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THE MILITIA AND THE CONSTITUTION: A LEGAL HISTORY

WILLIAM S. FIELDS* and David T. Hardy**

I. Introduction

In examining the subject of the militia and the Constitution, a number of important issues immediately come to mind—the "federalism" issue of state versus national control of the militia, the "checks and balances" issue of presidential versus congressional control of the national military establishment, the issue of the political compromises reached in an effort to overcome the inherent weaknesses of the Articles of Confederation, and the paramount issue of civilian control over the military. To the Framers of the Constitution, the militia issue of perhaps the greatest significance, however, was the more fundamental question of the nature of the militia as a legal and political institution. Although less obvious to us today, that issue went to the very essence of the military's role in the new democratic republic and figured prominently in the debate over the ratification of the Constitution.

Nowhere in the Constitution is the term "militia" actually defined. Yet, when the Framers of the Constitution referred to the militia in the text of the document and the ratification debates, they had very definite ideas of what they meant. Their concept of the militia as a legal and political institution was a product of English heritage, as it was modified by the uniqueness of the American experience. It differed radically

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from our own concept. Specifically, what we think of today as the militia—that is, the National Guard—would have been viewed as a "standing army" by political leaders of the Revolutionary era.

At the same time, however, the Framers' concept of the militia was not static. Throughout the period of the Articles of Confederation and the early republic, changing political, economic, and strategic realities were forcing a reexamination of the militia's nature and role. This reexamination occurred along lines similar to what had occurred in England less than a century before. The language relating to the militia that the Framers ultimately chose for inclusion in the Constitution and Bill of Rights sought to reconcile the traditional Anglo-American view of the militia with the uncertainties of changing circumstances. The end result was a set of provisions that proved to be sufficiently flexible to endure the test of time and to accommodate the changing needs of the new nation.

The purpose of this article is to examine the role of the militia in the legal history of the Constitution and Bill of Rights. In doing so, it will emphasize the common-law origins of the militia as a legal and political institution, and the militia's role in the development of Anglo-American democratic institutions and the concept of individual liberties.

II. The English Background

A. *Common-Law Origins of the Citizen Militia.*

The citizen militia is one of the most ancient of Anglo-American institutions. Sir William Blackstone credited Alfred the Great with the development of the militia system, stating: "It seems universally agreed by historians, that King Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers . . . . "[1] More recent historical research, however, has suggested that the origins of the early militia can be traced back at least to the seventh century and, in all likelihood, "the obligation of Englishmen to serve in the . . . peoples' army is older than our oldest records."[2] Clearly, the citizen militia, as an institution with a legal identity of its own, had existed for centuries prior to the Norman Conquest.

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[1] 1 WILLIAM BLACKSTONE, COMMENTARIES *409.

[2] 1 J. BAGLEY & P. ROWLEY, A DOCUMENTARY HISTORY OF ENGLAND 1066-1540, at 152 (1965).

The Saxon militia, known as the *fyrd*, was a "general" militia composed of all able-bodied men. In times of emergency, it was called out only in districts actually threatened with attack. Service in the fyrd was usually of short duration and the participants legally were obligated to provide their own arms and provisions in accordance with their socioeconomic standings. The system was well suited for an island kingdom with a simple agrarian economy and no need to project military power externally. The success of the Norman Conquest usually is attributed to a lack of Saxon leadership after the death of Harold, rather than any shortcoming with respect to thefyrd system.[3]

The only "professional armies" during the Saxon era were a few contingents of *housecurls* attached directly to the households of the King and the great Earls. These contingents were small in number because they were expensive to maintain. For the battle of Hastings, Harold could muster a force of only about *2200 housecurls*, his own double force of about 2000 as King and Earl of Wessex, and several hundred more from his brothers Gyrth and Leofwine, whose earldoms adjoined his own. This was at a time when the total *fyrd* for all of England numbered around 50,000.[4] In earlier times, these contingents were even smaller. In the seventh century, for instance, the *Dooms* of ***Ine*** defined a group of seven men or less as "thieves," a group of seven to thirty-five men as "a band," and a group of more than thirty-five men as "an army."[5]

William the Conqueror retained the *fyrd* system, but modified it by distributing the land to his followers to be held on a system of military tenure.[6] Under this system of feudalism, each estate was obligated to provide a particular number of appropriately armed knights for military service.[7] Because the military duty ran with the land, determining who owed service and how many men he was obligated to provide soon became complicated and easily disputed. For instance, the same individual might owe military service to two landowners in conflict with each other, or a major landowner might be able to

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[3] *See generally* C. HOLLISTER, ANGLO-SAXON MILITARY INSTITUTIONS (1962); 1 F. GROSE, MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE BRITISH ARMY (1812); Brooke, *The Development of Military Obligations in Eighth and Ninth Century England*, in ENGLAND BEFORE THE CONQUEST 69 (P. Clemoes & K. Hughes eds. 1971).

[4] D. HOWARTH, 1066 THE YEAR OF THE CONQUEST 43-44, 80 (1970).

[5] C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 6-7 (1937).

[6] Blackstone, *supra* note 1, at *410; *see also* 2 *id.* at *44-58.

[7] *Id.*; *see* D. DOUGLAS, THE NORMAN ACHIEVEMENT 174-75 (1969); I. SANDERS, FEUDAL MILITARY SERVICE IN ENGLAND (1956).

call upon his subordinate tenants to fight with him against the King.[8] These problems were made more acute because the feudal lords were notoriously unreliable. Of the ten largest Norman landowners listed in the *Doomsday Book*, two had their lands forfeited for disloyalty before the survey was completed, and six more rebelled within fifteen years.

Beginning in the twelfth century, the system of scutage was introduced, which allowed the vassals to pay a fixed sum instead of actually producing knights for service.[9] The rise of scutage was a by-product of economic changes. In the early feudal period, money was so scarce that land itself became the index of wealth, and service-in-kind became the rule. As money in circulation rose, it became increasingly feasible to reduce military obligations to cash payments. The King could then use the money to hire professional soldiers more amenable to his control. This situation served to increase tensions between the King and his barons. Armed conflicts became common as both groups sought to protect and expand their political and economic positions. Abuses with respect to the practice of scutage actually were one of the major complaints that the barons sought to remedy with the *Magna Carte*.[10] These early conflicts were the antecedents of later disputes between the Crown and Parliament over matters of taxation and the control of the military establishment.

The Norman conquerors militarized the country, seized the estates of the Saxon hierarchy, built large numbers of castles manned by Norman men-at-arms, and taxed and abused the

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[8] *See* Brooke, supra note 3, at 97. For example, a vassal frequently found that he owed fealty to both of two lords presently at war with each other. Medieval jurists at length determined that in these situations the vassal personally must fight for the one to whom he had first sworn fealty, while hiring a mercenary of equal skill to fight in his place for the other. Both lords then were barred from forfeiting lands for default or treason. *See* B. TUCKMAN, A DISTANT MIRROR 260-61 (1978). In an effort to avoid this problem, in 1086, William the Conqueror required every land holder to swear directly to him "loyalty against all men." R. ADAMS, A CONQUEST OF ENGLAND 214-15 (1965). Maitland considered the combination of that oath and *fyrd* duty as the crucial distinction between English and Continental political ideals. F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 162 (1908). Jolliffe, however, discounted the importance of the 1086 oath, arguing that it must have been an unenforceable oath of fealty—not the enforceable oath of homage. *See* J.E.A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 162 n.2 (4th ed. 1961).

[9] BLACKSTONE, supra note 1, at '310. Blackstone states that scutage "appeared to have been levied for the first time in the fifth year of Henry the Second, on account of his expedition to Toulouse." Later historians, however, share the view that the practice dates back at least to the time of Henry I, and that William the Conqueror may have used similar means for raising money to pay soldiers. Smail, *Art of War, in* I MEDIEVAL ENGLAND 138-39 (A. Poole ed. 1958).

[10] STEPHENSON & MARCHAM, supra note 5, at 117-18.

native population. Saxon villages, towns, and manors were sacked and burned; their inhabitants were raped, robbed, and murdered. In the north of England, the Normans devastated thousands of square miles of countryside, leaving much of the area uninhabitable for a generation. The experience instilled in the common people a hatred and distrust of the Norman soldiers and a corresponding fondness for their native Saxon institutions, one of which was thefyrd.

Although the distinction between Norman and Saxon eventually faded, friction between professional soldiers and the civilian population continued. The Middle Ages was a time of almost continuous warfare as English kings sought to secure their thrones domestically and maintain their foreign possessions. Internally, the English experienced a number of private and civil wars of which the conflicts between Henry III and Simon de Montfort, as well as the War of the Roses, were the most notable. Additionally, there were constant military conflicts in the marches of Wales until the thirteenth century and on the Scottish border in the fourteenth and fifteenth centuries. It was England's external conflicts of the period, however, that played the largest role in molding the English peoples' attitudes toward the professional army and the militia. From the time of the Norman Conquest to the conclusion of the Hundred Years War in the middle of the fifteenth century, English kings were involved in an almost continuous series of military campaigns to defend or recover their continental possessions.

Feudal sources alone were insufficient to meet the need for soldiers to fight in the continental wars. A feudal tenant was obligated to provide military services only for a limited period—usually no more than forty days a year.[11] This brief period was all but useless in an age when conquest required lengthy sieges. Additionally, most of the King's vassals denied that they owed service beyond the channel, in the Angevin's continental possessions. The extraction of services was made even more difficult where fiefs had been subdivided over time among co-heirs. To circumvent these problems, English kings increasingly came to rely upon armies of professional soldiers, under the command of indentured captains, that were financed

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[11] BLACKSTONE, *supra* **note 1, at '410. The pre-Conquest obligation had been** 60 **days; the Norman custom was 40 days. Sixty days apparently remained the norm in England for a time, until the barons, during the reign of Stephen, were able to force a reduction to 40 days.** J. SCHLIGHT, MONARCHS AND MERCENARIES 20 **(1968).**

with money raised through scutage, burdensome taxes, or plunder.

The new mercenary armies were made up largely 'of tramps, beggars, criminals, and persons who were "pressed" into military service. In one year alone, for example, Edward I pardoned 450 murderers and numerous lesser offenders in exchange for their services in the army. These soldiers were notorious for their mistreatment of the civilian population regardless of whether it was friend or foe. In Normandy, for instance, one fifteenth century writer advised Edward IV that his military officers had "suffred to be done unponisshed to the pore comons, labororers, paissaunts of the saide duchie" a variety of "tirannyes, ravynes, and crueltees." The officers were accused of allowing their men to beat and manhandle the peasants, and to "mischieve[] theire bestis withe theire wepyns."[12]

B. The Militia as a Constitutional Institution.

The experience of the Middles Ages instilled in the English people a deep aversion to the professional army, which came to be associated with oppressive taxes, physical abuses to persons and property, and acts of oppression. Conversely, it fostered a corresponding fondness for the traditional institution of the militia, which was perceived as an inexpensive and nonthreatening means of national defense. The development of these attitudes was to have a profound effect on the evolution of civil liberties and democratic institutions in both England and America.

The English militia concept was unique because of its plebeian character. By 1181, every English freeman was required annually to prove ownership of weapons according to the worth of his chattels, and to serve the King at his own expense when summoned by the sheriff of his county.[13] In **1253,** an Assize of Arms expanded the duties still further to encompass villeins or serfs — the lowest socioeconomic group in English society.[14] The universal nature of the obligation again was con-

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[12] THE BOKE OF NOBLESSE 73 (1792).

[13] Assize of Arms, 27 Hen. 2 (1181); ***see*** BLACKSTOSE, ***supra*** note 1 at *411; 1 Grose. ***supra*** note 3, at 9-11; B. LYON, A CONSTITUTIONAL ASD LEGAL HISTORY OF MEDIEVAL ENGLAND 273 (2d ed. 1973).

[14] ***See*** BAGLEY & ROWLEY, ***supra*** note 2, at 155-56. The legal status of a serf was barely above that of a slave. Serfs were bound to the land, subject to oppressive demands for their labors and productions. and had no right of appeal to the royal

firmed in 1286, by the Statute of Winchester, under Edward I.[15]

This trend toward the universal participation in defense was reinforced by the ascendancy of the longbow as a characteristically English weapon. The longbow was inexpensive and suitable for the mass armament commoners, but had sufficient power to pierce the armor of a feudal knight. In the thirteenth and fourteenth centuries, English armies—composed largely of commoners equipped with longbows—inflicted stunning defeats upon traditional French feudal forces in such notable clashes-of-arms as Crecy, Poitiers, and Agincourt. As a result, the Middle Ages saw the enactment of a series of laws designed to encourage the keeping of, and the maintenance of proficiency with, longbows. The 1286 Statute of Winchester established the requirement that "anyone else who can afford them shall keep bows and arrows."[16] A century later, Edward III ordered the sheriffs of London to force "every one of said city strong in body, at leisure time on holidays," to "use in their recreation bowes and arrows."[17] His successor, Richard 11, extended this policy, commanding that "every Englishman or Irishman dwelling in England shall have a bow of his own height;" that each town maintain an archery range; that games of dice, horseshoes, and tennis be banned to force citizens to use the bow for sport; and that prices of bows be controlled to make them available to even the poorest citizens.[18] Not until the sixteenth century did English monarchs seek, for various political and religious reasons, to restrict the possession or use of weapons to the wealthier classes.[19]

The concept of a general militia differed radically from the continental feudal system, which limited the right of armament and the duty of fighting in defense to a relatively small and wealthy class.[20] The end result for the English was the evolu-

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courts for any injuries inflicted by their overlords. *See* 1 M. BLOCH, FEUDAL SOCIETY 272-75 (1961); F. HEER, THE MEDIEVAL WORLD 22-34 (1962).

[15] Y.B. 13 EDW. 1, ch. 6 (1286); BLACKSTONE, *supra* note 1, at *411. This statute apparently was necessitated because the practices mandated by the Assize of Arms of 1181 had grown lax. Its enactment confirmed the two tradition roles of the militia—the defense of the island and the maintenance of domestic law and order. J. MAHON, HISTORY OF THE MILITIA AKD THE NATIONAL GUARD 7 (1983).

[16] Y.B. 13 Edw. 1, ch. 6 (1285).

[17] E. HEATH, THE GREY GOOSE WING 109 (1971).

[18] R. HARDY, THE LOKGBOW 128-29 (1977).

[19] *See* 19 Hen. 7, ch. 4 (1603); 3 Hen. 8, ch. 13 (1611); 6 Hen. 8, ch. 13 (1614); 25 Hen. 8, ch. 17 (1633); 33 Hen. 8, ch. 6 (1641); 33 Hen. 8, ch. 6 (1541).

[20] *See generally* J. BEELER, WARFARE IN FEUDAL EUROPE (1971); TUCKMAN, *supra* note 8. The English citizen army was not without its imitators. For instance, when the French

tion of an institution that exercised a moderating influence on monarchical rule and aided in the development of the Anglo-American concept of individual liberties. Examples of this occurred throughout the Middle Ages. In 1066, an army of disgruntled people under the leadership of thanes revolted against Tostig, Earl of Northumbria, killing his armed retainers and plundering his treasury and armory at York. In 1381, a group of armed peasants, led by Wat Tyler, held London at its mercy for a short time during popular unrest that resulted from the economic distress which had persisted in England since the Black Death. The British military historian Sir Charles Oman provided a particularly cogent case in point, noting of Henry VIII:

> More than once he had to restrain himself, when he discovered that the general feeling of his subjects was against him. As the Pilgrimage of Grace showed, great bodies of malcontents might flare up in arms, and he had no sufficient military force to oppose them. His "gentlemen pensioners" and his yeomen of the guard were but a handful, and bows and bills were in every farm and cottage.[21]

The influence of the militia concept on English legal and social institutions did not go unnoticed to contemporary observers. As early as the 1470's, Sir John Fortescue, Chief Justice of the King's Bench and a veteran of the War of the Roses, distinguished between France's "jus regale" and England's "jus regale et polliticum." "Jus regale" can be rendered "royal law" or "law of the King"; "polliticum" can be rendered as "of the state," "national," or "of the republic." Fortescue maintained that the French peasants were starved and impoverished so that they were "crokyd" and "feble," and unable to defend the realm: "nor thai have wepen, nor money to bie them wepen withall." Thus the French King, unable to use his unreliable nobility or his weak and unarmed peasants, was forced to rely on mercenaries: "Lo, this is the frute of his Jus regale. Yf the reaume of Englonde, wich is an Ile, and therfor mey not lyghtly geyte soucore of other landes, were rulid vnder such a lawe and vnder such a prince, it wolde be a pray to all oper nacions pat wolde conqwer, robbe or deuouir it." Conversely,

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attempted a similar experiment, seeking to organize 42,000 citizen soldiers, the result was a failure. A contemporary noted of them that "they were brought up in slavery, with no experience in handling weapons, and since they have passed suddenly from total servitude to freedom, sometimes they no longer want to obey their masters." 1 R. LAFFONT, THE ANCIENT ART OF WARFARE 486 (1966).

[21] C. OMAN, A HISTORY OF THE ART OF WAR IN THE SIXTEENTH CENTURY 288 (1937).

Fortescue saw Englishmen as healthy, wealthy, and well armed, "wherfore thai ben myghty, and able to resiste the adversaries of this realme, and to beete oper reaumes that do, or woldee do them wronge. Lo, this is the fruty of Jus polliticum et regale, under wich we live."[22]

A century later, Sir Walter Raleigh—corsair, explorer, and historian—made a similar observation, assigning to the "barbarous and professed tyranny" the plan "to unarm his people of weapons," while the "spohistical or subtle tyrant" would seek "to unarm his people and store up their weapons, under pretense of keeping them safe."[23] Thus, by the fifteenth century, Englishmen already regarded the citizen militia as a critical element in their development of "government under law." Thereafter, that view would be reinforced by the rise of royal absolutism on the continent.

C. The Upheavals of the Seventeenth Century.

The English militia system reached its ascendancy during the dictatorships of the great Tudor monarchs. With the loss of British holdings in France during the mid-fifteenth century, England had stood mainly on the defensive, and the number of professional soldiers had dwindled to a handful of body guards and coastal garrisons. This decline was paralleled by an expansion and perfection of the militia system and the implementation of a domestic policy aimed at suppressing the military establishments of the nobility. The reign of Elizabeth I, in particular, saw an increased organization of the militia, complete with mandatory annual drills, inspections, and target practice. Its size alone was striking to foreign visitors of the era. In 1639, the French ambassador reported that "in Canterbury, and the other towns upon the road, I found every English subject in arms who was capable of serving. Boys of 17 and 18 have been called out, without exception of place or person . . . . "[24] A few years later, the English Government was able to keep a body of 120,000 men available throughout the summer.

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[22] J. FORTESCUE, THE GOVERNANCE OF ENGLAND, OTHERWISE CALLED THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY 114-16 (C. Plummer rev. ed. 1886).

[23] W. Raleigh, Maxims of State, in 8 THE WORKS OF SIR WALTER RALEIGH, KNT., NOW FIRST COLLECTED 22 (Oxford Univ. 1812).

[24] L. BOYNTON, THE ELIZABETHAN MILITIA 8-9 (1967).

1. The Militia and the Events of the Seventeenth Century.— The great militia system established by the Tudors all but collapsed during the reign of the pacifistic James I, who acquiesced in the repeal of the militia statutes. The reign of his son, Charles I, saw the resurgence of the ancient nemesis, the professional army. Under the influence of the Duke of Buckingham, Charles had become involved in a series of wasteful wars against France and Spain. As in the past, professional soldiers were used in these conflicts and allegations arose over the mistreatment of civilians by the soldiers as they traveled to their continental passages. Parliament, which was deeply distrustful of Buckingham and his policies, balked at subsidizing these military ventures. Charles's solution was to attempt to circumvent parliamentary authority by raising revenue through such means as the extraction of customs duties know as "tonnage and poundage," the revival of feudal rights, the granting of "patents," and the extension to inland counties of the infamous tax known as "ship money." The situation eventually evolved into civil war in 1642. Blackstone, like later historians, concluded that the question of control over the militia "became at length the immediate cause of the fatal rupture between the king and his parliament."[25] The seriousness of the militia issue was illustrated by the atypically firm response of Charles: "By God, not for an hour. You have asked that of me in this, which was never asked of a King."[26]

During the ensuing conflict, both sides relied upon the use of standing armies, often armed with weapons confiscated from the militia. Both of these armies were responsible for abuses committed against the civilian population, which furthered the aversion to the army. Sir Thomas Fairfax, a parliamentary leader, noted of his opponents that:

> [they] are extremely outragious in plundering puting no deferanc at all betweene friends and supposed enemis . . . taken al that hath been useful1 for them and ript up featherbeds and throwne the feathers in the wind to be blowen away for sport and scaned all the barrels of beere and wine and spilt it in their sillers. They have kild of one mans 1,000 sheepe and throwne away much of it they could not eats, many other outrages they commit to large exspres this way . . . . [27]

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[25] BLACKSTONE, supra note 1, at *412.

[26] R. OLLARD, THIS WAR WITHOUT AS ENEMY 53 (1976).

[27] P. HAYTHORNTHWAITE, THE ENGLISH CIVIL WAR 1642-1651, at 103 (1983)

The English Civil War ended in a total parliamentary victory and Charles's attempts to revive the conflict ended with his trial and execution. Within a short time, however, Parliament's attempts to dissolve the army—while conveniently ignoring that many of its regiments had been unpaid for months—and to prosecute religious independents led to a military takeover of the government. The precipitating event was Parliament's attempt to enact a militia ordinance; and one of the first acts of the new "Rump'' Parliament, which was put into power by the army, was to rescind that ordinance. In 1654, yet another Parliament was dissolved after it tried to enact a similar law. That body was replaced by a new Parliament which was nominated by officers of the army. Within a year, Oliver Cromwell had pressured it into dissolution and replaced it with yet another Parliament, which named him "Lord Protector" of England.[28] In 1656, however, even this Parliament began to press for a reduction of the standing army and a revitalization of the militia. Cromwell finally dissolved it and created a military government that divided the nation into eleven districts—each district headed by a major general whose duties included political surveillance, censorship, and influencing elections. These districts were assigned a special militia—limited to slightly over 6000 men—who were paid by the government on a yearly basis.

After Cromwell's death, the remnants of the Rump Parliament were recalled in May 1659 and, within a few months, it passed "An Act for settling the Militia in England and Wales.''[29] The title, however, was misleading, because the officials administering the statute were authorized to muster only "well affected persons," and were on the other hand empowered to:

> search for and seize all arms, in the custody and possession of any popish recusant, or other person that hath been in arms against the Parliament, or that have adhered to the enemies thereof, or any other person whom the Commissioners shall judge dangerous to the peace of this Commonwealth.

The new Rump Parliament did not last long. The commander-in-chief of its army advanced on London with his own troops, overthrew the New Model Army without a fight, and called a new Parliament. This parliament invited Charles 11, the son of

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[28] *See* J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 6 (1966).

[29] ORDINANCES AND ACTS OF THE COMMONWEALTH AND PROTECTORATE 1317 (London 1911).

the executed King, to return. The rule of the military junta had ended, but occurring as it did, barely a century before the American Revolution, it had left a bitter taste for all concerned: "The soldier is no longer an injured citizen; he is a danger to the state."[30]

Charles II demobilized the army, keeping only troops that he felt would be loyal to the new regime. Using his own prerogative in the absence of statute, he reconstituted a very limited organized force and began trying to disarm his opponents. He issued instructions commanding the Lords Lieutenant of the militia to exercise their troops: "well-affected officers chosen, the volunteers who offer assistance formed in troops apart and trained; the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized . . . . "[31] Five months later, he caused a militia bill to be introduced in the Commons, but it encountered opposition based more on the harassments and excessive arms searches by the organized militia than on the terms of the bill.[32] Only in 1662 did Charles get his militia statute, after trumping up reports of various plots against the government and stacking the committee considering the bill with his father's former officers.[33]

Like the militia establishments under the Protectorate, Charles's "select" militia was composed only of a small part of the population — many fewer than had been enrolled in the militia in the less populous times of Elizabeth I. Under the new militia statute, those "charged" with providing a militiaman were exempted from service if they hired substitutes in their places, and were required to swear "that it is not lawful upon any pretense whatsoever to take arms against the king."[34] Other provisions of the 1662 Militia Act empowered lieutenants of the Militia to confiscate all arms owned by any person "judge[d] dangerous to the peace of the kingdom."[35] To buttress those measures, parliament enacted amendments to the Hunting Act in 1671 that were designed to disarm the non-

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[30] J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 225 (1928). *See generally* L. SCHWOERER, NO STANDING ARMIES: THE ANTIARMY IDEOLOGY IN SEVENTEENTH CENTURY ENGLAND (1874).

[31] 8 CALENDAR OF STATE PAPERS (DOMESTIC), Charles II, No. 188, at 150 (July 1660).

[32] WESTERN, *supra* note 28, at 10 (1966). *See generally* D. WITCOMBE, CHARLES II AKD THE CAVALIER HOUSE OF COMMONS 1663-1674 (1966).

[33] *See* WESTERK, *supra* note 28, at 10-15.

[34] 14 Car. 2, ch. 3 (1662).

[35] *Id.* The act was somewhat expanded the following year. *See* 16 Car. 2, ch. 4 (1663).

landowning population.[36] The *Calendars of State Papers* for the period are filled with examples of the enforcement of these measures.[37]

Charles II was succeeded by his brother James 11. James's major drawback was that, while officially head of the Anglican Church and King of a nation that barred Catholics from appointive office, he was himself a practicing Catholic. Within a few months, he was faced with a rebellion led by the Duke of Monmouth—Charles II's charismatic illegitimate son—who portrayed himself as the savior of Anglicanism. The local militia proved incapable of stopping the rebellion, which finally was put down by regular troops. In response, James greatly increased the size of the regular army, but because no act authorized him to impose martial law, discipline was weak and clashes with civilians were frequent.[38] Concurrently, he continued and expanded the arms confiscations that had been begun by his brother, directing them increasingly against his political opponents—the new Whig party. In December 1686, orders were sent to six of the Lords Lieutenant of the militia, informing them that the King had heard "that a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses," and that the King therefore desired "that you should send orders to your Deputy Lieutenants to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."[39] The records of the period show many searches executed under the authority of either the Militia Acts or the Hunting Act.[40]

James's civil policies alienated the Whigs, and his religious policies alienated the Anglican establishment, which was the normal bulwark of the throne. In November 1688, England nominally was "invaded" by his son-in-law, William of Orange, and his daughter, Mary, forcing James to flee to the continent. This bloodless coup came to be known as the "Glorious Revolution."

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[36] 22 & 23 Car. 2, ch. 26 (1671). *See generally* P. MUNSCHE, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671-1831, at 11-14 (1981). Those amendments were enacted at Parliament's initiative, rather than at the initiative of Charles. *See* Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition,* 10 Hastings Const. L.Q. 302 (1983).

[37] *See* 68 CALENDAR OF STATE PAPERS (DOMESTIC), Charles II, No. 36, at 44 (Feb. 1662); 70 CALENDAR OF STATE PAPERS (DOMESTIC), Charles II, No. 13, at 83 (Mar. 1662); 83 CALENDAR OF STATE PAPERS (DOMESTIC), Charles 11, No. 60, at 333 (Nov. 1663).

[38] *See* C. BARNETT, BRITAIN'S ARMY 1603-1970 119 (1970); G. TREVELYAN, THE ENGLISH REVOLUTION 67 (1939); 2 CALENDAR OF STATE PAPERS (DOMESTIC), James 11, No. 167, at 38.

[39] 2 CALENDAR OF STATE PAPERS (DOMESTIC), James II, No. 1212, at 314 (Dec. 6, 1686).

[40] *See id.*, No. 1688, at 392 (Mar. 10, 1687); 3 *id.* No. 477, at 96 (Nov. 2, 1687).

2. The Militia in Seventeenth Century Legal and Political Thought.—The previous centuries had witnessed a decline in the power of the monarchy and the destruction of the baronage as a political class. Governments arose and fell in relatively rapid succession, often through the force of arms, and the English people grew accustomed to the idea of popular participation in the political process. Those turmoils predictably inspired political theoreticians to suggest various changes designed to modify or improve the political system. The ideas of one of those groups of thinkers, the Classical Republicans—members of which came to be associated with the Whig Party—would have a significant effect upon the leaders of the American Revolution.[41]

The Greek and Roman republics provided the inspiration for the Classical Republicans. Its members came to view the militia concept as more than just simple tradition. The belief that such a militia was "necessary to a free State" soon became central to their political thought. They drew upon the ideas of Niccolo Machiavelli, who had explained—and had attempted to implement—a national militia centuries before. Writing to an Italy that had seen its city-states and mercenary armies defeated by the French and Spanish, Machiavelli advocated an Italian nation led by a popular prince and based on a national militia.[42] Machiavelli viewed mercenaries as " . . . disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies . . . [and]hav[ing] no fear of God, and keep[ing] no faith with men."[43] To him, their lack of patriotism left no motivation beyond wages, which were not enough to motivate men to die. More fundamentally, any mercenary army powerful enough to defend a state would be more than powerful enough to subjugate it.[44] The great Florentine expanded upon those themes in his Art of War, in which he concluded that a prince who relies upon mercenaries must either remain

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[41] *See* PAMPHLETS OF THE AMERICAS REVOLUTION (B. Bailyn ed. 1965); H. COLBOURN, THE LAMP OF EXPERIESCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAS REVOLUTION (1965); G. WOOD, THE CREATION OF THE AMERICAS REPUBLIC 1776-1787 (1969); B. BAILYS, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 Wm. & Mary Q. (3d Ser.) 167 (1974); Pocock, *Machiavelli, Harrington and English Political Ideologies in* the *Eighteenth Century*, 22 WM. & MARY Q. (3d Ser.) 549 (1965); Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. (3d Ser.) 334 (1982).

[42] N. MACHIAVELLI, THE PRISCE ASD THE DISCOURSES (MOD. LIBRARY ED. 1950) (1513).

[43] See *id.* at 44-45.

[44] See *id.* at 45.

embroiled in wars, or risk overthrow when the mercenaries became unemployed with the advent of peace.[45]

To Machiavelli, the militia ideal offered a means of escape from this dilemma. Not only would it render the republic militarily powerful, it also would ensure the citizenry against decadence by maintaining their public spirit and self-reliance. Members of the militia would remain citizen-soldiers, and would comprise a force for stability—not urban mobs:

> [I]t is certain that no subjects or citizens, when legally armed and kept in due order by their masters, ever did the least mischief to any state . . . . Rome remained free for four hundred years and Sparta eight hundred, although their citizens were armed all that time; but many other states that have been disarmed have lost their liberties in less than forty years.[46]

It was through the writings of James Harrington that Machiavelli had his greatest impact upon English thought.[47] Harrington applied Machiavelli's ideas to seventeenth century England, substituting a republic of freeholders for rule by a popular prince. The outcome for Harrington was a stable republic in which all landowners would vote and serve in the militia. Ownership of land gave independence; unlike feudal landholders, the modern freeholder owned in fee simple and was not obligated as a condition of tenure to fight for a superior. Instead, he defended his own rights and interests. Harrington's rejection of royal absolutism was intertwined with his belief that property, political power, and arms should be in the same hands. Such a republic would face few internal or external threats, because those with arms also would have the greatest economic and political interest in maintaining the state.[48]

When Harrington wrote during the 1650's, efforts to maintain a standing army actually were destabilizing the nation. After the Restoration, the army played a different role—that

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[45] N. MACHIAVELLI, THE ART OF WAR 21 (1621) (rev. ed. 1966).

[46] *Id.* at 30.

[47] Harrington's major **works** were *Oceana*, published in 1666, and ***The Prerogative*** of *Popular* ***Government,*** published in 1668. ***See*** THE POLITICAL WORKS OF JAMES HARRINGTON 210, 389 (J.G.A. Pocock ed. 1977) (best current collection); ***see also*** C. HILL, THE CENTURY OF REVOLUTION 1603-1714 310 (1962).

[48] THE POLITICAL WORKS OF JAMES HARRINGTON, ***supra*** note 47, at 442-43, 663-64, 669; ***see also*** A. FLETCHER, A DISCOURSE OF GOVERNMENT WITH RELATIOK TO MILITIAS (London n.d.) (probably before 1737). Like Harrington, Fletcher shared Machiavelli's admiration for the ancient republics of Rome and Sparta.

of maintaining royal power. Harrington's assumption that an army could not be financed and controlled adequately was compromised, and his followers — particularly Henry Neville — modified his theory. Whereas Harrington had assumed a standing army could not stabilize a government — whether good or bad — Neville and other post-1675 Classical Republicans asserted that a standing army could be a stabilizing influence to an autocratic regime.[49] Conversely, democracies could obtain a unique advantage by arming the general population: "[D]emocracy is much more powerful than aristocracy, because the latter cannot arm the people for fear they could seize upon the government."[50] Harrington's followers also reinterpreted his utopia in a conservative light, arguing that traditional English practices actually had been republican. "The arming and training of all the freeholders of England . . . as is our undoubted ancient Constitution, and consequently our Right," argued Robert Molesworth; "so it is the Opinion of most Whigs, that it ought to be out in Practice."[51] Thus the Classical Republicans ultimately cast the militia not only as part of the republican utopia, but also an underpinning of the existing English constitution.

Before Harrington's successors could refine the argument for the militia vis-a-vis the standing army, however, they were overtaken by events. In 1688, James II had relied — to no avail — upon a standing army staffed with hand picked officers and financed out of personal funds, rather than parliamentary appropriations. Although mustering more than twice the number of troops as his opponent, William of Orange, internal dissension and his own failure of leadership prevented him from offering battle, and he fled into exile.

This "Glorious Revolution" and William's and Mary's acceptance of the throne offered by Parliament did nothing to reduce the support for the standing army. England's acceptance of William also meant being drawn into the ongoing struggle between Holland and France, and facing the risk of James's return with a French army. The need for the projection of military force on the continent had returned and, as always, the militia was totally unsuited to this task.

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[49] *See* TWO ENGLISH REPLBLICAN TRACTS (C. Robbins ed. 1969) (containing Neville's work, *Plato Redivus, Or a Dialogue Concerning Government*). *See generally* HILL, *supra* note 47, at 223.

[50] C. HILL, SOME IXTELLECTUAL ORIGINS OF THE EXGLISH REVOLUTION 27 (1980) (citing Neville's work, *Plato Redivus, Or a Dialogue Concerning Government*).

[51] R. Molesworth, *Foreword* to F. HOTMAN, FRAXCO GALLIA xxvi (R. Molesworth trans., London 1711).

Several other realities now also favored reliance on a standing army. An invasion, if it came, would be spearheaded by well-trained French troops, during a period in which such training was becoming of increasing importance. Technical improvements over the course of the seventeenth century had complicated the role of the average infantryman immensely, requiring that he be trained to execute a multitude of orders effectively. "[O]fficers became not merely leaders, but trainers of men; diligent practice in peace-time, and in winter, became essential; and drill, for the first time in modern history became the precondition for the military success."[52] Conversely, the financial revolution of the 1690's, which saw the creation of a national bank and the acceptance of national debt, made the funding of a large standing army possible. This increasing tactical and economic sophistication was paralleled by the realization that political means could guarantee legislative control of the army. Parliament could keep a tight rein on the standing army by limiting appropriations and by enacting "Mutiny Acts" of intentionally short duration.[53]

The standing army's increased viability forced the post-1688 Whigs to face the prospect of becoming members of the establishment they had formerly opposed.[54] Some, like Molesworth, hedged:

> A Whig is against the raising or keeping up a Standing Army in Time of Peace; but with this Distinction, that if at any time an Army (tho even in Time of Peace) should be necessary to the Support of the very Maxim, a Whig is not for being too hasty to destroy that which is to be the Defender of his Liberty.[55]

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[52] M. Roberts, "The Military Revolution 1560-1660," Inaugural Lecture delivered before the Queen's University of Belfast 9-11 (copy in possession of authors).

[53] BARNETT, *supra* note 38, at 124. The Mutiny Acts authorized the imposition of martial law on persons enlisted in the military. Absent the acts' sanctions, a deserting soldier could be punished by a civil suit for breach of contract, or at most, prosecuted as a runaway apprentice. In addition, one who struck an officer might face misdemeanor assault charges in the civilian courts. The post-1688 Mutiny Acts were generally of one year's duration, ensuring that without annual parliamentary reauthorization, army discipline would be almost unattainable.

[54] The events of 1688 did not represent an unqualified Whig victory. William's policies favored neither party and those of his successor, Ann, strongly favored the Tories. Only with the accession of George I in 1714, did the Whigs attain a dominant hand. At the same time, for Whigs after 1688, the destruction of the government likely would have meant replacement of a generally unsympathetic Tory establishment with an oppressive and vengeful Jacobite one, and the loss of its gains during the Glorious Revolution.

[55] Molesworth, *supra* note 51, at xxv.

Others continued to defend the renaissance ideal of the citizen-freeholder-soldier, and argued that treating military skills as a specialization would lead inevitably to tyranny and corruption. Their ideas gained great currency in the colonies, where John Adams estimated that nine-tenths of Americans were Whigs by the outbreak of the Revolution.[56] The wealthier and more conservative colonists, such as Adams and George Mason, would find them particularly persuasive. In England, however, their views became simply "the Opposition."[57]

Consequently, a standing army had become more acceptable to Englishmen in the years after 1688. The Whig historian, Macaulay, described the transition as follows:

> What had been at first tolerated as an exception began to be considered as the rule. Not a session passed without a mutiny bill, regarded merely as an occasion on which hopeful young orators fresh from Christchurch were to deliver maiden speeches, setting forth how the guards of Pisistratus seized the citadel of Athens, and how the Praetorian cohorts sold the Roman empire to Didius. At length these declamations became too ridiculous to be repeated. The most old fashioned, the most eccentric, politician could hardly, in the reign of George the Third, contend that there ought to be no regular soldiers . . . . [58]

The domestic political changes that occurred in England throughout the seventeenth century also created a favorable climate for a reevaluation of the traditional militia concept. The primary legacy of the 1689 settlement had been the supremacy of Parliament. Bodin's maxim, that every government must have a single, ultimate repository of sovereignty, was accepted; and the British Government's repository was

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[56] C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 55 (1963); *see* C. ROBBINS, THE EIGHTEENTH CENTURY COMMONWEALTHMAN 100-102 (1969); L. CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812 36 (1982). Whigism was predominant in the American colonies for at least the half-century preceding the American Revolution. Conversely, Toryism was revived in Britain in the second half of the eighteenth century, when the country was almost constantly at war. American Whig sentiment deepened in reaction to that revival.

[57] Even under William, who relied heavily upon Whig ministers, "[t]he honeymoon did not last . . . . [A]flood of publications reminded Englishmen of the ancient system they were supposedly reviving, including a Saxon-styled militia. Yet William believed that military common sense dictated a standing army." COLBOURN, *supra* note 41, at 48. Under the Tory administrations that followed, these views became truly the "opposition theory [that]provided a model for an American version." Banning, *supra* note 41, at 183.

[58] 3 T. MACAULAY, THE HISTORY OF ENGLASD FROM THE ACCESSION OF JAMES THE SECOND 47 (1856).

fixed in Parliament. The militia might be a "constitutional institution," but "the Constitution" was what Parliament said it was.[59] Parliament now had little need for the militia as a check on monarchical rule, and had no need for any institution that might serve as a threat to itself.

This changing attitude met with surprisingly little popular resistance. Service in the militia was viewed by many as an expensive and onerous duty. The militia's moderating influence upon the crown had not derived from its legal status per se, but had been a by-product of the universal armament of the commoners. So long as they retained a "right" to keep their arms, Englishmen were more than willing to forego their collective duty to serve in the militia.

The domestic political changes soon were paralleled by changes in the law. Throughout the seventeenth century, the common-law courts, under the leadership of Coke, had struggled to establish the doctrine of the "supremacy of law." In doing so, they had managed to turn what had been the feudal duties of the overlord toward his tenants into the equivalent of legal duties of the King toward his subjects. These duties emerged as fundamental common-law rights of Englishmen, which the courts would secure, even against the crown.[60]

At the same time that the common-law courts were prevailing in their conflicts with the Stuart Kings, a juristic theory also developed — abstractly individualistic in nature — which subscribed to the existence of fundamental "natural rights." This theory, an outgrowth of the emphasis on individualism that began with the Reformation and grew with the emancipation of the middle class, held that these rights existed independently of states, and that states could not alter or abridge those rights, but were under an obligation to secure them.[61] The theory originally took two different directions. Hobbs and his adherents conceived of these rights as the outgrowth of a social contract; Grotius and his successors viewed them as qualities inhering in individuals. The latter approach, which

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[59] As one British historian put it,

> It follows from all this that there is nothing rigid or static about the English Constitution. Not being set out or declared in any sacrosanct document nor hedged in by some special procedure of amendment, it can be changed or modified in any or every particular by ordinary process of legislation. It can be reformed in any part by an ordinary Act of Parliament assented to in the ordinary way.

B. CHRIMES, ENGLISH CONSTITUTIONAL HISTORY 9 (2d ed. 1963)

[60] I. R. POUND, JURISPRUDENCE § 43, at 484-86 (West 1959).

[61] *Id.* at 486, 492.

placed rights above civil society, ultimately prevailed. Society, however, gradually reconciled these two views, and the social contract was reinterpreted — not as a source of rights, but as a means for enhancing the security of preexisting natural rights.[62]

At a practical level, the natural rights approach was merged with the common-law rights approach and, in the words of the great American legal scholar, Roscoe Pound, "By a natural transition, the common-law limitations upon royal authority became natural limitations upon all authority and the common-law rights of Englishmen became the natural rights of man."[63] The concept of the militia as a "constitutional institution" was altered dramatically as a result of this transition.

