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Articles

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THE SOLDIER'S RIGHT TO ADMINISTRATIVE DUE PROCESS: THE RIGHT TO BE HEARD*

By Captain Arthur Haessig**

No person shall . . . be deprived of life, liberty, or property, without due process of law, . . .[1]
While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.[2]

I. INTRODUCTION

Twelve years ago Professors Jaffe and Nathanson noted in the preface of their administrative law casebook[3] that "[t]here is, now, an insistent demand that the principles of fair play developed to protect property interests be extended to the 'personal interests' of the alien, the government employee, the citizen."[4] If that preface were being written today, it should also include the soldier, for, to a significant degree, the personal interests of the soldier and his administrative relationship to his commander and the Army have only recently become the subject of in-depth judicial scrutiny, interpretation and delineation.

The thesis of this article is that the soldier has a constitutional (due process) right to be heard in any administrative proceeding initiated by his commanders against him, if those proceedings could affect adversely his significant interests. This article will examine certain such administrative procedures in light of the thesis, current law and policy. The administrative actions to be ana-

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* This article is adopted from a thesis presented to The Judge Advocate General's School, Charlottesville, Virginia while the author was a member of the 21st Advanced Class. 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 U. S. CONST. amend. V.

2 Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957).

3 L. JAFFE AND N. NATHANSON, ADMINISTRATIVE LAW vii (2d ed. 1961).

4 *Id.*

lyzed include revocation of security clearances,[5] enlisted separations for unfitness and unsuitability,[6] enlisted reductions for civil conviction and for inefficiency,[7] bars to reenlistment,[8] reclassification of the Military Occupational Specialty (MOS) of the enlisted soldier,[9] and, to the extent that the soldier's career is adversely affected by the proceedings, the Army's Qualitative Management Program.[10]

II. THE THEORY OF DUE PROCESS

Nowhere in the Constitution is the phrase "due process of law," as found in the fifth[11] and fourteenth,[12] amendments defined. Mr. Justice Frankfurter has called "[t]he vague contour,"[13] of the clause "the least specific and most comprehensive protection of liberties."[14]

Traditionally, due process of law has generally implied and included *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding~. Historical search and analysis, however, are not likely to do more than "further obscure the judicial value-choosing inherent in due process adjudication."[16] Due process is thus held to be "a summarized constitutional guarantee of respect for those personal immunities which are"[17] "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[18] or are "implicit in the concept of ordered liberty."[19] Thus:

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5 Army Reg. No. 604-5, Chap. 3 (16 Nov. 1970).

6 Army Reg. No. 635-200, Chap. 13 (Change No. 39, 23 Nov. 1972).

7 Army Reg. No. 600-200, Chap. 7, Sec. vii (Change No. 47, 10 Feb. 1972).

8 Army Reg. No. 601-280, Chap. 1, Sec. viii (Change No. 5, 29 June 1971).

9 Army Reg. No. 600-200, Chap. 2, Sec. vi (Change No. 51, 26 Sept. 1972).

10 Army Reg. No. 500-200, Chap. 4 (Change No. 41, 15 Jan. 1971).

11 U. S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property without due process of law; . . . ."

12 U. S. CONST. amend. XIV. "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

13 Rochin v. California, 342 U.S. 165, 170 (1952).

14 *Id.*

15 Murray's Lessee v. Hoboken Land and Improvement Company, 59 U.S. (18 How.) 272, 280 (1855).

16 Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L. J. 319, 340 (1957).

17 Rochin v. California, 342 U.S. 165, 169.

18 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

19 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

> Due process cannot be confined to a particular set of existing procedures because due process speaks for the future as well as the present, and at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities. Some features of present procedures are now accepted by force of custom, or because no practical way has been found to improve them. Technological change or a refinement in our sense of justice may make their retention intolerable.[20]

While it is undoubtedly true that general propositions do not decide concrete cases, the "full meaning [of due process] should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions as they arise." [21] And with respect to decisions involving due process "[t]he decision will depend on a judgment or intuition more subtle than any articulate major premise." [22] Rlr. Justice Frankfurter eloquently synthesized the essence of the due process standard when he said:

> The requirement of due process is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process.[23]

This process has compelled a qualitative standard that:

> When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard . . . . The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.[24]

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[20] Shaefer, ***Federalism and State Criminal Procedure,*** **70** HARV. L. REV. 1, 6 (1956).

[21] Twining v. New Jersey, 211 **U.S. 78,** 100 (1908).

[22] Lochner v. New York, 198 U.S. 45, 76 (1905).

[23] Joint Anti-Facist Refugee Committee v. McGrath, **341** U.S. **123,** 162-163 (1951).

[24] Parker v. Lester, 227 F.2d 708, 716 (9th Cir. 1955).

Further, it has been stated that "[t]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." [25] But this is not an absolute principle. It must be recognized that "[w]hether the constitution requires that a particular right obtain in a specific proceeding depends on a complexity of factors." [26] Thus, "[t]he nature of the alleged right involved, the nature of the proceedings, and the possible burden on that proceeding, are all considerations which must be taken into account." [27] The starting point in the determination of what procedures due process may require under any given set of circumstances is a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[28]

III. THE PRACTICE OF DUE PROCESS

In recent years administrative proceedings adversely affecting the personal rights, property, or liberty of the individual have undergone increasingly close analysis by the courts. A trio of United States Supreme Court cases decided in the late 1950's—*Accardi v. Shaughnessy*,[29] *Service* v. *Dulles*,[30] and *Vitarelli v. Seaton* [31]—firmly established the principle that:

> Although a matter may be wholly within otherwise judicially uncontrollable executive discretion, when the executive prescribes regulations as to the manner in which he will exercise that discretion he is bound to follow his own regulations; action by him to the detriment of an individual in violation of such regulation is illegal, and relief can be had in court.[32]

Shortly after *Seaton* the Supreme Court, in *Greene* v. *McElroy*,[33] turned its attention not to the issue of whether an executive branch regulation had been followed, but ostensibly to the issue of whether authority existed to promulgate certain regulations. Mr. Chief Justice Warren, speaking for the Court, strictly limited the issue in the case to:

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[25] Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951).

[26] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[27] Id.

[28] Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy. 367 U.S. 886, 895 (1961).

[29] 347 U.S. 260 (1954).

[30] 354 U.S. 363 (1957).

[31] 359 U.S. 535 (1959).

[32] Meador, Some *Thoughts on Federal Courts and Army Regulations*, 11 MIL. L. REV. 187, 190 (1961).

[33] 360 U.S. 474 (1959).

> . . . whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.[34]

Mr. Justice Harlan, concurring specially, considered the constitutional issue presented to be "whether the particular procedures . . . employed to deny clearance on security grounds were constitutionally permissible," and one which was "most difficult and far reaching" and "fraught with important consequences to both the Government and the citizen." [35]

In order to understand fully the real, but unstated, due process issue in *Greene*, as opined by Mr. Justice Harlan, a recital of the facts involved is necessary. Greene, an aeronautical engineer, was vice president and general manager of a defense contractor whose business was devoted wholly to defense contracts with the United States. He was discharged from his employment solely as a consequence of the revocation of his security clearance because access to classified information was required by the nature of his job. Because of his discharge, the field in which he had expertise was effectively closed to him.

Following World War II Greene had been given security clearances, including two Top Secret clearances, on three occasions. In November 1951 his company was advised that its clearance for access to classified information was in jeopardy because of a tentative decision to deny Greene further access to such information; the company was invited to respond. The company, through its president, responded that due to the jeopardy of its clearance it had furloughed Greene. The company president also stated that in his opinion Greene was a loyal, discreet United States citizen and that his absence denied the corporation the services of an outstanding engineer and administrative executive. In December Greene was advised that his access to information at the company would be inimical to the best interests of the United States and his security clearance was revoked. He was told that the revocation action was based on information indicating that between **1943** and 1947 he had associated with Communists, visited officials of the Russian Embassy, and attended a dinner given by an allegedly Communist Front organization. In January 1952 Greene, with counsel, appeared at a hearing where he was the subject

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34 *Id.* at **493.**
35 *Id,* at 510.

of numerous and searching questions. He apparently answered the questions posed in detail, categorically denied that he had ever been a Communist, expressed his dislike for the Communist theory of government, and stated that his visits to persons in various foreign embassies were made in connection with his attempts to sell his employer's products to those governments. Greene also produced top level company executives and a number of military officers who had worked with him in the past. They corroborated many of his statements and testified that he was a loyal and discreet citizen. The Government presented no witnesses and relied instead on confidential reports which were never made available to Greene.[36]

In April 1953 the Secretary of the Navy advised Greene's employer that he had reviewed the case, concluded that Greene's continued access to classified information was inconsistent with the best interests of national security, requested the corporation to exclude Greene from any corporate areas where classified projects were being carried out, and further to bar him from access to all Navy classified information. Greene's employer had no choice but to comply with the request since it was contractually bound to accept such security determinations by the Navy. As a result, Greene was discharged.

Greene then requested reconsideration of the decision. Correspondence between the successor to the agency which first acted and Greene's counsel resulted in a second hearing in April 1954. Again he was subjected to intense examination. New subjects of inquiry were injected by the examining board and again it was evident that various investigatory reports and statements of confidential informants were being relied on by the board, but again they were not made available to Greene. The board affirmed the Secretary's revocation of Greene's clearance. Greene's request for a detailed statement of findings was denied on the ground that security considerations prohibited such disclosures. He then requested appellate administrative review, and in March 1956 was notified that he had been found to be untrustworthy and that the earlier decision to revoke his security clearance was affirmed.

The Supreme Court chose not to decide *Greene* on due process grounds, but rather placed its decision on the narrower ground of "authorization.'' The case was, in fact, decided on the former ground. Mr. Justice Harlan's opinion that the case was decided on due process grounds is well founded when one considers that

[36] *Id.* at **479.**

the majority devoted approximately fifteen pages of its opinion to an extended, detailed statement of the facts and procedures involved. This lengthy exposition would not have been needed if the Court meant to analyze only the basic authority for the security regulations involved. Furthermore, Mr. Justice Clark, in his dissent, found the case to be "both clear and simple" [37] and stated his belief that "the Court is in error in holding, as it must, in order to reach this authorization issue, that Greene's right to hold specific private employment and to follow a chosen profession free from governmental interference is protected by the Fifth Amendment." [38]

Within two years the Supreme Court was faced with a variation on the teaching of ***Greene*** in *Cafeteria & Restaurant Workers Union v. McElroy*.[39] Mrs. Rachel Brawner, a member of the Cafeteria Workers Union, was a civilian short order cook at the cafeteria operated by a civilian restaurant chain at the Government's Naval Gun Factory in Washington, D. C. She had worked there for over six years and in her employer's opinion had an entirely satisfactory work record. The Gun Factory was engaged in highly classified weapons system work. In November **1956** Mrs. Brawner was required to turn in her security badge on the unelucidated ground that she had failed to meet the security requirements of the installation. Without the badge she was unable to enter the installation. The Union sought a meeting with the factory superintendent who denied the request on the ground that such a meeting would serve no purpose. Since Mrs. Brawner could not enter the installation, and she refused to work in another restaurant owned by the concessionaire, her employment as a cook was terminated.

In the Supreme Court's opinion two issues were presented : **(1)** Was the commanding officer of the Gun Factory authorized to deny Mrs. Brawner access to the installation in the way he did? and **(2)** If he was so authorized, did his action in excluding her operate to deprive her of any right secured to her by the Constitution? The Court summarily disposed of the first issue by finding Mrs. Brawner's exclusion to be authorized both by history and Navy regulations. On the second issue the Court brushed aside the government's argument that "because she had no constitutional right to be there in the first place she was not deprived of

[37] *Id.* at 510.
[38] *Id.* at **512.**
[39] **367** U.S. 886 **(1961).**

liberty or property" [40] with a quip from another case that "[o]ne may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law." [41]

The Court's analysis of the second issue began with the standard that what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the precise private interest that has been affected by governmental action. The Court found both the nature of the governmental function involved and the private interest to be simple and uncomplicated; the government function was proprietary, managing the internal operation of an important military establishment, while the affected private interest was the opportunity to work at one isolated and specific military installation.[42] The right to follow a chosen trade or profession, the issue in the *Greene* case, was not presented in the instant case.[43] The Court assumed that Mrs. Brawner could not constitutionally have been excluded from the Gun Factory on arbitrary or discriminatory grounds without reaching the issue of whether an abstract right to public employment exists.[44] Most importantly, the Court found Mrs. Brawner's case not to be one where governmental action operated to bestow a badge of disloyalty or infamy. To the contrary, the Court accepted the government's assertion made in oral argument that "denial of access to the Gun Factory would not by law or in fact prevent Rachel Brawner from obtaining employment on any other federal property." [45] In balancing the governmental function and the private interest involved, the Court found that Mrs. Brawner was not constitutionally entitled to prior notice and a hearing relative to her exclusion from the Gun Factory.

The dissenters, however, were willing to expand the teaching of *Greene.* They found that the holding arrived at by the majority "in effect nullifies the substantive right—not to be arbitrarily injured by government—which the Court purports to recognize," [46] and asked, "What sort of right is it which enjoys absolutely no

[40] *Id.* at 894.
[41] Homer **v.** Richmond, 292 F.2d 719 (D.C. Cir. 1961).
[42] 367 **U.S.** at 895-896.
[43] *Id.* at 896.
[44] ***But see*** Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd,* 341 U.S. 918 (1951) (by equally divided court).
[45] 367 U.S. at 899, n. 10.
[46] *Id.* at 900.

procedural protection?"[47] In sum, the dissenters were of the opinion that "it is fundamentally unfair, and therefore violative of the Due Process Clause of the Fifth Amendment, to deprive her of a valuable relationship so summarily."[48]

While a cursory analysis of ***Cafeteria Workers*** would seem to indicate that it substantially undercuts ***Greene*** and the right of the individual to notice and a fair hearing as a matter of due process prior to adverse governmental action, close analysis of the factual bases of the two cases leads to the opposite conclusion. Greene was effectively denied all responsible employment in his chosen profession while Mrs. Brawner was not. He was an admittedly outstanding aeronautical engineer and corporate manager who was, as a result of arbitrary governmental action, relegated to working as a draftsman at a salary approximately seventy-five percent less than he had earned prior to the government's action. Mrs. Brawner, a short order cook, on the other hand, was specifically offered other, similar employment by her civilian employer which she declined for reasons of personal convenience. She did not show any harm to her economic or social status while Greene demonstrated that he was effectively destroyed, both socially and economically. The two cases would appear, therefore, to stand on a due process continuum with Mrs. Brawner finding herself near the lesser protected end of relatively minor personal interests, and Greene at the opposite end involving substantial and pervasive personal interests. Greene was found to be entitled to notice and a fair hearing including the right of confrontation while Mrs. Brawner was not.

In ***Greene*** and ***Cafeteria Workers*** the Supreme Court analyzed the personal aspects of an individual's direct injury suffered at the hand of government while in ***Hannah v. Larche,***[49] the Court subjected third party due process rights to judicial scrutiny in a factual setting analogous to ***Greene. Hannah*** involved an attack on the constitutionality of the procedures used by the Civil Rights Commission in investigating allegations by blacks that they had been improperly denied their right to vote by state and local authorities. Commission rules provided for subpoenaing witnesses and allowing them to appear with counsel, but did not allow them to be apprised of the names of those who had made allegations against them, of the exact allegations that had been made against them, or to confront and cross-examine the complainants. The

47 ***Id.***
48 *Id.* **at 902.**
49 **363** U.S. **420 (1960).**

issues presented were whether persons whose conduct is under investigation by a governmental agency of the nature of the Civil Rights Commission are entitled, by virtue of the due process clause, to know the specific charges being investigated, to know the identity of the complainants, and to cross-examine those complainants and other witnesses.

The Court found that the Commission was purely an investigative and fact finding body, wholly lacking any adjudicatory powers. It was powerless to issue orders, punish, impose sanctions, determine civil or criminal liability, deprive anyone of life, liberty, or property, or to take any affirmative action affecting individual rights. On the positive side the Commission could only investigate, find facts, and make recommendations for subsequent executive or legislative action. Mr. Justice Frankfurter noted that:

> Whether the procedure now questioned offends the rudiments of fair play is not to be tested by loss generalities or sentiments abstractly appealing. The precise nature of the interest allegedly to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good—these and such like are the considerations, avowed or implicit, that determine the judicial judgment when appeal is made to due process.[50]

Here the competing individual and public interests were, respectively, the interests of the witnesses in confronting the complainants and cross-examining them, and the merged public and private interests in: (1) Determining if the voting franchise was unlawfully being denied to those eligible to exercise it; (2) Shielding the complainants from sanctions or reprisals; and (3) Recommending to the Executive and to the Congress the means whereby the franchise could be secured if it was being denied or impeded unlawfully.[51] Balancing these competing and possibly

[50] *Id.* at 487.

[51] *Compare* Greene v. McElroy, 360 U.S. 474 (1959) and Hannah v. Larche, 363 U.S. 420 (1960), *with* Jenkins v. McKeithen, 395 U.S. 411 (1969). In *Jenkins* a state Labor-Management Commission of Inquiry, whose authority was limited to investigating criminal violations of state and federal labor law, and which, by its recommendations made public criminal accusations against specific individuals, was found to deprive those individuals of due process by severely limiting the right of the person being investigated to confrontation and cross-examination of witnesses. *Jenkins* appears to be consistent with *Greene* and *Hannah* on a balancing theory that as the extent of possible harm to the individual as a result of government action increases, the due process rights required to be afforded correspondingly increase. *See* Note, *Confrontation and Cross-Examination in Executive Investigations*, 56 VA. L. REV. 487 (1970).

conflicting interests reveals that if the public good and the individual interests of the complainants were to be affected in any meaningful way, the nonproprietary interests of the witnesses had to be subordinated to the broader and merged interests of the complainants and the public. The Court held that the Commission rules denying confrontation and cross-examination of witnesses were not violative of the due process guarantee. *Hannah,* although chronologically preceding *Cafeteria Workers,* fits into the general "balancing of interests" scheme used in deciding the military security cases. The major difference is that the public interest was shared by a portion of the citizenry in opposition to another segment of the citizenry. While *Hannah* might be dismissed as a pragmatic decision, that is, protection of the civil rights movement long favored by the Court, the analysis of the "harm" arising from Commission action and the protection of the franchise and individual safety foreshadowed the test to be applied in *Cafeteria Workers.*

As previously noted, "Due Process cannot be confined to a particular set of existing procedures because due process speaks for the future as well as the present . . . [and] a refinement in our sense of justice may make . . . [present procedures] 'intolerable." [52] For an undetermined number of individuals, the future became the present with the landmark Supreme Court decision in *Goldberg v. Kelly,*[53] where "[t]he question for decision [was] whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause. . . ." [54]

Appellees in *Goldberg* were New York City residents who were receiving financial aid under the federally assisted program of Aid to Families with Dependent Children or under New York State's General Home Relief Program. They alleged that officials administering these programs terminated, or were about to terminate, the aid without prior notice and hearing, thereby depriving them of due process of law. Agency procedures provided that a recipient could request a post-termination hearing before an independent state hearing examiner. At this hearing the recipient could appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the examiner's decision was adverse to the re-

52 Shaefer, ***supra,*** **note 20** at **p. 6.**
53 **397** U.S. **253 (1970).**
54 ***Id.*** at **255.**

cipient, he could obtain judicial review, but if the hearing examiner held in favor of the recipient, all payments erroneously withheld were repaid.

The Court found that welfare benefits were a statutory entitlement for persons eligible to receive them and that their termination involved a state action unilaterally adjudicating important individual rights. The often used "right versus privilege" argument was summarily dismissed,[55] with a finding that constitutional principles applied here as they did to state disqualification for unemployment benefits,[56] denial of a tax exemption,[57] discharge from public employment,[58] and other individual-state relationships.[59] After quoting from Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath* [60] that the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," the Court stated that the extent of due process protection "depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." [61] Applying the interest standard of *Cafeteria Workers,* the Court found the recipient's interest in receiving welfare benefits outweighed the government's interest in fiscal conservation — to the extent that due process requires an adequate hearing prior to termination of benefits.[62]

Turning to the requirements of due process, the Court initially noted that "the fundamental requisite of due process of law is the opportunity to be heard" [63] and that the hearing must be "at a meaningful time and in a meaningful manner." [64] In the factual context of *Goldberg*, these principles required that "timely and adequate notice detailing the reasons" for the proposed termination be provided the recipient along with an "effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." [65] The Court

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55 *Id.* at 262 (citing Shapiro v. Thompson, 394 U.S. 618 (1969).).
56 *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963).).
57 Id. (citing Speiser v. Randall, 357 U.S. 513 (1958).).
58 Id. (citing Slochower **v.** Board of Higher Education, 350 U.S. 551 (1956).).
59 *Id.*, n. 9.
60 *Id.*, n. 9.
61 Goldberg v. Kelly, 397 US. 253, 263 (1970) (citing Cafeteria and Restaurant **Workers** Union v. McElroy, 367 U.S. 886 (1961),).
62 *Id.* at 261.
63 *Id.* at 267 (citing Grannis v. Ordean, 234 U.S. 385 (1914).).
64 *Id.* (citing Armstrong v. Manzo, 380 U.S. 545 (1965).).
65 *Id.* at 267-268.

found that the failure of the city's procedure to permit a personal appearance before the official determining eligibility, with or without counsel, and the resultant inability of the recipient to confront or cross-examine witnesses were constitutionally fatal to the adequacy of the procedures. Of particular importance to this article's central theme is the Court's analysis that:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision-maker in writing or secondhand through his case worker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not permit the recipient to mold his argument to the issues the decision-maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side cannot safely be left to him. Therefore a recipient must be allowed to state his position orally.[66]
>
> . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses.[67]

Not surprisingly, ***Greene*** was cited for this latter proposition.[68]

The question of whether the due process concept of a hearing embraced the right of the recipient to be provided with counsel was answered negatively, although the Court stated that the recipient "must be allowed to retain an attorney if he so desires";[69] unquestionably, the Court would view with favor provisions for providing counsel:

> Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.[70]

As a final element of due process the Court held that the impartial decisionmaker's conclusion must be founded solely on the law and evidence brought out at the hearing, as reflected in his written statement of the reasons for his decision.[71]

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66 Id. at 268-269.
67 Id. at 269.
68 See notes 33-38 supra and accompanying text.
69 Goldberg v. Kelly, 397 U.S. 253, 270 (1970).
70 Id. at 271.
71 Id.

Anyone seeking to analyze military due process must also become familiar with the case of *Perry V. Sindermann.*[72] Sindermann was a nontenured teacher in the Texas state college system who, during the last four years of his employment, had been employed on successive one year contracts. Disputes arose between him and the college's Board of Regents and, as a result, the Board did not offer him a new contract for the following academic year. The Board did not afford Sindermann a hearing to challenge the factual basis for the nonrenewal and although the Board gave no official statement of the reasons for the nonrenewal of his contract, they did issue a press release setting forth allegations of insubordination. Sindermann brought suit against the Board alleging, *inter alia,* that the failure of the Board to afford him an opportunity for a hearing on the reasons for the nonrenewal violated the fourteenth amendment's guarantee of procedural due process.

Sindermann argued that his interest in continued employment, while not secured by a formal contractual tenure provision, was secured by an equally binding understanding fostered by the college administration that constituted a *de facto* tenure program. He based his argument on a provision in the college's official faculty guide which read :

> Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the Faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

Additionally, he claimed reliance on policy guidelines issued by the Coordinating Board of the Texas College and University System that provided for some form of job tenure for persons who had been employed as long as he had been, although that policy did not apply directly to him.

The Court noted that in a companion case, *Board of Regents v. Roth,*[73] it had found that "property interests subject to procedural due process protections are not limited by a few rigid technical forms. Rather, 'property' denotes a broad range of interests that are secured by existing rules or understanding," [74] and that "[a] person's interest in a benefit is a 'property interest' for due process purposes if there are such rules or mutually explicit un-

[72] 408 U.S. 593 (1972).
[73] 408 U.S. 564 (1972).
[74] Perry v. Sindermann, 408 U.S. 593, 601 (1972).

derstandings that support his claim of entitlement to the benefit that he may invoke at a hearing." [75]

In *Sindermann,* the lack of a written contract with an explicit tenure provision was held not to have foreclosed the possibility that Sindermann had a "property interest" in being reemployed. The Court relied upon a general rule of the law of contracts, that binding agreements, not formalized in writing, may be "implied," [76] and its prior holdings that a "common law of a particular industry or of a particular plant" may supplant a collective bargaining agreement.[77] From these legal propositions, the Court concluded that there may be an unwritten "common law" in a university that employees shall have the equivalent of tenure.[78] While the Court noted that the finding of such a property interest would not entitle Sindermann to reinstatement, it would require the Board to grant him a hearing where the basis for his contract nonrenewal could be challenged.

IV. THE JUDICIAL VIEW OF DUE PROCESS IN MILITARY LAW

A. GENERALLY

The twentieth century opened with a judicial reaffirmation in *Reid v. United States* [79] of the then existing general rule that military actions taken with respect to those properly in the military service were beyond the scrutiny of the judiciary. Reid, an enlisted man, had been stationed at Fort Brown, near Brownsville, Texas, when a group of armed men rampaged through the town indiscriminately firing their weapons. While the townspeople were unable to make a positive identification of the gunmen, it was generally believed that they were soldiers from nearby Fort Brown. When investigators attempted to determine who the guilty parties were, they met absolute silence by the Fort Brown garrison. Subsequent investigations were equally fruitless and eventually the President ordered the discharge "without honor" of practically every enlisted man at Fort Brown. Reid sued to recover past pay as a result of the President's discharge action and the Government defended on the ground that the President was

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[75] *Id.*

[76] *Id.* at 602 (citing 3A CORBIN ON CONTRACTS, §§ 561-572A (1960).).

[77] *Id.* (citing Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579 (1960).).

[78] *Id.* at 602.

[79] 161 F. 469 (S.D. N.Y. 1908), *writ of error dismissed,* 211 U.S. 529 (1909).

authorized to issue the discharges. In declining to reach the merits of the issues presented the Court stated:

> Whether Reid or his comrades, or any of them, were guilty of the riotous disturbance in question; or whether Reid personally committed any infraction of good order or military discipline; or whether he is in fact a desirable soldier; or whether he knew or withheld anything tending toward the discovery of the perpetrators of the Brownsville riot; or whether, so far as Reid and the others are concerned, the President's action was unnecessarily severe, cruel, or unjust — are questions beyond this judicial investigation.[80]

Three years later in *Reaves v. Ainsworth* [81] an officer sought to judicially contest the Army's discharging him rather than retiring him as disabled due to mental illness. One of Reaves' arguments was that the Army's action was arbitrary, an abuse of discretion, and violative of due process. In upholding the Army's discharge of Reaves the Court commented that "[t]o those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts." [82]

The judicial views expressed in *Reid* and *Reaves* remained the law until the 1953 landmark Supreme Court case of *Burns v. Wilson* [83] which held that the basic constitutional guarantees, such as due process, applied to the military. While four separate opinions were written in the case, it is noteworthy that Justice Douglas was of the opinion that all constitutional claims of a serviceman may be subject to ultimate judicial review.[84] Mr. Justice Frankfurter advanced the view that the courts should set standards adjusted peculiarly to the military while discarding the traditional view of *Reid* and *Reaves*.[85]

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[80] *Id.* at 470.

[81] 219 U.S. 296 (1911).

[82] *Id.* at 304. See also, *e.g.*, United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); United States *ex rel.* Creary v. Weeks, 359 U.S. 336 (1922).

[83] 346 U.S. 137 (1953).

[84] *Id.* at 154. "If the military agency has fairly and conscientiously applied the standards of due process formulated by the Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate." *Id.*

[85] *Id.* at 149. "I cannot agree that the only inquiry that is open on an application for habeas corpus challenging a sentence of a military tribunal is whether that tribunal was legally constituted and had jurisdiction, technically speaking, over the person and the crime. Again, I cannot agree

While *Burns* involved constitutional questions in a military criminal proceeding, the Supreme Court was also faced in **1953** with a military administrative question, the outcome of which has significantly affected the soldier and his claim to the rights of due process. In *Orloff v. Willoughby*[86] a doctor drafted into the Army attempted to compel the Army to either commission him as an officer based on his status as a doctor or to discharge him. When the Army would do neither, Orloff sought relief by petitioning for a writ of habeas corpus. The specific issue involved was whether one lawfully inducted into the armed service could have the benefit of habeas corpus to obtain judicial review of his duty assignment.[87] The Court reached the merits of the case deciding adversely to Orloff on the traditional view that it had "found no case. where the court has assumed to revise duty orders as to one lawfully in the service." [88] More importantly, however, was the dictum in *Orloff:*

> But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.[89]

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that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials." ***Id.***

[86] 345 U.S. 83 (1953).

[87] ***Id.*** at 92.

[88] ***Id.*** at 94.

[89] *Id.* While *Orloff* carried forward, and more concretely articulated, a principle of nonreviewability of military administrative actions absent some action in excess of the Army's authority, the more crucial Constitutional problems in criminal proceedings had given members of the Court an opportunity in ***Burns*** to question such a ***laissez-faire*** attitude. **A** discussion of the panoply of issues associated with judicial review is beyond the scope of this article, ***see generally*** Suter, ***Judicial Review of Military Administrative Decisions,*** 6 **HOUSTON L. REV.** 55 (1968), but in more recent years the doctrine of nonreviewability has been reduced in scope. See, *e.g.*, Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

As recently as 1956 in Schustack v. Herren, 234 F.2d 134 (2d Cir. 1956), the Court of Appeals for the Second Circuit expressed the view that:

> No one can reasonably doubt that the Army has the power to discharge without a hearing and without assigning any reason; such power is indispensable to the effective management of the armed services and to the national defense; and with the exercise of that power no court can properly interfere.

Id. at 135. The author has not found any statutory authority contradicting the view expressed in ***Herren*** that the soldier facing discharge or, for

B. JUDICIAL RECOGNITION OF THE RIGHT TO AN ADEQUATE HEARING

The failure of the military departments to provide a pread-verse action hearing which would afford the service member the right of confrontation was the subject of judicial criticism in *Bland* v. *Connally*.[90] In *Reed* v. *Franke*,[91] however, the view was expressed that "[a] fact finding hearing prior to discharge is one way to protect plaintiff's rights, but it is not the only means of protection. . ." [92] "The fact that the hearing provided by statute does not precede, but follows, . . . separation from the service does not make the hearing inadequate. The statutory review is part of the protective procedure, and due process requirements are satisfied if the individual is given a hearing at some point in the administrative proceedings." [93] Other cases have held that

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that matter, when facing most adverse personnel actions should be afforded a hearing. In certain cases, to be discussed in the next section, the Army has provided for limited hearings depending on the nature of the action and the grade of the soldier. Consequently, judicial review in the due process area has generally been restricted to an examination of the action taken and the authority upon which it was predicated see, *e.g.*, Harmon v. Brucker, 355 U.S. 579 (1958), or to an examination of whether the service involved followed its own regulations. See, *e.g.*, Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962); Roberts v. Vance, 343 F.2d 236 (D.C. Cir. 1964). In both situations, the courts have recognized a right to procedural due process as found in the law and in the regulations granting specific safeguards to the individual soldier. See, *e.g.*, Hollingsworth v. Balcom, 441 F.2d 419 (6th Cir. 1971). Regulations themselves must also comport with notions of fundamental fairness, *e.g.*, Clackum v. United States, 148 Ct. Cl. 404 (1960); Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971).

[90] 293 F.2d 852 (D.C. Cir. 1961).

[91] 297 F.2d 17 (4th Cir. 1961).

[92] *Id.* at 27.

[93] *Id.* The Discharge Review Board referred to in *Reed*, established pursuant to 10 U.S.C. § 1553 is a post-action review board sitting only in Washington, D. C. and the aggrieved soldier desirous of obtaining a hearing is faced with the heavy and frequently insurmountable burden of travel and lodging expenses. In effect, the availability of the right, and the eventual outcome, may well depend solely on economic factors rather than on the merits of the case. Whether such a procedure can be said to comport with fundamental fairness is indeed questionable. Another post-action review board, the Army Board for the Correction of Military Records, established by Army Regulation No. 15-185 (28 Aug. 1970) pursuant to 10 U.S.C. § 1552, has as its function the consideration of "all applications properly before it for the purpose of determining the existence or an error or injustice." AR 15-185, para. 4. The board determines whether a hearing is warranted on any application, *Id.* at para. 11, and when an application is denied without a hearing, written findings, conclusions, and recommendations are not required. *Id.* at para. 10*c*. Like the Discharge Review Board, the Army Board for the Correction of Military Records sits in Washington, D. C., and the same deficiencies mentioned above apply to it also.

due process rights may be protected by provision of a written appeal without affording the individual a hearing.[94] This view of due process is appealing from the standpoint of administrative expediency, dictated by a principle of conserving combat effectiveness. However, the same type of argument, fiscal conservation, was advanced by the Government in ***Goldberg*** and the Court found that the Government, not the individual, was better able to absorb the hardships of delay occasioned by a preaction hearing.[95]

Two recent cases have directly addressed the question of whether or not a member of the military has a due process right to a preadverse action hearing and reflect a noteworthy change in judicial attitude. The first case, ***Wasson*** v. *Trowbridge*,[96] involved the expulsion of a cadet from the Merchant Marine Academy for engaging in "an unauthorized mass movement" [97] of his fellow cadets in throwing a Cadet Regimental Officer into Long Island Sound on **30** March 1967. Pursuant to the Academy's regulations pertaining to expulsion actions, he was provided with a detailed written statement of charges on 10 April, and was notified that a hearing before a Regimental Board of Investigation, composed of cadet officers, would be held on **13** April. Wasson submitted a written statement prior to the hearing and made a demand for counsel that was denied — the pertinent academy regulations did not provide for the appointment of counsel. Wasson challenged the composition of the Board on the ground that the cadet members were drawn from his Regiment, but the protest was rejected on the ground that none of the Board members had been involved in the incident under investigation. The hearing was held and Wasson was awarded sufficient demerits, in conjunction with previously awarded ones, to warrant his dismissal from the Academy. Pursuant to Academy regulations, Wasson appealed the decision to the Academy Superintendent who, after talking to Wasson, denied the appeal. The Superintendent then properly convened a Senior Board of Aptitude, Conduct and Discipline Review composed of Academy staff and faculty "to interview the Cadet and to review his entire discipline and conduct record at the Academy, and to determine whether or not the Ca-

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94 **Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971); Ansted v. Resor, 437 F.2d 1020 (7th Cir.),** ***cert. denied,*** **404 U.S. 827 (1971).**

95 **397 U.S. at 265-266.**

96 **382 F.2d 807 (2d Cir. 1967).**

97 ***Id.*** **at 810.**

det should be retained." [98] Wasson again demanded counsel; again, his request was denied. Wasson personally presented his case to the Board, but it recommended his dismissal. An appeal by Wasson to the Superintendent followed, but the appeal was rejected and the Superintendent recommended Wasson's dismissal to the Maritime Administrator whose action was considered to be only a formality.

Addressing the constitutional standard to be applied, the court noted the traditional test that it "must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand." [99] In its analysis of this test, the court found that:

> While the government must always have a legitimate concern with the subject matter before it may validly affect private interests, in particularly vital and sensitive areas of government concern such as national security and military affairs, the private interest must yield to a greater degree to the governmental . . . .[100] Few decisions properly rest so exclusively within the discretion of the appropriate government officials than the selection, training, discipline, and dismissal of the future officers of the military and Merchant Marine. Instilling and maintaining discipline and morale in these young men who will be required to bear weighty responsibility in the face of adversity — at times extreme — is a matter of substantial national importance scarcely within the competence of the judiciary. And it cannot be doubted that because of these factors historically the military has been permitted greater freedom to fashion its disciplinary proceedings than the civilian authorities.[101]

For Wasson, the implied personal interest, not discussed by the court, was a career as a Merchant Marine officer for which he had undergone three years of education and training.

The court concluded that the rudiments of a fair hearing were that the cadet: **(1)** Must be apprised of the charges against him; **(2)** Be given an adequate opportunity to present his defense both from the standpoint of time, the use of witnesses, and other evi-

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[98] *Id.* at 811.

[99] *Id.*

[100] In analyzing the requirements of due process the court contrasted the government's interest in *Wasson* with a lesser governmental interest in Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), ***cert. denied,*** 368 U.S. 930 (1961) where "a state supported university was required to hold a full hearing preserving in substantial degree the essentials of an adversarial proceeding before it could expel **a** student." 382 F.2d 807, 812 (2d Cir. 1967). For a stronger view of the government's interest than that expressed in *Wasson,* see Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971), where the war power was given transcendental importance in a case involving involuntary activation of **a** reservist.

[101] Wasson v. Trowbridge, **382** F.2d 807, 812 (2d Cir. 1967).

dence ; and **(3)** Be allowed to present his case to an impartial trier of fact.[102] Disagreeing with Wasson's argument that he was entitled to be represented by counsel, the court said:

> The requirement of counsel as an ingredient of fairness is a function of all the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial, and the government does not proceed through counsel, where the individual is mature and educated, where his knowledge of the events . . . should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.[103]

The issue presented in *Wasson* was again presented in **1972** in *Hagopian v. Knowlton.*[104] What minimum procedural due process must be accorded a cadet before he may be separated from a service academy? While Wasson was facing expulsion from the Merchant Marine Academy for having accumulated an excessive number of demerits, Hagopian had already been expelled from the United States Military Academy for the same reason. He challenged the particular procedure by which certain demerits were awarded[105] and the procedures followed by the Academy's Academic Board in determining whether a cadet whose accumulated demerits exceeded his allowance should be recommended for expulsion.

On May **31, 1972,** Hagopian was notified in writing that because of his deficiency in conduct he had been referred to the Academic Board for possible separation and that he had the right to present written evidence, not previously submitted. He did so

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102 *Id.*

103 *Id.*

104 **470** F.2d 201 (2d Cir. **1972).**

105 *Id.* The procedure challenged by Hagopian involved the awarding of demerits of a minor nature, particularly those awarded by his Tactical Officer. The Tactical Officer is responsible for instilling disciplined conduct in the cadets he supervises in a manner similar to the responsibilities of public school teachers in educating their students. After awarding the demerits the Tactical Officer notifies the cadet of the award and requests an explanation from the cadet. The cadet, if he desires, may submit an explanation to contest the demerit award. The Tactical Officer then reviews the reports which he initiated. He then notifies the cadet of the demerits awarded.

The court found no due process shortcomings in this procedure, finding that the Tactical Officer " . . . is not an adversary of the cadet but an educator who shares an identity of interest with the cadet whom he counsels from time *to* time as a future leader." *Id.* at 210. Additionally, the court found that the sanctions imposed for the individual award of minor demerits were minimal, and that an undue burden would be placed on the Academy's disciplinary system if a full hearing were required before the demerits were awarded.

by letter on June 2nd, but he did not dispute his delinquencies. On June 7th he was notified that the Academic Board, composed of eighteen members including the Academy Superintendent, would be meeting on the following day to consider his case. Hagopian telephonically sought legal advice from the Academy's legal department but was told by an attorney that they were discouraged from counselling cadets whose cases were called before cadet boards. Thus, Hagopian was denied the advice of counsel, was prevented from appearing before the Academic Board, and was not permitted to present any witnesses or cross-examine any adverse witnesses. The Academic Board recommended Hagopian's separation from the Academy and the separation was subsequently approved by the Secretary of the Army. The due process standard applied by the court was substantially the same as the one applied in *Wasson* but with an additional consideration of "the burden that would be imposed by requiring use of all or part of the full panoply of trial-type procedures", correctly noting that "[i]t could hardly be contended . . . that disciplinary action on the field of battle must conform to procedures applicable to the demotion of a civilian employee on the home front." [106]

In examining the issue of what procedural processes Hagopian was due, the court agreed with the government's argument that "we should not apply automatically the full dress standards required for hearings to revoke probation," [107] or parole,[108] or the criminalization and incarceration process after trial.[109] The court also found the factors in expelling a service academy cadet significantly different from those involved in terminating welfare benefits,[110] or in terminating occupancy of public housing.[111] On the other hand, factors in *Hagopian* were also distinct from those in cases where Ready Reservists are ordered to active duty for failure to satisfactorily perform their reserve obligation.[112] In the situation involving the activation of a reservist, the court found that the personal interest involved was limited primarily to a

[106] ***Id.*** at 207.

[107] *Id.* at 208 (citing Mempa v. Rhay, *389* U.S. *128* (1967).).

[108] ***Id.*** (citing United States ***ex rel.*** Bey **v.** Connecticut State Board of Parole, 443 F.2d 1079 (2d Cir.), ***vacated as moot,*** 404 U.S. 879 (1971).).

[109] ***Id.*** (citing Sostre **v.** McGinnis, 442 F.2d 178 (2d Cir. 1971), ***cert. denied,*** Oswald **v.** Sostre, 405 U.S. 978 (1972).).

[110] ***Id.*** (citing Goldberg **v.** Kelly, 397 U.S. 253 (1970).). ***See*** text accompanying notes 53-71, ***supra.***

[111] *Id.* (citing Escalera **v.** New York City Housing Authority, 425 F.2d 853 (2d Cir.), ***cert. denied,*** 400 U.S. 853 (1970).).

[112] ***Id.*** (citing O'Mara **v.** Zebrowski, 447 F.2d 1085 (3d Cir. 1971); Antonuk **v.** United States, 445 F.2d 592 (6th Cir. 1971); and Ansted **v.** Resor, 437 F.2d 1020 (7th Cir.), ***cert. denied,*** 404 U.S. 827 (1971).).

change in the form of military service required,[113] while the Academy cadet "faces the far more severe sanction of being expelled from a course of college instruction which he has pursued with a view toward becoming a career officer and of probably being forever denied that career.'' [114] The court found that "especially with respect to the subjective evaluation of the cadet's potential, the opportunity to personally appear and present his case may affect considerably the credibility which the members of the Academic Board attach to the cadet's appeal." [115] "The opportunity to bring witnesses to appear in his behalf may also strengthen the impact of his case above the frail impression which a written submission would make." [116] Here, as in ***Goldberg,*** the court opined that "[p]articularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decisions." [117] In conclusion, the court held that Hagopian must be permitted a personal appearance, be allowed to present evidence, and be permitted to call witnesses in his behalf before the Academic Board.

The court went on to find that the informality of the required hearing and Hagopian's education and training, as was the case in Wasson, militated against representation by government furnished counsel, but that Hagopian was entitled to seek the advice of counsel in the preparation of his defense.

Thus, a critical point in the court's analysis of the right to counsel as an ingredient of an adequate hearing in both *Wasson* and *Hagopian*, and upon which the issue of an adequate hearing turns as it relates to enlisted personnel faced with adverse administrative action, is the realistic recognition that the college level education and training of the respective cadets negated a due process need for counsel in those particular cases, and not that counsel was never required in any hearing. A soldier of average intelligence and posessing a high school education may not need counsel at his shoulder to insure an adequate hearing of his case, but a dull or functionally illiterate soldier, particularly in a case primarily involving documentary evidence, surely would.

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113 *Id.* The personal interest in Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971), was found by that court to be greater than Hagopian's. The court in ***Antonuk*** found that "[t]here is a significant risk that he might be wounded in battle or even killed." 445 F.2d at 594. The difference in the viewing of the personal interests involved by the respective courts is illustrative **of** the "judicial value choosing inherent in due process adjudication." **See** text accompanying footnote 16, ***supra.***

114 470 F.2d 201, 209 (2d Cir. 1972).

115 *Id.* at 211.

116 ***Id.***

117 *Id.*

V. ADVERSE FUNCTIONAL ELEMENTS OF THE ARMY INTEGRATED MANAGEMENT SYSTEM

A. GENERAL

It cannot be doubted that the Army requires a sophisticated and complex regulatory system to manage personnel resources in an economical and efficient manner attuned to the accomplishment of its assigned missions. To this end, the Army publicly announced the implementation of the Army Integrated Management System (AIMS) which has as its purpose the integration of functional elements responsible for enlisted force management.[118] Several of those functional elements will be analyzed here, solely with respect to the soldier's due process right to be fairly heard.

B. REVOCATION OF SECURITY CLEARANCES

Security clearances for both soldiers and civilians employed by the Army may be revoked on a number of grounds.[119] When a commander proposes to deny or revoke a clearance on any one ground, or a combination of grounds, he need only initiate a summary procedure falling far short of the procedures involved in *Greene.* The regulatory procedure only requires that he: **(1)** Notify the person involved in writing of the proposed action ; **(2)** Explain the reasons for the contemplated action (unless one of the exception hereinafter noted applies) ; and **(3)** Offer "the individual every reasonable opportunity to refute or explain the derogatory information (preferably in writing)." [120] No personal appearance before the commander proposing to revoke the clearance is required, no right to confront or cross-examine the source of the derogatory information is provided, and no provision exists for the presentation of any witnesses by the individual concerned in his own defense, nor for representation of the individual by counsel. Additionally, the individual may not even be entitled to be advised of the reasons for the proposed denial or revocation if "the release of information is prohibited by a non-Department of the Army agency which furnished it ; would compromise an investigation in progress or a confidential or family source; is clearly contrary to the national interest; or may be detrimental to the mental health of the member concerned." [121]

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[118] Army Personnel Ltr. No. 11-71 (DCSPER, December **1971).**

[119] Army Reg. No. 604-5, para. *a*(1)-(23) (4 May **1972)** [hereinafter cited as AR 604-5].

[120] Id. at para. 4-5*a*.

[121] Id.

Even if one of these conditions should reasonably exist there is no provision for furnishing the member so much as a summary of the information relied on by the commander. Thus, the member may find himself faced with the situation that he is told his security clearance is going to be revoked or denied on grounds that cannot be disclosed but that he has the opportunity to refute this undisclosed and undescribed information in writing. This remarkable situation might rationally be defended on the reasonable ground of the Army's interest in protecting security information if it were not for the fact that the loss of a security clearance can directly result in the termination of the soldier's miliary career.[122] The personal interests of the soldier, who may have devoted years of honorable service to the Army, who is denied his chosen career, who will lose years of retirement benefits, who will be stigmatized as a security risk and thus deprived of many civilian employment opportunities, are immaterial in the regulatory scheme. This regulatory scheme does not weigh or balance any interests as was the case in *Greene, Cafteria Workers or Hannah;* [123] rather the governmental interest is unilaterally raised by fiat to the exclusion of all others, and considerations of due process are substantially ignored.

C. *REDUCTION FOR CIVIL CONVICTION*

An enlisted soldier in the grade of **E-4** or below may be reduced one grade by his company commander upon conviction by a civil court of an offense not warranting discharge or upon adjudication as a juvenile offender [124] even absent any showing that the conduct for which he was convicted impaired his ability to perform his military duties.

The authority to initiate this reduction procedure lies in the discretion of the unit commander who is also authorized to impose the reduction.[125] It may be imposed without notice and without giving him any opportunity either in writing, or by way of personal appearance, to contest the action.[126] Written appeals may be submitted within thirty days of the initial action, but there is no requirement that the soldier be advised of the availability of

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122 **Army Reg. No. 601-280, para. 2-3 (Change No. 5, 29 June 1971).**

123 **See notes 33-51** *supra* **and accompanying text.**

124 **Army Reg. No. 600-200, para. 7-26***b* **(1) (c) (Change No. 47, 10 Feb. 1972) [hereinafter cited as AR 600-2001, Dep't of Army Message DAAG-PSA-PE 23 May 1972 subject: Interim Change to AR 600-200 (Change No. 50).**

125 **AR 600-200, para. 7-26***a* **(1).**

126 **Dep't of Army Message DAAG-PSA-PE, 23 May 1972, subject: Interim Change to AR 600-200 (Change No. 50), para. 9.**

the appellate procedure which also does not provide for a hearing.[127]

Enlisted soldiers in the grade of E-5 through E-9 fare somewhat better. They cannot be reduced in grade for a civil criminal conviction until such a reduction has been recommended by a reduction board composed of three members for cases in which the soldier holds the grade E-5 or E-6, and of five members for E-7 through E-9.[128] The soldier respondent is given a minimum of fifteen working days written notice of the hearing, and be represented by military counsel furnished free of charge by the government or he may hire civilian counsel at his own expense.'?!' He may challenge any member of the board for cause [130] and may also request the appearance before the board of any witnesses whose testimony he believes to be pertinent to his case.[131] Military witnesses who are not a "substantial distance" away may be ordered by their commanders to attend,[132] but the board has no subpoena power and cannot compel the attendance of civilian witnesses.[133] The respondent may cross-examine any witnesses appearing before the board;[134] the board may, however, base its decision solely on the basis of affidavits or the unsworn testimony of persons who are unable or unwilling to appear personally.[135] Copies of any documentary evidence used before the board are provided the respondent. If the respondent chooses, he may remain silent under the provisions of Article **31,** Uniform Code of Military Justice, or he may testify and subject himself to cross-examination.[136]

Any discussion of the procedural deficiencies in these reduction actions must center on the procedures applicable to soldiers in the grade of **E-4** and below since there is, in fact, no procedure. While a reduction in grade subjects the lower ranking soldier to disabilities similar to those suffered by higher ranking soldiers, he

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127 *Id.* at para. **11.**

128 *Id.* at para. 9.

