak also.**

[57] Letter from David G. Swaim to Honorable William C. Endicott. Secretary of War, dated 30 December 1885, The Sational Archives, Washington, D. C., at 1.

court, (3) allowing an argument of the Attorney General concerning the sentence given by the court to be read before a closed session of the court by the Judge advocate without allowing Swaim to be present or respond to this pressure being applied to the court with the sanction of the President and (4) not having an opportunity to expose the unreliability of Bateman to the reviewing authority before the review in the first case had been completed. Swaim then argued that the guilty findings on two specifications amounted to finding someone guilty of a criminal act for altogether legal actions he had taken. He went to great lengths to establish that the specifications, as altered by the findings, removed his fraudulent intent and resulted in unwarranted and unsupported conclusions of guilt on the part of the Court. His letter was not responded to favorably, however, so he turned in another direction.

On 1 April 1887, Swaim wrote again to Endicott seeking the return of the original due-bill. Subsequent indorsements by Lieber, Gardiner, and Bateman indicated that the instrument was being held by Gardiner who wished to be relieved of it but would not return it to anyone except Mr. Parker, the original recipient of the note by agreement between Bateman and Swaim, from whom he had obtained it. Parker would not accept it, however, so Gardiner refused to return it to anyone unless by mutual consent of Bateman and Swaim, both of whom claimed it, or by court order. As a result, Lieber returned the letter to Endicott with the indorsements and a notation that the civil courts furnished General Swaim vith a remedy and that the War Department had no jurisdiction to determine ownership of the due-bill. On 18 July 1887, Endicott forwarded all of the above information to General Swaim. On 15 May 1888, Swaim replied to Endicott's letter noting that Parker had turned over the receipt given by Gardiner to Parker for the due-bill to Mr. Butterworth, the arbitrator agreed to by Bateman and Swaim; however, Gardiner refused to turn the note over to Butterworth upon presentation of the receipt. Swaim stated further that ownership of the note rested solely with him and that the amount due on the note was the only question unresolved, but that in order to bring suit to determine that amount, he must have the original note to include with the complaint. Swaim's letter was followed by one from Mr. Charles H. Grosvenor, one of Swaim's counsel at the court-martial and now a member of the House of Representatives, reiterating that Swaim couldn't bring an action without the note and asking for its return. Endicott responded to Grosvenor on 7 June 1888 with no change of position. On 14 February 1889, Swaim wrote Endicott asking for a

response to his letter of 15 May 1888. This letter was forwarded to Gardiner who returned it to the new Secretary of War (Redfield Proctor, who served under President Benjamin Harrison), indicating that there was no change in his initial position and recommending that the Secretary of War take possession of the letter until a civil court decided the case. Proctor replied to Swaim on 5 April 1889, still indicating no change from Endicott's position on the note.

There appears to have been no further action on the case until 1891, when Swaim filed an action against the United States in the Court of Claims seeking the one-half of his pay which had been forfeited by the court-martial. On 27 February 1893, the Court of Claims rendered its verdict in the matter.[58] The Court spent 43 of the 64 pages of the opinion reproducing the important documents in the case and the arguments of Swaim (appearing *pro se*) and the Assistant Attorney General who appeared for the Government. Swaim had repeated all of his prior arguments and the Government had responded in kind. The Court pointed out that when the record of a court martial is collaterally attacked in a civil court, the court "must either give full effect to the sentence or pronounce it wholly void."[59] In making that determination, however, the court could consider only three questions: (1) was the court-martial legally constituted; (2) did it have jurisdiction of the case; and (3) was the sentence duly approved and authorized by law. The issues raised by Swaim as to appointing inferior officers and officers hostile to the accused to the court, permitting a person to act as judge advocate at the court martial who was not sworn or appointed as such, allowing the court to flagrantly violate the laws of evidence in a manner detrimental to the accused, and requiring the court to reconsider the sentence in the first court martial after hearing only the evidence against the accused in the second trial, were ruled to be inapplicable to any of the three questions that faced the Court of Claims regarding the court-martial; thus, they were not considered.