After James's departure, Parliament, meeting on its own initiative as a "convention," formulated a "Declaration of Rights" that William and Mary, its nominees, were required to accept prior to taking the throne. They then formally called a Parliament, which enacted the Declaration of Rights as the Bill of Rights. The Declaration was not intended as a radical statement of the rights of individuals. Because constitutional government was being held in limbo pending its drafting and acceptance by the intended sovereigns, speed was essential, and its principles had to be ones acceptable to virtually all members of the legislature, from the most conservative Tory to the most radical Whig. It was accordingly drafted — not to introduce new principles of law, but merely as a "recital of the existing rights of Parliament and the subject, which James had outraged, and which William promised to observe."[64] This essentially conservative consensus was to become the basis of the English and American theory of rights that predominated during the American Revolution less than a century later.

The debates over the Declaration in the House of Commons show that arms confiscations under the Militia Act were a widespread grievance.[65] Sir Richard Temple, for example, criticized the militia bill as containing the power to disarm all England.[66] Mr. Boscawen's crucial speech focused upon the oppres-

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[62] *Id.* $44, at 493-94.

[63] *Id.* § 43, at 486.

[64] G. TREVELYAN, THE ENGLISH REVOLUTION 179-80 (1979)

[65] *See* 2 P. YORKE, LORD HARDWICKE, MISCELLANEOUS STATE PAPERS FROM 1601 to 1726, at 399 (London 1778). The debates were preserved in a pencilled outline of speeches. The actual notes were made by Lord Somers, who headed the committee charged with drafting the Lord's version of the Declaration. They survived a 1752 fire at the Lincoln Inn, which destroyed most of the remainder of his papers.

[66] *Id.* at 416.

sive acts of Parliament, as well as the King.[67] Sergeant Maynard also complained that "an Act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or by night, by force or otherwise,"[68] and that the Militia Act was "an abominable thing to disarm the nation, to set up a standing army."[69] Many others seconded their complaints.

The declaration that the House of Commons finally voted out was in the form of a list of grievances and parallel rights. The list of grievances included a statement that "The Acts concerning the militia are grievous to the subjects." Although this statement clearly focused upon the rights of the individual, or "subject," the Commons still alluded to the concept of the armed citizenry as a collective institution with the additional statement that "the subjects . . . should provide and keep arms for the common defense; and that the arms which have been seized and taken from them be restored."[70] The House of Lords found this combination of individual right and remedy with a collective purpose unacceptable. The grievance section of the Commons' draft was altered into a general indictment of James's policies. He had endeavored "to subvert and extirpate" the "laws and liberties of this kingdom" by, inter alia, "causing several good subjects . . . to be disarmed . . . ."[71] The second passage was altered even more profoundly. The "common defense" proviso was replaced with a recognition that individuals might possess arms "for their defense . . . as allowed by law."[72] To avoid confusion over the phrase, "as allowed by law," Parliament amended the Hunting Acts to delete firearms from the list of contraband.[73] The House of Commons paralleled this with an amendment to the Militia Act that repealed all power to seize firearms, although this latter bill was lost in the House of Lords when William dissolved Parliament.[74] Its provisions, however, soon were incorporated into colonial militia statutes.[75] As the British military historian, J.

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[67] *Id.* Boscawen added a personal element: "Acts of the Long Parliament Militia—Imprisoning without reason; disarming—Himself disarmed." *Id.*

[68] *Id.* at 407.

[69] *Id.* at 414-17.

[70] *Journal of the House of Commons*, Dec. 26, 1688, to Oct. 26, 1693, at 21-22 (London 1742) (Library of Congress Rare Books Collection).

[71] *Id.* at 25.

[72] 1 W. & M., ch. 2 (1689).

[73] 4 W. & M., ch. 2 (1692).

[74] Malcolm, *supra* note 36, at 309 n.139.

[75] Maryland's colonial militia code of 1692 paralleled the 1662 Militia Act, but added a proviso that "no pressmaster or any persons whatsoever shall presume at any time

R. Western, later observed, "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbus to repel burglars."[76]

In England, therefore, the legal transformation of militia service, from feudal duty to individual right, was relatively swift. The Lords' changes, which prevailed in conference, emphasized the concept of the individual right to arms. The final form of the declaration did not so much as mention the militia. Standing armies were mentioned, but the only objection was that they were maintained "without consent of Parliament." A purely royal army was contrary to law; one created by Parliament, however, was quite consistent with the Constitution. In short, the common law would recognize an individual right to keep and bear arms that was separate and distinct from the related concept that a militia was an especially appropriate way of defending a free republic.[77]

The Enlightenment theories, with their emphases on the rights of the individual, would spread rapidly in the American colonies, finding their strongest support among the more liberal colonial leaders, such as Jefferson, Paine, and Samual Adams. Eventually, the concept of an individual right to keep arms would overshadow and supplant the Renaissance ideal of the republican militia, and would flourish in the age of Jeffersonian democracy.

D. The Decline of the English Militia

The rise of parliamentary supremacy, the acceptance of the standing army, and the emergence of the juristic theories of individual rights were paralleled by a decline of the militia system in England. This process was hastened by the rural disorders of the 1760's, which inspired fear in the gentry of the militia-trained portion of the populace. Lord Barrington, for instance, feared that "a few soldiers, commanded by a weak, ignorant subaltern might be defeated by a very large mob, full of men lately used to arms in the army and militia."[78]

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to seize, press or carry away from the inhabitant resident in this province any arms or ammunition of any kind whatsoever . . . any law, statute or usage to the contrary notwithstanding." 13 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GESERAL ASSEMBLY OF MARYLAND 557 (Apr. 1684 to June 1692) (W. Browne ed. 1894).

[76] WESTERS, *supra* note 28, at 339.

[77] BLACKSTONE, *supra* note 1, at '144.

[78] T. HAYTER, THE ARMY ASD THE CROWD IS MID-GEORGIAN ENGLAND 117 (1978).

The general militia in England was supplanted steadily by a select militia, which achieved efficiency by a sacrifice of almost every traditional attribute. The 1761 Militia Act, for instance, authorized mustering of only a few hundred men from each county. Those chosen were, if wealthy, able to hire another to serve as a substitute; those actually serving were issued government arms, stored by the officers under lock and key. The lieutenant of the county—or one of his deputies—was authorized "to employ such Person or Persons as he or they shall think fit, to seize and remove the arms, clothes and accoutrements belonging to the militia, whenever [they] shall adjudge it necessary to the peace of the kingdom . . . ."[79] Not surprisingly, the Whig mayor of London would inform Parliament a few years later that the militia "could no longer be deemed a constitutional defense, under the immediate control and direction of the people; for by that bill they were rendered a standing army to all intents and purposes whatever . . . ."[80]

III. The American Experience

A. The Militia in the Colonies

Although the militia, as an institution, declined in England during the eighteenth century, it retained vitality in the American colonies. Unlike the mother country, colonial America lacked both the need to project military force beyond its borders, and an economy that could support a significant standing force. The colonists quickly adapted the militia system to the Indian conflicts, creating multijurisdictional confederations, rapid response units, and long-range patrols. They also assimilated the views of the English Whigs and Classical Republicans, with their stress upon the militia's role in a free republic, and the juristic theories that espoused the concept of individual rights.

The militia in the American colonies, like its British counterpart, also came to play a role as a popular check on the excesses of royal authority. In the seventeenth century, Bacon's Rebellion against Virginia's Governor, Sir William Berkeley,

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[79] "An Act to explain, amend, and reduce into one act of Parliament the Several Laws, now in being, Relating to the Raising and Training the Militia Within that part of Great Britain called England." 20 Geo. **3,** ch. 20, § 105 (1761).

[80] THE NORTH BRITISH INTELLIGENCER 20 (Edinburgh 1776) (reporting speech by Lord Mayor of London attacking the Scottish Militia Bill) (Library of Congress Rare Books Collection).

was accomplished with militia support, as was the northeastern colonies' revolt against the Royal Governor, Sir Edmund Andros. The militia's role in this regard increased over time so that by the second half of the eighteenth century " . . . scarcely a decade passed that did not see the people in arms to redress official grievances."[81]

The colonists experienced their own standing army controversy, beginning in the mid-1700's, with the arrival of thousands of British regulars during the Seven Years War. The problem was caused by the lack of sufficient barracks to accommodate such large numbers of soldiers. Prior to the Seven Years War no need for barracks existed. After the war, however, they acquired a symbolic value. To build permanent barracks was to admit that standing troops had a permanent place in the colonies, something that no colonial legislature would concede. Accordingly, General Edward Braddock received rebuffs to his requests for supplies and lodging for his men. In 1756, New York City initially refused to provide winter quarters for 300 British soldiers under the command of Braddock's successor, John Campbell, Earl of Loudoun. After much delay, the city finally raised a fund to pay for lodging the men, but only after Loudoun's threat to bring in more troops. Throughout the colonies, British commanders encountered similar problems in their dealings with hostile colonial legislatures.

The end of the Seven Years War left England with a sizable empire to manage and large frontiers to defend. Expansion into the interior was discouraged, to maximize the lucrative fur trade with the Indians, and revenue-producing taxes were imposed. The implementation of these new policies required the permanent stationing of a large standing army throughout the colonies. In 1765, the British Parliament enacted the Quartering Act, which required the colonists to bear the cost of pro-

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[81] P. MAIER, **FROM** RESISTANCE TO REVOLUTION 5 (1972). One historian has described the militia's role in the development of our democratic institutions as follows:

> Aristocratic Whigs described the militia privates as "in general damn'd riff raff—dirty, mutinous and disaffected." The militia described themselves as "composed of tradesmen and others, who earn their living by their industry . . . ." [A] check of one militia company roster against the published tax lists for Philadelphia reveals that of sixty-seven names, almost half (twenty-nine) appeared on no tax list between 1769 and 1781 . . . . For such men, participation in the militia was the first step in the transition from crowd activity to organized politics. Like the New Model Army of the English Civil War, the militia was a "school of political democracy."

E. **FONER,** TOM PAINE AND REVOLUTIONARY AMERICA 63-64 (1976)

viding barracks and supplies for the resident British soldiers.[82] To raise revenue from the colonists to help cover the costs of maintaining the army, Parliament also enacted the hated Stamp Act.[83] Implementation of these acts immediately met with opposition in the colonies. In New York, General Thomas Gage's request for quarters and provisions was resisted by the legislature. The British response was to suspend the New York Assembly until it acquiesced to the General's demands.

In **1768,** the growing opposition to the British trade and revenue regulations resulted in the redeployment of the regular soldiers from the colonial frontier to locations near the seaboard cities. These soldiers were used to assist in law enforcement and increasingly became the objects of colonial hostility. In cities like Boston, confrontations between soldiers and civilians sparked fistfights, riots, and similar incidents, of which the Boston Massacre of March **5, 1770,** remains the most vivid example. The situation was aggravated in **1774** with the enactment of yet another quartering Act by the British Parliament.[84] The **1774** Act, one of the so-called "Intolerable Acts," was even more onerous than the **1765** Act in that it authorized the quartering of soldiers in the private homes of the colonists.

As had been the case in the English Civil War a century earlier, the issue of control of the militia became the catalyst for igniting the conflict. In **1774,** the British Government banned the export of arms and ammunition to the colonies, and instructed General Gage to disarm rebellious areas. The effect of the British efforts was to harden American resistance, and the colonists began to form the "minutemen"—a nationwide "select" militia organization. Radicals called for new elections for militia officers, and the resulting elections effectively purged pro-British officers from militia ranks, giving the radicals a firm hold on the organizations. Movements to upgrade the militia units spread rapidly. Patrick Henry's famed "give me liberty or give me death" speech, for instance, was directed to his resolution "that a well-regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government."[85]

After several attempts to raid militia arsenals in the Boston area—some successful and some unsuccessful—an intended

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[82] Y.B. **5 Geo. 3,** ch. **33 (1765).**

[83] Y.B. **5 Geo. 3,** ch. **12 (1765).**

[84] **Y.B. 14 Geo. 3,** ch. **54 (1774).**

[85] H. MILES, REPUBLICATION OF THE PRINCIPLES AHD ACTS OF THE REVOLUTION IN AMERICA **278 (1876).**

raid on the Concord arsenal brought about the outbreak of war at Lexington and Concord. At almost the same time, British authorities in Virginia secretly emptied the powder magazine at Williamsburg, but were discovered as they made off. The Virginians responded by mustering militia units, confronting British officials, and seizing 200 muskets from the governor's mansion. The unusually bad timing of the two raids brought Massachusetts and Virginia—which otherwise had little in common—into an alliance in revolution, and united the leadership of New England and the South.

The resentment against the standing army was expressed at the onset of the Revolution in the First Continental Congress's Declaration of Resolves of 1774[86] and in the Declaration of Independence of 1776.[87] In the Declaration, the complaint against the standing army was defined as political in nature and was leveled against the King alone in the phrase, "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures." Provisions relating to standing armies also were included in the declarations or constitutions adopted by a number of the colonies. The provisions found in about half of those documents reflected the view that the standing army problem was a political issue resulting from a lack of legislative control. Typical of that approach is the statement in the Maryland Declaration of Rights of **1776,** "[t]hat standing armies are dangerous to liberty, and ought not to be raised or kept up, without legislative consent."[88] The remainder of the documents, however, contained provisions that espoused the traditional Classical Republican notion that standing armies in peacetime represented a threat per se, regardless of whether or not they had been raised by legislative consent. Those provisions are similar to the one found in the Pennsylvania Declaration of Rights of **1776:** " . . . as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up."[89]

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[86] DOCUMEKTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 4-5 (C. Tansill ed. 1927).

[87] 1 THE FEDERAL AND STATE CONSTITUTIONS, COLOSIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 4 (B. Poore ed. 1877) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

[88] *Id.* at 816.

[89] 2 *id.* at 1542.

B. The Militia in State Constitutions and Bills of Rights

Provisions in the various declarations and constitutions of the colonies also reflected the beginnings of a divergence of opinions on the nature and purpose of the militia as an institution. Virginia, which was the first colony to adopt these documents, chose a constitution and bill of rights that was drafted by a committee, and was taken predominantly from the proposals of the conservative George Mason.[90] The prevailing version recognized, "A well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State."[91] It made no mention, however, of an individual right to arms.

The committee charged with the initial drafting of the Virginia documents was composed predominantly of large land owners. The Virginia Constitution, as finally adopted, looked to the maintenance of the status quo and reflected the Classical Republican emphasis on the establishment of a stable republic. Mason's original draft actually contained a substantial property requirement for legislators,[92] and did not recognize a "right" to freedom of religion. Instead, it acknowledged a "toleration of the exercise of religion,"[93] along the lines of the British Toleration Act which, for practical purposes, exempted certain faiths from the ban on nonestablishment churches.[94] Only the intervention of the novice legislator James Madison enabled an American president later to boast, "It is now no

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[90] The Virginia Bill of Rights traditionally has been ascribed to George Mason, based largely on Edmund Randolph's recollection that Mason's proposals "swallowed up the rest." 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 247 (1971). Recent evidence suggests, however, that the relevant portion was added by the committee, albeit taken almost verbatim from Mason's *Fairfax Resolves*. *See* H. MILLER, GEORGE MASON: GENTLEMAN REVOLUTIONARY 148 (1975). On the other hand, evidence also indicates that the *Fairfax Resolves* were more of a committee effort than has previously been supposed. *See* Sweig, *A New-Found Washington Letter of 1774 and the* Fairfax Resolves, 40 *Wm. & Mary Q.* (3d. Ser.) 283 (1983). Clearly, the body of the Virginia Constitution was actually a committee effort, based on submission of a number of plans. *See* 1 PAPERS OF THOMAS JEFFERSON 337 (J. BOYD ED. 1950).

[91] 7 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3814 (1909).

[92] J. MAIN, THE SOVEREIGN STATES 1775-1783, at 156-57 (1000 pounds of real estate to run for the lower house and twice that freehold to run for the upper house); PAPERS OF THOMAS JEFFERSON, *supra* note 90, at 366.

[93] Hunt, James Madison and Religious Liberty, *in* PROCEEDINGS OF THE 17TH ANNUAL MEETING OF THE AMERICAN HISTORICAL SOCIETY 165-67 (1901). Madison later recollected that Mason had "inadvertently adopted" the word of "toleration." PAPERS OF THOMAS JEFFERSON, *supra* note 90, at 250. This is consistent with the hypothesis that Mason differed from Jefferson and the Radicals not as much in values as in perspective. To Mason, the object was to establish a stable republic, which naturally would respect individual rights, while to Jefferson the object was to reserve rights and let the republic form within those reservations.

[94] Y.B. 1 W. & M., ch 18 (1689).

more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."[95]

Virginia's rejection of Thomas Jefferson's draft document, with its Enlightenment approach, was indicative of the Virginia gentry's philosophical orientation. Jefferson's draft would have extended the franchise to any taxpayer, divided state lands among the landless citizens, ended importation of slaves, and banned the establishment of religion.[96] His proposal contained no mention of the militia or its role in a republic, but instead included an individual right to arms: "No freeman shall ever be debarred the use of arms."[97]

The contrast between Mason's and Jefferson's proposals reflected a correlation that would be seen in later efforts by other states. Constitutions that maintained the Classical Republican link between land ownership and electoral participation also stressed the ideal of a citizen militia. On the other hand, constitutions that accepted the Enlightenment concept of near-universal manhood suffrage largely ignored the militia ideal and instead stressed an individual right to arms.

Pennsylvania adopted a bill of rights only a few months after Virginia, but its political situation was nearly the opposite of the one in Mason's state. The Pennsylvania convention was dominated by a radical coalition whose political base consisted of small farmers in the western part of the state and "mechanics," or skilled tradesmen, in Philadelphia. Its product was decidedly Jeffersonian in nature, extending the franchise to any taxpayer over the age of twenty-one, and giving a greater scope to individual rights.[98] John Adams later would note that Pennsylvania's "bill of rights [was] almost verbatim from that

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[95] 31 WRITINGS OF GEORGE WASHINGTON 93 (J. Fitzpatrick ed. 1939).

[96] Jefferson's proposals would have divided State lands among persons owning less than fifty acres, would have provided these lands would be held in fee simple (a reflection of his opposition to fee tail, which was still permitted in Virginia), and would have barred transfer of State lands "until purchased of the Indian native proprietors." PAPERS OF THOMAS JEFFERSON, *supra* note 90, at 362.

[97] *Id.* at 344.

[98] PA. CONST. § 6 (1776), *reprinted in* 5 Thorpe, *supra* note 91, at 3084; **see** *also* J. SELSAM, THE PENNSYLVANIA CONVENTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY (1936); Gough, ***Notes*** *on the Pennsylvania Revolutionaries of* ***1776,*** 96 PA. MAG. 89 (1972); Harding, *Party Struggles Over the First Pennsylvania Constitution, in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 371-72 (1895). Most noticeably, Pennsylvania added rights to freedoms of speech and assembly. Virginia recognized—probably through oversight—only the right of freedom of the press. *See* SCHWARTZ, *supra* note 90, at 262-63.

of Virginia."[99] Respecting the militia issue, however, the word "almost" is one that bears emphasis because Pennsylvania clearly departed from the Virginia approach by deleting the Virginia reference to well-regulated militias and by adding a new recognition "[t]hat the people have a right to bear arms for the defense of themselves and the State."[100]

In states in which a relatively even split between liberal and conservative elements existed, efforts were made to reconcile the diverging views on the nature of the militia. The Massachusetts Constitution, whose chief author was John Adams, contained an elaborate provision for the democratic election of militia officers. Captains and subalterns were to be elected by their companies; higher officers were to be elected by their subordinates; major generals were to be appointed by the legislature.[101] In the bill of rights, Adams chose an unusual mode of trying to compromise the arms verses militia issue. He took the language of the Pennsylvania convention, expanded it by recognizing for the first time a right to "keep" as well as to "bear" arms, but then qualified the right by recognizing it only with regard to "the common defense."[102]

Given Adam's legal background and his general suspicion of the people and of mobs, his approach was hardly surprising. To "keep" arms was, after all, a more precise rendition of the 1689 English Declaration than the "to bear" language used in the other state constitutions. The 1670 English Hunting Act, which prohibited arms to the poor, had used the phrase "have or keep," and the phrase, "keep arms," had appeared in post-1692 English case law interpreting the Act as modified after the Declaration of Rights.[103] The qualifier, "for the common defense," probably shared similar roots. Adams was mindful of the legitimate uses of arms, such as hunting, self-defense, and militia duty. He was mindful, however, about the misuse of

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[99] J. ADAMS, DIARY AND AUTOBIOGRAPHY 391 (L. H. Butterfield ed. 1964).

[100] PA. DECL. OF RIGHTS § 12 (1776), *reprinted in* 6 THORPE, *supra* note 91, at 3083. The Pennsylvania Constitution itself did provide for the militia, but contained businesslike statements, such as, all "freemen" shall be "trained and armed" under legislative direction. Pa. Const. § 5 (1776), *reprinted in* 5 THORPE, *supra* note 91, at 3084. No statement of the militia's necessity or role in a republic appears in that constitution; instead, it contains a simple, practical provision for its organization.

[101] MASS. CONST. pt. II, ch. 2, sec. 1, art. X, *reprinted in* 1 FEDERAL AND STATE CONSTITUTION, *supra* note 87, at 966.

[102] "The people have a right to keep and to bear arms for the common defence." MASS. CONST. pt. I, art, XVII, *reprinted in* 3 THORPE, *supra* note 91, at 1892.

[103] *See* J. Smith, Constitutional Right to Bear Arms 16-26 (1969) (unpublished manuscript).

arms for mob action or anarchy. In his *Defense of the Constitution,* he would later write:

> To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns, counties or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man; it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed and commanded by the laws, and ever for the support of the laws.[104]

The character of Adams' work was indicative of his status as one of the premier attorneys in the colonies. With far greater precision than is typical in the constitutional process, he sought not only to ensure the breadth of the right he desired, but also to fix its boundaries. His efforts, however, were not fully appreciated by his fellow Massachusetts citizens, who did not share his fear of the common people. A meeting of the citizens of Williamsburg objected to the language, noting that "we deem it an essential privilege to keep Arms in our Houses for Our own Defense" and that the qualifier might be read to allow government to "Confine all the fire Arms to some publick Magazine."[105] Likewise, in Northampton, an objection was raised that the right to keep and bear arms "is not expressed with that ample and manly openess and latitude which the importance of the right merits" and should be changed to "[t]he people have a right to keep and bear arms, as well, for their Own as the Common defence."[106]

Consequently, by 1780, Americans had begun to reassess the legal and functional nature of the militia along lines similar to what had occurred in England a century before. The ancient concept of the general militia as a "constitutional institution," serving as a check on governmental excesses, was starting to erode. In its place was emerging the belief that the interests of the people now could be protected effectively by the establishment of democratic governments, offering legal guarantees of

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[104] 6 WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE U.S. 197 (C. Adams ed. 1851). Adams, however, was not a defender of the select militia concept: "The American states have owed their existence to the militia for more than two hundred years. A select militia will soon become a standing army . . . . " *See* Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts,* 10 VT. L. REV. 314 (1985) (citing Adams in 1823).

[105] THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS OS THE MASSACHUSETTS CONVENTION OF 1780, at 624 (O. & M. Handlin eds. 1966).

[106] Clune, *Joseph Hawley's Criticism of the Constitution of Massachusetts,* 3 SMITH C. STUD. HIST. 15 (1917).

individual rights. This transition process was for the moment tentative. For instance, it is that Jefferson—who had served on the committee to organize the Virginia militia—was actually an opponent of the militia concept. Likewise, Mason, who was a firearms collector and George Washington's hunting partner, was an improbable supporter of popular disarmament. The difference in their approaches was still one of emphasis, rather than substance. This would change, however, when the experiences of the war and the security needs of the new nation eventually forced American political leaders critically to reevaluate the militia's traditional role.

C. The Effects of the Revolution and the Changing Security Needs of the New Nation

After the Revolution, Americans found themselves in a position similar to that of post-1689 English Whigs—that is, the former opponents were now in control. Many now found a limited standing army necessary and acceptable. The militias generally had acquitted themselves poorly during the major organized battles of the war and had been the subject of constant and bitter criticism.[107] At Guilford Courthouse, for instance, the Virginia and North Carolina militias broke and ran before sustaining a single casualty. The militias' American commander noted, "[t]hey had the most advantageous position I ever saw, and left without making scarcely the shadow of opposition."[108] George Washington complained, "To place any dependence upon Militia, is, assuredly, resting upon a broken staff. If I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter."[109] As Alexander Hamilton later observed, the exclusive dependence on the militia "had like to have cost us our independence . . . . The steady operation of war against a regular and disciplined army can only be successfully conducted by a force of the same kind."[110]

The increasing support for the standing army was reinforced by the fact that the conclusion of the war had left the former

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[107] *But see* Higginbotham, *The American Militia: A Traditional Institution with Revolutionary Responsibilities, in* RECONSIDERATION ON THE REVOLUTIONARY WAR 96 (1978); J. SHY, A PEOPLE NUMEROUS AND ARMED 23-33 (1976); Shy, *A New Look at the Colonial Militia,* 20 WM. & MARY Q. 175-85 (1963).

[108] B. DAVIS, THE COWPENS-GUILFORD COURTHOUSE CAMPAIGN 155-56 (1962).

[109] Letter from George Washington to the President of Congress, Sept. 14, 1776, *in* 6 THE WRITINGS OF GEORGE WASHINGTON 106, 110 (1932).

[110] THE FEDERALIST No. 26, at 166 (A. Hamilton) (C. Rossiter ed. 1961).

colonies facing an uncomfortable military situation. The British remained in Canada and some of the forts in the West; the Spanish were in Florida; and the French controlled Louisiana and the Mississippi River. Additionally, hostile Indian tribes were still a concern and several states were threatened with internal insurrections. The traditional militia was, by its nature, inadequate to cope with these problems. In the end, the pragmatic security needs of the new nation took precedence over the adherence to an increasingly outmoded political theory. As in post-1689 England, the standing army would be denounced, derided, and retained; the militia would be lauded, idealized, and changed.

1. The Militia and the Constitution. — The changing view toward both the standing army and the militia was evident at the Constitutional Convention held in Philadelphia in the summer of 1787, where the debate on the subject of a permanent military establishment had centered upon its size and control, rather than the necessity for its existence in some form.[111] The constitution that the convention proposed granted Congress the exclusive authority "[t]o raise and support armies."[112] The only restriction on this power was a two-year limitation on any appropriation for that purpose.[113] Additionally, the document granted Congress the authority to provide for the "calling forth [of] the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions."[114] It also gave Congress the authority to provide for the "organizing, arming, and disciplining, [of] the Militia, and for [the] governing of such Part of them as may be employed in the Service of the United States."[115] The only power over the militia that the document reserved for the states was the authority to appoint officers and train the militia "according to the discipline prescribed by Congress."[116] With the exception of the Article I, Section 9, limitations on ex post facto laws, bills of attainder, and peacetime suspensions of habeas corpus, the draft Constitution did little to recognize individual rights.[117] The contrast between the breadth of powers granted to the new national government

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[111] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 326, 329, 509, 563, 616, 617, 633 (1911).

[112] U.S. CONST. art. I, § 8, cl. 12.

[113] *Id.*

[114] *Id.* art. I, § 8, cl. 15.

[115] *Id.* art. I, § 8, cl. 16.

[116] *Id.*

[117] *Id.* art. I, § 9, cls. 2, 3.

and the traditional views toward the standing army and the militia led to conflicts during the ratification process.

The Antifederalists were quick to seize upon the obvious argument that, while standing armies were still anathema to most Americans, the proposed Constitution gave the national government unlimited authority to "raise and support armies." Federalists were hard pressed to deny or to justify this provision. Instead, they sidestepped the issue by advancing the existence of the militia as a counterpoise to the risks of a federal standing army. Hamilton, in ***The Federalist No. 26,*** suggested,

> It is not easy to conceive a possibility that dangers so formidable can assail the whole union as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which ought always to be counted upon as a valuable and powerful auxiliary.[118]

While in ***The Federalist No. 46***, Madison argued that a standing army of 25,000 to 30,000 men would be offset by "a militia amounting to near a half million of citizens with arms in their hands, officered by men chosen from among themselves . . . ."[119] The Antifederalists were not persuaded by these arguments, in part because of the degree of control over the militia given to the national government by the proposed constitution. The fears of the more conservative opponents centered upon the possible phasing out of the general militia in favor of a smaller, more readily corrupted, select militia. Proposals for such a select militia already had been advanced by individuals such as Baron Von Steuben, Washington's Inspector General, who proposed supplementing the general militia with a force of 21,000 men given government-issued arms and special training.[120] An article in the ***Connecticut Journal*** expressed the fear that the proposed constitution might allow Congress to create such select militias: "[T]his looks too much like Baron Steuben's militia, by which a standing army was meant and intended."[121] In Pennsylvania, John Smiley told the ratifying convention that "Congress may give us a select militia which will in fact be a standing army," and worried that,

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[118] THE FEDERALIST NO. 26, at 173 (A. Hamilton) (Mentor ed. 1961).

[119] THE FEDERALIST NO. 46, at 299 (J. Madison) (Mentor ed. 1961).

[120] ***See generally*** L. CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 780-92 (1982); J. MAHON, THE AMERICAN MILITIA, DECADE OF DECISION 1789-1800, at 6-8 (1960).

[121] 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378 (M. Jenson ed. 1976).

with this force in hand, "the people in general may be disarmed."[122] Similar concerns were raised by Richard Henry Lee in Virginia. In his widely-read pamphlet, ***Letters from the Federal Farmer to the Republican,*** Lee warned that liberties might be undermined by the creation of a select militia that "[would] answer to all the purposes of an army," and concluded that "the Constitution ought to secure a genuine and guard against a select militia by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms."[123]

The more radical opponents of the proposed Constitution, who also found the standing army objectionable, had scarcely a good word for the militia for a far different reason. To them the danger was not that the Congress would fail to discipline the militia adequately — thereby allowing the Republican tradition to lapse — but that Congress might endanger individual liberties by using its powers too forcefully. Militia discipline to them posed a danger to the individual.

> [T]he personal liberty of every man, probably from sixteen to sixty years of age, may be destroyed by the powers Congress have in organizing and governing of the militia. As militia they may be subjected to fines of any amount, levied in a military manner; they may be subjected to corporal punishments of the most disgraceful and humiliating nature; and to death itself, by the sentence of a court-martial.[124]

In Virginia, George Mason expressed the fear that the proposed militia provisions could allow the national government to "subject[] [militiamen] to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much as to make them cry out, 'give us an army.'"[125] His concerns were shared by Patrick Henry, who saw the potential of excessive federal requirements such as requiring special firearms for federal duty, as adding too much to the citizens' burdens. "The great object is that every man be armed,"

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[122] 2 *id.* at 509.

[123] R. LEE, LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 21, 124 (W. Bennett ed. 1978).

[124] J. MCMASTER & F. STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 480 (1888).

[125] D. ROBERTSOS, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 270-71 (2d ed. Richmond 1806).

he argued, "but can the people afford to pay for double sets of arms?"[126]

The Antifederalists were also skeptical of the Federalists' argument that the universal armament of individual citizens would remove any basis for concern over the standing army. In the first major Federalist pamphlet, aimed at the people of Pennsylvania, Noah Webster had contended,

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops than can be, on any pretence, raised in the United States.[127]

On a similar theme, Madison, in ***The Federalist No.*** 46, invoked "the advantage of being armed, which the Americans possess over the people of almost every other nation," avowing that if European civilians were comparably equipped, "it may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."[128]

The problem with those arguments, however, was that they assumed something that the language of the proposed constitution did not guarantee — that the individual citizen had a "right" to keep arms. The issue of the absence of this guarantee was raised repeatedly at the state conventions as their attendees debated ratification.

In Pennsylvania, the first state to consider ratification, the radical minority put forth a group of proposals that mirrored almost every provision of the later federal bill of rights.[129] Those proposals included a provision that expressly recognized an individual right to bear arms. They also included a provision calling for the organization, armament, and training of the militia to remain a state responsibility, as well as a provision

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[126] *Id.* at 274-76

[127] N. WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (1787).

[128] THE FEDERALIST No. 46, at 300 (J. Madison) (Mentor ed. 1961).

[129] The later Fifth and Eighth Amendments were taken almost verbatim from the Pennsylvania wording. The Pennsylvania proposals also called for the recognitions of the freedoms of conscience, speech, and press, as well as the establishment of protection against warrants unsupported by evidence or not particularly describing the property to be seized. McMaster & Stone, *supra* note 124, at 461-63.

for no militiaman to be forced to serve outside of his state of residence.[130] No mention was made of the necessity of the militia to a free republic. Although the proposals did not prevail in the state's convention, the publicity accorded them ensured that they were considered by members of later conventions.[131]

In states where the ratification vote was expected to be close, Federalist leaders were quick to see the advantage of accepting proposals for bills of rights to secure passage of the proposed constitution. By the time of the ninth ratification vote, three major proposals for bills of rights had surfaced. Each proposal sought a clearly individual right to bear arms, but none lauded the necessity of the traditional militia.

New Hampshire became the ninth state to ratify the proposed constitution, making it binding on the states which had already signed. Among the states that as yet had not ratified, however, were the major commercial states of Virginia and New York. Because the absence of those two states would, in all likelihood, have proved fatal to any union, the battle over ratification continued.

In Virginia, the Federalists' task was complicated by the state's unusual alignment on the federal constitutional issues. The leaders who opposed an unamended constitution, and were calling for a bill of rights, came from varied backgrounds. The conservative George Mason and the liberal Thomas Jefferson joined forces to promote a bill of rights, despite their earlier differences over what that bill should contain. They were joined by the fire-brand Patrick Henry and the more staid Richard Henry Lee, both of whom defy simple classification. Although Mason was a strong supporter of the traditional militia concept, he was acutely aware of the threat to the institution, which resulted from the lack of an individual right to keep arms.

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people—that was the best and most effectual way to enslave them—but that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia.[132]

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[130] Id. at 462-63.

[131] *See* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY (1957)

[132] ROBERTSON, *supra* note 125, at 270.

Patrick Henry shared similar fears. The "militia, sir, is our ultimate safety," he argued, yet, "[t]he great object is that every man be armed . . . every one who is able may have a gun."[133] Even Richard Henry Lee concluded, "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."[134] Although, to Lee, "the young and ardent part of the community, possessed of but little or no property" could not be relied upon as the militia, he nevertheless thought that this part of the community should be allowed to possess arms.[135]

Virginia ultimately ratified the Constitution by the close vote of eighty-eight to eighty, but only at the price of simultaneous proposals for a bill of rights.[136] The proposals were drafted by a committee that included Antifederalists Lee and Mason, as well as Federalists James Madison, John Marshall, and George Wythe.[137] On the arms versus militia issue, this committee took an unusual approach. Previous proposals either had emphasized the importance of the traditional militia or had recognized an individual right to arms. The Virginia committee chose to do both, and spliced together language that extended protection both to militia needs and individual rights. In its final form this provision read "that the people have the right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state . . . ."[138] The lack of the qualifier "for the common defense" in the arms segment of the provision was indicative of the committee's recognition of the individual right as being separate and distinct from the militia issue.

The Virginia proposal is noteworthy because it marked the first time a state ratifying convention had so stressed the need for a militia. The committee's approach of combining a militia recognition with a statement of individual rights, as expected, had a broader appeal than either provision taken alone. Not surprisingly, it supplanted the previous models, and was em-

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[133] *id.* at 274-75.

[134] LEE, *supra* note **123,** at **124.**

[135] *Id.* at **22.**

[136] *See* C. BOWEN, MIRACLE AT PHILADELPHIA **304** (1986).

[137] **2** SCHWARTZ, *supra* note 90, at **765.**

[138] 1 *id.* **at 842.**

ployed almost verbatim in the ratifying conventions in New York and North Carolina.[139]

2. The Militia and the *Bill* of Rights.—After the ratification of the Constitution, Madison found himself cast in the unlikely role of father of the Bill of Rights. He had argued against a bill of rights in his contributions to The Federalist papers and at the Virginia convention had stated that "A bill of rights would be a poor protection for liberty."[140] As a result, he had been passed over for a seat in the first Senate, and when he ran for the House, his district was "gerrymandered" to his great disadvantage. His later change in attitude—although partly the result of Jefferson's influence—was due in large measure to his own need for popular support in his closely contested congressional race. A campaign letter that he dispatched included a promise to get Congress "to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights."[141]

Madison's first step toward drafting a bill of rights was to obtain a pamphlet that listed all of the state proposals.[142] He then embarked upon a process of editing. Out of hundreds of proposals—many redundant and some questionable—he assembled a condensed list of usable proposals. As had been the case with the English Declaration of Rights, the purpose of the exercise was not to "create" entirely new rights, but to formulate a document that represented a present consensus of opinion about the obvious rights of human beings. This process necessarily involved discarding all controversial proposals. As he informed Jefferson, "every thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three quarters of the States was studiously avoided."[143] After excluding the controversial propositions, Madison still had to single out the most desirable proposals, and then select the specific terms of the guarantees.

In resolving the arms versus militia issue, language that combined a militia statement with a recognition of an individual right fitted Madison's objectives perfectly. A militia statement standing alone likely would have been unacceptable to liberal

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[139] *See id.* at 912, 968. Of the two, only Sew York ratified. The North Carolina convention refused either to ratify or to repudiate the proposed constitution pending the inclusion of a bill of rights.

[140] *Id.* at 764.

[141] B. SCHWARTZ, THE LAW IS AMERICA 47 (1974).

[142] 12 PAPERS OF JAMES MADISON 58 (R. Rutland & C. Hobson eds. 1977).

[143] *Id.* at 272.

groups such as the Pennsylvania minority, Samual Adams and his supporters, the New Hampshire majority, and possibly Jefferson himself—all of whom had advocated an individual right to arms and none of whose efforts had so much as mentioned the militia. Conversely, an individual right to arms clause, standing alone, might well have irritated supporters of the traditional militia such as George Mason and possibly Richard Henry Lee, both of whom were powerful Virginians. In addition, both were figures with whom Madison still had to deal because they would vote on his proposal—Mason as a Virginia legislator and Lee as a member of the federal Senate. By joining the two issues, Madison would be assured of broad-based support for his proposal. He naturally chose language that already had proved acceptable to both groups. "[T]he right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country."[144]

Much of Madison's handiwork underwent substantial editing in both the House and the Senate, but his militia and arms proposal survived relatively unscathed. In the version finally passed by the House, the order of the provisions was reversed: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[145] Although the first casualties of the House's editorial process were his preambles and explanations, the militia statement and the right to arms guarantee both were retained. The House apparently did not think that either portion of what would become the Second Amendment was redundant; nor did the Senate, which emphasized the differing natures of each provision. On the one hand, it refused to add "for the common defense" to the right to arms guarantee, which would have suggested that the guarantee's purpose was linked solely to the militia; on the other, it replaced the House's statement that the militia was "the best security" of a free state with a stronger statement that it was "necessary" to the security.[146]

The other issues related to the military were dealt with more expeditiously. Madison restricted subjection of the militia to martial law in what would become the Fifth Amendment by guaranteeing jury trials to militiamen not in actual service dur-

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[144] 1 JOURNAL OF CONGRESS **451** (J. Gales ed. 1789).

[145] JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES **63,** 64 (Washington 1820) (citing bill as passed by the House) [hereinafter JOURNAL].

[146] *Id.* at 77.

ing times of war or public danger.[147] The involuntary quartering of soldiers was prohibited in what would become the Third Amendment.[148] Conscientious objection was addressed in an addendum to the militia statement, although that addendum was later removed by the Senate.[149] Accordingly, Madison was able to resolve five of the arms- and military-related concerns that had been raised by the ratifying conventions.

Significantly, the one military concern that Madison did not address in the Bill of Rights was the call for limitations on a standing army. As he had previously stated to Jefferson, "I am inclined to think that absolute restrictions . . . are doubtful . . . . Should an army in time of peace be gradually established in our neighborhood by [Britain] or Spain, declarations on paper would have . . . little effect in preventing a standing force for the public safety."[150] By 1789, Americans had crossed the line the English Whigs had passed a century before — that is, a standing army might be a nuisance, but now it was an American nuisance. Statesmen still would condemn it, but also would continue to authorize it. Moreover, unlike the other military concerns, the details of limiting the standing army were eminently "controvertible." Federalists in the conventions strongly had opposed any limitation, and no consensus had developed among the supporters of limitations. Madison wisely avoided inserting these controverted provisions in his draft and, when others proposed them in the Senate, their motions were defeated uniformly.[151] Consequently, the Bill of Rights would not be a barrier to the maintenance of a standing army.

D. The Decline of the General Militia in America

The inclusion of the militia provisions in what became the Second and Fifth amendments proved insufficient to prevent the original ideal of the American militia from ultimately going the way of its English counterpart. Pre-1789 American political thought had emphasized the need to enroll all citizens — or at least freeholders — for militia duty, and had rejected the idea of a "select militia," in which only a portion of the population was enrolled. Provisions that authorized the new Con-

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[147] U.S. CONST. amend. V.

[148] *Id.* amend. III.

[149] JOURNAL, *supra* note 145, at 71.