129 AR 600-200, App. 5, para. 14*c*(2).

130 *Id.* at para. 14*c* **(4).**

131 *Id.* at para. 14*c*(5).

132 Army Reg. No. 15-6, para. ***13b*** (12 August 1966) [hereinafter cited as AR 15-61.

133 2 Joint Travel Regs. for the Uniformed Services, para. C 5000.2 (10) (Change No. 53, 2 Jan. 1970). A witness appearing on invitational travel orders may be paid per diem and travel if the presiding officer finds **that his** testimony is substantial and material and that an affidavit would not be adequate. **48** Comp. Gen. 664 (1969).

134 AR 600-200, App. ***5***, para. 14*c*(7).

135 AR 15-6, para. 10.

136 AR 600-200, App. ***5***, para. **14*c*(6).**

has no effective role or means of effectively contesting the action. He is presented with the reduction as an accomplished fact without the most basic due process protection — the right to be heard (in some form) on his own behalf.

The most serious due process deficiency of the reduction board is not a procedural one, but a substantive one. The regulation fails to prescribe any substantive guidelines for the board to follow in determining whether or not the soldier should be reduced in grade. As a result, each board member is at liberty to base his decision, and his vote, on personal criteria or private whim. The same criticism applies to the convening authority who is left without standards that are susceptible to consistent and even application. This is important, since it is the convening authority who initially decides to send the case to a board and who approves or disapproves the recommendation of the reduction board. A procedural weakness in the reduction board action is that the regulation fails to provide for, or even recommend, that the board's action be subject to a legal review.

By definition, a reduction in grade affects the soldier's standing relative to his peers, seniors and subordinates. His pay is detrimentally affected in that he is paid at a lower rate; his entitlement to government furnished quarters may be adversely affected; and the reduction becomes a matter of permanent record which in turn may adversely affect his chances for promotion in the future. Additionally, his duty position may be in jeopardy and the conviction may become evidence in a subsequent separation action for unfitness where he would be subjected to the risk of being awarded an undesirable discharge.[137]

D. REDUCTION FOR INEFFICIENCY

"An individual who has served in an assigned position in the same unit, under the same commander, for ninety days or more may be reduced one grade for inefficiency . . ." [138] if the commander concerned has reduction authority.'"[139] The regulatory scheme for reductions for inefficiency is similar to that prescribed for reduction for misconduct except that: (1) only a one grade reduction for inefficiency is permittea where a one or more grade reduction may be imposed as a result of a civil conviction, (2) the soldier must be advised in writing of the proposed action, (3)

[137] Army Reg. No. 635-200, para. 13-5*a*(1), and para. 13-31*a* (Change 39, 23 Nov. 1972) [hereinafter cited as AR 635-2001.

[138] *Id.* at para. 7-26*b*(2)(a).

[139] *Id.* at para. 7-26*a*(1)-(3).

the soldier may submit matters in rebuttal, and **(4)** the soldier is informed of his right to appeal.[140] Inefficiency is defined as "demonstration by an individual of distinctive characteristics which reflect his inability to perform the duties and responsibilities of his grade and MOS," [141] and "may also include any act or course of conduct affirmatively evidencing that the enlisted member concerned . . . lacks those abilities and qualities required and expected of a person of that grade and experience." [142] Additionally, "commanders may consider any act or acts of misconduct including conviction by a civil court as bearing on efficiency as well as longstanding indebtedness which the individual is not attempting to resolve." [143]

Because of the similarity of procedures in reductions for inefficiency and for civil conviction, similar due process shortcomings are evident: lack of readily ascertainable standards; lack of the right of confrontation for soldiers in the grade of **E-4** and below; lack of any mandatory legal review; and the inherently discriminatory separation of lower ranking enlisted men as a class from higher ranking soldiers who are afforded the minimal protection of a board hearing.

It should be noted that the practical adverse effect of a reduction for inefficiency may be even more severe than that resulting from a civilian criminal conviction. Whereas the civil conviction may be minor and be recognized as such, the reduction for inefficiency is readily recognized to be duty connected, and therefore may stand as a more severe adverse action in the eyes of the soldier's subsequent commanders.

E. BAR TO REENLISTMENT

> The policy of the Department of the Army is that only personnel of high moral character, professional competence, and demonstrated adaptability to the requirements of the professional soldier's moral code of exemplary performance and conduct shall be extended the privilege of reenlisting in the Regular Army. Persons who cannot or who do not measure up to and maintain such standards, and whose separation under appropriate procedures is not warranted, will be barred from further service. . . ."[144]

In a recent change to the regulation it is stated that "the fact an individual may have served honorably for a number of years,

[140] Id. at para. 7-26*b*(2)(a).
[141] Id. at para. *7-2h.*
[142] Id. at para. 7-26*b*(2)(e).
[143] *Id.*
[144] Army Reg. No. 601-280, para. 1-28 (Change No. **5,** 29 June 1971) [hereinafter cited as AR 601-2801.

though considered in the evaluation of his service, does not **prohibit** the initiation of bar to reenlistment procedures if such action is otherwise appropriate." [145] The general substantive criteria to be applied by the commander in identifying untrainable [146] and unsuitable [147] personnel are found in seventeen frequently encountered situations or combinations of situations listed in the regulation.[148] An examination of a soldier's conduct or duty performance where the existence or nonexistence of certain facts is critical to the soldier concerned. It is precisely in this type of situation that the due process hearing right can be of inestimable value, not only to the soldier, but also to the Army.

The regulatory procedure to effect a bar to reenlistment is simple and straightforward.[149] The soldier's unit commander prepares a statement summarizing the basis for his intention to initiate bar proceedings. The statement is then given to the soldier who has thirty days to prepare his written response and to collect documents or materials he believes may be pertinent to his case. An extension of the thirty day period may be granted in the discretion of the unit commander. After the soldier has returned the notification and his written matters in rebuttal, the file is for-

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[145] *Id.* at para. 1-29*e*.

[146] *Id.* at para. 1-30*a*. "These individuals who are found to be so lacking in abilities and aptitudes as to require frequent **or** continued special instruction or supervision. . . ." ***Id.***

[147] *Id.* "These persons may exhibit their unsuitability through interests and/or habits which are detrimental to the maintenance of good order and discipline. They may have records of habitual minor misconduct requiring corrective or disciplinary action." *Id.*

[148] *Id.* at para. 1-30*c*(1)-(17). The situations are:

(1) Late to formations, details, or assigned duties.
(2) AWOL for 1 to 24-hour periods.
(3) Losses of clothing or equipment.
(4) Substandard personal appearance.
(5) Substandard personal hygiene.
(6) Persistant indebtedness, reluctance to repay or late payments.
(7) Recurrent Article 15 punishments.
(8) Frequent traffic violations.
(9) "Rides" sick call without medical justification.
(10) Late returning from pass or leave.
(11) Misses bed check.
(12) Cannot follow orders; shirks; takes too much time; is recalcitrant.
(13) Cannot train for a job; apathetic; disinterested.
(14) Cannot adapt to military life; uncooperative; involved in frequent difficulties with fellow soldiers.
(15) Failure to manage personal, marital, and/or family affairs.
(16) Involvement in discreditable incidents in the civilian community.
(17) Involved in incidents of moral turpitude evidencing a character deficiency. ***Id.***

[149] *Id.* at para. 1-31*b*, e, and *d*.

warded to the next higher commander in the chain of command who indorses the file by adding his recommendation, and who then forwards the file to the officer exercising general court-martial jurisdiction over the soldier. It is this officer who approves or disapproves the bar to reenlistment for personnel with less than ten years' service. For personnel with over ten years' service the decision is made by the major commander or Headquarters, Department of the Army.[150]

It is apparent that credibility, veracity, and personality are inextricably intertwined here. Again, the value of a personal appearance before the commander recommending the bar would be of inestimable value to all the parties: the soldier, the commander and the Army. For the individual, the opportunity to plead his case on a face-to-face basis could be far more effective than a response on paper, particularly when the commander does not have personal knowledge of the underlying facts of the bar to reenlistment. Inaccurate, biased or even untruthful information provided by others could be more readily countered, attacked or explained in a personal appearance. A personal appearance would also benefit the commander; he would have an opportunity to judge the strength or weakness of his own recommendation to bar the soldier.

If a hearing is not to be afforded the soldier at the lowest level of command, the seriousness of the contemplated action suggests that the hearing be held by the next higher commander. This higher commander will have an added measure of experience to apply to the situation. The action by the general court-martial convening authority in directing the bar is too far removed from the factual basis of the case to adequately protect the interest of either party. Additionally, by not having the benefit of even the most rudimentary type of hearing report, the approving authority is relegated to looking for only the most blatant abuse of discretion by those who have already acted. Provision for some type of hearing is particularly important when it is considered that the soldier has no right to the assistance of military counsel at any time during the bar procedure.[151]

The weaknesses of a written rebuttal are apparent when one considers that the ability to effectively communicate by writing is a direct result of education, training, or socio-cultural background. When a written response is the only means provided by a regu-

[150] Id. at para. 1-31*c*(1), (2), and (3).

[151] U. S. DEP'T OF THE ARMY, PAMPHLET No. 27-12, LEGAL ASSISTANCE HANDBOOK para. 1-1 (1970).

latory scheme for the protection of individual interests, and when, on the basis of the regulation involved a hearing is denied, such a procedure is fundamentally unfair as it inherently discriminates against those who, by reason of various deprivations, are unskilled in written self expression and are therefore incapable of adequately protecting their own interests. Such a regulatory scheme, even in the military, is violative of the concept of due process.[152]

F. MILITARY OCCUPATIONAL SPECIALTY (MOS) RECLASSIFICATION

Due to the diverse personnel skills a twentieth century Army requires to function effectively in increasingly complex warfare, the proper classification of personnel assumes great importance. While the full range of personnel classification procedures is beyond the scope of this article, that portion of the classification system wherein a soldier's job, qualification designation, and MOS may be involuntarily changed with concomitant loss of special kinds of pay is a proper subject of analysis.

The regulatory scheme providing for **MOS** reclassifications enumerates seven basic situations where mandatory reclassification is required.[153] The soldier is entitled to a hearing before a reclassification board (1) if the proposed mandatory reclassification would subject him to a loss of proficiency pay, **(2)** if he is serving on an enlistment for which he has received an Enlistment Bonus or a Variable Reenlistment Bonus, or (3) if his physical profile classification is changed to one below that established for the MOS in which he is serving.[154] Soldiers facing a nonmandatory reclassification may request **a** reclassification board hearing,[155] although the permissive language of the regulation does not require that such a hearing be held.

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[152] See Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) and Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972).

[153] AR 600-200, para. 2-30a(1)-(7). They are:
(1) Erroneous award entry;
(2) Medical (physical) inability;
(3) Disciplinary action;
(4) Loss of qualifications;
(5) Lack of security clearance; (See text accompanying notes 119-123, ***supra)***;
(6) Appointment to a grade not commensurate with, or authorized for, previously held MOS;
(7) By direction of Headquarters, Department of the Army.

[154] Id. at para. 2-29*c*, and ***d.***

[155] Id. at para. 2-29*c*.

A reclassification board hearing is presided over by a commissioned officer and is composed of at least two other members who may be commissioned officers, warrant officers, or enlisted men of the highest three grades.[156] There is no requirement that the board members be technically proficient in the MOS of the soldier appearing before the board, although the board may have such a member.[157]

Open sessions of the board are to be formal but are not to "create the impression of a courts-martial or a reduction board."[158] The senior officer present acts as board president and must explain to the soldiers appearing before it the purpose of the hearing and the manner in which it will be conducted."[159] Specific provision is made in the regulation for furnishing individual records, documents and correspondence to the board members, although no such provision is made for providing these materials to the soldier. He must assert his right to them under a different, but related regulation.[160] The soldier may be represented by an officer, warrant officer, or noncommissioned officer[161] but he has no right to qualified legal counsel.[162] He may testify in his own behalf and have, as a matter of substantive right, matters of doubt which cannot be decided or supported factually resolved in his favor.[163] He also has "the *privilege* of challenge for cause . . ., where it appears clearly that a challenged . . . member of a board of officers cannot impartially participate . . . ."[164] In addition, a related regulation provides that he may call witnesses in his own behalf.[165]

The officer who appointed the reclassification board has the authority to approve the recommendations of the board, disapprove them and order another hearing by the same or another board, or to disapprove the recommendations of the board and decide for himself the action to be taken.[166] There is no provision that the appointing authority is bound by a recommendation favorable to the soldier, nor are any particular criteria prescribed for the evaluation of evidence by either the reclassification board or the appointing authority.

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156 *Id.* at para. **2-39.**
157 *Id.* at para. **2-39***c.*
158 *Id.* at para. **2-41b.**
159 *Id.* at para. 2-41*b*(2).
160 **AK 15-6,** para. 6*a*(5).
161 **AR 600-200,** para. **2-41b**(4).
162 **AR 15-6,** para. **8.**
163 **AR 600-200,** para. 2-41*b*(6).
164 **AR 15-6,** para. **5** (Emphasis added.).
165 *Id.* at para. 6*a*(3).
166 **AR 600-200,** para. **2-42.**

The due process deficiencies of the MOS reclassification procedure are readily apparent: **(1)** The board need not have as a member one who is technically qualified to judge the soldier's qualifications or fitness to hold the MOS which is in jeopardy; **(2)** The qualitative criteria prescribed for weighing the evidence before the board is unduly vague; **(3)** The standard for the soldier to challenge a member of the board for cause is erroneous since it is considered to be a privilege rather than a right founded in fairness, and that a clear indication of impartiality in a board member is required for challenge rather than only an indication of the same; and **(4)** The appointing authority is not bound by the findings of his own board.

G. INVOLUNTARY SEPARATIONS FOR UNSUITABILITY AND UNFITNESS

> Inevitably, in a society as large and complex as the Military Establishment, there are and will be individuals who, for a variety of just and appropriate reasons, must be involuntarily removed from the service in the interest of national security, the preservation of good order and discipline, and for the sound and efficient operations of the military service.[167]

That is not to say, however, that the procedures used for such removal may be beyond the basic protections afforded by the United States Constitution.

Based on a Department of Defense Directive[168] the Department of the Army has provided by regulation for the involuntary separation of soldiers for unfitness and unsuitability.[169] Unfitness is generally characterized to include frequent incidents of misconduct[170] while unsuitability generally includes inaptitude or in-

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[167] Statement of Mr. Niel Kabatchnick, ***Hearings on Constitutional Rights of Military Rights of Military Personnel Before the*** *Subcomm. on* ***Constitutional Rights of the Senate Comm.*** *on* ***the Judiciary,*** 87th Cong. **2d** Sess. ***552 (1962).***

[168] Dept. of Defense Directive No. ***1332.14 (20*** Dec. ***1965).***

[169] **AR** ***635-200,*** Chapter ***13.***

[170] *Id.* at para. 13-5*a*. Unfitness generally includes:

(1) Frequent incidents of a discreditable nature with civil or military authorities;

(2) Sexual perversion;

(3) Drug abuse;

(4) An established pattern of shirking;

(5) An established pattern showing dishonorable failure to pay just debts;

(6) An established pattern showing dishonorable failure to support dependents; and

(7) In-service homosexual acts. *Id.*

ability to meet minimum military standards."[171]

The regulation provides that when the soldier has not or will not respond to rehabilitation attempts and is not qualified for a medical discharge, his commander may initiate separation action. At this time the soldier is advised of the proposed action, his right to a hearing where he will be represented by military counsel, and his right to submit rebuttal statements. He may waive these rights, but only after counselling by a military attorney.[172]

The case is forwarded to the appropriate discharge authority, through the chain of command, and if a board was requested, the discharge authority will appoint a board of three officers to hear the case. It is at this stage that the first procedural deficiency occurs. It is only after the hearing has been directed that action is first taken to prevent the transfer or separation [173] of essential military witnesses. Properly, the inquiry into the status of witnesses should occur at the time the unit commander is advised by the soldier that a hearing before a board of officers is demanded. If it is not done at that point, essential witnesses may well prove to be unavailable at the time of the hearing with the result that the soldier may be deprived of what could be essential testimony.

A minimum of fifteen days written notice must be provided to the respondent soldier, although for overriding reasons the fifteen day period need not be given.[174] No example or definition of overriding reasons is given in the regulation and, if such reasons should exist, no provision is made for an irreducible number of days to which the soldier may be entitled as a matter of right.

At the hearing the board president is required to give certain advice to the respondent including the advice that he is entitled to be represented by counsel if he should initially appear without counsel.[175] The respondent may challenge board members only for cause [176] and may request the appearance before the board of any

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[171] *Id.* at para. 13-5*b*. Unsuitability generally includes:
(1) Inaptitude;
(2) Character and behavior disorders;
(3) Apathy;
(4) Alcoholism; and
(5) Homosexual tendencies. *Id.*

[172] *Id.* at para. 13-19.

[173] *Id.* at para. 13-17*d*.

[174] *Id.* at para. 13-22.

[175] The respondent is entitled to be represented by a military attorney only if the separation action is for unfitness. AR 635-200, para. 13-19*a*. If the separation is for unsuitability counsel need only be a commissioned officer in the grade of First Lieutenant or higher. *Id.* at para. 13-19*b*.

[176] **AR** 15-6, para. 5; AR 635-200, para. 13-22*b*(2).

witnesses he believes to be pertinent to his case.[177] The regulation provides the respondent must:

> . . . specify in his request the type of information the witness can provide. The board will secure the attendance of a witness if it considers that he is reasonably available and that his testimony can add materially to the case. The attendance of military witnesses under the control of the convening authority will be ordered if reasonably available. The attendance **of** other military witnesses will be requested through command channels. However, witnesses not on active duty must appear voluntarily and at no expense to the government.[178]

The respondent may cross-examine witnesses who do appear.[179] A verbatim record of the proceedings is not required to be kept except for the findings and recommendations of the board which may be conclusory and summary in nature.[180]

Substantively, no evidentiary rules are prescribed except for the vaporous standard that ". . . there will be admitted in evidence without regard to technical rules of admissibility any oral or written matter (including hearsay) which in the minds of reasonable men is relevant and material." [181] That criteria is not made any more definite by the standard of proof to be used by the board in evaluating the evidence before it: "Each finding must be supported by substantial evidence, which is defined as such evidence as a reasonable man can accept as adequate to support a conclusion." [182] And, "The president of the board will insure that sufficient testimony is presented to enable the board to fairly evaluate the usefulness of the individual." [183]

The board may recommend separation because of unfitness or unsuitability with an indication of the type of discharge to be awarded, or retention with an indication of the type of duty which it is believed the soldier can perform satisfactorily.[184] The convening authority must refer any case involving an undesirable discharge to a Judge Advocate General Corps officer for legal review prior to taking his action.[185] The convening authority may approve the recommendations of the board for separation and the type of discharge, suspend execution of the discharge, or

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177 **AR 635-200,** para. **13-22b(3).**
178 *Id.*
179 *Id.* at para. **13-22***b*(6).
180 *Id.* at para. **13-22f.** See **AR 635-200,** Appendix **C,** p. C-15, for an example of acceptable findings.
181 **AR 15-6,** para. 10.
182 *Id.* at para. **20.**
183 **AR 635-200,** para. **13-22e.**
184 *Id.* at para. **13-23.**
185 *Id.* at para. **13-26.**

change the basis for separation and the character of the discharge to a more favorable one.[186] He may not direct a separation if the board recommended retention, or direct a discharge of a lesser character than that recommended by the board.[187] The board's findings and recommendations are not final, however, since the convening authority may forward a board recommendation for retention to Headquarters, Department of the Army for separation authority.[188]

A soldier discharged for unfitness will receive an undesirable discharge unless some grounds exist for granting an honorable or general discharge.[189] A soldier separated for unsuitability will receive an honorable or general discharge as merited by his record.[190] In either case the soldier will generally be barred from reenlistment.[191]

An examination of the applicable procedures reveals general areas where the supposed "protection" lacks credibility or is subject to abuse. First, the delay in identifying and retaining available witnesses can and often does thwart the soldier's efforts to cross-examine adverse witnesses or present favorable witnesses. The exception to the fifteen day notice provision could be abused due to the lack of guidance in determining what is an overriding reason. The regulation speaks of best evidence, not admitting rumors, and using only evidence which is relevant and material. However, the regulation does not establish any positively worded substantive rules of evidence.[192]

It is true that the individual has the right to a hearing and generally to personal appearance, and can call available witnesses and be represented by counsel (not always a lawyer). This minimum of due process, however, does not balance out the "harm caused by the Government" in the elimination action.

There is a significant distinguishing factor in the separation for unsuitability and for unfitness generally lacking in the administrative procedures discussed previously: in the separation action the character of the discharge, in addition to revealing the reason for the separation, stigmatizes the recipient for life, and

186 *Id.*
187 *Id.* at para. 11-36*e*.
188 *Id.* at para. 13-26*d*.
189 *Id.* at para. ***13-31a.***
190 *Id.* at para. ***13-31b.***
191 ***Id.*** at para. ***13-34.***
192 For a comprehensive discussion of the evidentiary standards involved in military administrative discharge proceedings, ***see*** Lane, ***Evidence*** *and* ***the Administrative Discharge*** *Board*, 55 MIL. L. REV. 95 **(1972).**

particularly so if an undesirable discharge was issued. The undesirable discharge and its adverse effects on the recipient's life are universally recognized. The Army acknowledges this fact when it requires the soldier facing involuntary separation action to sign a statement acknowledging his realization of that very fact.[193] Judicial recognition has come about in strong language:

> There can be no doubt that [an undesirable] discharge . . . is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against a serviceman's character, patriotism or loyalty.[194]

In the civilian business community, employers generally won't grant an employment interview to a man with an undesirable discharge,[195] and the public generally views the undesirable characterization of a discharge as applying to the whole man, a failing to look behind the label.[196] Even the general discharge has been recognized as imposing a stigma on the recipient since "[a]ny discharge characterized as less than honorable will result in serious injury."[197] Recent congressional hearings reinforce these views with respect to both undesirable and general discharges.[198]

A balancing of interests in the involuntary separation situation reveals a duality and merging of governmental and Army interests. While the Army's main interest is the expeditious separation of personnel incapable or unwilling to meet minimum standards, it should also be interested in using procedures that are conducive to creating the belief and feeling among soldiers that they will be treated fairly and be given reasonable protection when an adverse action which may affect the rest of their life is initiated. In the same vein, the Army should be interested in

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193 AR 635-200, Fig. 13-1. "I understand that I may expect to encounter substantial prejudice in civilian life in the event a general discharge under honorable conditions is issued to me. I further understand that, as the result of the issuance of an undesirable discharge under conditions other than honorable, I may be ineligible for many or all benefits as a veteran under both Federal and State laws and that I may expect to encounter substantial prejudice in civilian life." *Id.*

194 Stapp v. Resor, 314 F. Supp. 475, 478 (S.D. N.Y. 1970).

195 Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation,* 59 MIL. L. REV. 1, 14 (1973).

196 *Id.*

197 Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961).

198 *Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit the Separation of Members of the Armed Services Under Conditions Other Than Honorable Before Subcomm. No. 3 of the House Comm. on Armed Services,* 92d Cong., 1st Sess.. at 5988-6000 (1971).

retaining competent soldiers who, for one reason or another, may be the undeserving object of a commander's wrath. On the Government's side, it should be interested in providing procedures which will tend to minimize future societal expenditures, like welfare, for those ex-soldiers who cannot obtain gainful employment because of the way they were separated from the service and the character of the discharge they were issued. There is a certain overlap of governmental, Army, and individual interests in the involuntary separation situation. The issue is not which of these sometimes conflicting interests is overriding or paramount, but where the balance is to be struck. Striking the proper balance would seem to be effectuated by insuring due process guarantees to a full and fair hearing.

H. QUALITATIVE MANAGEMENT

> Qualitative management is a system intended to enhance the quality of the career enlisted force. It provides for the selective retention of personnel, improved career progression, and denial of reenlistment to the nonprogressive and nonproductive. The basic premise of the program is that an individual must establish his eligibility to remain in the Army as a careerist by developing his potential and by demonstrating his efficiency. The ultimate result intended is to upgrade both the qualitative content and the public image of the career enlisted force.[199]

While three separate procedures are used to attain the stated goal of the Qualitative Management Program, only the procedure involving the qualitative screening of enlisted personnel records will be discussed in this article.

The qualitative screening procedure involves three distinct steps.[200] First, low quality or low potential personnel are identified by a computer printout showing their relative standing within their grade Army-wide, based on proficiency scores and periodic evaluation scores. The second step is consideration of the soldier's record by a screening board at either his installation or at Headquarters, Department of the Army[201] to determine if a pattern of low performance exists. Third, the soldier who is found to be below par is denied reenlistment, thus his Army career is involuntarily terminated. The author is particularly concerned with the screening board, since the board does not hold a hearing at which the soldier can be present.

The screening board is composed of at least five members, in-

[199] **AR 600-200,** para. 4-1.
[200] ***Id.*** at Chap. **4,** Sec. III.
[201] *Id.* at paras. **4-13, 4-14.**

cluding officers and noncommissioned officers senior in grade to the soldier being screened.[202] The board president in all cases must be a general officer for boards convened at the Department of the Army level and at least a Lieutenant Colonel for boards convened at the installation level.[203] Minority group representation is required.[204]

The computer data in each case is examined by the review boards in light of, as a minimum, the soldier's scope and variety of assignments ; degree or level of responsibility ; efficiency ; moral standards ; integrity and character ; disciplinary record ; length of service and maturity ; awards, decorations, commendations, and commanders' recommendations ; military and civilian education ; and general physical condition.[205] This evaluation is to be made in light of the review board's ". . . primary function of confirming the tentative determination of grounds for denial or reenlistment made by Headquarters, Department of the Army, on the basis of (computer) printouts . . . ." [206] This presumption, based on the tentative determination that the soldier should be denied the opportunity to reenlist coupled with the lack of any provision allowing the soldier to be heard by the board consitutes a denial of due process. While the regulation instructs the board that "[o]nly in those cases where manifest error clearly exists, or where cruel and undue hardship would result, should a board recommend the reenlistment of an individual who has been identified as sub-standard," [207] how is the board to be aware of such factors if the soldier is not permitted to have a hearing and attempt to show either that he is not sub-standard, or that the conditions referred to do not exist? The board is also cautioned to ". . . strive to protect individuals against mistakes or errors which may occur in the evaluation data reporting process, and against improper conclusions which might be drawn from isolated or nonrepresentative data." [208] But again, how can that instruction be efficiently and fairly carried out absent hearing from the person in the best position to know if such errors have occurred?

If, based on the review board's recommendation, the soldier is denied the opportunity to reenlist he is denied his chosen pro-

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202 *Id.* **at para. 4-13.**
203 *Id.* **at para. 4-14.**
204 *Id.* **at para. 4-14*a*.**
205 ***Id.* at para. 4-12*c*.**
206 *Id.* **at para. 4-12d.**
207 *Id.*
208 **Id. at para. 4-12b.**

fession, and, at a minimum, whatever retirement benefits he may have accrued. Depending on the soldier's grade and the length of his service at the time of the reenlistment denial, a retirement benefit loss may amount to thousands of dollars. It would appear that the loss of such a sizeable expectancy is at least as important a protectable interest as was found in *Sindermann, Wasson* and *Hagopian.*

VI. WHY IS THE SOLDIER SO DIFFERENT?

The crumbling cornerstone of the judicial attitude toward judicial review of military administrative actions, and consequently the crux of the issue discussed herein, is the uncritical reasoning found in *Orloff v. Willoughby*[209] to the effect that: **(1)** Judges are not given the task of running the Army; **(2)** That the military constitutes a specialized community governed by a separate discipline; and **(3)** That orderly government requires the judiciary to be scrupulous not to interfere with legitimate Army matters.

Even that dictum was undercut by the Court when it decided *Orloff* on the merits.[210] No one reasonably advocates that judges should run the Army, but judges should recognize and decide cases involving those few protectable and necessary interests the soldier has: his pay, his employment, and his retirement, to mention the major ones. Judges are, however, particularly well adapted by reason of education, training and experience in the ways of men to critically examine military personnel law matters in light of constitutional requirements. Judges spend their careers determining facts and applying the law thereto. No more than that is suggested here.

Deciding whether or not certain administrative actions taken by the Army comport with Constitutional guarantees does not involve running the Army any more than the courts run Congress or the Executive when a statute or an Executive Order is held unconstitutional. The orderly government argument is significantly weakened when one considers that the Supreme Court has entered other areas where the argument has at least equal weight.[211] The specialized community argument loses its force when one considers that:

> Military service is not an isolated and occasional occurrence in American life. The "cold war" has kept the Armed Forces at record

[209] 345 U.S. 83 (1953).
[210] See note 89 *supra* and accompanying text.
[211] *See, e.g.* Baker v. Carr, 369 U.S. 186 (1962)

> peace time levels. Millions of civilians work closely with, and for, the military establishment. The points of contact between the civilian community and the Armed Forces are today so numerous and so intimate that it can truly be said that military life is an immediate and integral part of American life.
>
> Part of our heritage of freedom is the complex of the basic rights embraced within constitutional due process. Those same rights are inseparably interwoven into due process of military law. . . . It is, therefore, the responsibility of the legal professional, both in and out of the military service, to uphold the meaning and importance of due process in the administration of military law and to help make military law an integral part of American jurisprudence.[212]

The separate community argument is further weakened when it is considered that the ultimate control of the military lies in the hands of the President and the Congress through the appropriations process.

Arguments pertaining to efficiency to the extent suggested in *Shustack* v. *Herren* [213] are equally lacking in force.[214] Absolute military efficiency is not an ultimate virtue in a democratic society. No one would suggest, for example, that an officer have the unbridled authority to summarily execute a soldier who disobeys an order on the battlefield even though such authorization would obviously be an efficient method of enforcing compliance with orders. The view that to afford a soldier a right to be fairly and fully heard when his important personal interests are at stake would somehow destroy discipline or undermine the authority of the commander is equally lacking a rational basis. Knowledge by the soldier that he is protected from arbitrariness, personal animosity, capriciousness and improper discrimination should contribute to, rather than detract from, soldierly discipline *and morale.* This recognition would seem to be a fundamental prerequisite to good leadership.

Two other views, known as the "dire disaster" and "floodgates" arguments must also be addressed. The "dire disaster" argument 2s generalized by Mr. Justice Clark in his dissent in *Greene* [215] has, as is the case with most such arguments, failed to materialize. The "floodgates" argument is always urged when change is on the horizon; the courts would be flooded with suits filed by serv-

[212] Statement of Hon. Robert E., Quinn Chief Judge. United States Court of Military Appeals, *Joint Hearings on' S.* 74J *(and other bills) Before the Subcomm. on Constitutional Rights of the Senate Comm. rn? the Judiciary and the Special Subcomm. of the Senate Comm. on Armed Services,* 89th Cong., 2d Sess., pt. 2, at 737 (1966) [hereinafter cited as Joint Hearings on S. 745].

[213] 234 F.2d 134, 135 (2d Cir. 1956).

[214] *See* Hagopian v. Knowlton, 470 F.2d 201, 212 (2d Cir. 1972).

[215] 360 U.S. at 524.

icemen if they were to recognize, more than they have, the constitutionally based rights of soldiers."[216] If anything, fairer military administrative procedures should lessen the discontent which leads to most litigation.

VII. A SUMMARIZED BASIS FOR THE SOLDIER'S DUE PROCESS RIGHT TO AN ADEQUATE HEARING

The Supreme Court has firmly rejected the once well-established rule of *Bailey v. Richardson* that public employment is a privilege as distinguished from a right, and that procedural due process guarantees are therefore inapplicable."[217] A soldier's statutory right to his pay has been judicially recognized [218] and should stand at least as high on the judicial value scale as welfare benefits did in *Goldberg v. Kelly*. His military fringe benefits such as medical care and retirement are as much an entitlement within the property clause of the fifth amendment as are other recognizable benefits. The pursuit of an anticipated military career as an officer by a military academy cadet has been recognized as being within the fair hearing requirement of the due process clause although the cadets have only the objective expectancy of a military career.[219] By contrast, the soldier on active duty has realized that career. It would indeed be an anomaly for the objective expectation to receive more substantial protection from the law than the actual realization thereof.

Finally, the soldier may base his right to a hearing on what might be termed the "common law of reenlistment." In *Sindermann* the Court found that as there may be a "common law of a particular industry that may supplement a collective bargaining agreement" [220] so too a university may have an unwritten "common law" conferring the equivalent of tenure,')?' a protectable interest requiring a hearing prior to involuntary termination or de-

[216] *E.g.*, Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971).

[217] 182 F.2d 46, *aff'd*, 341 U.S. 918 (1951) (by an equally divided court), ". . . the Court has fully and finally rejected the wooden distinction between 'right' and 'privileges' that once seemed to govern the applicability of procedural due process rights." Board of Regents v. Roth, 408 U.S. 564, **571** (1972). ***See*** *also* Graham v. Richardson, 403 U.S. 365 (1971) and Van Alstyne, ***The Demise of the Right-Privilege*** *Distinction* in *Constitutional* ***Law,*** 81 HARV. L. REV. 1439 (1968).

[218] Bell v. United States, 366 U.S. 393 (1961).

[219] Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972).

[220] 408 U.S. at 602 (citing Steelworkers v. Warrior & Gulf Co., 363 U.S. **574** (1960).).

[221] *Id.*

nial. Just as the college in *Sindermann* afforded the protectable interest of continued employment as long as the college and teacher were mutually satisfied with each other, so too does the Army, in a *de facto* manner, offer continued "service" to the soldier. Not only does the Army offer qualified personnel continued employment, it actively induces continued "service" by a variety of means including reenlistment bonuses, promotions and ultimately retirement to name but three. The Army recognizes, at least to a limited degree, the soldier's interest in continued employment, and ultimately, retirement, by providing additional safeguards for members with eighteen years or more of service in both the involuntary separation[222] and bar to reenlistment situations.[223] The net effect of this "military common law" should be for the soldier what it was in *Sindermann,* a protectable employment interest for due process purposes requiring an adequate hearing where Army action may adversely and involuntarily affect the soldier's continued military employment.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A growing legal foundation currently exists for full judicial recognition of the soldier's due process right to an adequate hearing in the adverse personnel actions. While legislation has been introduced in Congress proposing some needed remedial changes in the area of involuntary administrative discharges,[224] more needs to be accomplished immediately, particularly in the areas which touch the soldier's daily life and are so vital to his total Army career. It is indeed incongruous that the soldier currently falls short of the due process protection *vis-a-vis* the hearing rights afforded to public school students,[225] public school teachers,[226] welfare recipients,"? convicts,[228] debtors,"!' juvenile delinquents,[230] parole and probation violators,[231] mental patients,[232]

[222] AR 635-200, para. 13-4*a*.

[223] AR 601-280, para. 1-29*e*.

[224] H.R. 86, 93d Cong. 1st Sess. (1973). Commonly known as the "Bennett Bill," an identical bill was passed by the House in the 92d Congress.

[225] *E.g.*, Dixon *v.* Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert.* denied, 368 U.S. 930 (1961).

[226] *E.g.*, Perry *v.* Sindermann, 408 U.S. 593 (1972).

[227] *E.g.*, Goldberg *v.* Kelly, 397 U.S. 254 (1970).

[228] *E.g.*, Haines *v.* Kerner, 404 U.S. 519 (1972).

[229] *E.g.*, Sniadach *v.* Family Finance Company, 395 U.S. 337 (1969).

[230] *E.g.*, *In* re Gault, 387 U.S. 1 (1967).

[231] *E.g.*, Morrisey v. Brewer, 408 U.S. 471 (1972); Mempa v. Rhay. 389 U.S. 128 (1967); United States *ex rel.* Bey v. Connecticut Board of Parole, 443 F.2d 1079 (2d Cir.), vacated as *moot,* 404 U.S. 879 (1971).

[232] United States v. Horton, 440 F.2d 253 (D.C. Cir. 1971).

and government employees,"[233] to name but a few. As Senator Ervin has noted, "[n]o objective should be more important than to protect the rights of servicemen and women who are ever ready to protect the Constitution of the United States and the Government established under it."[234]

To effect minimum due process protections for the soldier, the Army should immediately undertake a Comprehensive review of the regulations discussed herein, and incorporate in a single regulation a uniform procedure to be followed in all these actions. This procedure should, as a minimum, provide the respondent with:

(1) Written notice of the contemplated action and access to all evidence relied on by the Government;

(2) A reasonable time to prepare a response with the assistance of military legal counsel ;

(3) Personal appearance before the commander, board or decisionmaker, as appropriate ;

(4) An opportunity to confront adverse witnesses and have compulsory process in all involuntary separation actions where a less than honorable discharge may be awarded ;

(5) A written decision reflecting the law and evidence upon which the decision was based ;

(6) The right of appeal to the next higher commander; and

(7) The right to mandatory legal review of the decision prior to action on appeal.

This proposed regulation should also provide for a single administrative hearing board convened at the installation level for all adverse personnel actions. The board should include a member with technical expertise in the subject matter of the case before the board, and should sit for a stated period of time. Such a board would be consistent with the current Army policy favoring the appointment of permanent boards of officers [235] and would provide, at a minimum, expertise, uniformity and maximum freedom from improper command control.

Failure to meet the challenge of due process in a meaningful way by correction of the deficiencies currently found in the regulations discussed can only be an invitation to judicial intervention and rulemaking.[236]

[233] *E.g.*, Kennedy v. Sanchez, 349 F. Supp. 863 (1972).

[234] Joint Hearings on S. 745, *supra* note 212, at 7.

[235] AR 635-200, para. 13-21*e*.

[236] *E.g.*, Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). *See* Kimball and Newman, *Judicial Intervention in Correctional Decisions : Tkreat and Response,* 14 CRIME & DELIN. 1 (1968); Turner, *Establishing the Rule of* ***Luw*** *in Prisons: A Manual for Prisoners Rights in Litigation,* 23 **STAN.** L. REV. 473 (1971) ; *Judicial Intervention in Prison Discipline, 63* J. CRIM. L. C. & P. S. 200 (1972).

USING COUNSEL TO MAKE MILITARY PRETRIAL PROCEDURE MORE EFFECTIVE*

By Major Dewey C. Gilley, Jr.**

1. INTRODUCTION

In recent years, the Supreme Court of the United States has interpreted the constitutional right of an accused to counsel to extend to representation by counsel at all stages of the criminal process — from the preliminary hearing to the final disposition of the case.[1] The Court has specifically addressed instances of crimi-

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[1] The development of the right to counsel began with Powell v. Alabama, **287** U. S. **45, 70 (1932)** (The right to counsel in a criminal proceeding is "fundamental" to due process.) ; and continued, Johnson v. Zerbst, **304** U. S. **458 (1938)** (The Sixth Amendment provision "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," includes the right of federal indigent defendants to be furnished counsel.) ; Gideon v. Wainwright, **372** U. S. **335 (1963)** ("in our adversary system of justice, any person hailed into state or federal court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). The case-by-case approach to the right to counsel in felony prosecutions, adopted in Betts v. Brady, **316** U. S. **455 (1942),** was thus rejected. Therefore, the right to counsel, for serious cases, was made obligatory on the states through Fourteenth Amendment due process; Argersinger v. Hamlin, **407** U. S. **25 (1972)** (Counsel must be furnished the accused in trials of petty offenses or no confinement can be imposed.); Hamilton v. Alabama, **368** U. S. **52, 55 (1961)** (Arraignment where defendant called on to plead in capital case so critical that benefit of counsel required without weighing "degree of prejudice which can never be konwn.") ; White v. Maryland, **373** U. S. **59 (1963)** (same rule as in ***Hamilton v. Alabama*** for preliminary hearing in capital case); Coleman v. Alabama, **399** U. S. **1 (1970)** ***(White v. Maryland*** extended to any preliminary hearing held to determine if probable cause to bind accused over to grand jury and to fix bail if the offense is bailable.); Douglas v. California, **372** U. S. **353 (1963)** (requiring appointment of counsel for indigent defendants at first level of appeal) ; Mempa v. Rhay, **389** U. S. **128 (1967)** (probationer entitled to be represented by appointed counsel at a combined revocation

nal pretrial procedure, holding that the accused is entitled to the assistance of counsel at a preliminary hearing where a judicial officer is to determine if there is probable cause to hold a defendant for trial and, if so, may fix an appropriate condition restricting the pretrial liberty of the defendant. The right exists even if the preliminary hearing is dispensable.: The decision to restrain the individual prior to trial must meet constitutional due process requirements because a defendant deprived of his liberty may be denied his right to a fair trial.:'

Federal criminal procedure provides that a magistrate, a member of the independent judicial branch of government and usually a lawyer, shall make any decision restricting the liberty of a defendant pending trial.[4] When arrested, a defendant is to be brought before a magistrate without unnecessary delay.[5] The magistrate informs the accused of (1) the complaint against him and any accompanying affidavits, (2) "the general circumstances under which he may secure release" from confinement, (3) his right to the assistance of counsel who will be provided free of charge if the accused is unable to afford counsel, (4) his right to remain silent and (5) that any statement he makes may be used against him.[6] The accused is then given reasonable time and opportunity to consult counsel and to prepare for a formal hearing held by the magistrate. At the hearing, the magistrate determines whether there is probable cause to hold the defendant; if the mag-

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and sentencing hearing because sentencing is a "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." 389 U. S. at 134.).

See Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771 (1961); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right of an Accused'*, 30 U. CHI. L. REV. 11 (1962); Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962); Schafer [Justice, Supreme Court of Illinois], *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.").

[2] Coleman v. Alabama, 399 U. S. 1, 9-10 (1970).

[3] U. S. CONST. amend. V (". . . nor be deprived of life, liberty, or property, without due process of law. . . ."). United Stares *ex rel.* Chaparro v. Resor, 412 F.2d 443, 445 (4th Cir. 1969) (". . . [Military] pretrial confinement may be illegal, and, since liberty is at stake, such an illegal confinement is a denial of a constitutional right.").

[4] 28 U.S.C. § 631(b) (1968). Federal civilian criminal procedure is determined either by Congressional legislation or by Supreme Court rules promulgated under power granted by Congress. Act of June 29, 1940, 18 U.S.C. § 3771 (1940).

[5] FED. R. CRIM. P. 5(a).

[6] *Id.* 5(c).

istrate finds that probable cause exists he will also determine the conditions to be imposed on the defendant's liberty pending preliminary examination, grand jury consideration of the case, and trial.' At this formal preliminary hearing, the defendant can present evidence on whether there is probable cause to bind him over and whether any conditions of restraint should be imposed upon him.[8] Judicial review of the preliminary examination is immediately available.!'

Congress has required the President to follow federal criminal procedures when "practicable" in establishing military criminal procedures.[10] Because significant changes have occurred in federal criminal practices and procedures since 1950 without corresponding changes in military criminal procedure, the need for reexamination of military procedure is clear. The Federal Rules of Criminal Procedure and ABA Standards of Criminal Justice set forth guidelines for the administration of criminal justice in the 50 states and in the courts of federal jurisdiction.[11] The Standards attempt to meet the needs of effective law enforcement so that society is adequately protected, yet insure that the constitutional rights of those suspected of a crime are preserved.[12]

The public will have confidence in a military criminal law system that insures not only that strong discipline is maintained, but that the constitutional rights of military accused are protected. ". . . [D]iscipline is enhanced far more by a belief that a soldier can get fair treatment than it is by any system of iron-fisted military justice which appears to be unfair." [13] This article considers the need for a greater use of defense counsel in military pretrial

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[7] *Id.*

[8] *Id.*

[9] Bail Reform Act of 1966, **18** U.S.C. §§ 3146-48 (1966).

[10] UNIFORM CODE OF MILITARY JUSTICE art. 36a.

[11] Jaworski, *The Challenge and the Response,* 55 JUDICATURE 362, **363 (1972).** In the original statement of the nature and purpose of the ABA Standards, the description of applicability was to the "administration of criminal justice in all of the 50 states, and *when appropriate,* throughout the jurisdiction of the federal government." Jameson, *The Background and Development of the Criminal Justice Standards,* 55 JUDICATURE 366, 367 **(1972)** (emphasis added); The Standards of Criminal Justice "represent a concensus of top judges, lawyers, and law professors on the optimum methods and procedures in all aspects of criminal justice." The National Judicial Conference has endorsed the Standards in a concensus statement and urged each state to thoughtfully consider them with a view to adoption in principle. *The National Judicial Conference-United Judges for Reform,* **55** JUDICATURE 357.

[12] Jaworski, *supra* note 11, at 363.

[13] Hodson, *Perspective, The Manual for Courts-Martial-1984,* 57 **MIL.** L. REV. 1, 16 **(1972).**

procedures to bring military justice more in line with the constitutionally guaranteed rights of counsel.

II. THE RIGHT TO COUNSEL IN MILITARY PRETRIAL PROCEDURE

When there has been an unreasonable delay in bringing an incarcerated accused to trial, the Supreme Court has held that the only permissible remedy is dismissal of the charge, even though the result is to set free a man clearly guilty of the offenses charged against him.[14] Only occasionally can harm to the accused be seen, so rather than speculate about what assistance defense counsel would have been,[15] the Court finds general prejudice.[16]

A. UNITED STATES COC'RT OF MILITARY APPEALS POSITION

In military criminal procedure, the unit commander normally makes the determination to restrain or confine an accused member of his command pending disposition of the charges.[17] The commander is required to have personal knowledge of the offense or to have made an inquiry[18] sufficient to provide him with probable cause to believe that the person to be restrained or cocfined committed the offense. He must also be of the opinion that confinement is necessary to prevent flight of the individual or that the offense of which the accused is suspected is serious enough to warrant pretrial confinement.[19] Military pretrial procedure neither requires a formal hearing prior to this decision nor specifically provides the accused with the assistance of counsel. The only protection afforded the accused under the Uniform Code of Military Justice is the right to complain to senior commanders about any restraint upon his liberty or the severity of that re-

[14] Strunk v. United States, 41 U.S.L.W. 4794 (1973); *See* Barker v. Wingo, 407 U. S. 514, 522 (1972).

[15] *See, e.g.*, United States v. Parish, 17 U.S.C.M.A. 411, 416, 38 C.M.R. 209, 214 (1968) (Defense asserted that delay because of government negligence caused the loss of two witnesses who could have substantiated the accused's testimony.).

[16] Strunk v. United States, 41 U.S.L.W. 4794 (1973).

[17] UNIFORM CODE OF MILITARY JUSTICE art. 9 [hereinafter cited as UCMJ or the Code]. The UCMJ is codified as 10 U.S.C. §§ 801-940 (1970 Supp.). Congress prescribed military pretrial procedure in the Code. The President has implemented the Code by the Manual for Courts-Martial, United States, 1969 (Rev. ed.), [hereinafter cited as MCM or Manual].

[18] UCMJ art. 9(d); MCM, para. 19d.

[19] UCMJ art. 13; MCM, para. 19c.

straint.[20] Instead of being held to answer by a neutral and detached, legally qualified magistrate, the military accused is held to answer by a layman who is responsible for discipline in the unit, and who more often than not, is the formal accuser of the defendant, Whether the United States Constitution or the concept of military due process [21] permits these differences is an important question.

Too often in the military system there are prolonged delays in charging the accused and in referring the case to trial.[22] In 1972, the issue of protracted delay was presented to the Court of Military Appeals in four cases in which the accused had requested, but were not furnished, counsel before their cases were referred

[20] UCMJ art. 138.