Judge Charles C. Nott, who delivered the opinion and who had been on the Court since 1865, was troubled by the contention that the President did not have the authority to constitute the general court martial of Swaim because Article 72 of the Articles of War allowed him to do so only if the accused's commanding officer was the accuser. The Judge traced the entire legislative and statutory history of Article 72 and its predecessors before concluding:

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[58] **Swaim v.** Pnited **States, 28** Ct. **Cls. 173 (1893).**
[59] *Id.* **at 218.**

> It seems evident, then, to the court that as courts-martial are expressly authorized by law, and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer can not be invested with greater authority by Congress than the commander in chief and a power of command devolved by statute on an officer of the Army or Savy is necessarily shared by the President. The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be "expressly" granted by Congress, then Congress, by the simple expedient of exclusively granting the authority to appoint courts-martial and approve sentences to a few officers of the Army and tacitly ignoring the President, could practically defeat the express declaration of the Constitution and strip the office of commander in chief of all real powers of command."

The opinion artfully criticized the findings of the Court without saying so, pointing out that the note which passed to Humphrey, Bright, and Company from Swaim gave them no more right to its proceeds than Swaim would have had, a completely legal transaction. However, the Judge did not stop at that point:

> These remarks are not intended as criticism of the court-martial. A military court does not find in an involved case like this a general verdict like that of a jury on an indictment, nor a special verdict of the material facts established by the evidence such as is sometimes found in civil cases. It labors under the great inconvenience of having to travel through every specifIcation, line by line and word by word, and find whether the facts alleged did or did not occur. In the present case the court found the accused "not guilty" as to a single word. Moreover, the findings of a court-martial take the form of "guilty" or "not guilty" and may adjudge in form that the accused is guilty of an act which was in itself innocent"

After reviewing the controversy, public uproar, and uncomfortable position of a Judge Advocate General caused by not-illegal activities which occurred, the Judge concluded:

> This Court can not say that these acts were not prejudicial to good order and military discipline, and accordingly must hold that they are sufficient to uphold the charge."

The effect of this statement was to uphold the court's jurisdiction of the case, although it did not expressly say *so.*

Turning to the sentence itself, which was the crux of the case as

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[60] *Id.* at 221–222.
[61] *Id.* at 230
[62] *Id.*

far as the decision of Court of Claims was concerned, Judge Nott retraced the three sentences which the court-martial imposed, noting with regard to the Attorney General's opinion after the first sentence:

> It is manifest that the Attorney-General did not clearly apprehend the position taken by the court-martial; that he did not perceive that the claimant's evasive and uncandid action, no matter how described, was something less than and different from the positive offense of fraud. He intimates in his opinion that there is no difference between an intent to perpetuate a "wrong" and an intent to perpetuate a "fraud"; and he fails to observe that the court-martial had carefully sifted out of the specifications the element of fraud which was the gravamen of the charge, "conduct unbecoming an officer and a gentleman;" [63]

and noting with regard to the President's disapproval of the second sentence:

> In the opinion of the court-martial the change of position [from brigadier general to major after a one-year suspension from rank and duty and forfeiture of all pay for the same period] imposed by the sentence was one of rank; in the opinion of the President it was one of office.

After noting the approved third sentence, the Judge traced the history of the 62nd Article of War and its "catch-all" nature. His conclusion was that a court martial must determine in Article 62 violations whether the acts proved are prejudicial to good order and discipline, then what the gravity, seriousness, and degree of the offense is, and finally what punishment is appropriate. After having done that, the convening authority may not increase the sentence; he may only disapprove or mitigate the sentence. The Army regulation [64] allowed disapproval only to perfect or correct the record, but did not allow the reviewing officer to require the court martial to increase the severity of a sentence. After noting that it had been argued that the Supreme Court case of Ea *parte Reed* [65] was controlling here, he appeared to equivocate slightly by comparing that case and the present one. The essential similarities involved the disapproval of the sentence of the court martial because of its leniency and the subsequent imposition of a severer punishment by the court-martial. In *Reed*, the court upheld the subsequent sentence. Judge Nott's analysis of the present case deserves reproduction:

> On the one hand, it may be said of this case that the President did not interfere with the discretion of the court; that he did not require

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[63] *Id.* at 231-232.

[64] Army Regulations, 1881, sec. 923.

[65] 100 U.S. 13 (1879). Mr. George S. Boutwell, attorney for Swaim in his second court martial, served as attorney for the petitioner in this case.

> it to impose a more severe sentence: that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand, it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient, in effect compelled the court to impose a more severe one; that in military life a superior officer is conceded to be invested with superior wisdom; and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively vested by law.
>
> But while the last principle is a sound one, which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in *ex parte* Reed is conclusive upon this branch of the case."