[150] I THE FOUNDER'S CONSTITUTION 477 (P. Kurland & R. Lerner ed. 1987)

[151] JOURNAL, *supra* note 145, at 71, 75.

gress to provide for the arming and organizing of the national militia were seen as allowing it to require that all citizens possess arms of uniform caliber and conform to a standard of drill.[152] In practice, while various administrations prepared detailed plans along those lines, Congress refused to enact them.[153] Washington's first annual address acknowledged that "[a] free people ought not only to be armed, but disciplined; to which end a uniform and well-digested plan is requisite."[154] His second address courteously hinted that the "establishment of a militia" was among the "subjects which I presume you will resume of course, and which are abundantly urged by their own importance."[155] One year later, Washington again listed militia legislation as "a matter of primary importance whether viewed in reference to the national security to the satisfaction of the community or to the preservation of order."[156]

In 1792, Congress enacted the first (and until 1903, the last) national Militia Act.[157] While this Act required all white males of military age to possess a rifle or musket—or, if enrolled in cavalry or artillery units, pistols and a sword—it did nothing to guarantee uniformity of calibers, fixed no standards of national drill, and failed even to provide a penalty for noncompliance. The subsequent presidential calls for detailed organization of a national citizen army went unheeded.[158] By 1805, even Jefferson was reduced to asking for a select militia, which had been anathema even to conservatives a few years before. In a message to Congress Jefferson stated, "I can not, then, but earnestly recommend to your early consideration the expediency of so modifying our militia system as, by a separa-

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[152] At the Constitutional Convention, a delegate explained that "by organizing, the Committee meant proportioning the officers and men—by arming, specifying the kind, size, and calibre of arms—and by disciplining, prescribing the manual exercise, evolutions." 5 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTIOK OF THE FEDERAL COKSTITUTIOK 344 (1836) (2d ed. 1966). In the Pennsylvania convention, James Wilson explained, "If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States." 2 *id.* at 521.

[153] Major plans included Steuben's of 1784, Knox's of 1786, and Washington's of 1790. Washington's plan was submitted to Congress in January 1790. It then was drafted, debated, and—after a year and a half of work—enacted in emasculated form as the Militia Act of 1792. J. PALMER, WASHINGTON, LIKCOLN, WILSON: THREE WAR STATES. MEK 87-89, 104-05, 107-123 (1930).

[154] 1 MESSAGES AKD PAPERS OF THE PRESIDEKTS 57 (1897) [hereinafter MESSAGES].

[155] *Id.* at 75.

[156] *Id.* at 99.

[157] Act of May 8, 1792, 1 Stat. 271.

[158] MESSAGES, *supra* note 154, at 132, 176, 317, 333, 360.

tion of the more active part from that which is less so, we may draw from it when necessary an efficient corps fit for real and active service, and to be called to it in regular rotation."[159]

Within two decades of the ratification of the Constitution, American political leaders had abandoned the original concept of the militia, and in the words of one historian, "The ideological assumptions of revolutionary republicanism would no longer play an important role in the debate over the republic's military requirements."[160]

IV. Conclusion

The wisdom of Madison's approach to the resolution of the militia issue was born out by subsequent events. The language relating to the militia, which he chose for inclusion in what became the Constitution's Second and Fifth Amendments, was specific enough to satisfy both the supporters of the Renaissance militia ideal and the advocates of the Enlightenment theories of liberal democracy. The approach, therefore, resolved most of the concerns that had been raised during the ratification process. More importantly, however, that language also proved to be flexible enough to allow the nation to meet its changing military needs pragmatically when new political, economic, technological, and strategic realities necessitated an abandonment of revered, but outmoded, military practices.

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[159] *Id.* at 373.

[160] CRESS, *supra* note 120, at 176. The United States technically continues to have a national "general" militia, consisting of all able-bodied males between the ages of 17 and 46 years of age who are not members of the National Guard or the Naval Militia. 10 U.S.C. § 311 (West Supp. 1989). Likewise, state codes contain provisions establishing general "unorganized" militias. ***See,*** *e.g.*, VA. CODE ANN. § 44-1 (Michie Supp. 1989). For practical purposes, however, these "organizations" have ceased to play any real role in national defense.

ALLIED SECURITY SERVICES IN GERMANY: THE NATO SOFA AND SUPPLEMENTARY AGREEMENT SEEN FROM A GERMAN PERSPECTIVE

ANDREAS GRONIMUS*

I. Introduction

Allied Forces stationed in Germany have been a common feature since 1945. They have been serving here under consecutive legal arrangements. What started with the Hague Convention of 1907, and developed into the special Four Power Occupation Regime for Germany, is now to be found in the NATO Status of Forces Agreement (SOFA) of 1951 and the Supplementary Agreement between Germany and the NATO sending States concluded in 1959 (SA/GE).[1]

Cooperation between German and Allied authorities has developed smooth and time-honored procedures. Nevertheless, the controversy over NATO's "double track decision" exit to modernize its INF arsenal in 1979 generated substantial criticism of the standing agreements and even more criticism of Allied activities. These lawyers and politicians view the Allied privileges under the SOFA and the SA/GE as an infringement of German sovereignty.

In addition, after reunification the German Federal Government requested, and the Allied sending States agreed to, nego-

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[1] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces stationed in the Federal Republic of Germany, with Protocol of Signature, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter SA/GE]. The NATO SOFA and SA have been in force in the Federal Republic of Germany since July 1, 1963. ***See*** Bundesgesetzblatt [BGBl] 1963 II S.747; see also Horst Kratz, ***The NATO Status of Forces Agreement and Supplementary Agreement,*** ARMY LAW., Nov. 1990, at 3.

tiations to review—and probably to amend—the SA/GE. These negotiations already have begun and are scheduled to be concluded in the summer of 1992.

II. The Facts: The Protection of Military Security in the Federal Republic of Germany

This article will study the legal authority granted to Allied military police and other security personnel under SOFA and SA/GE provisions. To promote a better understanding of the intra-German legalistic and political discussion, it starts with a comparative analysis based on the technical framework of German security laws.

A. The Protection of German Military Security

The activities of German military police and other security services are governed by the Use of Force (Armed Forces) Act of 1965.

1. The Approach of the 1965 Act.—This bill was enacted in an era strongly distrustful of any military privileges and focused extensively on the protection of military installations.[2] The authority of security personnel is much more restrictive than under any state police act in Germany. As a consequence, the law's operation has manifested many legal problems and loopholes. For example, no sufficient authority exists—for technical reasons stemming from the burden of proof[3]—to stop people outside installations from spying inside.[4] The summary arrest of offenders usually is unlawful because of similar technical flaws in the 1965 Act. Finally, only specially commissioned personnel can use this problematic authority.

2. The Problem of *"Official" Self-Defense.*—The paramount problem of the 1965 Act is its assumption that the military police may invoke civil-law rules of self-defense and summary arrest. German administrative law doctrine, however, has established that the constitutional "rule of law" provision[5] requires state authorities to invoke specific powers granted by public law and forbids, among other things, recourse to civil-law rules of self-defense. In addition, under German adminis-

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[2] ***See*** **4** Bundestag, doc. 3390, at 1.

[3] *Cf.* Rauschning in: v. Mffnch, 8 BVerwGE 944.

[4] *Cf.* Groβmann, Bundeswehr-Sicherheitsrecht, UZwGBw § 9, **n.55** (1981)

[5] GG art. 20, para. 3 (1949).

trative law, acts of a government agency in its official capacity are attributed to the state. This "official act" will be lawful only if specific authority under administrative law exists. The acting person may invoke civil law rules of self-defense exclusively in proceedings to establish his or her personal liability under criminal or civil law. Even if these rules are invoked successfully, the "official act" will remain unlawful unless the official actor has authority to perform the act under administrative law.[6]

In contrast to all federal and state police acts, the 1966 Act contains no clause allowing the "official" recourse to self-defense. This puts the acting service member in legal limbo. Thus far, the courts have managed to avoid resolving this question.

3. Powers of the State Police.—On the other hand, the state police of the German "Lfinder" are granted full powers to act in the maintenance of security and public order. They may enforce any legally protected interests and public regulations. As a rule, police may take any necessary measures in the maintenance of security and public order, subject to the principle of proportionality. Accordingly, the "Lfinder" state Police—not federal forces—are tasked to support German military police in the protection of military security and to cooperate with Allied Forces' security agencies in Germany.[7]

B. Allied Security Operations

Allied security regulations come in a variety of technical constructions. These differences in technical terms can be traced back to different legal traditions. The three major allied powers of World War II—that is, the United States, the United Kingdom, and France—should be sufficient to serve as examples.

1. United States Forces' Regulations.—The practice of United States Forces in Germany is governed by Department of Defense (DOD) administrative "regulations." The equivalent technical instruments in Germany are known as government ordinances. These regulations are issued by the DOD to maintain common standards throughout the United States Armed

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[6] 33 BVerfGE 1, 17.

[7] *See* 4 Bundestag doc. 1004, at 15; BECKERT, DIE BUNDESWEHRVERWALTUNG 217, 226 (1983). The State Police are obliged to respond to Allied requests for assistance under SOFA art. I, para. 2; SOFA art. VII, para. 11; SA/GE art. 3; and SA/GE art. **29,** para. 1(1).

Forces. Regional and local commanders may issue supplementary regulations within the framework of DOD regulations to adapt the latter to specific legal and practical requirements.[8]

Authority to use force against military personnel can be found in the provisions of the Uniform Code of Military Justice.[9] The use of force against civilians is based on common-law rules of self-defense and summary arrest.[10] Special provisions restrict the use of deadly force. These provisions are based on the "minimum force doctrine".[11] This doctrine is emphasized strongly in all other cases as well.[12] The right to administer installations as competent commanders see fit—such as through the use of identity checks, restricted access, and searches—is derived from the state's title as land owner or rightful tenant to the land.[13]

United States regulations explicitly declare all powers subject to further restriction in compliance with local law or stationing agreements[14]. American commanders in Germany maintain that the SOFA, and to a greater extent the SA/GE, warrant no such restrictions[15]. Accordingly, the general regulations of the different services apply in full. Some exceptions are made regarding members of civil support units and local hire guards.[16]

2. *British* Practice in Germany.—British forces work in a similar common-law tradition. Common-law rules, such as self-defense and summary arrest, are held to be applicable.[17] While this may be a universal principle of law, a German lawyer would find that important legal differences exist. First, the legally protected interests a person may defend by actions of self-defense, prevention of crime, or summary arrest differ

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[8] *E.g.*, Dep't of Defense Directive 5210.56; Dep't of Defense Dir. 6100.76-M; Army Reg. 190-14, Military Police: Carrying of Firearms and Use of Force for Law Enforcement and Security Duties (23 Sept. 1988) [hereinafter AR 190-14]; Air Force Reg. 125-26; U.S. Army Europe Reg. 55-355; Commander in Chief, U.S. Navy Europe, Inst. 4600.7C; U.S. Air Force Europe Reg. 75-4.

[9] *See* Uniform Code of Military Justice art. 5, 10 U.S.C. $805 (1976).

[10] *Cf.* WELTON, NEUE ZEITSCHRIFT FOR WEHRRECHT 65, 68 (1985).

[11] *Cf.* AR 190-14, para. 2-5.

[12] *Cf.* AR 190-14, ch. 4 (as to nondeadly force); AFR 125-26, para. 19 (same).

[13] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 893 (1960); Greer v. Spock, 424 U.S. 828 (1975).

[14] *Cf.* AR 190-14, ch. 4; AFR 125-26 paras. 11(a), 22.

[15] *Cf.* USAREUR Suppl. 1 to AR 190-14, para. 4(c).

[16] *See* USAREUR Reg 600-472, para. 4(a).

[17] *Cf.* BATSTONE & STIEBRITZ, NEUE JURISTISCHE WOCHENSCHRIFT 770, at 3 (1984); 18 Halsbury § 1610; 41 *id.* §§ 129, 134.

from country to country. Second, differences in technical terms exist.

For instance, self-defense is a valid defense in Germany only if the perceived threat actually exists. An honest mistake of fact that prompts an individual to intervene, will not render his or her action lawful. Mistakes of fact are addressed as a matter of personal guilt.[18] Therefore, German law divides criminal responsibility into the "factual" question of lawfulness and the "personal" question of guilt. As to actions of state officers in their official capacities, German administrative law concentrates exclusively on the "factual" lawfulness of the action. This construction is inconsequential in criminal and civil proceedings, in which the personal responsibility of the officer is in question. The implications, however, should be clear concerning suits against the state.

By contrast, under Anglo-American common-law rules, self-defense is a valid defense if an honest mistake of fact occurs.[19] These rules combine both problems by asking whether the force used was "reasonable under the circumstances,"[20] and by giving a single answer. This construction may lead to problems of mutual misunderstanding on account of different legal traditions. Because the law of the land cannot apply "out of area," United Kingdom authorities assume that British common-law rules do not apply in Germany, while German civil-law rules apply by way of SA/GE articles 12 and 20. Accordingly, separate regulations have been issued with no serious differences in practice.

3. The French Point of View.—France always has put a strong emphasis on national sovereignty.[21] That emphasis even led General de Gaulle to leave NATO's military organization in 1966.[22] French troops, however, have stayed in Germany, and the parties firmly have established that the SOFA and the SA/GE still apply to French forces in Germany.[23]

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[18] *Cf.* JESCHECK, STRAFRECHT-ALLGEMEINER TEIL 411, 415 (4th ed.).

[19] *Cf.* R. v. Chisam, **47** Crim. App. Rep. 130 (OLGSt 1963). As to summary arrest, German rules should apply in any case because SA/GE article **20** has emulated German law.

[20] *Cf.* Criminal Law Act 1967, sec. 3, para. 1. The "reasonableness" test includes the United Kingdom's version of the minimum force doctrine. ***See generally*** BATSTONE & STIEBRITZ, *supra* note 17.

[21] This concern led France to question SOFA article VII (10). ***See*** NATO doc. MS(J)-R (51) 5, at 16(c).

[22] *Cf.* COOK, FORGING THE ALLIANCE 264.

[23] *Cf.* FEDERAL BULLETIN 1304 (FRG 1966).

French authorities maintain that standardized practice is a factual necessity, especially for a country deploying troops in many receiving states, such as the United States. Logically, French commanders will apply their national regulations to the extent arrangements with the receiving state allow. The legal title in the sphere of criminal jurisdiction is the sovereignty of the state over members of its armed forces.[24] In other cases, stationing agreements have to provide this legal title. Criminal procedures are reserved to the courts-martial and the special Gendarmerie of the Army.[25] Other security services, such as sentry services and escorts, are provided by local units themselves. From the French perspective, the sovereignty of the receiving state as protected by the SOFA forbids the use of nonmilitary personnel in the course of these duties.

This different perception of legal principles demonstrates the divergent traditions of the European continental states. Nevertheless, these technical differences do not produce different results of major proportions. For instance, self-defense inside French installations is applied according to French law as a matter of practicability—though the legal problems of this practice are acknowledged—while action off post is restricted to cases of "danger in delay."

III. The Law: The Allied "Right to Police" Under Paragraph 10 of SOFA Article VII

Since July 1, 1963, the status of Allied Forces in Germany has been based on the SOFA. That same day, the SA/GE of 1969 and additional agreements entered into force.

A. The Special Legal Situation in Germany

In Berlin, the quadripartite occupation regime continued to apply[26] until the Four Powers ceded their rights on October 3, 1990, when German reunification took effect.[27] Whereas United States, British, and French Forces will continue to be

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[24] ***See*** SOFA art. VII.

[25] ***See Code de Justice Militaire, amended by*** L. So. 82-621, July 21, 1982.

[26] ***See Convention on relations between the*** *FRG* ***and the Three Powers, amended by*** Paris Treaties, art. 2, Oct. 23, 1954.

[27] ***See*** *Moscow* ***"2 + 4" Treaty,*** art. 7, para. 1(1), Sept. 12, 1990. This provision was made effective on October 3, 1990, prior to ratification, by way of the Quadri-partite New York declaration of October 1. 1990. ***See*** 11 BUNDESTAG, doc. 8024. at 17. To prevent a "lawless" transitory period starting October 3, 1990, the Bundestag passed a special Transition Bill on September 20, 1990. This bill provides for the provisional

subject to the SOFA, the status of Soviet Forces in East Berlin and the former German Democratic Republic, scheduled to pull out by 1994, is the subject of transitory arrangements. The new German-Soviet SOFA, signed in Bonn on September 12, 1990, was derived largely from the NATO SOFA.[28]

The SOFA is meant to be a framework for all NATO troops stationed in any Allied country. Accordingly, it necessarily must be augmented by additional arrangements that pertain to the applicable state.[29] These arrangements serve to adapt the general provisions of the SOFA to the individual situation in the respective receiving state. Because of its strategic position, Germany absorbed the biggest Allied contingents. This necessitated the biggest and most complicated supplementary agreement as well.

The general provision concerning Allied security functions is paragraph 10 of SOFA article VII. This paragraph is supplemented by SA/GE articles 12, 20, 28, and 53. Some additional arrangements, outside of the SA/GE, apply as well.

B. The Right to Police On Post

Paragraph 10(a) of SOFA article VII stipulates that "regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State." To claim the "right to police," the premises must be acquired through an agreement with the receiving state. Premises held by way of agreement with private landlords will be subject, in full, to the sovereignty of the receiving state.[30]

1. The Right to Police as a Function of Criminal Jurisdiction.—The "right to police" has two aspects. One task of the police is to conduct criminal proceedings. German legal doctrine calls this the "repressive function of police." This task derives from the criminal jurisdiction of the state. SOFA article VII restricts the exercise of sending-state criminal jurisdiction to their service members, members of their civilian compo-

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applicability of the Moscow Treaty and related arrangements until they are ratified and enter into force permanently.

[28] For the complete text see FEDERAL BULLETIN, No. 123, at 1284 (Sept. 17, 1990).

[29] SOFA preamble, para. 2.

[30] United States authorities should keep this in mind in regard to their WHNS depots and other installations managed by MDBG and similar private agencies.

nents, and their dependents. This is no infringement of the sovereignty of the receiving state because, in these cases, the sending state rightfully may claim the prerogative to exercise its "personal" jurisdiction over its own people. The "repressive" component of the right to police may be executed under sending state law even on the territory of the receiving state.[31]

2. The Right to Police as a Function of *Territorial* Sovereignty.—The second task of the police is the maintenance of public order and security. The police may see to it that any duly enacted laws and regulations are observed, and may prevent the commission of criminal and other offenses. German legal doctrine terms this the "preventive function of police."[32] This task is derived from the duty of the state to safeguard peace and order on its territory. If the state forbids the private use of force and requires its inhabitants to seek redress in the courts, it must guarantee that justice will be done and that violations of the law of the land will be prevented as far as possible.

This "preventive" function of police is, as a consequence, directly related to the territorial sovereignty of the state. This context shows that the preventive component of the right to police under paragraph 10(a) of SOFA article VII is—in addition to an exercise of criminal jurisdiction—a "leased privilege," permitted to the sending state by the receiving state. As a right derived from the territorial sovereignty of the receiving state, its scope depends on the constitutional law of the receiving state even when it is exercised by Allied Forces. No state may grant another state on its territory rights in excess of the powers that the receiving state itself may exercise.[33]

The constitutional laws of most NATO Allies establish essential rights that limit each state's respective police authority. Even though variances in constitutional traditions and legal doctrines have produced safeguards emphasizing different aspects of the peaceful citizen's right to be left alone, the basic concerns addressed by these rights are essentially the same in each nation.

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[31] This is most evident from the wording of SOFA art. VII, para. 1(a)5-7, and SA/GE art. 21, para. 2.

[32] These functions more clearly were divided under the defunct European Defense Community (EDC) Treaties of May 27, 1952. ***See*** EDC Jurisdiction Protocol, art. **30,** no. 8 (establishing repressive function): EDC SOFA, art. **5** (establishing preventive function).

[33] This principle is mandated by Sorth Atlantic Treaty art. 11. This provision was agreed upon at the request of the United States. It was meant to guarantee that NATO arrangements will not supersede national constitutions.

In Germany, recent history prompted a few additional clauses in the "Basic Law" of 1949. The Basic Law is comparable to the United States Constitution. Under the Basic Law, the state may not impede a person's human dignity or the right to privacy. Equality before the law is especially guaranteed. The principle of proportionality, known in the United States as the "minimum force doctrine," as well as the rule of law, serves as the most important check on police power because these police powers can be exercised only under special circumstances. Specific aspects of the rights of freedom of expression, freedom of religion, and habeas corpus cannot be limited by the police. The same applies even more to the constitutional protection of private homes and third-party property.

3. The Direct Applicability of SOFA Article *VII* in Germany. — Paragraph 10(a)2 of SOFA article VII further provides that the exercise of police functions can be taken only by the military police of the Force. The actual enforcement of the law against individuals therefore is a function granted to the military police only, while administrative measures — such as the establishment of restricted areas, traffic regulations, and access rules — may be assigned to other authorities as the sending state sees fit.

As far as Germany is concerned, this clause technically functions as direct legal authority, giving Allied military police "full powers to act."[34] Because the SOFA and the SA/GE, have been adopted by the Federal Parliament,[35] no further act or consent on the part of German authorities is necessary for Allied military police to take actions justified under paragraph 10(a) of SOFA article VII. In effect, this clause authorizes police action to the same extent that similar clauses — also known as "general clauses" — in any German police act would authorize. These clauses typically read, "The police may take all necessary measures to maintain security and public order." This comparison shows that paragraph 10(a)2 of SOFA article VII contains all the important checks of police powers found in these acts — that is, necessity of a threat to security and public order, proportionality of actions taken, and discretion to be exercised by competent officers. Accordingly, paragraph 10(a) enacts no exceptional powers for Allied military police.

This clause will, accordingly, allow any standard police action. One important exception, however, is the requirement for

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[34] *Cf.* LAZAREFF, STATUS OF FORCES 282 (1971).

[35] *See* Approvement Bill of **Aug.** 18, 1961, BGBl 1961, **pt.** II, at 1183

mandatory writs of competent courts in arrests and house searches. These writs, mandated by the Basic Law, cannot be incorporated reasonably into the SOFA rules. Obviously, Allied military police can conduct arrests and searches[36] even though they otherwise could be carried out only upon the order of the competent German court.

The second impediment to Allied military police is paragraph 3 of Basic Law article 14. Under this clause, any infringement on, or use of, third-party property is an unlawful expropriation unless the Act of Parliament authorizing the particular action provides for sufficient compensation. Because neither the SOFA itself nor the Approvement Bill of 1961 contain such compensatory clauses, third-party property is strictly off limits to Allied agencies.

C. *Paragraph 10(b) of SOFA Article VII* as *a* Lex Imperfecta

In contrast to paragraph 10(a) of SOFA article VII, paragraph 10(b) is a ***lex imperfecta.*** This provision allows competent local authorities of the Force and German security agencies to enter into arrangements that authorize and regulate common activities necessary for the maintenance of discipline and order among members of the Force.

D. *Police Practice Under SOFA Article VII*

The basic principle of paragraph 10 of SOFA article VII is the distinction between actions occurring on post and actions occurring off post. While the Force enjoys the full right to police its installations, police action off post is limited to exceptional situations.[37] This distinction also appears in the German Use of Forces (Armed Forces) Act of 1965. As a consequence, cooperation with German military police is reasonable only when a German restricted area — that is, a ***militarischer Sicherheitsbereich — has*** been established and all measures under the 1965 Act have been taken.[38] Outside these areas,

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[36] This applies only to the "preventive" police function.

[37] This distinction is fundamental to any important Western SOFA after World War II. Identical provisions can be found in article 5 of the defunct EDC SOFA of 1952 and, more recently, in article 9, paragraphs 1 and 2, of the new German-Soviet SOFA of 1990.

[38] Permanent restricted areas established by Allied authorities will qualify as a *militärischer Sicherheitsbereich* under section 2 of the 1965 Act, while provisional restricted areas, such as crash sites, may be established only by *Bundeswehr* authori-

state police of the Lander is the competent agency.[39]

1. Specific Measures *of* Security *Officers.*—The right to police includes identity checks—to include access controls, exit controls, and on-post checks—even if Germans may find them unusual. These checks may be backed up by physical examinations, such as photos and fingerprints, if specific necessities of security and public order require them. In the course of investigations, suspects and witnesses living on post may be called in to testify, and in some cases subpoenaed.

If sufficient dangers arise, installations or parts thereof may be declared restricted areas with additional controls, or may be closed off completely and evacuated. Demonstrations and protests may be regulated, forbidden altogether, or stopped through similar actions. German law does not require a landlord to facilitate these activities and, like any landlord or rightful tenant, the post commander may allow or forbid such activities, subject them to certain conditions, and enforce his or her decision. This applies to all installations—including those without a purely defensive military mission, such as housing areas—even if they are not specially protected by fences. Under German law, a road belonging to an installation will remain legally "private" even if it is open to the public, and it may be closed off at the discretion of the owner.

The military police may apprehend a person not only in cases of summary arrest, but also in cases of preventive detention when a danger in delaying could arise. If action is not urgent, a prior decision of the competent court is mandatory. Otherwise, this decision must be obtained on the same or following day.[40] Courts of the sending state may exercise criminal jurisdiction only over certain people related to the Force and may determine the propriety of summary arrests in criminal and disciplinary proceedings in these cases. Therefore, military police who execute a preventive detention of someone not connected with the Force must hand over the detainee to the German police. A competent German court then will review the act.

The right to police the installation includes authority to search persons and their belongings. This applies even during

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ties. *See* 4th BUNDESTAG, doc. 1004, at 8; LINGENS, NEUE ZEITSCHRIFT FÖR WEHRRECHT 167, 172 (1981).

[39] The legal background to this is the distribution of jurisdictions between Federal and *Länder* governments. In particular, the right to maintain police is one of three essential pillars of *Läer* jurisdiction under Basic Law arts. 30 and **70.**

[40] *See* BASIC LAW art. 104, para. 2.

"open houses" and similar public events. Competent authorities may decide to forbid or restrict photographing on post. In case of violations, offenders may be searched, removed from the installation, and forbidden to reentering. Films and cameras also may be seized.

Private homes, however, are protected under article 13 of the Basic Law; this applies even to military housing areas. If homes are searched in the course of criminal proceedings, a prior order by a competent court is mandatory except when a danger in delay exists. A search in the course of "preventive" police action is also dependant on a prior court order. Because this order would have to be issued by a German court, it must be executed by German police.

2. Police action in extraordinary situations. — Paragraph 10 of SOFA article VII is not limited to these standard police measures. This clause allows any necessary action in the maintenance of security and public order as the particular situation may require. Even deadly force may be employed when necessary — for example, in hostage situations. Military police may do whatever is necessary to free hostages. German legal doctrine has developed this notion in the context of bank robberies. If the lives of hostages imminently are threatened and cannot be protected by lesser means, a hostage taker may be killed by police. Of course, the courts ask hard questions, and the state police specially train and equip special weapons teams for these purposes.[41] The ultimate task of these teams is to free victims without killing offenders. Even in on-post incidents, calling in these teams and putting them at the disposal of Allied commanders should be relatively quick and effortless.

The INF controversy has generated many examples of blockades and other disturbances at installation fences and gates. Paragraph 10 of SOFA article VII, however, normally restricts the employment of Allied military police to on-post duty. On the other hand, paragraph 10 stipulates that military police may be employed with no restrictions when the effects of the threat may materialize on post. While paragraph 10(b) would be violated by military police action aimed solely at effects off post, it may be deemed lawful under paragraph 10(a) to take action off post, if security and public order on the installation imminently and gravely are menaced.

Commanders contemplating these types of actions, however, must bear in mind that SOFA article VII draws the line at the

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[41] These units, called MEK or SEK, are stationed in most major cities

perimeter of the installation and allows for no areas in the immediate proximity of the installation to be deemed "on post".[42] Patrols can be conducted by military police only if the surroundings of the installations are considered public places under SA/GE article 28.

Allied military police may conduct traffic controls on post. This practice conforms with paragraph 10 of SOFA article VII to the extent road safety is ensured. Controls in the "repressive" police function, however—such as speed limits and controls—have to conform with the limits set by the sending state's jurisdiction.[43]

Sentry and guard services need not be construed as part of the "right to police" under paragraph 10. The SOFA's negotiating history indicates that classifying sentry and guard services as operations conducted by the rightful tenant of the installation is appropriate.[44]

III. Special Allied Rights Under SA/GE Provisions

Allied military police and other security personnel in Germany enjoy additional rights under SA/GE articles 12, 20, 28, and 53. Because paragraph 10 of SOFA article VII grants full powers to act only on post, these additional rights are most important to justify action off post. Specifically, these rights actually must be invoked—especially when conducting criminal investigations against persons under the jurisdiction of the sending state off post.

A. Self-Defense Under SA/GE Article 12

SA/GE article 12 was derived from article 29 of the 1952/1954 SOFA and deals with the right to possess, carry, and use arms. The right to possess and carry arms under paragraph 1 of article 12 addresses only members of a civilian component and other employees of the force. This means that article 12 is directed at CSU personnel, civilian personnel, and even local

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[42] This was raised explicitly in the SOFA negotiations. Cf. NATO SOFA doc. MS(J)-R (51) 5, *supra* note 22, at 16(b).

[43] United States regulations defer the prosecution of speeding violations off post to German police in almost any case unless the latter request the military police's assistance. ***See*** SOFA art. 28, para. 2.

[44] The new German-Soviet SOFA of 1990 explicitly distinguishes the right to police under article 9, paragraphs 1 and 2, from the right to escort and sentry operations under article 2, paragraph 8. ***See*** *also* SA/GE art. 53.

hire guards.[45] It does not apply, however, to military personnel—to whom SOFA article VI applies[46]—nor to employees of local contractors—to whom German law applies. Allied authorities enjoy discretion to grant the right to possess and carry arms to persons who come under article **12.** German weapons legislation will not apply.

While they enjoy discretion under paragraph **1** of article **12,** paragraph **2** of the same article mandates that Allied authorities **"shall** issue regulations, which shall conform to the German law on self-defence (Notwehr), on the **use** of arms by persons authorized in accordance with para. **1."** Accordingly, no discretion over the decision to issue these regulations actually exists.[47] Rather, these regulations must be issued, and German law becomes the strict upper limit in the use of force.

The German law referred to in article **12** is cited specifically and defined by the "Protocol of Signature to the Supplementary Agreement re Art. **12.** So Art. 12,"[48] which is not a "dynamic," but a "static" reference. This means that the Allies have to observe the law of self-defense as stated in section **53** of the former Penal Code[49] and as developed by the courts until 1959.[50] Article **12,** however, does not ***require*** Allied regulations or local commanders to exercise these powers in full. In other words, nothing in article **12** restricts an Allied Force commander from not taking action in self-defense and calling in the German police instead.

A change in German law would warrant a new treaty amending article **12** only if Germany's Parliament—or its courts—expanded the cases in which self-defense may be invoked. This, however, is unlikely. If self-defense were restricted, the

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[45] *See* SA/GE art. 56, para. 4

[46] *Cf.* LAZAREFF, *supra* note 34, at 126; Summary Record From SA/GE Negotiations, SC/SR/2 pt. XII, at 35; ***see*** U S Air Force Accounting and Finance Center, Text of Negotiating History of NATO/SOFA Supplementary Agreement with Germany. doc. SC/WD/87, at 612, 1028 [hereinafter Kegotiating History].

[47] Article 29, paragraph 1(1) of the 1952/54 SOFA allowed for this discretion, but later was changed on this point.

[48] *See* Protocol of Signature to the Supplementary Agreement, at 1350 ("The present Protocol of Signature shall constitute an integral part of the Supplementary Agreement").

[49] The FRG Penal Code was reformed and restated totally in 1974. The provisions addressing self-defense moved to sections 32 and 33.

[50] While the FRG had proposed a dynamic reference, the Allies demanded—and received—concrete rules. *Cf.* Negotiating History, *supra* note 46, doc. SC/SR/18 (annex), at 1185.

Allies would be free to stay with the old law or follow suit by amending their regulations.[51]

These regulations should be sufficient to address the tasks of nonmilitary sentry services and escorts. While regulations under paragraph 2 of article 12 are technically applicable only to personnel mentioned in paragraph 1, presumably military personnel also will be subject to them as a matter of practicability. The legal basis for this practice, however, will have to be found elsewhere.

B. Summary Arrest Under Article 20

SA/GE article 20 grants competent Allied agencies the right of summary arrest with respect to offenders not under the criminal jurisdiction of the sending state as established in SOFA article VII. Only competent agencies—not just any soldier or employee—may invoke this right. This provision is proof of the assumption that criminal jurisdiction under SOFA article VII is meant to include not only criminal court proceedings, but also criminal investigations and any criminal proceedings leading to an indictment. As a consequence, the right to arrest people within the criminal jurisdiction of the sending state is included in SOFA article VII, and the laws of the sending state are to be applied on foreign territory.

The right to arrest under SA/GE article 20 appears in three forms.[52] A general right of summary arrest exists, which is enjoyed by any private person under section 127, paragraph 1, of the German Code of Criminal Procedure (CCP). This right applies if a person is found to be preparing to commit, or in the act of committing, a criminal offense.[53] In addition, the right of summary arrest is enjoyed by police and public prosecutors under CCP section 127, paragraph 2. This right applies if an urgent reason exists to believe that a person is committing or has committed an offense. Finally, Allied authorities may arrest persons upon request of competent German authorities or

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[51] As a matter of courtesy among Allies, following suit would be appropriate. In the era of public relations, an exchange of letters between competent authorities would be the right vehicle because the substance of any exchange not only would be legally binding, but also would be easy to conclude and easy to amend in the future.

[52] In a sharp departure from article 7 of the 1952/54 SOFA, SA/GE article 20 is based strictly on German law. *Cf.* Negotiating History, ***supra*** note 46, doc. SC/SR/12 pt. V, at 1098); ***id.*** pt. 111, at 1125.

[53] As to mistakes of fact, see Negotiating History, ***supra*** note 46, doc. SC/WD/252 (annex A), at 906.

authorities of other sending states that enjoy jurisdiction over the arrested person.[54]

Article 20 provides the only right to detain persons not under the jurisdiction of the Force. The right to arrest includes all measures necessarily incidental to it. For example, the detainee and his or her belongings may be searched and evidence may be seized. Any seized material, however, must be turned over to competent authorities.

C. The Right to Patrol Off Post Under Article 28

The wording alone evidences that SA/GE article 28—while being derived from article 23 of the 1952/54 SOFA—actually refers to SOFA article VII, paragraph 10(b).[55] Off-post action taken under article 28, therefore, is restricted to military police officers. In other words, security personnel such as guards, patrols, and sentries may not invoke article 28. Furthermore, article 28 was drafted based on the assumption that the military police are not restricted to actions that are justified only under article 28; rather, they still may take recourse to German civil law rules of self-defense.

1. Individual Rights Under Article 28.—Paragraph 1(1) of article 28 functions as a "general clause," in the same way that SOFA article VII, paragraph 10(a)2, operates—that is, it effectuates the special task of maintaining order and discipline "with respect to the members of a force, etc." To facilitate this task, the right to take action against members of the Force is coupled with the right to patrol any roads, transports, and places open to the public. The limitation to public places renders off-post private homes off limits to the military police. Military police may enter off-post private homes only upon a prior order of the competent court.

The rights under article 28, paragraph 1, correspond to the responsibility of Allied Forces not to disturb the peace. This responsibility is evident from article 28, paragraph 2, which states that if members of the Force are involved in an incident, Allied military police *have* to take action upon the request of the competent German authority.[56]

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[54] In the case of concurring jurisdiction under SOFA article VII, paragraph 3, both states' authorities may request the arrest. *Cf.* SA/GE art. 20, para. 4; Negotiating History, *supra* note 46, doc. SC/SR/26, pt. IV, at **1235; *id.*** doc. SC/WD/252 (amend.). at 906.

[55] *Cf.* Negotiating History, *supra* note 46, doc. SC/WD/96, at 630.

[56] *Id.* doc. SC/WD/135 at 706; ***id.*** doc. SC/WD/749, at 724.

2. *Article* **28** *as a Partial Violation of the* SOFA.—Article 28 of the SA/GE grants rights in excess of SOFA article VII, paragraph 10(b). The SOFA's negotiating history, however, clearly demonstrates that the latter provision was drafted in response to the minor Allies' concern that the major Allies—who were predicted to be, and continue to be, the major sending states as well as the Allies with superior "bargaining power"—would demand privileges infringing on the receiving state's sovereignty. Article VII, paragraph 10(b), being a protective clause on behalf of the receiving State, must be construed to block and invalidate any supplementary arrangements deviating from its specifications in favor of sending states.[57]

Consequently, SOFA article VII, paragraph 10(b), renders agreements with local authorities under SA/GE article 28, paragraph 1(2), not as "necessary or expedient," but as mandatory. No action whatsoever may be taken unless it is agreed upon by local authorities and carried out in "close mutual liaison." Paragraph 10(b) of SOFA article VII strictly precludes any "independent" operations off post when local authorities are absent.

The negotiating history of SOFA article VII, paragraph 10(b) also prompts the conclusion that action under these arrangements between Allied Forces and local authorities not only is legitimate with respect to members of the Force, but also may be agreed upon with respect to all members of a civilian component, except for dependents.[58] This renders SA/GE article 28, paragraphs 1 and 2, invalid to the extent that no action may be taken with respect to dependents. If dependents are involved in incidents off post, German authorities—as the agency of the territorial sovereign—are required to maintain or restore order. After order has been restored, offenders will be dealt with according to SOFA article VII.

D. The Administration of Premises Under Article **53**

Article **53** of the SA/GE puts into operation a very special—and very favorable, at least from the sending State's perspective—administrative regime for Allied installations. This provision replaced article 21 of the 1952/54 SOFA. Allied Forces

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[57] *Cf.* **LAZAREFF,** ***supra*** note **34,** at **72.**

[58] Because of complicated negotiations, the SOFA's English version was modified at the United Kingdom's request to exclude "civilian components," while the French version included them. See Negotiating History, ***supra*** note **46,** doc. **D-D** (61) **23,** at art. VI para. 9(b), MS-D **(51) 2,** MS-R (61) 16 at **22,** MS-R (61) **10** at 2/3.

need not buy land or facilities. Instead, the Federal Treasury will acquire these accommodations in the execution of programs under SA/GE article 49. If accommodations are released under SA/GE article **52,** the Force will not be responsible for finding a new tenant or buyer, or for redeveloping the facility.

1. The Privileged Status of Allied Premises.—During the period a facility is used by a Force, its status can be characterized as a lease between the German Federal Treasury and the Force that has been modified by far-reaching privileges. These privileges justify the notion that the leases effectively turn Allied Force facilities into quasi-estates.[59] This notion clearly is demonstrated by the fact that the Force, as the tenant, is entrusted with the administrative police functions[60]—and the military police with actual police duties. Allied authorities will issue regulations to maintain order and security as they see fit. This provision is all the more important because SOFA article VII, paragraph **10,** is based on the mutual understanding that these facilities must not develop into *actual* extraterritorial estates.[61]

2. *The Standards of Security Under Article 53.*—Paragraph 1(2) of SA/GE article **53** requires the Allies to adopt "standards equal to or higher than those prescribed in German law" in their regulations. This clause has been the focus of legal controversy in recent discussion and some practitioners have referred to it in trying to restrict Allied rights. The restrictive nature of this provision, however, affects only the operation of technical facilities—for example, emission standards for electric power plants, sewage installations, heating plants, and even training ranges.[62] On the other hand, with respect to action against offenders taken in the maintenance of order and

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[59] Even the German authorities' access to Allied installations, as provided by the Protocol of Signature, SOFA article 53, paragraph 6(b), was made conditional on an on-the-record declaration of Germany to waive this right. *Cf.* Negotiating History, ***supra*** note 46, doc. SF/SR/48, pt. VII, at 1670. Mutual trust and cooperation, however, will collapse in the long run if access is denied without demonstrating grave reasons of national security. Access under Protocol of Signature, SOFA article 53, paragraph 6(b), may be claimed only by competent administration officers. Courts and legislators—as well as other politicians—do not enjoy this right. Accordingly, the United States was acting completely within its rights under SA/GE article 63 when it denied German politicians access to the Fischbach depot in 1989. A similar provision was included in article 8, paragraph 4, of the German-Soviet SOFA 1990.

[60] ***See*** Protocol of Signature, SOFA art. 63, paras. 5, 6.

[61] *Cf.* NATO doc. MS(J)-R (51)5, at 16(c); (51)6, at 15, 17; ***see also*** 18 Halsbury § 1610 (United Kingdom).

[62] For an explanation of the controversy surrounding the Bradley ranges at Wildflecken, see "Neue Juristische Wochenschrift," VGH KASSEL 677, 679 (1986). As to SOFA article 53, see Protocol of Signature, art. 53, paras. 5c, 5f.

security, the effect of article **63,** paragraph 1(2), actually expands Allied rights.

Article **63** requires security standards at least equal to German standards. In other words, the level of security must be at least as high as under German law. Accordingly, Allied authorities may regulate—and even prohibit—behavior on post that could not be construed as a danger to security and public order under German police law. If these on-post security regulations are to be enforced, Allied agencies naturally may take action that otherwise would be unlawful for German Police to take.

3. Other Aspects.—In organizing its administrative functions, the Allies are free to follow their own procedures. The responsibility for issuing and enforcing regulations may be assigned to the sending state's agencies as that government sees fit. The discretion in organizing the enforcement of regulations under SA/GE article **63,** paragraph 1(2), for instance, permits the sending state to organize on-post guard and sentry services.

The Allies enjoy wide discretion in drafting their security regulations. Article **63,** paragraph 1(1) simply requires that the measures taken be "necessary for the satisfactory fulfillment" of the Force's defense responsibility. The only check that has been incorporated is the word "necessary." Its implication is that any measures deemed "necessary" must be proportional to the intended result to be achieved.