[21] Military due process is hard to define. The difficulty results in part from differences among judges on the Court of Military Appeals concerning the meaning of the concept. Judge Quinn considers military due process to be consistent with constitutional due process and to provide "something more." United States v. Prater, 20 U.S.C.M.A. 339, 343, 43 C.M.R. 179, 183 (1971) (concurring opinion). Chief Judge Darden does not believe that the due process clause of the Fifth Amendment applies of its own force to military trials. *Id.* at 341, 43 C.M.R. at 181 (opinion of the court). His view is that Congress sets the rights of servicemen in military procedure, even though in a pattern similar to that developed for federal civilian procedure. His philosophy of military due process expressed in *United States v. Prater* is that expressed in United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951). U. S. CONST. art. 1, §8, cl. 14, (Congress has the power to "make rules governing the land and naval forces."). Significant changes in the relationship of the Constitution to military criminal law have occurred in the years since enactment of the Code. At first, the Court of Military Appeals based rights and privileges on only the Code. United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.R.I.R. 74, 77 (1951). Later, constitutional rights were deemed to apply to the serviceman, except when "expressly" or by "necessary implication" constitutional rights were considered inapplicable. United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 24 C.M.R. 244, 246-47 (1960). Now, the court recognizes that certain procedures and rights may be required in the military because the Supreme Court holds them to be required by the Constitution. United States v. Penn, 18 U.S.C.M.A. 194, 197, 39 C.M.R. 194, 197 (1969). (Darden, J. and Ferguson, J. concurring). *See* Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A.L. REV. 1240 (1968) and United States v. Tempia, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249, 253 (1967). Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV, 37, 65 (1972). *E.g.*, United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (required the furnishing of counsel to implement the fifth amendment right against self-incrimination because the Supreme Court held in Miranda v. Arizona, 384 U.S. 436 (1966) that the Constitution required it.).

[22] The problem of delay, however, is not unique to the military. Chief Justice Burger has stated: ". . . [T]hose who are apprehended, arrested, and charged are not tried promptly because we allow unconscionable delays that pervert both the right of the defendant and the public to a speedy trial of every criminal charge. . . ." Comments at the First Conference of the Judiciary, Williamsburg, Virginia, *cited* in Erickson, *The Standards of Criminal Justice in a Nutshell*, 32 LA. L. REV. 369, 370 (1972).

to trial or Article 32 investigations.[23] These four cases present several problems for analysis. In light of recent developments in constitutional law regarding an accused's right to counsel, speedy trial and due process, any system of pretrial procedure which permits protracted pretrial delay needs to be examined.

In *United States v. Przybycien*,[24] the Court of Military Appeals expressed its "concern" with the absence of any provision in the Code authorizing counsel to the military accused entering pretrial confinement. Przybycien was tried by general court-martial for desertion. He was apprehended on July 10, 1968 by Federal Bureau of Investigation agents after a three-year absence and was returned to Camp LeJeune, North Carolina. Although an Article 32 investigating officer was appointed on July 24, 1968,[25] no attorney was provided to Przybycien until 72 days after he was confined. One hundred seventeen days after confinement, Przybycien was tried and convicted; at trial a motion to dismiss the charge for denial of the accused's right to a speedy trial was denied. The Court of Military Appeals found that the delay was caused by the government's loss of service records but that there was no indication of prejudice to the accused by the delay even though the accused was not immediately informed of the charges against him[26] nor were the charges forwarded to the general court-martial convening authority within eight days and there was no written explanation."

The majority did state, however, that

> [t]he need for the assistance of counsel during extended, but necessary, confinement is patent. Witnesses may have to be located and interviewed, and physical evidence may need to be safeguarded. . . .

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[23] United States v. Mason, 21 U.S.C.M.A. 380. 45 C.M.R. 163 (1972) (62 days from confinement to furnishing of counsel on date Article 32 began. Four requests to consult a lawyer bore no fruit. Findings and sentence set aside for denial of speedy trial required by Constitution and Article 10, UCMJ. Darden, C. J., dissented.); United States v. Adama, 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972) (Accused requested five or six times to see a "lawyer counsel" from second week in confinement. Forty-six days after confinement a lawyer was appointed. The lawyer was injured before he saw the accused, and a replacement saw the accused in another 16 days. Conviction affirmed. Duncan, J. dissented because denial of right to consult counsel fundamentally unfair.); United States v. Winston, 21 U.S.C.M.A. 573, 45 C.M.R. 337 (1972) (a question of whether accused in fact requested counsel. If so, four unsatisfied requests while confined for 49 days without charges being preferred; conviction affirmed. Duncan, J. dissented, resultant impact unconscionsable.).

[24] 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969).

[25] *Id.* at 121, 41 C.M.R. at 121.

[26] 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969).

[27] *Id.*

> [D]elay [in furnishing counsel] may disadvantage the accused. . . . [No] provision . . . insure[s] the accused will be apprised of his legal rights and be in a position to prepare his defense. It is appropriate, therefore, to give a prisoner in confinement for more than a brief period specific advice as to his right to consult an attorney and right to prepare for trial. . . .[28]

This comment was based on the separate opinion of Judge Faw in the Board of Review's decision in *Przybycien*.[29] In setting forth additional reasons why an accused should be furnished counsel when he is in pretrial confinement, Judge Faw observed that permitting the trial counsel or anyone else to marshal evidence against the confined accused "while no one is seeking evidence in the accused's behalf seems somewhat unfair." [30]

As Professor Beaney stated,

> Only if the defense has an opportunity to prepare for trial substantially equal to that enjoyed by the prosecution can a criminal proceeding be considered fair in any realistic sense. This in turn means that counsel, whether retained or appointed, must have access to the accused soon after arrest.[31]

> . . . [T]he delay [in appointment of counsel] in itself is a serious element of unfairness, a proposition that can be tested by asking what would be the reaction of any defendant with means to retain counsel and what would be his counsel's attitude if he were forced to forego the privilege of representation until a week or more had elapsed?[32]

Another consequence of not furnishing counsel for the confined accused is that an accused cannot be expected to request an early trial since he might not know that he has a right to a speedy trial. The Uniform Code of Military Justice requires that counsel be furnished only when the case is referred to an Article 32 investigation or to trial.[33] For this reason, the Court of Military Appeals has expressed reluctance to force an uncounseled [34] accused to demand a speedy trial.[35] The result of countenancing a

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[28] *Id.* at **122,** n. **2;** 41 C.M.R. at **122,** n. **2.**

[29] *Id.* at **123-25;** 41 C.M.R. at **123-25** (opinion of Faw, J. set forth in full in dissenting opinion by Ferguson, J., who would have reversed the conviction because holding an accused in confinement for **72** days without benefit of counsel denied him due process. *Id.* at **122;** 41 C.M.R. at **122).**

[30] ***Id.*** at **122;** 41 C.M.R. at **122.**

[31] Beaney, ***supra*** note **1,** at 780-81.

[32] *Id.* at **780.** The proposition is applicable to the military because the **Court** of Military Appeals has acknowledged the right of an accused to consult counsel before the law requires the appointment of counsel. United States v. Gunnels, 8 U.S.C.M.A. 130, **23** C.M.R. 354 **(1957).**

[33] UCMJ arts. 32(b) and 27.

[34] United States v. Przybycien, **19** U.S.C.M.A. **120, 122** n. **2;** 41'C.M.R. **120, 122** n. **2 (1969)** (The term counsel is used by the court to mean lawyer.).

[35] United States v. Hounshell, 7 **U.S.C.M.A.** 3, **7,** 21 C.M.R. 129, 133 **(1956).**

delay when the accused has not been furnished counsel is to force the accused into an uninformed waiver of his right to a speedy trial.

The Court of Military Appeals was presented with the problem of an accused's frustrated attempts to obtain counsel while in extended pretrial confinement and unanimously required that a request by a pretrial detainee to consult with counsel be honored.[36] Chief Judge Darden and Judge Quinn considered such denial to be prejudicial unless the record of trial shows no prejudice to "the progress or the result" of the court-martial:" In his concurring opinion, Judge Duncan maintained that if an accused requests counsel, counsel must be promptly provided; if not, prolonged delay in preferring charges or in bringing the accused to trial is sufficient for prejudicial error."': Judge Duncan proposed a rule that

> . . . an accused be furnished counsel on preference of charges or, if charges are not preferred, upon request such an accused must be allowed to consult counsel within eight days after his arrest or confinement, if practicable.[39]

In *United States v. Mason,* the accused was placed in confinement on April **26,** 1970 on charges of attempted murder, resisting apprehension, two separate assaults with a dangerous weapon, wrongful discharge of a firearm, and being in an off-limits

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[36] United States v. Mason, **21** U.S.C.M.A. **389, 45** C.M.R. **163 (1972)**; United States v. Adams, **21** U.S.C.M.A. **401, 45** C.M.R. 175 **(1972)**; United States v. Bielecki, **21** U.S.C.M.A. **450, 45** C.M.R. **224 (1972)**; United States v. Winston, **21** U.S.C.M.A. **573, 45** C.M.R. **347** (1972).

[37] United States v. Adams, **21** U.S.C.M.A. **401, 405; 45** C.M.R. **175, 179 (1972)** (Darden, C. J., opinion of the court; Quinn, J., concurring). The requirement that the government prove that the accused was not prejudiced by the failure to furnish counsel is the same standard used by the Supreme Court to determine whether a conviction should be reversed for failure to furnish an indigent defendant counsel for a preliminary hearing. Coleman v. Alahama, **399** U.S. **1 (1970).** The possible benefits to the accused of counsel at a preliminary hearing are somewhat speculative. It should be considered whether such benefits are more or less speculative when there is no preliminary hearing or prompt judicial encounter at all, which is the military procedure. In United States v. Winston, **21** U.S.C.M.A. **573, 575; 45** C.M.R. **347, 349** (1972), the military judge established on the record of trial through the accused and defense counsel that they had conferred before trial without any restraints placed upon them and that they were not claiming lack of opportunity to prepare for trial because of denial of an earlier request to consult counsel. This procedure should be followed in all cases with an issue of delay in furnishing counsel.

[38] Cnited States v. Winston, 21 U.S.C.M.A. 573, *577,* 45 C.M.R. 347, 351 **(1972)** (dissenting opinion).

[39] United States v. Mason, **21** C.S.C.M.A. *389, 392,* 45 C.M.R. 163, 166 (1972) (dictum).

area. While in confinement, Mason submitted requests on May 2, 12, 17, and 23 to consult with a lawyer and be informed of the charges against him. On June 27, the date of the first Article 32 investigation, Mason finally saw a lawyer.[40] Judge Duncan wrote the principal opinion holding that the government did not proceed as required by Article 10 of the Code, and that "the accused was not given a speedy trial as required by the Constitution of the United States."[41] Judge Quinn concurred in the result "because the circumstances, including the frustration of the accused's efforts to consult counsel" showed " 'willful, purposeful, vexatious . . . [and] oppressive delay by the Government.' "[42] Chief Judge Darden dissented ; he did not find an intentional delay by the government in order to gain some tactical advantage or to harrass the accused.[43] He would require that actual prejudice to the accused at trial or in preparing for trial be asserted and proved.[44]

The court has recognized the frustration of an accused who requests to consult with counsel and has his request denied or ignored. The failure of the government to furnish an accused with counsel at the time he is charged with an offense or detained may be a failure on the part of the government to exercise reasonable diligence in processing the case for trial.[45] When counsel is not provided the accused until referral of the case to trial, the trial may have to be delayed so that the defense counsel may prepare. If the government had acted with reasonable diligence, the delay could have been avoided.

Judge Duncan perceives that

> [l]egal counselling at the early stages not only is often invaluable to the defense of the case but also serves to provide an accused with knowledge with respect to his conduct while in confinement, his conduct if interrogated, and even to advise him regarding the legality of the confinement. In addition, such an accused is to be relieved from the anxiety of being without advice concerning matters of the greatest personal importance to him.[46]

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[40] *Id.* at 392; 45 C.M.R. at 166.

[41] *Id.* at 394; 45 C.M.R. at 168.

[42] *Id.* at 399; 45 C.M.R. at 173, *quoting from* United States v. Brown, 13 U.S.C.M.A. 11, 14; 32 C.M.R. 11. 14 (1962).

[43] United States v. Mason, 21 U.S.C.M.A. 389, 400, 45 C.M.R. 163, 174 (1972).

[44] *Id.*

[45] United States v. Parish, 17 U.S.C.M.A. 411, 416, 38 C.M.R. *209,* 214 (1968). Reversal of a conviction may occur even where the government has a reasonable explanation for the delay.

[46] United States v. Mason, 21 U.S.C.M.A. 389, 397, 45 C.M.R. 163, 171 (1972). Duncan, J., also notes that many military accused are away from home, family and friends for the first time and would be considered juveniles in many jurisdictions, *citing* United States v. Donohew, 18 U.S.C.M.A. 149,

In addition, it can be argued that the rehabilitation of an accused who is furnished counsel at the time of confinement is more likely; bitterness is less likely when the system enforcing the law shows sensitivity toward the anxiety and the needs of the accused. Finally, Judge Duncan points out that the accused in military pretrial confinement is greatly handicapped in his attempts to obtain counsel because he has no right to be admitted to bail.[47]

Dictum in Judge Duncan's opinion in *Mason* provided a new approach to the right to counsel in military pretrial procedure. Judge Duncan observed that no specific provision of the Code or of the Constitution provides counsel to the military accused upon his arrest, his confinement or prior to the preferring of charges. Then, relying upon the general supervisory power of the Court of Military Appeals over the administration of military justice, he asserted that the court has an *obligation* to insist on "civilized standards of procedure." [48] Judge Duncan views the derivative power of the Court of Military Appeals to be the same as that power vested in the Supreme Court which flows from its "judicial supervision of the administration of criminal justice" in the federal courts.[49]

Judge Duncan would prescribe a test of "fundamental fairness" in determining when the accused must be furnished counsel."' For the Supreme Court, "fundamental fairness" has long meant the standard of criminal procedure applied to the states under the due process clause of the fourteenth amendment.[51] For federal courts the term has meant the scope of the due process clause of the fifth amendment."' Judge Duncan does not use the term "military due process" in either his opinion in *Mason* or in his dissents in the three related 1972 cases.[53] His formulation of the

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152, 39 C.M.R. 149, 152 (1969) (Military judge must conduct hearing to make certain the accused makes a knowing, voluntary and intelligent exercise of his right to counsel at trial.).

47 *Id.*; Levy v. Resor. 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

48 United States v. Mason, 21 U.S.C.M.A. 389, 397, 45 C.M.R. 163, 171 (1972), *quoting from* McNabb v. United States, 318 U. S. 332, 240-41 (1943) (Frankfurther, J.).

49 McNabb v. United States, 318 U. S. 332 (1943).

50 United States v. Mason, 21 U.S.C.M.A. 389, 398, 45 C.M.R. 163, 172 (1972).

51 Lisenda v. California, 314 U. S. 219, 236 (1941) (The state must afford the defendant "that fundamental fairness essential to the very concept of justice.").

52 Bolling v. Sharpe, 347 U. S. 497. 499 (1954) (". . . discrimination may be so unjustifiable as to be violative of due process [of the fifth amendment]." Id. at 499).

53 United States v. Adams, 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972);

meaning of "fundamental fairness" is that which is "basic to the fair and orderly conduct of a criminal case." [54] His readiness to reverse in *Mason* and related cases, cases in which "fundamental fairness" cannot be found, makes it clear that for him "fundamental fairness" is "military due process." [55]

In examining the federal system to determine the requirements of fundamental fairness, Judge Duncan perceived that a principal purpose of Federal Rule of Criminal Procedure 5 is to have the magistrate inform the defendant of his right to obtain counsel. He based his view of Rule *5* upon the **1966** amendment of the Rule which required that the defendant be advised of his "right to request the assignment of counsel if he is unable to obtain counsel." The requirement of Article 10 of the Code that "immediate steps shall be taken" to inform the accused of charges against him was seen as "somewhat analogous" [56] to the Federal Rule *5* provision that the defendant be taken to the magistrate "without unnecessary delay." [57]

The Article **32** investigation was equated to the federal preliminary examination where the defendant has counsel.[58] The Article **32** investigation is held before the charges are forwarded. Thus, if Article **33** of the Code were complied with by forwarding the charges and specifications within eight days of restraint, the accused held for general court-martial would already have the services of counsel. Judge Duncan therefore concluded that Articles 10 and **33** "offer a proper and measurable standard for requiring the government to furnish an accused in confinement with counsel for consultation even if charges have not been preferred." [59]

United States v. Bielecki, **21** U.S.C.M.A. **450, 45** C.M.R. **224 (1972)** ; United States v. Winston, **21** U.S.C.M.A. **573, 45** C.M.R. **347 (1972).**

[54] United States v. Mason, 21 U.S.C.M.A. **389, 398, 45** C.M.R. **163,** 172 **(1972).**

[55] Judge Duncan's due process approach is not foreign to the court, which has observed that "the issues of speedy trial and due process are frequently inextricably bound together and the line of demarcation is not always clear." United States v. Schalck, **14** U.S.C.M.A. 371, 373, 34 C.M.R. 151, 153 **(1964);** United States v. Mason, 21 U.S.C.M.A. **389, 399, 45** C.M.R. 163, 173 **(1972)** (Quinn, J., concurring in result because of "willful, vexatious and oppressive" delay) ; United States v. Przybycien, **19** U.S.C.M.A. **120,** 127, 41 C.M.R. **120,** 127 (1969) (Ferguson, J., dissenting opinion. Denial of due process to hold an uncharged accused in confinement for **72** days without benefit of counsel).

[56] United States v. Mason, **21** U.S.C.M.A. **389, 398, 45** C.M.R. **163,** 172 **(1972)** (dictum).

[57] **FED.** R. CRIM. P. **5.**

[58] United States v. Mason, 21 U.S.C.M.A. **389, 398, 45** C.M.R. **163,** 172 **(1972).**

[59] *Id.*

Judge Duncan perceives that counsel can "speed disposition of the matter,"[60] just as counsel has been a means to enforce other specific constitutional safeguards. The Supreme Court used counsel to safeguard the right against self-incrimination in police custodial interrogations[61] and in police post-indictment lineups to protect the right of a defendant to a fair trial, "as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[62]

Judges Darden and Quinn have different views of the role of the court in implementing due process rights. While Chief Judge Darden states that "[i]ndifference or neglect that permits continued requests for consultation to go unanswered is indefensible,"[63] he regards the court bound by the legislative will of Congress expressed in the Code. He does not deem the court to have a warrant to legislate rights to counsel when Congress has not dune s ~ . ~ Judge Quinn will reverse a conviction when the government has "vexatiously" frustrated the effort of an accused to consult counsel. Judge Duncan considers the court to have a responsibility to "strive to make the system of military justice equally as fair, if not more fair, than any other."[65] The reasons listed by Judge Duncan indicate why the military accused needs counsel upon being charged or detained even more than the civilian defendant. The only apparent justifications for not furnishing counsel for the military accused when he is charged or detained are in the uncommon situations of a ship at sea without lawyers or the demands of a combat or other military mission. The divergent views of the court suggest the need for analysis of other available approaches to the problem of the right to counsel in military pretrial procedure.

B. CONSTITCTIONAL DUE PROCESS AND DEPRIVATION OF LIBERTY

Decisions of the Supreme Court defining the extent of due process requirements increasingly affect military decisions and

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60 *Id.*
61 Miranda **v.** Arizona, **384** U. S. **436 (1966).**
62 United States **v.** Wade, 388 U.S. **218, 227 (1967).**
63 United States v. Mason, 21 U.S.C.M.A. 389, 400, 45 C.M.R. 163, 174 **(1972)** (dissenting opinion).
64 ***See*** note **21** *supra.*
65 United States v. Mason, 21 U.S.C.M.A. 389, 397. 45 C.M.R. 163, 171 **(1972).**

procedure. Recently, in ***Morrissey*** v. *Brewer,*[66] the Supreme Court held that the loss of liberty resulting from parole revocation is a serious deprivation of liberty requiring that the parolee be afforded due process safeguards. Thus, before a parole can be revoked, due process requires simple preliminary and factual hearings. In *Gagnon v. Scarpelli,*[67] the Supreme Court held that the same due process requirements apply to probation revocation procedures.

The Department of the Army has applied ***Morrissey*** v. ***Brewer*** to all proceedings seeking to vacate the suspension of confinement imposed by any type court-martial, even though Article 72 of the Code only requires a hearing to vacate suspended sentences of general courts-martial and of special courts-martial when the sentence includes a bad conduct discharge.[68] It should be determined whether due process requirements for parole revocation also apply to pretrial deprivation of liberty.

The Supreme Court observed that because parole revocation is not part of a criminal prosecution, the parolee is not entitled to all the safeguards afforded a criminal defendant.[69] Nonetheless, the Court observed that the conditional liberty enjoyed by the parolee was similar in many respects to the unqualified liberty enjoyed by other citizens, and then held that procedural due process protections apply to the loss of liberty resulting from parole revocation.[70]

Assuming for the moment that the decision to place an accused in pretrial confinement is not part of the criminal prosecution,[71] *Morrissey* requires that an examination of the nature of the deprivation of liberty be undertaken to determine if the accused is entitled to any procedural rights. Pretrial confinement is a deprivation of liberty, which continues until the conclusion of the trial and a confined accused is cut off from active, personal participation in the preparation of case for this trial. Under federal practice

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[66] **408 U.** S. **471 (1972).**

[67] **13 Crim. L. Rptr. 3081 (U.** S. **Sup. Ct. 1973).**

[68] **Department of the Army Message 1972/12992, reproduced in The *Army Lawyer,* Jan. 1973 at 13.**

[69] **Morrissey v. Brewer, 408 U.** S. **471, 480 (1972).**

[70] ***Id.* at 481-482, *citing* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.** S. **123, 168 (1951); Goldberg v. Kelly, 397 U.** S. **154, 163 (1970); Fuentes v. Shevin 407 U.** S. **67 (1972) (temporary deprivation of property is a "deprivation" in terms of the Fourteenth Amendment). See Cafeteria Workers v. McElroy, 367 U.** S. **886 (1961).**

[71] United States **v.** Adams, 21 U.S.C.M.A. **401, 405, 45** C.M.R. 175, **179 (1972). (Darden, C. J., maintains that the decision to place an accused in pretrial confinement is not a "stage" of the criminal proceeding requiring furnishing the accused counsel or prompt appearance before a magistrate.).**

commitment of the accused by the magistrate to await grand jury action has been described as in effect "a sentence to imprisonment." [72] Thus, the Circuit Court of Appeals for the District of Columbia held that the legal presumption of defendant's innocence has meaning at the preliminary hearing, and the accused is entitled to his liberty unless the government can show probable cause for detention.

In holding that due process requires that a neutral and detached magistrate must determine probable cause to detain an untried defendant and that due process "abhors" incarcerating a defendant solely upon the filing of an information by a prosecutor,[73] the Court of Appeals for the Fifth Circuit observed that "the practice may substantially prejudice defendants in preparation of their cases and result in the incarceration of defendants against whom the State dismisses charges." [74]

In ***Morrissey,*** the Supreme Court stated that a parolee may be arrested and held in confinement pending the final decision to revoke his parole. Due process "would seem to require" [75] that an arrest be followed as soon as possible by a "preliminary hearing" to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts constituting a violation of his parole conditions.[76] It should be

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[72] Washington v. Clemmer, **339** F.2d **725,** 728 (D. C. Cir. **1964).** Lem Woon **v.** Oregon, **229** U. S. 586 **(1913)** held that since the due process clause of the Fourteenth Amendment does not require the states to adopt the institution and procedure of the grand jury, relying on Hurtado v. California, **110** U. S. 516 **(1884),** neither does it require an "examination or the opportunity for one prior to the formal accusation or information of the prosecutor." *Id.* **590.** In ***Lem*** *Woon* v. ***Oregon,*** the defendant was in fact arrested on a warrant based on a complaint sworn to before a committing magistrate. The defendant was taken before the magistrate. He waived preliminary examination and was held to answer for the charge of murder. It appears that such a preliminary examination had no lawful status under Oregon law. Later the prosecutor issued the information. The issue before the court was not whether pretrial confinement was permissible without any hearing, but whether the information of the prosecutor had to be preceded by a preliminary examination. The court stated in dictum that the waiver of the preliminary hearing by the defendant did not affect the decision of the court.

[73] Pugh v. Rainwater, **13** Crim. L. Rptr. 2525 (5th Cir. **1973).** The Supreme Court has granted review of this case on petition for certiorari, including as a question presented: does a person in state custody have a federally protected right to a preliminary hearing? **73-477** Gerstein v. Pugh, **14** Crim. L. Rptr. **4107 (3** Dec. **1973).**

[74] Pugh **v.** Rainwater, **13** Crim. L. Rptr. 2525 (5th Cir. **1973).**

[75] Morrissey **v.** Brewer, 408 U. S. **471,** 485 (1972). (Burger, C. J., wrote the opinion of the Court).

[76] One reason for requiring this hearing be conducted promptly is that the place of confinement is often some distance from the location of the

noted that the Court used the phrase "preliminary hearing;" a "preliminary hearing" is the common procedure to commit a defendant to pretrial deprivation of liberty.[77]

The Court divides the process of parole revocation into two stages. The first occurs on arrest and detention by the parole officer. The second is the formal parole revocation. The first stage of deprivation of liberty for one accused of an offense is also arrest and detention. The second is sentence by the trial court. The Court noted the substantial time lag between arrest for a parole violation and the eventual determination by the parole board to revoke the parole.[78] This same type of delay occurs for those awaiting trial. Therefore, a preliminary hearing is arguably required when a military accused is placed in pretrial confinement.

The probable cause finding in the parole revocation situation is to be made by an officer not directly involved in the revocation process. The officer making the recommendation to revoke the parole cannot always be completely objective in evaluation and recommendation. Friction between parolee and parole officer may have affected the officer's judgment.[79] The need for an independent decision-maker to examine the initial decision is required without impugning the motives of the parole officer. The Court suggested that a parole officer other than the one assigned to the parolee could make this determination. It need not be a judicial officer; administrative officers normally handle these matters.

The procedure for the preliminary hearing before the independent officer in parole violation cases includes notice to the parolee of the purpose of the hearing — to determine whether there is probable cause to believe he has committed a parole violation and the nature of the alleged violations. At the hearing the parolee may appear, speak in his own behalf, bring witnesses and any documents, and request the presence of any witnesses who have given adverse information. These persons will be present unless the hearing officer determines that disclosure of their identity would subject them to risk of harm. At the conclusion

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alleged parole violation. Another reason for promptness is to use information while it is fresh and the sources are available. Effective investigation should be conducted at that location before the accused is taken to the confinement facility. Id. at 485.

77 FED. R. CRIM. P. 5 and 5.1 (for federal criminal procedure). Some form of preliminary hearing is provided in all American civilian jurisdictions. Note, *Constitutional Right to Counsel at the Preliminary Hearing,* 75 DICK. L. REV. 143, 165 (1970).

78 Morrissey v. Brewer, 408 U. S. 471, 485 (1972).

79 Id. at 485-486 (". . . realistically the failure of the parolee is in a sense a failure of his supervising officer.").

of the hearing, the hearing officer makes a summary of the evidence presented and based upon this evidence the parole officer is able to determine whether probable cause exists to hold the parolee for the final decision of the parole board on revocation. If the parole officer finds that probable cause exists, the parolee can be returned to the state correctional institution pending the final decision.[80] This procedure is strikingly similar to the procedure under Federal Rule 5.1 in the preliminary examination in a federal criminal case.

The role of the company commander in determining probable cause for arrest and confinement based on personal knowledge or personal inquiry may be compared directly to the role of the parole officer in arresting his parolee.[81] The commander normally prefers the charges and specifications against an accused as well as makes a recommendation as to disposition of the charges. If charges are preferred against the accused by someone else, the accused's commander investigates the case and recommends a disposition of the charges as he would in the case of charges he preferred. Since, procedurally, military pretrial apprehension and confinement is analogous to parole arrest and detention, it can be argued that the procedural due process protections required prior to detention pending parole revocation are required for detention pending trial. In light of the due process requirements established in *Morrissey* v. ***Brewer,*** the *Mason* line of cases should be examined to determine the constitutional adequacy of military pretrial procedure.

A question specifically left unanswered by *Morrissey* v. *Brewer* is whether the parolee is entitled at either hearing to retain counsel or to have counsel appointed for him if he is indigent.[82] In *Gagnon* v. *Scarpelli,*[83] the Supreme Court has held that "fundamental fairness'' will require that indigent probationers and parolees be provided counsel, at state expense, at preliminary and final hearings where the probationer or parolee denies violation of the conditions of his liberty, or where complex or difficult reasons exist not to revoke the probation or parole.

The Army requires that lawyer counsel be provided to the military member at a vacation of suspension hearing unless the ac-

[80] Morrissey v. Brewer, **408** U. S. **471, 487** (1972).
[81] MCM, para. 20*d*.
[82] Morrissey v. Brewer, **408** U. S. **471, 487** (1972).
[83] **41** U.S.L.W. **4647, 4650-51 (U** S. **Sup.** Ct. 1973); See Note, *Parolee's Right* to *Counsel at a Parole Revocation Hearing, 8* **W. F. L. REV. 459. 461-**465 (1972) and Bey v. Connecticut State Board of Parole, 443 F.2d 1079 (2d Cir. **1971).**

cused knowingly and intelligently waives the right.[84] A waiver of counsel is possible only after the accused has consulted with a lawyer or has affirmatively elected not to do so. The formula enunciated by the Supreme Court for providing counsel for probationers and parolees facing revocation also includes the requirement that the probationer or parolee be first informed of his right to request counsel.[85] In the military, the accused has a right to be represented by counsel whether tried by summary, special, or general court-martial and regardless of the length of confinement approved. Now that the level of court and length of confinement no longer determine the accused's right to counsel, the Army requirement of counsel for vacation of suspension hearings is analogous to the *Argersinger* v. *Hamlin* requirement of counsel for a criminal trial where confinement can be adjudged.[86] Because the level of trial court to which a case is referred is no longer a consideration in determining an accused's right to counsel, neither should the level of trial court to which a case is expected to be referred determine the point at which the accused is entitled to counsel. The Court of Appeals for the Fifth Circuit expressly used this reasoning: "[t]he plight of an accused misdemeanant incarcerated without a hearing is just as serious as that of an accused felon. . . ."[87]

C. SIXTH AMENDMENT RIGHT TO COUNSEL

In 1972, the Supreme Court considered the question of when an accused becomes entitled to the right to counsel under the sixth and fourteenth amendments. In *Kirby* v. *Illinois*[88] the Court held that the right to counsel attaches only at or after the initiation of adversary judicial proceedings.[89] In *Kirby*, the accused and a companion, Bean, were stopped on a Chicago street for questioning about an offense. When Kirby produced property belonging to a man named Shard, Kirby and Bean were arrested. After ar-

[84] Department of the Army Message 1972/12992, reproduced in The *Army* Lawyer, Jan. 1973 at 13.

[85] Gagnon v. Scarpelli, 41 U.S.L.W. 4647, 4651 (U.S. Sup. Ct. 1973).

[86] The Army requirement for counsel went beyond Article 72 of the Code which requires counsel only when there is a vacation of suspension hearing for a general court-martial sentence or a special court-martial sentence which includes a bad conduct discharge.

[87] Pugh v. Rainwater, 13 Crim. L. Rptr. 2525 (5th Cir. 1973).

[88] 406 U. S. 682 (1972).

[89] Id. at 689. (Stewart, J., announced the judgment of the Court and wrote the opinion, joined by Burger, C. J., Blackmun, J., and Rehnquist, J. Powell, J., concurred in the result because he would not "extend the Wade-Gilbert per se exclusionary rule." Id. 691).

riving at the police station, the arresting officers learned that Shard had been robbed the day before. Shard was brought to the police station where he identified Kirby and Bean as the men who robbed him. Counsel was not present at the identification proceedings nor had Kirby been informed of any right to have counsel present. Despite the importance of the identification procedure, the Court held that the sixth amendment right to counsel had not attached because a criminal prosecution had not begun.[90]

The Court observed that a "criminal prosecution'' can begin in a variety of ways at different points in time, for example, upon the formal charge, preliminary hearing, information, or arraignment. In each of these examples

> . . . the government has committed itself to prosecute, and [it is] only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutional forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.[91]

Chief Justice Burger concurred, stating that he would limit attachment of the sixth amendment right to counsel guarantee to as soon as, and not until, ". . . criminal charges are formally made against an accused and he becomes the subject of a 'criminal prosecution.' ".[92]

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[90] *Id.* at 690. Thus a post-initiation-of-criminal-proceeding limitation was placed on the rule announced in United States v. Wade, 388 U. S. 218 (1967), that the accused not be exhibited to witnesses in a line-up conducted for identification purposes without being informed of his right to counsel and in the absence of his counsel, unless he makes and knowing and intelligent waiver of the right to counsel.

[91] Kirby v. Illinois, 406 U. S. 682, 689 (1972). Based on ***Kirby v. Illinois***, adversary judicial proceedings were held to have begun where magistrate issued arrest warrant based on "information upon oath" that accused committed assault, robbery and possession of a dangerous weapon. Therefore the accused was entitled to counsel at identification confrontations with a witness by show-up the next day at the police station where the defendant was brought pursuant to the warrant. United States *ex rel.* Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972). *But see* State v. St. Andre, 12 Crim. L. Rptr. 2098 (La. Sup. Ct. 1972) (right to counsel attaches only after indictment).

[92] Kirby v. Illinois, 406 U. S. 682, 691. (concurring opinion). Justices Brennan, Douglas, and Marshall in dissent would not have restricted ***United States v. Wade*** to the post-beginning-of-adversary proceedings context. *Id.* at 691. The plurality opinion makes it clear that this case does not concern the right against self-incrimination, but only the explicit guarantee of the sixth amendment for a "criminal prosecution." *Id.* at 688. The dissenters pointed out that the Court held in United States v. Marion, 404 U. S. 307. 325 (1971), that the right of a speed) trial under the sixth amendment applied to periods of pretrial detention before a formal charge. *Id.* at 698-699 n. 7. The only possible reconciliation of these holdings is in the different nature of the sixth amendment rights under consideration.

In *Coleman* v. *Alabama,*[93] the prosecutor sent a charge of assault with intent to murder to a preliminary hearing instead of directly to the grand jury. Upon finding probable cause that the indigent accused committed the offense, the magistrate conducting the preliminary hearing held Coleman answerable for the offense until the grand jury could consider the case. The magistrate also set bail.[94]

Six justices approached the issue of whether a criminal prosecution had begun by examining the value of counsel to the accused at the preliminary hearing.[95] First, through skillful direct examination or cross-examination, defense counsel may show weaknesses in the case which might cause the magistrate to refuse to bind the accused over. Second, counsel may develop impeachment evidence for use at a future trial or preserve the testimony of witnesses that will be unavailable for trial. Third, counsel may use the preliminary hearing to discover the case the defense must meet at trial. Fourth, the defense counsel can effectively argue on behalf of the accused on such matters as bail and the necessity for an early psychiatric examination.[96] The values of the hearing to counsel for discovery purposes and development of impeachment evidence for use at trial are limited because the prosecutor need only show probable cause.[97] Therefore, the primary benefits of counsel at the preliminary hearing are (1) in persuading the court not to hold the accused over for consideration of the case by the grand jury or (2) admitting the accused to bail if he is

93 399 U. S. 1 (1970).

94 *Id.* at 8. The accused is discharged if probable cause is not found. *Id.* at 8, n. 3.

95 Mr. Justice Brennan delivered an opinion setting forth specifically the utility of counsel at the preliminary hearing.

96 *Id.* at 9.

97 The right to a bill of particulars and other devices for pretrial discovery also limits the relative value of discovery at the preliminary hearing. For these reasons, the Supreme Court held in Adams v. Illinois, 408 U.S. 278 (1972), that *Coleman v. Alabama* will not be retroactively applied because its primary thrust was not at preserving the integrity of the fact-finding process. Chief Justice Burger dissented in *Coleman v. Alabama,* because he does not consider the preliminary hearing to be part of a "criminal prosecution" described by the sixth amendment. He does not view the constitutional command to require furnishing counsel for "shifting notions of 'critical stages'." *Id.* at 285. *But see* Myers v. Commonwealth, 13 Crim. L. Rptr. 2472 (Mass. Sup. Jud. Ct. 1973) ("probable cause" for a preliminary hearing means in Massachusetts and most commonly means in other states with probable cause hearings, a "directed verdict" definition: whether there is enough credible evidence to send the case to a jury, citing F. Miller, *Prosecution: The Decision to Charge a Suspect With Crime* (ABA Study) and Graham and Letwin, *The Preliminary Hearing in Los Angeles,* 18 U.C. L.A.L. REV. 636 (1971)).

held over. Because the military commander decides whether there is probable cause to hold an accused for trial and if so under what restraint, the military accused needs counsel at this stage of the commitment procedure just as the civilian defendant does at the preliminary hearing.[98]

The Court of Military Appeals has not, however, applied the sixth amendment right to counsel to the commander's decision to hold the accused to answer the allegations and to the imposition of pretrial restraint.[99] Judge Duncan describes the sixth amendment right to counsel to apply to "critical periods" in order to prevent "unfairness at the trial by enhancing the reliability of the fact-finding process." [100] The Supreme Court in *Coleman* did not limit the basis of the right to counsel to the value of counsel for the integrity of the fact-finding process at trial.[101] Whenever a magistrate can terminate the prosecution or set bail or other re-

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[98] Chief Judge Darden maintains that the absence of a preliminary hearing from military procedure frees the military from providing counsel for the accused under the sixth amendment right to counsel. United States v. Adams, 21 U.S.C.M.A. 401, 405, 45 C.M.R. 175, 179 (1972). Absence of a hearing in the military system does not, however, justify failure to furnish counsel to the military accused at the point counsel is provided for the civilian defendant.

[99] United States v. Mason, 21 U.S.C.M.A. 389, 45 C.M.R. 163 (1972). United States v. Adams, 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972). United States v. Culp, 14 U.S.C.M.A. 199, 215, 216. 219, 33 C.M.R. 411, 427, 428, 431 (1963) (Kilday, J., stated that sixth amendment right to counsel does not apply to courts-martial. Quinn, C. J., and Ferguson, J., opined that it did apply.). Even if the sixth amendment right to counsel does apply, questions remain of what does it require and when does it attach. *See* United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973) (Judge Quinn and Duncan agree that the Arpersinger v. Hamlin, 407 U. S. 25 (1972) holding that an accused is entitled to counsel at a trial at which he is sentenced to confinement applies to military criminal courts, but Chief Judge Darden is of the opinion that *Argersinger* should not be applied to military courts unless the Supreme Court so directly holds. Judge Quinn states in dictum that because adversary judicial proceedings have not begun, "pretrial arrest and confinement do not require that the accused be accorded counsel at the time of the imposition of restraint." *Id.* at 301, 46 C.M.R. at 301.). Federai civilian courts have split on these questions. *In re* Stapley, 246 F. Supp. 316 (D. Utah 1965) (granted writ of habeas corpus when accused denied legally qualified counsel at special court-martial when such counsel not required by UCMJ). *Contra,* LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965). *See also* Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967). *See generally* S. ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL (1970).

[100] United States v. Mason, 21 U.S.C.M.A. *389,* 395, 45 C.M.R. 163, 169 (1972) (dictum).

[101] "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." Coleman v. Alabama, 399 U. S. 1, 9 (1969) (Opinion of Mr. Justice Brennan).

lease conditions for an accused, the accused is entitled to the assistance of counsel.[102]

D. COUNSEL TO IMPLEMENT THE RIGHT TO A SPEEDY TRIAL

In *Barker v. Wingo*,[103] the Supreme Court stated that legislatures and courts, in the exercise of their supervisory power, may establish a fixed period in which cases must normally be brought to trial. Thus, the rule established by the Court of Military Appeals in *United* States v. *Burton*[104] that the accused be brought to trial within three months of confinement unless the government has a satisfactory explanation for not doing so, is constitutionally permissible.

In setting forth the criteria for measuring the right to a speedy trial, however, the Supreme Court stated that the "amorphous" quality of the right prevents declaring a specified number of days beyond which the right can be said to be denied.[105] The Supreme Court also rejected requiring an accused to demand a speedy trial or otherwise be deemed to have waived the right, for ". . . it is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself."[106] Just as for other constitutional rights, a valid waiver of the right to a speedy trial must be shown in the record to be "an intentional relinquishment or abandonment of a known

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[102] The assistance of counsel means *effective* assistance. United States v. King, 13 Crim. L. Rptr. 2407 (D.C. Cir. 1973) (Sixth Amendment guarantee of effective assistance of counsel infringed when defense denied the right to call the alleged rape victim as a material witness on the issue of probable cause at the preliminary hearing. It made no difference that the grand jury later indicted the accused.).

[103] 407 U. S. 514, 528, 530 n. 29 (1972). In Kloper v. North Carolina, 386 U. S. 213 (1967), the Court held the right to speedy trial to be fundamental, and imposed on the states by the due process clause of the fourteenth amendment.

[104] 21 U.S.C.M.A. 122, 44 C.M.R. 166 (1971). Note the limits of this prospective rule to pretrial confinement and the employment of the ultimately severe, but Congressionally imposed, sanction upon the Government: dismissal of the charges. The harshness of this remedy may increase the length of delay appellate judges will countenance. United States v. Hubbard, 21 U.S.C.M.A. 131, 134, 44 C.M.R. 185, 188 (1971) (dissent by Darden, J., "I believe dismissal of charges is drastic and unsatisfactory remedy. . . . It frees offenders against military law, but it does not punish those responsible for the delay."). Strunk v. United States, 41 U.S.L.W 4794 (U. S. Sup. Ct. 1972) (dismissal of charges as only possible remedy for denial of constitutional right to a speedy trial).

[105] Barker v. Wingo, 407 U. S. 514, 521, 522 (1972).

[106] *Id.* at 522-23, 526.

right or privilege." [107]

The Supreme Court has determined that the only way to determine whether the accused has been denied a speedy trial is by weighing "both the conduct of the government and the accused." [108] The first factor to be considered under this balancing test is the length of the delay, which "is to some extent a triggering mechanism." [109] The second factor considered is "the reason the government assigns to justify the delay." [110] A simple offense like AWOL must be tried sooner than a complex conspiracy charge. Negligence or deliberate delay to hamper the defense case, however, will weigh heavily against the government.

On the other side of the balancing test are the defendant's conduct, measured by whether he "asserts his right" to a speedy trial,[111] and whether he is prejudiced by the delay.'" The Court views any prejudice in light of the "evils protected against by the speedy trial guarantee." [113] One evil is the possibility that a delay may jeopardize the ability of the accused to defend himself.[114] The "major evils," however, flow from the consideration that :

> [t]o legally arrest and detain, the Government must assert probable cause to believe the accused has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and friends.[115]

In *Barker*, the Supreme Court questioned the ruling of a lower federal court that had applied the demand rule without questioning whether the accused had counsel at the point demand for trial was required.[116] Barker did have counsel during the entire five

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[107] *Id.* at **525** (applying the principle set forth in Johnson v. Zerhst, **304** U. **S. 458, 464 (1938).**

[108] Barker v. Wingo, **407** U. S. **514, 529-30 (1972).**

[109] *Id.* at **530.**

[110] *Id.* at **531.**

[111] *Id.*

[112] *Id.* at **532.**

[113] United States v. Marion, **404** U. S. **307, 320 (1971).**

[114] ***Id.***

[115] *Id.*

[116] Barker **v.** Wingo, **407** U. S. **514, 524** n. **22 (1972).** The Court commented that United States **v.** Perez, **398** F.2d **658** (7th Cir. 1968), ***cert. denied*, 393** U. **S. 1080** (1969), applied the demand rule even though the record did not show that the accused was represented by counsel at the time he should have made his demand, or that the accused was informed by the court or the prosecution of his right to a speedy trial. The Court noted that the ABA also rejects the demand requirement. *Id.* at **528** n. **28.** The ABA describes the demand rule as unfair where the accused is unaware of the

years a murder charge was pending against him and it is reasonable to conclude that to require that an accused be furnished counsel at this point in the proceeding only if he requests it without requiring any showing that he knew of and could have voluntarily exercised the opportunity to make this request, is not effectively furnishing counsel. In reality, the military and the Court of Military Appeals cannot apply the constitutional balancing test unless the accused is effectively furnished counsel from his arrest or from the formal initiation of the prosecution.[117]

Moreover, if counsel is furnished the accused at the inception of his restraint or the preference of charges, the defense counsel will not require as long to prepare for trial. Thus, the government can achieve a more rapid disposition of cases by using counsel to implement the right to a speedy trial.

The criminal process in the military is to be in accord with American legal principles to the greatest extent possible. Examination of the role the defense counsel should play in pretrial procedure must include a consideration of the federal court development of the due process rights, the right to counsel and the right to a speedy trial.

III. COUNSEL IN MILITARY PRETRIAL PROCEDURE

A. HOLDING AN ACCUSED PENDING TRIAL

Ordinarily, the decision to restrict or confine an accused is made by his unit commander.[118] The Manual for Courts-Martial requires

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charge or without counsel. ABA, STANDARDS RELATING TO SPEEDY TRIAL, Commentary 17.

[117] *See* United States v. Dolack, 14 Crim. L. Rptr. 2053, 2054 (10th Cir. 1973) (indigent federal defendant who was in Canadian jail when indicted was denied his right to counsel because of failure of court to appoint counsel until he was back in court's jurisdiction, holding up work on case for 13 months. "Related to the reasons stated in Kirby v. Illinois, 406 U. S. 682 (1972) and of particular significance here is the Sixth Amendment right to a speedy trial, and the reasons therefor [possibility of impairing the defense].").

[118] MCM, para. 19*d*. "Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person." UCMJ art. 9a. "Restriction" is "to specified areas of a military command," and still participating in all military duties and activities of his organization. The person in arrest cannot be required to perform full military duty. MCM, para. 20a and *b*. The commander can delegate his authority to arrest or confine to warrant or noncommissioned officers for enlisted members of his command. UCMJ art. 9b. While an apprehension, which frequently precedes the decision to restrict or confine, must be based upon necessity and upon probable cause to believe the person has committed an offense under

the person ordering an individual into restraint or confinement to have personal knowledge of the offense of which the individual is suspected or to have made sufficient inquiry into the facts so as to furnish reasonable grounds to believe that the offense has been committed by the individual to be restrained.[119] The Manual also states that confinement will be imposed only when deemed necessary to assure the presence of the accused for trial or because of the seriousness of the offense charged.[120]

Restraint and confinement in the military are imposed "pending disposition of charges" [121] and the individual has no right to bail.[122] No record of the factual basis is prepared to support the

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the Uniform Code of Military Justice, there is no requirement of a warrant issued by a neutral and detached magistrate. UCMJ art. 76; MCM, para. 19*a* and *d*. If charges should be preferred before restraint is imposed, the commander determines appropriate restraint when he receives the charges. MCM, para. 30*h*.

[119] "Section (d) of article 9 provides that no accused may be confined except for probable cause, and the decision of the officer issuing the order is substituted for that of the committing magistrate in the civilian sphere." Latimer [former Judge, U.S.C.M.A.], A *Comparative Analysis of Federal and Military Criminal Procedure*, 29 TEMP. L. Q. 1, 3 (1955).

[120] MCM, para. 20*c*. *But cf.* United States v. Bayhand, 6 U.S.C.M.A. 762, 768, 21 C.M.R. 84, 90 (1956), relying on article 13, UCMJ, to conclude that the "only valid ground for ordering confinement prior to trial is to insure the contined presence of the accused," giving as examples, a history of AWOL's and the recognized danger of a serious sentence. ". . . No person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence. . . ." UCMJ art. 13. Chief Judge Darden, however, opines that article 13 is a "limit on the nature of confinement and not the discretion to confine." United States v. Jennings, 19 U.S.C.M.A. 88, 89, 41 C.M.R. 88, 89 (1969). "Any person subject to this chapter shall be ordered into arrest or confinement, as the circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement." UCMJ art. 10. The term "accused" is used, instead of "charged," in paragraph 8, MCM, in describing this provision of the UCMJ as the reference does not really mean formal charges, but being suspected. *Hearings on HR 2498 Before the House Armed Services Comm.*, 81st Cong., 1st Sess., 908 (1949) [hereinafter cited as *1949 Hearings.*]. Paragraph 8b(1), MCM, provides that no restraint need be imposed in cases involving minor offenses.

[121] MCM, para. 20*a* and *c*. For arrest and restriction the person is ordered orally or in writing not to go beyond the limits of his restraint. MCM, para. 20*d*(2). For confinement, the person is delivered to the place of confinement with a statement identifying the person and the offense of which he is accused. MCM, para. 20*d*(3). Article 13 of the Code requires that confinement be no more rigorous than necessary and that there be no punishment other than for minor infractions of discipline during confinement.

[122] Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956)

decision to hold an accused to answer for alleged offenses or upon which to review the decision.[123] Counsel is not provided to advise or represent the individual in this process.