The Court dismissed the case, but General Swaim was not yet satisfied and appealed to the Supreme Court, where the Court of Claims decision was affirmed in 1897.[67]

In the meantime, the unexecuted portion of General Swaim's sentence was finally remitted on 3 December 1894[68] and he was retired on 22 December of that year.[69] On 3 January 1895, Colonel Lieber was promoted to brigadier general and appointed Judge Advocate General, serving until 1901.

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[66] Swaim v. United States. 28 Ct. Cl. 173, 235–36 (1893).
[67] 165 U.S. 553 (1897).
[68] General Order *So.* 66, Hq. of the Army, 3 December 1894.
[69] General Order *So.* 69, Hq. of the Army, 22 December 1894.

BOOK REVIEWS

THE COURT-MARTIAL OF LT. CALLEY

By Richard Hammer

Coward, McCann & Geoghegan, Inc., 1971

Richard Hammer writes of men and not of law in his commentary on the most famous court-martial in the history of the U. S. Army. His 400 pages are replete with testimonial excerpts of the one hundred and four trial witnesses, of the banter between the judge and counsel, and of the endless arguments of counsel on the legal issues that webbed the facts that were My Lai. But the book is much more than the bang-bang-bang witness parade of a Perry Mason segment or the limelight lawyer's periodic recounting of how he did it in his ten most spectacular and notorious cases. This is a book of the judge and the trial counsel who ceased their pre-Calley bridge games to become all business for the business at hand, of the respected former judge of the Nation's highest military court who became the weary captain of a diverse defense crew, of the ramrod military defense counsel whose warmth and dedication emerged from a cold and grizzly segment of American history, and of the witnesses who repeated their story just one more time for the record.

Hammer weaves a very readable and sensitive text which covers the gamut of My Lai as seen through the Calley case. He is convincingly accurate in recording the facts as exposed by the witnesses, the many hundreds of exhibits, and the numerous other persons Hammer encountered in Vietnam and in and about the trial scenes at Fort Benning and the sites of the companion cases in Texas and Atlanta. The colonel, the sergeant, the pilot, the Vietnamese refugee, the civilian who was a soldier on that 16th of March in 1968, and the former Army photographer whose camera was also there on the 16th of March—their words are all there,

Hammer selects and culls their words but with the skill of a surgeon, not the cleaver of a muckraker. The words are woven with the personality vignettes of the stars and the bit players to create a you were there touch that gives this well written, well documented book its novel-like quality,

One feature does, however, strike the reader. One rapidly feels he knows all the players but one—Lieutenant William Calley. Hammer

begins with a cameo survey of a host of heroes and anti-heroes of history baiting the reader as to Calley the hero or Calley the criminal or Calley the fallguy. The book talks about Calley's alleged deeds and Calley's lawyers and Calley's friends and Calley's own words—but there is no feeling of Calley the person vis-a-vis Calley the court-martial.

Hammer closes his sound work with a whole new arena of Presidents and State Secretaries and Defense Secretaries and Theater Army Commanders which does not fit comfortably in this book of the courtroom. His penchant for supported views is absent in his assessment of the degree of responsibility of these senior officials for My Lai. My Lai and the Vietnam War may be cut from the same cloth but Hammer does not convince in his indictment of all those above the rank of lieutenant for the crime of which Calley was convicted.

Hammer's last chronological setting is the now famous letter from Captain Daniel to the President in the wake of the massive swell of public indignation at Calley's conviction. Would Hammer see the same result in the faded light of a passing year and the seeming re-examination of My Lai by the American people? That answer is for the reader.

The Court-Martial of Lt. Calley is first rate in-depth reporting and commentary; its prospect for history is seemingly great. Time and the grist of the judicial and administrative process will make the final selection of this recommended book.

MAJOR JAMES A. ERDICOTT, JR.*

The Military Prison: Theory, Research and Practice,
Stanley L. Brodsky and Norman E. Eggleston (Editors),
Southern Illinois University Press, 1970

The strength of *The Military Prison: Theory, Research and Practice* is its critical review and eraluation of important topics in military corrections. Diverse and comprehensive research and review articles were commissioned, making these scholarly articles difficult to integrate as well as evaluate. It took expertise in many areas, to include military justice and military deviance, to correlate existing theory and data and to be able to place the essays into perspective. Such expertise is exemplified by the editors Brodsky and Eggleston

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as they collaborate to present original research based on extensive clinical and research experience. Vignettes of importance emerge, offering the reader insight into the basic dimensions of corrections in a military system. Since almost every essay is on a unique aspect of military corrections, the historical bases of their theoretical formulations are presented for the reader who is not familiar with them.