IV. The Commander's Right of Self-Defense

The Allied Forces have certain additional rights that date from the occupation period. These rights derive from various exchanges of letters.

A. The Military Commander's Rights Under the Bonn Treaties

As part of the Bonn Treaties of May 26, 1962, article 6, paragraph **7,** of the "Convention on Relations between the Three Powers and the Federal Republic of Germany"—which is not identical with the Bonn SOFA of 1952—provided, "Independently of a state of emergency, any military commander may, if his forces are imminently menaced, take such immediate action appropriate for their protection (including the use of armed force) as is requisite to remove the danger."

1. *The Letter of October 23,* 1954.—The Paris Treaties of October 23, 1954, which opened membership in NATO to Germany, amended this convention and, *inter alia,* rolled back the emergency powers that the Three Powers enjoyed in the 1952 Convention. Paragraph 7 of article 5 of the Relations Convention also was omitted. Instead, in a letter to the Secretaries of State of the Three Powers, the Federal Chancellor Conrad Adenauer declared that

> independently of a state of emergency, a military commander may, if his [or her] forces are imminently menaced, take such action appropriate for their protection (including the use of force) as is requisite to remove the danger. The Federal Government is of the opinion that this is the inherent right of any military commander according to international law and therefore German law. I therefore wish to say that the right referred to in paragraph 7 of Article 5 of the Convention on Relations between the Three Powers and the Federal Republic of Germany will not be affected by the deletion of that paragraph as provided by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany.

This letter was forwarded at the request of the Three Powers. It was discussed explicitly and affirmed in Parliament, and is part of the Approvement Bill for the Paris Treaties of March 24, 1955.

2. *The Declarations of* 1956 *and* 1968.—In the negotiations to conclude the SA/GE, the German delegation answered Allied requests for similar provisions on security by citing this letter.[63] When Germany finally passed emergency laws in 1968, then-Foreign Minister Willy Brandt again explicitly reaffirmed the 1954 letter in an exchange of notes with the ambassadors of the Three Powers.[64]

B. The Legal Validity of These Letters

For these declarations to be considered valid, the principle of self-defense must be an "accepted rule in the Law of Nations" under article 25 of the Basic Law. Article 25, however, has been construed very restrictively by the German Federal Constitutional Court. If the tests mandated by the Court are

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[63] *Cf.* doc. GS/Memo/16, June 23, 1966; Negotiating History, *supra* note 46, at 2463.

[64] *Cf.* FEDERAL BULLETIN, No. 68, at 681 (1968).

applied, the right of military self-defense is clearly a well-founded principle in the Law of War, but no Allied power has accepted strict limits to this right. Consequently, because of the lack of an agreed definition, the principle of self-defense has not been defined with the requisite precision to be an accepted *rule* of the "Law of Nations" under article 25.[65]

Therefore, the Adenauer letters are legally wrong. In exchanging these letters, however, the German Government consented to this interpretation of the law of self-defense. These letters, therefore, constitute an additional international agreement and uphold in full the rights previously found in article 5, paragraph 7, of the 1952 Convention.[66] Note, however, that these letters were addressed to the Three Powers; therefore, these rights cannot be invoked by the other NATO Allies.

Interestingly, the letters may be responsible for a strange twist of history. The documents concerning article 5, paragraph 7, of the 1952 Convention upheld rights exercised by the Three Powers as the occupying powers after World War II. They now have revoked all their remaining rights as occupying powers, effective October 3, 1990. Thus far, however, no new letter upholding the military commander's rights under article 5, paragraph 7, has been published. Accordingly, these rights arguably did not survive German reunification and ceased to exist on October 2, 1990.

B. The Practical Importance of the 1954 Letter

The self-defense clause clearly justifies off-post guard and escort operations. The simple presence of armed escorts with a transport is covered sufficiently by SOFA article VI and SA/GE article 12, paragraph 1. If officials involved in these types of operations are in imminent danger from outside sources, they may act in self-defense under article 5, paragraph 7 of the 1952 Convention or under the Adenauer letters. Ironically, however, the employment of Allied military police actually is restricted by SOFA article VII, paragraph 10(b), which limits their off-post authority to situations that threaten discipline and order among the members of the Force. Accordingly, these

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[65] *See Rojahn in:* von Munch, 2 GRUNDGESETZ, art. 26, at 17, 27; 29 BVerfGE 348, 360 (discussing Basic Law article 69).

[66] *Cf.* Vienna Convention on the Law of Treaties art. 46.

self-defense operations must be conducted by units, rather than by individuals.[67]

V. Limits of Self-Defense Under German Civil Law

Recourse to civil-law rules of self-defense is not recognized under German law with respect to police functions. In particular, an innocent bystander or other "third party" cannot be protected against his or her will in case of an accident. Similarly, the responsibility of a sending state, as the owner of dangerous property involved in an accident, does not justify members of its armed forces in providing protection to parties who do not consent.

Sending states will find no exception to this rule under article **28** of the SA/GE. The right of the Force to patrol and intervene applies exclusively to members of the Force and its civilian component. It cannot be invoked to cordon off public or private places off post without the owner's prior consent. Self-defense does not cover a situation involving a private property owner because invoking the right of self-defense would require a concrete and imminent attack against military property that is involved in an accident. The general consideration that open access to the site for bystanders may endanger military secrets does not suffice. In these situations, only German State Police or Military Police can establish and enforce a restricted area.

German law, however, gives the owner of personal property limited rights to secure his or her property against theft on third-party land under Civil Code sections **867** and **229.** If restricted areas are established pursuant to these sections, however, these areas would be treated as "temporary installations." Accordingly, they retain their off-post character, and Allied authorities may conduct investigations accordingly.

The practice of establishing an "inner circle" where Allied military police operate freely and give—and eventually enforce—orders to German civilians[68] is strictly illegal under SOFA and SA/GE arrangements. This creates major problems in justifying the present practice with respect to incidents such as plane crashes and accidents involving ammunition transports. The same principles apply to restricted areas estab-

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[67] United States regulations assume, however, that military police may be employed. By contrast, the same regulations reveal that in the BENELUX states any similar operation is reserved to the military police.

[68] **An** example of this was the operation after the **A-IO** crash at Remscheid in 1989.

lished during maneuvers. Except for actions in self-defense and summary arrests, German police or military police must be employed to fend off intruders.

VI. Constitutional Tangles Regarding the SOFA and the SA/GE

Even though they are of relatively minor practical importance to Allied Forces, some additional "trip wires" can be found with respect to the German Approvement Bill of **1961.** The German Constitutional Court has held that the Basic Law distinguishes the international validity of a treaty from its binding force as national law.[69] To become binding law on the national level, a treaty has to be enacted by an approvement bill under article 69 of the Basic Law. The approvement bill has to satisfy the specifications of the Basic Law as does any other bill.

The provisions of the treaty must conform substantively to the standards of the rule of law doctrine under article **20,** paragraph **3** of the Basic Law. In particular, they must give specific rules of law—not mere political declarations. The negotiating history of the NATO SOFA and the SA/GE evidence that these treaties conform to this test. In addition the approvement bill must conform to the procedural requirements of article **19.** Article **19,** paragraph 1(2) mandates that any bill allowing official action interfering with the human or civic rights granted by the Basic Law must cite these rights explicitly. For instance, article **2** of the **1961** Bill cites exclusively the habeas corpus clause of SA/GE article **20.** This renders the bill invalid under SOFA article VII, paragraph **10,** and SA/GE articles **12, 28,** and **63,** to the extent action under these provisions interferes with the right to life and physical integrity and the protection of private homes. Because these rights are human rights under German law, they are also applicable to foreigners on post.

To the extent the **1961** bill is invalid, the Allies can, according to the German Constitutional Court, demand the full enjoyment of their agreed upon rights. Offenders, however, as third parties to the international treaty, are not obliged to tolerate the enforcement of these rights. If they resist Allied enforcement, they cannot be prosecuted in German courts. If they suffer harm to life, limb, or property, civil courts would have to award damages. Accordingly, demanding that Germany amend

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[69] *See, e.g.*, **72** BVerfGE 200, **264.**

the 1961 Approvement Bill for the SOFA and the SA/GE, so that it conforms with article 19 of the Basic Law, would appear to be in the best interest of the Allies.

VII. Summary

Taken together, the SA/GE provisions contain important modifications of SOFA article VII, paragraph 10, in favor of the sending states. The Allies maintain that these provisions address the special situation of Germany and the problems generated by the size of Allied Forces in Germany. The Allies' position is somewhat true, but all of these clauses can be traced back to articles 7, 21, 23, and 29 of the German-Allied SOFA of 1952,[70] which was part of the Bonn treaties and which was concluded when the Occupation Statute of 1949 was still in force. The 1952 SOFA was reviewed in Paris in a hurry, and the mentioned provisions were included—identical up to the numbers—in the Paris SOFA of October 23, 1954.[71] These clauses fairly adapt the NATO SOFA framework to entrenched customs of the occupation period, not vice versa.[72]

These clauses predictably will be questioned in the upcoming years even more than they were during the INF controversy. Parts of these provisions are relics of the occupation, and they will be viewed as such. These parts, however, do not conform with the full sovereignty Germany was guaranteed in the reunification treaties. Accordingly, the negotiations to revise the SA/GE will have to address these lingering questions. Moreover, the new SA/GE will survive politically only if it contains a lot more of the SOFA's common-sense provisions and very few—or no—vestiges of the 1952 Convention.

On the other hand, the NATO SOFA has proved itself to be a fair compromise between receiving and sending states. It can—and should—be the legal basis of deployments in 1995 and beyond. Accordingly, the Allies may be wise to put the old occupation privileges on the table before the popular political debate in Germany reaches the boiling point. This would leave room and precious time to sort out entrenched customs from the still-valid concerns that the parties must address.

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[70] BGBl. II, at 78 (1954).

[71] *Id.* at **321** (1966).

[72] *Cf.* **Mark** D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 116 (1988).

As a German, I may predict that German politics will be consumed by the problems of real inner reunification. Ironically, I have to hope that the Allies will offer a new SA/GE so that the old one will not fall altogether. The recent history of my country has taken some breathtaking turns—some lucky, some not. This must not irritate us—especially not those of us who contemplate events in the long run and who wish to keep this country in the NATO fold. Nevertheless, the termination of Allied prerogatives with respect to Berlin and Germany as a whole—which entered into effect on October **3,** 1990—was a big step in forming Germany's long-term position in Europe and in NATO; it was a wise step, as well.

DEFENSE WITNESS IMMUNITY AND THE DUE PROCESS STANDARD: A PROPOSED AMENDMENT TO THE *MANUAL FOR COURTS-MARTIAL*

MAJOR STEVEN W. MYHRE*

So in the Libyan fable it is told,
That once an eagle, stricken with a dart,
Said, when he saw the fashion of the shaft,
With our own feather, not by others' hands,
Are we now smitten.

—Aeschylus

I. Introduction

Testimonial "use" immunity' is a powerful weapon for penetrating complex criminal conspiracies and producing evidence leading to successful prosecution. When confronted with a particularly secretive, devious, or sophisticated criminal conspiracy, the government often "immunizes"[2] the less culpable actors to go after the "bigger fish."[3] While the practical effect of this practice is to forgo the prosecution of the lesser actor, this societal cost is outweighed by the benefits derived from prose-

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[1] The term "use" immunity refers to the scope of the protection afforded the witness who receives the grant of immunity from the appropriate authority. The scope of the immunity encompasses protection from the Government's use of the immunized testimony or use of evidence derived from the immunized testimony in a subsequent criminal proceeding. "Use" immunity should be distinguished from "transactional" immunity, which protects a witness from a subsequent prosecution for the criminal transaction about which the witness has testified under an appropriate grant. For background and general discussion, see MCCORMICK ON EVIDENCE § 143 (Clary Brauer ed., 3d ed. 1984).

[2] The term "immunize" will be used interchangeably with, and will have the same meaning, as the phrase "to confer a grant of immunity."

[3] For a general discussion on the value and effectiveness of immunity as a prosecutorial device, see John A. Darrow, *Immunity*, AM. CRIM. L. REV. 1169 (1989).

cuting the most nefarious criminals in an organized conspiracy.[4]

Sadly, criminal organizations continue to launch all-out assaults against the safety, security, and well-being of our society, thereby increasing the importance of use immunity in the continuing combat against these execrable organizations. Nevertheless, some courts have sought to place the Damoclesian sword of testimonial immunity into the hands of a criminal defendant by vesting in that person the right to have a defense witness immunized upon an offer of proof[5] that the witness will offer clearly exculpatory evidence.[6]

Like the eagle in the Libyan fable cited above, one is struck by the irony of placing a law enforcement device into the hands of the defense to be used against the government. The practical effect of this right is to cause the government to either alter the order of its prosecution or to forgo prosecution of coconspirators altogether.[7]

While this right is found in the minority of federal courts split over this issue,[8] the military has adopted the rule into its practice and continues to breathe life into it.[9] As a result, present military practice requires the judge to inquire into the exculpatory nature of the proffered testimony. If it is clearly exculpatory, then the judge must either order a grant of immu-

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[4] For a general discussion by the former United States Attorney for the Northern District of Illinois concerning the policy factors to consider when conferring grants of immunity, see William J. Bauer, *Reflections On The Role Of Statutory Immunity In The Criminal Justice System*, 67 J. CRIM. L. & CRIMINOLOGY 143, 145-53 (1976).

[5] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 103(a)(2) [hereinafter Mil. R. Evid.]. Because the defense witness holds the privilege, no other means exists to assess the nature of the expected testimony except by way of an offer of proof unless, of course, the witness has made some other pretrial, out-of-court statement.

[6] "Exculpatory" is defined as that which tends to clear from alleged fault or guilt. BLACK'S LAW DICTIONARY 508 (5th Ed. 1989). The phrase "clearly exculpatory" appears to be borrowed from the line of cases descending from Brady v. Maryland, 373 U.S. 83 (1963), and culminating in United States v. Augurs 427 U.S. 97 (1973). In these cases the Court held that in the absence of a specific discovery request, a prosecutor withholding evidence from the defense would not violate due process unless it was clearly exculpatory — that is, "highly probative" and of "obviously of such substantial value to the defense" that the withholding would violate notions of fundamental fairness. *Augurs*, 427 U.S. at 110.

[7] *See infra* text accompanying notes 179-181.

[8] *See infra* text accompanying notes 149-150. For analysis of state court decisions dealing with exculpatory witness immunity, see Robert M. Schoenhaus, Annotation, *Right of Defendant In Criminal Proceeding To Have Immunity From Prosecution Granted to Defense Witnesses*, 4 A.L.R. 4th 617 (1981).

[9] *See* United States v. Alston 33 M.J. 370 (C.M.A. 1991) (although not reversing judge's denial of the defense motion, court applied the "clearly exculpatory" standard).

nity for the defense witness or abate the proceedings,[10] thereby ensuring the defendant's right to present this evidence.

While changes to this practice have been proposed,[11] none have been forthcoming. Although the "clearly exculpatory" standard has gained great favor in scholarly works advocating the right to obtain immunity for a clearly exculpatory defense witness,[12] the federal courts have not uniformly embraced it. Furthermore, as if to obfuscate the issue even more, the military courts have been reluctant to depart from their present line of decisions favoring the clearly exculpatory standard.[13]

This article proposes an amendment to the *Manual for Courts-Martial (MCM* or *Manual)* changing the existing rule. The proposal will eliminate the defense's right to witness immunity when the grant will affect the government's interest in the future prosecution of the witness. Instead of focusing on ethereal notions of "the court's truth-finding function"[14] and "separation of powers,"[15] this article will focus on the role of immunity in the law enforcement process and how the creation of a defense right to immunity will affect the adversary process within our system of justice. It will argue that defense witness immunity should be allowed only when the government either has interfered with the defense access to an available witness or has no interest in preserving evidence for the future prosecution of the witness.

This article will conclude that the military courts should use a test that employs the due process standard, which represents the standard used in the majority of federal courts. Before arriving at that conclusion, however, an examination of the pre-

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[10] Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 704(e) [hereinafter R.C.M.].

[11] *Manual for Courts-Martial Notice of Proposed Amendments,* 55 Fed. Reg. 26740 (1990).

[12] *See* Peter Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71 (1974); Note, *The Sixth Amendment Right to Have Use immunity Granted To Defense Witnesses,* 91 HARV. L. REV. 1266 (1978) [hereinafter Note, *Sixth Amendment];* Debra Mass, Note, *Witness for the Defense: A Right to Immunity,* 34 VAND. L. REV. 1665 (1981). *But see* Alfred Hill, *Testimonial Privilege and Fair Trial, 80* COLUM. L. REV. 1173, 1181-85 (1980) (arguing that the courts should not extend the Sixth Amendment right to present evidence to statutory privileges); Richard L. Stone, Note, *The Case Against a Right to Defense Witness Immunity,* 83 COLUM. L. REV. 139 (1983) (arguing that separation of power and other prudential considerations weigh against judicial interference with the prosecution function).

[13] *See infra* text accompanying notes 83-110.

[14] *See* Westen, *supra* note 12.

[15] *See* Stone, *supra* note 12.

sent rule and the evolution of its authoritative basis is necessary.

II. The Right to Defense Witness Immunity Under the Present Rule

Presently, a defendant's entitlement to witness immunity is embodied in Rule for Courts-Martial (R.C.M.) 704(e),[16] which states:

> *Decision to Grant Immunity.* Unless limited by superior competent authority, the decision whether to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated upon findings that:
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> (1) The witness' testimony would be of such central importance to the defense case that it is essential to a fair trial; and
>
> (2) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify.

The rule usually is invoked in the context of a trial involving either a conspiracy or accomplice theory of criminal liability. Either before or during trial, the defense may discover that the testimony of an alleged coconspirator or coactor will show that the witness—or someone the witness knows—and not the accused, was involved in the criminal act. This testimony, accordingly, would rise to the level of clearly exculpatory evidence.[17] Because of the nature of testimony, the witness will

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[16] *See* R.C.M. 704(e).

[17] As the Supreme Court has noted, exculpatory evidence is, by its nature, an inevitably imprecise standard, the significance of which seldom can be predicted accurately until the entire record is complete. Augurs, *supra* note 6, at 108. The imprecise nature of the clearly exculpatory standard has led some military courts to engage in strained reasoning to avoid a finding that proffered defense witness testimony was clearly exculpatory. *See, e.g.*, *Alston,* 33 M.J. at 370 (defense witness testimony was not clearly exculpatory because it merely served as potential credibility and impeachment evidence); United States v. James, 22 M.J. 924 (N.M.C.M.R. 1986) (evidence that defense witness was with accused during time of alleged robbery and did not observe

claim the privilege against self-incrimination,[18] thereby precluding the testimony without a grant of immunity. Consequently, the defense will argue that a grant of immunity under R.C.M. 704(e) is required to compel the witness's testimony to ensure that the defendant receives a fair trial.

As a first step, the defendant must apply to the general court-martial convening authority (GCMCA) for the immunity.[19] When the defense witness is a potential defendant, however, the GCMCA ordinarily will deny the request to avoid any resulting taint that may endanger the investigation or future prosecution of the witness.[20] After GCMCA denial, and upon motion by the defense, the military judge may review the GCMCA's decision and either order the grant of immunity or abate the trial if the judge determines that the testimony is essential to a "fair trial."[21]

By implication, the rule suggests that the trial judge must balance the accused's interests in presenting exculpatory evidence against the government's interest in the denial of the grant of immunity. The standard under which the balancing is performed is this notion of a "fair trial." The rule, however, gives no guidance regarding the factors the trial judge must consider in making this determination.

To the extent that R.C.M. 704 vests the GCMCA with the sole authority to grant witness immunity, the rule embodies the tradition found in previous versions of the *Manual*[22] and forms

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accused participate in any such crime held not to clearly negate the guilt of the accused because witness was not present the entire time). The imprecise nature of this type of evidence lends greater unpredictability to the entire process.

[18] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1988) [hereinafter UCMJ].

[19] R.C.M. 704(c).

[20] Under the rule articulated in Kastigar v. United States, 406 US. 441 (1971), the Government bears the heavy burden of affirmatively proving that the evidence used against the immunized witness is wholly independent of the compelled testimony. As a result, the Government will use immunity only as a last resort in an effort to avoid the risky proposition of losing a subsequent prosecution because of a tenuous finding of taint. ***See*** *also* United States v. North, 920 F.2d 940 (D.C. Cir. 1990) (Government required to prove that content of witness's testimony was not affected by immunized testimony and to show that evidence was discovered from independent source).

[21] R.C.M. 704(e).

[22] Manual for Courts-Martial, U.S. Army, 1917, para. 216 ("The fact that an accomplice turns state's evidence does not make him immune from trial, unless immunity has been promised him by the authority competent to order his trial."); Manual for Courts-Martial, U.S. Army, 1921, para. 216 (same language); Manual for Courts-Martial, U.S. Army, 1928, para. 120d ("The fact that an accomplice testifies for the prosecution does not make him afterwards immune from trial except to the extent that immunity may have been promised him by an authority competent to order his trial by ***general*** court-martial") (emphasis added); Manual for Courts-Martial, U.S. Army, 1949, para.

the basis for the power to compel a witness to testify.[23] To the extent that R.C.M. 704(e) provides for judicial review of the GCMCA's decision to deny immunity, however, the rule has no predecessor in any previous *Manual* and has no statutory foundation. Rather, the President promulgated this rule in reaction to military case law.[24] Therefore, to discover the origin of the rule and its rationale, one must examine its progenitor—*United States* v. *Villines*.[25]

The following section will demonstrate that the defense right to witness immunity, as first articulated in the dissent in *Villines*, was not a function of executive or legislative mandate. Rather, the Court of Military Appeals created the right by judicial fiat. As a result, the present rule runs afoul of legislative and executive authority for conferring grants of immunity.

In reaching this conclusion, one first must explore the nature and development of the authority to grant immunity, and then must examine the relationship between that authority and the court-mandated right embodied in the present rule. As this article will demonstrate, an understanding of the relationship between the legislative and executive power to grant immunity, and the defense "right" to witness immunity, is key to understanding why the present rule lacks an authoritative basis.

A. The Source of Authority for the Present Rule

As a general rule, grants of immunity may be conferred only pursuant to express statutory authorization.[26] Under military law, however, no statute expressly confers this power to military personnel. Rather, the president in using his rule-making authority under Uniform Code of Military Justice (UCMJ or Code) article 36, delegated the authority to grant immunity to the GCMCA in R.C.M. 704.[27]

Under this rule, the GCMCA is given sole authority[28] for con-

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134d (same language as 1928 Manual); Manual for Courts-Martial, United States, 1969, para. 68h ("An authority competent to order a person's trial by general court-martial may grant or promise him immunity from trial") [hereinafter MCM, 1969].

[23] *See* United States v. Kirsch, 35 C.M.R. 56 (C.M.A. 1964).

[24] *See* R.C.M. 704(e) analysis, app. 21, at A21-35.

[25] 13 M.J. 46 (C.M.A. 1982).

[26] Earl v. United States 361 F.2d 531, 534 (D.C. Cir. 1966). *See generally* Herbert Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1, 10-12 (1971).

[27] R.C.M. 704 is the only provision in the *Manual* that expressly addresses the issue of immunity.

[28] R.C.M. 704(c).

ferring grants of either transactional[29] or testimonial[30] immunity, subject to the approval of the United States Department of Justice.[31] With respect to immunizing persons subject to the UCMJ,[32] the GCMCA has broad discretion and need only coordinate with the Department of Justice if the Attorney General or local United States attorney expresses an interest in prosecuting the military witness in federal district court.[33] The GCMCA, however, must receive specific authorization from the United States Attorney General to immunize persons not subject to the code — that is, civilian witnesses.[34]

Furthermore, the conferring authority's decision to grant witness immunity is not reviewable by the courts.[35] As to the decision to deny immunity to a defense witness, on the other hand, R.C.M. 704 empowers military courts to review whether or not the GCMCA denied the defendant a "fair trial'' by refusing to grant immunity to the requested witness. Before discussing the present legal standard by which courts review the GCMCA's denial of immunity, however, an understanding of the nature and source of the GCMCA's authority to grant immunity is important.

1. The Authority to *Confer* Grants of Immunity. — While the GCMCA's authority to confer immunity under R.C.M. **704** does not spring from express legislative or executive authority,[36] it nonetheless has its foundation in legislative and executive authority by delegation from the President. As discussed below, both branches of government possess the constitutional power to grant immunity and both have further delegated that power and responsibility.

(a) Legislative power to grant immunity. — The practice of granting immunity to compel a witness's testimony was born of expediency in England over two centuries ago. To facilitate investigations into political corruption, Parliament would pass a bill — often referred to as an "indemnity" — to remove the

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[29] R.C.M. 704(a)(1).

[30] R.C.M. 704(a)(2).

[31] As a further limitation, the GCMCA may not delegate the authority to grant immunity to a subordinate or principal staff officer. R.C.M. 704(c)(3).

[32] *See* UCMJ art. 2.

[33] For this determination, coordination with only the local United States attorney usually is required. ***See*** R.C.M. 703 discussion.

[34] R.C.M. 704(c)(2).

[35] *See* Ullman **v.** United States, 350 U.S. 422, 432-454 (1956); United States **v.** Kilgo 484 F.2d 1215, 1219 (4th Cir. 1973) (applying the holding in *Ullman* to the Federal Immunity of Witnesses Act).

[36] *See* Green, ***supra*** note 26, at 10-12.

penal consequences for offenses to which a witness may admit during examination.[37] As a result of this indemnification, a witness was powerless to assert the privilege against self-incrimination.[38]

Eventually, the use of indemnity was adopted in the United States where it became known in practice as "immunity."[39] By 1970, Congress had passed more that fifty federal "immunity" statutes — each tailored to a specific law or government agency.[40] These statutes typically authorized the granting of immunity from prosection for any act about which the witness may testify. This practice was otherwise known as "transactional" immunity.

The Supreme Court first recognized Congress's power to authorize grants of transactional immunity in Brown *v. Walker.*[41] In upholding the validity of a grant of transactional immunity issued by the Interstate Commerce Commission,[42] the Brown Court reasoned that Congress had derived its power to authorize transactional immunity from its power to pass acts of general amnesty.[43] Although it found no specific constitutional provision granting this authority, the Court nonetheless found the amnesty power to be common to all legislatures.[44] Therefore, the power to remove the penal consequence for the act was sufficient authority to enable Congress to enact legislation to confer grants of immunity.

In 1970, Congress sought to reform the laws regarding immunity. As a result, it replaced the vast array of diverse immunity statutes with the Federal Immunity of Witnesses Act of 1970 (FIWA),[45] thereby making it the sole legislative authority for conferring executive grants of immunity.

(1) The Federal Immunity of Witnesses Act *(FIWA).*—The impetus behind the FIWA was the attempt to resolve the problems caused by numerous federal entities granting transactional immunity under separate statutes. Generally, these

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[37] *See* VIII WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2281, at 492-93 (J. McNaughton rev. ed. 1961).

[38] *Id.*

[39] *Id.*

[40] 2 Working Papers of the National Commission On Reform of Federal Criminal Law, 1444-45 (July 1970) [hereinafter Working Papers].

[41] 161 U.S. 591 (1896).

[42] 27 Stat. 443 (1893).

[43] *Brown*, 161 U S at 601.

[44] *Id.* at 601-605.

[45] 18 U.S.C. §§ 6001-6005 (1988).

problems included the following: overly broad protection granted a witness under transactional immunity; the granting of immunity before the witness had invoked the privilege against self-incrimination; and the lack of a central approval authority for grants of immunity.[46] These problems led the National Commission on Reform of Federal Criminal Laws[47] to recommend that Congress replace these numerous immunity statutes with one uniform statute.[48] Significantly, the Commission found that the lack of a central authority for approving grants of immunity resulted in conferring immunity to support the interests of one agency to the detriment of the interests of another agency.[49] In other words, agencies within the federal government were either not talking to one another or were not cooperating when making a decision to grant immunity.

To resolve the lack of a central approval authority, the Commission recommended that the Attorney General have ultimate approval authority over grants of immunity because that office would be most familiar with the executive branch's law enforcement policies and activities.[50] In this regard, Congress intended that the Attorney General be granted broad discretion in making an immunity determination.[51] As a result, judicial review of the government's grant of immunity is limited to ensuring that the procedures were followed properly.[52]

Ultimately, President Nixon endorsed the Commission's recommendations and draft legislation,[53] which Congress eventually enacted as FIWA. The provisions most relevant to grants of immunity in the military are sections 6001 and 6004. Section 6004 authorizes an agency to grant immunity for a witness who must testify "before *any* proceeding before an agency of the United States,"[54] when the agency deems the grant to be necessary to the public interest. Section 6001 further 'includes a "military department'' within its definition of "agency.''

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[46] 2 Working Papers, *supra* note 41, at 1412-21.

[47] *See* Pub. L. No. 89-801, 80 Stat. 1616 (1966).

[48] 2 Working Papers, *supra* note 41, at 1421-22.

[49] *Id.* at 1422.

[50] *Id.* at 1433-34.

[51] *Earl*, 361 F.2d at 634.

[52] United States v. Herman, 689 F.2d 1191, 1197 (3d Cir. 1978) (in drafting the FIWA, Congress adopted the holding in *Ullman*, which precluded judicial review of whether or not the grant of immunity served the public interest).

[53] H.R. Rep. No. 91-1188, 91st Cong., 2d Sess. 8 (1970).

[54] 18 U.S.C. 6001 (1988) (emphasis added).

Unlike previous statutes that authorized transactional immunity, section 6004 authorizes the agency to issue "testimonial use" immunity, thereby protecting the witness from the use—or derivative use—of the testimony in any subsequent criminal case.[55] Nevertheless, the agency may not issue the grant of immunity before the witness invokes the privilege against self-incrimination[56] and the Attorney General approves the grant.[57]

As described, the FIWA resolves the problems first defined by the National Commission on the Reform of Federal Criminal Law. Specifically, the concept of "use" immunity guards against extending overly broad protection to the witness; the witness first must invoke the privilege; and the Attorney General serves as the overall approval authority. This legislative grant of authority to immunize witnesses also empowers a GCMCA with the authority to grant testimonial use immunity.

(2) *Rule for Courts-Martial* **704** *and the FIWA.*—Because Congress intended the FIWA to be the sole authority for grants of immunity within the federal government, the issue becomes whether the FIWA preempts R.C.M. **704,** thereby invalidating military grants of immunity. This issue first was examined in *Villines*[58] and has been addressed by one federal court, which held that grants of immunity under paragraph 68h of the 1969 version of the *Manual for Courts-Martial* had the effect of statutory law.[59] The Court of Military Appeals appears to have adopted this position as well.[60] The danger of treating the Rules for Courts-Martial as statutory law, however, is that it allows for an expansive reading of the provisions of the *Manual* and contributes to the difficulty of interpreting the rules according to the principles of law recognized in federal courts.[61]

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[55] *Id.* § 6002.

[56] *Id.*

[57] *Id.* at § 6004.

[58] "Of course, this rationale assumes that enactment of 18 U.S.C. §§ 6001-6005 was not intended by Congress to preempt the field of testimonial immunity—an assumption which is not indisputable." *Villines,* 13 M.J. at 61.

[59] Terzak v. Usher, 571 F. Supp. 1203, 1207 (D. Colo. 1883).

[60] United States v. Fisher, 24 M.J. 368, 361 n.2 (C.M.A. 1987).

[61] Military courts are required to interpret the Rules for Courts-Martial in a manner consistent with the principles of law generally recognized in federal courts. UCMJ art. 36. The problems that arise by failing to reconcile the Rules for Courts-Martial with existing federal law is demonstrated in the dissenting opinion in *Villines,* in which the court expansively read MCM, 1969, paragraph 115a, as providing the military judge the authority to grant immunity. That language directly conflicted with paragraph 68h, in which the GCMCA is given the authority to grant immunity. ***See*** *Villines,* 13 M.J. at 62. ("Obviously, it would be desirable if the Federal Immunity of Witnesses Act were amended to include courts-martial *explicitly* . . . . ") (emphasis added).

When viewed in light of its purpose and legislative history, however, the FIWA and R.C.M. 704 are consistent. Actually, R.C.M. 704 is simply a lawful delegation of the FIWA's express legislative authority to grant immunity.

As previously discussed, one purpose behind the FIWA was to unify the procedures for grants of immunity and provide a central approval authority. For this reason, the initial draft legislation proposed that Congress specify the persons within each agency who would be authorized to grant immunity. Once Congress designated those individuals, the Attorney General then would be required only to receive notice of that individual's intent to grant immunity.[62]

Congress, however, amended this provision of the draft legislation to eliminate the requirement that Congress authorize particular persons within each agency to grant immunity.[63] By doing this, Congress "anticipated, that upon enactment of the bill, the Attorney General will take such steps as are necessary to insure that appropriate procedures are followed by *each agency to designate who* may issue an immunity order and in what circumstances they may be issued."[64] Accordingly, in enacting section 6004, Congress conferred immunity power to the entire executive branch for further delegation within its various "agencies."[65]

As a result, R.C.M. 704 is a lawful delegation[66] of a power legislatively conferred to the President by operation of section 6004.[67] If this were not the case, no agency in the federal government ever could grant immunity because section 6004 does

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[62] 2 Working Papers, *supra* note 41, at 1438.

[63] H.R. Rep. 91-1188, 91st Cong., 2d Sess. 12-13(1970).

[64] H.R. Rep. 91-1549, 91st Cong., 2d Sess. 43 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4018 (1970) (emphasis added).

[65] The delegation of the immunity power apparently would not have to be accomplished by the Attorney General; rather the President, as the chief law enforcement officer, possesses the power to delegate law enforcement powers within the executive branch. In the area of immunity, understanding how Congress implicitly could grant the Attorney General the exclusive power to delegate the authority to grant immunity, without unnecessarily interfering with the executive function, would be difficult. ***See,*** *e.g.*, United States v. Nixon, 418 U.S. 683 (1979).

[66] The delegation occurs under the President's rule-making authority. UCMJ art. 36.

[67] Unlike 18 U.S.C. § 6004 (1982), R.C.M. 704 does not require Attorney General approval for military witnesses not subject to trial in federal district court. ***See*** *supra* note 34. Nevertheless, prior approval appears to have little consequence in upholding the validity of immunity grants. ***See***, ***e.g.***, *In* ***re*** Application of the President's Commission on Organized Crime, 763 F.2d 1191 (11th Cir. 1985). *But* ***c.f.*** *Villines*, 13 M.J. at 61 (Everett, C.J., dissenting) (apparently indicating that the military practice of not obtaining Attorney General approval is significant to show that 18 U.S.C. § 6004 is inapplicable to courts-martial).

not designate any individuals — within any agency — authorized to grant immunity. Clearly, Congress's intent was to unify the immunity practice within the federal system, rather than to remove immunity power from federal agencies altogether.

In summary, Congress enacted the FIWA to unify the disparate federal practice that had resulted from numerous and diverse immunity statutes. In enacting section 6004, Congress authorized the President to delegate to the military the authority to grant immunity.[68] Furthermore, Congress chose not to designate those individuals empowered to grant immunity within the military; instead it vested in the executive branch the discretion to designate those individuals. By operation of UCMJ article 36,[69] the President lawfully has designated GCMCAs as the only individuals within the military empowered to grant immunity for persons subject to the Code. Consequently, R.C.M. 704 embodies the express legislative authority for the GCMCA's exclusive power to grant immunity.

Even if the FIWA did not exist, however, the President still possesses executive power to grant immunity. Therefore, R.C.M. 704 would remain a valid grant of executive authority to grant immunity.

(b) Executive power to grant immunity. — Independent of the legislative power to grant immunity, the executive power to confer grants of immunity also derives from R.C.M. 704 through the President's inherent authority to confer grants of immunity. This authority stems from the President's constitutional "Power to grant Reprieves and Pardons for Offenses against the United States."[70] Early American jurisprudence recognized this power as "extending to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken,

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[68] Chief Judge Everett seems to suggest that the FIWA does not include grants of immunity for courts-martial because "the failure to enumerate courts-martial in the definition of 'courts of the United States' in 18 U.S.C. § 6001(1) gives rise to a negative implication that courts-martial were not included within the purview of the Act." *Villines*, 13 *M.J.* at 61 (Everett, C.J., dissenting). This analysis, however, ignores the analysis of 18 U.S.C. § 6001, which states that the agencies enumerated in this section are "those having immunity granting power under present law. Delegation of the immunity power within the agency is *intended* to *follow present practice* within the agency for delegation of comparable powers." H.R. Rep. 91-1188, 91st Cong., 2d Sess. § 12 (1970). Accordingly, when Congress enacted 18 U.S.C. § 6001, it intended to keep in place the practice that already had developed in courts-martial at the time of FIWA's enactment.

[69] *See supra* note 27.

[70] U.S. CONST. art. II, § 2, cl. 1.

or during their pendency, or after conviction and judgment."[71] Actually, courts had recognized this power well before they recognized Congress's power to pass acts of general amnesty.[72]

The use of the President's pardon power for the purpose of granting witness immunity, however, has lain dormant since the Supreme Court decided *Burdick v.* United *States.*[73] Burdick was an editor for the New *York* Tribune who claimed the privilege against self-incrimination in an effort to conceal his editorial sources from a grand jury that was investigating various fraud cases. After Burdick claimed the privilege, however, the United States attorney served him with a document, signed by President Woodrow Wilson, which pardoned Burdick for all offenses against the United States that he may have committed relating to the publication of those articles.[74] Burdick, however, refused to accept the pardon and continued to refuse to testify, whereupon he was found in contempt and placed in jail.

On appeal, the Court reversed the contempt finding, holding that the Government could not use a presidential pardon to compel Burdick to testify over his privilege against self-incrimination based upon his refusal of the presidential pardon.[75] The Court's rationale was that, unlike Congress's amnesty power, the President's pardon power was contingent upon acceptance by the person being pardoned. Because a pardon carried an imputation of guilt, an individual could refuse to be pardoned — and thereby refuse to testify — whereas under a grant of amnesty, a person could not testify because the grant of amnesty carried no imputation or confession of guilt.[76]

Burdick, however, is an anomaly and should be read in the context of the Court's reluctance to compel an editor to reveal his sources, rather than reading it as the definitive statement of the President's power to pardon. In distinguishing a pardon from amnesty, the Court directly contradicted its earlier decision ~and~failed to acknowledge that presidential pardon power is explicit while Congress's amnesty power is implicit.

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[71] *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[72] *See, e.g., Brown,* 161 U.S. at 691.

[73] 236 U.S. 79 (1915).

[74] *Id.* at 86.

[75] *Id.* at 96.

[76] *Id.* at 94-95.

[77] *See Brown,* 161 U.S. at 601 ("The distinction between amnesty and pardon is of no practical importance") (citing Knote v. United States, 96 U.S. 149, 162 (1877)) ("the Constitution does not use the term 'amnesty,' and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individ-

Furthermore, subsequent to *Burdick*, the Court has held that an individual's consent to receive a presidential pardon will not defeat the public's interest in seeing that the pardon is given full power and effect.[78] Clearly, since *Burdick*, the Court consistently has recognized the important public welfare served in compelling a witness's testimony to enhance the law enforcement effort.[79]

Accordingly, *Burdick* highlights a distinction without a difference when comparing the powers of amnesty and pardon. In modern trials, a witness essentially never could reasonably refuse a grant of immunity derived from a presidential pardon on the basis of avoiding an imputation of guilt. Actually, most witnesses likely would admit to the commission of an offense regardless of the basis for the immunity they would enjoy in consideration of their admissions. Accordingly, striking down the President's power to confer immunity—which springs from express constitutional provisions[80]—by distinguishing pardons from grants of amnesty is unsound under current practice. Rather, the President retains the power to confer a grant of immunity based upon the executive power to pardon.[81]

Having analyzed the nature and source of the power to confer grants of immunity, analyzing the relationship between this power and the origin of the military rule conferring a defense right to immunity is now necessary. As previously noted, prior to the promulgation of R.C.M. 704(e), the *MCM* made no provision for defense witness immunity. Furthermore, courts long had held that the FIWA did not authorize grants of immunity to defense witnesses.[82] When the Court of Military Ap-

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uals, the distinction between them is one rather of philological interest than of legal importance").

[78] Warden v. Perovich, 274 U.S. 486 (1926) (Holmes, J.) (holding that to allow an accused to refuse a Presidential pardon that commuted the accused's sentence from death to life was contrary to the public welfare).

[79] *See Ullman* 350 U.S. at 422; Murphy v. Waterfront Comm'n, 378 U.S. 52 (1963); *Kastigar*, 406 at U.S. 441.

[80] ***But see*** *Kirsch*, 35 C.M.R. at 73; Green, *supra* note 26, at 7-10.

[81] Even if ***Burdick*** were still good law today, the President's power to immunize would be valid for a defense witness because a defense witness who has expressed a willingness to testify, but for the lack of immunity, has de facto consented to the pardon.

[82] *See, e.g.*, United States v. Frans, 697 F.2d 188 (7th Cir. 1983) (18 U.S.C. § 6003 was not designed to benefit defendants; therefore, the court cannot review the prosecutorial decision to deny immunity); United States v. Capozzi, 883 F.2d 608 (8th Cir. 1989) (court is not empowered by federal immunity statute to confer grant of immunity); United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981) (in the absence of a request by the Government, the federal immunity statutes do not authorize the court to grant immunity); United States v. D'Apice, 664 F.2d **76** (5th Cir. 1981) (decision to grant immunity rests solely with the executive under FIWA).

peals decided *United States v. Villines*,[83] the concept of defense witness immunity crept into military law. However, if grants of immunity may be conferred only through express legislative or executive authority and if neither the FIWA, nor any provision of the *MCM*, provided for grants of immunity to defense witnesses, from whence did the authority for defense witness immunity found in *Villines* originate? The answer is that no origin for that authority exists. As a result, R.C.M. 704(e) rests on a house of cards because—as discussed below—the defense entitlement to witness immunity is based purely on judicial fiat.