When the commander is notified of a suspected offense, he must ". . . collect and examine all evidence that is essential to a determination of the guilt or innocence of the accused, as well as evidence in extenuation or mitigation." [124] As a result of this preliminary inquiry, the commander may decide that the reported offenses do not warrant further action,[125] or based upon his inquiry, the commander may pursue one of several courses of disciplinary action. He can take disciplinary action himself under Article 15 or any authority he might have to convene a court-martial or recommend that a higher commander take appropriate action.[126] Only at the general court-martial level does the Code require that the accused be furnished counsel to challenge the allegations upon which his detention is based.

B. COUNSEL AT THE ARTICLE 32 INVESTIGATION

No violation of the Uniform Code of Military Justice can be referred to trial by general court-martial until an investigating officer has made ". . . inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition of the case in the interest of justice and discipline." [127] The Army generally uses a non-lawyer officer as the investigating officer,[128] but an investigating officer

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123 Horner v. Resor, *19* U.S.C.M.A. *285, 286; 41* C.M.R. *285, 286 (1970)* (review of the decision of the commander to restrain only for an abuse of discretion).

124 MCM, para. *32b.* "Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice or discipline. . . ." UCMJ art. *30*(b). The Manual requires the accused to remain in restraint until released by proper authority even if he is not charged promptly. MCM, para. *22.*

125 MCM, para. *32d.* This decision may be based upon triviality of the charges, failure to state offenses, lack of evidence to support the allegations, or other sound reasons.

126 MCM, para. *33.* Charges "ordinarily" should be tried at a single trial at the lowest level which can "adjudge an adequate and appropriate punishment." *Id.* at para. *33h.* If the commander making the inquiry prefers the charges, he disposes **of** them in the same manner as other charges. *Id.* at para. *33a.*

127 UCMJ art. 32(a); MCM, para. 34*a*. An Article *32* investigation may be conducted in any case; for example, where it appears that a bad conduct discharge may be warranted. ***Legal and Legislative Basis,*** Manual for Courts-Martial, *1951,* at *53* [hereinafter cited as L&LB]. In Army practice this is not done because **of** the delay and inconvenience encountered.

128 "The officer appointed to make such an investigation should be **a**

who has legal training or experience is preferred in the conduct of the investigation which is thorough and fair, yet brief and "limited to the issues raised by the charges and to the proper disposition of the case." [129]

At this Article 32 investigation, the accused has the right to be represented by civilian counsel provided by him at no expense to the government, by a military counsel specifically requested by him if that military counsel is reasonably available, or if the accused desires, by a certified military lawyer detailed by the general court-martial convening authority.[130] The investigating officer informs the accused of his rights to counsel and his right at the investigation to cross-examine any available witnesses against him, to know the names of all witnesses, and to present any matter, including witnesses, in his own behalf.[131] Because the accused is able to make a knowing and intelligent assertion or waiver of his right to counsel at the Article 32 investigation, this procedure meets the standard established for the waiver of constitutional rights.[132]

The Court of Military Appeals has stated that the Article 32 investigation is judicial in nature and is analogous to a civilian preliminary hearing and a grand jury investigation. Therefore,

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mature officer, preferably an officer in the grade of major or lieutenant commander or higher, or one with legal training and experience." MCM, para. 34*a*.

[129] *Id.* Even though the rules of evidence do not apply at the investigation, the investigating officer must cull from his final product "all extraneous matters" and present only such evidence as in his opinion will be admissible at trial. McDonald v. Hodson, 19 U.S.C.M.A. 582, 583, 42 C.M.R. 184. 185 (1970). If the basis of the recommendation is inadmissible evidence, the investigating officer should show to what extent and why. L&LB, 53. This problem is arguably diminished because the case cannot be referred to trial by general court-martial until the convening authority finds on the advice of his lawyer staff judge advocate that the charge alleges an offense and trial is "warranted by evidence indicated in the report of investigation." UCMJ art. 34(a). The investigating officer may, of course, obtain legal advice from a designated member, *e.g.*, Chief, Military Justice, of the local Staff Judge Advocate office. But justice is more likely to be delayed or denied if the case has to be returned to investigate further or if valuable evidence is never presented in the investigation. The government is not required to be represented at the investigation and is for only complex cases. McDonald v. Hodson, 19 U.S.C.M.A. 582, 583, 42 C.M.R. 184, 185 (1970).

[130] UCMJ art. 32(b).

[131] MCM, para. 34b; UCMJ art. 32(b); United States v. Nichols, 8 U.S.C.M.A. 119, 124, 23 C.M.R. 343, 348 (1957).

[132] Johnson v. Zerbst, 304 U.S. 458 (1933). United States v. Rhoden, 1 U.S.C.M.A. 193, 2 C.M.R. 99 (1952) (Accused may waive counsel for the Article 32 investigation.). The advice of rights is set forth on the investigating officer's report, MCM, App. 7.

the accused is entitled to representation by qualified counsel at the Article 32 investigation.[133] The Court of Military Appeals also views the investigation as a discovery proceeding for the accused.[134] Because of the close connection between the purposes of the investigation and the trial, the court has required legally qualified counsel be appointed for the accused at the Article 32 investigation when he desires to be represented by a lawyer.[135]

The rights of the accused to cross-examine and call witnesses are made meaningful by the effective assistance of counsel.[136] The

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133 ". . . something roughly analogous to the federal procedure of preliminary examination and grand jury indictment is obtained in the military through the use of a formal pretrial investigation and convening authority consideration," Latimer, *supra* note 119 at 5. The analogy was felt to be "appropriate" by the Court of Military Appeals. United States v. Roberts, 7 U.S.C.M.A. 322, 326, 22 C.M.R. 112, 116 (1956). "We conceive that the pretrial investigation in military practice may properly be identified with the preliminary hearing of criminal law administration in the civilian scene." United States v. Eggers, 3 U.S.C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953). What a "preliminary hearing'' is is difficult to describe as it varies from jurisdiction to jurisdiction. ***See generally,*** Hunvald, ***The Right to Counsel at the Preliminary Hearing,*** 31 Mo. L. REV. 109, (1966) ; United States v. Nichols, 8 U.S.C.M.A. 119, 124, 23 C.M.R. 343, 348 (1957). The Article 32 investigation does not, however, inquire into the necessity of pretrial restraint. Wood v. Georgia, 370 U. S. 375, 390 (1962), ". . . the grand jury serves the invaluable function in our society of standing between the accuser and the accused . . , to determine where a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

134 United States v. Obligacion, 17 U.S.C.M.A. 36, 38, 37 C.M.R. 300, 302 (1967) ; United States v. Allen, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1955); United States v. Tomazewski, 8 U.S.C.M.A. 266, 268, 24 C.M.R. 76, 78 (1957). ". . . this is an investigation for purposes of determining whether there is probable cause and it is an investigation to assist the accused." *1949 Hearings,* 198, 199.

135 United States v. Tomazewski, 8 U.S.C.M.A. 266, 269, 24 C.M.R. 76, 79 (1957). Article 27(b), UCMJ, describes qualified counsel as a military judge advocate who is a graduate of an accredited law school or is a member of the bar of a federal court, of the highest court of a state, or a member of such a federal or state bar; and certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member.

136 United States v. Worden, 17 U.S.C.M.A. 486, 489, 38 C.M.R. 284, 287 (1968) (Impairing the right of accused and counsel to prepare for the Article 32 investigation by interviewing each and any other person they would have to to prepare for trial undermines the right to cross-examination, and consequently the right to effective assistance of counsel, ***citing*** People v. Maddox, 322 P.2d 163 (Cal. Sup. Ct. 1967)). The Court of Military Appeals stated that it would not indulge in "nice calculations as to the amount of prejudice" in the case. The court set aside the findings and sentence, and permitted a rehearing to be ordered. This result is captioned "appropriate relief," as "Denial of the right to counsel during pretrial stages of the proceedings against the accused does not invalidate charges referred to trial or otherwise deprive the court of the power to proceed to

value of this right of cross-examination, however, is diminished somewhat by absence of a verbatim record of the Article 32 investigation.[137] The use of a verbatim record could be of value to a defense counsel in his attempts to have charges against his client dismissed, to have the case referred to a lower level court-martial, to have nonjudicial punishment imposed, or to enter into a pretrial agreement as to findings and sentencing. Impeachment at trial through the use of the investigation testimony also would be facilitated by a verbatim record, since the strengths and the weaknesses of witnesses, and thus prosecution's case, frequently will not appear in a summary of evidence prepared by a layman investigator.

The usefulness of counsel at the Article 32 investigation is diminished because there is no power to subpoena non-military witnesses to testify.[138] If a civilian witness is willing to testify at the Article 32 investigation, he may receive transportation costs,[139] but he is not entitled to a witness fee.[140] If the civilian witness refuses to testify, however, his sworn statement can be considered in the investigation over the objection of the accused.[141]

The procedure in the military of providing a preliminary hearing with the services of a defense counsel only when referral to a general court-martial is a possibility raises two questions concerning a denial of equal protection of the laws and hence due

findings and sentence. . . ." United States v. Worden, 17 U.S.C.M.A. 486, 489, 38 C.M.R. 284, 287 (1968). The probable source for this treatment of the problem is "the requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error." UCMJ art. 32(d).

[137] United States v. Norris, 16 U.S.C.M.A. 574, 576, 37 C.M.R. 194, 196 (1967); L&LB 54. In the Army a verbatim record is rare. The United States Supreme Court recognized that counsel at the preliminary hearing can show "through skillful examination or cross-examination" weaknesses in the case that cause it never to be referred to trial at all. Coleman v. Alabama, 399 U. S. 1, 9-10 (1970). See Hunvald, supra note 133, at 117; Note, The *Preliminary Hearing-An Interest Analysis,* 51 IOWA L. REV. 164 (1965); and United States v. Worden, 17 U.S.C.M.A. 486, 38 C.M.R. 284 (1968).

[138] MCM, para. 34d. Of course, military witnesses can be ordered to appear at the investigation to testify.

[139] 50 Comp. Gen. 810 (1971). (The issuance of invitational travel orders and payment of commuted travel allowances to civilian persons other than federal government employees requested to testify at Article 32 investigations may be authorized since the Article 32 investigation is an integral part of the courts-martial proceedings required by statute. The guidelines of article 49, UCMJ, should be followed. The Comptroller General recommended paragraph 34*d*, MCM, be amended to provide guidance for the exercise of such authority.).

[140] MCM, para. 34*d*.

[141] United States v. Norris, 16 U.S.C.M.A. 574, 578, 37 C.M.R. 191, 198 (1967).

process. The first issue arises because commanders utilize pretrial restraint in cases likely to be referred to a special court-martial as well as in those cases likely to be referred to a general court-martial. A case involving repeated short absences without leave may dictate that the accused be confined prior to trial in order to assure his presence for trial, although the charges have been referred or are to be referred to a special court-martial. Because the special court-martial is designed for the trial of less serious offenses, subjecting an accused to pretrial confinement or other restraint is less appropriate than when trial is to be by general court-martial.[142]

The second problem arises in cases that are referred to a special court-martial which can adjudge a bad conduct discharge. While an accused whose case is referred to a general court-martial has the benefit of a defense counsel and an Article 32 investigation, the accused whose case is referred to a special court-martial does not receive these benefits regardless of the maximum permissible penalty. A defense counsel can use the Article 32 investigation as a basis upon which to seek dismissal of the case and as a discovery tool to appraise the defense of prosecution evidence. Thus, the accused whose case is referred to a special court-martial which can adjudge a bad conduct discharge can receive a punitive discharge, yet he will not receive the benefits of an Article 32 investigation with representation by a defense counsel.[143] It is arguable that this process of granting an Article 32 investigation complete with defense counsel to the accused facing a punitive discharge by a general court-martial but not to an accused facing a special court-martial denies the accused equal protection and due process of law.[144]

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142 Pugh v. Rainwater, 13 Crim. L. Rptr. 2525, 2526 (5th Cir. 1973) (Incarcerated misdemeanant is in just as serious "plight" as incarcerated felon, and due process requires preliminary probable cause hearing for both when incarcerated, *citing* Argersinger v. Hamlin, 407 U. S. 25 (1972)).

143 United States v. Kelly, 5 U.S.C.M.A. 259, 264, 17 C.M.R. 259, 264 (1954) (Brosman, J., concurring in result). Quoted with approval by unanimous court in United States v. Johnson, 12 U.S.C.M.A. 640, 645, 31 C.M.R. 226, 231 (1962) (adding, ". . . damages to the accused by sentence to confinement may not involve the serious consequences of a punitive discharge. . . . which is not lesser included in confinement and forfeitures.").

144 The rationale of Coleman v. Alabama, 399 U. S. 1 (1970), requiring appointment of defense counsel for indigent accused, for a preliminary hearing, has an equal protection basis. "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." Id. at 9 (Opinion of Brennan, J., joined by Douglas, J.; White, J.; and Marshall, J., Black, J., Id. at 12; White, J., Id. at 17; and Harlan, J., Id. at 19 agreed that the appointment of counsel is required for the preliminary hearing.). Not providing some ac-

C. SAFEGCARDS FOR THE DETAINED MILITARY ACCUSED

The Uniform Code of Military Justice contains provisions to assure that pretrial deprivations of liberty will be proper and that the disposition of charges against the accused will be prompt. Unfortunately, these safeguards have been of questionable effectiveness. Many general court-martial convening authorities have withdrawn from their subordinate commanders the power to order pretrial confinement.[145] Although military justice is more expeditious than civilian criminal justice,[146] existing military pretrial procedure has not eliminated all unnecessary pretrial delays in the administration of military justice.[147]

When the accused is placed in pretrial restraint, Article 10 of the Code provides that ". . . immediate steps shall be taken to inform him [the accused] of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." [148] The Court of Military Appeals has stated that the purpose of the notification requirement of Article 10 is to enable the accused to "consider his defense" and to "apprise *his* family, friends or ***counsel*** of his predicament to enable them to assist him by whatever means available." [149] Judge Duncan observed that unless the

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cused a hearing or counsel to safeguard pretrial liberty and to seek not to have to face a punitive discharge, and yet to provide a hearing and counsel for other accused similarly situated seems without rational justification. See notes 28-35 *supra* and accompanying text.

[145] *E.g.*, U. S. Army, Europe, lessens rhe opportunity for abuse of discretion to confine by permitting only general court-martial convening authorities or their designees such as the Chief of Staff or Staff Judge Advocate to personally approve pretrial confinement. A judge advocate must be notified if the Staff Judge Advocate is not the designee to approve pretrial confinement. Letter from General Michael S. Davison to the members of U. S. Army, Europe, July 31, 1972; Pretrial Confinement Approval, Materials, 16th Judge Advocate General of the Army's Conference (Oct. 1972, Charlottesville, Virginia).

[146] United States v. Burton, 21 U.S.C.M.A. 122, 117, 44 C.M.R. 166, 171 (1971).

[147] ANNUAL REPORT OF THE U. S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION (Jan. 1, 1971 to Dec. 31, 1971) at 3: ". . . [d]elay in the processing of disciplinary actions has been a continuing problem. These delays detract from the overall quality of military justice and contribute to a feeling on the part of many officers and enlisted men that the military justice system is too complex and bureaucratic for full effectiveness. . . ."

[148] 10 U.S.C. § 810 (1970).

[149] United States v. Tibbs, 15 U.S.C.M.A. 350, 354, 35 C.M.R. 322, 326 (1965) (emphasis added). United States v. Moore, 4 U.S.C.M.A. 482, 486, 16 C.M.R. 56, 60 (1954), states that ". . . [N]o right exists to be provided with appointed military counsel prior to the filing of charges." The court

government takes steps to provide counsel for an accused, particularly if he is in confinement, he is not realistically going to be able to obtain counsel.[150] If an accused fails to request the assistance of counsel because he does not know nor has he been informed of his right to counsel, the accused is forced into an uninformed waiver of counsel.[151]

It is arguable that if an accused may retain counsel to "assist him by whatever means available" [152] when he is restricted or confined, the government must provide counsel for an indigent ac-

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has not held that the right to appointed counsel exists on the preferring of charges. The authority for the statement in ***Moore*** was a statement in United States v. Shaull, C.M. **359571, 10** C.M.R. **241, 250** (ABR **1952**), that "Nowhere in the Code or Manual is there any provision according a person suspected of a crime the right to demand legal counsel prior to the preferring of charges against him." This approach should not be considered to exclude the furnishing of counsel when required by the Constitution, for example, as construed by the Court of Military Appeals in United States v. Tempia, **16** U.S.C.M.A. **629, 37** C.M.R. **249 (1967)** (custodial interrogation), **or** perhaps in the supervisory power of the Court of Military Appeals. United States v. Mason, **17 U.S.C.M.A. 389, 397, 45 C.M.R. 163, 171 (1972)** (dictum).

150 United States **v.** Mason, **21 U.S.C.M.A. 389, 397, 45** C.M.R. **163, 171 (1972)** (dictum).

151 *See* Carnley **v.** Cochran, **369** U.S. **506,** 513 **(1962)** ("[w]here the assistance of counsel is a constitutional requisite," evidence must show that the defendant was informed specifically of his right to the assistance of appointed or retained counsel at trial and that he clearly rejected such assistance.).

152 United States v. Tibbs, **15 U.S.C.M.A. 350, 354, 35 C.M.R. 322, 326 (1965).** ". . . [I]t does not seem that any greater significance should be attached to the request for counsel [sooner after arrest than at trial] . . . [for] [i]f the right [to counsel] is deemed to be sufficiently important to be a due process requirement, why is it not sufficiently important to be made available to the unwary, ignorant and inexperienced as well as the informed, sophisticated and professional?" Kamisar and Choper, ***The Right to Counsel in Minnesota : Some Field Findings and Legal-Policy Observations,*** **48** MINN. **L.** REV. **1, 60-61 (1963).** Professors Kamisar and Choper also present the argument that while permitting the assistance **of** counsel for those who request counsel, whether indigent or not, and not for other defendants, would be constitutionally permissible if there were no right to counsel at that point, the practice might run afoul of equal protection and due process if it were shown that only the affluent requested counsel, especially when it is considered that "the availability of counsel immediately or soon after arrest is regarded by" prosecutors and defense counsel "to be of great consequence.'' *Id.* at **61.** One assistance of counsel is to obtain a speedy trial; "Similarly, when the defense requests a speedy disposition of the charges, the Government must respond **to** the request and either proceed immediately or show adequate cause for further delay. A failure to respond to a request for a prompt trial **or** to order such a trial may justify extraordinary relief." United States v. Burton, **21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971).** It is not clear from the statement **of** the rule whether the defense request for continuance obviates the entire burden of the government or only for the period of requested defense countinuance. Only the later reading would prevent prejudicing the defendant for a request of any continuance.

cused. In *Earnest v. Willingham*,[153] the Tenth Circuit Court of Appeals held that where financially able prisoners are allowed to retain counsel in a federal parole board proceeding for revocation of mandatory early release of prisoners, the parole board must provide counsel for indigent prisoners. From this decision, it can be seen that a failure to furnish counsel to a restrained military accused who cannot retain counsel is discriminatory in violation of the due process clause of the fifth amendment.[154]

Article 33 of the Code provides that in cases where an accused is "held for trial by general court-martial" the commanding officer will forward the charges, investigation and allied papers to the officer exercising the general court-martial convening authority within eight days.[155] If "that is not practicable," he shall report in writing the "reasons for delay."[156] Compliance with this provision requiring a report of any reasons for delay depends upon strict enforcement by each general court-martial convening authority.[157]

The only additional review of pretrial confinement is that provided by a Department of Defense Instruction — the general court-martial convening authority must approve any pretrial confinement in excess of thirty days.[158] Thus, 22 days after the required date for forwarding the charges, investigation and allied papers, the general court-martial convening authority reviews the propriety of the pretrial confinement, whether the pretrial confinement should be continued, and whether any delay in forwarding the case file is because of impracticability. If pretrial confinement of the accused is deemed necessary, the general court-martial convening authority must choose between releasing an accused who

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153 406 F.2d 681 (10th Cir. 1969). *But see* Wainwright v. Cottle, 14 Crim. L. Rptr. 4027 (U.S. Sup. Ct. 1973) *vacating judgment below*, 13 Crim. L. Rptr, 2176 (5th Cir. 1973), that a state that allows parolees to be represented by counsel at revocation hearings may not deny counsel to those who cannot afford it.

154 *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

155 UCMJ, art. 33. Meeting the eight day requirement, to include a completed Article 32 investigation, would be exceptional in actual practice. Blackstone noted that English law permitted the magistrate to hold the accused in confinement for eight days pending completion of the preliminary examination. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, OF PUBLIC WRONGS 350 (Beacon ed. 1962).

156 UCMJ, art. 33.

157 United States v. Tibbs, 15 U.S.C.M.A. 350, 355, 35 C.M.R. 322, 327 (1965). When a written report is not made of why the case is not forwarded within eight days, the Court of Military Appeals will not reverse a conviction if "impracticability of forwarding the charges" is shown in the record of trial.

158 Department of Defense Instruction 1325.4, para. 111, A. 2. b. (1968).

is dangerous or likely to flee, and continuing the pretrial confinement. Although the delay that has occurred may be unreasonable, the convening authority is inclined naturally to continued confinement because of the immediate needs of good order and discipline in his command.

If a pretrial detainee believes his detention is improper, his immediate remedy under the Code is to file an Article 138 complaint against his commanding officer, the person responsible for the wrong. This complaint is initially presented to that same commanding officer and if he refuses to redress the wrong, the detainee may submit his complaint to any superior commissioned officer. The complaint is forwarded by that officer to the general court-martial convening authority having jurisdiction over the accused. That officer then investigates the complaint, takes any steps necessary to remedy the wrong, and forwards the case file to the Secretary of the Military Department.

In *Catlow* v. *Cooksey*,[159] the petitioner alleged that he had been wrongfully confined as well as that his rights had been violated by the conditions of his confinement. He further alleged that his pretrial confinement was punishment, a violation of Article 13 of the Code. The Court of Military Appeals held that a pretrial detainee must first seek relief under the provisions of Arti'cle 138 before he petitions for intervention by the Court of Military Appeals under the All Writs Act.[160] Should the Article 138 remedy prove ineffective, the court stated that the issue may still be raised

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159 21 U.S.C.M.A. 106, 44 C.M.R. 160 (1971) (Memorandum opinion of the court); Tuttle v. Commanding Officer, 21 U.S.C.M.A. 229, 230, 45 C.M.R. 3, 4 (1972) (Memorandum opinion of the court). The requirement to pursue the Article 138 complaint prior to seeking extraordinary relief from Court of Military Appeals for improper pretrial confinement is not met by sending copy of petition for habeas corpus to commander responsible to redress the wrong, at the time Court of Military Appeals is petitioned. Federal courts also require exhaustion of the Article 138 complaint before confined personnel may seek habeas corpus relief in federal courts. *See* Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969).

160 Catlow v. Cooksey, 21 U.S.C.M.A. 106, 108, 44 C.M.R. 160, 162 (1971). The All Writs Act, 28 U.S.C. §1651(a) (1949): The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. In United States v. Frischholz, 16 U.S.C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966), the court held "Part of our responsibility includes the protection and preservation of the constitutional rights of persons in the armed forces. . . . We entertain no doubt, therefore, that this court is a court established by act of Congress within the meaning of the All Writs Act." In United States v. Draughon, C.M. 419814, 42 C.M.R. 447, 451 (ACMR 1970) (Opinion of the court en banc), the Army Court of Military Review took the same view of its respective extraordinary relief power as did the Court of Military Appeals in *United States v. Frischholz.*

by an appropriate motion to the military judge of the court-martial to which the pending charges are referred.[161]

Because the relief sought is extraordinary in nature, the Court of Military Appeals requires a petitioner to demonstrate that review of the propriety of pretrial confinement at trial and through appellate processes is inadequate and that the actions of the detention officials would tend to deprive the court of its appellate jurisdiction to review the case.[162] Consequently, military appellate court relief for the pretrial detainee is, in effect, unavailable.

The convening authority creates a court to act in a case by his referral of the case to that court for trial.[163] Thus, a military judge cannot provide relief for the pretrial detainee until a court-martial has been convened and he has been detailed to hear the case.[164] The Court of Military Appeals perceives that at the trial the military judge can remedy harrassing or oppressive actions that have taken place prior to trial and have resulted in denial of the accused's right to a speedy trial, improper procurement of a confession,[165] denial of the right to consult with counsel, impeded preparation for trial, or other action constituting denial of due process of law.[166]

The lack of judicial supervision of a case prior to its referral to trial cannot always be remedied in the trial forum. When the case comes to trial, the only affirmative judicial sanction for denial of an accused's right to a speedy trial is dismissal of the charges against the accused who may be guilty and should be punished, The remedies available to the trial court when an accused has been denied his right to consult counsel and prepare for trial are: a continuance, with the accused often in confinement, or a dismissal of the charges. The harshness of dismissal of

161 Catlow v. Cooksey, 21 U.S.C.M.A. 106, 108, 44 C.M.R. 160, 162 (1971); Hallihan v. Lamont, 18 U.S.C.M.A. 654, 653 (1968). Any referral to trial should be by the time the Article 138 complaint is acted on.

162 Hallihan v. Lamont, 18 U.S.C.M.A. 652, 653 (1968).

163 UCMJ art. 39(a).

164 *See* Font v. Seaman, 20 U.S.C.M.A. 387, 390-91, 33 C.M.R. 227, 230-31 (1971).

165 Hallihan v. Lamont, 18 U.S.C.M.A. 652, 653 (1968). The court made clear that appellate court extraordinary relief is not going to be available in such cases. Review of all questions raised at the Article 39(a) session including any labelled as having "constitutional dimensions" will be reviewed in the "normal course of appellate review." Font v. Seaman, 20 U.S.C.M.A. 387, 390-91, 43 C.M.R. 227, 230-31 (1971).

166 Font v. Seaman, 20 U.S.C.M.A. 387, 390-91, 43 C.M.R. 227, 230-31 (1971). (Restriction to specified limits as "the least severe form of restraint available to a commander who believes that some restraint must be placed upon the liberties of one waiting disposition of charges'' was the context for applying the required Article 138 approach before seeking judicial relief.).

charges could cause countenance of denials of pretrial rights.

Does the trial military judge have the power to order the accused freed from pretrial restraint? In *Newsome v. McKenzie*,[167] seventeen sailors in pretrial confinement petitioned the Court of Military Appeals for "Relief from Unlawful Pretrial Confinement" resulting from an incident that took place aboard the *U. S. S. Kitty Hawk* on October 12, 1972. The charges against fifteen of the sailors were referred to a special court-martial and the accuseds had already been before a military judge at an Article 39a hearing at which time they had challenged the jurisdiction of the court-martial. In a memorandum opinion, denying the petition, two of the three judges of the Court of Military Appeals addressed the question of whether a military judge can order an accused released from pretrial confinement.[168] Judge Quinn was of the opinion that the military judge could "resolve" the issue,[169] while Judge Duncan in his dissent to the denial of the petition stated that he would require the government to show cause why the petitioners should not be released from pretrial confinement. Although he expressly withheld an opinion on whether a military judge can order a detained sailor released from pretrial confinement, Judge Duncan observed that neither the Code nor Manual "invest a military judge with *specific* authority to consider a petition for writ of habeas corpus."[170] He noted, however, that the authority of a military judge under the Manual to grant motions for appropriate relief and decide interlocutory questions other than challenges may include the authority to order an accused released from pretrial confinement.[171]

Because judicial relief at trial can come "too late" or be inadequate in nature, the effective use of the Article 138 complaint becomes more significant. The Army grants the accused the services

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167 22 U.S.C.M.A. 92, 46 C.M.R. 92 (1973).

168 *Id.* at 93, 46 C.M.R. at 93. Chief Judge Darden opined that release from pretrial confinement is not "in aid of" the Court of Military Appeals' jurisdiction.

169 *Id.*

170 Id.

171 Id. at paragraphs 69 and 57, MCM. ***But*** *see* Gagnon v. United States, 42 C.M.R. 1035, 1037 (AFCMR 1970) (military judge cannot order release from pretrial restraint because paragraph 21c, MCM reserves to commander or other appropriate commander the power to confine and release from confinement.). ***Contra,*** Gagnon v. United **States,** 42 C.M.R. 1035, 1041-43 (AFCMR 1970) (dissenting opinion. Paragraph 21c, MCM illegal ,because release from pretrial confinement may be the only remedy for the military judge to meet his responsibility to assure a fair trial and because a session of the trial held under Article 39a of the Code includes the power to grant final relief on motions made by the parties.).

of a judge advocate in "submitting" the complaint,[172] but the services of an Army lawyer to pursue the complaint are, however, provided "upon request.''

When an accused is in confinement, the problem is compounded. His freedom to seek advice on whether he has a valid complaint is severely restricted. Many accused do not realize the importance of obtaining the presence of possible witnesses ;[174] others will not be able to do so since they are confined.

The use of counsel can also help the complainant furnish the relevant information free of any command intimidation. Having all pertinent information benefits the government since it is "charged with acting for" the complainant in "subsequent action on his complaint," [175] and because the information may indicate any leadership deficiencies of the commanders involved.

The Article **138** quasi-judicial remedy can be the most effective weapon available under military procedure to the accused challenging the legality of his pretrial restraint. The effectiveness of Article **138** depends upon whether the accused is furnished counsel to pursue relief from improper pretrial deprivation of liberty.[176]

IV. PRETRIAL ROLE OF COUNSEL IN OTHER AMERICAN SYSTEMS

A. PROBABLE CAUSE DETERMINATIONS BY A MAGISTRATE

Unlike military arrests, federal arrests are usually made pursuant to an arrest warrant issued by a magistrate who has determined that the facts set forth in a complaint supported by affidavits provide probable cause to believe the accused committed

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[172] Army Reg. **27-14,** para. **8 (10** Dec. **1973)** (". . . advice will include whether, and under what circumstances, an Article **138** complaint properly lies. . . .").

[173] *Id.*

[174] ***See*** Coleman v. Alabama, **399 U.S. 1, 9-10 (1970)** : The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance [at a preliminary hearing] compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the **state's** criminal process at which the accused is "as much entitled to such aid [of counsel] as at the trial itself." Powell v. Alabama, **287 U.S. 45, 57 (1932).**

[175] Army Reg. **27-14,** para. **5c (10** Dec. **1973).**

[176] The complainant has the burden of proof that he has been wronged. Army Reg. **27-14,** para. **3a (10** Dec. **1973).** The complainant is advised to state all pertinent facts and document them with independent evidence. Army Reg. **27-14,** para. **5 (10** Dec. **1973).**

an offense.[177] Although the Court of Military Appeals has not required application for nor authorization of a search to be in writing,[178] it has stated that the application for authority to search should be in writing.[179] In *United States v. Sam* [180] the court, however, described oral application and authorization to search as "uncomplimentary" to military law, Because the decisions to apprehend and restrain deprive an accused of his liberty as well as invade his privacy, a record should be made of the facts supporting the decisions to apprehend and restrain.

At the present time, the Army uses military judges to issue search warrants, as well as continuing the use of traditional commander-authorized searches, since the legal issue of probable cause is more likely to be correctly determined by a military judge and consequently that the evidence seized will be admissible at trial.[181] Likewise, it is more likely that a correct determination of

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[177] FED. R. CRIM. P. 4, 5, and 5.1. The Fourth Amendment of the Constitution provides that ". . . no warrants shall issue, but upon probable cause. . . ." *E.g.*, Federal Bureau of Investigation agents can arrest without a warrant for offenses committed in their presence or on reasonable grounds to believe the person to be arrested has committed or is committing a felony. 18 U.S.C. $3052 (1951). If an arrest is for an offense committed in the presence of an officer or otherwise precedes obtaining an arrest warrant, a complaint showing probable cause must be filed promptly. FED. R. CRIM. P. 5(a). The requirement is made explicit in the 1972 amendment of Rule 5. Giordenello v. United States, 357 U. S. 480, 486 (1958) (The magistrate must judge for himself whether the facts show probable cause.). The rules set out in paragraph 152, MCM, for determining probable cause to search in situations involving hearsay could assist military police and commanders with apprehension and restraint situations involving hearsay. Because the requirements of reasonableness cannot be less stringent in arrests and searches without warrants, probable cause is required in these circumstances as well. Wong Sun v. United States, 371 U. S. 471 (1963); and see Draper v. United States, 358 U. S. 307 (1959). *Compare* paragraph 20*d*, MCM, *with* paragraph 152, MCM. A commander who appreciates the possible use of hearsay in committing an accused can exercise a broader Dower to commit an accused than if he thought he was limited to strict rules of evidence.

[178] United States v. Hartsook, 15 U.S.C.M.A. 291, 298, 35 C.M.R. 263, 266 (1965); United States v. Sparks, 21 U.S.C.M.A. 134, 135, 44 C.M.R. 188, 189 (1971).

[179] United States v. Hartsook, 15 U.S.C.M.A. 291, 298, 35 C.M.R. 263, 270 (1965); United States v. Sparks, 21 U.S.C.M.A. 134, 135, 44 C.M.R. 188, 189 (1971).

[180] United States v. Sam, 22 U.S.C.M.A. 124, 129, 46 C.M.R. 124, 129 (1973) (Criminal investigator and commander authorizing search recalled different facts being submitted to commander in request by investigator to commander for search authorization).

[181] Army Reg. 27-10, Chapter 14 (Change No. 9, 19 July, 1972). Query the desire of commanders and police agents to undergo the rigors and time consumption to prepare written affidavits. To encourage commanders and police to utilize legal expertise to determine the question of probable cause, some general court-martial convening authorities have delegated to part-time

probable cause to restrain an accused pending trial would be made by a military judge,

Although the Court of Military Appeals sanctions, with "careful scrutiny," [182] the commander acting in the capacity of a magistrate, it is clear that commanders are not sufficiently "neutral and detached" to meet the test prescribed by the Supreme Court in *Coolidge v. New Hampshire* [183] and *Shadwick v. Tampa.*[184] In *Coolidge,* the state Attorney General, in his capacity as a magistrate, issued a search warrant for the evidence of a murder. The Court held the warrant invalid because the Attorney General was "actively in charge of the investigation and later was to be chief prosecutor at the trial." [185] In *Shadwick v. Tampa,* the Court construed the "neutral and detached" test to require "severence and disengagement from the activities of law enforcement.'' [186] The Manual places an affirmative duty upon the commander to be actively engaged in the investigation of reported offenses,[187] and, more often than not, the commander is commonly the formal accuser.[188]

"Careful scrutiny'' of the commander's decision to restrain an accused pending trial by a military judge or by the appellate courts is arguably required because of the difficulty the com-

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military judges stationed at their commands the authority to order searches. A memorandum of record of the information presented to the judge preserves a record of the facts on which the decision is based. This procedure would be the same value in the authorizing of apprehensions.

[182] United States v. Sam, 22 U.S.C.M.A. 124, 127, 41 C.M.R. 124, 12' (1973); United States v. Hartsook, 15 U.S.C.M.A. 291. 294, 35 C.M.R. 263. 266 (1965). The Court of Military Appeals permits delegation of the authority to authorize searches, so long as the Supreme Court standard of capability of exercising a "judicial" rather than a "police" attitude exists in the delegee. United States v. Drew, 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965), *citing* Johnson v. United States, 333 U. S. 10 (1948). *Compare* the likely permissible delegees for searches *with* those possible under article 9, UCMJ, (noncommissioned officers) for arrest or confinement.

[183] 403 U. S. 443 (1971).

[184] 407 U. S. 345 (1973).

[185] Coolidge v. New Hampshire, 403 U. S. 443, 450 (1971).

[186] Shadwick v. Tampa, 407 U. S. 345, 350 (1973). (non-lawyer clerks in judicial branch qualified to issue arrest warrants in simple misdemeanors). Generally, federal magistrates must be members of the bar of the highest court of the state in which they serve. Federal Magistrate's Act, 28 U.S.C. §§631-639 (1968).

[187] MCM, para. 32*b*.

[188] The commander's role as a policeman can be perceived by the requirement that a commander questioning one suspected or accused of an offense inform him of his Article 31 rights against self-incrimination and to counsel. United States v. Fisher, 21 U.S.C.M.A. 223, 224, 44 C.M.R. 277, 278 (1972) (interrogation by a person with disciplinary authority over the accused).

mander "may tend to experience" in being neutral and detached.[189]

B. PROCEEDINGS BEFORE THE MAGISTRATE

1. Purpose of the initial appearance. When an arrest is made by federal officers, the defendant must be taken "without unnecessary delay" to the nearest available federal magistrate.[190] The magistrate informs the defendant

> . . . of the complaint against him and any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, . . . of the general circumstances under which he may secure pretrial release, . . . that he is not required to make a statement and that any statement made by him may be used against him. . . . [and] of his right to a preliminary examination.[191]

The defendant must be allowed a "reasonable time and opportunity to consult counsel" before the preliminary examination can be held,[192] and the defendant can be released on bail pending the preliminary examination.[193] At the preliminary examination, the magistrate determines if there is probable cause to believe that

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[189] United States v. Sam, 22 U.S.C.M.A. 124, 127, *46* C.M.R. 124, 127 (1973). *See* Morrissey v. Brewer, 408 U. S. 471, 485-86 (1972) (Friction between parolee and parole officer may have affected the parole officer's recommendation to revoke parole.).

[190] FED. R. CRIM. P. 5(a). If a federal magistrate is not reasonably available, the defendant can be taken to the nearest state or local magistrate specified in 18 U.S.C. $3041.

[191] *Id.* at 5(c). *Compare* the scope of this information *with* that of Article 10 of the Code to "inform him of the specific wrong of which he is accused." If the federal offense is "minor," one with a maximum punishment not exceeding imprisonment for more than one year or a fine of $1,000 or both, the magistrate can try it. On initial appearance, in a minor offense, the magistrate informs the defendant of the same information as set forth in Federal Rule 5c, and takes the defendant's plea to the charge if the defendant consents to trial by the magistrate. If the offense is "petty," one with a maximum punishment not exceeding imprisonment for six months or a fine of not more than $500 or both, on appearance, the magistrate informs the defendant of the charge against him, his right to counsel, and his right to trial in the district court, and proceeds to take the defendant's plea to the charge. 18 U.S.C. §3401 (1968) (definition of a minor offense); 18 U.S.C. §1(3) (1948) (definition of a petty offense); FED. R. PROC. FOR THE TRIAL OF MINOR OFFENSES BEFORE U. S. MAG. 2, 3. "A defendant is entitled to a preliminary examination" if he is to be tried by a judge of the district court, instead of a magistrate, except that there is no right to a preliminary examination for a petty offense." FED. R. CRIM. P. 5(c). Advice of the general circumstances under which he may obtain pretrial release was added in 1972 because the defendant is often without counsel at this point and may be unaware of his right to pretrial release. H. R. Doc. No. 92-285, 92d Cong., 2d Sess. 29 (1972) [hereinafter cited as H. R. Doc. NO. 92-285].

[192] FED. R. CRIM. P. 5(c).

[193] *Id.*

the accused committed the offense in order to justify holding him in custody or require him to post bail until the grand jury considers whether to indict him.[194] If the magistrate finds that probable cause exists, he may set conditions for the accused's pretrial release under court control. If he does not find probable cause, he discharges the accused and dismisses the complaint.[195]

The purpose of this "initial appearance" before a magistrate is to make certain that a judicial officer, not a law enforcement officer, advises the accused of his right to counsel and of his privilege against self-incrimination as quickly as possible.[196] The initial appearance and judicial warnings are intended to prevent any violation of the suspect's rights and to prevent arrests from being made on suspicion alone.[197] When a confession or other evidence has been obtained from an accused after an "unnecessary delay" in taking him before a magistrate, the evidence is inadmissible under the *McNabb-Mallory* rule.[198]

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194 H. R. Doc. No. **92-285,** at **29.**

195 **FED.** R. CRIM. P. **5,** 5.1. In **1972** Rule **5** was split into the initial appearance before the magistrate and the preliminary examination to "prevent confusion as to whether they constituted a single or two separate proceedings." H. R. Doc. No. **92-285,** at **28.** Usually, the preliminary examination comes later since counsel needs time to prepare for it. *Id.* The amendment became effective Oct. **1, 1972.**

196 Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue,* **47** GEO. L. **J. 1, 27 (1958)** ; McNabb v. United States, **318** U. S. **332, 343-44 (1943)** ; Mallory v. United States, **354** U. S. **449, 454 (1957).**

197 McNabb v. United States, **318** U.S. **332, 343-44 (1943)** ; Hogan and Snee, *supra* note **196.**

198 The Supreme Court developed the *McNabb-Mallory* rule "in the exercise of its supervisory authority over the administration of criminal justice in the federal courts. . . ." McNabb v. United States, **318** U. S. **332, 341 (1943)** (therefore unnecessary to reach the Constitutional question of self-incrimination in violation of the fifth amendment). The Advisory Committee had considered placing the exclusionary rule in the Federal Rules, but omitted it because of controversy. 1 C. **WRIGHT,** FEDERAL PRACTICE AND **PROCEDURE—CRIMINAL §65 (1969).** The Supreme Court construed Rule **5a** to require the exclusionary rule for fruits of an illegal detention. Upshaw v. United States, **335** U. S. **410 (1948)** (delay of **30** hours without taking the defendant before a magistrate, in order to obtain a confession) ; Mallory v. United States, **354** U. S. **449 (1957)** (rape suspect detained without appearance before a magistrate from early afternoon in building, with magistrates in the building. At 10:00 p.m. the suspect confessed. He made further confessions during the night. He was not taken before a magistrate until the next day.). The only delay countenanced has been for brief periods, for good cause, *e.g.,* the story *volunteered* by the accused is capable of quick verification through third parties. *Id.* at **455.** Hogan and Snee, *supra* note **196,** at **22-23, 27.** (*McNabb-Mallory* effectuates constitutional rights to counsel, and to be confronted with pending charges of the sixth amendment; right against self-incrimination of the fifth amendment; and protection against arbitrary arrest of the fourth amendment). Some states also have a *McNabb-Mallory* rule. *E.g.,* Delaware, Del. Superior Ct. Crim. R. 5., Vorhanen **v.** State, **212** A.2d **886** (Del. **1965).**

Although *McNabb-Mallory* does not appear to apply to military practice, there is no anologue to the initial appearance before a magistrate required in the federal system,[199] the military accused is deprived of his liberty before trial through the same basic procedural scheme that is used to determine any pretrial restraint of the federal accused.[200] Thus, the need for the *McNabb-Mallory* rule or a similar provision exists in military criminal procedure.

Congress has reacted to the *McNabb-Mallory* rule by tailoring it. The Omnibus Crime Control and Safe Streets Act of 1968[201] provides that, absent some other indication of involuntariness, a confession obtained within six hours following arrest is admissible, even though the person has not been brought before a committing magistrate. Even if delay exceeds six hours, a voluntary confession is admissible if the delay is reasonable in light of the inaccessability of the magistrate.[202] The stated purpose of this provision was not to overrule *McNabb-Mallory*, but to assign "proper weight" to it.[203]

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[199] United States v. Moore, 4 U.S.C.M.A. 482, 485, 16 C.M.R. 56, 59 (1954) (*McNabb-Mallory* described as mere rule of evidence to enforce Congressionally created federal criminal procedure). Burns v. Wilson, 346 U. S. 137, 145 n. 12 (1953) observed that the *McNabb* rule did not have its source in due process but in supervision over the administration of criminal justice in the federal civilian courts. The Supreme Court observed that it did not have this supervisory power for courts-martial. This observation does not mean that the *McNabb-Mallory* rule is not appropriate for the military criminal law system, where compulsion to speak on interrogation may be greater than in civilian jurisdictions, and incommunicado incarceration can just as easily occur. *See* United States v. Gellegos, C.M. 400516, 27 C.M.R. 579, 583 (ABR 1958). The federal circuit courts have split over when an "arrest" occurs for purposes of the *McNabb-Mallory* rule. Seals v. United States, 325 F.2d 1006 (D. C. Cir. 1963), *cert. denied,* 376 U. S. 964 (1964) (defendant held to be under "arrest" when police took him to police station, kept him in constant custody and conducted continuous interrogation, even though he agreed to go to the police station with police officers and was told while there that he was free to leave at any time). *Contra,* United States v. Vita, 294 F.2d 523 (2d Cir. 1961), *cert. denied,* 369 U. S. 823 (1962). Little problem exists, however, in finding arrest when a police officer stops a car and restricts the liberty of movement of the occupants. Henry v. United States, 361 U. S. 98, 103 (1959).

[200] UCMJ arts. 9 and 10.

[201] 18 U.S.C. $3501(c) (1968).

[202] *Id.*

[203] S. REP. NO. 1097, 90th Cong., 2d Sess., *reported* at 1968 U. S. CONC. AND ADMIN. NEWS 2112, 2127. However, Congress could not modify *McNabb-Mallory* if the rule is required by the Constitution. The Supreme Court has stated that ". . . Even in the absence of . . . oppressive circumstances, and where an exclusionary rule [*McNabb-Mallory* rule] rests principally on nonconstitutional grounds, we have sometimes refused to differentiate between voluntary and involuntary declarations." Wong Sun v. United States, 371 U. S. 471, 486 n. 12 (1963); Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483, 557-579 (1963).

2. Furnishing counsel. The **ABA** Standards provide that an accused should be furnished counsel "as soon as feasible" either upon his being taken into custody, being brought before a committing magistrate, or being formally charged, whichever occurs first.[204] Likewise, federal criminal procedure provides that a defendant unable to obtain counsel should be assigned counsel "to represent him at every stage of the proceedings from initial appearance before the magistrate through appeal." [205]

Early furnishing of counsel to an accused benefits both society and the accused:

> Not only common concern for protection of the interests of the accused but also the desire to maintain the viability of the advesary

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Broeder sees this footnote as a departure from the previous Court refusal to apply the *McNabb-Mallory* rule to the states. *E.g.*, Gellegos v. Nebraska, 342 U. S. 55 (1951). Broeder points to the reliance in footnote 12 of *Wong Sun* on Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale pnd Rescue*, 47 GEO. L. J. 1, 26-27 (1958) where the authors state that "Rule 5a of the Federal Rules of Criminal Procedure is a *sine qua non* in any scheme of civil liberties" and that Rule 5a and its exclusionary rule deserve constitutional status in both the states and the federal government. Broeder, *supra*, at 572-73. Broeder also notes that the invasion of privacy and effect on reputation is far more significant with prolonged illegal detention than with illegal arrest or search applied to the states through the Fourteenth Amendment due process clause in *Wong Sun* and Mapp v. Ohio, 367 U. S. 643 (1961). Broeder, *supra*, at 570-72. If "fundamental fairness" requires *McNabb-Mallory* to protect the fifth amendment in the federal scheme of procedure, then military due process requires the rule. United States v. Culp, 11 U.S.C.M.A. 199, 206, 33 C.M.R. 411, 418 (1963) (Kilday, J., opinion): "We have held that an accused shall not be denied 'fundamental fairness, shocking to the universal sense of justice;' this we hare denominated 'military clue process.' connoting observance of his right? in his state. or status. of a soldier." See United States v. Clay. 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). *See* Miranda v. Arizona, 384 U. S. 436, 476 (1966) ("incommunicado incarceration" causes compulsive circumstances and is strong evidence that a subsequent statement did not follow a valid waiver of rights by the accused) and United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (subscribing to full constitutional dimensions of *Miranda v. Arizona*).

[204] AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (Approved by ABA House of Delegates, 1968) [hereinafter cited as ABA STD. DEF. SVC.] §5.1.

[205] The breadth of Rule 44 was spelled out in 1966 by amendment from this statement:

> If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel.

The standard for furnishing counsel is not indigency, but inability to obtain counsel, for example, unpopularity of cause. To require payment of what one can would be a proper course. Wood v. United States, 389 U. S. 20 (1967); Criminal Justice Act. 18 U.S.C. §3006 A (1964).

> system is at stake. The health of that system depends upon the constant challenging of officials by professional counsel trained in the values that system seeks to protect and schooled in the proper methods of its operation.[206]

When officials in the system are neither "legally qualified" nor "neutral and detached," the requirement for the early effective assistance of counsel is more imperative.

Rehabilitation of an accused is more likely if he is furnished counsel as early in the prosecutorial process as possible. Detained first offenders have been shown to be half again as likely to receive prison sentences as bailed repeated offenders.[207] The same generalization can be said of the military procedure of deferring a sentence to confinement pending final action on the case by the convening authority.[208] If the convicted soldier has manifested good behavior during deferment of the sentence, clemency in the form of a suspension of confinement is more probable.[209] One must be treated fairly throughout the entire criminal process, not just at the trial, if he is to develop a respect for the criminal process.[210] Providing counsel early in the criminal process may counter to some degree the public pressures for mass-produced justice.[211] Rehabilitation can be sought in some cases by diverting a case to agencies other than the criminal court. The ABA Stand-

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206 ABA STD. DEF. Svc., Commentary 14.