A theme can be discerned in the fourteen essays—the emergence of "corrections" and "rehabilitation" in a system historically characterized by punishment. The growing awareness of the extent of military deviance, the limitations of traditional treatment methods, and the realization that the military correctional system has and will continue to have an impact upon the lives of hundreds of thousands of American servicemen, have all led to the growing interest in improving the military's approach to restoring wayward soldiers to duty and aiding in their subsequent adjustment in civilian life.

The authors refer to military deviance and military justice as being unique when compared to their civilian counterparts. Should the military be in the criminal justice system at all? Should deviance be blamed on the military environment? From the outset, Brodsky examines these basic issues by illuminating the emergence of corrections and military justice from relative anonymity and respectability to the glare of considerable publicity, attention and revision. The military environment, Brodsky documents, may not only have a criminological influence but also a therapeutic influence. The environment inherently possesses "built in" or automatic factors that change selected individuals in positive ways.

Equally controversial are the military correctional programs which vary in design and operation. Richard Hershel reviews military correctional objectives, social theory, official policy and practice, and points out that "the goals which corrections should aim for must be set forth explicitly and agreed upon." Brodsky and Eggleston provide a comprehensive overview of the military correctional institutions recounting the unique as well as common activities which characterize facilities in the Army, Navy and Marines, and the Air Force. The authors conclude that "as military confinement historically replaced corporal punishment of the potential military offender, a variety of positive approaches and correctional innovations have developed." Multidimensional and multidisciplinary aspects of correctional programs were studied and illustrated by: Bushard and Dahlgren's study of the Fort Dix program, Broder's description and evaluation of the Air Form's 3320th Retraining Program, Nichols and Brodsky's vocational follow-up study of

former prisoners, and Brodsky's study of prisoner evaluations of correctional programs.

The complexities of rehabilitation are nowhere so evident as in the military's approach to the restoration of deviant personnel. Hankoff studied the social relations in five military penal institutions, describing the staff-prisoner culture, its dynamics and patterns of interaction. Eggleston, in his study of roles in the military prison, exposes the importance of role perceptions as determinants of behavior and attitudes. These studies help to establish a necessary and useful focus on the "cultural" aspects of a correctional program, leaving no doubt as to its importance.

The deviant soldier, his personality, his potential for restoration, and involvement in the program play a critical part in the success of the correctional program. Brodsky notes the prevalence of individuals with lower than average intelligence and character and behavior disorders, but the relative absence of psychoses and neuroses. The task of restoring these individuals is self evident. The process of selection for clemency, parole and restoration is even more complex. Brodsky points out the paradoxical patterns appearing in recommendations for restoration and the need to undertake predictive validity studies so that such military correctional decision making may be objectively and quantatively based. In any case the individual prisoner must become involved in the decisions related to his future. He must not only be responsible for considering all of the pros and cons of each direction he might take, but also, for therapeutic reasons, make his own decision. To these ends, Hippchen points out the need for recent and accurate information on future problems of dischargees. His study of employer attitudes toward hiring dishonorably discharged servicemen sheds light on an important issue which "could be added to the factors being reviewed by the prisoner."

Military penologists have reason to be proud of what their evolutionary and reconstructive efforts have produced. John Morris Gray brilliantly and concisely summarizes the status and measured impact of the military's correctional programs. His conclusions emphasize the tremendous achievements made in successfully restoring men to honorable duty and the importance of restoration as a vital part of the military's efforts.

The editors and contributors are to be commended for taking the initiative in a field which is of transcendent importance. Their publication coincides with the successful development of the Army's Correctional Training Facility, and the Special Civilian Committee study of the Army's Confinement System which demonstrate the

growth in corrections and the historical significance of this book. While it represents a long overdue and timely publication, a work of this broad scope exposes obvious gaps in theory and research, thereby promulging many complex and unanswered questions : Can we screen out potential military offenders before they enter the service? What preventative efforts may be taken? Would a Correctional Command designed to coordinate existing correctional facilities and resources be a more effective approach to the problem? The book represents the reality of the present state of military corrections—a field in need of continued development, evaluation and systematic research.

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'Mention **of a work** in this section **does** not preclude later **review** in the *Military **Law** Review.*

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The Adjutant General.

Distribution :

Active Army : To be distributed in accordance with **DA** Form 12-4 requirements for Military Law Review.

NG & USAR: None.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1972 O—460-564