2. *The Judicial Fiat of* United States v. Villines.—In *Villines*, the Court of Military Appeals (CMA) first confronted the issue of when military law requires granting a defense request for witness immunity. In that case, the defense sought immunity for two witnesses who would testify about the defendant's lack of involvement in a conspiracy to commit larceny.[84] For undisclosed reasons, the GCMCA granted immunity for one witness, but not for the other.[85] In deciding a motion for appropriate relief from the denial, the trial judge ruled that immunity should not be granted because the witness was appealing his conviction for the same offenses that the accused was facing.[86] As a result, the defense witness claimed his privilege against self-incrimination and thereby never testified.[87]

Upon review, the CMA upheld the trial court's ruling, in a two-to-one decision, in which the court issued three confusing and imprecise opinions on when to require immunity for defense witnesses. Each opinion makes vague references to due process and fair trials without articulating a dispositive rule concerning the circumstances under which a defense request for testimonial immunity must be granted. Perhaps the key to making sense of *Villines*, however, lies in understanding that the holding in each of the opinions is contingent upon each judge's view of the trial judge's role in the immunity process.

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[83] ***See*** *supra* note **25.**

[84] This was Private Villines' second court-martial for the same offense because the first had resulted in a mistrial. The second trial took place about one month after the first. During the time between trials Villines "discovered" that Private Holodinski—the alleged coconspirator—would testify that Holodinski knew who had stolen the motorcycles which Villines was charged with stealing. *Villines*, 13 M.J. at **49.**

[85] The GCMCA did not endorse the defense counsel's request with anything other than a general denial. The trial counsel's endorsement indicated that the GCMCA should deny the request because of the likelihood that the witness would fabricate a story. *Id.* at 48.

[86] *Id.* at **50.**

[87] *Id.* at **48.**

In the lead opinion, Judge Fletcher held that a military judge is not authorized to grant immunity and therefore may review a denial of immunity only for abuse of discretion.[88] While conceding that a prosecutorial authority has broad discretion in exercising the authority to disapprove requests for immunity,[89] he nevertheless noted that the military judge should ensure that a denial is neither based upon an unjustifiable standard—such as race or religion—nor made with the intent of distorting the fact-finding process.[90] In applying this standard in ***Villines,*** Judge Fletcher found no abuse because the possibility of a retrial of the defense witness was a proper basis upon which to deny a request for immunity.[91]

Judge Fletcher further reasoned, however, that even in the absence of an abuse of discretion, immunity may be required to ensure that the defense enjoys a right to a fair trial.[92] To demonstrate the denial of a fair trial, however, the defense had the heavy burden of establishing that the GCMCA denied the accused "clearly exculpatory evidence."[93] In this case, Judge Fletcher found that the evidence was not "clearly exculpatory;"[94] therefore, he did not explain whether or not any countervailing government interests could outweigh the need for the defense to present this type of evidence. Furthermore, he did not explain the extent to which the judge could fashion a remedy to ensure the accused's right to a fair trial, should the GCMCA deny the accused the exculpatory evidence.

In his concurring opinion, Judge Cook also held that the trial judge has no inherent power to grant immunity.[95] Unlike Judge Fletcher, however, Judge Cook found that this lack of power precluded the military judge from reviewing the denial for an abuse of discretion. Furthermore, he held that neither the

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[88] *Id.* at 55.

[89] *Id.* at 53. (Fletcher, J.) (relying on the broad spectrum of law enforcement powers granted to the convening authority and citing ***Kirsch,*** 35 C.M.R. at 36, to uphold the power of GCMCA to grant immunity under authority of UCMJ article 46).

[90] *Id.* at 55 (citing Oyler **v.** Boles, 368 U.S. 448 (1962)) (GCMCA cannot base the denial on an improper basis); United States **v.** Herman, 589 F.2d 1191 (3d Cir. 1978).

[91] ***Villines*** 13 M.J. at 55. The opinion does not reveal the basis for the witness's appeal.

[92] The term "fair trial" is used in the present rule in apparent reference to Judge Fletcher's use of the term. ***See*** R.C.M.704(e) analysis, app. 21, at A21-35.

[93] *Id.* (citing *Brady,* 373 U.S. at 83) (upon specific defense request from the defense, the prosecution has a duty under the Due Process Clause to disclose to the defense any evidence in its possession that is material to either guilt or punishment).

[94] ***Villines,*** 13 M.J. at 56. Judge Fletcher apparently relied on the difference between the respective proffers of the trial and defense counsel in making this finding. Apparently, he was uncertain about what the witness would say.

[95] *Id.* at 58.

Fifth nor Sixth Amendments required the Government to grant immunity to a defense witness.[96] As a result, he found that the trial judge's only power, when faced with a defense witness who invokes a privilege, is to grant a continuance until the privilege no longer attached. Because the defense in this case had not asked for a continuance, however, Judge Cook simply did not address the issue any further.

In dissent, Chief Judge Everett held that paragraph 115a of the 1969 *Manual for Courts-Martial*[97] empowered a trial judge to grant immunity by operation of the judge's general power to obtain the appearance of witnesses.[98] Proceeding from this premise, he concluded that under the "equal opportunity to obtain witnesses" provision of UCMJ article 46,[99] the defense possessed the right to witness immunity to "obtain" the defense witness.[100] Accordingly, to guarantee that the accused received "equal opportunity," Chief Judge Everett would have required that the trial judge balance the Government's interest in the prospective prosecution of the witness against the material nature of the exculpatory evidence.[101] The opinion, however, does not indicate what factors the trial judge should consider in weighing these competing interests. Rather, Chief Judge Everett simply asserted that because the judge did not exercise his authority to grant immunity properly, the accused had been denied material evidence.[102]

The confusion generated in *Villines* is exacerbated further by the court's subsequent decision in *United States v. Zayas*,[103] in which the court reexamined the *Villines* rule.[104] In Zayas the

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[96] *Id.*

[97] MCM, 1969, para. 115a. (providing authority for the production of witnesses to appear at courts-martial; enabling regulation for UCMJ art. 46). For current corresponding rule, see R.C.M. 703.

[98] *Villines*, 13 M.J. at 62.

[99] UCMJ art. 46.

[100] *Villines*, 13 M.J. at 63.

[101] *Id.* at 64 (Everett, C.J., dissenting). Chief Judge Everett seemed to adopt a "materiality" test instead of a "clearly exculpatory" test. A materiality test would suggest that a form of exculpatory evidence exists that is more exculpatory than other exculpatory evidence.

[102] *Id.*

[103] 24 M.J. 132 (C.M.A. 1987).

[104] The Court of Military Appeals decided Zuyas after the promulgation of R.C.M. 704(e) in the 1984 *Manual*, but based its holding upon the pre-1984 Rules for Courts-Martial. Although, Judge Cox, in dissent in Zuyas, recognized that R.C.M. 704(e) explicitly vested sole authority for immunity in the GCMCA, the rule in its present form has not moved the court from engaging in the balancing test first articulated in the *Villines* dissent—despite the balancing test being based on the premise that the military judge could grant immunity.

GCMCA denied the defense request for immunity because the witness was pending charges at his own general court-martial. The trial judge upheld the GCMCA's denial on that basis. On appeal, however, the CMA reversed, holding that the pendency of charges alone was insufficient to show how the granting of immunity would impair the Government's interest in the future prosecution of the witness. Furthermore, even if the Government made the required showing, the court indicated that the trial judge still should weigh the Government's interests in prosecution against the accused's due process right to present exculpatory evidence and general right to a fair trial.[105] Significantly, the court remanded the case for further evidentiary hearings concerning the substance and quality of the witness's testimony.

Zayas therefore abandoned the test articulated in the lead opinion in *Villines,* which required the defense to meet its "affirmative and heavy" burden to show that the Government had denied the defense "clearly exculpatory'' evidence, in favor of the balancing test first articulated in the *Villines* dissent. As a result, the court intimated that the Government must make a "particular" and "substantive" showing that a grant of immunity would jeopardize a future prosecution.[106] Once the Government makes this showing, however, the court then must weigh the Government's interests in a future prosecution against the materiality of the defense's evidence.

Zuyas effectively adopted the test first articulated by Chief Judge Everett in the *Villines* dissent. In *Villines,* however, Chief Judge Everett based his test upon a finding that the accused enjoyed a *statutory* right to immunity under a UCMJ article **46** equal-access-to-evidence theory.[107] Zayas, however, actually does not rely on such a statutory right; instead it simply articulates the test on the basis of the accused's "due process and fair trial" rights.[108] Accordingly, the court's intellectual shell game between *Villines* and Zuyas totally obscures

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[105] *Zayas*, **24** M.J. at 136.

[106] *Id.*

[107] This is significant because Judge Everett did not have to engage in a constitutional analysis of the requirement for immunity. By basing his decision on a "statutory" right, he could carve out rights greater than those enjoyed under the law employed in federal courts.

[108] Adding to the confusion is the court's failure to distinguish between the requirements under the Due Process Clause of the Fifth Amendment and the right to a fair trial. If they are not one in the same, from where does the right to a fair trial originate? The court appears to use the term "fair trial" as a due process right, without acknowledging that the term "fair trial" has been used only to describe those rights contained in the Fifth and Sixth Amendments. as incorporated in the Due Process

the nature and source of the authority for a defense right to immunity—if one ever existed.

As explained above, immunity may be conferred to a defense witness only pursuant to legislative or executive authority. With respect to executive authority, however, the President clearly did not intend to exercise that authority to carve out a new right for the defense. Specifically, R.C.M. 704(e) was not applicable in *Villines* or *Zayas;* only later was it promulgated in reaction to *Villines*.[109] Furthermore, with respect to legislative authority, Congress clearly did not intend the FIWA to provide an entitlement to defense witness immunity. Accordingly, the conundrum remains—is the defense right to immunity under case law based on a statute other than the FIWA, or is it based on the Constitution? Because neither of these decisions can point to a single basis of authority, *Villines* and **Zayas** should be read for what they are—that is, judicial fiat through the usurpation of the legislative and executive functions of conferring grants of immunity. Rather than acknowledge this, however, the court disingenuously searched for legislative authority.

The *Villines* opinion actually attempts to establish legislative authority by creating a statutory right to defense witness immunity. This right, however, is created through a judicial fiction. The key to exposing this fiction is the exclusive nature of the GCMCA's authority to confer grants of immunity under the FIWA. Unfortunately, the authoritative basis for the present rule rests upon that fiction.

B. The Judicial Fiction of Villines *Incorporated into the Present Rule*

The exclusive nature of the GCMCA's authority to grant immunity is the key to solving the conundrum created by the *Villines* and *Zayas* decisions. Central to Chief Judge Everett's analysis in *Villines* was the premise that no legislative authority expressly vests convening authorities with the power to grant immunity. Consequently, he presumed that the military judge possessed the power to grant immunity under the rules providing for compulsory process to obtain witnesses.[110] This presumption then allowed Chief Judge Everett to "beg the

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Clause of the Fourteenth Amendment. See Chambers v. Mississippi, 410 U.S. 284, 294-303 (1972); *In* re Oliver, 333 U.S. 257, 273 (1948).

[109] **See *supra* note 24.**

[110] **MCM, 1969, para. 115a.**

question" of an accused's *right* to immunity by using TJCMJ article 46, thereby resulting in the judicial fiction of an accused's having a *statutory right* to immunity.

The fiction results from the notion of "equal opportunity" to obtain witnesses under article 46, which states:

> The trial, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

Theoretically, *equality* between trial and defense counsel can occur only if both are authorized to request a grant of immunity from the military judge. Only then would each party have "equal opportunity" to appeal a GCMCA's denial of witness immunity. Otherwise, both trial and defense counsel are bound equally by the GCMCA's decision under the article 46 provision that provides that grants of immunity must comply "with such regulations as the President may prescribe."

Because the existing "regulations"—both at the time the court decided *Villines*[111] and now[112]—only authorize the GCMCA to grant immunity, both trial and defense counsel are bound equally by that decision unless a right of appeal from a "wrongful" decision exists. Accordingly, the "statutory right" to immunity in *Villines* was based on interpreting the words, "as such regulations as the President may prescribe," to mean that the accused had a right to have the military judge grant immunity whenever the GCMCA wrongfully denied immunity to the accused's witness. This reasoning is circular, however, because a defendant could be denied immunity wrongfully only if he or she had a right to immunity in the first instance—that is, only if the defendant was denied a statutory or constitutional right to immunity.

If the UCMJ expressly had granted the trial judge the authority to grant immunity, then *Villines* and *Zayas* could be read to confer a statutory right to immunity under UCMJ article 46. In other words, the trial judge would be empowered to entertain both trial and defense counsel requests for witness immunity. The judge then could overrule the GCMCA's denial of immunity for a prosecution witness to obtain inculpatory

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[111] *Id.*, **para.** 68h

[112] R.C.M. **704.**

evidence.[113] Likewise, the trial judge then would be empowered to defeat the witness's privilege to obtain exculpatory evidence for the defense on an equal footing with the GCMCA's power to defeat a witness's privilege to obtain inculpatory evidence for the prosecution.

Proceeding from the premise that the FIWA and R.C.M. 704 lawfully vest the GCMCA with the *sole*[114] power to grant immunity, however, article 46 cannot be interpreted as providing a "statutory right" to immunity for two reasons. First, the trial counsel has no power to grant immunity. Consequently, if the GCMCA finds that granting immunity to one of the trial counsel's witnesses is contrary to the public interest, no "existing regulation'' allows the trial counsel to appeal that denial. Second, because the trial counsel is as equally bound by the GCMCA's decision to deny witness immunity as is the defense counsel, the Government enjoys the same "opportunity to obtain the witness" as the defense. Under Chief Judge Everett's analysis in ***Villines,*** however, the defense — which has the right of appeal to a military judge from a denial of witness immunity — actually enjoys a greater "opportunity" to obtain witness immunity under this provision than does the trial counsel. Therefore, by infusing the military judge with the power to confer immunity to defense witnesses, Chief Judge Everett actually upsets the balance under UCMJ article 46 that he sought to enforce.

From the forgoing analysis, interpreting UCMJ article 46 as providing legislative authority for grants of defense witness immunity is impossible. Because R.C.M. 704(e) vests sole authority in the GCMCA, the judicially presumed power to grant immunity is flawed fundamentally. The loss of this cornerstone forces the judicial fiction of the ***Villines*** analysis to crumble under the weight of its own logic.

Accordingly, UCMJ article 46 clearly does not compel the granting of defense witness immunity and, therefore, **R.C.M.** 704(e) has no authoritative basis in statute. This conclusion, however, does not end the analysis. Whether or not the defendant may enjoy a constitutional right to immunity still remains an issue.

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[113] **Chief Judge Everett's holding in *Villines*, however, extends only the military judge's power to grant immunity to defense witnesses.**

[114] **Judge Everett, however, takes issue with the exclusive nature of the GCMCA's authority. *See Villines*, 13 M.J. at 59-62 (Everett, C.J.,dissenting).**

III. The Constitutional Right to Defense Witness Immunity

The theory that a criminal defendant enjoys a constitutional right to immunity grew from the logic that defense witness immunity would guarantee a defendant's right to present evidence under the Compulsory Process Clause of the Sixth Amendment.[115] While courts generally have recognized that immunity may be ordered as a remedy for a violation of an accused's Fifth Amendment right to due process,[116] no such consensus exists with respect to the proactive use of immunity as part of a right to compulsory process.[117] Actually, much of the confusion surrounding this issue results from a failure to distinguish between the various interests protected by the Due Process and Compulsory Process Clauses.

A. Immunity and the Defendant's Right to Present Evidence.

At common law, coconspirators and accomplices were considered incompetent to testify because of their obvious self-interests and motives to lie.[118] As a result, trial courts traditionally precluded alleged coconspirators from calling each other to testify for fear that "each would try to swear the other out of the charge."[119] The fear that perjured testimony would disrupt the truth-finding process provided the rationale for upholding challenges to laws disqualifying defense witnesses from testifying.[120] In 1966, however, the Supreme Court decided *Washington v. Texas*,[121] in which it directly confronted the issue of whether a state constitutionally could preclude the defendant from calling a witness.

In *Washington* the defendant was tried for the murder of his estranged girlfriend's paramour. According to the evidence, Washington and a man named Fuller together obtained a shotgun and killed the girl's lover. After first obtaining the conviction of Fuller, the State tried Washington. During his trial, however, Washington testified that he tried to persuade Fuller not to kill the victim and that he had run away before Fuller pulled the trigger. Following this testimony, Washington attempted to call Fuller to support this version of the facts. The

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[115] U.S. CONST. amend. VI, cl. 4.

[116] U.S. CONST. amend. V, cl. 2.

[117] ***See*** *infra* note 149.

[118] *See generally*, II WIGMORE, *supra* note 37, §§ 575-576.

[119] Benson **v.** United States, 146 U.S. 325, 335 (1892).

[120] For background, see United States v. Reid, 12 U.S. (12 How.) 361 (1851).

[121] 388 U.S. 14 (1966).

Texas trial court, however, precluded Fuller from taking the witness stand because of a Texas statute that prevented coparticipants in a crime from testifying for one another.

Upon review, the Supreme Court struck down the Texas statute as violative of Washington's right to obtain witnesses on his behalf under the Compulsory Process Clause of the Sixth Amendment. It held that the statute was arbitrary because it automatically precluded any coparticipant from testifying for the defense while, at the same time, it allowed a coparticipant to testify for the State.[122] The Court further reasoned that no rational basis existed for the premise that the statute was designed to prevent perjury because a witness for the State would have more of a motive to lie than a witness for defense who, in Washington's case, had less of a motive to lie.[123]

Despite the holding in *Washington,* defense requests for immunity did not surface until after Congress passed the FIWA and the Court decided *Kastigar* v. *United States*.[124] In *Kastigar* the Supreme Court held that grants of testimonial use immunity under the FIWA were coextensive with the scope of the privilege against self-incrimination, thereby allowing the Government to compel testimony under this type of immunity.[125] In reaching this conclusion, the Court found that the privilege against self-incrimination is not a privilege to avoid prosecution and that testimonial use immunity "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege."[126] Therefore, *Kastigar* would allow for a subsequent prosecution of the witness as long as the evidence was neither directly nor indirectly derived from the immunized testimony.

Seizing upon this language, various commentators began to interpret *Washington,* in light of *Kastigar,* as creating a Sixth Amendment right to obtain use immunity for defense witnesses.[127] Consequently, as defendants began to request witness immunity, the federal courts split over the legal standard to apply in entertaining these requests. The split developed between two competing theories: (1) the defendant's right to present evidence under the Compulsory Process Clause of the

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[122] *Id.* at 23.

[123] *Id.* at 23-24.

[124] 406 U.S. 441 (1971).

[125] *Id.* at 460.

[126] *Id.* at 462.

[127] *See generally* articles cited *supra* note 12.

Sixth Amendment; and (2) the defendant's right to immunity as a remedy for the Government's violation of the accused's right to due process under the Fifth Amendment. As discussed below, these two theories lead to different legal standards upon which to base a grant or denial of a defense request for immunity.

1. Compulsory Process Standard: Effecting Equal Access to Exculpatory Evidence.—The Sixth Amendment contains two clauses that pertain to a defendant's right of access to evidence: (1) the Confrontation Clause;[128] and (2) the Compulsory Process Clause.[129] The Confrontation Clause ensures the defendant's right physically to face those who testify against him or her, and the right to conduct cross-examination. It therefore operates as a shield to protect the defendant from potential prosecutorial abuses. The Compulsory Process Clause, on the other hand, ensures the defendant's right to present evidence in his or her defense. Therefore, it operates as a sword to strike at the Government's case.[130]

Under the compulsory process theory of immunity, the defendant is entitled to "process" for compelling a witness to appear and testify.[131] Interpreting Washington liberally, this process also secures the defendant's equal access to governmental "devices" for obtaining witnesses.[132] Because "use" immunity is such a governmental device, the failure to grant defense-requested immunity violates this right to "process" under the Sixth Amendment.[133] The Government, therefore, is obligated to use its "devices" to defeat any impediment to the defendant's right to present exculpatory evidence, regardless of who or what creates that impediment. Accordingly, when a third party refuses to testify for the defense by invoking the privilege against self-incrimination, the Government must grant immunity when that testimony is exculpatory.

The underlying rationale for this obligation is the assumption that grants of immunity serve the public's interest in discovering the truth and that the defense is as equally entitled to immunity as is the prosecution.[134] The only roadblock to this access would be a compelling government interest in the denial

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[128] U.S. CONST. amend. VI, cl. 3.

[129] *See* U.S. CONST. amend. V, cl. 2.

[130] Pennsylvania v. Ritchie, 480 U.S. 39, 61 (1987).

[131] *See* Westen, *supra* note 12, at 168.

[132] *Id.*

[133] *See* Note, *Sixth Amendment,* *supra* note 12, at 1267

[134] *See* Westen, *supra* note 12, at 167.

of immunity. Because the government's only compelling interest, however, is the prosecution of the "guilty," the benefit of denial does not justify the withholding of the grant of immunity because Kastigar would allow for the future prosecution of the witness testifying under a grant of "use" immunity.[135] As a result, the Government should be made to accommodate the defense request by taking action to preserve any future prosecution.[136]

The logic undergirding this theory is found in the seminal case of *Government of the Virgin Islands v. Smith.*[137] In *Smith* three of four codefendants in a joint robbery trial wanted to call a juvenile witness to testify that he was involved in the robbery and that the other three were not involved. When the witness indicated that he would invoke his privilege against self-incrimination, the defendants sought a grant of immunity from the authorities responsible for juvenile cases at the Virgin Islands United States Attorney's office. These authorities indicated that they would grant the immunity, provided that the United States Attorney concurred. For reasons that were never disclosed, the United States Attorney refiised to grant the immunity, even though he did not have jurisdiction to prosecute juvenile offenders. Significantly, the court found that the lack of jurisdiction to prosecute combined with the failure to provide a reason for the denial suggested that the United States Attorney deliberately intended to keep highly exculpatory evidence from the jury, thereby distorting the court's fact-finding process.[138]

As a result, the United States Court of Appeals for the Fourth Circuit remanded the case for further evidentiary hearings to determine if the United States Attorney had a reason for the denial other than the intentional distortion of the fact-finding process. The court then went on to say that if the United States Attorney had distorted the fact-finding process intentionally, then the court should order the Government to grant immunity or direct a verdict of acquittal.[139] The basis for the court's holding on this ground is consistent with the due

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[135] *Id.* at 169.

[136] These actions may include isolating evidence and compelled testimony, sequestering the individuals charged with prosecuting the prospective defendant, or postponing the present trial until the witness has been tried. ***See*** Westen, ***supra*** note 12, at 169-70.

[137] 616 F.2d 964 (4th Cir. 1980).

[138] *Id.* at 969.

[139] *Id.*

process consideration of preventing prosecutorial interference with defense witnesses that prevent them from testifying.[140]

Nevertheless, the court went beyond the specific facts of the case and, in dicta, declared that immunity may be required even in the absence of prosecutorial misconduct. Relying on *Chambers v. Mississippi*[141] and Brady v. *Maryland*,[142] the court reasoned that a trial court possessed the "inherent power" to grant immunity as "a grant of relief" for a violation of an accused's due process right to present clearly exculpatory evidence. Accordingly, the *Smith* court held that when a defendant demonstrates that the expected testimony is "clearly exculpatory" the burden then shifts to the Government to demonstrate any countervailing interests that may preclude granting the relief.[143] While the future prosecution of the witness is a legitimate countervailing interest, the *Smith* court reasoned that the protection of this interest is "virtually costless"[144] to the government; the Government, therefore, should be forced to accommodate the defense request by taking measures to preserve the future prosecution.[145]

The test employed in *Villines* and Zayas is a clear reflection of the balancing test employed in the *Smith* dicta. Like Zayas, *Smith* involves a balancing of the accused's right to present evidence against the Government's interest in the future prosecution of the witness. Both cases proceed from the assumption that because the prospective prosecution of the witness is "costless" to the government, the Government can accommodate the accused's request easily. Unlike Zayas, however, the *Smith* court recognized an "inherent" power belonging to the trial judge to grant immunity to enforce this right.

The problem with *Smith* is that it relies on both Brady and *Chambers* for the proposition that the rights enumerated in both of these cases are entitled to the same protection. *Chambers,* however, is a Sixth Amendment compulsory process case;[146] Brady, on the other hand, is a Fifth Amendment due

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[140] *See infra* text accompanying notes 151-157.

[141] *See supra* note 108.

[142] *See supra* note 6.

[143] *Smith*, 616 F.2d at 974.

[144] *Id.* at 973.

[145] The *Smith* court suggested a number of possible options for the Government: assemble all the evidence; "sterilize" the testimony of the immunized witness; or seek postponement of trial. *Id.*

[146] Taylor v. Illinois, 484 U.S. 400, 406 n.9 (1987).

process case.[147] By lumping due process with compulsory process under the guise of the right to a "fair trial,"[148] the Smith court failed to articulate the interests that each clause protects. Consequently, like Zayas, the Smith case states an imprecise rule without stating a clear constitutional rationale which a court may employ to determine the Government's countervailing interests.

Among federal court decisions, Smith represents an anomaly. No court has reversed a case on the basis of a denial of a defense Sixth Amendment right to immunity. While two federal circuits have acknowledged the possibility of a defense right to witness immunity to present a defense,[149] most of the circuits have eschewed the "clearly exculpatory" balancing test in favor of the due process standard[150]—that is, immunity as remedy instead of immunity as right.

2. The Due *Process* Standard: Immunity as *a* Remedy *for* Government Overreaching.—Under due process theory, the defense right to immunity is governed by whether or not the Government creates the impediment to defense access to exculpatory evidence. When the Government unlawfully interferes with the defense right to present a defense or call a witness, then due process intervenes to cure the Government's overreaching. Unlike the compulsory process theory, which focuses

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[147] *See* United States v. Augurs, 427 U.S. 97 (1976).

[148] This is the same type of jumbled analysis engaged in by the court in *Villines. See Villines,* 13 M.J. at 64.

[149] *See, e.g.*, United States v. Pratt, 913 F.2d 982, 991 (1st Cir. 1990) (acknowledging that defense may be entitled to immunity under a theory of presenting an "effective defense"). A further anomaly within an anomaly is United States v. Herman, 689 F.2d. 1191, 1204 (3rd. Cir. 1978) (holding that Sixth Amendment does not require immunity, but that Fifth Amendment may require it when witness immunity is essential to the defense case).

[150] *See, e.g.*, United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981) (trial courts have no authority, absent a request by the government, to provide use immunity to a defense witness); United States v. Mitchell, 886 F.2d 667 (4th Cir. 1989) (exculpatory evidence alone is not sufficient to require immunity, absent prosecutorial misconduct); United States v. Smith, 436 F.2d 787 (6th Cir. 1971) (courts do not have statutory authority to grant immunity and therefore cannot err in refusing to grant a defense request for immunity); United States v. Pennell, 737 F.2d 621 (6th Cir. 1984) (judicially-created immunity violates separation of powers; therefore courts lack power to effect the defense's opportunity to present exculpatory evidence); United States v. **Hooks,** 848 F.2d 788 (7th Cir. 1988) (courts are powerless to direct the Government to seek immunity for a defense witness who exercises a Fifth Amendment privilege); United States v. Payton, 878 F.2d 1089 (8th Cir. 1989) (power to grant immunity for a defense witness who possesses exculpatory evidence lies with the executive and not enforceable by the courts); United States v. Alessio, 628 F.2d 1079 (9th Cir. 1976) (denying immunity when witness possesses clearly exculpatory evidence does not deprive the accused of a fair trial; immunity is the sole function of the executive branch and is not to be infringed upon by the court).

on equal ability to produce exculpatory evidence, the due process theory focuses on Government actions that affirmatively have interfered with the defense's ability to produce the evidence.

The leading case adopting this theory is *United States v. Turkish*.[151] In *Turkish* the defendant requested that the Government use its authority under the FIWA to immunize seventeen defense witnesses. The trial court upheld the Government's refusal, holding that the defense request was untimely and did not involve exculpatory evidence. On appeal, the Second Circuit upheld the result, but held that trial judges summarily should reject defense requests for immunity whenever the witness is an actual or potential target for prosecution, regardless of whether or not the testimony was exculpatory.[152] In reaching this conclusion, the court first reasoned that the Compulsory Process Clause did not obligate the government affirmatively to remove a privilege through a grant of immunity. As a result, it concluded that no defense "right" to immunity exists under the Sixth Amendment.[153] Next, the court dealt with the issue of whether basic fairness under the Due Process Clause required the Government to assist in extracting exculpatory evidence that it did not possess.

In addressing this issue, the court reasoned that fairness could not be premised on an equalization of the powers between the prosecution and defense. Because the Government bears the burden of proof, court proceedings are by nature not procedurally symmetrical. Accordingly, they do not lend themselves to equalization of power.[154] Furthermore, the court reasoned that fairness could not be premised on the concept that a trial is a search for the truth because important facts routinely are shielded from disclosure by operation of lawful privileges. Consequently, the court explicitly rejected the *Smith* balancing test.[155]

In abandoning the *Smith* test, the court adopted a due process standard by which the trial judge summarily would reject claims for defense witness immunity "whenever the witness for whom immunity is sought is an actual or potential target of prosecution,"[156] unless prosecutorial misconduct has interfered

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[151] 623 F.2d 772 (2d Cir. 1980).

[152] *Id.* at 778.

[153] *Id.* at 774.

[154] *Id.*

[155] *Id.* at 777.

[156] *Id.* at 778.

with the defense's access to the witness. In the absence of prosecutorial misconduct, however, the court would not be required to "engage in a balancing of the public interest in withholding immunity against the defense need for it."[157]

In developing its due process standard, the *Turkish* court correctly addressed the interests protected by the Due Process Clause—that is, to protect against Government overreaching that interferes with the defendant's ability to present available evidence. Examples of the type of overreaching the *Turkish* analysis protects against include Government conduct that amounts to a deliberate distortion of the fact-finding process[158] and Government denials of grants of immunity when no prosecutorial interests are served by the refusals.[159] In both situations, immunity would serve to save a case in which a directed verdict might otherwise be the only remedy to cure Government actions designed to thwart the defense's ability to present its case.

In the first example, Government actions interfere with the defense's ability to present otherwise available evidence to the trier of fact. Due process intervenes in such a case as a check on the Government's power to ensure against the Government's taking undue advantage of its position to intimidate witnesses. For example, the court should require the Government to immunize a defense witness when the prosecutor intimidates an otherwise willing witness into invoking the privilege by making threats of future prosecution for perjury if the witness testifies.[160]

Likewise, in the second case, when the Government can articulate no reason for withholding immunity, it then evinces a prima facia case of an invidious design to thwart the defen-

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[157] Id. at 777.

[158] **See** EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE § 11-4 b(2)B (1990).

[159] Because the Government would have no reason to refuse immunity under this circumstance, due process would require the court to examine the Government's refusal and determine whether it is engaging in an invidious prosecution. This concern was raised in an illustration used in Earl, 361 F.2d at 633 n.1 (expressing concern that due process might intervene in a case in which the Government applied the immunity statutes in a manner that granted immunity to the Government's eyewitness and concomitantly refused immunity to the defense's eyewitness).

[160] ***See, e.g.***, United States v. Morrison, 636 F.2d 223 (3d Cir. 1976) (requiring Government to immunize defense witness or order directed verdict upon failure to immunize a defense witness who, on three occasions, was threatened by an assistant United States attorney with prosecution for perjury and drug offenses if the witness testified for the defense). For a related example of how a judge judicially may impede the fact-finding process, see Webb v. Texas, 409 US. 96 (1972) (judge causing the defense witness to invoke the privilege after issuing repeated warnings from the bench of the dangers of and likelihood of prosecution for perjury).

dant's ability to present a defense[161] and breaches its general duty to assist the defense in obtaining witnesses. In neither case, however, does the Due Process Clause empower the court with an independent right to confer a grant of immunity to cure the violation. Rather, the court either may allow the Government to cure the violation by conferring the grant, or may direct a verdict in favor of the defendant.[162]

Turkish further stands for the proposition that due process does not require the court to engage in a judicial balancing of Government and defense interests once the Government has articulated a rational basis for its decision to refuse to grant immunity. Under the due process standard, the focus is on whether or not the Government has used its power with the intent to take unfair advantage of the defense. Therefore, in the case in which the Government justifies its refusal of defense witness immunity to protect a legitimate law enforcement interest, it sufficiently has demonstrated that it has no invidious intent and is wielding its power fairly.

The main criticism of *Turkish*, however, is that it fails to analyze whether or not the Sixth Amendment requires a balancing of Government and defense interests in assessing the requirement for defense witness immunity.[163] In this regard, *Turkish* fails to confront the issue raised in *Smith* directly—that is, whether or not the right of compulsory process and due process are coextensive with respect to defense witness immunity.

While the *Turkish* court held that due process does not require the Government to produce evidence from others that it does not already have, it fails to explain whether compulsory process may require it to do so. As a result, the split between the competing theories concerning defense witness immunity is left unresolved by ***Turkish.***

B. Immunity and the Government's Right to ***Prosecute.—Al****though* the Supreme Court never has confronted the issue of defense requests for witness immunity directly,[164] it defined

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[161] Surmising why the Government would have no legitimate reason for refusing the grant of immunity would be difficult, which is why this case is highly suspect. ***See,*** *e.g.*, ***Smith,*** 615 F.2d at 969 (finding that such conduct suggests that the prosecution deliberately intended to keep this evidence from the jury).

[162] *Turkish*, 623 F.2d at 777.

[163] The court simply stated that the Sixth Amendment does not require defense witness immunity. *Id.* at 774.

[164] ***See,*** *e.g.*, Autry v. McKaskle, 465 U.S. 1085, 1087-1089 (1984) (Marshall, J., dissenting) (calling on the Court to address the issue of whether or not the Sixth Amend-

the contours of compulsory process analysis in *Taylor*. In *Taylor* the trial court precluded the defense from calling a material witness as a sanction for its intentional failure to make timely disclosure of its witness list as required under Illinois procedure. The trial judge ruled that the suspect veracity of the witness combined with the amendment of the witness list two days into the trial required exclusion of the witness as a sanction for the violation of the discovery rule.

On appeal, the Court held that the State properly could exclude defense evidence as a sanction for intentional violations of discovery without violating the Compulsory Process Clause of the Sixth Amendment.[165] In reaching this holding, the Court acknowledged that compulsory process included the right to subpoena witnesses and the right to Government assistance in compelling witness attendance.[166] Nevertheless, the Sixth Amendment did not include an "unfettered right to offer testimony that is incompetent, *privileged*,[167] or otherwise inadmissible under standard rules of evidence."[168]

Significantly, the Court then focused on the State's interests in the orderly conduct of a criminal trial as sufficient justification for the sanction,[169] to include the State's interest in protecting the trial process from the "pollution of perjured testimony."[170] Even though less severe sanctions were available to the trial court,[171] the Court nevertheless determined that the right to compulsory process invariably does not outweigh other countervailing public interests.[172] These interests include the integrity of the adversary process, the fair and efficient administration of justice, and the potential prejudice to the truth-determining function that results from prosecutorial surprise or prejudice.[173] Because the defense's intentional failure to disclose its witness list in a timely fashion had contravened these interests, the trial court properly could prevent the de-

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ment creates a right in the defense to obtain witness immunity to present exculpatory evidence).

[165] *Taylor*, 484 U.S. at 418.

[166] As a result, the Court was unwilling to state that the Sixth Amendment could "never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a defense witness." *Id.* at 409.

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

[168] *Id.* at 410.

[169] *Id.* at 411.

[170] *Id.* at 417.

[171] An example would be a continuance to allow the Government sufficient time to prepare for cross-examination.

[172] *Taylor*, 484 US. at 414.

[173] *Id.* at 414-15.

fense from calling its witness without running afoul of the Compulsory Process Clause.

Taylor, therefore, indicates that the accused's right to present evidence is not an unlimited right. Unlike the *Smith* balancing of interests between the Government and defense, *Taylor* reviewed the trial court's decision to merely determine whether or not it was arbitrary. In this regard, the Court stated, "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversary system."[174] Once the Court was satisfied that the trial judge's decision served a legitimate public interest, it was reluctant to engage in an interest-balancing test for determining a less severe sanction. Consequently, *Taylor* indicates that the right first articulate in *Washington* may be limited by rules that serve a legitimate public interest.[175]

Applying *Taylor* to the issue of whether or not the Compulsory Process Clause requires grants of immunity to defense witnesses, clearly the mere invocation of the accused's right to present evidence is insufficient either to defeat a witness's privilege against self-incrimination or to prevail over the countervailing public interests served by the denial of the immunity in the first instance. In other words, the defense bears the burden of demonstrating that, on balance, the public's interest in the fair and efficient administration of justice, the lack of prejudice to the truth-finding process, and the integrity of the adversary process are best served by requiring the Government to grant the immunity.

Furthermore, the *Taylor* Court's reluctance to engage in a balancing of interests indicates that a trial court need not balance the nature and materiality of the defense's exculpatory evidence against the prejudice that might accrue to the Government's prosecution of the witness. Instead, *Taylor* demonstrates that the Government need not bend its rules solely to accommodate the defense right to present evidence as long as those rules serve a legitimate public interest.

Reviewing the public interest served by vesting the power to grant immunity in the GCMCA now is appropriate. As previously discussed, the objective of the FIWA is to vest the au-

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[174] *Id.* at 412-13 (citing United States v. Nobles 422 U.S. 225, 241 (1975)).

[175] This is consistent with the holding in *Washington,* in which the court found that excluding the defense witness on the basis that he would commit perjury was purely arbitrary because that rule did not apply with equal effect to immunized Government witnesses. *See supra* note 122 and accompanying text.

thority to grant immunity in the chief law enforcement officer of the nation — that is, the President acting through the Attorney General. The rationale behind this objective was to ensure that someone would oversee the entire process and ensure that the granting of immunity would not subvert the overall law enforcement effort. The application of the FIWA under R.C.M. 704(e) serves the same objective.

Within the military, the GCMCA serves as the chief law enforcement officer for those units he or she may command. This is a direct function of a commander's traditional responsibility for the good order and discipline of the unit. Consequently, the President gave GCMCAs the authority to grant or deny requests for immunity as one of the many tools they possess to meet the needs of good order and discipline. Therefore, a GCMCA's denial of defense requested immunity under the authority of R.C.M. 704 is presumed to be in the public interest in light of the authority and responsibility vested in a military commander.

By allowing the defense to overcome this presumption by the mere invocation of the words "right to present exculpatory evidence," a trial court likely will subvert the legitimate public interest in the good order and discipline of the unit. This subversion may manifest itself in one of the following ways:

> (a) By discouraging a future prosecution of the defense witness because the issue of tainted evidence places the likelihood of conviction in doubt;
>
> (b) By compelling the government to enter into a plea bargain with the defense witness in order to avoid prolonged litigation over the issue of taint;
>
> (c) By causing the government to truncate an ongoing investigation because the taint issue no longer makes the future expenditure in time and effort worthwhile;
>
> (d) By causing the government to remove a prosecutor from a case involving the investigation and prosecution of several co-defendants because of the potential taint that may result upon hearing the codefendant's immunized testimony;[176] or

[176] *See, e.g.*, United States v. Kurzer 634 F.2d 611 (3d Cir. 1976) (Government could not sustain burden necessary to prove lack of taint because Government's witness was led to cooperate with the Government by an indictment secured through defendant's immunized testimony on an unrelated matter); North, 920 F.2d at 940.

(e) By disrupting the order of the prosecution of several codefendant's when the government tries to avoid court-mandated immunity by trying the exculpatory witness first.[177]

All of these possible outcomes, represent harsh implications of court-mandated immunity. All result in delays, inefficiencies, and decreased enforcement of criminal laws. Nevertheless, these are realistic outcomes given the Government's heavy burden to show that its evidence was not derived from immunized testimony[178]—a burden which, in the case of defense witness immunity, the Government is forced to bear through no fault of its own. Is this the price that the Government must pay each time it attempts to try a conspiracy case? Should society have to pay the price in terms of increased inefficiency of the criminal justice system?

A court, however, cannot reconcile the accepted rationales to justify a grant of defense witness immunity easily. Specifically, a court reasonably cannot use the rationale that the burden to the government under *Kastigar* is "costless" as suggested in *Smith*[179] while it concomitantly requires the Government to "bear a heavy burden" of proving that the evidence it intends to use against the witness in a separate prosecution is not tainted.

On the other hand, to what extent should the defendant's right to present evidence be sacrificed either to lighten the Government's burden or to increase the efficiency of the trial court? To what extent should the truth-finding function of the court be sacrificed to make it more efficient? The resolution to these questions lies in assessing defense requests for immunity in terms of the goals that the criminal justice system hopes to achieve through the adversary process. Once these goals have been articulated, assessing the costs and benefits that accrue to a rule that provides or prohibits defense witness immunity becomes easier.

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[177] This possible solution to the problems created by defense witness immunity was suggested in *Villines,* 13 M.J. at 58 (Cook, J.).