207 Wald, Pretrial Detention and Ultimate Freedom — A Statistical Study, 39 N.Y.U.L. REV. 631, *635* (1964). Studies in Philadelphia, the District of Columbia, and New York show a conviction rate for jailed defendants materially exceeding that of bailed defendants. For example, for grand larceny, 43% of those on bail pending trial were convicted, whereas 72% of those in jail were convicted. ABA STANDARDS RELATING TO PRETRIAL RELEASE (1968) [hereinafter cited as ABA STD. PRE. REL.], Commentary 2-3. Strong evidence of guilt or a long criminal record discount these figures somewhat, but still show "a strong relationship between detention and unfavorable disposition." Rankin, The *Effect* of Pretrial Detention, 39 N.Y.U.L.REV. 641 (1964).

208 UCMJ art. 57(d) (1968). Paragraph 88*f*, MCM, authorizes deferment in the sole discretion of the convening authority on a written application of the accused or his counsel. "Deferment should not be granted, for example, when the accused may be a danger to the community or when the likelihood exists that he may repeat the offense or flee to avoid service of his sentence." The deferment may be rescinded in the "sole and plenary" discretionary authority of the convening authority. MCM, paragraph 88g. Rescinding deferment cannot, however, be without a factual basis or otherwise arbitrary. Collier v. United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970).

209 ABA STD. PRE. REL., Commentary 3.

210 "Representation at the earliest opportunity is essential to forestall the institution of unfounded proceedings through effective use of the preliminary examination and other screening devices." ABA STD. DEF. Svc., Commentary 45. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

211 ABA STD. DEF. Svc., Commentary 39.

ards Relating to the Defense Function require the lawyer to "explore" an early diversion of the accused from subjection to the criminal process.[212] Because of the necessity in the military for good order, discipline, high morale, and protection of the public investment in each soldier by rehabilitation wherever possible, the military should furnish counsel to an accused as early as does the civilian system.

The Supreme Court has recognized the necessity for counsel during the period before trial when "consultation, thoroughgoing investigation and preparation [are] vitally important." [213] Judges, prosecutors, and defense counsel agree that the appointment of counsel as early as possible is "a critical aspect of providing representation that is truly valuable and effective." [214] The liberty of the accused may be necessary for the conduct of an effective pretrial investigation; the accused may be the only person who can locate witnesses whom he recognizes but does not know by name. Important military witnesses may be difficult or impossible to locate because of frequent transfers and rapid separations from service.

The ABA Standards recommend that legal services be initially offered to the accused through a *Miranda*-type warning administered by the police who already give the warning upon taking a person into custody or restraining his freedom.[215] The ABA

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[212] ABA STANDARDS RELATING TO THE PROSECUTION AND DEFENSE FUNCTION, THE DEFENSE COUNSEL (Approved by ABA House of Delegates, 1971) §6.1a. [hereinafter cited as ABA STD. DEF. FUNCTION]: "Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an ***early*** diversion of the case from the criminal process through the use of other community agencies." (emphasis added.) The ABA Standard, The Prosecution and Defense Function has been made applicable to the Army, "unless they are clearly inconsistent with the Uniform Code of Military Justice, the Manual for Courts-Martial and applicable departmental regulations." Dep't of Army Message No. 2220552 September 1972, DAJA-MJ. (To become paragraph 2-32, Army Reg. 27-10).

[213] Powell v. Alabama, 287 U. S. 45, 57 (1932), ". . . during perhaps the most critical period of the proceedings against the defendants charged with rape, a capital offense in the jurisdiction, that is to say, from the time of their arraignment when they pleaded not guilty until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to aid during that period as at the trial itself."

[214] ABA STD. DEF. SVC., Commentary 45, ***citing*** L. SILVERSTEIN, DEFENSE OF THE POOR 83-86 (1965); ***see*** Hunvald, ***The Right to Counsel at the Preliminary Hearing,*** 31 Mo. L. REV. 109, 117-19 (1966). Early representation includes motions seeking pretrial release of the accused. ABA STD. DEF. FUNCTION, §5.1a.

[215] ABA STD. DEF. SVC. §7.1, Commentary 60.

Standards further provide for a formal offer of counsel by a lawyer, or by a judge or magistrate if a lawyer is not available as soon as possible after the police warning.[216]

When the defense counsel has entered the case, he is duty bound to obtain evidence needed in his representation of the accused.[217] Defense counsel should use investigatory and expert services ". . . for effective defense participation in every phase of the process, including determinations on pretrial release [and] competency to stand trial. . . ." [218] Congress has provided the federal accused with supporting services that meet the ABA Standard.[219] The Court of Military Appeals has ruled, however, that Congress did not intend to provide them to the military accused.[220] The only relief afforded to the military accused is government-furnished expert assistance in order to assure the accused a fair opportunity to prepare for any trial which may eventually be ordered.[221] The opportunity is fair only if that opportunity is substantially equal to that enjoyed by the prosecution.[222]

Disposition of military charges will be expedited by furnishing counsel to the accused upon incarceration or charging, whichever occurs first. Because the accused is entitled to legally qualified defense counsel at all levels of Army courts-martial,[223] no increase in manpower will be required if counsel is provided to the accused when he is placed in pretrial confinement or upon restriction, or

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216 *Id.* at $7.1, Commentary 60-61. Offering counsel in private through an attorney minimizes the risk of disclosure of information prejudicial to the accused. Perhaps paralegal personnel can be trained to do this. *See* 41 F. R. D. 389, 402 (1967). "The things that are said, the tone of voice, the atmosphere of the courtroom or other place where the offer is made, whether the defendant is given a written explanation of his rights or told orally, whether by the judge, the prosecutor, the defender, or a court official; all these matters and perhaps others affect the defendant's decision to accept the offer of counsel or reject it." ABA STD. DEF. SVC., Commentary 60, *quoting* L. SILVERSTEIN, DEFENSE OF THE POOR 85 (1965) (relying on an American Bar Foundation Survey). These observations possess greater materiality in the military context. If necessary, the formal offer of counsel and later communication with counsel could be by telephone. *E.g.*, Illinois Code of Criminal Procedure requires that a notice of this right be conspicuously in the jail or police station. ILL. REV. STAT. C. 38, 103-3-7 (SUPP. 1966).

217 ABA STD. DEF. FUNCTION, Commentary 217.

218 ABA STD. DEF. SVC., $1.5.

219 Criminal Justice Act, 18 U.S.C. §3006A (1964).

220 Hutson v. United States. 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970).

221 *Id.* at 438, 42 C.M.R. at 40.

222 Beaney, *supra* note 1, at 781.

223 407 U.S.L.W. 25 (1972). Department of the Army Message, this subject, reproduced in *The Army Lawyer*, Aug. 1972 at 7 and in *The Army Lawyer*, Sep. 1972 at 13, applies Argersinger v. Hamlin, 407 US. 25 (1972) to the Army.

upon preferrance of charges. Needless trials will be avoided when the defense counsel can convince the government of the inadvisability of proceeding to trial. If a case is referred to special or general court-martial in the Army, the military trial judge will normally schedule the trial within ten days of referral for a special court-martial, and **20** days for a general court-martial.[224] The military judge cannot, however, arbitrarily deny a defense request for a continuance to prepare for trial.[225]

Effective furnishing of counsel to the military accused could be accomplished by directing defense counsel to interview the detained or charged accused or by establishing an analogue to the federal "initial appearance." As a minimum, the statement of the commander under Article 10 of the Code should also include advice to the accused of his right to the immediate assistance of counsel.

3. *Setting conditions for pretrial release.* Conditions for release of the defendant are first set by the magistrate at the initial appearance. If, at the preliminary examination, the magistrate finds probable cause to believe the accused committed the alleged offense, restraints on the liberty of the accused are prescribed pending consideration of the case by the grand jury.[226]

"From the view of pretrial release, the early appointment of counsel is essential.'' [227] Even if background information on the accused is available to the magistrate from other sources, the ABA Standards perceive that the defense counsel must present the defendant's claim for pretrial release at the initial appearance if it is ever to be adequately heard.[228]

The ABA Standards Relating to Pretrial Release favor "the release of defendants pending determination of guilt or innocence." [229] In 1966, Congress reformed the federal bail system to reflect this same purpose — prevention of needless pretrial deten-

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[224] MILITARY JUDGE'S GUIDE, DEPARTMENT OF THE ARMY PAMPHLET 27-9, Appendix H, Uniform Rules of Practice Before Army Courts-Martial, Rule 33 (Change **4,** 9 Jan. 1973) ("Counsel for both sides shall prepare for trial as expeditiously as possible.").

[225] United States v. Sutton, **46** C.M.R. **826** (ACMR, 1972) (Military defense counsel represented that he was not prepared to go to trial on merits or sentence because of the short time, two weeks, he had been assigned the case. Military judge arbitrarily denied two-week request for delay in trial.).

[226] **1** C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE-CRIMINAL §80, at 135 (1969).

[227] ABA STD. PRE. REL., Commentary **44.**

[228] ***Id.***

[229] ABA STD. PRE. REL. § **11.**

tion.[230] Deprivation of pretrial liberty should be based on "some legitimate purpose of the criminal process.''[231] For example, in the federal criminal jurisprudence system, excluding the District of Columbia, prevention of flight is the only factor considered in determining the degree of control over a defendant pending trial.[232] In the District of Columbia, "the safety of any other person or the community" is another factor to be considered in establishing conditions of pretrial release.[233]

Both the Bail Reform Act of 1966 and the ABA Standards recommend consideration of conditions other than the nature of the present charge in determining what conditions should be placed upon pretrial release.[234] The accused's family ties, length of residence in the community, mental condition, record of prior punishment, record of appearance or nonappearance or flight concerning previous prosecutions, reputation and character, and persons who would vouch for his reliability should be considered.

The magistrate must also consider the issue of probable cause, the likelihood of conviction, and any punishment that might be imposed in determining the conditions of pretrial restraint. Knowledge of the military background and much of the civilian background of the accused is available to the commander as well as the same type of information available to the federal magistrate. The commander frequently cannot make an informed evaluation of these matters. Consequently, if a lawyer is not available to represent the accused, the commander cannot make an informed decision.

In the federal criminal system, the court expects the defense counsel to assist it in the establishment of effective conditions of release.[235] Defense counsel can locate and point out available community resources. Too often in the military criminal practice the company commander is satisfied if a trouble-maker is away from the company regardless of whether he belongs in confinement. The accused's defense counsel would be more interested, for example, to see that the accused needing alcohol abuse treatment or other

230 80 Stat. 214, §2 (1966); The purpose "of the Bail Reform Act of 1966 is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearances to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."

231 ABA STD. PRE. REL., Commentary 23.

232 Bail Reform Act of 1966, 18 U.S.C. $3146(a).

233 23 D. C. Code $23-1321(a) (1970).

234 Bail Reform Act of 1966, 18 U.S.C. §3146(b); ABA STD. PRE. REL. $5.1.

235 Banks v. United States, 414 F.2d 1150 (D. C. Cir. 1969).

medical treatment is sent to an appropriate hospital instead of to the stockade.

Under federal criminal procedure, if the conditions determined for release are not met, the federal court exercises supervision over the continued confinement of the accused. The attorney representing the government must report to the court bi-weekly why each defendant held pending indictment, arraignment, or trial is still in confinement.[236]

If the defendant is unable to meet the imposed conditions within 24 hours, he can require the magistrate to put the reasons for the particulars of the order in writing.[237] The defendant may then move for amendment of the order in the court having original jurisdiction over the offense.[238] If that court determines that the defendant should remain detained, the defendant may appeal within 10 days to the court with appellate jurisdiction over the trial court. The appellate court may approve the order, return the case to the lower court for further evidence, or order the defendant released. In order to facilitate the just and speedy disposition of the appeal, the district court must state the reasons for its decision.

The Article 138 complaint serves the same purpose under military procedure as does judicial review of pretrial deprivation of liberty in the federal system. The federal defendant has the assistance of counsel in his pursuit of review of his deprivation of liberty and this representation by counsel does not depend on the chance that he will request the assistance of counsel. Unless counsel is effectively provided to the military accused, the Article 138 complaint cannot be compared with the federal system of judicial review of deprivation of pretrial liberty.[239]

C. A NONMILITARY SYSTEM OF PRETRIAL DETENTION

The use of counsel as a safeguard in a civilian system of pretrial detention where an accused is not entitled to bail should be particularly enlightening in the examination of what role the military defense counsel should play in the system of military pretrial detention. The value of providing counsel to the accused under the present military pretrial detention system can be more

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236 FED. R. CRIM. P. 46(g).

237 18 U.S.C. §3146(d).

238 18 U.S.C.$3147(a).

239 See Bitter v. United States, 389 U. S. 15, 17 (1967) and United Stater v. Przybycien, 19 U.S.C.M.A. 120, 122 n. 2, 41 C.M.R. 120, 122 n. 2 (1969).

accurately assessed by considering the additional safeguards used in the nonmilitary pretrial detention system.

A pretrial detention statute that does not authorize the release of the accused on bail under any circumstances would probably be constitutional.[240] The ABA Standards provide that a limited pretrial detention provision, hedged with adequate procedural safeguards, would survive constitutional attack,[241] and dictum in one Supreme Court decision has suggested that the eighth amendment prohibition against excessive bail applies only in cases where the judge decides to grant bail.[242]

In 1970 Congress established in the District of Columbia the first federal civilian pretrial detention system that did not provide the defendant with a right to bail.[243] Congress incorporated

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240 ABA STD. PRE. REL., Commentary 67, *citing* Note, ***Preventive Detention Before*** *Trial,* 79 HARV. L. REV. 1489, 1500-05 (1966). The ABA Standards, however, recommended against the adoption of preventive detention for several reasons. The constitutional questions would becloud the detention system. Prediction of who would be likely to commit further offenses is too uncertain to be tolerable. The effect on the detained defendant would be "devastating." Newspaper accounts of the detention could reach the jury. Too little is known of the time need for preventive detention. *Id.,* Commentary 69. Many state constitutions and statutes require that bail be set for all non-capital offenses. *Id.,* Commentary 68.

241 ABA STD. PRE. REL., Commentary 67. The rationale supporting pretrial detention in non-capital cases is the public necessity for safety from further offenses and to protect the integrity of the trial process from tampering by the accused when the already present sanctions of the criminal law will not suffice. This exception for public necessity can be analogized to that for first amendment speech. The strength of this approach is greater in the military because of the absolute necessity for maintaining good order and discipline. Thus, danger to the community is a sufficient basis €or pretrial deprivation of liberty without equal protection difficulties. Note, ***The*** *Bail* ***Reform Act of*** *1966,* 53 IOWA L. REV. 170, 193 (1967). Note, 79 HARV. L. REV. 1489, *supra* note 240. The principal problem is predictability of future criminal conduct. For this reason, the courts still require that there be no deprivation of pretrial liberty without due process of law. This requirement has been expressed by applying the "presumption of innocence'' rule of evidence for trials to the basis for pretrial liberty. ***See*** Stack v. Boyle, 342 U. S. 1, 4 (1951). This observation was made in Note, 79 HARV. L. REV. 1489, *supra* note 240, at 1501. To accord with due process, the Harvard note describes as necessary procedures for preventive detention the right to a full hearing, the effective assistance of counsel, and an adequate review procedure. 79 HARV. L. REV., at 1508.

242 Carlson v. Landon, 342 U. S. 524 (1952) (civil case involving deportation when national security involved). *Contra, Id.* at 556 (Black, J., dissenting opinion).

243 District of Columbia Court Reform and Criminal Procedure Act of 1970. 23 D. C. Code, Chapter 13, §§23-1301-23-1332, 84 STAT. 604 (1970). Four state jurisdictions authorize denial of bail in limited circumstances: Texas (Vernon's Texas Constitution, V.l, Art I, §11a when a substantial showing of guilt of charged felony and two previous felony convictions, for 60 days unless continuance, with immediate appeal); Arizona Revised

strict substantive standards and procedural safeguards into the legislation to satisfy the requirements of due process. Under this system, the defendant may be detained pending trial for 60 days without bond if the magistrate has conducted a preventive detention hearing and has found that none of the alternatives available in the general federal civilian system short of confinement would "reasonably assure the safety of any other person or the community." [244] In making this determination, the magistrate applies the standard of "clear and convincing" evidence to the particular circumstances of the case in deciding whether there is a substantial probability that the defendant committed the offense for which he is brought before the magistrate.[245] Circumstances justifying pretrial detention without bail are: **(1)** the accused is charged with a "dangerous crime;" [246] **(2)** the accused is charged with a "crime of violence" and he has been convicted of a crime of violence within the past ten years, or the current charge originated while the defendant was released pending trial or sentence; [247] or **(3)** the defendant is charged with any offense and he has attempted to or does obstruct justice or intimidate witnesses.[248]

The procedural safeguards, including counsel to represent the defendant, are generally the same in the pretrial detention determination proceeding as they are in the federal preliminary examination.[249] The hearing to determine detention is held immedi-

Statutes, **V.5,** Title 13, 1970 Supplement, §§13-1577-78, revocation of pretrial release upon finding of probable cause that the defendant committed a felony while on release); Maryland (Art. 27, §616½ Annotated Code of Maryland [V. 3, 1971 Supp.], refusal of bail to person charged with crime while free on bail); and New York (McKinney's Annotated Laws, Code of Criminal Procedure, Title 12, $553, bail is "a matter of discretion in all felony cases." Authorizing denial of bail for high risk of flight and dangerousness, when appropriate. People v. Melville, **62** Misc. 2d 366, 308 N. **Y. S.** 2d 671 (1970).

[244] 23 D. C. Code, §23-1322(b) (2) (1970)

[245] *Id.*

[246] *Id.* at §23-1322(a)(1). "Dangerous crimes" are robbery, burglary or arson of business or sleeping premises, forcible rape and assault with intent to commit rape, and sale of dangerous drugs. *Id.* at 823-1331(3). The government must also show that no other condition will reasonably assure safety of the community based on the defendant's "pattern of behavior consisting of his past and present conduct." *Id.* at $23-1322(a)(1).

[247] *Id.* at §23-1322(a)(2). "Crimes of violence" are offenses listed in note 246 *supra* and murder, statutory rape, mayhem, kidnapping, voluntary manslaughter, extortion of blackmail with threats of violence, and assault with a dangerous weapon or with the intent to commit any other offense and attempts or conspiracies to commit any of these offenses when punishable by imprisonment of more than one year. *Id.* at §23-133(4).

[248] *Id.* at §23-1322(a)(3).

[249] *Id.* at 823-1322(c).

ately, but the defense may request a delay; five day is the maximum unless there are extenuating circumstances. The prosecutor can request up to three days delay.[250] Until the preventive detention hearing the defendant can be detained.[251] At the hearing "it is obviously important [for the defense counsel] to be able to propose less restrictive alternatives to the court. . . ." [252] If the defendant is ordered detained after the detention hearing, the magistrate must issue "an order of detention accompanied by written findings of fact and the reasons for its entry." [253]

A study of the first ten months experience under the District of Columbia pretrial detention statute showed that one-third of the District's felony defendants probably did fit under the categories of persons accused of "dangerous crimes" or "crimes of violence," yet only two percent were proceeded against under the preventive detention statute.[254] Approximately one-third of the defendants who were subject to the preventive detention statute were never released before trial because they were unable to meet the condition of release, usually a requirement that high bond be posted.[255] The average pretrial detention hearing lasted about three hours, with a vigorous defense being conducted on constitutional, legal, and factual grounds.[256] In contrast, the average bail preliminary hearing lasts about five to ten minutes.[257] Consequently, little incentive is present for the prosecution to engage in the lengthy and case-divulging preventive detention hearing. Evidentiary considerations do not cause the lengthy preventive detention hearing, since the information presented does need not

250 *Id.* at $23-1322(c)(3). The preventive detention hearing is independent of and can precede or follow the preliminary examination (hearing to determine probable cause).

251 *Id.*

252 N. BASES AND W. MCDONALD, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS, App. J. at 119 (Public Defender Service guidance to defense counsel, 1972) [hereinafter cited as PREVENTIVE DETENTION IN D. C.].

253 D. C. Code, §23-1322(b)(3).

254 PREVENTIVE DETENTION IN D. C., *supra* note 252 at 68.

255 *Id.*

256 Letter from Harold H. Titus, Jr., U. S. Attorney, Washington, D. C. to Professor Samuel Dash, Jan. 3, 1972, in PREVENTIVE DETENTION IN D. C., *supra* note 252 at App. B. The District of Columbia Court of Appeals has required that a five-day detention under D. C. Code §23-1322(e) (1970) be imposed before preventive detention is sought for persons who have been released on probation, parole, or mandatory releasing pending completion of a state or federal sentence. Briscoe v. United States, No. 5800, Jan. Term 1971 No. 16081-71.

257 Letter from Mr. Titus, Jr., to Professor Dash, *supra* note 256. The lengthy pretrial detention hearing time can be expected to be reduced once the constitutionality of the statute is litigated.

conform to the requirements established by rules of evidence,[258] and substantial probability of guilt of the alleged offense can be shown by "proffer or otherwise to the judicial officer.''[259] Unless the preventive detention procedure becomes more commonly used, judges will continue to manipulate bail to preventively detain defendants believed dangerous to the community or likely to intimidate witnesses.

There are significant differences between the military pretrial detention procedure and the pretrial detention system used in the District of Columbia. The District of Columbia system is more sophisticated, evidenced by more refined criteria to confine, higher requirements of proof, and greater procedural safeguards including the early assistance of counsel.

Pretrial procedures in civilian criminal justice systems assure that there is probable cause to hold an accused for trial,[260] while pretrial procedures in the military are largely without the safeguards used to insure the existence of probable cause to hold.[261] The Congress and the military have recognized this fact and currently are considering improvements in the quality of pretrial procedure in military justice. These improvements will not only incorporate many of the safeguards afforded by civilian procedure, but will also take into consideration the unique requirements of military operations and the commander's responsibility for maintaining discipline.

V. PROPOSALS TO IMPROVE MILITARY PRETRIAL PROCEDURE

A. ARMY PILOT PROGRAMS

The United States Army has recently implemented several pilot programs that incorporate many of the provisions of the Federal Rules of Criminal Procedure, the District of Columbia pretrial detention system, and the ABA Standards With Regard to Pretrial Procedure.

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258 D. C. Code, §23-1322(b)(2)*(e)* (1970).

259 *Id.* at §23-1322(c)(5).

260 Schafer, *supra* note 1, at 6. Whether the safeguards achieve due process can be determined by whether the procedures are "fair and feasible in the light of then existing values and capabilities."

261 ". . . the imponderable 'military necessity' . . . is an important additional variable in military law. . . . military necessity is an often used and undefined term. Generally it represents that which is essential to the successful fulfillment of the military mission (whatever that may be)." Willis, *The Constitution The United States Court of Military Appeals and the Future,* 57 MIL L. REV. 27, 65 n. 206 (1972).

Under one of the new programs members of the United States Army serving in Europe who are ordered into pretrial confinement must now consult with a lawyer before being physically placed in confinement.[262] Under another program all summary and special courts-martial must begin within 45 days of the initial date the accused is restricted, confined, or that charges are preferred.[263] Still another program has initiated the use of "military magistrates"; one such program is found in Europe and two are found at separate Army posts in the United States.[264]

The use of military magistrates is a major change in the military justice system. The military magistrate is a field grade judge advocate, appointed for a particular confinement facility by the command judge advocate; he acts as a representative of the commanding general.[265] Within seven days of the confinement of an accused, the magistrate evaluates the need for continued pretrial confinement. If, after having considered all the facts and circum-

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[262] *Appointment* of *Defense Counsel for Pretrial Confinement,* Materials, 16th Judge Advocate General of the Army's Conference, (Charlottesville, Virginia, Oct. 1972). The requirement became effective July 1, 1972. When feasible the appointed defense counsel will continue to represent the accused through the trial of the case. If a command in the United States or elsewhere is small or isolated, available counsel nearest the stockade could be used to advise the accused concerning pretrial confinement and represent him as necessary until trial defense counsel is appointed. Permanent change of station, separation from the service, and other necessary military reasons for changing before trial, should be clearly presented to the accused, so far as known before trial, to avoid a binding attorney-client relationship creating great inconvenience and questionable practices encountered in attempts to sever such relationships. *See* United States v. Eason, 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972); United States v. Murray, 20 U.S.C.M.A. 61, 42 C.M.R. 253 (1970) (Accused may not be deprived of services of appointed defense counsel without accused's consent because of routine change of station of the defense counsel.). The ABA Standards point out that the advantage of familiarity with the case will probably outweigh the value of a fresh viewpoint of successor counsel. ABA STD. DEF. SVC., Commentary 48. Requiring counsel before the accused enters confinement assures that he will not be in confinement without having counsel because of administrative delay.

[263] U. S. Army, Europe Supplement 2 to Army Reg. 27-10, para, 2-41 (added).

[264] Message, Subject: The Military Magistrates, 2911492 July 1971, from Commander-in-Chief, U. S. Army, Europe superseded by Message, Military Magistrate Program, 1113452 July 1972, from Commander-in-Chief, Europe [hereinafter cited as CINCUSAREUR MSG 1113452 JUL. 72]. Pilot programs are being established at two Army installations in the continental United States applying the U. S. Army, Europe program. The post Staff Judge Advocate appoints the military magistrate for the post confinement facility. Letter from The Adjutant General by order of the Secretary of the Army to Commander, Continental Army Command, 30 Oct. 1972.

[265] CINCUSAREUR MSG 1113452 JUL. 72; Letter from The Adjutant General by Order of the Secretary of the Army to Commander, U. S. Army Continental Army Command, 30 Oct. 1972.

stances of the case, the magistrate determines that continued pretrial confinement is not warranted, he can order the release of the prisoner,[266] and the accused is returned to his unit where the commander may impose pretrial restriction if he deemes it appropriate.[267]

In about 25 percent of the cases, the accused's defense counsel presents additional facts to the magistrate including information on any affirmative defenses, the existence of a pretrial agreement with the convening authority, the likely disposition of the case, and any delays in the trial.[268] The magistrate can obtain additional information concerning disposition of the case from the Staff Judge Advocate or a member of his office.[269]

The magistrate must presume that the allegations in the charges preferred against the prisoner "are based upon substantial evidence," [270] If the magistrate finds, however, under no circumstances can the government prove the alleged offenses, he can order the release of the accused.??' The presumption of probable

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266 CINCUSAREUR MSG 1113452 JUL. 72, para. 1.

267 CINCUSAREUR MSG 1113452 JUL. 72, Appendix F. para. *5.* A military magistrate may also order that a prisoner be released in instances where the defense counsel has not interviewed the accused. Letter from General Michael S. Davison to the members of U. S. Army, Europe, July 31, 1972. (The accused can make a knowing and intelligent rejection of the offer of counsel) ; the command has not promptly scheduled the accused for departure if he has an approved administrative discharge. CINCUSAREUR MSG 1113452 JUL. 72, Appendix F. para. 4; or the general court-martial convening authority has not approved pretrial confinement in excess of thirty days. Letter from Major Jack A. Mullins, JAGC, U. S. Army, (Military Magistrate) to the author, 8 Jan. 1973. Abuses are to be reported to the Commander-in-Chief, U. S. Army, Europe. CINCUSAREUR MSG 1113452 JUL. 72, para. 1. The decision of the magistrate is promptly communicated to the accused. *Id.* Appendix F. para, 10. In the first fourteen months of the program military magistrates considered 1725 prisoners for release. 177 were released. 118 of these were over the objection of the commander. *USAREUR's Military Magistrate's Program,* Materials, *16* Judge Advocate General of the Army's Conference, (Charlottesville, Virginia, Oct. 1972). The accused released from pretrial confinement by the magistrate can be reconfined only because of one or more new offenses. Then the magistrate considers the entire case again. CINCUSAREUR MSG 1113452 JUL 72, Appendix F, para. *7.*

268 Letter from Major John T. Sherwood, U. S. Army, JAGC (Military Magistrate) to the author, 22 Jan. 1973.

269 Letter from Major Sherwood to the author, *supra* note 268.

270 CINCUSAREUR MSG 1113452 JUL 72. Consequently, the favorable comments of Chief Judge Darden concerning this program as "similar to Rule 5 [and 5.1 since 1972 amended to FED. R. CRIM. P.]" should be read in the context that examination by the military magistrate does not include the question of probable cause that the accused committed the alleged offense. United States v. Bielecki, 21 U.S.C.M.A. 450, 452 n. 1, 45 C.M.R. 224, 226 n. 1 (1972).

271 Letter from Major Sherwood to the author, *supra* note 268. The same approach enables the military magistrate to order release when unreasonable

cause significantly influences the question of whether pretrial confinement is necessary when alleged offense is of a serious nature; it is reasonable to conclude that an accused is more likely to flee, might commit other serious offenses, or be more disposed to intimidate witnesses.[272]

Although the magistrate does not hold a formal adversary hearing, the accused, his counsel, and the government representative can offer the magistrate additional information.[273] One magistrate has observed that counsel who endeavor to represent their clients at this early stage of the criminal proceeding are frequently successful when they supply at least one additional significant factor that tends to establish that their client is an acceptable risk.[274]

The defense counsel can enhance his client's acceptability for pretrial release by convincing the client of the necessity for good behavior pending disposition of the case. The defense counsel can then present the accused's improved behavior to the magistrate requesting that the magistrate make a recommendation to the accused's commander as to the appropriate restrictions to be placed on the liberty of the accused. The commander is normally expected to comply with these recommendations if the magistrate gives "good and sufficient" reasons.[275] One military magistrate has observed that "[m]ost commanders think only in terms of pretrial confinement without considering such alternatives as temporary transfer pending trial, and restriction."[276]

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government delay will clearly result in a dismissal of charges at trial, or where the government bases its case on the fruits of an illegal search and seizure. Id.

[272] Department of Defense Directive **1325.4,** para. 111. A. **2.** a., at **1-2** authorizes pretrial confinement based on the presence of factors endangering life or property. Arguably this basis is a reasonable inferrence from seriousness of the offense as a basis for pretrial confinement. ***See*** MCM, para. **20**(c). This is particularly true because the military offender has perhaps greater opportunity to intimidate witnesses or repeat the offense as he goes back to the same unit area where the offense was committed. Fulton, ***Command Authority in Selected Aspects of the Court-Martial Process*** **25,** ***presented at*** **U. S.** Army War College **(1971).**

[273] CINCUSAREUR MSG **1113452 JUL.** 72, Appendix F, para. 3.

[274] Letter from Major Sherwood to the author, ***supra*** note **268.** Letter from Major Mullins to the author, ***supra*** note **267,** estimates that in only ten per cent of the cases does defense counsel present such information. Occasionally defense counsel are present on reinterviews of accused.

[275] CINCUSAREUR MSG **1113452 JUL. 72,** Appendix F, para. **5.**

[276] Letter from Major Sherwood to the author, ***supra*** note **268.** The commander could also order the accused not to see certain persons, drink alcoholic beverages, or drive an automobile. The magistrate's decision on pretrial confinement is final. Message, Subject: Military Magistrate Program, 0809377, Nov 1972, from Commander-in-Chief, **U.** S. Army, Europe, para. 2 [hereinafter cited as CINCUSAREUR MSG **0809372** Nov. 72]. Comments

The Report of the Task Force on the Administration of Military Justice in the Armed Forces has recommended that military justice procedures be stabilized in each service with a view toward limiting the opportunity for abuses of discretion and to enhance the perception of fairness.[277] Specific task force recommendations include (1) appointment of a judge advocate defense counsel to talk with the accused prior to accused's entry into pretrial confinement or shortly thereafter,[278] (2) that a legal officer who is independent of the confining command review the pretrial confinement and release an accused from confinement if "the circumstances warrant." [279] Unlike the Army's military magistrate program, the proposal does not include a presumption of probable cause or of the existence of substantial evidence to support the charges. This prompt legal review of the probable cause issue would enhance the appearance of fairness in the exercise of the power to confine before trial.

Army experimentation with furnishing a lawyer to an accused before he enters confinement and using a military magistrate provides a valuable check on the objectivity and the uniformity in the imposition and continuation of pretrial confinement. There still is cot, however, a preliminary examination to determine whether to hold an accused for prosecution and whether to place him in confinement prior to trial, The essential question to be answered is how to have the preliminary examination and yet retain the commander's legitimate interest in the processing of the case.

B. PROPOSED CHANGES TO THE CODE

Since the enactment of the Military Justice Act of 1968,[280] proposed legislation has been introduced in both houses of Congress

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can be brought to the attention of the Commander-in-Chief, Europe and the magistrate concerned through the Commanding Officer, Legal Services Agency, Europe. *Id*. The magistrate continues to review each case of pretrial confinement at least every two weeks until confinement is terminated. CINCUSAREUR MSG 1113452 JUL. 72, para. 1. In those cases where the magistrate determines that pretrial confinement of an accused is improper, the accused is released and returned to his unit. The commander is informed of the reasons for the accused's release. CINSUSAREUR MSG 0809372 Nov. 72, para. 2. The communication is routed through the general court-martial convening authority. After the accused has returned to the unit, commanders are required to report to the military magistrate on the conduct of the accused after release and on the final disposition of the case. This communication is also routed through the general court-martial convening authority.

[277] REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 122 (1972).

[278] *Id*.

[279] *Id.*

[280] Public Law 90-632, 82 Stat. 1135 (1968).

to eliminate the appearance of command control in the court-martial process.[281] Senator Birch Bayh has introduced one of the most comprehensive of these proposals.[282]

Senator Bayh's bill would establish an independent court-martial command in the office of The Judge Advocate General of each armed force. This court-martial command would be responsible for the convening of all courts-martial and for providing prosecutors, defense counsel, and military judges.[283] Senator Bayh's bill also provides for pretrial procedure consisting of an initial appearance and a preliminary examination similar to federal civilian criminal procedure.

*1. **Pretrial procedure under Senator Bayh's bill.*** In order to deprive an accused of his liberty pending the disposition of a charge against him, the Bill requires procedure applicable to general and special courts-martial alike, a procedure the commander would not control. Instead, the Judge Advocate Prosecution Division of the independent trial command would consider and investigate the case to determine if there was sufficient evidence present to obtain a conviction.[284] If the evidence is present, charges would be preferred by the Prosecution Division. The accused would then be brought before a military judge of the Trial Command within 24 hours of his arrest or the preferring of charges, whichever occurs first.[285] A *McNabb-Mallory* type sanction is provided — statements made by the accused while he is held in custody in violation of the requirement to take him before the magistrate are to be excluded from evidence.[286] If not charged within 24 hours of his arrest, the

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[281] ***E.g.,*** S. 987, 93d Cong., 1st Sess. (1973) (introduced by Senator Bayh); S. 2171-S. 2181 and S. 2183, 92d Cong., 1st Sess. (1971) (introduced by Senator Hatfield); H. R. 579, 92d Cong., 1st Sess. (1971) (introduced by Congressman Bennett); and H. R. 10423, 92d Cong., 1st Sess. (1971) (introduced by Congressman Bingham). Bayh, ***The Military Justice Act of 1971: The Need for Legislative Reform,*** 10 AM. CRIM. L. REV. 9, 17 (1971).

[282] S. 987, 93d Cong., 1st Sess. (1973).

[283] ***Id.*** art. 6a.

[284] 117 CONG. **REC.** 5309-5310 (1971) (remarks of Senator Bayh in introducing S. 1127, 92d Cong., 1st Sess. (1971)). S. 987 introduced by Senator Bayh is the same proposed legislation as S. 1127 in subjects discussed here unless otherwise indicated.

[285] S. 987, 93d Cong., 1st Sess., art. 32(a) (1973). "Arrest is the taking of a person into custody or otherwise impairing his freedom of locomotion in any significant way . . . ." *Id.* art. 7(a). Restriction and confinement would be permitted pending trial only on order of the military judge. ***Id.*** art. 10. The military judge would be granted explicitly the All Writs Act, 28 U.S.C. $1651 (1964), power, ***Id.*** art. 26(b), and the contempt power possessed by federal district court judges. ***Id.*** at 48; Bayh, ***supra*** note 281, at 16.

[286] S. **987,** 93d Cong., 1st Sess., art. 32(a) (1973).

accused must be released until charges are preferred.[287] These rules would have the practical advantage of certainty.

Similar to the procedure under Federal Rule 5, when an accused is taken before the military judge, he would be informed of his right to counsel, his right to remain silent, and his right to a preliminary examination.[288] A judge advocate defense counsel would be provided to the accused at the time he initially appears before the magistrate,[289] and in order for the accused to consult with counsel and prepare for the preliminary examination, a reasonable, but judge-set, delay would be granted.[290] In the interim, the accused would be admitted to bail, restricted or confined by the military judge ; the accused will be confined only upon a showing of reasonable necessity to insure the presence of the accused for trial.[291]

At this preliminary examination, the accused could present evidence in his own behalf as well as confront and cross-examine the witnesses against him.[292] He would have the same rights as an accused at a federal preliminary examination and additionally an accused would explicitly have the right to discover the evidence against him.[293] If the military judge concludes that probable cause to believe that the accused committed the alleged offenses does not exist, he would release the accused and dismiss the specification without prejudice.[294] If he finds that probable cause does exist, the military judge could admit the accused to bail, restrict him or confine him as reasonably necessary to insure the presence of the accused for trial.[295] A denial of bail to an accused would be appealable to the Court of Military Review as an interlocutory matter.[296] The accused would receive credit for the period of time

[287] *Id.* art. 32(b).

[288] *Id.* art. 32(c). The 1973 bill of Senator Bayh did not contain the advise "of the general' circumstances under which he may secure pretrial release" which is contained in the 1972 amendment of Federal Rule 5.

[289] S. 987, 93d Cong., 1st Sess., art. 32(c) (1973). Provision is not made for appointment of counsel before the initial appearance of the accused before the military judge.

[290] *Id.* art. 32(d).

[291] *Id.* art. 32(b). Senator Hatfield proposed a standard of release from pretrial confinement on the request of an accused or his counsel, pending trial, unless the military judge is presented "substantial and convincing evidence" that pretrial confinement is necessary to assure the presence of the accused for trial. S. 2178, 92d Cong., 1st Sess., art. 10(b) (1971).

[292] S. 987, 93d Cong., 1st Sess., art. 32(d) (1973).

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.* Defense counsel would be able to at government expense, seek collateral relief from any court with jurisdiction to grant it to protect the

he spent in confinement, before and during trial, by deducting it from any confinement imposed as a sentence.[297]

The military judge would be required to forward a summarized record of the preliminary proceedings, the charges, and the allied papers to the Prosecution Division within eight days of the conclusion of the preliminary examination.[298] The Chief of the Prosecution Division will decide whether there is sufficient evidence to convict the accused on the charges,[299] and, if so, it would be within his discretionary power to refer the case either to a general or special court-martial for trial.[300]

2. A critique of the proposed pretrial procedure. Senator Bayh's bill would avoid the "appearance of unfairness'' in the present procedure under which the commander holds the accused to answer.[301] The proposed legislation, however, has several deficiencies.

First, the standard for appropriate pretrial deprivation of liberty should include as a consideration the risk of possible commission of further offenses in the military community. The deleterious effect on discipline is exacerbated when the offender is already being subjected to punitive action.

Second, the proposal providing for the preliminary examination should specify whether in the exercise of his rights the accused will enjoy the right to subpoena witnesses and documents. The Circuit Court of Appeals for the District of Columbia has held that an accused is entitled to the presence of the complaining and government eyewitnesses at the preliminary examination so that the accused, with the assistance of counsel, can exercise his rights to confront and cross-examine witnesses and present evidence in his own behalf.[302] The new Article 46 of the Code proposed in

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rights of the accused. *Id.* art. 38(c). Article 138(c) would be changed to have the more independent but more remote Judge Advocate General determine complaints.

[297] *Id.* art. 57(b). Senator Ervin introduced similar legislation. S. 1743, 92d Cong., 1st Sess. (1971).

[298] S. 987, 93d Cong., 1st Sess., art. 33(a) (1973). Blackstone noted that eight days was the maximum length of time the English magistrate could detain, in prison, if necessary, an accused pending delay in the completion of the preliminary examination, at which the accused had the right to a lawyer. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, OF PUBLIC WRONGS 350 (Beacon Press ed. 1962).

[299] S. 987, 93d Cong., 1st Sess. art. 33(b) (1973).

[300] *Id.*

[301] 117 CONG. REC. 5305 (1971) (remarks of Senator Bavh in introducing S. 1127.)

[302] United States v. King, 13 Crim. L. Rptr. 2407 (D. C. Cir. 1973); Washington v. Clemmer, 339 F.2d 715 (D.C. Cir. 1964): Washington v. Clemmer, 339 F.2d 725 (D.C. Cir. 1964) (complaining witness in a rape case); and

Senator Bayh's bill does give the military judge subpoena power in "court-martial cases," but traditionally a court-martial does not come into existence until charges are referred to trial. Senator Bayh, in introducing his legislation, indicated that the legislation does not provide for subpoena power at the preliminary examination.[303]

A third deficiency in the proposed legislation is its failure to specify whether the evidence considered at the preliminary examination must be admissible under the rules of evidence. Federal Rule 5.1 provides that a finding of probable cause at a preliminary examination "may be based upon hearsay evidence in whole or in part," and that "[o]bjections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination."[304] Under such a provision, the military judge could discern whether there is admissible evidence available to prove the charge, thus sparing the government the expense of bringing that evidence to the preliminary examination. An exception to this rule would require the presentation of evidence if the accused could demonstrate that personal hearing of the testimony by the judge was essential to his decision on the issue of probable cause.

A fourth deficiency found in the proposed legislation is its failure to provide for a transcript of the preliminary examination if such a transcript would be of value. Federal procedure eliminates the delay and expense occasioned by the preparation of a transcript in every case by providing that a tape recording will be made of each hearing.[305] Upon request directed to the magistrate, counsel can arrange to hear this recording and upon application

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Ross v. Sirica, 380 F.2d 557 (D.C. Cir. 1967) (eyewitness to the alleged offense). *Cf.* Wirtz v. Balder Electric Co., 337 F.2d 518, 525-26 (D.C. Cir. 1963) (Ordinarily the complaining witness should be present to testify at a preliminary hearing.).

[303] 117 CONG. REC. 5310 (1971) (remarks of Senator Bayh in introducing S. 1127).

[304] This rule was added for the administrative efficiency of not having two decisions on the admissibility of evidence, and not to encourage bypassing the preliminary examination by gaiing directly to the grand jury. H. R. DOC. No. 92-285, 92d Cong., 2d Sess. 31-32 (1972, Advisory Committee on the Federal Rules of Criminal Procedure Note). 18 U.S.C. §3060 (preliminary examination not required when a grand jury indictment is already obtained or an information has been filed when authorized.). FED. R. CRIM. P. 5(c). An indictment is required for capital offenses or offenses which can be punished by imprisonment for more than one year unless the defendant makes a knowing and intelligent waiver of indictment and an information is filed. "Any other offense may be prosecuted by indictment or information." *Id.* at *7*.

[305] FED. R. CRIM. P. **5.1**(a).

to a judge have a transcript prepared of the necessary portions of the preliminary examination.[306] Such a transcript can be valuable in preserving the testimony of a witness while events are still fresh in the witness' mind and while the witness is available to testify.[307] Moreover, the transcript would serve to discourage threats made against witnesses and subornation of perjury.

In addition, the proposed legislation should specify the time periods within which the preliminary examination should be held and the standard for granting a delay in the preliminary examination. Federal Rule 5(c) states that even if the defendant consents to delay in the preliminary examination, the magistrate will take "into account the public interest in the prompt disposition of criminal cases."

The purported *McNabb-Mallory* sanction, excluding statements of the accused made more than 24 hours after arrest if he has not been taken before a magistrate, contrasts sharply with the Congressional limitation on the *McNabb-Mallory* rule. The requirements of certain military operations that would prevent taking the accused before a magistrate would seem to be as persuasive as the reasons for delaying a civilian presentment.

Two provisions of the bill should not be enacted. First, introducing the concept of bail into the military criminal justice system would have little value. The ABA Standards for Pretrial Release state that bail should be used only when no other condition can reasonably assure the defendant's presence for trial.[308] Bail is commonly set high in civilian courts in order to detain the accused, rather than to serve its legitimate purpose — securing the appearance of the accused for trial.[309] If the proposed legislation is amended to permit the military judge setting the conditions of pretrial liberty to consider the risks of violence, as well as the likelihood of flight to avoid trial, it would be unnecessary to use bail improperly as a means of keeping an accused in pretrial confinement. Furthermore, if a soldier trained to obey orders will not obey the prescribed conditions of his pretrial release without the posting of bail, it is doubtful that he will obey the conditions with the posting of bail. Moreover, an accused who absents himself without leave already suffers a financial forfeiture since his pay is stopped.[310]

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306 Id.
307 California v. Green, 399 U. S. 149 (1970).
308 ABA STD. PRE. REL. 55.3(a).
309 *Id.* at §5.3(c) and Commentary 69-60.
310 Department of Defense Pay Entitlements Manual, para. 10312.

Second, the new Article 32 type investigation would deprive both the government and the accused of the benefit of the thorough and impartial investigation currently provided by the Article 32 investigation. The new Article 32 investigation would be a hearing only to determine the probable cause justifying the pretrial deprivation of liberty of the accused pending a trial convened by the Chief Prosecutor.

3. A proposed solution. The Appendix sets forth a proposed bill which seeks to improve the legislation already proposed. The bill also provides the following:

(1) expansion of the definition of restriction to include control over the accused's activities pending trial as a condition of release —a course of action which may be appropriate without resorting to confinement (article 9(a));

(2) a specific exception to the *McNabb-Mallory* sanctions when the requirements of a military operation so dictate (article 32(a));

(3) the military judge inform the accused of his right to the assistance of counsel in seeking pretrial release, thereby assuring that the accused knows he can seek pretrial release and do so with the assistance of counsel (article 32(c));[311]

(4) sets forth precise guidance on when the accused must be furnished counsel (article 32(d));

(5) requires the establishment of a substantial probability of guilt to permit the ordering of pretrial detention. This requirement follows the District of Columbia model, and the higher standard negates the argument that pretrial detention cannot be fairly imposed because of the unpredictability of future criminal misconduct. If the accused is not confined, the commanding officer of the accused retains the power to restrict him since the commander is in the best position to know and supervise appropriate restraints on the accused's liberty less severe than confinement (article 32(*g*));

(6) an appeal by both the government and by the accused to assure a prompt judicial decision and adequate control over the accused pending the appeal (article 32(i));

(7) a military judge retains the authority to release the accused from, or place the accused in, pretrial confinement pending completion of a trial (article 32(k));

(8) the commander decides whether to refer a case to trial. A commander must consider the impact of a trial on morale and dis-

[311] *See* FED. R. CRIM. P. 5(c).

cipline in the unit and on the accused; accordingly, the commander should decide whether to refer a case to trial.[312] The thorough and impartial proposed preliminary investigation enables the commander to make an informed decision.

(9) a preliminary examination only if promptly requested and only in cases where the accused is in pretrial confinement or is facing charges which could result in a punitive discharge.

These proposed procedures will not be prohibitively expensive or time-consuming and the use of legal expertise will make the pretrial investigations more efficient and less costly in man-hours. The trial and defense counsel who ultimately try the case will be more prepared because of the preliminary examination. Furthermore, the government can more readily determine whether a trial will result in a conviction before going to the time and expense of even a special court-martial.

Once an independent military judge has found probable cause and ruled on the necessity of pretrial confinement, the unfair appearance of military pretrial procedure disappears and the legitimate interests of the commander can be clearly perceived.[313]

The legislation proposed in the Appendix seeks to incorporate into military pretrial procedure the essential safeguards and the efficient procedures found in the pretrial procedure of civilian jurisdictions while retaining the advantages now found in military procedure. The safeguards are refined to meet the requirements of the military organization and still keep their value as safeguards.