[178] *See Kastigar*, 406 U.S. at 460 (Government's affirmative duty to show that the evidence is wholly independent of the compelled testimony); *Murphy,* 378 U.S. at 78 (Government must prove that the evidence is not tainted by establishing an independent legitimate source of the evidence); *Kurzer,* 534 F.2d at 511; United States v. Boyd, 27 M.J. 82 (C.M.A. 1988) (Government unable to meet burden of lack of taint when accused had testified at the earlier trial of the principal witness against the accused, even though Government established that evidence was not derived from accused's compelled testimony).

[179] *Smith*, 615 F.2d at 973.

IV. Proposed Amendment to R.C.M. 704(e)

The foregoing analysis has demonstrated that neither statute nor the Constitution compels the result reached in *Villines* and *Zayas*. As a result, the President should amend R.C.M. 704 as follows:

(e) **Decision to grant immunity.** Unless limited by superior competent authority, the decision whether to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. ~~However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness, or as to the affected charges and specifications, the proceedings against the accused be abated,~~*If the general court-martial convening authority denies a request to grant testimonial immunity to a defense witness who will offer material evidence not otherwise available, then, upon motion, the military judge may abate the proceedings with respect to the affected charge and specification only* upon *a* findings that:

~~(1) The witness' testimony would be of such central importance to the defense case that it is essential to a fair trial; and~~

(~~2~~*1*) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; *and*

(2) *a grant of testimonial immunity will have no legal or tactical affect upon the ongoing investigation, future prosecution, or postconviction appeal of the witness; or*

(3) *testimonial immunity* **is** *necessary to cure the effects of prosecutorial misconduct with respect to the defense witness.*

This amendment advocates the adoption of the due process standard for granting defense requests for witness immunity. Accordingly, it reflects the rule currently applied in the majority of the federal courts and meets the constitutional requirements for a "fair trial" under the Fifth and Sixth Amendments. Furthermore, the amendment eliminates the requirement in *Villines* that the military judge balance the

Government's interest in the future prosecution of the witness against the material nature of the defense's exculpatory evidence.

Under the amendment, the Government is required to articulate its reason for denying immunity to a defense witness. When the Government indicates that it has denied immunity because of the government's law enforcement interest in preserving the conviction,[180] ongoing investigation, or future prosecution of the witness, then the court need inquire no further and may uphold the denial.[181] To prove the government's law enforcement interest, the pendency of charges alone is sufficient.[182] In the case of an ongoing investigation without preferred charges, a government affidavit detailing the status of the investigation, filed ex parte with the military judge, would be sufficient proof of the government's law enforcement interest.[183] The amendment further overrules *Villines* in that it shifts the burden from the Government to the defense to establish that, notwithstanding the exculpatory nature of the defense evidence, the grant of immunity will have no tactical effect upon the government's interest in the future prosecution of the witness.

The larger issue, however, is whether or not this rule adequately protects the interests of the judicial system in general, as well as the litigants in particular. For this determination, examining the policy issues at stake in Sixth Amendment jurisprudence is necessary.

A. Truth-finding Function Versus Protection of the Adversary Process

The rationale supporting a Sixth Amendment right to clearly exculpatory testimony is the notion that the court must invoke its powers to ensure that it fulfills its "truth-finding" function.[184] This phrase by itself, however, does not provide a talismanic formula for reaching a just result. A closer examination of the nature of the court's truth-finding function is required.

On one extreme, is the view that the "truth" is readily ascertainable only when complete information exists. The court then would seek to find every possible shred of evidence. Accordingly, it essentially would function as supreme investiga-

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[180] *See* ***Villines,*** **13** M.J. **at 46.**

[181] **See** ***Turkish,*** **623 F.2d** at **772.**

[182] *Id.* **at 778.**

[183] *Id.*

[184] *See* **Westen,** *supra* note **12, at** 152-70.

tor, charged with leaving no stone unturned and no witness uninterviewed.[185] Consequently, the court should look skeptically upon whether or not the government's investigators and prosecutors have done their jobs adequately in marshalling all of the evidence before the court. Indeed, government investigators should operate at the behest of the court as it culls through the cases and determines what information it needs to determine the truth. Actually, little need would exist for rules of evidence because the application of those rules would deny the court possible relevant information that it needs to "find the truth."

Because the court alone is able to ascertain the truth, its powers to find evidence should be absolute. Indeed, no privilege should override this inexorable quest for truth because the completeness of information alone should result in a just and correct outcome. Accordingly, privileges such as attorney-client, self-incrimination, and husband-wife would have no utility once the case has reached the courtroom.[186] Rather, the exercise of the truth-finding function overcomes the social policies served by these privileges.

On the other extreme, is the view that truth is ascertainable only when the court receives untainted and unbiased information. Under these circumstances, the court acts as a purification system, judging the admissibility of the evidence based upon the motives of the party offering it. As a result, evidence tainted by potential bias or suspected to be perjurious should be kept from the finder of fact. Accordingly, the accused never would be able to testify because of his or her obvious motive to lie to avoid conviction. Likewise, friends or relatives of the accused would be precluded from testifying because of their motives to lie springing from their relationships with the accused.[187] Because the court must ensure that the finder of fact

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[185] For an argument in favor of this type of system and general discussion of its advantages advocated by a federal district court judge, see Marvin Frankel, *The Search For Truth: An Umpireal View*, **123 U.** Pa. L. Rev. **1031, 1052-67 (1975)** (arguing that the search for truth should be paramount and that allowing counsel to "control the evidence" is counterproductive to this process because it suppresses the facts; the judge therefore should assume the role as interrogator).

[186] For an argument in favor of defeating privilege in favor of finding the truth, see generally Marvin Frankel, *The Search For Truth Continued: More Disclosure, Less Privilege*, **64 U.** COL. L. REV. **51 (1982).**

[187] At common law, witnesses were judged incompetent — otherwise known as lacked capacity — to testify for a variety of reasons. Examples included lack of belief in a supreme being, prior criminal conviction, immaturity, and general lack of intelligence. For discussion of common law origins of precluding witness testimony on grounds of incompetency, see Scott Rowley, *The Competency of Witnesses*, **24 IOWA L. REV. 482 (1939).**

decides the issues on "pure" information, it should remove the risk that the evidence is tainted by an improper motive for offering it.

These two extreme views of the world obviously bear no resemblance to the realities of the contemporary courtroom. Obviously, the court requires evidence upon which to render a verdict, but it has neither the resources nor the time to function as supreme investigator. Furthermore, evidence does not present itself to the court. Rather, someone must locate, gather, organize, and present it in an organized and understandable form.

In a criminal case, this function falls upon the Government, whose interests extend to lawfully meeting its heavy burden of "proof beyond reasonable doubt." The defendant's interests, on the other hand, extend to avoiding conviction, which carries no burden of proof. Defense efforts essentially are directed at discrediting the Government's evidence. As a result, whether or not the defense presents evidence will largely be a tactical judgment call.

If the defense chooses to present evidence, then whether or not the evidence presented is false or perjurious is a function of the level of integrity of the defense counsel[188] as well as the ability of the criminal to conceal the truth from his or her attorney.[189] Ultimately, the finder of fact must sort through the dynamics of this process and make a determination based on witness credibility, the probabilities of truth, and the weight of the evidence.

Therefore, a verdict is, by definition, simply a decision. That decision is binary in that it determines whether or not the Government has sustained its burden of proof. The verdict does not, however, announce or divine the true state of affairs. The answer to whether the defendant is truly innocent or truly guilty is known to one person—the defendant—who also enjoys the privilege of remaining silent throughout the trial.

If the truth-finding function, however, requires a verdict based only upon full information, then the underlying basis for

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[188] **ABA** Code of Professional Responsibility. Disciplinary Rule 7-102(a)(4) ("In his representation of a client, a lawyer shall not . . . **(4)** Knowingly use perjured testimony or false evidence").

[189] For general discussion on the motivations behind criminal behavior, see STANTON E. SAMENOW, INSIDE THE CRIMINAL MIND 9-23 (1984) (arguing that what motivates a criminal's actions is the desire to avoid confinement and that any criminal acts committed in furtherance of that goal are rational behavior to the criminal).

the privilege against self-incrimination disappears.[190] Likewise, no need would exist to reinstate strict rules regarding the competency of witnesses because the finder of fact could not be trusted to make credibility decisions. Accordingly, to state that the truth-finding function of the court requires the court to engage in a quest for full information is not only naive, but also unworkable under the adversary process.

The more realistic view of the truth-finding function acknowledges that the court is limited in its capacity to function either as supreme investigator or as a purification system. Because our system of justice recognizes privileges[191] and presumes that witnesses are competent to testify, regardless of their motives or biases,[192] it necessarily functions on less than full and unbiased information.

Ultimately, the courts must rely on the adversary process[193] to present the available evidence to the court in a manner that will allow the decision makers to judge and weigh that evidence critically. The ultimate objective of the adversary process is not so much to find the "truth" as it is to distribute justice.[194] To achieve this objective the adversaries each must have the equal opportunity to present and examine the available evidence. Each of the parties should be able to maximize its control of the process without unwarranted interference from the court or the other party.

Under this system, both sides will seek to reveal the biases, credibility, imperfections, and inconsistencies of the evidence under the crucible of deft cross-examination and critical advocacy. Because the burden of proof in a criminal trial never shifts from the Government to the defense, the lack of infor-

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[190] An argument in favor of this position is found in Henry Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 16 YALE L.J. 127 (1906) (arguing that the privilege against self-incrimination deprives the state of access to a valuable source of information and therefore the privilege represents a cost to society that outweighs the benefits derived from the privilege).

[191] In addition to the privilege against self-incrimination, *see supra* note 18; Mil. R. Evid. 502 (Lawyer-Client Privilege); Mil. R. Evid. 630 (Privileged Communications to Clergy); Mil. R. Evid. 604 (Husband-Wife Privilege).

[192] Mil. R. Evid. 601. *See also* Advisory Committee's Note, Fed. R. Evid. 601 (" . . . A witness wholly without capacity is difficult to imagine . . . Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses").

[193] The adversary process fairly can be characterized as maximizing the distribution of control over the process to the parties to the dispute. *See* John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 666 (1978).

[194] For a discussion concerning dichotomous relationship between the "truth" and "justice" objectives of dispute resolution, see *id.* at 543-45.

mation resulting from unavailable evidence ultimately is resolved in favor of the defendant. The result sought through the adversary process is to allow both sides equal opportunity to present and examine the available evidence so the finder of fact may decide the issue of guilt or innocence based on critical examination of the evidence. In a legal system that emphasizes that an accused does not have to answer the accusations or prove one's innocence while recognizing the existence of privileges, this process will produce a just result based as closely on the "truth" as the system will allow.

Consequently, in fashioning a rule dealing with the issue of defense witness immunity, the goal must be to ensure that each side to the adversary process has a fair and equal opportunity to scrutinize and argue the available evidence without interference from the other side. The system, therefore, must deter conduct that detracts from this goal by reducing both the potential for gamesmanship and the opportunity to obstruct the efficient administration of the process. This is what bothered the *Taylor* Court. Because the defense intentionally had delayed in revealing its witnesses to the prosecution, the Court would not allow the defense to rely on the Compulsory Process Clause either to enable it to strike a tactical blow at the state's ability to fully examine and prepare for the testimony, or to create further delay of the trial. The harsh result of precluding the witness did not violate compulsory process because the State's significant interest lay in deterring conduct that would either impair an adversary's ability to present its case or interfere with the efficient examination of that evidence. While the Sixth Amendment empowers a criminal defendant to participate fully in the adversary process, it does not allow him or her to subvert it.

B. Cost-Benefit Analysis of the Proposed Amendment

When comparing the proposed amendment to the present rule, the costs and benefits must be assessed in terms of the goal of preserving the opportunity for the adversaries to prepare and present their respective cases. By removing the potential for subversion of those opportunities, the proposed amendment best meets this goal.

The present rule as interpreted under *Villines* and *Zayas* creates the significant potential for subversion of the adversary process. In its attempt to make immunity available to the defense to effect a broader right to present exculpatory evidence, the rule impacts upon the adversary process in ways that extend beyond the "search for truth," and creates the opportu-

nity for gamesmanship through the use of ruses. Accordingly, it further disrupts the efficient administration of justice. Consider the following examples:

1. Creating a Defense Right to Immunity Encourages *Gamesmanship.* — By mandating immunity whenever the defense makes an offer of proof that the witness's testimony is exculpatory,[195] the court places the Government in a dilemma. If it chooses not to grant immunity, it must face the likelihood of substantial delay in the trial until the witness becomes available.[196] If, on the other hand, the Government chooses to grant the immunity, it faces the likelihood that it will be unable to prosecute the defense witness. Both situations impair the Government's ability to present its case.

In the case of the former, the stale evidence resulting from long delays in the trial process works to the detriment of the Government. Furthermore, the tendency that the impact of the evidence will fade in the memory of the finder of fact works likewise to the detriment of the Government. In the case of the latter situation, the Government faces the real risk that it must give up the conviction of one — either the witness or the defendant — in the hope of securing the conviction of the other. Both situations force the Government into a plea bargaining situation to break the dilemma — a dilemma not of its own making. Accordingly, the defense will incorporate requests for defense witness immunity into its checklist to raise the issue in the hope of improving its own bargaining position against the Government.

2. *A* Defense Right to Immunity Encourages Forum Shopping. — As previously discussed, the defense right to immunity is unique to the military and a small minority of federal circuits. The GCMCA therefore would be wise to consider allowing conspiracy cases to be prosecuted in the local federal or

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[195] ***See*** *supra* note 6. Recall that the term "clearly exculpatory" is borrowed from the due process discovery cases. Under a ***Brady*** and *Augurs* analysis, the Government has the evidence in its possession to turn over to the court for examination. Under a *Zayas* analysis, however, the court cannot examine the evidence for a determination of its exculpatory nature because neither party possesses it. **As** a result, the court essentially is requiring the Government to "turn over evidence" to the defense that it does not possess. This constitutes a requirement that extends far beyond even the furthest stretch of *Augurs*, which acknowledges that absent a specific and particular request, the Government must be on clear notice of the exculpatory nature of the evidence before it is required to give it to the defense. *Augurs*, **427** U.S. at 110-11.

[196] Presumably, this occurs when the witness is tried and either convicted or acquitted. This tactic was suggested in ***Villines,*** 13 **M.J.** at 68 (Cook, J.). This assumes, of course that the witness-defendant will not attempt to call the original defendant as an exculpatory witness in the subsequent trial.

state court, in jurisdictions where the accused does not enjoy this liberal right to immunity. By doing this, the GCMCA will avoid the dilemma of having to forego the prosecution of a coconspirator because the military judge has mandated defense witness immunity.

3. *A Defense Right to Immunity Is Unworkable Under Military Procedure.* — *Under* R.C.M. 704, a GCMCA is not authorized to grant immunity to a civilian witness. That power rests with the Attorney General and the local United States attorney — both of whom likely will deny the grant of immunity as a matter of policy whenever the witness is a potential defendant.[197] Therefore, no mechanism exists to move the trial forward should the military judge rule that the defense witness must receive immunity.

4. Creating a Defense Right to Immunity Unnecessarily Interferes With the Prosecutorial Function.[198] — By mandating immunity based upon a proffer of evidence, the military judge interferes de facto with prosecutorial functions such as determining who will be tried first, how the Government will proceed with its investigation, and who will prosecute the case. The military judge possesses no special expertise to make these decisions.[199]

5. *In the Case of Conspiracy, a Defense Right to Immunity Interferes With the Coaccused's Right to* Counsel. — Clearly, a coconspirator pending charges before a court-martial is entitled to counsel.[200] No case, however, has held that a grant of immunity is coextensive with an accused's Sixth Amendment right to counsel. As a result, an issue still persists over what happens when an immunized witness refuses to testify without the presence of counsel. Does the court allow the coaccused's counsel to be present during questioning? If it does, must the court allow the witness's defense counsel to interject objections? What if counsel advises the witness not to answer questions despite the grant of immunity for fear that tainted evidence somehow may be admitted at the coaccused's trial?

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[197] *See* U.S. Department of Justice, III(a) UKITED STATES ATTORKEYS' MANUAL § 9-23.214 (1988) (stated policy does not authorize granting defense witness immunity absent "extraordinary circumstances").

[198] *See generally* Stone, *supra* note 12, 153-55 (arguing that separation-of-powers considerations requires judicial deference to decision of prosecutors to confer grants of immunity).

[199] *See also* James Flanagan, *Compelled Immunity for Witnesses: Hidden Costs and Questions,* 56 NOTRE DAME L. REV. 447, 463-72 (1981) (discussing the nature of the decision-making powers of the judge with respect to the prosecutor).

[200] U S CONST., amend VI, cl 4.; United States v. Wattenbarger, 21 M.J. 41, 45 (1985).

Furthermore, if the witness refuses to testify upon the advice of counsel, may the court lawfully order the witness to ignore the advice of counsel?

A major consideration, however, is that the present rule creates the opportunity for collusion among coconspirators and promotes perjury. A criminal typically seeks to avoid conviction and punishment, not out of fear of imprisonment or concern for the stigma it carries, but because it interferes with the criminal's ability to continue his or her chosen life of crime.[201] Accordingly, the threat of a future perjury conviction likely will not deter criminals from colluding to take advantage of a present opportunity to avoid conviction and to continue their criminal enterprises. The true deterrent to perjury, therefore, is to eliminate the opportunity for collusion altogether. The present rule, however, not only provides the opportunity for perjury—it actually encourages it.

Clearly, not all criminal defendants are actual criminals. Individuals who argue that defense witness immunity helps to avoid conviction of the innocent, however, fail to acknowledge that exculpatory evidence is readily available through the defendant's testimony. While the essence of the Sixth Amendment is to guarantee the defendant's right to participate in his or her own defense, it should not be construed as a right not to have to testify in one's own defense when someone else can do it for you.

The proposed amendment, on the other hand, is a specific deterrent to pretrial collusion among coconspirators. Furthermore, it eliminates the opportunity for the gamesmanship and inefficiencies listed above, which subvert the adversary process. The proposed amendment removes the potential for subversion by eliminating the requirement that the military judge abate the proceedings upon a proffer that the expected testimony is clearly exculpatory. Instead, to defeat the Government's law enforcement interest, the accused is required to demonstrate sufficient countervailing interests that extend beyond merely invoking the right to present exculpatory evidence. Accordingly, if the accused can demonstrate that the witness is invoking the privilege because the Government has threatened the witness with prosecution to keep the witness from testifying, then the public's interest in preventing prosecutorial misconduct would outweigh the Government's

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[201] ***See generally,*** Samenow, ***supra*** note 189, at 191-210.

law enforcement interest.[202] On the other hand, in a case in which the Government can articulate no legitimate law enforcement reason for denying the immunity, the judge properly may mandate defense witness immunity or abate the proceedings, provided the proffered evidence is material, exculpatory, and noncumulative.[203]

Absent these circumstances, however, the defense will be prevented from using a request for witness immunity as a stratagem by which the defense—in an artfully drafted offer of proof—will entice the court into a "fishing expedition" for unavailable evidence, the nature of which is unknown to the court or Government because it is privileged. Furthermore, the amendment would deprive the defense of the tactical advantage gained by forcing the Government into the dilemma of choosing between candidates for prosecution, without depriving the defense of its ability to present available evidence or argue the weight and credibility of the evidence in the Government's case.

Likewise, the Government would be prevented from using its power to coerce and intimidate witnesses from freely testifying for the defense. Actually, any invidious intent by the Government to obstruct the defense's access to available witnesses presumptively would be established if the Government fails to articulate a law enforcement purpose for withholding the immunity.

Finally, the proposed amendment would increase judicial efficiency and economy without interfering with the defense right to present evidence. By eliminating the concomitant delay that comes with a court's unnecessary interference with the traditional prosecution function of organizing and presenting the evidence, the rule would eliminate the need for the Government to engage in forum shopping rather than risk the abatement of the proceedings.

Consequently, the benefits of the proposed amendment clearly outweigh the costs of maintaining the present rule. Because the proposed amendment maintains the appropriate balance between the adversaries in a criminal trial, it best serves the goals of the adversary process.

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[202] *See, e.g.*, *Morrison*, 535 F.2d at 223.

[203] This would satisfy the mandate articulated in *Taylor* and *Ritchie*, that the accused has a right to the Government's assistance in compelling the attendance of a favorable witness.

V. Conclusion

The President should adopt the proposed amendment R.C.M. 704(e) for four reasons. First, the present rule was founded upon the assumption that the accused enjoyed a statutory right to immunity under UCMJ article 46. As previously discussed, however, article 46 no longer can be interpreted to confer this right in light of the GCMCA's exclusive power to grant immunity.

Second, the balancing test derived from *Villines* and *Zayas*—embodied in the present rule—is not required to ensure the accused's constitutional right to a fair trial under the Fifth or Sixth Amendments. Due process under the Fifth Amendment operates to protect the accused from government interference in presenting its case. The present test, however, goes beyond prevention of interference and requires affirmative government assistance to obtain otherwise unavailable evidence. Compulsory process under the Sixth Amendment actually may require government assistance to obtain the witness. Nevertheless, when immunity is withheld to protect a legitimate law enforcement interest, *Taylor* suggests that the defense—not the government—bears the burden of demonstrating a countervailing public interest.

Third, the proposed amendment comports with the law applied in federal courts. The clear majority of federal courts recognize the due process standard for requiring immunity and have eschewed interpreting the FIWA as conferring a Sixth Amendment right to witness immunity.[204] Accordingly, the present rule does not follow the interpretation of the law of immunity as applied in the federal courts, and thereby violates UCMJ article 36.

Finally, the proposed amendment best serves the goals of the adversary process by protecting each side from unnecessary interference from the other. It preserves the opportunity for each side to examine the available evidence fully and present its case without the threat of ruses and stratagems that have been designed to employ witness immunity as an impairment to the adjudicatory process. Consequently, the proposed amendment best serves the end of justice by preserving the integrity of the adversary process.[205]

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[204] *See supra* note 150.

[205] For an empirical study supporting the proposition that the adversary process—a process that delegates control to the participants—is perceived as more fair than a nonadversary process—a process that delegates greater control to decision makers—

In the absence of an amendment to the present rule, Government counsel should argue — and military courts should recognize — the fundamental flaws of the *Villines* and *Zayas* decisions in light of the GCMCA's sole authority to confer grants of immunity. They should argue that the words "fair trial'' in the present rule require the adoption of the due process standard and the eschewal of the notion that compulsory process compels the court to balance the interests between the Government and defense. Due process never has been held to require that a defendant be able to marshal the same investigative tools as the Government.[206] Nor has the court's truth-finding function ever encompassed a "sporting theory" of justice that must give the defense as equal a chance of acquittal as of conviction. Now is the time to put away, for good, the defense witness immunity dart.

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see Laurens Walker, E Allan Lind, & John Thibaut, *The Relation Between Procedural And Distributive Justice*, 65 VA. L. REV. 1401 **(1979).**

[206] *Herman*, 689 F.2d at **1203.**

OPERATION DESERT STORM: R.E. LEE or W.T. SHERMAN?

MAJOR JEFFREY F. ADDICOTT*

War will never be abolished by ***people*** *who are ignorant of war.*

—Walter Lippman[1]

I. Introduction

As the brilliant Allied military victory in the Persian Gulf recognizes its first anniversary, the focus has shifted from the emotions of homecoming celebrations to the seriousness of lessons learned and lessons validated. While the ingredients of victory are a combination of many factors—from logistics to training to armament—history has shown that one of the most important elements in a successful combat operation is the quality of the commander. The commander decides the strategy, directs the tactics, and inspires the morale of his soldiers. To those mediocre captains of history who arrogantly relied on sheer numbers of forces to ensure success on the battlefield, the past is replete with the story of the small army which, with the leadership of a great commander, overwhelms numerically superior forces.

Operation Desert Storm[2] confirmed that the American commander, General Norman Schwarzkopf, was no mediocre leader. Clearly, he had learned well many of the lessons written in the bloody ink of military history. In this context, the war also paid a magnificent tribute, albeit a silent one, to a man who is arguably the greatest military leader this country

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[1] T. HARRY WILLIAMS, THE HISTORY OF AMERICAN WARS xviii (1981).

[2] ***See*** Michael Cramer, *Kuwait: Back to* ***the*** *Past*, TIME, Aug. 6, 1991, at 33. The military campaign in the Persian Gulf actually was a single battle with the expressed goal being the liberation of Kuwait. For an excellent overview of the campaign see ***The*** *Gulf War*, MIL. REV., Sept. 1991.

has ever produced—Robert E. Lee. Actually, not only in the sphere of battlefield tactics, but in ensuring strict adherence to the laws regulating warfare,[3] General Lee and General Schwarzkopf had much in common; tactical skills and ethical conduct go hand in hand in the making of a great leader.

Unfortunately, however, many are unaware of the phenomenal benefits that our military has most certainly drawn from General Lee. Curiously, this was brought out by the battle in the Persian Gulf, When reporters asked General Schwarzkopf which military leaders he most admired, Schwarzkopf, as expected, turned to the War Between the States for his examples. What was totally unexpected to some, however, was that he departed from the opinions of recent prominent American military leaders who typically cited General Lee,[4] and instead cited General William T. Sherman as one of his heroes.[5] As this article will assert, the United States of America was fortunate that both General Schwarzkopf and the forces under his command emulated the tactics and humanity of the Confederate General instead of the Union leader he mentioned.

Although General Schwarzkopf's public admiration for General Sherman really raised little concern about the soundness of America's military strategy or its willingness to abide by the law of war in the conduct of hostilities, his recognition of Sherman and exclusion of Lee does raise several critical issues.

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[3] The laws of war consist of all of those laws, by treaty and customary principles, that are applicable to warfare. Its basic role is to limit the impact of the evils of war by: "(1) Protecting both combatants and noncombatants from unnecessary suffering; (2) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and **(3)** Facilitating the restoration of peace." Dep't of the Army, Field Manual 27-10, The Law of Land Warfare, at **3** (July 1956) [hereinafter FM 27-10].

[4] The previous commander of an American force equivalent in size to the one commanded by General Schwarzkopf was General William Westmoreland, from the Vietnam War. The man General Westmoreland most often cited as his role model was General Lee. In his memoirs, ***A** Soldier Reports*, he leaves no doubt that his touchstone was Robert E. Lee. Lee so influenced the Westmoreland family that when his father died, General Westmoreland had a favorite quotation from Lee carved into the headstone: "Duty is the sublimest word in the English language." ***See*** JAMES RESTON, JR., **SHERMAN'S** MARCH AND VIETNAM 279 (1984).

[5] Lewis Lord, *civil War Tactics Could Win 'The Mother oj Battles,'* U.S. NEWS AND WORLD REP., Feb. 25, 1991, at 42; Paul Hoversten, *Schwarzkopf Introspective,* **USA** TODAY, Feb. **28,** 1991, at 6A. Schwarzkopf also named General Ulysses S. Grant. Grant is remembered best for his resolve to "fight it out." In the first month that Grant confronted Lee—from May to June 1864—he sacrificed, in suicidal frontal assaults, over 50,000 of his men. This was a five-to-one loss ratio against the ill-fed and ill-equipped Confederate forces. Grant compensated for Lee's tactical superiority by relying on overwhelming manpower and material to wear Lee down. Although the Federals were defeated in almost every engagement, Grant correctly understood that the Federal forces could keep losing longer than the Rebels could keep winning.

First, recognizing the importance of image projection, it provides an opportunity to examine the roots of America's international reputation in terms of war-making and the role of law in regulating this conduct.[6] Second, from both a tactical and law-of-war perspective, whom did our commanders and soldiers most emulate — Robert E. Lee or William T. Sherman?

II. R.E. Lee

> ***The blow, whenever struck, must, to be successful, be sudden and heavy.***
>
> —R.E. Lee[7]

An unspoken tribute to General R.E. Lee was particularly evident in the grand strategy used by the American commander in the Gulf. As General Schwarzkopf held his "victory" press conference and explained the concept of the overall operation in the defeat of the Iraqi forces, he obviously not only had been able to apply the lessons and experiences of his own career successfully, but also had drawn heavily from the wisdom of General Lee.

To the serious student of American history, Schwarzkopf's celebrated "Hail Mary" flanking movement to the west of the enemy strongly echoed from another time and place. While no two wars are ever alike, and every commander's actions must be evaluated in terms of their unique circumstances, the basic tactics employed in the "hundred-hour'' ground war were undeniably similar to those used by the commander of the Confederacy's Army of Northern Virginia.

Time after time, General Lee executed magnificent flanking movements at battles such as Second Manassas (1862), Chancellorsville (1863), and The Wilderness (1864).[8] Similarly, the ground phase of Operation Desert Storm was vintage Lee — that is, fix the enemy forces in place and hit them suddenly

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[6] ***See also*** Stephen W. Sears, *McClellan* vs. ***Lee,*** MIL. HIST. ***Q.,*** Autumn 1988, at 10. A similar comparison between Lee and another Union commander, General George McClellan, concludes that Lee probably was the greatest American military commander ever produced and that McClellan was someone who had considerable military knowledge, wanted to be president, and "sat a horse well."

[7] Rod Gragg, ***The Quotable Robert E. Lee,*** S. PARTISAN IX, 1989, at **26,** 31.

[8] ***See generally*** DOUGLAS SOUTHALL FREEMAN, LEE'S LIEUTENANTS, A STUDY IN COMMAKD (1946). Lee's only major error during the War Between the States was the frontal assault he ordered on the third day at Gettysburg, in July 1863. Failing to break the Federal defenses, he still was able to withdraw his army intact.

and heavily in the flank. The heart and soul of Lee's superior strategy was based on surprise and economy of force—the same key elements superbly employed in Operation Desert Storm.

A. Lee as a Role Model

That America's military leaders continue to concentrate on the military campaigns of General Lee is, of course, no revelation to most senior officers in the armed forces. Even the United States Navy acknowledges the leadership abilities of Lee, studying and publishing at the Naval War College the works of scholars who have devoted their entire lives to exploring the person and legend of Lee.[9] As for Lee's most natural constituency—the ground commanders![10]—one need only take a cursory tour of the Army War College in Pennsylvania to confirm its commitment to studying the War Between the States in general, and R.E. Lee in particular. Battle scenes from the bloodiest war in American history hang from almost every hall in the institution. In a recent United States Army War College publication concerning two of Lee's most classic victories, the authors confidently challenged modern officers to learn from, and appreciate the genius of, Lee and his corps commander T.J. "Stonewall" Jackson. In the preface they note, "Lee and Jackson did not see themselves as old soldiers; they considered themselves modern soldiers, and *today's officers will quickly learn to identify with them.*"[11]

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[9] *See* STUART W. SMITH, DOUGLAS SOUTHALL FREEMAN ON LEADERSHIP (1990). Published by the Naval War College Press for use in the training of senior Naval officers, it encompasses every aspect of Lee's tremendous leadership qualities. ***See also*** Douglas Southall Freeman, ***Robert E. Lee: Maker*** *of Morale,* **44** NAVAL WAR C. REV., 75 (1991). *But* ***see*** David Maurer, *Putting the General on* ***the*** *Couch,* THE DAILY PROGRESS, Sept. 30, 1991, at A7. Lee's reluctance to shame or humiliate another person was probably his only handicap as a commander. Dr. J. Anderson Thomson, a noted psychiatrist from Charlottesville, Virginia, pointed out this paradox concerning Lee: "Here's a person who is considered one of the greatest leaders of men in the deadliest form of conflict known, armed warfare, who in inner-personal contacts had difficulty reprimanding or tactfully criticizing a subordinate who had disappointed or even failed him terribly."

[10] *See* JOHN E. JESSUP & ROBERT W. COAKLEY, A GUIDE TO THE STUDY AND USE OF MILITARY HISTORY (1979); MICHAEL SHAARA, THE KILLER ANGELS (1990). These books are just samples of many used by the United States Army in the training of its officers at Fort Leavenworth, Kansas. In addition, Lee's Chancellorsville campaign is given detailed attention in a separate block of instruction.

[11] JAY LUVAS & HOWARD W. NELSON, THE U.S. ARMY WAR COLLEGE GUIDE TO THE BATTLES OF CHANCELLORSVILLE AND FREDERICKSBURG xvii (1988) (emphasis added).

B. Lee's Impact on the American Military

Apart from being the most enduring conflict in the nation's psyche, the "Civil War"[12] brought into focus the extraordinary genius of General R.E. Lee—a genius so phenomenal that his impact upon the armed forces of the United States is still felt over a hundred and twenty years after his death. This is not surprising, however, when one considers that even before the outbreak of the War, Lee's military value already was firmly established in the young nation.

General Winfield Scott, commander of the American forces during the Mexican War (1846-1848), noted on many occasions that that war was won due largely to the efforts of, then, Captain Robert E. Lee. Captain Lee had made such an impression on Scott that thirteen years later, in 1861, when asked about the best officer in the United States military, he promptly replied, "I tell you, sir, that Robert E. Lee is the greatest soldier now living, and if he ever gets the opportunity, he will prove himself the greatest captain of history."[13]

President Abraham Lincoln also was well acquainted with Lee's military acumen. In April 1861, before Colonel Lee—then serving in the 2d United States Cavalry—had to decide between Virginia and the Union, Lincoln eagerly tendered to Lee the supreme command of all Union forces in the field. If he had accepted, Lee would have been second only to General Scott, who was then the general-in-chief of the Federal forces.

Weighing a devoted career spanning over thirty years of service to the Armed Forces of the United States against his attachment to Virginia, Lee turned down this greatest of all opportunities.[14] Taken to the mountain top of temptation and offered what many a soldier dreams of—fantastic success and fame—Lee maintained his loyalty to his state and family, thereby reflecting to the world a glimpse of his incredible in-

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[n] The term "the War" refers to the War Between the States, popularly called the American Civil War. However, Francis Lieber, the author of the Union's rules regulating warfare, correctly asserted that the conflict between North and South was not a "civil war." Lieber commonly defined the term civil war as, "War between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government." ***See*** RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 18 (1983). As Mark Twain, himself a former Confederate soldier, often remarked, "In the South, ***the War*** is what A.D. is elsewhere, they date from it."

[13] REV. J. WILLIAM JONES, LIFE AND LETTERS OF GENERAL ROBERT EDWARD LEE 129 (1906).

[14] Gragg, ***supra*** note **7,** at 31. Just before submitting his resignation, Lee wrote, "With all my devotion to the Union, and the feeling of loyalty and duty of an American citizen, I have not been able to make up my mind to raise my hand against my relatives, my children, and my home."

tegrity. A product of southern aristocracy, honor and duty were more important than fame. He could not draw his sword against his native state. W.T. Sherman would later write of Lee, "His Virginia was to him the world . . . . "[15]

At the conclusion of the War Between the States, military leaders throughout the world quickly recognized the incredible battlefield accomplishments of Lee. British, Prussian, and French officers, renowned in their own rights, expressed only the highest regard for General Lee.[16] The great British officer, General Garnett Joseph Wolseley, had observed Lee at first-hand during the War and called him a genius in the art of warfare, "being apart and superior to all others in every way, a man with whom none I ever knew and few of whom I have read are worthy to be classed."[17]

While the Virginia of the Old South long since has faded, in the decades that have passed and to this day, Lee's name only has increased in brightness,[18] illuminating the pages of military doctrine as perhaps no other soldier in American history. "Few public figures in any age have bequeathed such an enduring legacy of national respect and affection . . . ."[19] Indeed, in the history of the United States, no officer has inspired such great devotion and trust in his soldiers as did General Lee.[20]

This leadership quality was illustrated beautifully in an incident just before the surrender at Appomattox when Lee turned to Brigadier General Henry Wise and asked him what the army and country would think of him once he surrendered. General Wise, a former governor of Virginia blurted out, "General Lee,

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[15] JUSTIN WINTLE, THE DICTIOXARY OF WAR QUOTATIONS 280 (1989).

[16] British soldiers included Colonel Chesney, Lord Wolseley, Lord Roberts, and Colonel Henderson; Prussian soldiers included Von Moltke, Bismarck, Colonel Von Borcke, Colonel Scheibert, and Major Mangold. *See* Jones, *supra* note 13, at 483.

[17] *Id.* at 484.

[18] *See* PAUL C. NAGEL, THE LEES OF VIRGINIA 300-05 (1990). World-wide recognition of Lee as a great "soldier, gentleman and Christian" first began in France, in the mid-1870's. By the first decade of the twentieth century, Britain also had become enthralled totally with Lee—in part because of the great English writer Henry James. The Canadians, who always had been sympathetic to the South, quickly expressed their high regards for General Lee. By the time Lee died in 1870, the *Montreal Telegraph* was able to say, "Posterity will rank Lee above Wellington or Napoleon, before Saxe or Turenne, above Marlborough or Frederick, before Alexander, or Caesar . . . . In fact, the greatest general of this or any other age. He made his own name, and the Confederacy he served, immortal." JONES, *supra* note 13, at 483.

[19] ROD GRAGG, ILLUSTRATED COXFEDERATE READER 224 (1989).

[20] *See* GREGORY J. URWIN, THE UNITED STATES INFANTRY 15-30 (1988). One could argue that General George Washington perhaps equalled Lee in terms of devotion by his soldiers.

don't you know that you are the army . . . . [T]here is no country. There has been no country, for a year or more. You are the country to these men."[21]

Arguably, Lee contributed more than any other single man in setting the very bedrock for some of the most outstanding and valuable attributes of American military power. That bedrock is so strong today that, when asked to identify the most notable characteristics of the United States military, one can expect the worldwide response to literally echo Lee's signature—superior tactical abilities in combat leaders and civilized conduct of Americans in war.

That the American military establishment proudly has maintained its reputation not only for sound military tactics, but also for an unmatched sense of humanity, is well known.[22] One of the men most responsible for all of this—General Lee—is not as well advertised. Perhaps the passage of time has concealed his name. On the other hand, Lee's fame may have been reduced by an unfortunate legacy, marred in the minds of many Americans who still lack an understanding of his cause.[23]

In spite of the fact that its greatest champion often is overlooked, Lee's tactics and civility have become ingrained into the character of the United States military establishment. Although these qualities certainly existed before the emergence

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[21] Joseph B. Mitchell, ***You Are*** the ***Army,*** CIVIL WAR, July-Aug. 1991, at 25. When General Lee surrendered the Army of Northern Virginia in April 1866, all military forces throughout the South quickly followed suit. The identification with Lee clearly was so great that much of the Confederate military followed Lee, rather than President Jefferson Davis, who advocated continued resistance.

[22] *See* B. BLECHMAN & S. KAPLAN, FORCE WITHOUT WAR 9 (1979). No nation has been as active as the United States in adherence to the rules of warfare, as well as the peacetime use of its forces "in providing disaster assistance and similar supportive activities." ***Id.***

[23] *See* Jeffrey F. Addicott, ***Values and Religion in the Confederate Armies,*** CONFEDERATE VETERAN, Nov.-Dec. 1990, at 29-38. The popular revisionistic claim that the average Confederate soldier fought to perpetuate the evil of slavery is without historical validity. While the issue of slavery was certainly a catalyst, the vast majority of Confederate soldiers did not own slaves, or ever hoped to own them. They did not view themselves as fighting for slavery. Actually, the greatest leaders in the army were opposed strongly to the institution. General Lee owned no slaves, and those in his wife's estates were freed in 1862. His opposition to the evil of human servitude is well documented. Before the War, he believed in a process of gradual manumission. At the conclusion of the War, having suffered total poverty from its effects, he wrote,

> So far from engaging in a war to perpetuate slavery, I am rejoiced that slavery is abolished. I believe it will be greatly for the interests of the South. So fully am I satisfied of this . . . that ***I would cheerfully have lost all I have lost by the war and suffered all I have suffered, to have this object attained."***

Id. (emphasis added).

of Lee the general, his genius and humanity have epitomized and translated them into the very fabric of subsequent American military doctrines. For this reason, any analysis of the United States military — either in terms of tactics or comportment with the law of war — that ignores the tremendous contributions of General Lee never can be more than a fraction of the truth. More closely than any other officer in this nation's history, Lee has proved to be the most qualified to project the American standard of behavior in these areas.

III. W.T. Sherman

> *[W]e are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies.*[24]
>
> —W.T. Sherman

When General Schwarzkopf listed General Sherman as among those whom he most admired from history, many misunderstood the reasons associated with that choice and hence, the efficacy of his statement.[25] In the minds of many Americans — particularly in the South — the name of W.T. Sherman immediately is associated with a most heinous array of war crimes.

During his **1864** march from Atlanta to the sea, and then through South Carolina, Sherman employed a concept of "total war,"[26] — a concept that included the targeting of defenseless civilian populations. The wanton destruction and theft of nonmilitary property that resulted from that campaign, arguably marked Sherman as one of the most infamous figures in American military history. Of course, this was not the attribute that General Schwarzkopf sought to embrace when he listed Sherman as one of his heros. Was it then the tactical side of Sherman that won Schwarzkopf's respect?

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[24] RUSSEL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY **252** (1984).

[25] *See supra* text accompanying note **5.** News releases did not give any detailed explanation for General Schwarzkopf's admiration of Sherman. The reasons advanced included: **(1)** he was a "muddy boot" soldier; **(2)** he did not worry about taking the credit for accomplishments — only for getting the job done; and **(3)** he hated war, but waged it ferociously.

[26] *See* WILLIAMS, supra note 1, at 300-02.

Few historians rank General Sherman among the brilliant.[27] Most writers believe that he was far too cautious when conducting war against sizable concentrations of enemy soldiers. "As a consequence he tended to hold back both in the employment and deployment of his forces. This in turn either cost him defeats, as at Missionary Ridge, or else lost him the fruits of victory, as at Jonesboro."[28]

As a military commander Sherman was, at best, only average. Compared to the vast majority of Union general officers, however, Sherman looked fairly capable. His mainstay was his tenacity, not his imagination. Tenacity, on the other hand, can do great things when juxtaposed with a tremendous military might, such as was furnished to him by the industrialized North. Sherman systematically could conduct his version of "total war" at will.