4. Advantages over an All Writs Act approach. The proposed legislation has the practical features of an All Writs Act. Just as in the All Writs Act, a preliminary examination is utilized only when an accused requests it, The only exception is when the government calls for a preliminary examination to test the validity of the complaints of the government witnesses.[314]

Application of the All Writs Act would have to be coupled with the compulsory furnishing of a lawyer to an accused either upon pretrial restraint or upon preferrance of charges. Otherwise, the

312 Fulton, *supra* note 272, at 31.

313 Major General Kenneth J. Hodson, U. S. Army, Chief, U. S. Army Judiciary suggests a court-martial system in which the commander's legal advisor would docket the case for trial after a preliminary hearing before a military judge assigned to a central judiciary. The commander and legal advisor could not overrule the military judge's determination that there is not probable cause to hold the accused for trial. Hodson, *Courts-Martial and the Commander,* 10 SAN. D. L. REV. 51, 60 (1972).

314 COLO. R. CRIM. P. 5 (accused and government have ten days to file a motion requesting a preliminary hearing).

military accused will still not be able to make a knowing and intelligent assertion of his rights to the military judge. In addition, the "initial appearance" feature of the proposed legislation makes clear to the accused that there is judicial control of pretrial restraint, a judicial power to safeguard the accused's pretrial rights and judicial insurance that the accused's pretrial rights and judicial insurance that the accused fully understands his pretrial rights. The proposed legislation also. prescribes effective machinery for those occasions when judicial action is necessary. Because the procedure is set out in full, military criminal procedure can be perceived to be as fair as any in the United States.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

The administration of military criminal justice should be quick, efficient, and fair.[315] The implementation of Army pilot programs represents an attempt to achieve these goals. These programs have furnished judge advocate counsel to accused before they enter confinement, designated military magistrates to monitor the necessity for confinement, and established the 45-day rule to speed the disposition of courts-martial. These new programs have improved the effectiveness of military justice and have improved the image of military justice.

The pilot programs generally meet the constitutional standards developed by the Supreme Court for speedy trial, counsel, and due process. The rights of the accused can be protected best before trial by representation of the accused by counsel upon the accused's confinement, upon the imposition of other restraint, or upon the accused being charged as well as a review of the facts by an independent and competent magistrate.

Civilian safeguards will not be incorporated into military pretrial procedure by rule-making of the Court of Military Appeals since its position is that the Code is a charter which does not permit the court to legislatively innovate.[316] Because the commander is responsible for the morale and discipline of a military organi-

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[315] Westmoreland, *Military Justice— A Commander's Viewpoint*, 10 AM, CRIM. L. REV. 5, 8 (1970).

[316] Even though the Court of Military Appeals may consider "military due process" as "fundamental fairness, shocking to the universal sense of justice," it will not create new procedures without basis in the Uniform Code of Military Justice. United States v. Culp, 11 U.S.C.M.A. 199, 206, 33 C.M.R. 411, 418 (1963) (Kilday, J., opinion, *citing* United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

zation, he should retain the authority to determine the disposition of cases.

B. RECOMMENDATIONS

A bill similar to the one set forth in the Appendix should be enacted to improve pretrial procedure in the military. The recommended changes could be implemented by amending the Manual for Courts-Martial or by the promulgation of regulations by the service secretary.[317]

Bringing due process to military pretrial procedure will enhance confidence in military criminal law. The improvements proposed in the suggested bill would assure to all servicemen the constitutional right to counsel and due process at the early stage of the criminal proceeding while preserving to the commander the authority to decide the disposition of cases.

[317] To the extent not inconsistent with the Uniform Code of Military Justice, the President can amend the Manual for Courts-Martial to furnish the accused counsel on the beginning of the criminal process against an accused by deprivation of his liberty or by publicly accusing him of a violation of the Code. *See* UCMJ art. 36 delegating to the President the authority to promulgate procedure "in cases before courts-martial. . . ." United States *ex rel.* Chaparro v. Resor, 412 F.2d 443, 445 (4th Cir. 1969) treats paragraph 20(c), MCM, as prescribing permissible grounds for pretrial confinement pursuant to Article 36, UCMJ, even though Part 6 of the Code is described in 95 CONG. REC. 5720 (1949), as prescribing Pretrial Procedure and Part 7 as prescribing Trial Procedure. Article 36 is in Part 7. United States v. Smith, 13 U.S.C.M.A. 105, 119, 32 C.M.R. 105, 119 (1962) views Article 36 as a mandate for the President to prescribe rules with a scope similar to the Federal Rules of Criminal Procedure, which include pretrial as well as trial procedure. The President could arguably act as Commander-in-Chief where Congress has not exercised its rule-making power to the contrary. U. S. CONST. art. 11, $2; *Id.* art. I, $8, cl. 14. The current Manual is based on the authority granted the President by the Code and his authority as President. If no legislation expands the authority of a military judge to act as such before a court-martial is created by referral of the charges to trial, the military judge can act as a representative of the service secretary with complete and final authority. See Army Reg. 27-10, Chapter 14 (Change No. 9, 19 Jul. 1972) (military judges authorized to issue search warrants by order of the Secretary of the Army).

APPENDIX

A BILL

To amend the Uniform Code of Military Justice to protect the constitutional rights of persons subject to the military justice system, to improve military justice, and for other purposes.

Be it enacted by the Senate and House of *Representatives of the United States* of *America in Congress assembled.*

That Articles 7, 9, 10, 32 of the Uniform Code of Military Justice are repealed, and the following sections are substituted in lieu thereof: [318]

"$807. *Art.* **7.** *Arrest*

"(a) Arrest is the taking of a person into custody or otherwise impairing his freedom of locomotion in any significant way under the authority of this chapter.

"(b) Any person authorized under regulations governing the armed forces to arrest persons subject to this chapter may do so upon reasonable belief that an offense has been committed and that the arrested person committed it.

"(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to arrest persons subject to this chapter who take part therein.

"§*809. Art.* 9. *Imposition of restriction and confinement*

"(a) Restriction is the restraint of a person by an order, directing him to remain within certain specified limits and to refrain from certain activities or associations with persons. Confinement is the physical restraint of a person.

"(b) No person may be ordered into restriction or confinement except for probable cause.

"§*810. Art. 10. Restriction* ***and*** *confinement* of *persons charged with offenses*

"Any person subject to this chapter charged with an offense under this chapter shall be ordered into restriction or confinement only as provided in sections 815 and 832 of this chapter.

"§*832. Art.* **32.** *Initial appearance; preliminary examination*

"(a) Within six hours after any person is arrested under the

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[318] Article **7** is as proposed by Senator Bayh. Articles 9 and 10 are based upon articles 9 and 10 proposed by Senator Bayh with changes for clarity and for expansion of the definition of restriction in article 9. Article **32** modifies the Article **32** proposed by Senator Bayh by making changes and additions as described in the text and by utilizing Federal Rules of Criminal Procedure **5** and 6.1.

authority of this chapter, or within six hours after charges are preferred against any person under the authority of this chapter, whichever even occurs first, the accused person shall be taken before a military judge, except that initial appearance before a military judge may occur later than six hours after arrest or charges being preferred if the delay is caused by the requirements of military operations. Any statement made by an accused person held in violation of this article shall be inadmissible in a trial by court-martial unless objection to such statement is affirmatvely waived by the accused person at trial.

"(b) Any person not charged with an offense punishable by this chapter within 24 hours after his arrest under the authority of this chapter shall be forthwith released until such time as charges are preferred, unless the delay is caused by the requirements of military operations.

"(c) The military judge shall inform the accused of the charges against him; of his right to be represented by a civilian lawyer if provided by him, or by a military lawyer of his own selection if such lawyer is reasonably available, or by a lawyer detailed by the officer exercising general court-martial jurisdiction over the command ; of his right to the assistance of counsel in determining whether he should receive pretrial release from restriction or confinement; and of his right to have a preliminary examination. The military judge shall also inform the accused that he is not required to make a statement and that any statement made by him may be used against him. The military judge shall allow the accused reasonable time and opportunity to consult counsel and may impose such restriction or confinement of the accused as he determines reasonably necessary to insure the presence of the accused for the preliminary examination and trial or to prevent the commission of further offenses by the accused.

"(d) If the accused requests a reasonably available military lawyer, or a lawyer detailed by the officer exercising general court-martial jurisdiction over the command, the requested lawyer will be provided within 24 hours after the initial appearance.

"(e) Under the proceedings provided for in this section the accused shall not be called up to plead. If the military judge determines that a specification does not state an offense punishable by this chapter, he shall dismiss the specification without prejudice. If neither the accused nor the government requests a preliminary examination, within five days of the initial appearance, the case shall be forwarded forthwith to the summary court-martial convening authority for such further proceedings or recommenda-

tions as he deems appropriate. If either the accused or the government requests a preliminary examination, within five days of the initial appearance, the military judge shall hear the evidence within a reasonable time but in any event not later than five days following receipt of the request if the accused is in confinement and not later than seven days if the accused is not in confinement. The time limits for holding the preliminary examination may be extended by a military judge only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. If the accused is not in pretrial confinement and no court-martial could adjudge a punitive discharge for the charges preferred against the accused, there shall not be any preliminary examination.[319] In such cases, following the initial appearance of the accused before a military judge, the military judge shall proceed under subsections (h) or (j) as if a preliminary examination had been held.

"(f) At the preliminary examination, the military judge shall make a thorough and impartial investigation as to the truth of the charges and specifications. If from the evidence it appears that there is probable cause to believe that an offense under this chapter had been committed and that the accused committed it, the military judge shall forthwith hold him for a determination by a convening authority of the disposition of the charges and specifications. The finding of probable cause may be based upon hearsay evidence in whole or in part, except that when the military judge finds that nonhearsay evidence is essential to a thorough and impartial investigation, he shall issue orders or process to compel witnesses to appear and testify and to compel the production of other evidence, with such process similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions. The accused may cross-examine witnesses against him, discover the evidence against him, and may introduce evidence in his own behalf. Objections to evidence on the grounds that it was acquired by unlawful means are not properly made at the preliminary examination.

"(g) The military judge shall order the accused into confinement pending disposition of the case upon finding a substantial

[319] In these circumstances, the initial appearance and prompt furnishing counsel are sufficient safeguards without making available a preliminary examination. *See Recommendations of the National Advisory Commission on Criminal Justice Standards and Goals,* Standard 4.3, 14 CRIM. L. RPTR. 3001, 3006 (Oct 31, 1973).

probability that the accused is guilty of the offenses charged against him, and that confinement is reasonably necessary to assure the presence of the accused for trial or to prevent the commission of further offenses by the accused. If the accused is held to answer and not confined, the immediate commanding officer of the accused may restrict the accused as reasonably necessary to assure his presence for trial or to prevent his commission of further offenses.

"(h) If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the accused committed it, the military judge shall dismiss the charges and release the accused. The dismissal of charges shall not preclude the preferring of subsequent charges for the same offense.

"(i) The government and the accused may appeal the decision of a military judge to confine or not to confine the accused pending trial to the next senior military judge nearest the command of the accused. Pending the decision on appeal, the accused shall remain in confinement if he was in confinement before the decision of the military judge at the preliminary examination.

"(j) After concluding the preliminary examination, the military judge shall transmit the charges and specifications and allied papers, his findings and orders, a summary or transcript of the proceedings before him, and his recommended disposition of the charges and specifications to the summary court-martial convening authority for such disposition or recommendations as he deems appropriate. Upon application to a military judge the lawyer for the accused and for the government shall be entitled to hear a recording of the proceedings or to receive a transcript or a partial transcript of the proceedings as determined by the military judge.

"(k) Upon application to the military judge, by either the government or the accused, prior to referral of the charges to trial, the military judge may reconsider his decision concerning confinement of the accused pending disposition **of** the charges. Upon referral of the charges to trial, such application may be made to the military judge detailed to the court-martial to try the case who shall determine whether the accused shall be confined in accordance with the standard provided herein for the military judge at the preliminary examination. Appeal from the ruling of the military judge may be made by the government and by the accused as set forth herein for appeal from the ruling by the military judge at the preliminary examination."

COMMENTS

THE COURT OF MILITARY APPEALS: A SURVEY OF RECENT DECISIONS*

By Captain Edward J. Imwinkelried** and Captain Miles J. Mullin***

This comment studies the work of the United States Court of Military Appeals during its last term, running from September 1, 1972 to August 31, 1973. In many respects, the Court's decisions during this last term parallel those of the United States Supreme Court. It has been observed that the Supreme Court sets the judicial tone for the American legal system, and the Court of Military Appeals' performance during the last term tends to validate that observation.

While it is certainly dangerous to generalize about the Burger Court's decisions, there are certain observations which can be made about the trends in its decisional work product. First, the Justices of the Burger Court have occasionally seemed unable to reach any kind of consensus. As a case in point, *Furman v. Georgia*,[1] the death penalty case, produced ten separate opinions. Second, rather than radically expanding the Warren Court's doctrines or expressly overruling them, the Burger Court has generally been content to clarify or impliedly limit the Warren Court's innovations.[2] Third, in the fourth amendment area, the Court has increasingly abandoned property-oriented analysis and relied upon *Katz*,[3] privacy analysis.' Finally, again in the fourth

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

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1 408 U.S. 238 (1972).

2 See, *e.g.*, Kirby v. Illinois, 406 U.S. 682 (1972), and Harris v. New York, 401 U.S. 222 (1971).

3 Katz v. United States, 389 U.S. 347 (1971).

amendment area, the Supreme Court has revived the old, general reasonableness standard to sustain regulatory programs which intrude upon privacy.[5]

A review of the Court of Military Appeals' decisions during the last term demonstrates that intentionally or otherwise, our Court is following the Supreme Court's lead. A reading of the Court's splintered fourth and sixth amendment opinions shows that the Court occasionally displays the same lack of consensus troubling the Supreme Court. Especially in the fourth amendment area, it is quite common now for each judge to routinely file a separate opinion. Secondly, in most of its procedural and common-law evidence decisions, the Court has been content to explicate and clarify its old precedents. Like the Burger Court, the Court of Military Appeals has evidently set its face against judicial activism. Thirdly, the judges are citing *Katx* more and more frequently and expressly analyzing fourth amendment issues in terms of privacy.[6] Finally, Judge Quinn has resurrected the general reasonableness standard to sustain regulatory programs designed to interdict military drug traffic.[7] The authors feel that in these important respects, the Supreme Court is fixing the doctrinal direction for the Court of Military Appeals. It is the authors' hope that the following summary of the Court of Military Appeals' decisions will help the reader to form his or her own opinion of the evolution of military case law during the past term.

I. JURISDICTION

A. O'CALLAHAN INTERPRETATION

A significant *O'Callahan v. Parker*[8] issue was presented to the Court in *United States* v. *Teasley*.[9] Teasley, while in an off-limits bar and dressed in fatigues contrary to the local post attire regulation, was seen using a hypodermic syringe to inject an "unidentified substance" into his arm. In holding that the facts of the case did not present sufficient "service connection" or "military

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[4] *See, e.g.*, Combs **v.** United States, **408** U.S. **224 (1972).**

[5] *See, e.g.*, United States **v.** Biswell, **406** U.S. **311 (1972)** and Wyman **v.** James, 400 U.S. **309 (1971).**

[6] *See, e.g.*, United States **v.** Simmons, **22** U.S.C.M.A. **288, 46** C.M.R. **288 (1973).**

[7] United States v. Unrue, **22** U.S.C.M.A. **466, 47** C.M.R. **556 (1973);** United States v. Poundstone, **22** U.S.C.M.A. **277, 46** C.M.R. **277 (1973).**

[8] **395** U.S. **256 (1969).**

[9] **22** U.S.C.M.A. **131, 46** C.M.R. **131 (1972).**

significance" to render the accused triable by court-martial, the Court reasoned that the possession of a syringe which "can be used for the injection of a narcotic" does not affect the health, morale, or good order and discipline of the armed forces in the same "direct and immediate'' way as does possession of the drug. The accused committed an offense under the state law and could have been tried in a state court for his act; but since the act had no "independent military significance," he could not be tried by court-martial,

In dismissing a petition for a writ of prohibition in *Rainville v. Lee,*[10] the Court adhered to its previous position that off-post possession and use of marijuana, "because of their manifest tendency to prejudice [the] good order and discipline of the armed forces," are triable by court-martial. The Court also posited that off-post sale of marihuana by a service member to a fellow soldier has sufficient service connection to be triable by court-martial.

B. JURISDICTION OVER THE PERSON

Three distinct factual situations involving court-martial jurisdiction over an accused were presented to the Court. In the first, *United States v. Graham,*[11] the defendant had enlisted in the Army at the age of 16. When he received orders for Vietnam, Graham informed his personnel officer of his true age, but the officer did not believe him and told Graham that he would have to comply with the orders sending him to Vietnam. Graham continued his efforts to obtain his release from the service on the basis of his minority enlistment. When his efforts met with no success, he absented himself without leave. A unanimous Court, speaking through Chief Judge Darden, held that the trial court was without jurisdiction to try the accused ; Graham's enlistment was void at its inception. The government contended that the defendant had "constructively enlisted" in the Army, because he had continued to serve on active duty after he reached the minimum enlistment age of 17. The Court emphasized that crucial to a constructive enlistment is the intent of the enlisted person-did he want to be a member of the armed forces after he had achieved the minimum statutory enlistment age. Under the facts present in *Graham,* the Court concluded that acceptance of some benefits of military service by the accused did not constitute a waiver of his right to seek

[10] **22** U.S.C.M.A. **465, 47** C.M.R. **555 (1973).**
[11] **22** U.S.C.M.A. **75, 46** C.M.R. **75 (1972).**

release from continued service.

In *United States v. Kilbreth*,[12] the accused, a member of the Arkansas Natipnal Guard, had been ordered to active duty because of his unsatisfactory participation in his unit's reserve meetings. The Army Regulation governing unsatisfactory reserve participation afforded the individual guardsman certain procedural safeguards, including provisions that the reservist be furnished a letter of instruction after each unexcused absence and that the reservist be notified of his right to appeal his call to active duty for unsatisfactory participation.[13] At trial, the defense introduced unrebutted evidence that neither of these requirements had been complied with and argued that the defendant was not properly a member of the Army, thus not subject to the Uniform Code of Military Justice. In dismissing the charge for lack of jurisdiction over the accused, the Court reasoned that the failure of the government to follow the positive procedural "commandments" of its own regulation prejudicially denied the defendant his right to due process of law. The Court opined that the defendant's acceptance of orders to report to another active duty station after his conviction for AWOL by a prior court-martial did not constitute a waiver of his right to object to the military's jurisdiction over him.

The most interesting factual situation was presented in *Peebles v. Froehlke*.[14] In 1970, the petitioner was convicted of several different offenses by a court-martial and sentenced to a dishonorable discharge, confinement at hard labor for 10 years and accessory penalties. The findings and sentence were approved by the convening authority and the accused was sent to the United States Disciplinary Barracks. While confined at the Disciplinary Barracks, the accused committed another offense and was convicted by a second court-martial. This second court-martial resulted in a sentence of a dishonorable discharge, confinement at hard labor for 14 months and accessory penalties. The Court of Military Appeals denied a petition for review of the second court-martial conviction, and the sentence was ordered executed.

Subsequently, the Court of Military Appeals set aside the findings of guilty in the defendant's first court-martial and authorized a rehearing. Because, under military practice, a second executed court-martial sentence interrupts the service of a prior unexecuted

[12] 22 U.S.C.M.A. 390, 47 C.M.R. 327 (1973).
[13] Army Reg. No. 135-91 (11 June 1968).
[14] 22 U.S.C.M.A. 266, 46 C.M.R. 266 (1973).

court-martial sentence,[15] Peebles' dishonorable discharge had been executed pursuant to the second court-martial sentence. In this action for a writ of prohibition, injunction and other appropriate relief, the petitioner asserted that he was no longer subject to military jurisdiction; thus, he could not be forced to undergo a rehearing directed by the convening authority after the reversal of his first conviction. The petitioner contended that as a result of the execution of the sentence imposed at his second court-martial, he had been dishonorably discharged from the Army, that he was a civilian and that, as a civilian, he was not subject to court-martial jurisdiction.

In denying his petition, the Court held that although court-martial jurisdiction over a person is dependent upon that person's status as a member of the armed forces, once the proceedings have begun, that status is fixed. A subsequent reversal of a conviction and sentence does not divest the court-martial of jurisdiction over the person of the accused until "final disposition of the case." This rule applies even when the accused has been discharged from the armed forces prior to the reversal.

C. OTHER JURISDICTIONAL MATTERS

The Court was asked to interpret Article **22** of the Code in *United States* v. *Wilson.*[16] The accused was tried by a court-martial convened by the Commanding General, U. S. Army Element, I Corps (ROK/US) Group. I Corps (ROK/US) Group consisted of Korean and American units, but included only one U. S. division and several U. S. support units. Appellate defense counsel argued that U. S. Army Element I Corps (ROK/US) Group could not be considered an Army Corps because it did not contain at least two divisions; therefore, its commanding general did not have the authority to convene general courts-martial. The Court stated that Article **22** was intended to provide "flexibility in conferring general court-martial jurisdiction.'' After examining various definitions of "Army Corps," the Court concluded that the presence of two assigned divisions was not the determinative factor. Article *22* confers general court-martial jurisdiction upon an Army corps or a "corresponding unit"; since U. S. Army Element, I Corps (ROK/US) Group was a unit corresponding to an Army corps, its commander possessed general court-martial jurisdiction.

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[15] *See* **United States v. Bryant, 12 U.S.C.M.A. 133, 30 C.M.R. 133 (1961).**
[16] **22 U.S.C.M.A. 416, 47 C.M.R. 363 (1973).**

Last term, the Court held in *United States* v. *White*[17] that, in the absence of a personally signed written request by an accused for the inclusion of enlisted members upon his court-martial board, the inclusion of enlisted members deprives the court of jurisdiction to try the accused. This term the Court held in *Asher V. United States*[18] that *White* is to be given retroactive effect. Since the inclusion on a court of enlisted members absent an accused's personally signed written request was "a plain violation of the statute,"[19] the Court reasoned that it was not appropriate to give *White* only prospective application.

11. COUNSEL RIGHTS

A. THE APPLICATION OF ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972) TO COURTS-MARTIAL

In *Argersinger,* the Supreme Court announced a rule that a court may not sentence even a petty offender to imprisonment unless the accused has been afforded a right to counsel. The question then arose whether *Argersinger* applied to summary and special courts-martial. During the past term, the Court issued over 20 opinions dealing with the question. All of the cases involved the trial counsel's use of prior convictions or Article 15 records as a matter in aggravation. In each case, appellate defense counsel challenged the use of the evidence on the ground that the conviction or the Article **15** proceeding was constitutionally void.

1. The Threshold Question of *Argersinger's Applicability*

The landmark military decision is *United States V. Alderman.*[20] After the court found Alderman guilty, the trial counsel introduced two prior court-martial convictions as aggravating matter. One was a summary court-martial conviction, and the other was a special court-martial conviction. Each judge on the court filed a separate opinion.

Judge Quinn wrote the lead opinion. He took the position that if an accused is indigent and the court actually imposes confinement without affording the accused counsel, lay or attorney, the underlying conviction is constitutionally void. Judge Quinn noted that the Supreme Court has granted the constitutional right to appointed counsel only when the accused is indigent. The judge speculated that in the light of *Argersinger,* Congress would probably

17 **21** U.S.C.M.A. **583, 45** C.M.R. **357 (1972).**
18 **22** U.S.C.M.A. **6, 46** C.M.R. **6 (1972).**
19 **21** U.S.C.M.A. **583, 589, 45** C.M.R. **357, 563 (1972).**
20 **22** U.S.C.M.A. **298, 46** C.M.R. **298 (1973).** *Cf.* Daigle v. Warner. **42** U.S.L.W. **2269** (9th Cir. October **24, 1973).**

be willing to extend a statutory right to counsel to all accused in summary and special courts, but he insisted that there is no constitutional infirmity unless the accused demonstrates that he is indigent. He explained that ***Argersinger*** applies only if the court actually sentences the accused to confinement; in his opinion, other types of punishment, including restriction, do not trigger the application of ***Argersinger.*** Next, he stated that lay counsel can satisfy ***Argersinger's*** requirements. He pointed out that in their opinion in ***Argersinger,*** Mr. Justices Powell and Rehnquist sanctioned the use of lay counsel. Judge Quinn felt that the detail of lay counsel with "sufficient training and capability to render effective assistance. . . ." would satisfy *Argersinger*.[21] Hence, he adopted the view that prior special court-martial convictions are valid if the accused had detailed, lay counsel. If ***Argersinger*** applied but the accused was not afforded any counsel, then the underlying guilty finding is void. Finally, Judge Quinn stated that the admission of a void conviction does not result in automatic reversal ; the Court must test for prejudice to determine whether there is a fair risk that the evidence of the conviction influenced the trial court to impose a more severe sentence.

Judge Duncan concurred in part and dissented in part. Judge Duncan agreed with Judge Quinn that if the court imposes confinement without affording counsel, the conviction is void. However, he disagreed that a military accused must demonstrate indigency before invoking ***Argersinger.*** Finally, he expressed no opinion on Judge Quinn's suggestion that lay counsel may satisfy the constitutional requirement.

Chief Judge Darden dissented. He advanced two objections to Judge Quinn's opinion. First, he doubted that ***Argersinger*** applies to the military; its application would have such a drastic, adverse impact on military justice that the Court should not follow ***Argersinger*** until the Supreme Court expressly extends it to the military. Second, assuming ***arguendo*** that ***Argersinger*** applies, it does not invalidate the underlying conviction; its only effect should be to invalidate the confinement portion of a sentence. The fact of a conviction should be admissible for such purposes as aggravation and impeachment.

In ***United States*** v. *O'Brien*,[22] a per curiam opinion, the Court confirmed that ***Argersinger*** applies only when the court actually imposes confinement.

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[21] *Id.* **at 300, 46 C.M.R. at 300.**
[22] **22 U.S.C.M.A. 325, 46 C.M.R. 325 (1973).**

2. The Application of Argersinger to Article 15 Proceedings

In *United States* v. *Shamel,*[23] and *United States* v. *Langston,*[24] the Court discussed *Alderman's* application to Article 15 proceedings in which the commander imposes correctional custody. Judge Quinn held that with respect to its purpose, mode of application, and the community's general attitude toward it, correctional custody is distinguishable from confinement. In *Alderman,* Chief Judge Darden had indicated that he thought that confinement and correctional custody are indistinguishable, but he concurred on the ground that *Argersinger* does not apply to the military. Judge Duncan dissented on the ground that *Argersinger* applies and that, in terms of the policy considerations underlying *Argersinger,* confinement and correctional custody are indistinguishable. The upshot of the three opinions is that for different reasons, Judge Quinn and Chief Judge Darden subscribe to the view that there is no requirement for counsel in an Article 15 proceeding in which the commander imposes correctional custody.

In *United States v. Plys,*[25] the Court dealt with the nonjudicial punishment of restriction. In a per curiam opinion, the Court decided that restriction does not trigger a right to counsel.

3. Suspended Sentences to Confinement

In *United States V. Seda,*[26] and *United States* v. *Smith,*[27] the Court confronted summary court-martial convictions in which the convening authority had suspended the adjudged confinement. There was no indication whether the convening authority had ever revoked the suspension. Defense counsel evidently argued that *Argersinger* invalidated the convictions even though the accused had not served confinement. In *Seda* and *Smith,* Judge Quinn found it unnecessary to decide whether *Argersinger* applied in spite of the suspension. In both cases, he concluded that even if *Argersinger* applied and the conviction's admission was error, the error was harmless. In both cases, Chief Judge Darden restated his position that *Argersinger* does not apply to the military at all. Finally, in both cases, Judge Duncan seems to have taken the view that, notwithstanding the suspension, *Argersinger* applied. The issue will not be settled until the Court must decide a case in which Judge Quinn cannot avoid the issue by the expedient of deeming the error harmless.

[23] **22 U.S.C.M.A. 361, 47 C.M.R. 116 (1973).**
[24] **22 U.S.C.M.A. 372, 47 C.M.R. 127 (1973).**
[25] **22 U.S.C.M.A. 374, 47 C.M.R. 129 (1973).**
[26] **22 U.S.C.M.A. 341, 46 C.M.R. 341 (1973).**
[27] **22 U.S.C.M.A. 342, 46 C.M.R. 342 (1973).**

4. The Use of Lay Counsel

As previously stated, in *Alderman,* Judge Quinn opined that lay counsel would satisfy the requirements of *Argersinger;* and Judge Duncan reserved his opinion on the question. In *United States v. Henry,*[28] *United States* v. *Wilkins,*[29] and *United States* v. *Acosta,*[30] the Court squarely addressed the issue. Judge Quinn adhered to his statement in *Alderman;* he took the position that the use of lay counsel is constitutional. Chief Judge Darden concurred on the ground that *Argersinger* does not apply to the military. Judge Duncan took the position that *Argersinger* applies and that the use of lay counsel does not satisfy *Argersinger.* The result is similar to the result reached on the issue of Article 15 proceedings: for different reasons, Judges Quinn and Darden uphold the validity of court-martial convictions in which the detailed counsel was a layman.

5. No Automatic Reversal

All three judges have adopted the view Judge Quinn first expressed in *Alderman:* the admission of a void conviction as an aggravating matter can qualify as harmless error.[31]

B. INDIVIDUAL COUNSEL

The Court decided three cases involving the right to individual counsel.

United States v. *Jordan*[32] presented the question whether the accused has the right to individual military counsel in addition to detailed military counsel and individual civilian counsel. The Court decided that the accused does not have a right to a second individual counsel. The decision turned upon the construction of Article 38 (b) of the Code.[33] In pertinent part, the Article provides that:

> **The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, *or,* by military counsel of his own selection if reasonably available *or* by the defense counsel detailed under section 827 of this title.[34]**

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[28] **22 U.S.C.M.A. 328, 46 C.M.R. 328 (1973).**
[29] **22 U.S.C.M.A. 334, 46 C.M.R. 334 (1973).**
[30] **22 U.S.C.M.A. 347, 46 C.M.R. 347 (1973).**
[31] ***See, e.g.,* United States v. Mullinix, 22 U.S.C.M.A. 336, 46 C.M.R. 336 (1973).**
[32] **22 U.S.C.M.A. 164, 46 C.M.R. 164 (1973).**
[33] **10 U.S.C. §838(b) (1970); Article 38(b), UNIFORM CODE OF MILITARY JUSTICE [hereinafter referred to as Code].**
[34] ***Id.* (Emphasis added).**

In interpreting the term "or," the Court gave the term its usual, disjunctive meaning. The Court noted that even as so construed, Article **38** affords an accused more liberal rights than a civilian defendant enjoys. Under Article **38,** the military accused can have both individual counsel and detailed associate counsel, while a civilian defendant is entitled to the appointment of only one counsel.

While *Jordan* involved the right to individual counsel at the trial level, *United States v. Patterson* [35] and *United States v. Herrera* [36] involved the right to individual appellate counsel. Patterson requested that his trial defense counsel be appointed as individual appellate counsel. The local staff judge advocate determined that trial defense counsel was reasonably available for the appointment. The Judge Advocate General declined to appoint the trial counsel as appellate counsel. Judges Darden and Duncan voted to sustain the denial of the request. Initially, Judge Darden rejected the contention that The Judge Advocate General could not appoint a trial defense counsel as individual appellate counsel. He was certain that arrangements could be made. Second, Judge Darden construed Article 70 of the Code [37] and concluded that it did not grant the accused a right to individual appellate counsel. Finally, he held that The Judge Advocate General did not abuse his discretion in denying the request. The judge pointed to the advantages of detailing appellate counsel other than the trial defense counsel.[38] Judge Quinn dissented. Judge Quinn felt that The Judge Advocate General had abused his discretion; in denying the request, The Judge Advocate General had not stated his reasons. Rather, he simply asserted his power to appoint the appellate counsel. In Judge Quinn's opinion, The Judge Advocate General had not considered the merits of the accused's request and, for that reason, had exceeded his discretion.

C. *ELIGIBILITY OF COUNSEL*

In *United States v. Phillips,*[39] the Court considered the eligibility of a defense counsel who had previously been detailed to the case as trial counsel. The original, written appointing order named Captain H as one of several trial counsel. At the accused's

[35] 22 U.S.C.M.A. **157,** 46 C.M.R. 157 (1973).
[36] 22 U.S.C.M.A. 163, 46 C.M.R. 163 (1973).
[37] 10 U.S.C. §870 (1570).
[38] United States v. Patterson, 22 U.S.C.M.A. 157, 161-62, 46 C.M.R. 157 161-62 (1973).
[39] 22 U.S.C.M.A. 4, 46 C.M.R. 4 (1973).

request, the convening authority orally modified the order to reassign Captain H as defense counsel. At trial, the accused informed the military judge that he wished to be defended by Captain H as individual counsel. The record did not contain any disclaimer by Captain H that he had previously acted on the Government's behalf in the case. However, on appeal, Captain H filed an affidavit to that effect. The Court held that the affidavit was properly before the Court and that there was no impropriety in Captain H's service as associate defense counsel.

In *United States v. Willis*,[40] the question of the defense counsel's eligibility arose because before his appointment as defense counsel, the investigating CID agents had consulted him. The only evidence of the consultation was a notation in an interim CID report of investigation. The report did not indicate the subject-matter the agents had discussed with the counsel. After the consultation, the counsel represented the accused at an Article 32 hearing. The convening authority then appointed him trial defense counsel. Judges Quinn and Darden found that the notation proved only an advisory consultation between the counsel and the CID agents. Using that finding, they held that the counsel was eligible. Judge Quinn authored the majority opinion. Judge Quinn argued that while Article 27(a)[41] disqualifies persons who have acted as investigating officers from serving as defense counsel, the Court has held in analogous cases that judge advocates were not disqualified as investigating officers. He rested his argument on two analogies. First, he pointed out that a staff judge advocate may render the pretrial advice on charges even though he has previously given the trial counsel general advice on the evidence necessary to prove the charge. Second, he noted that the fact that a counsel has previously advised the investigating officer does not make him ineligible to serve as trial counsel. Judge Quinn emphasized that judge advocate officers perform a variety and range of functions which have no parallel in civilian practices. In light of judge advocates' "multiple investiture," the majority felt that the counsel's mere advisory consultation with the CID agents was not disqualifying. Judge Duncan dissented. He acknowledged that during the trial, the defense counsel had stated that he had not acted for the prosecution. However, Judge Duncan emphasized that the counsel's statement was simply a boilerplate disclaimer. He thought that the defense counsel was obliged to state for the record the exact nature of his consultation with the CID agents.

[40] 22 U.S.C.M.A. 112, 46 C.M.R. 112 (1973).
[41] 10 U.S.C. §827(a) (1970).

The counsel had not stated the subject-matter of the consultation; and for that reason, the convening authority, military judge, and military courts could not independently assess whether the consultation was disqualifying.

D. ADEQUACY OF COUNSEL

In *Cnited States V. Bethea,*[42] and *United States v. Jarvis,*[43] the Court again confronted the troublesome issue of adequacy of counsel.

In *Bethea,* the Court dealt with the issue summarily. The case file indicated that a key prosecution witness had made prior inconsistent statements, but the defense counsel did not attempt to use the statements at trial to impeach the witness. Judge Duncan openly wondered why the defense counsel had neglected to use the statements; but considering the record as a whole, he could not conclude that the defense counsel's representation was inadequate.

While the defense counsel in *Bethea* escaped censure, the military judge and defense counsel in *Jarvis* were not as fortunate. Jarvis and Levine had robbed a German national. The defense counsel represented both accomplices. Levine's trial was held first, and at his trial, Levine pled guilty. During the providency inquiry, Levine implicated Jarvis. The parties then introduced a stipulation of fact stating that it was Jarvis who had fired at the policemen who had attempted to apprehend Jarvis and Levine. In mitigation, the defense counsel called a witness who testified that Jarvis had misled Levine. Levine testified that he feared Jarvis and that the robbery was Jarvis' idea. The military judge sentenced Levine to a BCD and confinement at hard labor for one year, but recommended suspension of the discharge and part of the confinement, The convening authority deferred the service of part of Levine's sentence. Jarvis then came to trial before the same military judge. The defense counsel challenged the judge for cause on the ground that he had presided over Levine's trial. The judge denied the challenge. The judge convicted Jarvis and sentenced him to a dishonorable discharge and confinement at hard labor for **2** 1/2 years. The Court held that the cumulative effect of the challenge's denial and the failure to obtain new counsel for Jarvis denied him a fair trial. Judge Darden commented that the accused probably had the impression that the judge had al-

[42] **22** U.S.C.M.A. **223, 46** C.M.R. **223 (1973).**
[43] **22** U.S.C.M.A. **260, 46** C.M.R. **260 (1973).**

ready determined his guilt. The Government conceded that if the accused had been tried together, the defense counsel's portrayal of Jarvis as the principal offender would have amounted to ineffective representation. The Government argued that a defense counsel may employ the same tactics if the accused are tried separately, but Judge Darden responded that where the accused are tried separately before the same judge in a relatively short period of time, the distinction between separate and joint proceedings becomes "almost imperceptible."[44]

E. TERMINATION OF THE ATTORNEY-CLIENT RELATIONSHIP

United States v. *Timberlake*[45] posed the question whether the accused's relationship with an individual counsel, Captain M, had been properly terminated. The convening authority initially detailed Captain H as defense counsel. Captain H undertook representation on the understanding that he would not be the trial defense counsel. Captain G then formally replaced Captain H. The accused then requested Captain H as individual defense counsel. The request was granted, and Captain G became assistant defense counsel. Captain M represented the accused at two depositions, but the accused and Captain M disagreed over the depositions; Captain M was inclined to permit the government to use the depositions, but the accused refused. Captain M told the accused that because of their disagreement, he could no longer represent the accused; he told the accused that there was no longer any attorney-client relation between them. Captain G then assumed the defense and, on the accused's behalf, wrote a letter to the government demanding speedy trial. Captain M was formally relieved as counsel and returned to the United States. Captain G was again detailed the appointed defense counsel. At trial, the accused indicated that he wished to be represented by Captain M. However, he did not apply for a continuance to arrange for Captain M's reassignment. He said that the government had not left him much choice. When the military judge reminded the accused that he could request individual military counsel, the accused replied that he thought he had to accept Captain G.

Judges Quinn and Darden held that the attorney-client relation between the accused and Captain M had been properly terminated. They held that there was good cause for the termination

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44 Id. at **262, 46** C.M.R. at **262.**

45 **22** U.S.C.M.A. **117, 46** C.M.R. **117 (1973).**

and emphasized three factors. First, there were apparently serious disagreements between Captain M and the accused. The disagreements were so deep-seated and persistent that Captain M was led to inform the accused that he could no longer represent the accused. Second, Captain M had not become so deeply involved in the case that he possessed a unique knowledge of the facts. Rather, if any counsel possessed such knowledge, it was Captain G. Finally, although the military judge had expressly reminded the accused of his right to individual military counsel, "[t]he accused refused to exercise the right." [46]

Judge Duncan dissented, arguing that the attorney-client relationship had not been properly terminated. The judge both questioned whether there was good cause and felt that Captain M had not followed the proper procedures, The judge stated that differences of opinion between accused and counsel are far from rare. In his estimation, Captain M's disagreement with the accused over the depositions "set(s) a low mark to pass in order to justify the inability for an attorney to provide an effective defense for his client." [47] In addition, Judge Duncan felt that Captain M had unilaterally — and therefore improperly — declared himself unavailable to represent the accused. He pointed out that Captain M had not made any showing to the convening authority or the military judge. Paragraph **46b** of the Manual provides that if the detailed defense counsel feels that he cannot continue to represent his client, he must make a report of the facts to the convening authority to obtain relief from the case.[48] Although Captain M was individual counsel, Judge Duncan thought that Captain M was obliged to follow the same procedure. Captain M did not move the court to withdraw and present his reasons. Judge Duncan would have authorized a limited rehearing to determine whether the differences of opinion between the accused and Captain M were so great that they would have prevented Captain M from effectively representing the accused.

III. GENERAL PROCEDURE

A. RECORDS OF TRIAL

Three cases before the Court this term presented issues involving records of trial. In *United States v. Thompson* [49] and its com-

[46] Id. at 120, 46 C.M.R. at 120.
[47] Id. at 122, 46 C.M.R. at 122.
[48] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev.ed.), para. 46b, [hereinafter referred to as Manual or MCM].
[49] 22 U.S.C.M.A. 448, 47 C.M.R. 489 (1973).

panion case, *United States v. Rogers*,[50] summarized records of trial were prepared in general courts-martial cases. In both, the sentence approved by the convening authority was in excess of that which a special court-martial could have adjudged, but neither included a punitive discharge. The Court of Military Review found that the preparation of nonverbatim records of trial was error; a majority of that court, however, held that the error could be corrected on appeal by "reducing the sentence to one which can lawfully be adjudged by a general court-martial when a nonverbatim record is prepared." [51] Writing the Court's opinion, Judge Quinn reasoned that, although the government must furnish an indigent defendant a transcript of the trial proceedings for use on appeal, the transcript does not need to be verbatim.[52] Since the Constitution does not give the defendant a right to a verbatim transcript, any requirement for a verbatim transcript of a court-martial must be found in the Code or its "authorized supplementary regulations." Analyzing the provisions of the Code and the Manual, Judge Quinn pointed out that a verbatim transcript need not be included in the record of every general court-martial which is originally recorded verbatim; Article 54*a* of the Code and Paragraphs 82*b* and *83b* of the Manual are evidence of this position. Although these cases do not fall within these provisions, the findings and the sentences were not invalid. The defense did not contend that the summarized records were inadequate for review purposes, and examination of the records indicated that they met the general standard for review. The Court went on to state that the Court of Military Review could have returned the record in these cases for inclusion of a verbatim transcript of the proceedings, but it was not error to remedy the defect in the record by an action prejudicial to "[n]either the accused" nor the government.

In *United States* v. *Boxdale*,[53] four tape belt recordings of the accused's trial were negligently erased. The erased portion of the recordings contained the testimony of five defense witnesses and the proceedings in connection with a defense motion for a mistrial. The trial counsel was directed by the staff judge advocate to "reconstruct" the missing portion of the record. The trial counsel, relying upon his notes, the notes of the military judge, the notes and recollections of the reporter, and consultation with one

50 *Id.*
51 *Id.* at **449, 37** C.M.R. at **490.**
52 Citing Mayer **v.** Chicago, **404** U.S. **189 (1970)** among other cases.
53 **22** U.S.C.M.A. **414, 47** C.M.R. **351 (1973).**

of the witnesses whose testimony was missing, reconstructed in 24 pages the missing portion of the record; the staff judge advocate originally thought that the missing portion of the record was at least 60 pages in length. The trial defense counsel was "not invited nor permitted'' to participate in this reconstruction.

The issue presented to the court was whether, under the circumstances of this case, the record was verbatim. Speaking for a unanimous court, Chief Judge Darden concluded that it was not. The Court found that other than the authority found in paragraph 82i of the Manual, a provision authorizing the reconstruction of a record so that in directing a rehearing the convening authority may be convinced of the sufficiency of the evidence at the first trial, no other authority for reconstruction of a trial transcript exists. The Court held that a substantial omission from a record gives rise to a presumption of prejudice and the government has the burden of rebutting that presumption. In this case, the government did not carry its burden.

B. CONVENING ACTHORITIES

The selection of members of a court-martial by the convening authority was discussed in *Cnited States v. Kemp.*[54] At trial, defense counsel moved for random selection of court members "conforming to the practice in the United States district courts" [55] or by alternative methods. Prior to trial the convening authority had denied the request; the military judge did likewise. The Court reiterated the rule that the sixth amendment right to trial by jury, as well as the corollary considerations concerning the methods by which jurors are selected, have no application to courts-martial; a court-martial is not an Article III court. Trial defense counsel had also urged that the convening authority did not personally select the ccurt members as required by Article 25 since he allowed a member of his staff to prepare a list of nominees. The Court found that the evidence in the record demonstrated that the convening authority personally chose the members of the court "in light of their qualifications under the criteria laid down in Article 25." [56] Although a convening authority is vested with the responsibility of personally selecting the members of a court-martial which he convenes, he may rely upon his staff and subordinate commanders to nominate prospective members.

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[54] 22 U.S.C.M.A. 152, 46 C.M.R. 152 (1973).
[55] *Id.* at 153, 46 C.M.R. at 153.
[56] *Id.* at 156, 46 C.M.R. at 156.

C. SJA REVIEW

1. Summary of *the Evidence.*

Four cases decided by the Court indicated that Justice Van Devanter's words in *Johnson v. Manhattan Ry,*[57] "[t]he possession of power is one thing; the propriety of its exercise in particular circumstances is quite a different thing," are applicable to the discretion the staff judge advocate exercises in summarizing the evidence in his post-trial review. Although a staff judge advocate is vested with discretionary power to summarize the evidence adduced at trial in his post-trial review,[58] the evidence must be fairly summarized. In *United States v. Chandler,*[59] one witness, testifying through an interpreter, gave testimony that could be read in either of two ways. One interpretation would have obliged the convening authority to consider a possible defense in his review of the record while the second did not. In summarizing the evidence on this point, the staff judge advocate resolved the inconsistency against the accused. The Court held that any doubt should have been resolved in favor of the accused, or the ambiguity should have been expressly discussed in the post-trial review so that the convening authority could have been fully informed before he took his action upon the record of trial.

The staff judge advocate who prepared the post-trial review in *United States v. Timmons* [60] made no mention of any evidence introduced during the sentencing portion of the trial. The defense had introduced evidence in extenuation and mitigation, including the accused's unsworn statement. Speaking through Judge Duncan, the Court held that the convening authority, just as a court-martial, should be made aware of information bearing on the appropriateness of the sentence. The failure of the staff judge advocate to include this vital information in his review was prejudicial, and the case was remanded to the Court of Military Review for reassessment of the sentence in light of this error and the unreasonable delay of the convening authority in taking his action upon the record of trial. Judge Quinn dissented; he felt that in light of the record and the Court of Military Review's failure to consider the error in the post-trial review, the interest of justice would best be served by the dismissal of the charges.

Still another case involving a prejudicial summary of evidence

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57 **289 U.S. 479, 504 (1933).**
58 **United States v. Cash, 14 U.S.C.M.A. 96, 36 C.M.R. 308 (1963).**
59 **22 U.S.C.M.A. 73, 46 C.M.R. 73 (1972).**
60 **22 U.S.C.M.A. 226, 46 C.M.R. 226 (1973).**

in a post-trial review was *United States v. Roeder.*[61] The defendant, a Marine, was convicted, *inter alia*, of assaulting another Marine. The sworn testimony of the accused during extenuation and mitigation indicated that the accused assaulted the other Marine after that individual explicitly stated that the accused's wife was not faithful and that the defendant's father was "probably taking care of her." In his post-trial review, the staff judge advocate summarized this testimony by stating that the assault took place because the victim had "made some bad remarks about his (the defendant's) wife." Judge Duncan, in writing the opinion, stated that to even the most speculative reader of the review, the victim's intimations about the defendant's wife and father were more than just "bad remarks." Judge Duncan felt that even the fact that the victim and defendant were lower ranking Marines could not produce a reasonable inference that "bad remarks" meant sexual promiscuity or had a "profane significance." The review's brief, cryptic treatment of victim's remark to the defendant immediately preceding the assault minimized, if not negated, the defendent's testimony on this point.

In *United States v. Samuels*[62] there was only one real issue at trial: the identification of the accused as one of the participants in the crime. During the trial, the prosecution's chief witness, the victim, identified the accused as one of the participants in the crime. He also stated that he had identified the accused at two line-ups conducted prior to trial. One defense witness refuted the prosecution witness' statement that he identified the accused at the two line-ups; the defense witness testified that the victim identified two individuals at the line-ups, but not the accused. In his post-trial review, the staff judge advocate omitted all of the testimony of this defense witness. In returning the case for a new action, the Court stated that the omission was an abuse of the staff judge advocate's discretion.

2. Time of Review

In *United States v. Hill*,[63] the Court was asked to determine whether the staff judge advocate committed error by submitting to the convening authority a post-trial review that had been completed before the record of trial had been authenticated. In resolving the division of authority between panels of the Army Court of Military Review, the Court held that, although the sub-

[61] **22** U.S.C.M.A. **312, 46** C.M.R. **312 (1973).**
[62] **22** U.S.C.M.A. **238, 46** C.M.R. **238 (1973).**
[63] **22** U.S.C.M.A. **419,** 47 C.M.R. **397 (1973).**

mission of a post-trial review to the convening authority is contrary to the Code if the record has not been authenticated, this "error" is to be tested by the same standard applied to other errors in review: the error may be disregarded if "it presents no fair risk of prejudice to the accused." [64] Judge Duncan concurred in the result for several reasons: comparison of the post-trial review and the record of trial revealed no inconsistencies, Hill's judicial confession to the offense and the convening authority's approval of a sentence less than the one adjudged by the court. However, he added that under a different factual situation he might find error.