After burning the entire city of Atlanta to the ground, Sherman set out with over 62,000 Federal soldiers—not to engage Confederate combat forces, but to "make Georgia howl."[29] Tragically, the only persons who "howl" under such brutal activities are members of the defenseless civilian population—primarily women and children. Although Sherman issued "official" orders that prohibited the trespass of all dwellings, required the leaving of reasonable provisions for families who were forced to provide food, and even prohibited the use of profane language, in reality none of these orders actually were enforced.[30] The soldiers were allowed to rob, pillage, and burn in a swath of horror that, from one wing of his forces to the other, extended almost sixty miles in width.

As members of the Union army approached their homes, defenseless southern civilians understood the approaching terror. In the distance, they could see the pillars of smoke by day and the fires by night. If Sherman did not order the rape[31] and

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[27] Thomas Robertson, *The War in Words*, CIVIL WAR TIMES ILLUS., Oct. 1979, at 20.

[28] *Id.*

[29] WINTLE, *supra* note 16, at 281. Sherman wired to General Grant on Sept. 9, 1864, "Until we can repopulate Georgia, it is useless to occupy it; but the utter destruction of its roads, houses and people will cripple their military resources. I can make this march and make Georgia howl." The Confederate army under General Hood had evacuated Atlanta and marched north into Tennessee. Apart from Rebel cavalry to harass his flanks, or small local home guards consisting of old men and boys, General Sherman faced no significant military opposition until he reached North Carolina.

[30] RESTON, *supra* note 4, at 67.

[31] Because of the social stigma attached, rape was a crime seldom discussed in nineteenth century America; victims often kept the crime to themselves. While it was probably less widespread than some might allege, documented cases of Sher-

other physical abuses that accompanied his campaign of terror, he—as the commander of the army—must have shared responsibility for these additional crimes.[32]

Boasting of his wholesale looting and burning through Georgia, General W.T. Sherman telegraphed to his superior, General U.S. Grant,[33] "I sincerely believe that the whole United States, North and South, would rejoice to have this army turned loose on South Carolina, to devastate that state in the manner we have done in Georgia."[34] Later, as Sherman headquartered in

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man's forces raping black and white Southerners occurred. Dr. Daniel Trezevant, a respected physician in Columbia, South Carolina, listed several cases of which he had personal knowledge. See GRAGG, *supra* note 19, at 192-96. *But see* RESTOK, *supra* note 4, at 73-74. In the city of Milledgeville, Georgia, only one rape of a white female could be substantiated by a respected writer and physician, Dr. James Bonner.

[32] Modern concepts of what is termed "indirect responsibility" come from two American cases. The obvious standard to apply to a commander is the "direct knowledge" standard. If a commander orders a violation of the law of war, or does nothing to stop a violation he has knowledge about, he is guilty of those crimes. This is known as the *Medina* standard, so named from the courts-martial of Captain Ernest Medina, for his role in the My Lai massacre in Vietnam. The second standard for command responsibility comes out of the *Yamashita* case from World War II. Yamashita, a Japanese general officer, was tried for the rape and murder spree committed by 20,000 Japanese troops in Manila. Although the military commission was unable to prove that Yamashita ordered the crimes, it held him responsible under a "should have known" theory. If, through normal events, the commander should have known of the crime, but did nothing to stop it, he or she is guilty of the actions of his or her soldiers. This "should have known" standard applies only when a widespread pattern of abuse over a long period of time has existed. In this scenario, the commander is presumed either to have knowledge of the crimes or to have abandoned his or her command. *See* JOHK NORTOK MOORE, FREDERICK S. TIPSON, & ROBERT F. TURNER, NATIONAL SECURITY LAW 387-401 (1990).

[33] As his superior, General Grant shares culpability for Sherman's actions. Grant actually approved, and later defended, the actions of his subordinate. Sherman, however, could not rely on the defense of superior orders to escape responsibility. This rule was firmly established in the context of the only major "war crimes" trial that came out of the War—the Union trial of Confederate Major Henry Wirz. Major Wirz was the commandant of the Andersonville prisoner of war camp in Georgia and was charged with numerous offenses, to include murder. Although the trial was flawed in many respects, it correctly affirmed a principle of law—that is, the defense of superior orders would not justify violations of the law of war. *See* Glen W. LaForce, *The Trial of Major Henry Wirz: A National Disgrace,* THE ARMY LAW., Jan. 1988, at 3.

[34] Because South Carolina was the first southern state to secede from the Union, Sherman felt that the citizens of the state should be made to suffer. GRAGG, *supra* note 7, at 30. Sherman thoroughly devastated South Carolina. A noted northern journalist, John T. Trowbridge, traveled through South Carolina just after the War ended and recorded the sight that greeted him:

No language can describe, nor can catalogue furnish, an adequate detail of the wide-spread destruction of homes and property. The negroes were robbed equally with the whites of food and clothing, The roads were covered with butchered cattle, hogs, mules, and the costliest furniture.

For the full text, see GRAGG, *supra* note 19, at 180.

the finest mansion in Savannah, he again corresponded with Grant concerning his upcoming march through South Carolina. As if attempting to shed all responsibility for controlling his army Sherman said, "the whole army is burning with an insatiable desire to wreak vengeance upon South Carolina. I almost tremble for her fate, but I feel she deserves all that seems in store for her."[35]

A. *The Law of War During the War Between the States*

Even though the modern international rules regulating the conduct of armed forces during combat, as codified in the 1949 Geneva Conventions, did not exist during the War Between the States, Sherman certainly violated the well-established customary prohibitions[36] of his day in addition to the much praised Lieber Code.[37] Issued to the Union forces as General Order No. 100, the Lieber Code spelled out very specific rules in the conduct of warfare, "correspond[ing] to a great extent to the laws and customs of war existing at that time." This code, coupled with the existing customary obligations, absolutely prohibited the larceny, vandalism, or indiscriminate burning of civilian property, as well as all associated crimes of violence against civilians. Article 47 of the Lieber Code provided that:

> Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, ***the severer punishment shall be preferred***.[38]

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[35] RESTON, ***supra*** note **4,** at 95.

[36] ***See generally*** HARTIGAK, ***supra*** note 12, at 554. Sherman "mocked the West Point canons that condemn[ed] atrocities, calling the canons 'old notions.'" JOSEPH GOLDSTEIN, BURKE MARSHALL & JACK SCHWARTZ, THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW? **664** (1976).

[37] DIETRICH SCHINDLER & JIAI TOMAN, THE LAWS OF ARMED CONFLICT 3 (1988). Francis Lieber, a German international law scholar and professor at Columbia University, was asked by the Federal authorities to draft a code for the conduct of war on land. Promulgated as "Instructions for the Government of the Armies of the United States in the Field," it was issued on April **24,** 1863. The Lieber Code consisted of 167 articles. ***See also*** MOORE, ET AL., ***supra*** note 32, at 309-10. The Southern forces adopted their own code of conduct for land warfare in 1861—"Articles of War, Regulations of the Army of the Confederate States." ***But see id.*** at 120-30. In June of 1863, James A. Seddon, the Confederate Secretary of War, pledged to abide by most of the substantive provisions of the Lieber Code.

[38] ***See*** SCHIKDLER & TOMAN, ***supra*** note 37, at 10 (emphasis added).

Certainly, many Union officers and soldiers assigned to Sherman did display military discipline, but the vast majority of Sherman's troops soon discovered that the chain of command made little effort to protect civilians or civilian property.[39] Early in the "march," some subordinate commanders, such as General Oliver Howard, dutifully informed Sherman that the soldiers were committing "inexcusable and wanton acts."[40] While still marching through Georgia, well before the most barbarous atrocities were committed, General Howard even issued his own orders:

> It having come to the knowledge of the major general commanding that the crime of arson and robbery have become frequent throughout this army, notwithstanding positive orders both from these and superior headquarters having been repeatedly issued . . . it is hereby ordered: that hereafter any officer or man of this command discovered in pillaging a house or burning a building without proper authority, will upon sufficient proof thereof, be shot.[41]

Despite such "official" directives that threatened death by firing squad for any form of pillaging, not a single Union soldier ever was executed.[42] The obligatory "wink at the law" had been given.[43] Accordingly, bands of roaming marauders, calling themselves foragers or "Sherman's Bummers," engaged in indiscriminate plunder upon the defenseless civilian population.[44] Sherman essentially refused to establish a military police force to "watch and discipline his own men because to have done so would have delayed the operation."[45]

In defending his atrocities,[46] General Sherman did not attempt to conceal his crimes under the guise of military necessity. As provided in article 44 of the Lieber Code,[47] destruction

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[39] *See supra* note 30 and accompanying text.

[40] RESTON, *supra* note 4, at 70. Howard related this to Sherman on November 23, 1864.

[41] *Id.* General Howard issued this order on November 24, 1864.

[42] *Id.*

[43] WEIGLEY, *supra* note 24, at 301. "[H]is men knew he [Sherman] would understand if they went beyond the orders. A great deal of unauthorized and individual looting went on as the army ripped across the state, and it went unpunished." *Id.*

[44] *See* MARSHA LANDRETH, WILLIAM T. SHERMAN (1990).

[45] *See* GOLDSTEIN, ET AL., *supra* note 36, at 555.

[46] Despite numerous eyewitness accounts to the contrary, Sherman always denied the burning of Columbia, blaming it on the retreating Confederate cavalry. *See* Bernard Davidson, *Who Burned Columbia?—A Review of General Sherman's View of the Affair, in* 7 S. HIST. SOC'Y PAPERS 185-92 (1977).

[47] SCHINDLER & TOMAN, *supra* note 37, at 6, 10.

of private property was allowed upon the order of an officer in the case of military necessity. Although the exception was worded in the negative—"all destruction of property not commanded by the authorized officer . . . are prohibited"[48] —it was not meant to be construed broadly. If article 44 allowed the means for an officer to order an otherwise illegal act, articles 14 through 16—by setting out strict definitions of the term military necessity—certainly limited his ability to issue such commands.[49] Article 14 held that military necessity "consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[50]

Anticipating that most cases of military necessity would involve the taking of food stuffs from the local population, article 16 of the Lieber Code did allow for the "appropriation of whatever an enemy's country affords *necessary for the subsistence and safety of the army* . . . ."[51]

Sherman, however, paid little attention to the Code. In twisted logic based on pure vengeance, he openly and intentionally targeted innocent civilians to make them suffer for having supported the Confederacy,[52] rather than to feed his troops. Claiming that his barbarous machinations had a bright side—that is, they might somehow induce the civilians to sue for peace—Sherman freely admitted, "If the . . . [civilians in the South] raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity-seeking. If they want peace, they and their relatives must stop the war."[53] By his own admission, Sherman purposefully violated article 16 of the Lieber Code:

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[48] *Id.* at 10.

[49] Id. at 6.

[50] *Id.*

[51] Id. (emphasis added).

[52] *See* de Mulinen, *The* Law of War and *the* Armed Forces, 18 INT'L REV. OF THE RED CROSS 18, **20** (1978). "The only rules that count for the armed forces are those that must be applied in war. The question as to who is at the origin of a conflict and who is the victim is a matter belonging to the realm of politics and is of no concern to members of the armed forces."

[53] WINTLE, supra note 16, at 280. On set of commentators observed,

> In [Sherman's]view the mission of the Army was to kill, burn, mangle and destroy, and in a memorandum to President Lincoln he urged a policy of ruthlessness, contending that the war must go on until "enough" southern landowners (innocent civilians) were killed off. He did not hesitate to invoke terror. He wrote, "To secure the navigation of the Mississippi River I would slay millions; on that point I am not only insane, but mad."

GOLDSTEIN, ET AL., supra note **36,** at 554.

> Military necessity does not admit cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of wounding or maiming except in fight . . . nor wanton destruction of a district. It . . . does not include any act of hostility which makes the return to peace unnecessarily difficult.[54]

Finally, the popular but erroneous contention by some modern writers that "General Sherman's march of devastation . . . during the American Civil War may have been viewed as lawful tactics at the time" is simply a twisted manifestation of "victor's justice."[55] The adoption of the Lieber Code as an official military order made the Code absolutely binding on all Federal soldiers—particularly the officers who were solemnly charged with upholding the laws.[56]

B. *Total War*

In today's setting, had General Schwarzkopf followed Sherman's example of "total war," not only would he be guilty of numerous war crimes, but also the armies he commanded and the nations he represented would have been subjected to the scorn and ridicule of the entire civilized world.[57] Even by the somewhat less rigid standards of his own day, General Sherman left the civilized world nothing worth emulating. Obviously, however, in stark contrast to his opponent Saddam Hussein, General Schwarzkopf strictly adhered to both the spirit and the letter of all aspects of the law of armed conflict. With the wholesale looting, hostage-taking, murdering, torturing, raping, and environmental destruction visited upon Kuwait, Saddam Hussein actually was the one who carried General Sherman's notion of "total war" to unspeakable extremes.[58]

Furthermore, the American Government never would tolerate abuses of this critical rule of law, particularly abuses that were command directed. The Bush Administration could be expected to take steps immediately to halt any violations of the

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[54] SCHIKDLER & TOMAN, *supra* note 37, at 6.

[55] LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 77 (Peter D. Trooboff ed., 1977). Victor's justice refers to the view that the victorious side can prosecute anyone it wishes without regard to normal process of laws.

[56] ***See*** *supra* text accompanying notes 36-37.

[57] ***See*** Matthew E. Winter, *"Finding the Law"—The Values, Identity, and Function of the International Law Adviser,* 128 Mil. L. Rev. 1, (1990).

[58] ***See*** AMKESTY INT'L, IRAQ/OCCUPIED KUWAIT HUMAN RIGHTS VIOLATIONS SINCE AUGUST 2, 1991 (Dec. 1990).

law of war and to prosecute promptly any Americans guilty of these crimes.[59]

Unfortunately, Sherman's conduct evidently was not so shocking to the Lincoln Administration.[60] Notwithstanding the rules that his general breached, the Commander in Chief apparently accepted Sherman's conduct. That the American government tolerated this behavior over 126 years ago should be disturbing, but not surprising. For instance, it earlier had condoned the forced evacuation of every human being in most of the border areas of western Missouri and, pursuant to General Order No. 11, it had directed the burning of every single home.[61]

Accordingly, when Sherman flippantly quipped, "War is hell,"[62] he, by his barbarous acts, made it so hellish. Sherman's tactic—to assert that, because war is utterly repulsive, one need not abide by rules—is as old as it is fallacious.[63] Rules regulating the conduct of warfare and the associated punishments for those who violated those rules always have existed.[64] The real point of shame may have been that General

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[59] *See* Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para. 506(a) (1 July 1966). Under the provisions of the Geneva Conventions, each nation is obligated to search for persons alleged to have committed war crimes, to investigate the allegations, and to prosecute or extradite individuals so accused. In addition, the policy of the United States mandates that all American military personnel who are tried for war crimes must be prosecuted in military courts-martial under the substantive provisions of the Uniform Code of Military Justice. *See* GERHARD VON GLAHN, LAW AMONG NATIONS 870-91 (1991).

[60] Lincoln apparently was willing to overlook Sherman's actions because of his successes. The President sent Sherman the following message when he reached Atlanta; "God bless you and the army under your command." GOLDSTEIN, ET AL., *supra* note 36, at 555.

[61] Dino A. Brugioni, *The Meanest Bushwacker,* BLUE AND GRAY, June 1991, at 32, 34. Union General Thomas Ewing issued the order in the fall of 1863. In essence, all individuals residing in an area that covered four western counties in Missouri were given 16 days to evacuate. The homes, farms, and fields of some 20,000 civilians were burned, and many of their personal valuables were stolen.

[62] LANDRETH, *supra* note 44, at 62. Some writers believe that this phrase was taken from a speech made by Sherman in 1880. Sherman said, "There is many a boy here today who looks on war as all glory, but, boys, it is all hell." From this sentence the newspapers coined the phrase, "War is hell." Other sources attribute the phrase to a 1879 address made before the Michigan Military Academy where Sherman remarked, "I am tired and sick of war. Its glory is all moonshine . . . War is hell." *See* WINTLE, *supra* note 16, at 91.

[63] WINTLE, *supra* note 16, at 24. Marcus Tullius Cicero (106-43 B.C.) stated in *Pro Milone* (61 B.C.) "*inter arma legis silent,*" which means, in war the law is silent. That statement was not true then and is not true today. Rome had very specific rules on the regulation of hostilities. *See* ARTHUR FERRILL, THE FALL OF THE ROMAN EMPIRE (1986).

[64] One of the earliest examples of rules regulating combat comes from the *Torah.* For example, in the book of *Deuteronomy,* the Hebrews were given specific instructions on the protections that were to be afforded to the inhabitants of a city under siege. In all cases, torture was prohibited. Similarly, fruit trees outside of a besieged city were

Sherman never was held accountable for the barbarous outrages that he sponsored.

IV. Conclusion

> *Lee is the only man I know whom I would follow blindfolded.*[65]
>
> —Thomas J. Jackson

The antithesis of Sherman, General Lee not only is remembered as a military genius, but also is praised equally by North and South, for his careful adherence to the laws of war—particularly in the protection of the property and persons of civilians. Lee never subjected the northern civilian population to the terror and horror that was visited upon his own people. On the other hand, to those who have studied the man, Lee knew no other way.

In April 1861, when Lieutenant General Scott received Lee's resignation from the United States Army to offer his services to the southern cause, Scott expressed the greatest regret. A witness, however, noted that General Scott was consoled knowing that he "would have as his opponent a soldier worthy of every man's esteem, and one who would conduct the war upon the strictest rules of civilized warfare. There would be no outrages committed upon the private persons or property which he could prevent."[66] Clearly, even before they were codified in the Lieber Code, Scott understood—as did Lincoln, Sherman, and Grant—what the customary international rules regarding civilized conduct in war required of them.[67]

On both of his campaigns into the North, Lee conducted his army impeccably, punishing all soldiers convicted for larceny of private property. Fully realizing that Union forces wantonly had razed civilian homes and farms in the neighboring Shenandoah Valley, Lee nevertheless kept close rein on his soldiers. Lee wrote,

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protected from destruction. The fruit could be eaten, but it was unlawful to cut down the tree. ***Deuteronomy*** 20:10-20.

[65] G. F. R. HENDERSON, STONEWALL JACKSON **307** (1989). Considered to **be** Lee's finest corps commander, General Jackson was wounded mortally at the battle of Chancellorsville.

[66] JONES, *supra* note 13, at 128.

[67] *Id.*

> No greater disgrace can befall the army and through it our whole people, than the perpetration of barbarous outrages upon the innocent and defenseless. Such proceedings not only disgrace the perpetrators and all connected with them, but are subversive of the discipline and efficiency of the army, and destructive of the ends of our movement.[68]

Although some southerners have criticized Lee for not authorizing lawful reprisals[69] to deter Federal violations in the future, General Lee firmly believed that reprisals were not the answer. Responding to a letter from the Confederate Secretary of War regarding possible Confederate responses to Union atrocities, Lee reiterated his position in the summer of 1864:

> As I have said before, if the guilty parties could be taken, either the officer who commands, or the soldier who executes such atrocities, I should not hesitate to advise the infliction of the extreme punishment they deserve, but I cannot think it right or politic, to make the innocent . . . suffer for the guilty.[70]

With Americans fighting Americans, Lee knew that the long-term effects of engaging in reprisals would not be profitable for the nation or the South. He was undoubtedly correct; Lee's strict adherence to the rules regulating warfare, coupled with his firm policy prohibiting reprisals, contributed greatly to the healing process after the War.[71]

One of the driving forces that created the legend of Lee, the ultimate gentleman, was his unmatched sense of humanity.[72] "Lee was the soldier-gentleman of tradition, generous, forgiv-

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[68] EDWARD J. STACKPOLE, THEY MET AT GETTYSBURG 31 (1980).

[69] When one party to the conflict violates an established rule of law, the injured party has the right to respond with a use of force that otherwise would be unlawful. Reprisals are not designed to punish the offending party, but to persuade it to cease and desist the illegal conduct. Under current rules, several criteria — some required by domestic policy — must be met before the United States may resort to reprisals. At the time of the War Between the States, the injured party first would have to provide a warning to the wrongdoing belligerent. If the wrongdoer refused to comply, then the injured belligerent could employ a response proportionate to the initial illegal act. See FM 27-10, para. 497.

[70] 30 S. Hist. Soc'y Papers 94 (1902).

[71] *See* WILLIAMS, *supra* note 1, at 301. Just before the surrender at Appomattox, several officers suggested that the Confederate Army should scatter and "take to the hills." Lee would not permit continued resistance by guerrilla methods. He replied that "this kind of warfare would bring only devastation and misery to the people the army had been defending."

[72] *See* BURKE DAVIS, GRAY FOX (1966).

ing, silent in the face of failure . . . a hero of mythology."[73] No matter how great the temptation for legitimate reprisals, a concept well recognized in international law, R.E. Lee would not stoop to the level of his enemies. This is one of the reasons he has been called the "Christian General,"[74] as reflected in his address to the troops as they marched into Pennsylvania during the Gettysburg campaign of 1863: "It must be remembered that we make war only on armed men, and that we cannot take vengeance for the wrongs our people have suffered without lowering ourselves in the eyes of . . . Him to whom vengeance belongeth."[75] Instructing his officers to arrest and punish all soldiers who committed any offense on the person or private property of civilians, he reminded them that "the duties exacted of us by civilization and Christianity are not less obligatory in the country of the enemy than in our own."[76]

In contrast, Sherman's atrocities simply sowed the seeds of hatred for generations of southerners — a hatred that is a common epitaph for those who commit war crimes. His assumption that he could terrorize the South into submission by devastating the farms and towns was totally fallacious. "Although the havoc wreaked by Sherman's hordes contributed to the Confederate defeat, this contribution was so indirect and ambiguous that it did not justify militarily, much less morally, the human misery that accompanied and followed it."[77]

Finally, the contention that violations of the law of war are necessary in an "ends justifies the means" analysis is fundamentally inaccurate. Aside from the obvious issue of morality, violations are most often an unwise waste of military resources. As the pragmatic Prussian soldier and author, Karl von Clausewitz, observed, "If we find that civilized nations do not . . . devastate towns and countries, this is because their intelligence exercises greater influence on their mode of carrying on War, and has taught them a more effectual means of applying force."[78]

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[73] Id. at 1.

[74] *See, e.g.*, NAGEL, *supra* note 18, at 301. Lee's view on Christian salvation was devoid of any form of human merit or morality although by the measure of any society, his own moral standards were impeccable. Grace oriented, he wrote, "I can only say that I am a poor sinner, trusting in Christ alone for salvation." ***See*** Addicott, supra note 23, at 37.

[75] GRAGG, *supra* note 7.

[76] *Id.*

[77] Robertson, *supra* note 27, at 20.

[78] KARL VON CLAUSEWITZ, ON WAR 4 (J. Graham trans. 1918).

One noted historian has described the true legacy of W.T. Sherman as follows:

> Sherman must rank as the first of the modern totalitarian generals. He made war universal, waged it on the enemy's people and not only on armed men, and made terror the linchpin of his strategy. To him more than any other man must be attributed the hatred that grew out of the Civil War.[79]

In the context of Operation Desert Storm, General Schwarzkopf clearly took only one quality from Sherman — that is, his reputation for ferocity. General Schwarzkopf related on numerous occasions that he hated war and all that it brought.[80] He also pointed out, however, that "once committed to war then [one should] be ferocious enough to do whatever is necessary to get it over with as quickly as possible in victory."[81] The difference, of course, was that Schwarzkopf, in lawful combat, directed his ferocity toward legitimate military targets of the enemy, while Sherman illegally directed his ferocity toward innocent and helpless civilians. Obviously, only in this limited analogy to the concept of "ferocity" did General Schwarzkopf pay any respect to William T. Sherman. From a military, as well as from a legal and moral perspective, General Schwarzkopf was not advocating that the United States military should find anything positive from the atrocities of General Sherman.

Whether judged in the light of tactics or of moral conduct, the actions of the American military in the Gulf War[82] reflected the impact of Lee—not Sherman. Gauged by these two factors, the Persian Gulf was not a place where lessons were learned, but a place where lessons were validated. With this validation of the magnificent ability and character of the Allied fighting forces in general, and the American military in particular, comes an appropriate tribute to Robert E. Lee.

Great armies are neither created, nor sustained, by accident. To a large degree, great armies are maintained by officers who

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[79] WINTLE, ***supra*** note 16, at 458.

[80] ***See*** WASH. TIMES, Mar. 1, 1991, at **6.**

[81] *Id.*

[82] ***See Investigators Dismiss War-Crime Allegations,*** ARMY TIMES, Sept. **23,** 1991, at 10. Allegations of American soldiers committing war crimes were minimal and all allegations were investigated promptly. In the Vietnam War, approximately fifty army personnel were tried by military courts for war crimes. ***See*** PETER KARSTEN, LAW, SOLDIERS, AND COMBAT 97 (1978).

understand, and then are able to apply, the lessons of military history. In this respect, no officer truly can be called a professional without a firm commitment to the moral and ethical rules regulating combat. Quite naturally, this objective requires constant training, as well as a comprehensive understanding of one's moral "roots."

With the collapse and dismantling of the Soviet Union, many argue that America has become the role model for the world. Certainly, this is only part of the truth. To a substantial degree, the tyranny of communism met its end precisely because America always has been humanity's beacon for all that is worthy about mankind.

Consequently, the military of the United States constantly must reaffirm its commitment to the positive values of military proficiency and ethical integrity. For instruction, inspiration, and inculcation, American officers can find no better role model than General Lee. While some may forget, ignore, or purposefully deny the role that Lee has had in shaping our modern military, to those who are objective, his impact never can be obscured.[83] To those who rediscover him through the pages of history, he still has much to impart. May the officer corps of the United States always reflect his military genius and gentle humanity.

Perhaps the most telling tribute to Lee came from his former enemies. When General Lee died in **1870,** newspapers throughout the North universally praised his military genius and morality.[84] The *New York Herald* said, "In him the military genius of America was developed to a greater extent than ever before. In him all that was pure and lofty in mind and purpose found lodgment. He came nearer the ideal of a soldier and Christian general than any man we can think of."[85]

In a speech given in **1874,** Senator Benjamin H. Hill of Georgia summed up the true greatness of General Robert Edward Lee as follows:

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[83] GRAGG, *supra* note 19, at 224. "More than a century after his death, amid the vastly different life-style of modern American society, literate Americans who discovered anew the life of Robert E. Lee would often be affected with the same awe and admiration experienced by Lee's contemporaries."

[84] Lee died in Lexington, Virginia, where he served as the President of Washington College from 1865 to 1870.

[85] *See* JONES, *supra* note 13, at 482. The *Cincinnati Enquirer* said, "He was the great general of the Rebellion. It was his strategy and superior military knowledge which kept the banner of the South afloat for so long . . . ." The *Philadelphia Age* called him "a great master of defensive warfare . . . probably not [to be] ranked inferior to any general known in history."

He was a foe without hate, a friend without treachery, a soldier without cruelty, and a victim without murmuring. He was a public officer without vices, a private citizen without wrong, a neighbor without hypocrisy, and a man without guilt. He was Caesar without his ambition, Frederick without his tyranny, Napoleon without his selfishness and Washington without his reward.[86]

[86] *General* ***Robert E. Lee and*** *His* ***Famous Horse Traveler,*** in 13 CONFEDERATE VETERAN 49 (1906).

"LAW OF WAR" AND ECOLOGY—A PROPOSAL FOR A WORKABLE APPROACH TO PROTECTING THE ENVIRONMENT THROUGH THE LAW OF WAR

MICHAEL D. DIEDERICH, JR.*

I. Introduction

International law imposes constraints upon the manner by which nations wage war. The intent of this body of law—in particular, the law of war—is to minimize some of the human suffering occasioned during wartime by restricting damaging hostile activities to those required by "military necessity." Accordingly, weapons that inflict unnecessary pain upon enemy soldiers, or that indiscriminately injure or kill civilians, are outlawed under various provisions of international law,

The discoveries revealed by the evolution of environmental law and science demonstrate that the destruction of the earth's environment and ecosystems not only is a loss in and of itself, but also has the potential of imposing present and future human pain and suffering comparable to war itself.' Today's weapons have the potential to create a nuclear holocaust[2], and to deposit chemical or biological residues that silently could kill and maim well into the future.

Unfortunately, war persists.[3] With modern weapons, the

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[1] For example, skin cancer deaths caused by ozone depletion, or deaths caused by drought or more intensive tropical storms in the wake of global warming, conceivably could exceed combat losses in a future war.

[2] *See, e.g.*, Turco, Toon, Ackerman, Pollack & Sagen, ***Nuclear Winter: Global Consequences of Multiple Nuclear Explosions, 22*** SCI. 1283(1983).

[3] Despite the end of the Cold War, warfare remains a plague that has caused roughly two million deaths in hundreds of small conflicts and 30 moderately-sized wars last year—one million in Ethiopia alone. The difficulty of negotiations between the parties is exemplified by the difficulties in persuading the Arab nations and Israel to engage in meaningful negotiations. ***See Osgood File: Interview with President Carter*** (CBS radio broadcast, Jan. 21, 1992). Environmental protection negotiations under hostile circumstances would seem unlikely, which is another reason for establishing prospective rules in the law of war.

world's population risks serious damage to vital ecosystems.[4] Therefore, governments and commanders should consider the potential environmental ramifications of combat actions. Constraints must be imposed—constraints that balance military objectives against the overall cost of the military action, *including the environmental costs.* To ignore the potential for environmental damage is to ignore the risk that this damage could threaten not only various plant and animal species with extinction, but also mankind itself.[5]

This article discusses the existing law of war as it concerns the environment, changes in international law to protect the environment further, and proposes reasoning by which commanders can balance environmental consequences against perceived military necessity.

II. Overview of Legal Constraints on the Conduct of War

A. Conduct of War Generally

War is synonymous with human suffering and has been marked throughout history by periods of unrestrained barbarity. Although humanitarian conduct has been attempted by belligerents in warfare, it often is rejected. Intentional barbarism sometimes has been accompanied by a self-righteous fanaticism.[6] More often, the worst barbarism accompanied an "inter-specific" view of the adversary—that is, a view that the opponent actually is another species.[7] Any moral con-

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[4] *See generally* A. WESTING, WEAPONS OF MASS DESTRUCTION AND THE ENVIRONMENT (1977); A. WESTING, WARFARE IN A FRAGILE WORLD: MILITARY IMPACT ON THE HUMAN ENVIRONMENT (1980); Westing, *Environmental Warfare,* 15 ENVTL. L. 645 (1986).

[5] *See generally* DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (1988). For another view of the danger of war to the environment, see "An Independent Declaration on the Environment (Dai Dong Declaration)" (1972), *reprinted in part in* B. WESTON, *R.* FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 1100-03 (1980).

[6] As one commentator stated,

> Christians seemed to have no greater scruples about going to war, or about the methods of waging it, than pagans or adherents of other faiths. Indeed, this was something which greatly shocked [Hugo] Grotius [the father of modern international law. "Throughout the Christian world I observed a lack of restraint in relation to war . . . . I observed that men rush to arms for slight cause, or no cause at all, and that when once arms have been taken up there is no longer any respect for law . . . . it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes."

BAILEY, WAR AND CONSCIENCE IN THE NUCLEAR AGE 36-37 (1988) (quoting H. Grotius).

[7] ROBERT L. O'CONNELL, OF ARMS AND MEN: A HISTORY OF WAR, WEAPONS, AND AGGRESSION 124, 190 (1989). An example was the "uniform Mongol disregard of any shared humanity between themselves and those they attacked." *Id.* at 100.

straints would apply only between kindred peoples or like civilizations.[8]

Even kindred people, however, might face slaughter. For example, the American Civil War often was "total war" in which no quarter was given (no prisoners taken alive), and by which war was waged successfully "by drastic measures justified with claims of righteousness."[9] The view of Union General Sherman was that all the destruction would force Southerners to reconsider secession. Southern General Stonewall Jackson held the reciprocal view.[10] To the Civil War generals, total war was justifiable. To General Philip H. Sheridan, war was more than simply a duel

> in which one combatant seeks the other's life; war means much more, and is far worse than this . . . . Death is popularly considered the maximum punishment in war, but it is not; reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life, as the selfishness of man has demonstrated in more than one great conflict.[11]

The barbarism of the American Civil War portended some of the more horrific episodes of the First and Second World Wars. Moreover, had those combatants possessed today's weapons of destruction, contemplating the specter of environmental calamity would be quite easy.[12]

War, therefore, rigorously tests the rationality of mankind. To the extent possible, the law of war sets forth rules that must appear rational during the heat of battle, lest the law be ignored. To add an "environmental" factor into such a life-and-death struggle is a necessary challenge.

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[8] *The Theory and Conduct of War*, *in* 29 ENCYCLOPEDIA BRITANNICA MACROPOEDIA 641.

[9] Shribman, *Wild Men of the Civil War*, N.Y.L.J., Nov. 19, 1991 (reviewing ROYSTER, THE DESTRUCTIVE WAR: WILLIAM TECUMSEH SHERMAN, STONEWALL JACKSON AND THE AMERICANS (1991)).

[10] *Id.*

[11] 1 P.H. SHERIDAK, PERSOKAL MEMOIRS 487-88 (1888).

[12] Saddam Hussein's wanton environmental destruction during the Gulf War with the very limited weapons at his disposal, likely would have paled by comparison. For example, Saddam's forces created in the Persian Gulf perhaps the largest oil spill known to man and set over 600 oil wells afire, causing black snow 1600 miles to the east. *See, e.g.*, Canby, *After the Storm*, NAT'L GEOGRAPHIC, Aug. 1991, at 2, 10; *see also* Earle, *Persian Gulf Pollution: Assessing the Damage One Year Later*, NAT'L GEOGRAPHIC, Feb. 1992 at 122-34. Hussein may have been inspired in his misdeeds by Hitler's statement to Raushning in 1932, "we may be destroyed, but if we are, we shall drag a world with us—a world in flames." O'CONNELL, *supra* note 7, at 281 (citing STRAWSON, HITLER AS A MILITARY COMMANDER 213 (1966).

B. The Law of War

Despite a demonstrated capacity for inhumanity,[13] warfare also has spawned its own rules of conduct. In 1625, Hugo Grotius published his work defining an international law of war.[14] Naturally, enunciating the law did not prevent the great human suffering of the Thirty Years' War of 1618-1648, or the Napoleonic Wars of 1796-1815.[15] Whatever the other values of these warring societies, concern for individual welfare was not one.

This changed with time, however, and with it came the modern development of the law of war. The American Civil War saw the Lieber Code, prepared by Francis Lieber and addressing—among other things—the treatment of civilians and prisoners of war.[16] A convention was concluded in Geneva in 1864 regarding the wounded of war[17] and, in 1868, certain explosive projectiles that "uselessly aggravate the suffering of disabled men, or render their death inevitable . . . , contrary to the laws of humanity" were banned.[18]

The Hague Conventions of 1899 and 1907 followed and substantially increased the body of the law of war by including

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[13] *See generally* P. JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES (1983).

[14] HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (De Jure Belli ac Pacis) (1626).

[15] With these wars also came great environmental destruction. *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, WARFARE IN A FRAGILE WORLD: MILITARY IMPACT ON THE HUMAN ENVIRONMENT 16 (1980) (table 1.2: Ecologically disruptive wars: a selection) [hereinafter SIPRI 1980].

[16] President Lincoln's General Orders, No. 100, "Instructions for the Government of Armies in the Field." The Lieber Code was very influential in the subsequent development of the law of war. *See, e.g., The Theory and Conduct of War,* 29 ENCYCLOPEDIA BRITANNICA MACROPOEDIA 642.

[17] 1864 Geneva Convention, 22 Stat. 940 (Senate accession Mar. 16, 1882), *reprinted in* FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY (1972).

[18] 1868 St. Petersburg *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. See* DOCUMENTS ON THE LAWS OF WAR 29-33 (Roberts & Guelff eds. 1981) [hereinafter DOCUMENTS]. The St. Petersburg Declaration was the first in a series of treaties banning the use of particular weapons of war. The underlying rationale, as stated then by the International Military Commission, was that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy" toward which it is "sufficient to disable the greatest possible number of men . . . This object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." The employment of such weapons "would, therefore, be contrary to the laws of humanity." The Commission, therefore, was to fix "the technical limits at which the necessities of war ought to yield to the requirements of humanity." KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 12, 36 (1987). This analysis might apply to environmental damage as well.

provisions concerning asphyxiating gases,[19] expanding ("dum-dum") bullets,[20] neutral powers and persons,[21] and the laws and customs of war on land.[22] The laws and customs of war on land included the definition of belligerents entitled to protection under the treaty, defined the rights of prisoners of war, and placed limitations on the means of warfare. In particular, the "Hague law" emphasized that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[23] Limitations were established, including prohibitions against treachery, improper use of a flag of truce, injuring prisoners, declaring that no quarter will be given, and pillaging.[24] Also prohibited were employing poison or poisoned weapons; using arms, projectiles or material calculated to cause "unnecessary suffering"; and destroying or seizing the enemy's property unless such destruction or seizure was imperative to the necessities of war.[25] The bombardment of undefended towns, villages, dwellings, or buildings was prohibited by the Hague Declaration.[26] During sieges and bombardments, the enemy had to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes; historic monuments; and hospitals,[27]

The 1907 Hague Convention IV was also important for its inclusion of the so-called "Martens Clause," which provided that "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[28]

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[19] 1899 Hague Declaration (11) Concerning Asphyxiating Gases. ***See*** DOCUMENTS, ***supra*** note 18, at 35.

[20] 1899 Hague Declaration (III) Concerning Expanding Bullets. ***See*** DOCUMENTS, ***supra*** note 18, at 39.

[21] 1907 Hague Declaration (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. ***See*** DOCUMENTS, ***supra*** note 18, at 61.

[22] 1907 Hague Declaration (IV) Respecting the Laws and Customs of War on Land. ***See*** DOCUMENTS, *supra* note 18, at 44.

[23] ***Id.*** art. *22* annex, sec. 11, ch. I.

[24] ***Id.*** art. 23.

[25] ***Id.*** These provisions also provide some incidental environmental protection. ***See*** *infra* notes 42-60 and accompanying text.

[26] 1907 Hague Declaration (IV) Respecting the Laws and Customs of War on Land, art. 25.

[27] ***Id.*** art. 27. This restriction applied only to buildings that actually were not being used for military purposes. Consider whether a "historic monument" can be a natural monument.

[28] ***Id.*** Preamble. This clause was named after the Russian delegate, DeMartens. ***See*** KALSHOVEN, *supra* note 18, at 14.

As to the sick and wounded, the Hague Conference of 1907 referred to, and adopted the provisions of, the Geneva Convention of 1906.[29] This "Geneva law'' was developed further in 1926, and again in 1949 with that year's four significant Geneva conventions pertaining to the sick and wounded combatants, prisoners of war, and civilians.[30]

The Hague and Geneva strains of the law of war continuously were supplemented by various other conventions[31] for a simple reason — warfare fought in violation of society's values engendered a demand for change. Generally these values concerned respect for the rights of individuals and an aversion to the harms that war inflicted upon them. Accordingly, the use of poison gas during World War I resulted in the 1926 Geneva Protocol.[32] Other valued assets, such as cultural and historic objects, also have been granted some measure of protection.[33]

With these developments, international law has achieved some success in placing limitations on the ad hoc decisions of military commanders — limitations that never constrained infamous predators such as Attila the Hun, Ghengis Kahn, or the Khmer Rouge. Modern law of war provided at least some protection to the individual, presumably because society began to value human life. A modicum of civility was added to warfare, though war certainly remained far from a medieval joust. Just as societal values of personhood and culture have imposed constraints on the conduct of war, environmental values also should be protected.

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[29] 1907 Hague Declaration (IV) Respecting the Laws and Customs of War on Land, sec. I, ch. III.

[30] *See* KALSHOVEN, *supra* note 28, at 10-11. The four conventions were "convention I for the Amelioration of the Condition of the Wounded, and Sick in Armed Forces in the Field, Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Convention III Relative to the Treatment of Prisoners of War, and Convention IV Relative to the Protection of Civilian Persons in Time of War." DOCUMENTS, *supra* note 18, at 169-337.

[31] *E.g.*, The 1923 Hague Rules of Aerial Warfare; The 1936 London Proces-verbal Relating to the Rules of Submarine Warfare, in The Treaty of London, pt. IV, 22 Apr. 1930; The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; The 1954 Hague Convention and 1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict. ***See*** *generally* DOCUMENTS, *supra* note 18.

[32] 1926 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S.No. 8061, *reprinted in* DOCUMENTS, *supra* note 18, at 37-145.

[33] The 1907 Hague Convention sought to protect "buildings dedicated to religion, art, science, or charitable purposes" and "historic monuments." ***See*** *infra* text accompanying notes 48-57. Two 1954 Hague instruments provide for protecting cultural property. ***See*** *infra* note 52.

III. The Current Status of Environmental Protection in the Law of War.

Much of the law of war discussed above also has been termed "international humanitarian law"[34] and, as the phrase suggests, has emphasized reducing human suffering caused by direct hostilities. The humanitarian laws were designed to ameliorate human suffering, and any environmental benefit was merely a secondary benefit.[35] Moreover, the history of warfare demonstrates that combatants have not hesitated to use—and abuse—the environment when doing so proved to be militarily expedient.[36] Nevertheless, the modern law of war has furnished some incidental protection to the environment.