3. Disqualification to Review

United States v. *Diaz* [65] presented the question whether the deputy judge advocate's deal with the accused's already tried and sentenced accomplice disqualified the convening authority and staff judge advocate from reviewing and taking action in the accused's case. The deal involved a recommendation to the convening authority that the accomplice's sentence to confinement be reduced by one-half. Citing *United States* v. *Albight*,[66] the Court held that the staff judge advocate had already judged the accomplice a truthful witness by recommending that the accomplice's sentence to confinement be reduced by one-half prior to his review of the accused's case; the staff judge advocate was no longer impartial when he reviewed the accused's case. The Court pointed out the "unitary function" of the staff judge advocate's office in holding that the consummation of the agreement by the deputy as opposed to the staff judge advocate was not a realistic distinction.

D. APPELLATE REVIEW

After he was arraigned at his special court-martial, the defendant in *United States v. Smith* [67] left for parts unknown; no one had given him permission to leave. The trial judge, after determining that the accused had left voluntarily and without authority, proceeded with the trial and entered findings and sentence. The Court of Military Review affirmed the findings and sentence approved by the convening authority, but since the defendant was in a deserter status, all attempts to serve that decision on him

[64] *Id.* at 400, 47 C.M.R. at 400.
[65] 22 U.S.C.M.A. 52, 46 C.M.R. 52 (1972).
[66] 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).
[67] 22 U.S.C.M.A. 247, 46 C.M.R. 247 (1973)

were unsuccessful. A certificate of attempted service was made part of the record, and the thirty day period of petitioning the Court of Military Appeals began to run. Appellate defense counsel within the statutory thirty-day period filed a petition for review in the Court of Military Appeals. The facts about the accused's absence were brought to the Court's attention after the order granting the petition for review had been entered. The Court held that under Article 66(b) of the Code a defendant's unauthorized absence during the period of review does not affect the Court of Review's jurisdiction; review is mandatory if the sentence includes one of the punishments or affects one of the persons specified in the Article. Such is not the case when review by the Court of Military Appeals is sought. **A** defendant who absents himself without proper authority is not entitled to have his case heard by the Court so long as he remains in that status; his counsel cannot invoke the Court's jurisdiction. Although the petition in the instant case was filed by counsel for the accused within the statutory thirty-day period, it was "ineffective for all purposes'' since the accused's continued absence made the petition ineffective.

The Court was asked to decide two cases concerning the authority of the Court of Military Review to take certain action in regard to the sentence of an accused. In the first, *United States v. Cox*,[68] the Court of Military Review suspended the execution of a bad conduct discharge and provided for its automatic remission after it had held that a pretrial agreement required the convening authority to suspend certain portions of the sentence adjudged by the court-martial. The Court pointed out that if the Court of Review had returned the record for a new action, the convening authority would have been legally bound to suspend the discharge. In the interests of judicial economy, the Court of Review had merely entered the legally correct sentence that the convening authority would have been legally obligated to enter.

In *United States v. Glaze*,[69] the Court faced the issue of whether the Court of Military Review had acted within its authority when it modified the term of suspension of an accused's reduction in grade. In his action upon the record, the convening authority had approved the sentence which included the accused's reduction to the grade of E-1. The supervisory authority's action suspended any reduction of the accused below the grade of **E-4.** In its review of the case. the Navy Court of Military Review "modified the suspended portions to suspend the accused's re-

[68] **22 U.S.C.M.A. 69, 46 C.M.R. 69** (1972).
[69] **22 U.S.C.M.A.**230, **46 C.M.R.** 230 **(1973).**

duction in its entirety." [70] Chief Judge Darden reasoned that since the Court of Review had the authority to disapprove in its entirety the sentence to reduction, it had the authority to modify the terms of the suspended reduction so that the appellant would not be reduced below the grade of **E-5.** To disapprove the Court of Review's action would have forced the court to disapprove the entire reduction in order to reach the desired result. Judge Duncan concurred since stare decisis governed the result,?' but stated that to draw a distinction between the authority to suspend a sentence, which the court of review does not have, and the power to further suspend an already suspended sentence is to make a differentiation without a distinction.

E. PRETRIAL AGREEMENTS

Two significant cases involving pretrial agreements were decided during this term of the Court. In *United States v. Cox,*[72] the Court insisted that pretrial agreements must be worded clearly, "therefore, implications are disfavored." [73] In ***Cox,*** the pretrial agreement provided for the suspension for six months of the bad conduct discharge and confinement if either was adjudged by the court. The convening authority refused to honor the agreement because the accused had committed other offenses subsequent to trial but prior to the date that the convening authority took his action. The Court rejected the government's assertion that the pretrial agreement contains an "implied covenant" or "condition" of good behavior. In dictum, the court indicated that an expressed condition of that nature might be valid.

The issue presented in *United States v. Lallande* [74] was whether a convening authority had the power to require an accused to submit to certain specified "conditions of probation" set forth in a pretrial agreement that provided for the suspension of portions of the sentence. In the instant case, the accused submitted a proposed pretrial agreement to the convening authority which provided in part that the convening authority would suspend portions of the sentence in exchange for the accused's plea of guilty; the proferred agreement also provided for automatic remission of the suspended portion of the sentence if the accused "complied with"

[70] *Id.* at 230, **46** C.M.R. at 230.
[71] United States **v.** Estill, 9 U.S.C.M.A. 458, 26 C.M.R. 238 (1958).
[72] 22 U.S.C.M.A. 69, **46** C.M.R. 69 (1972).
[73] *Id.* at 71, **46** C.M.R. at **71.**
[74] 22 U.S.C.M.A. 170, **46** C.M.R. 170 (1973); ***accord,*** United States **v. Joyce,** 22 U.S.C.M.A. 180, **46** C.M.R. 180 (1973).

the conditions set out in the same agreement. On appeal, the defendant contended that the convening authority had no power to prescribe conditions of probation and even if he did, three of the conditions of the defendant's probation contradicted public policy. In essence these three conditions provided that the probationer (1) conduct himself as a reputable and law-abiding citizen, (2) not associate with known users and traffickers in drugs and marijuana, and (3) submit himself and his property to warrantless searches at any time when requested to do so by his commanding officer or his commanding officer's authorized representative.

Speaking for himself and Chief Judge Darden, Judge Quinn discussed the probationary provisions of the Manual and the Code before concluding that both, as well as the Congressional hearings on the Code, supported the conclusion that the power to suspend granted by the Code carries with it the concomitant power to impose conditions of probation, at least of the same type that a federal criminal judge could impose.[75] The Court quickly upheld the first two conditions but the third, relating to the search of the accused and his possessions, was treated in more detail. Judge Quinn agreed that the provision "could be misused," but ". . . the possession of power, if not essential, is at least sound and appropriate, the potential for misuse requires not divestment of the power but careful scrutiny of its exercise."[76] Any judicial review of the proper exercise of power should take place after the power has been exercised.

Judge Duncan agreed that the hearings on the Code indicate that the power to suspend provided in the Code carries with it "a right to impose *some* conditions,"[77] but disagreed that the power was so extensive as to include the same conditions that a federal criminal judge might impose upon an individual. The conditions that the convening authority may impose are limited to those that pertain to conduct violative of the standards of good behavior. Judge Duncan agreed with the majority that conditions proscribing "affirmative *misconduct* or violations of standards of good behavior on the part of the probationer, . . ." are valid,[78] but the requirement imposed on the accused to submit himself and his property to search upon mere request would not further the specifically stated purpose of suspension — "promote discipline and aid

[75] *Id.* at 172-173, 46 C.M.R. at 172-173.
[76] *Id.* at 174, 46 C.M.R. at 174.
[77] *Id.* at 176, 46 C.M.R. at 176.
[78] *Id.* at 177, 46 C.M.R. at 177.

in the rehabilitation of the accused.''[79] Requiring an accused to waive a basic constitutional right as a condition of probation, says Judge Duncan, does not serve the purpose of suspension. Since the last'condition neither served the policy purposes of suspension nor directed itself at affirmative misconduct, it was illegal and unenforceable.

F. GUILTY PLEAS

Guilty plea cases involved little of the Court's time. In *United States* v. *Reeder*[80] the accused pled guilty to a charge of absence without leave ; the specification alleged that the accused departed on January 4, 1969 and did not return to military control until June 11, 1971. During the inquiry into the providency of his plea, the accused disclosed that he had attempted to submit to military control on January 10, 1969, but because of the time that it took the military police to "wait on him" he left again. The military judge agreed with defense counsel that the submission to military control on January 10 was imperfect and found the accused guilty of absence without leave during the entire period alleged. The Court of Military Review found that the accused returned to military control on January 10, 1969 and approved only a finding of absence without authority from January 4, 1969 until January 10, 1969. On appeal, the government argued that the Court of Review erred in holding that it could not affirm findings of guilty of a period of absence beginning on January 10, 1969 and terminating on June 11, 1971. The Court of Military Appeals in affirming the lower court's decision held that when "one offense is charged but two are proved, only the one alleged may properly be affirmed."[81] Although he concurred in the Court's decision, Judge Duncan felt that the Court of Review should have ordered a retrial after finding the accused's guilty plea improvident; under its judgment affirming a finding of a lesser period of absence, the Court of Review had precluded the government from litigating the issue of the accused's "alleged" return to military control on January 10. Judge Duncan thought the Court of Review could properly determine that a plea of guilty is improvident, but it had no power to decide a factual matter on the basis of assertions made during the trial judge's inquiry into the providency of a guilty plea.

In *United States v. Walters,*[82] the accused pled guilty to wrong-

79 Para. **88e (1), MCM, 1969 (REV. ED.).**
80 **22 U.S.C.M.A. 11, 46 C.M.R. 11 (1972).**
81 *Id.* at **14, 46 C.M.R. at 14.**
82 **22 U.S.C.M.A. 255, 46 C.M.R. 255 (1973).**

ful possession of secobarbital. During the military judge's inquiry into the providency of the accused's guilty plea, the exchange between the military judge, defense counsel and the accused, as well as a stipulation of fact, revealed that the accused was administered the drug upon his doctor's prescription. The nurse on duty had given the defendant the tablet to take orally, but the defendant took it from his mouth and later placed it with water into a syringe. He intended to inject it into himself at a later time. Subsequently, a medic saw the syringe in the defendant's pocket, took it from the defendant, and turned it over to the military police.

The Court felt that the question of whether the accused's plea was provident was governed by the provisions of Paragraph **213b** of the Manual. That paragraph provides that "[a] person's possession or use of a drug is innocent when the drug has been duly prescribed for him by a physician and the prescription has not been obtained by fraud. . . ." This same paragraph also states that if an issue of innocent possession is raised by the evidence, the government is required to prove that the accused's possession was not innocent. In this case, the evidence indicated that the accused had the drug pursuant to a doctor's prescription; although the accused's actions tended to indicate he may have obtained the drug by fraud, the existence of the doctor's prescription required the military judge to inquire into this "requirement of proof." The evidence of innocent possession was inconsistent with the accused's plea of guilty and the military judge should have inquired further.

Judge Quinn's dissent asserted that the accused's authorized possession of the drug was limited to possession in the presence of medical personnel at the hospital. Since the accused possessed it elsewhere without medical personnel present, his possession was wrongful and his plea of guilty was not inconsistent with the other evidence in the record.

In ***United States*** *v. Logan*[83] the Court concerned itself with evidence in the record that was inconsistent with the accused's plea of guilty. The Court felt that a guilty plea is improvident if the statements of the accused give "some substantial indication of direct conflict" with his plea. **A** plea of guilty, however, is not rendered improvident because of the "mere possibility" of conflict between the plea and the accused's statements; "the record must contain some reasonable ground for finding an inconsistency between the plea and the statements."[84] The record in *Logan* did

[83] **22** U.S.C.M.A. **349, 47** C.M.R. **1 (1973).**
[84] *Id.* **at 351, 47** C.M.R. at **3.**

not contain "some reasonable ground" and the plea was provident.

In *United States v. Woods*,[85] the accused's testimony indicated that an issue of self-defense might have been present. The Court felt that this was a matter that was inconsistent with the accused's plea of guilty and the failure of the military judge to inquire into this matter during the providency inquiry was error. The Court reversed.

The accused in *United States v. Barnhardt*[86] received a grant of immunity in exchange for his testimony in another case. The grant was made after the defendant had been convicted by court-martial but before the convening authority had acted on the record of trial. The grant was "from *further prosecution* for any criminal acts."[87] On appeal, defense counsel argued that properly construed, the grant required the dismissal of the charges. The Court held that, reasonably read, the grant from "further prosecution" did not invalidate the already existing court-martial conviction.

G. DEFENSE WITNESS

In *United States v. Johnson*[88] the accused was charged with premeditated murder. Because of the serious nature of the charge, the accused was first interviewed by a military doctor and then by a psychiatric board; at both interviews, the accused elected to remain silent. During several Article 39(a) sessions, the psychiatric evaluation of the accused was a major issue. At the first session the military judge suggested an evaluation and the government indicated its willingness to have the accused examined by a psychiatric board. Prior to the second session, the defense requested that funds be furnished so that a civilian psychiatrist could be employed to examine the accused; the convening authority denied the request but offered to convene a military psychiatric board to examine the accused. The defense also sought to have a civilian psychiatric consultant at the Army hospital examine the accused; the convening authority denied the request. At the second Article 39(a) session, the defense moved for an examination of the accused by the civilian consultant or by a civilian psychiatrist paid by the government. In denying the request, the trial judge stated that he had no authority to direct examination by a particular psychiatrist and that insufficient

[85] **22** U.S.C.M.A. 137, **26** C.M.R. 137 (1973).
[86] **22** U.S.C.M.A. 134, **46** C.M.R. 134 (1973).
[87] *Id.* at 134, **46** C.M.R. at 134 (Emphasis added.).
[88] 22 U.S.C.M.A. 424, **47** C.M.R. 102 (1973).

grounds necessitating an examination by a civilian psychiatrist had been shown. Individual defense counsel then requested that a military psychiatric examination be conducted, but that no Article 31 warnings be given the accused. Pursuant to this request, the military judge ordered a psychiatric examination of the accused; the military judge also imposed certain conditions upon the examination to protect the rights of the accused.

The accused was examined under these conditions and found competent and responsible. At the third and final 39(a) session, defense counsel stated that in light of "the lack of provision for the government to pay for a civilian psychiatric examination and the financial condition of the accused.'' [89] and the military psychiatric report, the defense waived civilian psychiatric examination of the accused unless "it could be conducted that same day or the next day"; the defense then rejected an offer of a continuance to seek a civilian psychiatric examination.

Chief Judge Darden, Judge Quinn concurring, saw the issue as whether, after a psychiatrict board examination in which his rights had been fully protected and he had been found capable and responsible, an accused is entitled to be examined at government expense by a civilian psychiatrist. Although military law provides that experts can be employed to assist both sides in a case,[90] a "necessity" for their service must be demonstrated.[91] Judge Darden then addressed each of the grounds asserted by the defense as necessitating the employment of the civilian psychiatrist at government expense. First, the defense suggestion that the military psychiatric board members are partial to the "government" does not establish the need in the absence of supportive evidence. Second, the defense assertion that they feared "the accused's statements to the military psychiatrist would be admissible in evidence against him" was without merit in light of the military trial judge's order that any statements made by the accused would not be revealed to the prosecution. Lastly, the lack of physician-patient privilege in the military is not the sort of "necessity'' requiring employment of a civilian expert. Since the existence of the doctor-patient privilege is governed by the trial forum, "a civilian psychiatrist may be compelled to testify con-

89 *Id.* at 426, 47 C.M.R. at 404.

90 Para. 116, MCM, 1969, (REV. ED.).

91 That portion of the Criminal Justice Act of 1964, 18 U.S.C. §3006A (e), which permits employment of expert witness on behalf of the indigent defendant does not apply to military law. Hutson v. United States, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970).

cerning disclosure made to him by the accused." [92] In an appropriate case, the need for the employment of a civilian psychiatrist may be justified ; this was not such a case and the conviction was affirmed.

Because the evidence in the record demonstrated that the accused was not denied any Constitutional rights, Judge Duncan concurred in the result. However, he would hold that due process of law requires that any incriminating statement made by a defendant during a psychiatric examination is inadmissible in evidence against him.

H. MISCELLANEOUS

In *United States* v. *Huntsman,*[93] the trial judge's "double-fault" cured his first error. During voir dire examination of the court members, the defense counsel attempted to question a court member concerning any predilection he might have to disbelieve a witness, regardless of other factors, who had a prior felony conviction. The military judge sustained an objection to the question. The only defense witness had a prior conviction for an AWOL that carried a maximum penalty of a dishonorable discharge, confinement at hard labor for one year and accessory penalties.

The Court first inquired whether the military judge's exclusion of the question was an exercise of sound discretion. The Court found that under the circumstances of this case the military judge's curtailment of the defense counsel's inquiry into any "potential for bias" against a witness with a previous conviction was not a sound exercise of his discretion. However, the Court's conclusion that the exclusion of the question was error did not complete its inquiry. When trial counsel attempted to impeach the defense witness by eliciting the existence of the prior conviction, the judge erroneously instructed the court to disregard the witness' answer for, in the judge's words, "An AWOL is definitely not an offense involving moral turpitude or a felony offense." [94] The Court stated that the trial counsel's attempt to elicit the impeaching conviction was proper. The Court added that the judge's second error not only did not prejudice the accused, but, moreover, cured the first error.

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[92] 22 U.S.C.M.A. **424, 428, 47** C.M.R. 402, 406 **(1973).**

[93] **22 U.S.C.M.A. 100, 46 C.M.R. 100 (1973).**

[94] *Id.* **at 104, 46 C.M.R. at 104.**

IV. MILITARY CRIMINAL LAW

A. SUBSTANTIVE OFFENSES

1. Disrespect

Is disrespect to a superior commissioned officer in violation of Article 89 of the Code a lesser included offense of the charge of willful disobedience of a superior commissioned officer, a violation of Article 90 of the Code? In *United States v. Virgilito*,[95] the accused entered a plea of guilty to a violation of Article 90. During the military judge's providency inquiry, the following facts developed. The accused was confined in a cell when a Captain approached the cell. The Captain ordered the accused to move to another cell, but the accused did not reply. After the Captain intimated that if the accused did not move willingly other measures would be undertaken, the accused retorted, "Well, if you want to do it physically, come on in and try."[96] The trial judge determined that since his cell was locked, the defendant was unable to comply with the order given and rejected his plea of guilty to the charge alleged. After further discussion, the military judge accepted the defendant's plea to the "lesser included" offense of disrespect. Chief Judge Darden and Judge Quinn posited that the test to determine whether one offense is a lesser included offense of another is ". . . whether they fairly embrace the elements of the lesser offense and thus give adequate notice to the accused of the offenses against which he must defend."[97] The only element not common to both offenses is the "using of disrespectful language,'' an element of the offense under Article 89. The judges felt the missing element may be implied if the evidence shows that the alleged disobedience occurred in a disrespectful manner; if such a showing is made, the offenses stand in the relationship of greater and lesser. The judges concluded that the evidence in *Virgilito* did make such a showing: the missing element could be supplied by implication and the military trial judge properly treated the offense of disrespect as a lesser included offense of disobedience.

Judge Duncan dissented since the specification did not include any language indicative of the essential element of disrespect. Presence of evidence in the record cannot remedy a defective specification and the present conviction cannot be treated as a lesser included offense of the disobedience alleged unless the Court holds,

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95 **22 U.S.C.M.A. 394, 47 C.M.R. 332 (1973).**
96 *Id.* at **395, 47 C.M.R.** at **332.**
97 *Id.* at **396, 47 C.M.R.** at **333.**

as a matter of law, that every disobedience has a lesser included offense, disrespect.

2. Disobedience of Orders

In *United States v. Scott,*[98] the accused, pursuant to his plea of guilty, was convicted, *inter alia,* of violating a lawful regulation by "wrongfully having in his possession four needles."[99] The Court set aside the finding of guilty on the ground that the regulation was not penal in nature. The Court concluded that the purpose of the regulation in question was to prescribe an area-wide drug suppression program to be implemented by local commands; the regulation did not prescribe a code of conduct for the individual serviceman. The Court suggested that if a regulation is intended to establish a code of conduct for the individual service member and to provide a criminal sanction for failure to abide by that code, the regulation should specify in unequivocal terms the persons to whom the code applies and whether local implementation is required for the regulation to be effective as a criminal law.[100]

3. *Absent Without Leave*

When the Army makes a mistake, it cannot attempt to prosecute the object of its mistake; so says the Court in *United States v. Davis.*[101] Davis was told by a government agent to go home and wait for orders, Not one to disobey orders, Private Davis went home and dutifully waited for his orders. When he finally visited a military base over two years later, Davis was charged and tried for being absent without leave. During the course of the trial, the military judge entered special findings of fact that the accused was told to go home and await his orders, that he never received those orders, and that he never received any official communications from the Army. The trial judge felt, however, that the accused's absence at some point in time became unreasonable and fixed that point at six months after he had departed his duty station. Judge Quinn stated that the Army's negligence cannot be attributed to the accused as his misconduct. The evidence, as found **by** the military judge, demonstrated that the accused had "specific authorization to remain away until 'the receipt of further

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98 **22 U.S.C.M.A. 25, 46 C.M.R. 25 (1972).**

99 **Id. at 25, 46 C.M.R. at 25.**

100 **Id. at 29, 46 C.M.R. at 29;** ***accord,*** **United States v. Wheeler, 22 U.S.C.M.A. 149, 46 C.M.R. 149 (1973).**

101 **22 U.S.C.M.A. 241, 46 C.M.R. 241 (1973).**

orders." [102] The order was never changed or revoked. Any fault that might be found in Davis' failure to report was the Army's and his conviction cannot stand,

4. Provoking Words and Gestures

In *United States v. Thompson*,[103] the defendant was convicted of uttering provoking words and making provoking gestures to a stockade guard. The guard had awakened the prisoners in the cell block including the defendant. When the guard returned, he made a second attempt to get the defendant out of bed but was unsuccessful. The guard told the accused to get up a third time. The defendant responded by jumping out of his bed, assuming a "fighting pose," and shouting "Don't yell at me or I'll wring your ———— neck." [104] The evidence showed that the accused was locked in his cell during the entire incident, and the guard had previously received special correctional custody training including instruction in how to handle these situations. In expressing the opinion of a unanimous Court, Chief Judge Darden wrote that Article 117 seeks to prevent the evil of inciting a "victim" to immediate action and the evidence must show the extent to which the words or gestures tend to do this. He went on to opine that **(1)** the accused's words were not fighting words, and **(2)** even if the words could be construed as "fighting words", under the facts of the case, they were not likely to provoke a reasonable guard standing outside the accused's locked cell.

5. Larceny

If the maker's signature is missing from a treasury check, does the check have a value equal to the amount it is made out for, or does it have only a nominal value? This was the issue that the Court decided in *United States v. Frost*.[105] The appellant, who as part of his duties in the local finance office typed checks, extracurricularly prepared a check payable to himself for $6,400.00 During the presentation of his case, the trial counsel called the Disbursing Officer who testified that in his experience, a check without a signature, but containing the name of a payee and a dollar amount, was not a negotiable instrument. Writing for the Court, Judge Duncan stated that the instrument in question was patently ineffective without a signature. He acknowledged the general rule that, without evidence to the contrary, the value of

[102] *Id.* at **242, 46** C.M.R. **at 242.**
[103] **22** U.S.C.M.A. 88, **46** C.M.R. 88 **(1972).**
[104] *Id.* at 88, **46** C.M.R. at 88.
[105] **22** U.S.C.M.A. **233, 46** C.M.R. **233 (1973)**

a check is its face value, but added that here the government had obligingly furnished evidence to the contrary through the testimony of the Disbursing Officer. The judge limited the language of Paragraph 200*a*(7) of the Manual to writings that are complete on their face.[106] Judge Duncan concluded that the value of the check in this case was the value of the paper it was written upon.

6. Article 134

One of the specifications the accused was convicted of in *United States v. Ross* [107] involved wrongfully introducing a drug (heroin) into a military base. At trial, the military judge questioned the sufficiency of the specification since it failed to allege the purpose for which the drug was introduced. The trial counsel urged that the allegations in the specification implied that the drug was brought into the base for the accused's own use; the accused, his appointed defense counsel, and the individual defense counsel agreed that introduction for the accused's own use "would be a necessary implication of the specification as alleged." [108] During the judge's inquiry into the accused's plea of guilty to the specification, the accused stated that the heroin was brought onto the the base for his own personal use. The military judge ruled that there was no need to amend the specification and accepted the plea. Judge Quinn agreed with the trial judge; he reasoned that even if allegation of the purpose of the introduction was an essential element of the offense, the defense knew that there was included within the allegations in this case an implication of purpose of use and the accused confirmed that implication of purpose of use during the trial judge's inquiry into the providency of his guilty plea. Chief Judge Darden concurred on the theory that the action of the government and defense at trial constituted an "amendment of the specification by stipulation." Judge Duncan would have held, however, that the specification was fatally defective since it did not contain language either explicit or implicit that alleged the purpose for which the drug was brought onto the military base.

Another offense under Article **134** was before the Court in *United States v. Caune*.[109] Specialist Four Caune decided that he no longer wanted to be a part of the Army and sought to "resign."

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[106] Paragraph 200*a*(7) provides that "[w]ritings representing value may be considered to have the value which they represented even though contingently — at the time of the theft."

[107] 22 U.S.C.M.A. 353, 47 C.M.R. 5 (1973).

[108] Id. at 354, 47 C.M.R. at 6.

[109] 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973).

Caune remained firm in his desire after counseling by the Headquarters Commandant and refused an order by his company commander to put on his uniform and report to his duty station, At wit's end, his company commander had a confinement order prepared and called the military police. After the military police arrived and placed the accused in custody, Specialist Caune removed his clothes. Although he was nude, Caune made no obscene or indecent gestures or remarks. While the accused remained nude, there were no females present and the room in which the accused was standing was closed off from public view. The accused was convicted of indecent exposure.

Chief Judge Darden, speaking for the Court, stated that "although we have difficulty in defining what indecency is, we believe we know what it is not." [110] The Court held that nudity, in and of itself, is not indecent and an unclothed male among other males is not offensive or lewd. The Court concluded that the evidence was insufficient to sustain the finding of guilty of the charge of indecent exposure. In dicta, the Court indicated that the behavior, while not constituting indecent exposure, amounted to disrespect.

7. Conspiracy

The Judge Advocate General of the Army certified the decision of the Court of Review in *United States v. Irwin* [111] to the Court of Military Appeals. Based upon the decision in *United States v. Brice,*[112] the Court of Review had held that the specification failed to state an offense since it did not allege that the object of the conspiracy, the sale of hashish, was wrongful; they reasoned that without an allegation of wrongfulness, the specification's wording did not import criminality. The Court, speaking through Judge Quinn, reasoned that the gravamen of the offense of conspiracy is not the act the conspirators sought to perform, but the agreement to perform it. **A** specification alleging a conspiracy need not allege the act conspired with technical precision. Here, the specification alleged that the act sought to be accomplished was in violation of the Uniform Code of Military Justice; all the specification need do is place the accused on notice that the act he conspired to commit was in violation of the law—the specification in the instant case accomplished that objective.

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[110] *Id.* at **201, 46 C.M.R.** at **201.**
[111] **46 C.M.R. 608 (ACR 1972).**
[112] **17 U.S.C.M.A. 336, 38 C.M.R. 134 (1967).**

B. DEFENSES

1. Speedy Trial

United States v. *Burton* [113] marked a great watershed in the military law of speedy trial. Weary of the burden of applying such vague speedy trial standards as reasonable delay and oppressive design, the Court announced more definite rules. The Court pronounced that for offenses occurring after its opinion's date, there would be a presumption of an Article 10 violation if the pretrial confinement exceeded three months in the absence of defense requested continuances. The Court elaborated that if the presumption arose, the Government would have a heavy burden of proving due diligence in the charges' processing. Further, the Court declared its intention to dismiss charges where the Government failed to sustain its burden. The Court unfortunately did not define precisely what type of showing the trial counsel would have to make to rebut the presumption.

The answer came in United States v. *Marshall.*[114] Writing for a unanimous Court, Judge Darden stated that in formulating its three month rule, the Court had taken into consideration routine reasons for delay such as defects in the drafting of the charges, failure to obtain statements from witnesses, a shortage of officers to prepare the pretrial advice, and the illness or injury of judge advocates. The judge attempted to define the government's burden affirmatively and negatively. Affirmatively, he indicated that the trial counsel could sustain the burden if he demonstrated truly extraordinary circumstances such as "operational demands, a combat environment, or a convoluted offense. . . ." [115] The judge referred to the special problems "found in a war zone or in a foreign country . . . or those involving serious or complex offenses. . . ." [116] Negatively, he held that "such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave" do not qualify as extraordinary reasons.[117]

Marshall set the tone for most of the Court's other speedy trial decisions during the term. In United States *v. Smith,*[118] the Court found that the delay was attributable to normal administrative processing. Accordingly, the Court dismissed the charges. The Court's most emphatic speedy trial decision was United States *v.*

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113 **21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).**
114 **22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973).**
115 ***Id.* at 435,** 47 **C.M.R. at 413.**
116 ***Id.* at 434, 47 C.M.R. at 412.**
117 ***Id.* at 431, 47 C.M.R. at 413.**
118 **22 U.S.C.M.A. 474, 47 C.M.R. 564 (1973).**

Stevenson.[119] The government charged Stevenson with arson and conspiracy to commit arson. The incident occurred in West Germany. The government argued that it had sustained its heavy burden because the case arose in a foreign country and involved complicated charges. Certainly, the language of the *Marshall* opinion gave the government reason to believe that its argument would be successful. The Court unanimously rejected the argument. First, Judge Duncan pointed out that although the case arose in a foreign country, the country was not a war zone and the record did not suggest that there was any "special problem encountered as a result of the foreign locale." [120] Second, after conceding that the charges were both serious and complicated, he found that the charges' complexity had not been a major factor in causing the delay. He noted that the investigating officers obtained most of the necessary evidence well before the expiration of the three month period. The judge concluded that the real reasons for the delay were the Article **32** officer's busy schedule and the shortage of experienced clerical personnel. Those reasons did not amount to the extraordinary justifications *Marshall* mandated.

The government prevailed infrequently. In *United States v. Gray,*[121] the government prevailed because the *Burton* presumption was inapplicable: the case was tried before the Court decided *Burton.* Most of the **122** day delay was due to a lengthy, complicated Article **32** investigation. Measuring the delay against pre-*Burton* standards, the Court concluded that the government had proceeded with reasonable diligence.

2. Insanity

The only noteworthy insanity decision during the past term was *United States v. Norton.*[122] The Government charged the accused with several, serious offenses, including assault with intent to commit murder. The parties vigorously litigated the issue of the accused's mental responsibility. The court found the accused guilty. The Court of Military Review granted the accused a stay of proceedings pending receipt of post-trial psychiatric reports. **A** medical board found that the accused was unable to adhere to the right at the time of the offense. The board's report suggested that in part, its finding rested upon the accused's post-trial behavior. The Army's Surgeon General concurred in the finding. The

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[119] **22** U.S.C.M.A. **454, 47** C.M.R. **495 (1973).**
[120] *Id.* at **455, 47** C.M.R. **at** 496.
[121] **22** U.S.C.M.A. **443, 47** C.M.R. **484 (1973).**
[122] **22** U.S.C.M.A. **213, 46** C.M.R. **213 (1973).**

Court eventually received a psychiatric progress report that the accused had gained the capacity to assist in his defense. The Court of Review then removed the stay. However, the Court denied the accused's request for a rehearing or dismissal on the basis of the board's report. Over Judge Quinn's dissent, the Court of Military Appeals reversed and ordered a rehearing.

Judge Duncan's majority opinion addressed two issues. The first issue was whether the Court could consider the post-trial report if the report was based on the accused's post-trial conduct. Judge Duncan wrote that if the medical experts felt that evidence of a subject's post-trial confinement conduct was valuable in evaluating his mental responsibility at the time of the charged offense, there was no reason to prevent the experts from considering the evidence. The second issue was whether the information contained in the report entitled the accused to a dismissal or rehearing. The judge pointed out that post-trial psychiatric evidence can lead to an affirmance, a dismissal, or a rehearing. If the evidence does not cast any doubt on the accused's responsibility, the Court can affirm the guilty finding. If the evidence clearly establishes a reasonable doubt, the Court can dismiss the charge. If the evidence simply creates a conflict of opinion, the Court should order a rehearing; "the crucible of examination at trial" is the best method for resolving the conflict.[123] Judge Duncan rejected the accused's prayer for dismissal. He felt that it was reasonably likely that the new evidence would lead to a different verdict, but he concluded that there was a substantial conflict and a rehearing was the most appropriate relief.

Judge Quinn disputed the majority's conclusion that if the new evidence were submitted to the court members, the members would probably reach a different result. Judge Quinn emphasized that the medical board's report did not set forth any new, underlying factual data. The report was based on information which the first court had in its possession when it found the accused guilty. He asserted that the report "presents nothing new that is likely to produce a different finding if the court again considered the matter." [124]

3. Former Jeopardy

The Court grappled with former jeopardy problems in three settings. *United States v. Bryant* [125] and *United States* v. *Green* [126]

[123] *Id.* at **218, 46 C.M.R. at 218.**
[124] *Id.* **at 221, 46 C.M.R. at 221.**
[125] **22 U.S.C.M.A. 36, 46 C.M.R. 36 (1972).**
[126] **22 U.S.C.M.A. 51, 46 C.M.R. 51 (1972).**

presented the first setting, a single trial. The government charged Bryant with premeditated murder. At the Article 39(a) session, the accused pled guilty to the lesser included offense of involuntary manslaughter. The military judge improperly entered an immediate finding of guilty on the lesser included offense. The judge emphasized that his finding had a limited effect; he told the counsel that the finding would not prevent the government from attempting to prove the charged offense. At the trial on the merits, the government persuaded the court members that the accused was guilty of unpremeditated murder. On appeal, the defense contended that in light of the judge's guilty findings, the court members' consideration of the charged offense constituted a retrial for the same offense. The defense argued that former jeopardy barred the retrial. The Court rejected the argument. The Court acknowledged that the judge's entry of the finding at the 39(a) session was erroneous; the governing regulation expressly prohibited the entry of a guilty finding on a lesser included offense at the session. However, after reviewing the record, the Court concluded that the judge had not intended his finding as an acquittal on the charged offense and that the defense had not interpreted the finding in that fashion. In Judge Quinn's words, "(n)either logically nor legally was continuation of the proceedings a second trial of the accused for murder." [127] *Green* presented the very same issue, and the Court disposed of the case in the same manner.

United States v. Culver [128] and *United States v. Lynch* [129] involved the second, more traditional setting: the accused arguing in a second trial that a separate, first trial barred retrial.

Culver involved a rehearing. At Culver's first trial, he requested trial by military judge alone. The judge granted the request even though it was not in writing. For that reason, the proceeding was jurisdictionally defective.[130] The military judge found the accused guilty of several offenses but acquitted him of a conspiracy to murder. The Court reversed the first trial for the jurisdictional defect.[131] The convening authority referred all the charges, including the conspiracy to murder, to a new general court-martial. At the rehearing, the defense counsel moved to dismiss the specification for conspiracy to murder. The military judge denied the

[127] **22 U.S.C.M.A. 36, 39, 46 C.M.R. 36, 39.**
[128] **22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).**
[129] **22 U.S.C.M.A. 457, 47 C.M.R. 498 (1973).**
[130] **United States v. Dean, 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).**
[131] **United States v. Culver, 20 U.S.C.M.A. 217, 43 C.M.R. 57 (1970).**

motion. Over Judge Darden's dissent, Judges Quinn and Duncan voted to reverse.

Judge Quinn thought that the Manual dictated the result. He pointed out that the Manual states that a retrial after a jurisdictionally defective trial is "subject to the sentence rules provided for rehearings." [132] The Manual further provides that the sentence at the rehearing may not exceed the previous trial's sentence, as ultimately reduced by the convening authority.[133] While the Manual language expressly referred to only sentence, Judge Quinn felt that the language extended to the first court's action on the merits. The first court-martial had acquitted Culver of the conspiracy to murder, and the Manual barred a second court from taking less favorable action on that charge.

Judge Duncan reached the same result through a different reasoning process. The judge noted the general rule of constitutional law that an acquittal by a court lacking subject-matter jurisdiction is void and has no former jeopardy effect.[134] However, the judge argued that *Culver* presented a different species of jurisdictional defect. At the outset of the case, the court-martial was properly constituted and had subject-matter jurisdiction. The military judge erred when, in the course of the trial, he accepted an oral request for trial by judge alone. Judge Duncan felt that although the Court had denominated the error jurisdictional, the error was not the type of "jurisdictional void" which should deprive the accused of the benefit of a prior acquittal. Judge Duncan concluded that the fifth amendment barred Culver's retrial on the conspiracy to murder.

Judge Darden rejected Judge Quinn's Manual argument and Judge Duncan's constitutional argument. Judge Darden criticized Judge Quinn for giving the Manual language a strained construction. He then cited and syllogistically applied the rule Judge Duncan had noted: if a judicial proceeding is jurisdictionally defective, it is void and has no former jeopardy effect; this proceeding was jurisdictionally defective ; and, ***ergo,*** the proceeding had no former jeopardy effect.

Lynch was subjected to two AWOL prosecutions. The accused was assigned to the Ft. Leonard Wood Special Processing Company and joined to the Ft. Sill Special Processing Detachment. In the first trial, the Government charged that he absented him-

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132 Para. 81*d*(a), MCM, **1969 (REV. ED.).**
133 *Id.* at para. **81*d* (1).**
134 Ball **v.** United **States, 163** U.S. **662 (1896).**

self from Fort Leonard Wood from 7 November 1969 to 7 January 1971. At the trial, the trial counsel introduced the Company's morning report showing a 7 November 1969 inception date. The trial counsel also introduced the Special Processing Detachment's morning report showing a termination date of 7 January 1971. The defense counsel offered a Detachment morning report indicating that the accused had returned to military control on 24 November 1969. The military judge found the accused not guilty. Within a week, the government had recharged Lynch. The second charge sheet alleged that he absented himself from the Fort Sill Special Processing Detachment from 27 November 1969 to 7 January 1971. At the trial, the defense counsel moved to dismiss. He argued that the second prosecution was for the same offense as that involved in the first case. The military judge denied the motion. On appeal, the Court reversed. The government argued that for two reasons, the second charge was a different offense: the new charge had a different inception date, and the charge alleged a different unit. The Court rejected the argument. The Court rejoined that the application of the former jeopardy doctrine does not rest solely upon "a surface comparison of the allegations of the charges." [135] Judge Quinn pointed out that because of the military command structure, the accused had absented himself by the same act from both the Company and the Detachment. Moreover, although the second charge alleged a different inception date, the alleged period of absence was contained within the original charge.

United States v. Crider [136] presented the third and undoubtedly the strangest setting: appeal. A general court-martial convicted Crider of several specifications of premeditated murder. On appeal, a panel of the Navy Court of Military Review reduced the guilty findings to the lesser included offense of unpremeditated murder. The accused then petitioned the Court of Military Appeals for a grant of review. The Court granted the petition and reversed the panel decision on the ground that the panel members should have recused themselves.[137] On further review, another panel of the Court of Military Review affirmed the original findings of guilty of premeditated murder.

Defense counsel then petitioned for another grant of review. The counsel argued that former jeopardy precluded the second

[135] United States v. Lynch, 22 U.S.C.M.A. 457, 459, 47 C.M.R. 498, 500 (1973).
[136] 22 U.S.C.M.A. 108, 46 C.M.R. 108 (1973).
[137] United States v. Crider, 21 U.S.C.M.A. 193, 44 C.M.R. 247 (1972).

panel from affirming guilty findings of any offense greater than that which the first panel had approved. The Court concurred. The Court discussed its general policy that "an accused who obtains review here does not forego the right to beneficial action taken on his behalf by the Court of Military Review when he secures reversal of that court's action." [138] Judge Darden pointed out that when the government feels that the Court of Military Review has erred, the government may seek certification of the case by The Judge Advocate General. Moreover, Judge Darden found an alternative ground for the preclusion. He noted that the Court of Military Review has fact-finding powers the Court of Military Appeals lacks. The Court of Military Review's factual determinations bind the Court of Military Appeals. For that reason, the Court of Military Review's "exercise of its fact-finding powers in determining the degree of guilt to be found on the record is more apposite to the action of a trial court than to that of an appellate body." [139] Because the Court of Military Review "acquitted" Crider of premeditated murder, Judge Darden analogized to the rule that on a rehearing after reversal, the second trial court cannot convict the accused of an offense which the first trial court acquitted him of.

V. EVIDENCE

A. WITNESSES

During the term, the Court had occasion to examine several of the methods of impeaching witnesses' credibility.

In ***United States*** v. *Colon-Atienza*,[140] the Court considered the possible remedies for the curtailment of the accused's right to cross-examine prosecution witnesses. In *Colon-Atienza*, the accused was charged with wrongful possession and sale of heroin. The government alleged that the accused had sold heroin to an informant, PFC Schuette. Schuette was a drug user, and he had become an informant only after the company commander threatened all drug users in the unit with "plenty of trouble." The commander gave Schuette a marked bill and directed him to make a controlled purchase from the accused. When Schuette gave the commander the package he allegedly purchased from the accused, the commander was surprised by the packet's small size. The

[138] **United States v. Crider, 22 U.S.C.M.A. 108, 110, 46 C.M.R. 108, 110 (1973).**

[139] *Id.* **at 111, 46 C.M.R. at 111.**

[140] **22 U.S.C.M.A. 399, 47 C.M.R. 336 (1973).**

commander was familiar with the local sales prices for drugs, and he expected a package twice as large as the one Schuette delivered to him. At trial, the defense counsel presented the theory that Schuette had purchased drugs from another source and consumed part of the drugs before delivering the packet to the commander. During cross-examination, Schuette refused to answer questions concerning his own use and sources of supply of narcotics. In response to each question, Schuette invoked his privilege against self-incrimination. The military judge denied the defense counsel's motion to strike Schuette's testimony.

On appeal, the government contended that the questions Schuette refused to answer related solely to his credibility and that if a witness invokes his privilege against self-incrimination to foreclose inquiry into matters related solely to credibility, the trial judge need not strike the witness' testimony. The Court held that the questions' subject-matter related to the case's merits; the Court stated that the answers to the questions might have supported the defense counsel's theory that Schuette had purchased the heroin from a third party. The Court enunciated the rule that if a witness' "assertion of the privilege against self-incrimination precluded the defense from properly cross-examining him on matters material to the merits,"[141] the military judge must remedy the curtailment of cross-examination by striking the witness' testimony.

The Court also focused its attention on the credibility of accomplice witnesses. In *United States v. Garcia*,[142] the Court clarified the substantive test for determining which witnesses qualify as accomplices. The government charged Garcia with riot and conspiracy to cause a riot. At trial, the government called Owens and Drummer as witnesses against the accused. Owens was present when the riot was planned and executed, but he denied any participation in the planning or execution. Drummer had been present when the riot occurred. The government had previously tried Drummer for the offense of riot, but Drummer had been acquitted. Severtheless, the specification against the accused named Drummer as a co-actor. The military judge did not give a cautionary, accomplice instruction with respect to either witness' testimony. The appellate defense counsel contended that the judge's failure to instruct was prejudicial error. The Court stated a general rule that a witness is an accomplice if he is "subject to

[141] *Id.* at **402, 47 C.M.R.** at **339.**
[142] **22 U.S.C.M.A.**8, **46** C.M.R. 8 **(1972).**

criminal liability for the same crime as the accused." [143] Applying the rule to Owens, the Court found that there was insufficient evidence in the record to support a finding that Owens was guilty of riot or conspiracy to cause a riot. The appellate defense counsel conceded that the record did not establish that Drummer was an accomplice, but they insisted that the specification's reference to Drummer as a co-actor required the judge to give the cautionary instruction. The Court disagreed, The Court asserted that "the better view" is that the trial judge need not give a cautionary instruction concerning a witness' testimony solely because the indictment names the witness as an accomplice.[144] The Court added that an instruction certainly was unnecessary where the witness had already been tried and found not guilty.

While *Garcia* [145] dealt with the substantive test for accompliceship, *United States* v. *Diaz* [146] analyzed the procedures to be used in determining accompliceship. In *Diaz*, the government charged the accused with premeditated murder and assault with intent to murder. The government's case depended primarily on the testimony of a Private Luis Perez-Perez. At the beginning of the instructions conference, the military judge informed the defense counsel that he intended to instruct the court members that as a matter of law, Perez was an accomplice. The defense counsel objected to the proposed instruction. The judge and counsel finally agreed that the instruction would be worded "if the testimony of Perez is believed, then Private Perez is an accomplice as a matter of law." Appellate defense counsel argued that the judge erred in instructing the members to decide as a question of fact whether Perez was an accomplice; counsel argued that the judge should have instructed that Perez was an accomplice as a matter of law. The Court noted that while the judge may sometimes rule that a witness is an accomplice as a matter of law, the presence of conflicting evidence can require that the judge submit the question to the court members. The Court felt that the military judge in the instant case could have properly ruled that as a matter of law, Perez was an accomplice. However, the Court concluded that the defense counsel's objection to the instruction the judge first proposed had induced the judge to submit Perez' accompliceship to the court as a question of fact. For that reason, the Court held

[143] *Id.* at 10, 46 C.M.R. at 10.
[144] *Id.*
[145] 22 U.S.C.M.A. 8, 46 C.M.R. 8 (1972).
[146] 22 U.S.C.M.A. 52, 46 C.M.R. 52 (1972).

that even if the instruction were erroneous, the accused could not complain.

Finally, in *United States v. Albo*,[147] the Court considered an accused's right under the Jencks Act to obtain the notes of testifying CID agents. A Criminal Investigation Division agent testified at Albo's trial on the issue of probable cause to search. The agent testified that he had received information from confidential informants. On cross-examination, the agent admitted that before testifying he had used his Case Activity Notes to refresh his recollection. The defense counsel then requested that the agent produce the notes for the defense counsel's use during cross-examination. The military judge denied the request. The judge did not attach the notes to the record of trial. On appeal, the Court set aside the guilty findings and sentence. After summarizing the decisional law construing the Jencks Act, the Court turned to the specific question of whether the CID agent's notes fell within the Act's purview. The Court noted that the federal civilian courts had divided on the production of policemen's notes, but the Court opted for the view that the agent's notes are statements within the Act's intendment. The Court's election forced the Court to face the problem that the judge had neither examined the notes nor attached them to the record. The Court complained that because of the judge's action, the Court could not determine whether the error was harmless. The Court noted that faced with the same problem, some Article III courts simply reversed while some Article III courts remanded to the trial court for a hearing on the Jencks Act issue. The Court stated that "[b]ecause a court-martial has no continuing existence, no regular procedure exists for our ordering the case remanded for a determination concerning whether part of the Case Activity Notes related to the subject of the agents' testimony."[148] Consequently, rather than remanding directly to the trial court-martial, the Court returned the record of trial to the Navy Judge Advocate General with authorization for a rehearing.

B. HEARSAY

The Court disposed of only one hearsay issue during the past term. *United States* v. *Seigle*[149] presented the question whether the military judge should ever submit the question of the suffici-

147 22 U.S.C.M.A. 30, 46 C.M.R. 30 (1972).
148 *Id.* at 35, 46 C.M.R. at 35.
149 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973).

ency of a confession's corroboration to the court members. The Court noted that the civilian jurisdictions have split upon the question: some civilian courts take the position that the trial judge must instruct the jurors that they must find sufficient corroboration for the defendant's confession before they consider the confession. Other civilian courts subscribe to the view that the trial judge alone should pass upon the sufficiency of the corroboration. The author of the Court's lead opinion, Judge Duncan, committed the military to a third, compromise view. Judge Duncan's view is based upon a general rule that the trial judge alone should determine the corroboration's sufficiency. However, the judge expressly excepted cases where the corroborating evidence is "substantially conflicting, self-contradictory, uncertain, or improbable." [150] In the excepted cases, the judge must instruct the court members that before considering the confession as evidence against the accused, the members must find that the essential facts admitted in the confession have been corroborated.

C. THE 4TH AMENDMENT— SEARCHES AND SEIZURES

In its last annual report, the Court of Military Appeals stated that the law of search and seizure is an area which "continue(s) to cause difficulty." [151] The sheer number of fourth amendment cases the Court decided during the last term and the complexity of the questions the cases presented bear out the Court's observation. In the term, the Court grappled with issues of searches' legality, standing, and the exclusionary rule.

1. The Legality of *Searches and Seizures*

a. Searches Based Upon Probable Cause

In the past few terms, the Court has greatly refined the military probable cause doctrine.[152] The Court's opinion in *United States v. Smallwood* [153] is a classic example of *Aguilar* [154] analysis. The author of the majority opinion, Judge Quinn, identified both prongs of the *Aguilar* test at the beginning of his opinion. Judge Quinn pointed out that to establish probable cause, the trial coun-

[150] ***Id.* at 407, 47 C.M.R. at 344.**

[151] U. S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE U. S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION 5 (1973).

[152] *See* **Gilligan,** *Probable Cause and the Informer,* **60 MIL. L. REV. 1 (1973).**

[153] **22 U.S.C.M.A. 40, 46 C.M.R. 40 (1972)**

[154] **Aguilar v. Texas, 378 US 108 (1964).**

sel must demonstrate that (1) the information the commander relied upon was reliable and (2) the information made it more likely than not that the contraband sought was located at the place to be searched. In Smallwood, the commander who authorized the search relied upon information from several sources, including an informant and a fellow officer. Judge Quinn found that the trial counsel had demonstrated the reliability of both sources. Judge Quinn found that the first informant was reliable for two reasons: in the past, the informant had given information which had proven to be correct, and the commander had personally met the informant and assessed the informant's credibility from his demeanor. Judge Quinn similarly found that the officer who had furnished information was reliable for two reasons: the officer had no evident reason for making a false report, and the information to be furnished was "an official report for the purpose of initiating appropriate official action." [155] Judge Quinn then turned from the reliability issue to the probability issue. Judges Quinn and Darden were satisfied that the trial counsel had met the second prong as well. Judge Duncan dissented on the second prong. Judge Duncan emphasized that when the informant reported that the accused had contraband drugs in his room, the informant had said only that "he knew for a fact" that the drugs were in the accused's room.[156] Judge Duncan agreed that the trial counsel had demonstrated the informant's reliability, but he felt that the trial counsel had not shown the basis of the informant's knowledge.

The judge's disagreement over the probability issue in *Smallwood* presaged the emphasis the Court was to place on the probability question in its decisions during the last term.

In United States *v. Sam*,[157] Judge Duncan authored the majority opinion. He stressed that after the trial counsel demonstrates the information's reliability, the question becomes whether the information creates "reasonable inferences that such items, in probability, were so located." [158] Judge Duncan conceded that a soldier's room and locker are likely places for him to conceal items he does not wish discovered. However, he insisted that to satisfy the constitutional requirement of probable cause, the trial counsel must show more than the joinder of that likelihood and suspicion that an accused has committed a theft. Judge Darden struck the same

[155] United States **v.** Smallwood, **22** U.S.C.M.A. **40, 46** C.M.R. **40, 42 (1972).**
[156] ***Id.*** at **41, 46** C.M.R. at **41.**
[157] **22** U.S.C.M.A. **124, 46** C.M.R. **124 (1973).**
[158] *Id.* at **130. 46** C.M.R. at **130.**

tone in *United States* v. *Troy*.[159] In Troy, officials discovered barbiturate pills and some personal papers in a common area near the accused's room. The papers were identifiable as the accused's property. Judges Duncan and Darden concurred that even the discovery of drugs in "close proximity" to the accused's room was an insufficient basis for inferring that there were drugs in the room.[160]

While he dissented in *Sam* and Troy, Judge Quinn's viewpoint prevailed in *United States v. Hennig*.[161] In *Hennig*, the issue was the basis of knowledge for the informant's report that the accused had drugs on his person. The informant initially reported that either the accused or an accomplice had the drugs. At that point, the commander asked the CID agent to contact the accused and his accomplice to determine which of the two had the drugs on his person. The agent later informed the commander that the informant had "in fact approached both'' the accused and his accomplice and reported that the accused had the drugs.[162] With Judge Darden's concurrence, Judge Quinn reasoned that there was a fair inference from the record that one of three things had happened: **(1)** the informant had seen the drugs in the accused's possession; **(2)** the accused had told the informant that he had the drugs; or **(3)** the accused's accomplice had told the informant that the accused had the drugs. Judge Quinn felt that, in any of these eventualities, there was a sufficient showing of basis of knowledge ; the informant's personal observation or the accused's admission would clearly be sufficient, and the accomplice's "association with the accused and apparent joint interest in the drugs'' would also be an adequate showing.[163] As in *Smallwood*, Judge Duncan dissented vigorously on the ground the informant had not specified the basis for his knowledge.

b. Searches Based Upon the Accused's Consent

During the past term, Judges Quinn and Duncan had an opportunity to write a lead opinion on consent searches.

Judge Quinn's opportunity came in *United States* v. *Glenn*.[164] Military police searched Glenn's automobile at the entrance to El Toro Marine Corps Air Station. When Glenn approached the entrance, a Sergeant stopped the vehicle. The Sergeant identified

159 **22 U.S.C.M.A. 195, 46 C.M.R. 195 (1973).**
160 *Id.* at **198, 46 C.M.R. 198.**
161 **22 U.S.C.M.A. 377, 47 C.M.R. 229 (1973)**
162 *Id.* at **378, 47 C.M.R.** at **230.**
163 *Id.* at **380,** 47 **C.M.R.** at **232.**
164 **22 U.S.C.M.A. 295, 46 C.M.R. 295 (1973).**

himself as a member of the Provost Marshal's office's marijuana detecting dog section. The Sergeant then indicated that he wanted to search Glenn's automobile. Without apparent nervousness or reluctance, Glenn granted permission for the search. The Sergeant first searched the vehicle with a marijuana dog. The dog did not alert. The Sergeant then personally inspected the auto and discovered LSD tablets. The Court sustained the seizure as the product of a consensual search. The Court rejected the defense argument that "human experience indicate(s) that an individual who is carrying. . . contraband . . . would not submit to a search unless he felt some compulsion to do so."[165] The Court rejoined that offenders sometimes feel that their contraband is so secure from discovery that they do not hesitate to consent to a search. Judge Quinn opined that Glenn might have thought the Sergeant would search only with the marijuana dog. If Glenn made that assumption, he might have felt that he could safely consent: the marijuana dog would not alert to the LSD. Judge Quinn held that even if Glenn mistook the scope of the contemplated search, his mistake did not invalidate the consent.

Judge Duncan wrote the lead opinion in the most difficult consensual search case during the past term, *United States v. Cady.*[166] Cady's commander asked Cady for permission to search his person. At first, Cady granted permission. The commander then directed Cady to empty his pockets. In response, Cady removed a matchbook from his pocket. The accused then withdrew his consent to the search. Disregarding the accused's wishes, the commander unbuttoned the accused's pocket and removed contraband heroin. The question presented was whether a suspect may revoke his consent after the search has begun. Judge Duncan noted that the civilian jurisdictions have divided upon the issue. Judge Duncan opted for the more liberal view that the suspect may withdraw his consent even after the search has begun. It is well-settled that a suspect may limit the scope of his consent, and Judge Duncan treated the suspect's right to revoke his consent as a corollary to the right to limit the search's scope. Judge Duncan also found an analogue in the *Miranda* rule that the suspect may terminate the questioning after he has previously waived his rights. Dissenting, Judge Quinn emphasized that the commander was in the process of unbuttoning the pocket when Cady revoked his consent. Judge Quinn relied upon the general fourth amendment standard of reasonable-

[165] *Id.* **at 296, 46 C.M.R. at 296.**
[166] **22 U.S.C.M.A. 408, 47 C.M.R. 345 (1973).**

ness; he opined that it is not "unreasonable for an enforcement officer to complete a particular physical movement when the beginning of that movement was with consent." [167]

c. Gate Searches

The Court revisited the gate search issue in *United States v. Poundstone*.[168] *Poundstone* concerned a search at the gate to Phu Loi Base Camp in Vietnam. Lieutenant Colonel Brown was the commander of a unit stationed at the base. He was also the camp's installation coordinator. As such, he was responsible for the camp's security. Brown's executive officer, Major Braush, testified that Brown's battalion was experiencing two acute problems, unsafe vehicles and narcotics traffic. The executive officer also testified that they suspected that drug dealers were using vehicles to introduce drugs onto the camp. The executive officer therefore instructed Eadleman, one of his warrant officers, to search all battalion vehicles entering the camp gate to ensure their safety and interdict the drug traffic. Braush further instructed Eadleman to search all the persons in the vehicles. On the morning in question, a battalion truck approached the gate, The accused was not a member of the battalion, but he was riding in the vehicle. The accused jumped from the truck when it reached the gate. He then walked toward the camp's interior. At Eadleman's direction, the accused was searched. The search uncovered ten vials of heroin. Judges Quinn and Darden agreed that the search was legal, but the Court found the search so troublesome that each judge felt compelled to write a separate opinion.

Judge Quinn authored the lead opinion. On the one hand, he rejected the government's contention that the fourth amendment does not apply in combat zones. On the other hand, he was unpersuaded by the defense argument that the search had to be based on probable cause. He rationalized the search of the vehicle before addressing the search of the accused's person. Judge Quinn reiterated the rule that incident to his responsibility for government property, a commander may search military property. Applying that rule to the instant gate search, he concluded that "there were good and sufficient reasons . . . to inspect every battalion vehicle for safety and to search it for contraband." [169] The judge then formulated a theory of search of a vehicle occupant incident to the inspection of military vehicle. His precise holding was that

[167] *Id.* at 412, 47 C.M.R. at 349.
[168] 22 U.S.C.M.A. 277, 46 C.M.R. 277 (1973).
[169] *Id.* at 281, 46 C.M.R. at 281.

persons in a military vehicle "suspected of being used to import forbidden matter into the command area" may be searched incident to search of the vehicle.[170]

While Judge Quinn justified the vehicle search on the stated justifications of safety inspections and the interdiction of drug traffic, Judge Darden stressed the commander's inherent power to search persons and vehicles entering or leaving his base. Judge Darden's review of the authorities convinced him that a commander has inherent power to "search all those who enter or leave the installation's perimeters." [171]

Judge Duncan dissented, arguing that the search of the accused's person suffered from two constitutional infirmities. First, he thought that judges Quinn and Darden had improperly extended the inspection doctrine. He thought that the inspection rationale should be limited to searches "closely connected to the concept of the security, welfare, or health of a number of persons.''[172] He objected to the extension of the inspection doctrine to a fact situation in which "(t)he professed concern" of the governmental officials was criminal activity.[173] Second, he decried the unlimited discretion of the persons authorized to conduct the searches. The installation coordinator had not limited the discretion of his delegates, and Judge Duncan feared that the delegates' personal dislikes and prejudices would determine which persons were searched at the gate.

d. Inspections and Regulatory Searches

United Stafesv. Torres [174] was one of the few fourth amendment cases in which all three judges agreed upon a single opinion. Torres was assigned to a postal unit. He had stolen mail matter and rewrapped it. The package was laying on a table in the unit work area when the postal group commander walked through during a routine inspection. The commander noticed that the package was addressed but lacked postage. The commander ascertained that the package belonged to the accused and that the accused was assigned to the postal unit. The commander then ordered the accused to open the package. The accused complied with the order and unwrapped the package to disclose stolen silverware. Judge Duncan's opinion forged two lines of reasoning to sustain the search. The first line upheld the search as an inspection. **A** valid

[170] *Id.* at **282, 46** C.M.R. at **282.**
[171] *Id.* at **283,** 46 C.M.R. **283.**
[172] *Id.* at **285,** 46 C.M.R. at **285.**
[173] *Id.*
[174] **22** U.S.C.M.A. 96, 46 C.M.R. 96 **(1973)**

postal regulation prohibited military postal employees from keeping their personal property in post offices. Moreover, rewrapping was a known method of stealing from the mails. The order was a legitimate security precaution to protect the mails; if the commander had merely ordered the accused to remove the package from the work area, the commander would have been remiss in his duty to protect the mails. Secondly, the judge sustained the order on the theory that the order did not violate any reasonable expectations of privacy of the accused. Citing *Katz*,[175] Judge Duncan stated that as a postal employee, the accused could not "expect freedom from governmental intrusion designed to insure proper, efficient, and secure operation of the postal unit. . . ." [176]

Following Judge Duncan's example in *Torres*, Judge Quinn relied upon *Katz* as a ground for sustaining the search in *United States v. Unrue*.[177] *Unrue* arose from a search conducted at Fort Benning. Colonel Latham commanded the 197th Infantry Brigade occupying the Kelly Hill area. The brigade was approximately 5,000 in strength. The brigade was experiencing approximately **30** incidents of drug abuse per quarter. The brigade was also experiencing approximately 25 larcenies per quarter; and in all of the solved cases, the thief was involved with drugs. Colonel Latham initiated a broad program to combat drug abuse within the brigade. He established a roadblock inspection system to prevent the introduction of narcotics into Kelly Hill. The system involved two roadblock checkpoints. At the first checkpoint, vehicles were stopped, and the inspectors checked driver's licenses and vehicle registrations. At this checkpoint, the inspectors searched neither the vehicle nor the person. Rather, they invited the driver and occupants to read a sign with the following legend:

> Attention, narcotics check, with narcotics dogs. Drop all drugs here and no questions asked. Last chance.[178]

There was an amnesty barrel under the sign. The inspectors informed the occupants that the vehicle would be stopped again at the second checkpoint. The inspectors afforded occupants the opportunity to deposit contraband in the barrel without punitive action. At the second checkpoint, the inspectors were to search vehicles and persons "if there was any indication of cause." [179]

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[175] Katz v. United States, 389 U.S. 347 (1967).
[176] United States v. Torres, 22 U.S.C.M.A. 96, 99, 46 C.M.R. 96, 99 (1973).
[177] 22 U.S.C.M.A. 466, 47 C.M.R. 556 (1973).
[178] Id. at 468, 47 C.M.R. at 558.
[179] *Id.*

The inspectors used a marijuana detection dog to determine whether there was cause. If the dog alerted to the vehicle, the inspectors searched the vehicle and passengers. If the dog did not alert, the inspectors allowed the vehicle to proceed without further interruption. On the date in question, the accused was a passenger in a vehicle driving to Kelly Hill. The inspectors stopped the vehicle when it reached the second checkpoint. The marijuana dog alerted to the vehicle. The inspectors then asked the passengers to exit the vehicle and step to the side. The dog continued his alert and pointed to a particular area in the vehicle. The dog handler searched the area and discovered some vegetable matter and cigarette rolling paper. The inspectors then searched all the occupants. They discovered several heroin packets on the accused's person.

With Judge Darden's concurrence, Judge Quinn sustained the search. Judge Quinn first sustained the search as a valid, regulatory inspection. He pointed to the Supreme Court decisions in which the Supreme Court sustained inspection systems as part of regulatory programs, especially if the inspection system was "carefully limited in time, place, and scope." [180] He then noted the parallel military decisions sustaining searches to protect command security or effectuate valid, administrative policies. The judge deferred to Colonel Latham's judgment that the incidence of drug snd related larceny offenses within the Kelly Hill area posed a serious threat to the command. Given that threat, there was a valid, regulatory purpose for the inspection system. The only question was then whether the means the Colonel selected to implement the system were reasonable. Judge Quinn specifically held that the use of the dog to detect odors a human inspector could not detect was reasonable. Segatively, using *Katx* privacy analysis, he thought that by the time the vehicle passed the sign at the first checkpoint, the occupants would have only a minimal expectation of privacy in odors emanating from the vehicle. Affirmatively, the dog's capability of detecting the odor of marijuana was so reliable that his alert furnished probable cause to search. In short, Judge Quinn employed a regulatory inspection rationale to justify the basic roadblock system; and measuring the specific means employed in the system against a fourth amendment standard of general reasonableness, he concluded that the means were also constitutionally unobjectionable.

Judge Duncan filed a forceful dissent. He conceded that the Court carved an exception from the fourth amendment for inspec-

[180] United States v. Biswell, 406 U.S. 311, **315** (1972).

tions based on military necessity, but he denied that the trial counsel's showing rose to the level of military necessity. He pointed out that **30** cases of drug abuse per quarter in a 5,000 man command hardly constitute an epidemic. He added that the trial counsel had not demonstrated the drug use had affected either the command's security or its ability to perform its mission. Finally, the judge felt that the statistics the trial counsel had offered were so commonplace that the same showing could be made for "any other military installation in the world."[181] To Judge Duncan's mind, it seemed that the trial counsel had proved only a relatively common level of drug abuse which simply did not satisfy the exacting, exceptional standard of military necessity.

e. Inventory Searches

The Court analyzed an inventory search of an impounded automobile in *United States v. Watkins.*[182] **A** security policeman's patrol of a barracks area triggered the chain of events which led to the search. The policeman observed an airman and woman in the barrack's parking lot. He suspected that she had been in the man's barracks. He noticed her standing beside an automobile. By radio, he checked with his headquarters and learned that the auto's license plates had been issued for another car. The policeman then approached the couple. They informed him that the accused owned the automobile. The policeman contacted the accused, and he acknowledged ownership of the automobile. The policeman then took the couple, the accused, and the accused's auto to security police headquarters. Because the auto was improperly registered, the policeman ordered it impounded and inventoried. The policeman then inventoried the auto. He inventoried the contents of the glove compartment, interior, and trunk. While inventorying the trunk's contents, he discovered marijuana. On appeal, the accused urged that the inventory was a subterfuge for a search of the vehicle without probable cause. Judge Quinn upheld the search; he held that the vehicle's improper registration and the routine manner in which the policeman conducted the search supported a finding that the search was a *bona **fide*** inventory.

f. Terminal Searches

The Court attempted to delimit the custom search doctrine in *United States* v. *Carson.*[183] The accused and two friends visited an

[181] **United States v. Unrue, 22 U.S.C.M.A. 466, 472, 47 C.M.R. 556, 562 (1973).**
[182] 22 U.S.C.M.A. 270, 46 C.M.R. 270 (1973).
[183] **22 U.S.C.M.A. 203, 46 CM.R. 203 (1973).**

aerial port passenger terminal in Thailand. The accused entered the terminal with his baggage and handbag. He approached the information counter and inquired about the schedule of departures. The accused filled out a booking card for a flight to Okinawa. The accused told the noncommissioned officer in charge of the terminal that Thailand was extremely expensive and that he wanted to return to Okinawa, even though he had spent less than **24** hours in Thailand. The accused's remarks struck the NCO as suspicious. The NCO also thought that the accused had an unusually large quantity of baggage. At the NCO's request, air police used a detection dog to check the accused's baggage. The dog alerted, and the baggage was searched. The search produced marijuana. The government attempted to analogize the search to a border or customs search. Judge Darden accepted the analogy, but invalidated the search. The judge accepted the rule that a terminal commander may require persons traveling on aircraft departing the terminal to submit their baggage to examination. However, he thought that the pivotal question was the point at which the baggage becomes subject to examination. The judge held that the air police had searched the accused's baggage before his baggage became subject to examination. On the one hand, the accused had entered the terminal and signed a request for transportation. On the other hand, he still retained physical control over his baggage, and he was not finally committed to the flight. He had not yet checked in for the flight, and the accused could still have changed his mind. The judge announced a rule that a military member does not subject his baggage to an inspection until he delivers it for weighing or handling by another.

Judge Quinn dissented. He would hold that the NCO was not acting as a government agent when he inspected the accused's baggage.

2. Standing to Object

United States v. Simmons[184] was the Court's first significant standing opinion since its **1966** decision in *United States v. Aloyian.*[185] Like Aloyian, Simmons suffered the fate of a conviction of possession of drugs produced by a search he lacked standing to challenge. The members of a drug suppression team observed the occupants of a military ¼ ton truck contact a group of Vietnamese children. The team suspected that the occupants had purchased drugs from the children. The team then saw the occupants

[184] **22** U.S.C.M.A. 288, 46 C.M.R. 288 (1973).
[185] 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966).

drive a short distance and stop. One of the occupants appeared to remove the gas cap, make some motions near the gas can, and screw the cap back on. The team radioed ahead to the gate of the camp that the truck was approaching. The gate guard searched the gasoline can and discovered **104** vials of heroin.

The accused moved to suppress the heroin at trial. The military judge denied the motion; the judge found probable cause for the search. The Court of Military Review sustained the ruling on the theory that the accused had wrongfully appropriated the vehicle and, hence, had no standing. Writing for the Court, Judge Duncan concluded that the Court of Military Review had reached the correct result for an incorrect reason. The judge first rejected the Court of Military Review's standing reasoning. Following *Aloyian,* Judge Duncan adopted the rule that an accused does not have standing solely because he is charged with a possessory offense; a trespasser on premises lacks standing to challenge a search of the premises, even if he is charged with a possessory offense. However, the judge thought there was insufficient evidence that the accused was a trespasser on the vehicle searched. He pointed out that the Court had previously held that an auto passenger's mere acceptance of a ride in a vehicle does not make him guilty of wrongful appropriation of the vehicle, even if he knows that the vehicle is stolen. In other words, given the posture of the record, Judge Duncan thought the accused would have standing under the traditional rule. However, he did not end his inquiry with the traditional rule. He stated that the Supreme Court now employs *Katx,* privacy analysis to decide standing issues, as well as questions of legality of searches. The judge found that the accused did not have a reasonable expectation of privacy from governmental intrusion in the military vehicle's gas can. The government had not made the can available to the accused for his personal use, and he could not reasonably expect any privacy in goods stored in the can. When the government issues clothing or equipment to a soldier for his personal use, his constitutionally-protected expectation of privacy is "nearly complete." [186] At the other end of the spectrum, when the government issues items such as large, crew-served weapons or gas cans to soldiers, the nonpersonal nature of the property cuts against recognition of a protected expectation of privacy.

Judges Darden and Quinn concurred in the result. Judge Darden's

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[186] United States **v.** Simmons, **22 U.S.C.M.A. 288, 293, 46** C.M.R. **288, 293 (1972).**

opinion is significant because of its reference to *United States v. Weshenfelder.*[187] In *Weshenfelder*, the Court sustained the search of a government desk for government property. In *Simmons*, Judge Darden suggested that he would be willing to apply *Weshenfelder* to the search of a government desk for contraband. In his brief concurring opinion, Judge Quinn also cited *Weshenfelder.*

3. The Application of the Exclusionary Rule to Derivative Evidence

In recent years. the fourth amendment exclusionary rule has come under heated attack.[188] Several commentators have called for the rule's abolition or modification.'"' Those recommendations notwithstanding, the Court applied the exclusionary rule forcefully during the past term. In one case, the Court held that a witness' testimony was the tainted fruit of the poisonous tree and in two other cases, the Court held that the accused's pretrial statements were tainted products of illegal searches.

United States v. Armstrong [190] was probably the most extreme application of the exclusionary rule. The military police suspected that Armstrong was dealing in drugs. They conducted an illegal search of his room. During the course of the search, they discovered incriminating evidence. On the basis of the evidence, they placed the accused's room under surveillance. They apprehended the witness as he exited the room. At trial, the witness' testimony was the only direct evidence that the accused had wrongfully transferred drugs. Judges Duncan and Darden agreed that the testimony should have been excluded. It was their opinion that the stake-out and the witness' apprehension were results of the police's exploitation of the illegal search. Judge Quinn filed a brief, but vigorous dissent. He argued that the illegal search merely motivated the police to continue their investigation of the accused's activities. He emphasized that an illegal search of an offender's living quarters does not grant the offender life-long immunity from investigation and prosecution.

The Court excluded pretrial statements as derivative evidence in

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[187] **20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971).**

[188] Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* **2 J. LEGAL STUD. 243 (1973)** ; **Oaks,** *Studying the Exclusionary Rule in Search and Seizure,* **37 U. CHI. L. REV. 665 (1970).**

[189] *See, e.g.,* Wright, *Must The Criminal Go Free If the Constable Blunders?* **50 TEX. L. REV. 736 (1972).**

[190] **22 U.S.C.M.A. 438, 47 C.M.R. 479 (1973).**

United States v. Hamilton[191] and *United States v. Troy*.[192] In *Hamilton,* the investigator began the interrogation three hours after the illegal search, The search produced a quantity of marijuana. During the questioning, the investigator specifically referred to the marijuana. The accused answered that "it looks like I've been caught, so I'll answer your questions." [193] Judge Darden wrote that where the government's first illegal act is likely to lead to a confession, a subsequent confession is presumptively tainted and the government must make a strong showing to rebut the presumption. Judges Darden and Duncan concurred that the statement was the product of the illegal search. The two judges reached a similar conclusion in *Troy*. *Troy* involved the admissibility of two statements the accused made after the illegal search. The first statement was made during an interrogation which the searching officer conducted soon after the illegal search. The judges had no difficulty finding that the first statement was the result of the search's exploitation. The second statement occurred on the following day, but the judges found it likewise tainted. The judges found the second statement was the illegal product of both the illegal search and the prior, inadmissible confession.

While the government failed to rebut the presumptive taint in *Hamilton* and *Troy,* the government succeeded in *United States v. Foecking*.[194] The interrogation in Foecking occurred shortly after the illegal search. However, the investigator made no reference to the gun seized, and it was unclear from the record whether the accused knew that the police had seized his gun. More importantly, the accused's testimony indicated that the search had not been an inducing cause of his confession. The accused was asked what went through his mind when he learned that the police had his gun. He replied, "Nothing." The Court concluded that the illegal search had not affected the accused's decision to speak.

D. THE 5TH AMENDMENT AND ARTICLE 31— CONFESSIONS

1. Article 31 Warnings

On many occasions, the Court of Military Appeals has asserted that Article **31's** scope is broader than the fifth amendment. In *United States v. Pyatt,*[195] the Court once again had to decide

191 **22 U.S.C.M.A. 209, 46 C.M.R. 209 (1973).**
192 **22 U.S.C.M.A. 195, 46 C.M.R. 195 (1973).**
193 **22 U.S.C.M.A. 209, 210, 46 C.M.R. 209, 210 (1973).**
194 **22 U.S.C.M.A. 46, 46 C.M.R. 46 (1972).**
195 **22 U.S.C.M.A. 84, 46 C.M.R. 84 (1972).**

whether Article **31** applied to conduct to which the fifth amendment was clearly inapplicable. The unit executive officer suspected Pyatt of a theft. He ordered Pyatt to report to his office. The officer then directed the accused to take out his wallet and count his money. The accused complied and displayed the **$292.00** in his wallet. The Court held that the officer's order violated the accused's Article **31** rights. The judges unanimously agreed that Article **31's** scope encompasses voluntary, physical acts which result in the production of incriminating evidence.

In *United States v. Temperley* [196] and *United States v. Woods,* [197] the Court had to decide which types of interrogators are required to administer Article **31** warnings. In *Temperley,* the interrogator was an FBI agent who specialized in the apprehension of AWOLees. The Court held that the FBI agent was not required to administer an Article **31** warning. However, in *Woods,* the Court held that a Charge of Quarters was obliged to give an Article **31** warning before questioning a suspect. The CQ was a Sergeant Akins. Akins had evidently seen and used drugs when he was stationed in Vietnam. Some of his friends had died as a result of drug abuse, and he hated to see anybody use drugs. During his tour of duty, someone informed Akins that the accused was selling drugs. Akins apparently decided to investigate as an undercover agent. Akins went to the accused's room ('to get evidence." [198] Akins asked the accused whether he had "anything to smoke." The accused said that he did. At trial, Akins testified that he investigated for "a personal reason (more) than anything else." [199] However, he also testified that he was acting as CQ and considered it his duty to investigate. The Court repeated the rule that a person subject to the Code need not give a suspect Article **31** warnings only if the questioner is "motivated solely by personal considerations . . ." [200] The Court concluded that Akins should have administered an Article **31** warning; when he conducted the questioning, he was directly engaged in the performance of his duties as command CQ during a regular tour of duty.

Finally, in *United States V. DeChamplain,* [201] the Court considered the effect of the accused's assertion of his right to remain silent. The investigators questioned the accused three times during a six-day period. On the first occasion, the accused refused to

196 **22 U.S.C.M.A. 383, 47 C.M.R. 235 (1973).**
197 **22 U.S.C.M.A. 369, 47 C.M.R. 124 (1973).**
198 **22 U.S.C.M.A. 369, 370, 47 C.M.R. 124, 125 (1973).**
199 *Id.* at **371, 47 C.M.R.** at **126.**
200 *Id.*
201 **22 U.S.C.M.A. 150, 46 C.M.R. 150 (1973).**

respond to any questions. The accused did not even acknowledge that he understood the warnings. On the second occasion, the accused again refused to speak. At the outset of the third interrogation, the accused merely shook his head to indicate that he did not wish to answer questions. The investigators persisted in their questioning, and the accused made inculpatory admissions. The Court held that the accused's repeated reliance upon his right to remain silent made it incumbent upon the interrogators to cease their questioning.

2. Mirandu Warnings

In addition to presenting an Article **31** issue, ***Temperley*** presented an issue as to when an accused becomes entitled to *Miranda* warnings. The FBI agent had information that the deserter Temperley was residing at an address under the name of John Rose. The agent visited the residence. When he knocked at the door, the accused answered. At first, the agent did not recognize the accused. The agent then said, "Mr. Rose." The accused replied, "Yes." The agent reiterated, "John Charles Rose." Again, the accused replied, "Yes." The agent and the accused then entered the hallway inside the house. The agent asked the accused his true name ; and the accused responded, "John Charles Temperley." The agent then placed the accused under arrest and administered *Miranda* warnings. The accused argued that custodial interrogation began when the agent first spoke to the accused. The Court distinguished custodial interrogation from preliminary interrogation prior to taking a suspect into custody. The Court concluded that prior to the formal arrest, the agent had not deprived the accused of his freedom of action in any significant way. Significantly, the Court rejected two defense arguments. First, the Court rejected the argument that the test for custodial interrogation is the questioner's subjective intent. The Court held that even if the officer subjectively intends to arrest from the beginning of the questioning, custodial interrogation begins only when there is an objective manifestation to the accused that he is not free to leave. Second, the Court rejected the proposal that it should apply a special rule to desertion cases where proof of the use of an alias is a common, damning item of evidence. The Court held that the test for custodial interrogation is the same for all criminal prosecutions.

In ***United States*** v. *Clayborne,*[202] the Court decided a significant ***Miranda*** issue and, by so doing, deftly avoided an even more significant issue. Clayborne's commander had questioned him while he

[202] *22* **U.S.C.M.A.** *387,* **47** C.M.R. **239 (1973).**

was in confinement. The commander expressly advised the accused of his right to have counsel present, but he did not specifically tell the acccused that he could consult with his counsel. The Court of Military Review held that the omission of a warning concerning the right to consultation was error. However, the Court of Military Review held that the error was harmless beyond a reasonable doubt; Judge Alley rejected the argument that the admission of a confession in violation of *Miranda* results in automatic reversal. The Court of Military Appeals found it unnecessary to decide whether a military court may apply the harmless error rule to confessions obtained in violation of *Miranda*. The Court concluded the commander's *Miranda* warning was not deficient; it held that the express warning of the right to counsel's presence fairly implied the right to consult counsel.

3. The Application of the Exclusionary Rule to Derivative Evidence

The Court's fifth amendment exclusionary rule decisions paralleled the Court's fourth amendment decisions. The Court treated searches and pretrial statements as the tainted products of illegal interrogations.

In *Pyatt*,[203] the Court held that the second pretrial statement was the product of the first illegal statement. The Court pointed out that the first statement was the type of evidence likely to produce a later confession and that the same investigator had participated in each stage of the investigation during a **24** hour period. The Court emphasized that the accused neither knew, nor had been informed that his prior statement was inadmissible.

In *Woods*[204] and *Cnited States* c. *Atkins*,[205] the Court decided that searches were the products of illegally obtained statements. In *Woods*, after the CQ contacted the accused, he conveyed the information he obtained to the company commander. Based largely upon the CQ's report, the commander authorized a search of the accused's room. The Court held that, since the search was "predicated upon'' the accused's statements to the CQ, the search itself was invalid.[206] In *Atkins*, an illegally obtained statement again led to an illegal search. **A** military policeman was on patrol near a bunker line in Vietnam. He heard a burst of automatic weapon

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203 United States **v.** Pyatt, **22** U.S.C.M.A. **84, 46** C.M.R. **84 (1972).**

204 United States v. Woods, **22** U.S.C.M.A. **369, 47** C.M.R. **124 (1973).**

205 **22** U.S.C.M.A. **244, 46** C.M.R. **244 (1973).**

206 United States **v.** Woods, **22** U.S.C.M.A. **369, 370, 47** C.M.R. **124, 125 (1973).**

fire. He entered the bunker and observed two sleeping men. There were two automatic rifles in the bunker. One rifle smelled as if it had just been fired. The policeman awoke the accused and asked him if the rifle was his. The accused responded that it was his rifle. The policeman then apprehended the accused and searched him incident to the apprehension. The search produced marijuana and heroin. At trial, the policeman testified that he would not have apprehended the accused unless the accused had admitted that it was his rifle. The military judge excluded the statement, but upheld the search; the judge reasoned that the policeman obtained the statement in violation of Article 31, but that the search was not a product of the statement. The Court concurred with the government that the test for the application of the exclusionary rule to derivative evidence is not a simple "but for" test; derivative evidence should not be excluded solely because it would not have been discovered but for the illegal statement. The appropriate test is whether the subsequent search is a direct exploitation of the unwarned statement. The Court decided that the search was a product of the policeman's exploitation of Atkins' unwarned statement. The Court stressed that the policeman had felt that, without the accused's statement, there was no probable cause for the accused's apprehension.

The government counsel found some solace in their victory in *Watkins*.[207] Before escorting Watkins and his vehicle to the station house, the security policeman obtained the accused's unwarned admission that he owned the automobile. The Court held that the security policeman should have administered an Article 31 warning. Defense counsel argued that the subsequent inventory of the vehicle was a tainted product of the admission. The Court rejected the argument. The Court pointed out that before the policeman questioned Watkins, the policeman already knew that Watkins owned the auto and that the auto was improperly registered. Distinguishing *Atkins,* the Court held that the inventory was not a result of the statement's exploitation.

VI. SENTENCES

United States v. Sosville [208] was a case of first impression for the Court of Military Appeals. The defendant had been convicted and sentenced to a bad conduct discharge, confinement at hard labor for **45** days, forfeitures of $150.00 per month for three

[207] **22** U.S.C.M.A. **270, 46** C.M.R. **270** (1973).
[208] **22** U.S.C.M.A. 317, **46** C.M.R. 317 (1973).

months, and reduction to the lowest enlisted grade. The convening authority's action provided that "the forfeitures shall apply to pay becoming due on and after the date of this action." On appeal, the appellant contended that, since he had already served his sentence to confinement at the time the convening authority took his action, Article **57**(c) of the Code and paragraph 88*d*(3) of the Manual precluded approval of the forfeiture portion of the sentence. The Court rejected this contention. The Court stated that Article **57**(a) is unambiguous. If a sentence, as approved, includes a period of unsuspended confinement at hard labor, forfeitures may be approved, and it is immaterial whether the defendant is in confinement on the date that the convening authority acts. Judge Duncan formulated a rule that forfeitures may be applied on or after the date the convening authority takes his action if the sentence, as approved, includes a period of confinement unsuspended or deferred.

An issue involving the trial judge's instructions was raised in *United States v. Keith.*'"!' Although administrative discharges would not ordinarily be discussed in a court-martial,[210] the trial judge allowed both the trial and defense counsel to refer in their arguments to administrative discharges. The arguments prompted several questions by the court members concerning their power to recommend or award an administrative discharge. In writing for the Court, Judge Duncan viewed the issue as whether, under the circumstances, the trial court's instructions and advice concerning administrative discharges were adequate to allow the court to intelligently determine an appropriate sentence. In *United States v. Turner*,[211] the Court had held that the trial judge must disclose to the court members their right to recommend clemency in a proper case. Keith's trial was such a case. When the military judge refused to give a clemency instruction despite requests for guidance by the court members, he erred since he failed to inform the members of the conditions under which they could recommend an administrative discharge.

In addition to presenting the Court with a question as to the admissibility of the accused's pretrial statement, *United States v. Foecking*[212] presented a second issue—when is a forfeiture le-

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[209] **22 U.S.C.M.A. 59, 46 C.M.R. 59 (1972).**

[210] **United States v. Quesinberry, 12 U.S.C.M.A. 609, 31 C.M.R. 195 (1962).**

[211] **14 U.S.C.M.A. 435, 34 C.M.R. 215 (1964).**

[212] **22 U.S.C.M.A. 46, 46 C.M.R. 46 (1972). See note 194, *supra*, and accompanying text.**

gally effective. The convening authority had approved the adjudged sentence, but the Court of Military Review returned the case for a new review and action based upon the inadequacy of the staff judge advocate's review, When the convening authority took his new action, he again approved the sentence as adjudged and directed that the forfeiture of pay and allowances be applied to the accused's pay as of the date of the convening authority's original action. The Court pointed out that Article 57(a) [213] allows the convening authority to make the forfeiture portion of a sentence effective the date he approves it. However, the operative fact upon which this provision depends is a "lawfully adjudged and approved" sentence. If the original approval was unlawful, the "dependent designation of the date the forfeitures were to be operative was similarly invalid." [214] Thus, Foecking's forfeitures would only be effective as of the date of the second action, the only legal action in this case.

VII. EXTRAORDINARY RELIEF

The last term witnessed the presentation of a fairly large number of petitions for extraordinary relief to the Court. The cases can be grouped into three categories.

In the first category, the Court found that it had no jurisdiction over the petition's subject-matter. *Hansen V. Hobbs,*[215] *Chenoweth v. VanArsdall,*[216] and *DeChamplain V. McLucas* [217] fell within this category.

In *Hansen,* the accused was stationed in Turkey. He was involved in a traffic accident which resulted in the death of a Turkish citizen. The Turkish officials charged the accused with negligent homicide. The Turkish General Staff issued a certificate, declaring that the accused was acting in the performance of his official duties at the time of the accident. On the basis of the certificate, the Turkish trial court dismissed the case, subject to the right of the decedent's representative to appeal. The representative appealed the dismissal. The American military authorities preferred charges against the accused for negligent homicide. The charges were referred to a special court, but no trial date was set. The accused filed a petition for a writ of prohibition with the

213 10 U.S.C. §957(a) (1970).
214 **United States v. Foecking, 22** U.S.C.M.A. **46, 46** C.M.R. **46 (1972).**
215 **22** U.S.C.M.A. **181, 46** C.M.R. **181 (1973).**
216 **22** U.S.C.M.A. **183, 46** C.M.R. **183 (1973).**
217 **22** U.S.C.M.A. **462, 47** C.M.R. **552 (1973).**

Court of Military Appeals; he alleged that the court-martial lacked jurisdiction over the offense because the accident occurred prior to his honorable discharge and immediate reenlistment. The government disputed the facts of the discharge and reenlistment. In a memorandum opinion, the Court dismissed the petition. First, the Court held that the petition was untimely. The Court noted that, until the final outcome of the representative's appeal in the Turkish courts, it was uncertain whether the military authorities would ever proceed to trial. Second, the Court stated that the questions of the accused's discharge and reenlistment "may more appropriately be resolved by the special court-martial if and when the decision to proceed with trial is made." [218]

Chenoweth was a far more complex case. The Government charged that Chenoweth had attempted to sabotage the USS *Ranger*. The trial was scheduled to commence at the Treasure Island Naval Station, San Francisco. The defense requested that the trial counsel issue subpoenas for **20** witnesses, most of whom were assigned to the *Ranger*. The *Ranger* had already departed for the western Pacific. The prosecution moved for a change in the situs of trial to the *Ranger*. Over the defense's objection, the military judge directed that the trial be moved to Subic Bay, Philippines, to hear the witnesses assigned to the *Ranger*. The judge further directed that having heard those witnesses, the trial would reconvene at Treasure Island. The accused then filed a petition for a writ of probition with the Court. The accused alleged that the judge's order violated the accused's constitutional right to be tried in the state in which the offense occurred. The accused also alleged that the military judge may not grant the prosecution to change of venue or situs. He further alleged that, even if the judge had power to change situs for the prosecution, here the judge's ruling was an abuse of discretion; the accused alleged that if the situs of trial were moved, he would be denied both a public trial and the effective assistance of counsel. The accused's civilian attorney filed a statement that when he was last in the Philippines, the local authorities had arrested him, threatened him with trial for capital offenses, and deported him without trial. The attorney stated that he feared for his safety if he returned to the Philippines. The government responded to the petition. Its response stated that the government had learned through appropriate channels that there were no charges pending against the civilian attorney in the Philippines.

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[218] Hansen **v.** Hobbs, **22** U.S.C.M.A. **181, 181,** 46 C.M.R. **181, 181 (1973).**

In another memorandum opinion, the Court dismissed the petition. First, the Court held that servicemen do not have a sixth amendment right to trial by a jury of the vicinage. Second, the Court held that a military judge may grant a prosecution motion for change of venue. Third, while the Court held that the judge's grant of a prosecution motion for change of venue is reviewable for abuse of discretion, the Court found that the military judge here had not abused his discretion. The Court stated that there was no indication that the government would deny the accused a public trial. Relying upon the government's response, the Court concluded that the accused's civilan attorney had no reason to fear making an appearance on the accused's behalf in the Philippines. The Court stressed that the exercise of the judge's discretion was subject to review in the normal course of appellate procedures. The Court concluded that the case did not involve any error which would tend to prevent the Court from subsequently either exercising its review power or granting meaningful relief,

In *DeChamplain,* at a rehearing, the military judge denied the accused's motions to dismiss on various grounds : speedy trial, the facial unconstitutionality of Article **134,** denial of defense access to relevant documents, right to public trial, release from pretrial confinement, and the necessity for a new pretrial investigation and advice. The accused filed a petition for extraordinary relief. In his petition, he in effect asked the Court to review the judge's rulings. The Court denied the petition. The Court pointed out that all the challenged rulings would be reviewable on appeal and that a petition for extraordinary relief is not a substitute for appeal.

In a second category of cases, the Court indicated that it had jurisdiction over the petition's subject-matter ; but reaching the petition's merits, the Court denied relief.

In *Wood* v. *McLucas,*[219] the Court denied a petition for a writ of habeas corpus. The government charged, *inter alia,* that the accused had conspired to communicate classified, security information to an agent of a foreign government. The maximum imposable punishments for the charged offenses included life imprisonment and dishonorable discharge. The accused was placed in pretrial confinement. The defense counsel twice requested that the convening authority release the accused from pretrial confinement. The convening authority denied both requests. The accused then submitted **a** request for release to the air base group commander. Like the convening authority, the group commander denied the

[219] **22 U.S.C.M.A. 475, 47 C.M.R. 643 (1973).**

request. The accused then filed an Article 138 complaint, but the Air Force Commander denied relief. The Secretary of the Air Force sustained the Air Force Commander's decision. The Court indicated that it had jurisdiction over the petition. The Court stated that the standard for review was an abuse of discretion. Considering the charged offenses' gravity and the imposable punishments' severity, the Court concluded that the authorities' decision to continue the accused's pretrial confinement was sound.

DeChamplain v. United States[220] represented DeChamplain's first attempt to obtain extraordinary relief from the Court. As previously stated, DeChamplain obtained a rehearing in his case. The rehearing was necessary because the Court had affirmed a Court of Military Review decision reversing the accused's conviction."' As a result of the affirmance, the convening authority had to determine whether a rehearing was practical. The accused filed his petition to obtain either a speedy trial or the charges' dismissal. The Court stated that the convening authority has a reasonable time to make his determination. The Court found that the convening authority had not yet delayed so long that he had exceeded "the limits of reasonableness. . . ."[222]

In the third category of cases, the Court both found jurisdiction and granted relief. Two cases involved delays in post-trial processing. In *Rhoades v. Haynes*,[223] on October 28, 1972, a general court-martial sentenced the accused to dishonorable discharge and confinement at hard labor for 30 years. The accused was confined at the U.S. Navy Disciplinary Command, Portsmouth, New Hampshire. The accused's petition alleged that as of February 21, 1973, the military judge had not authenticated the record of trial and, hence, the convening authority had not acted upon the record. The government's response indicated that the military judge authenticated the record on February 1 and that the law center was preparing the post-trial review. The Court held that the petition made "a prima facie case of unreasonable delay in the appellate processes . . . ."[224] Granting relief, the Court ordered that the convening authority file his action with the Court's Clerk by April 2, 1973. The Court reached a similar result in *Thornton v. Joslyn*.[225]

[220] 22 U.S.C.M.A. 211, 46 C.M.R. 211 (1973).
[221] 22 U.S.C.M.A. 150, 46 C.M.R. 150 (1973).
[222] DeChamplain v. United States, 22 U.S.C.M.A. 211, 212. 46 C.M.R. 211, 212 (1973).
[223] 22 U.S.C.M.A. 189, 46 C.M.R. 189 (1973).
[224] *Id.* at 190, 46 C.M.R. at 190.
[225] 22 U.S.C.M.A. 436, 47 C.M.R. 414 (1973).

As in *Rhoades*, the accused alleged a delay in his record's transcription and authentication; and as in *Rhoades*, the Court set a deadline for the convening authority's action.

The final case in the third category was *Gallagher v. United States*.[226] Enlisted members had served as court members at the accused's trial, even though the accused had not submitted a personal, written request for their detail. In light of *United States v. White*,[227] the absence of a personal, written request was jurisdictional error. However, the accused did not raise the issue in his original petition for grant of review or his petition for reconsideration. After the Court denied both petitions, the accused filed a petition for extraordinary relief, praying that the Court disapprove the findings because of the *White* violation. The government argued that the denial of the petition for reconsideration and the accused's separation from the service terminated the Court's jurisdiction under Article 67.[228] The Court found that it had jurisdiction and granted relief. The lead, memorandum opinion stated that the accused's original application for review vested jurisdiction in the Court. Although the accused did not specify the *White* error in the first two petitions, the Court's review responsibilities require that the Court note jurisdictional errors, even though the accused does not raise them. Reaching the merits, the Court granted the petition and set aside the findings.

The two extraordinary relief cases which divided the Court most sharply were *Newsome v. McKenzie*[229] and *Bumpus v. Thurnher*.[230]

In *Newsome*, a group of accused petitioned for writs of habeas corpus. The petition alleged that although the petitioners were in pretrial confinement, charges had not yet been preferred. The petition averred that the confinement was unwarranted, in violation of statutory and decisional law, and based in part upon undisclosed, classified information. The Court dismissed the petition. The memorandum opinion stated that Judge Darden was of the opinion that the relief sought was not in aid of the Court's jurisdiction. The opinion further indicated that Judge Quinn felt that the issues raised may "more appropriately be presented to and resolved by the military judge of the special court-martial to

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226 22 U.S.C.M.A. 191, 46 C.M.R. 191 (1973).
227 21 U.S.C.M.A. 683, 46 C.M.R. 257 (1972).
228 10 U.S.C. §867 (1964).
229 22 U.S.C.M.A. 92, 46 C.M.R. 92 (1973).
230 22 U.S.C.M.A. 376, 47 C.M.R. 227 (1973).

which the charges have been referred."[231] Judge Darden voiced his dissent. He would have ordered the government to show cause why it should not release the petitioners from pretrial confinement. The judge opined that to force the petitioners to wait until trial to litigate the confinement's legality would "subvert the very purpose of the writ."[232] The judge expressed his view that the Court has jurisdiction to reverse a convening authority's order for pretrial confinement if the order represents an abuse of the convening authority's discretion. In the instant case, he thought that the petition was not frivolous; the allegations of delay raised questions which demanded explanation.

In *Bumpus*, the accused filed a motion for a writ of mandamus. The accused was a member of the Coast Guard. He complimented the Army Legal Corps by requesting that he be furnished with an Army judge advocate as individual counsel. The petition alleged that the convening authority improperly forwarded the request and that the Coast Guard Commandant improperly denied the request. The Commandant's action was appended to the petition. The action stated that the accused could attempt to make private or personal arrangements for individual counsel. The petition did not indicate whether the accused had attempted to make such arrangements. The Court dismissed the petition. The memorandum opinion stated that the accused had not exhausted the available, alternate means of obtaining an Army judge advocate's services. The opinion specifically stated that Judge Darden was of the opinion that the relief sought was not in aid of the Court's jurisdiction. Finally, the opinion stated that Judge Duncan would have issued a show cause order.

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[231] Newsom v. McKenzie, 22 U.S.C.M.A. 92, 93, 46 C.M.R. 92, 93 (1973).
[232] *Id.* at 94, 46 C.M.R. at 94.

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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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