Until recently, the law of war, and international law in general, largely has ignored the environment as a major topic of concern.[37] Even such a significant and broad document as the **1949** Charter of the United Nations lacks of any direct reference to environmental concerns. This reminds individuals about how recently a regard for environmental awareness actually has developed.

The lack of any direct reference to environmental concerns in the **1949** United Nations Charter is conspicuous. For exam-

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[34] Examples of international humanitarian law are the "Geneva" types of regulation. *See, e.g.*, MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 1-2 (1990) ("International humanitarian law is that branch of the laws of armed conflict which is concerned with the protection of the victims of armed conflict, meaning those rendered hors de combat by injury, sickness or capture, and also civilians").

[35] *See infra* text accompanying notes 42-60.

[36] For example, the Boers burned wide areas of *veldt* (grassland) to deny forage to the British during the Second Anglo-Boer War of 1899-1902. Similarly, in June 1938, the Chinese drowned hundreds of thousands of their own people by dynamiting the Huayuankow dike to stop the Japanese advance. *See* Westing, *Environmental Warfare*, 16 ENVTL. L. 656, 661 (1985). Environmental warfare has not been limited to modern times. According to the Greek historian Herodotus, the Persian (today Iranian) commander Cyrus 11, frustrated in his siege of Babylon, diverted the Euphrates River by a canal into a marsh, which allowed his troops to storm the city through the river beds. ***See*** *The Theory and Conduct of War, in* 29 ENCYCLOPEDIA BRITANNICA MACROPOEDIA 669. In the thirteenth century, the Mongols destroyed the elaborate irrigation system of the Tigris River, upon which the agriculture of the indigenous civilization depended. ***See*** SIPRI, *supra* note 15, at 15.

[37] Even the concept of sustainable development, well articulated in the World Commission on Environment and Development's book, OUR COMMON FUTURE (1987) (Brundtland Report) does not seem to be known widely by either politicians or their constituents in a country as environmentally "aware" as the United States. At the time of this writing, President Bush was unsure whether he would attend the United Nations Conference on Environment and Development ("Earth Summit") in June 1992—a conference that is to focus on the issues of sustainable development—because ***of*** election year pressures. *See* N.Y. Times, Mar. 25, 1992, at A7. Americans, however, apparently are beginning to recognize the importance of long-term environmental issues. ***See,*** *e.g.*, *Growth vs. Environment: **In** Rio **Next** Month, **A** Push for Sustainable Development,* BUSINESS WEEK, May 11, 1992, at 66-76.

ple, the Charter's provisions concerning the use of force states that one purpose of the United Nations is:

> **3.** To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights ana for fundamental freedoms for all without distinction as to race, sex, language or religion; and
>
> **4.** To be a center for harmonizing the actions of nations in the attainment of these common ends.

The United Nations Charter was "state of the art" when drafted, yet nowhere does it directly address environmental concerns. This is instructive when analyzing the law of war—a law that can be expected to be only as environmentally progressive as society's values generally.

Fortunately, values appear to be shifting.[38] The United Nations General Assembly has recognized the environmental consequences of war.[39] The recent Persian Gulf crisis highlighted the potential for environmental abuse in war. The world com-

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[38] In recent years, environmental awareness has increased in the United Nations. *See, e.g.*, Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N.Doc A/Conf.48/14, 11 I.L.M. 1416. Principle 21 of that declaration asserts,

> "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

See also World Charter for Nature, infra note 41.

[39] G.A. **Res.** 35/8, U.N. GAOR (30 Oct. 1980):

> Conscious of the disastrous consequences which a war involving the use of nuclear weapons and other weapons of mass destruction would have on man and his environment,
>
> Noting that the continuation of the arms race, including the testing of various types of weapons, especially nuclear weapons, and the accumulation of toxic chemicals are adversely affecting the human environment and damaging the vegetable and animal world,
>
> Bearing in mind that the arms race is diverting material and intellectual resources from the solution of the urgent problems of preserving nature,
>
> 1. Proclaims the historical responsibility of States for the preservation of nature for present and future generations;
>
> **2.** Draws the attention of States to the fact that the continuing arms race has pernicious effects on the environment and reduces the prospects for the necessary international co-operation in preserving nature on our planet; . . .

munity, with its nascent environmental values, found intolerable Iraq's wanton ecological destruction.[40]

The United Nations is becoming cognizant of environmental considerations. The scope of international environmental values has been broadened to include military activities.[41]

A. Indirect Protection of the Natural Environment Through the Law of War

Despite the absence of an environmental awareness in international law until recently, several provisions of various law of war instruments have provided some incidental protection to the natural environment. These are discussed below.

1. Environmental Protection in Twentieth Century Western Law of War.—

(a) Chemical and bacteriological prohibitions.— The history of war is a study of atrocity that often occurs in spite of clear rules of law. Nevertheless, law of war prohibitions against the use of chemical and biological warfare generally have been observed. Even Hitler declined to use poison gas available to him against enemy troops,[42] though he showed no such scruples toward concentration camp internees.

The First Hague Peace Conference of 1899 prohibited projectiles used to disperse asphyxiating or deleterious gases. The basis for this prohibition derived from customary rules of international law prohibiting the use of poison and other materi-

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[40] Particularly deplorable during the Persian Gulf War was what appeared to be Iraq's environmental retribution while in retreat. Iraq would argue that these actions were defensive and in anticipation of the invasion of coalition forces. The United Nations, however, was not sympathetic to Iraq. ***See*** S.C. Res. 687 (3 Apr. 1991):

> [The Security Council r]eaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; . . .

Id. para. 16.

[41] ***See, e.g, World Charter for Nature,*** G.A. Res. 37, 1982 U.N.Y.B. 1023 (1982):

> 5. Nature shall be secured against degradation caused by warfare or other hostile activities.
>
> 20. Military activities damaging to nature shall be avoided.

Although the World Charter for Nature is "soft" international law—and therefore not as compelling as, for example, a treaty or protocol—it is indicative of changing values. Nevertheless, the United States voted against the Charter.

[42] O'CONNELL, ***supra*** note 7, at 276.

als causing unnecessary suffering.[43] Nevertheless, the use of chlorine, phosgene, and mustard gas during the First World War led to a conference and the 1926 Geneva Gas Protocol.[44] Though the protocol did not stop Italy's use of poison gas during its invasion of Ethiopia in 1935-36, Germany stated at the outbreak of World War II that it would observe the protocol, which it did. Gas and bacteriological weapons were not used to any great extent during the war.[45]

The law of war has continued to develop restraints on chemical and biological warfare. For example, the 1972 Bacteriological Convention expanded the 1925 Geneva Gas Protocol by prohibiting development, production, and stockpiling of bacteriological and toxin weapons.[46]

The principal purpose behind chemical and biological warfare prohibitions has been to avoid direct human suffering. These restraints, however, also have provided an incidental benefit to the environment. Poison gas or biological weapons sufficient to kill humans certainly is destructive to the non-human portion of the environment. Therefore, the earth's natural resources, including its flora and fauna, are spared to the extent that poison gas or other toxins are not used against combatants.

Constraints against the use of poison did not, however, deter the extensive use of herbicides by the United States during the Vietnam War. The use of poison, which society found abhorrent if used against humans, was permitted against nature.[47]

(b) Specially protected objects and sanctuaries. —

(i) Protected property and cultural objects. — *Both* "property" in general, as well as cultural and historical objects, are subject to protection under the law of war,

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[43] **See** DOCUMENTS, ***supra*** note 18, at 137. The 1907 Hague Convention also expressly forbade poison or poisoned weapons, which apparently included chemical warfare.

[44] ***See*** KALSHOVEK, ***supra*** note 30, at 16; 1926 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, June 17, 1926, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N T.S. 65. **See** DOCUMENTS, ***supra*** note 18, at 137-45.

[45] ***See*** DOCUMENTS, ***supra*** note 18, at 138.

[46] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 683, T.I.A.S. No. 8062.

[47] Upon some reflection, however, this changed. In 1977, and principally as a result of American use of chemical warfare in Vietnam, two significant additions were made to the law of war, directly protective of the environment — Protocol I Additional to the 1949 Geneva Convention and the 1977 Environmental Modification Convention (ENMOD). **See** ***infra*** notes 61-82 and accompanying text.

whether they are the property of noncombatants[48] or the property of a state.[49] For example, warring parties must take measures to avoid, if possible, the destruction of various buildings and places not used for military purposes.[50] Unless absolutely necessary, destruction of real or personal property — public or private — is barred.[51] This prohibition extends to a state's destroying property within its own borders.[52] In some respects, these rules are similar to the law of war's absolute prohibition against pillage;[53] unfortunately, however, international law has yet to prohibit the wanton destruction of the environment.

In addition to the protection of property and buildings or structures, the law of war also protects cultural, scientific, and historic assets. This protection demonstrates a further sophistication in the law of war based upon expanded societal values. Moreover, the law in this area is subject to some flexibility in interpretation. For instance, "cultural property" is defined as including "property of great importance to the cultural heritage," such as "monuments of architecture," archaeological sites, and "manuscripts, books and other objects of artistic, historical or archeological interest."[54] Allowing protection for "other objects of . . . interest" suggests deliberate flexibility in the application of the law.

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[48] *See, e.g.*, Convention for the Protection of War Victims Concerning the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 30, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; see *also* Dep't of Army, Field Manual 27-10, The Law of Land Warfare, at 28 (1978).

[49] International Convention with Respect to the Laws and Customs of War on Land (Hague 11), July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, art. 27, 36 Stat. 2277, T.S. No. 539.

[50] *See supra* note 49.

[51] 1949 Geneva Convention to Protect War Victims, *supra* note 48, art. 53 ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State . . . , is prohibited, except where such destruction is rendered absolutely necessary by military operations").

[52] Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol, May 14, 1964, art. 4.1, 249 U.N.T.S 215. Sanctions are also available. *See, e.g.*, 1907 Hague Convention, *supra* note 49, art. 56 ("All seizure of, destruction or wilful damage done to institutions of this character [religious, charitable, educational, arts and sciences], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings").

[53] *See, e.g.*, 1907 Hague Convention, *supra* note 49, art. 28 ("The pillage of a town or place, even when taken by assault, is prohibited").

[54] 1954 Hague Convention for the Protection of Cultural Property, *supra* note 49, ch. I, art. 1.

The law provides not only for respecting cultural objects, but also for identifying these objects in a distinct manner[55] to facilitate their transport and immunity from capture,[56] and to promote efforts by the United Nations to assist a country in protecting them from damage or destruction.[57]

(ii) Destruction of property as including environmental damage.—With increasing environmental awareness, the scope of the protections to "real and personal property" could be expanded to include the rape and pillage of the environment. Since 1907, destroying the enemy's property has been illegal unless "imperatively demanded by the necessities of war."[58] If possible, "historic monuments" also must be spared[59]—a mandate that arguably includes nature's monuments. Cultural protection might be broadened to include sanctuaries for sensitive portions of the natural environment under the mechanism found in the Cultural and Natural Heritage Treaty[60] or similar international laws. Protective demarcation might surround particularly sensitive habitats, so as to protect these areas as if they comprised a cultural site—or perhaps, an environmental demilitarized zone.

B. Most Recent Law of War Comprehensively Protecting the Environment—Protocol I and the ENMOD

1. Roots In the Vietnam Conflict.—The most significant law of war to concern protection of the environment directly resulted from the Vietnam conflict and the massive assault on nature inflicted during that war.[61] Actually, the term "eco-

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[55] *Id.*, ch. V, art. **16-17.**

[56] *Id.*, ch. **III**, arts. **12-14.**

[57] *Id.*, ch. VII, art. **23** (assistance from the United Nations Educational, Scientific and Cultural Organization (UNESCO)).

[58] **1907** Hague Convention, ***supra*** note **49,** art. 23(g).

[59] *Id.*, art. **27.**

[60] Convention for the Protection of the World's Cultural and Natural Heritage, Nov. **23, 1972,** ***reprinted in*** SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENVIRONMENT **276-82 (A.** Kiss ed. **1983).**

[61] STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, ECOLOGICAL CONSEQUENCES OF THE SECOND INDOCHINA WAR **(1976)** [hereinafter SIPRI 1976]:

> Military disruption of the environment during hostilities is pernicious because its spills over both the spacial and temporal boundaries of the attack, because of its partially unpredictable ramifications, and because its impact does not discriminate clearly between combatants and non-combatants. Military disruption of the environment is, however, exceedingly difficult to limit or control by legal instruments. This is because most hostile and many non-hostile military actions result in at least some level of environmental disturbance, whether intended (overtly or covertly) or not, and because of the subse-

cide" first was coined during the Vietnam War.[62] The United States conducted in Vietnam a cost-intensive war[63] to subdue its guerrilla enemy using—among other things—herbicides, high-explosive munitions, and mechanical land clearing to effectuate large-scale deforestation and crop destruction.[64] The United States expended more tonnage of munitions during the Vietnam conflict than it used during World War II and the Korean War combined.[65] The environmental damage that resulted from the profligate use of environmentally destructive warfare was profound.[66]

Aided by an increased environmental awareness in the United States, Congress became concerned about reports of excessive environmental damage and attempts at weather modification by the American forces in Vietnam.[67] Environmental interest was piqued internationally. In 1977, these environmental concerns produced two additions to the law of war—Protocol I and the ENMOD.

2. Protocol *I* to 1949 Geneva Convention.—The United States' widespread use of heavy munitions; incendiary weapons; herbicides; antipersonnel chemicals; weather manipulation; and bombing raids against dams, dikes, and seawalls, during the Vietnam War, arguably had serious environmental

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quent difficulties in establishing the magnitude of disruption to be proscribed and the means of determining whether it has, in fact, been exceeded.

A fundamental consideration to ponder is the philosophical basis for a concern over environmental warfare.

Id. at. 88-89. SIPRI, noting anthropocentric motivations, asks "But should not living things, and nature as a whole, have some level of immunity in their own right? *Id.* at 89. Should we treat trees as noncombatant bystanders, and thereby give them "standing"? This is an important question. *Cf.* Sierra Club v. Morton, 406 U.S. 727, 742 (1972) (Douglas, J. dissenting) (citing Stone, ***Should Trees Have Standing?—Toward Legal Rights for Natural Objects?,*** 46 S. Cal. L. REV. 460 (1972)).

[62] *See* A.W. Galston, N.Y. Times, Feb. 26, 1970, at 38 (coining "ecocide" as a term describing the killing of the ecological system or its components by positing "a plea to ban 'ecocide'"); *see also,* SIPRI 1976, *supra* note 61, at 10 n.1.

[63] SIPRI 1980, *supra* note 16, at 7.

[64] SIPRI 1976, *supra* note 61, at 9-10.

[65] *See* SIPRI 1980, *supra* note 16, at 4.

[66] *See generally* SIPRI 1976, *supra* note 61. For example, the *en masse* employment of high explosive munitions in Vietnam, expended largely for "massive strategic interdiction," led to a high level of indiscriminate destruction of field and forest. *Id.* at 21-22.

[67] *See, e.g.*, Prohibiting Environmental Modification as a Weapon of War, S. Rep. No. 270, 93d Cong., 1st Sess. 102 (1973); Schafer, ***The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct Are Permissible During Hostilities,*** 19 CAL. W. INT'L L. REV. 287 (1989).

effects.[68] Perhaps these measures could be viewed as resourceful applications of modern technology to waging such a war.[69] Nevertheless, the international community objected to these measures, kindling controversy over their employment.[70]

The result of the controversy was Protocol I to the 1949 Geneva Convention.[71] Protocol I advanced additional restraints on the means and methods of waging war.[72] One commentator characterized Protocol I as marking "the first significant development of the laws of war since 1907."[73]

The pertinent environmental sections of Protocol I prohibit attacking civilian necessities, including a "scorched earth" policy;[74] require combatants to "protect the environment against

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[68] SIPRI 1976, *supra* note 61, at 88; W. VERWEY, RIOT CONTROL AGEXTS AND HERBICIDES IN WAR 148 (1977).

[69] Schafer, *supra* note 67 at 309.

[70] *See, e.g.*, SIPRI 1976, *supra* note 61. Some were more vocal in objection than others. The Swedes were apparently not sympathetic to the American involvement in the Vietnam war. In the late 1960's, the United States was "tried" by a self-constituted "court" in Stockholm, which rejected an offer by a Swedish attorney to represent the United States. 26 ENCYCLOPEDIA BRITANNICA MACROPOEDIA 649.

[71] Protocol (I) Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 6 U.S.T. 3616, T.I.A.S.No. 3364, 16 I.L.M. 1391 [hereinafter Protocol I]. The United States is a signatory to Protocol I, but has not ratified it.

[72] *Id.* Protocol I, provides, in part:

Article 36 Basic Rules

> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Chapter III Civilian Objects

Article 55 — Protection of the natural environment

> 1. Care shall be taken in warfare to protect that natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited.

Article 66 of Protocol I protects from attack "works and installations containing dangerous forces." Examples include dams, dikes, and nuclear power plants. These installations, however, are excepted under special circumstances. These protections appear to be in the spirit of the Hague conventions relating to the means and objects of warfare.

[73] Aldrich, *Progressive Development of the Laws of War: A Reply to Criticism of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693, 694, 699 (1986); *see also* Schafer, *supra* note 67, at 308 n.107.

[74] Protocol I, *supra* note 71, art. 54.

widespread, long-term and severe damage" by prohibiting means of warfare intended or expected to cause such damage to natural environment;[75] and protect dams, dikes, and nuclear power plants in the absence of extraordinary military necessity.[76] These provisions are striking in that they directly protect the natural environment. Although these provisions may not go so far as to give trees "standing," they clearly acknowledge that the environment—in and of itself—is important to mankind.

3. *The 1977 Environmental Modification Convention (ENMOD).*—Another treaty that was drafted as a result of the Vietnam War—and, in particular, as a result of unofficial reports about American attempts to alter the weather[77]—was the 1977 Environmental Modification Convention (ENMOD).[78] The ENMOD contains broad language protective of the environment[79] that is similar, but not identical, to the language of Protocol I.

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[75] *Id.* art. 55.

[76] *Id.* art. 56.

[77] In 1972, the United States Senate passed a resolution requesting an international agreement prohibiting environmental warfare. Prohibiting Environmental Modification as a Weapon of War, S. Rep. No. 270, 93d Cong., 1st Sess. 1-2 (1973).

[78] The treaty is officially called the "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques," May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614. [hereinafter ENMOD]. It previously was adopted by the United Nations General Assembly as a recommendation to all states. ***See*** U.N.G.A. Res. A/RES/31/72 (10 Dec.76) (the United States is a signatory).

[79] ENMOD, ***supra*** note 78, states in part:

The States Parties to this Convention

. . .

Realizing that the use of environmental modification techniques for peaceful purposes could improve the interrelationship of man and nature and contribute to the preservation and improvement of the environment for the benefit of present and future generations,

Recognizing, however, that military or any other hostile use of such techniques could have effects extremely harmful to human welfare,

. . .

ARTICLE I

1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as a means of destruction, damage or injury to any other State Party.

. . .

ARTICLE II

As used in article I, the term "environmental modification techniques" refers to any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

The ENMOD prohibits environmental modification techniques designed to result in widespread and long-lasting or severe effects against a signatory opponent. Its prohibitions are limited to manipulation of the environment, and no "military necessity" exception exists. As with Protocol I, the ENMOD is also protective of nature itself.

4. Net Protections Afforded, and Not *Afforded,* by Protocol I and the ENMOD.—Protocol I and the ENMOD prohibit widespread, long-lasting, or severe effects or damage to the environment. Protocol I focuses on methods of warfare intended to cause damage to the environment by any belligerents. The ENMOD focuses upon manipulation of the environment by parties to the treaty.

Protocol I and the ENMOD place a limit upon the mindless mayhem that normally accompanies war. Nevertheless, many forms of military activity potentially devastating to the environment remain insufficiently regulated. First, collateral damage from conventional warfare does not appear to be covered under either Protocol I[80] or the ENMOD. Second, even intentional, direct damage to the environment is permissible if it is not covered specifically by the prohibitions. Third, the pertinent definitions are unclear and ambiguous. Finally, and most problematic, no clear "proportionality" equation exists to balance "military necessity" against harm to the environment.

Protocol I and the ENMOD are unprecedented in one important respect—both conventions are aimed at protecting the earth's natural environment, even though both have very high damage thresholds. The ENMOD and the environmental provisions of Protocol I effectively give nature "standing"—that is, they do not depend upon direct injury to identifiable human beings. Rather, the environment itself is the focus. In so doing, these conventions are the most progressive developments[81] to date in the arena of environmental protection as it applies to the law of war,[82] going beyond any prior law that arguably

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[80] The Conference Reports to Protocol I suggest that collateral damage from conventional warfare is not covered, even if it were of the magnitude suffered by France during World War I. *See* 3 LEVIE, PROTECTION OF WAR VICTIMS 269-77 (1980).

[81] For a discussion of the distinction between "progressive development" and "codification" in international law—particularly concerning the International Law Commission—see McCaffrey, *Codification and Progressive Development: Law and World Environment,* HARV. INT'L REV., Nov. 1984, at 8.

[82] More recent law exists, but it is not of general applicability. *See, e.g.,* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, G.A. Res. 34/68, 34 U.N. GAOR Supp. (No.46) at 77, U.N. Doc. A/Res/34/68, 18 I.L.M. 1434.

could be construed to protect nature itself.[83]

C. Other Environmental Ethos Potentially Relevant to the Conduct of War.—

If contemporary law of war concepts ultimately are only as strong as the underlying societal values of potential combatants, then considering some potential environmental values may be helpful to an analysis of the continued development of this area of international law.

1. Religious Constraint on Environmentally Destructive War.—In the middle ages, the concept of the "Just War" developed. This concept provided justification for the crusades and, in essence, sanctioned war as long as a moral cause existed. Because environmental values rest upon moral themes—that is, respect for nature, concern for health, and conservation—the immoderate destruction of natural resources may make an otherwise acceptable war "unjust." Accordingly, legal systems that are based upon varied moral norms still might support the addition of "environmentalism" to the law of war.

Religious tenets may impose limits on the methods of warfare. Hindu belief in Brahman—as well as the ancient "Laws of Manu"—includes respect for all life, and many are vegetarians. These religious values might offer some sanctuary to the ecology during war. Buddhism developed from Hinduism. Buddhist teachings include Buddha's Four Noble Truths, one of which is that elimination of desire leads to the cessation of suffering. This concept of moderation might deter unnecessary environmental destructiveness in war. The religion of Islam might find ecological values in its Koran, the fundamental tenets revealed by God to Mohammed, or in its traditions collected in the Hadith.

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[83] *See, e.g.*, The 1964 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 216 (14 May 1964). This convention provides, in part,

> 1. The High Contracting Parties undertake to respect cultural property . . . by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

This provision might protect some small piece of the environment. Consider whether Iraq's destruction of Kuwaiti **zoos** was a violation of this provision? *Cf.* Security Council Resolution 687, ***supra*** note 40. The 1963 Test Ban Treaty might be viewed as directly benefiting the environment, although it certainly was implemented to protect humans.

Indigenous peoples live closest to nature and tend to harbor a concomitant degree of respect for the environment. Furthermore, they often lost battles against their more "civilized" adversaries because the native peoples tended to exercise moderation. For example, they routinely took their enemies as prisoners, whereas colonialists often were more merciless.[84]

The combination of the nascent environmental ethic in the West, and the societal environmental values manifested by the Buddhist, Hindu, and Moslem religions and tribal societies, may be significant to the law of war. As mentioned before, the Martens Clause prohibits warfare contrary to the "usages established by civilized peoples, the laws of humanity, and the dictates of the public conscience."[85] Taken together, the congelation of many diverse environmental values might become sufficient for the environment to be protected in wartime under the Martens Clause.

2. Environmentalism in the Military. — Although it is an institution quite different from the societies based upon eastern religions, the American military also is developing an environmental ethic. The United States Army, for example, has a comprehensive program for factoring environmental considerations into its decision-making and operations. It is proactive in requiring environmental assessment in noncombat operations that may affect the environment adversely — even when the impact occurs outside of the United States. Other countries have adopted the concept of environmental impact assessment first developed in the United States. The United States similarly should proliferate the idea of military sensitivity to the environment.

Military forces may become more attuned to environmental concerns through active compliance with domestic environmental law. In the United States, the armed forces generally must comply fully with domestic environmental law. The Coast Guard has gone even further, taking on an increasingly active role as an environmental policeman. Similarly, the Army Corps of Engineers has a multifaceted involvement with environmental regulation, not the least of which is its responsibility for

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[84] *See,* O'CONNELL, *supra* note **7,** at 128-29. Arguably, native peoples would have preferred fighting the white man with native weapons, which would have been far less environmentally destructive. Western war against indigenous peoples, on the other hand, has been marked by both human and environmental destruction. O'Connell argues that westerners also have had a propensity for testing horrific new weapons on native peoples. *Id.*

[85] ***See*** *supra* note **28.**

issuance of dredge and fill permits under section 404 of the Clean Water Act.[86]

Because military activities frequently have overseas impacts, domestic law can project overseas and can present a model for other countries to emulate. For example, a great deal of legal controversy has arisen over the extraterritorial application of the National Environmental Policy Act (NEPA).[87] The courts apparently have had difficulty in reaching a consensus on NEPA's application,[88] despite Council on Environmental Quality guidelines that have required federal agencies to assess the environmental effects of a proposed action "as it affects both the national and international environment."[89]

On January 4, 1979, President Carter issued Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," which requires special implementing procedures — but not necessarily an environmental impact statement — when any federal agency undertakes actions overseas that affect the quality of the environment. This requirement applies equally when the agency contemplates action that could affect the "global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)."[90] It exempts certain activities, however, such as intelligence activities, arms transfers, emergency relief, or action occurring in the course of armed con-

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[86] 33 U.S.C. $1344 (1988).

[87] *See, e.g.*, 42 U.S.C. §§ 4321-4370 (1988). The National Environmental Policy Act (NEPA) section 102(2)(C) requires an impact statement for "major Federal actions significantly affecting the quality of the human environment." The NEPA also requires federal agencies to "recognize the worldwide and long-range character of environmental problems and [assist in] preventing a decline in the quality of mankind's world environment." *Id.* § 102(2)(F). The NEPA's legislative history, however, is silent on the issue of extraterritorial effects. *See generally* Comment, *NEPA's Role in Protecting the World Environment*, 131 U. Pa. L. Rev. 353 (1982); Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. Envtl. Aff. L. Rev. 643 (1991).

[88] *Compare* NRDC v. Nuclear Reg. Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) (United States Nuclear Regulatory Commission was not required to prepare environmental documentation to issue license for nuclear reactor) *with* National Org. for Reform of Marijuana Laws (NORML) v. United States, 462 F. Supp. 1226 (D.D.C. 1978) (environmental review required for herbicide spraying of Mexican marijuana and poppy plants). In People of Enewetak v. Laird, 363 F. Supp. 811 (D. Haw. 1973), the court held that the NEPA applies to activities that impact in United States trust territories. In EDF v. Massey, 772 F. Supp. 1296 (D.D.C. 1991), the court refused to enjoin the National Science Foundation from incinerating waste in Antarctica, after ruling that the NEPA does not apply extraterritorily and that Executive Order 12114 did not create a private cause of action. One example of a recent controversy is whether New York power authorities should contract with Quebec hydroelectric power producers without conducting an environmental review of the possible impact — particularly on Canadian Indians.

[89] 40 C.F.R. § 1500.8(a)(3(i)(1977), 38 Fed. Reg. 20663 (1973).

[90] Exec. Order 12114, para 2-3(a) (Jan. 4, 1979).

flict.[91] This executive order has been implemented by the Department of Defense.[92] The implementing Army Regulation states,

> Protection of the environment is an Army priority, no matter where the installation is located. The Army is committed to pursuing an active role in addressing environmental quality issues in our relations with neighboring communities and assuring that consideration of the environment is an integral part of all decisions.[93]

As to the global commons, the regulation goes on to state that "[a]ll the nations of the world share the stewardship of these areas."[94] This progressively responsible view is consistent with current Army domestic policy regarding the environment.[95]

Though not applicable to warfare, the above policies logically help create an environmental awareness — perhaps even an environmental "ethic" — that may eliminate needless environmental destruction during war.

V. Rationales for Protecting the Environment During Warfare

With increased scientific knowledge, the importance of the natural environment to human survival is becoming increasingly recognized as a societal value. The history of the law of war is the history of society's values — values such as chivalry, humanism, protection of civilians and prisoners of war, and respect for the church — being translated into combat restraint. Logically, increased environmental values similarly can translate into battlefield restraint. The degree to which this can occur will depend upon the strength of the rationale for the constraint,

One approach to factoring environmental protection into warfare is to treat nature as a noncombatant. Natural resources would be equated, to some degree, with civilians or

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[91] *Id.*, paras. 2-5(a)(iii), (iv), (vii).

[92] Dep't of Defense Directive 6060.7, DOD Final Procedures, Apr. 12, 1979, *44* F.R. 21786, *reprinted in part in* Army Reg. 200-2, Environmental Impact and Enhancement, apps. G, H (23 Apr. 1990) [hereinafter AR 200-2].

[93] *Id.* para. 8-1.

[94] *Id.* para. 8-3.

[95] *See, e.g., id.; see also,* Joy, *A Tennessee Snail Darter at Grafenwoehr? The Application of the Endangered Species Act to Military Actions Abroad,* ARMY LAW., Dec. 1991, at 23.

protected assets such as churches and historical monuments. The problem with this approach is that wars are fought largely in the natural environment, and that a commander would not be expected to sacrifice a soldier to save a tree.

A second approach is to educate service members, particularly military commanders, in ecology and the sciences generally, and to provide scientific advisors during combat. This would make commanders aware that the environment is crucial to both the short- and long-term benefits to—as well as the very existence of—mankind. Furthermore, this approach would tend to promote intelligent tactical and strategic decision-making.[96]

A third approach would require societies and their armed forces to observe "conservation" as an international legal precept. One commentator has concluded that the law of war and the laws of environmental protection share similar philosophies.[97] Both war and environmental exploitation provide anticipated benefit to its protagonist. War arguably restores international public order.[98] Exploitation of the environment has allowed the survival of society.[99] Nations, however, agree to limit the destructive nature of both these activities, with a common theme being conservation. Specifically, the law of war conserves military forces and battlefield surroundings, while environmental laws conserve environmental resources. The mandates of conservation in both of these contexts are directed against mindless exploitation and destruction.[100]

The idea that nations fight wars to restore public order may ring hollow in light of much of the violence of contemporary history, and may reflect an overly idealistic standard of "just

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[96] This is an approach which, if applied, may deter some wars in the future. If commanders are educated sufficiently to realize that certain conduct—such as destroying the Brazilian rain forest—actually might imperil mankind, they may face an "environmental deterrent" just as the threat of immediate obliteration created the nuclear deterrent of mutually assured destruction during the Cold War. Moreover, if environmental education were made a part of military training, the benefits might be immeasurable. Throughout the world, armies train vast numbers of troops who spend a few years in military service and then rejoin civilian society. Career soldiers often become national leaders. Society only could benefit by heightened environmental awareness by either group.

[97] *See* Schafer, *supra* note **67,** at 318.

[98] Viewing war as an activity maintained to restore public order may be self-deception in view of the horrendous destruction of public order that occurred in cases such as Nazi Germany, the Spanish revolution, Algeria's decolonialization, and the Khmer Rouge takeover of Cambodia. *See generally* **JOHNSON,** *supra* note 13.

[99] Schafer, *supra* note **67,** at 318.

[100] *Id.*

war."[101] Nevertheless, the concept of just war, to which most belligerents at least will pay lip-service, facilitates the imposition of standards of conduct in warfare. With today's more sophisticated weaponry, and greater scientific knowledge of the consequences of environmental destruction, the rules of war should include consideration of environmental impact.

Any reasonable approach must balance military necessity with environmental protection. Unless circumstances give them sufficient reasons to act otherwise, commanders predictably will rationalize a "military necessity" when balancing human lives against the natural environment. Commanders, however, must acknowledge, understand, and accept the reality that ecological destruction may cost human lives and suffering far exceeding the battlefield loses. Accordingly, environmental protection must be made a fundamental value to be secured even in time of war.

VI. Environmental Values

A nation at war pursues its self-interest by applying its own system of values. A nation's value system necessarily is based upon its people's collective understanding—or often its leader's understanding—of how the nation's perceived interests best will be served. Advances in weapons development, however, apparently may outpace the abilities of many nations fully to comprehend these weapons' potentials for destruction. Accordingly, without a complete understanding of how the employment of modern weapons may affect a nation or its environment, the country's people or leaders may fail to understand that restraint actually would promote that nation's self-interests.

With the types of weaponry now available, misplaced and blind self-interest, accompanied by a lack of environmental ethic, can result in tremendous destruction. This recently was demonstrated by Iraq in the Persian Gulf War. The International Committee of the Red Cross (ICRC) recently has expressed a dire warning concerning the increasingly destructive means of warfare:

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[101] For a discussion of the "just war" in Christian ethics and international law, see BAILEY, WAR AND CONSCIENCE IN THE NUCLEAR AGE, chs. 1, 2 (1988). For other overviews, see Dinstein, *supra* note 5 at 61-69; O'BRIEN, THE CONDUCT OF JUST ASD LIMITED WAR (1981); and WALTZER, JUST ASD UNJUST WARS (1977).

> Indeed, there is reason to fear that the use of particularly devastating means of warfare, the effects of which are often still unknown, could wreak such large-scale destruction as to render illusory the protection afforded civilians under international humanitarian law.[102]

Realistically, a nation will abide by law of war provisions that prohibit devastation to the environment only after an environmental ethic becomes part of that society's value system.

Based on the premises discussed above, some basic guiding principles that commanders can use as rationales for military decision-making—and which eventually can be incorporated into the law of war—should be apparent. First, mankind is dependent upon nature for its health and survival. Therefore, any destruction of nature should be viewed as potentially harmful to humans. At a minimum, harm to nature should be permitted only if mankind will accrue a net benefit to mankind. Second, mankind should understand that its knowledge about how human activity affects the environment is ever-increasing. Specifically, environmental damage that may appear to be minimal or innocuous today may be very significant in the long term. For instance, an exotic plant species may contain the cure to cancer—a cure that could be lost forever if the plant becomes extinct. Similarly, tropical forest destruction may increase the risk of global warming or may shift weather patterns.

In addition, the international community, national governments, and military commanders should include environmental considerations in military decision-making. These considerations would be based upon a society's "valuation" of the environment, and might include—

—environmental "sanctuaries" for critically sensitive ecosystems in which military activities are prohibited;[103]

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[102] ICRC statement to the Sixth Committee (Legal) of the United Nations General Assembly, 46th Sess. (1991), agenda item 140, dated Oct. 22, 1991. The ICRC convened a conference of experts on this topic in Geneva during April 1992.

[103] A registry might be established, using various inventories such as the United Nations List of Parks and Equivalent Reserves; the United Nations Educational, Scientific and Cultural Oraganization's (UNESCO) List of World Heritage Sites and Biosphere Reserves; and regional lists such as the Council of Europe's Biogenetic Reserves. ***See*** Professor Nicholas A. Robinson, "War and the Environment: Institutional Provisions in UNCED's Agenda 21", 17 Mar. 1992, ***submitted to*** UNCED Working Group III on behalf of the International Union for the Conservation of Nature and Natural Resources (IUCN), at 6-7.

— environmental assessment of contemplated military activities, so that any decision to destroy a natural resource through military activity is "informed";[104]

— balancing the environmental harm expected to be suffered against the military and societal benefits expected to be gained. In essence, this is the "proportionality" principle that, in traditional law of war analysis, sanctions the use of force in proportion to the "military necessity" involved.

— allowing a neutral body to act as the representative of the environment.[105] This body might be a "Green Cross" organization, perhaps under the auspices of the International Committee of the Red Cross. This body might be involved with establishing and supervising environmental sanctuaries, rendering advisory opinions regarding whether certain military activities are permissibly "proportional," and supervising or assisting with cleanup or remediation actions conducted in the zone of military operations.[106]

VII. Conclusion

Environmental concerns must take a center stage, even in the field of warfare, to protect mankind from ecological catastrophe. Adjusting the law of war so that it protects contemporary environmental values and reflects an awareness of the ecological effects of war not only is warranted, but also may be critical to the longevity of the human race.

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[104] For example, neither NEPA, nor Army regulations requiring environmental consideration, apply to military activities conducted as part of armed conflict. *See generally* 42 U.S.C. §§ 4321-4370 (1988); AR 200-2. Furthermore, whether NEPA applies by its terms overseas is still unclear, even though federal agencies are required by executive order to consider environmental impact. *See* Exec. Order 12,114 (Jan. 4, 1979).

[105] *See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance with the Charter of the United Nations*, U.N.G.A. Res. 2625 (XXV) (1970) ("Recalling the duty of states to refrain in their international relations from military, political, economic or any other form of coercion [including environmental pollution?] aimed against the political independence or territorial integrity of any state"); *cf. Declaration of Inadmissibility of Intervention*, U.N.G.A. Res. 2131 (XX) (1963) ("all forms of indirect intervention are contrary to these principles [of self-determination] and, consequently, constitute a violation of the Charter of the United Nations").

[106] Environmental Disaster Relief preparedness should be considered. During the Persian Gulf War, the Office of the United Nations Disaster Relief Coordinator (UNDRO) took initiatives to pool expertise and information concerning the environmental disaster. An international environmental response body certainly is suggested, but its actual functions and procedures are beyond the scope of this article.

A RAPE OF JUSTICE: MACARTHUR AND THE NEW GUINEA HANGINGS*

REVIEWED BY MAJOR FRED L. BORCH**

Was MacArthur a racist? If so, did this racism cause a miscarriage of justice in New Guinea in 1944? In ***A Rape of Justice: MacArthur and the New Guinea Hangings,*** Walter A. Luszki suggests that the answer to both questions is "yes." His book chronicles the court-martial and execution of six black soldiers found guilty of raping two white female nurses. Luszki calls the court-martial a "wartime tragedy" and blames racism for the deaths of the men. MacArthur's order to hang the soldiers, however, was more than just "a reflection of the racist attitudes of the military and of American culture." As the commander of the Pacific Theater, MacArthur had the final say on all courts-martial results. He could have declined to order the executions. He could have reduced the punishment to a term of years. That he did not, says Luszki, suggests a lack of "compassion" and racial prejudice—very serious allegations.

The author, a retired Army officer, demonstrates that the court-martial proceedings in these cases—at least by today's standards—were decidedly unfair to the six accuseds. ***A Rape of Justice: MacArthur and the New Guinea Hangings*** fails to prove, however, that MacArthur acted unreasonably in approving the death sentences. Moreover, the evidence presented by Luszki is woefully inadequate to support his principal charge that the hangings likely resulted from MacArthur's racial bigotry.

On the evening of March **16, 1944,** First Lieutenant Havers and Sergeant Flanagan picked up two female nurses and drove to the beach at Milne Bay, New Guinea. The two white couples had been on the beach for a little over three hours when five black soldiers approached them. According to the four whites, the black soldiers threatened to kill them if the women did not

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*WALTER A. LUSZKI, A RAPE OF JUSTICE: MACARTHUR AND THE NEW GUINEA HANGINGS (1991). Madison Books, Lanham, Maryland; 103 pages; $26.00 (hardcover).

** Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army.

consent to sexual relations. The couples apparently resisted, but were overcome when one accused brandished a knife. Both nurses testified that they were sexually assaulted. One nurse, Second Lieutenant Irvine, testified that she was raped by at least three of the accuseds, but did not "remember anything else." After this initial attack, two more black soldiers arrived on the beach. One of these two men also raped Lieutenant Irvine.

After an investigation, the six accuseds were tried by a general court-martial. All six men were privates, ranging in age from nineteen to twenty-two. The principal evidence against the men was the testimony of the two female victims, and their male escorts. The six soldiers also made written statements admitting that they had been on the beach. When questioned individually, however, each denied that he had engaged in sexual intercourse with either of the victims. One accused, a Private Arthur T. Brown, also admitted that he heard all of his companions "say that they had engaged in intercourse with the thin girl, [Irvine]." Another accused, Private Lloyd L. White, admitted that he had kissed one of the nurses, and had asked her to have sex with him. He claimed, however, that she would do no more than hold his penis in her hand. Finally, one of the black soldiers, Gradde Dupont, made a statement corroborating the victims' claims of assault and rape. Apparently, Dupont had tried to stop Private White's rape of Irvine and actually had been assaulted by White. A medical examination revealed the presence of semen in Irvine; no other evidence of injury to either woman existed.

Luszki concedes that a crime occurred. "Evidence indicates that in the first group either three or four of the five black men actually raped Lieutenant Irvine." He also says, "Although White and Dupont arrived on the scene later than the other five black men, White can be considered as having been involved in the gang rape. He knew what the other men got, and wanted some too." Luszki argues, however, that "extenuating circumstances . . . caused the six black men to commit rape." First, he says that the "six men were at an age . . . when they were at the peak of their sexual drive." Unlike their white counterparts, the African-American soldiers were unable to date the white females in the racially segregated Army. Second, the remoteness of New Guinea and the attitudes of the indigenous population meant that the young black soldiers had no other outlets for their sexual energies. Luszki says that this "coerced abstinence" may have created "deep feelings of resentment against those persons who are perceived

as responsible. The resentment may turn into hatred of those in authority and defiance of the rules and regulations which they impose." Luszki's words are worth quoting at length, because they reflect his general analytical approach to discussing the New Guinea hangings. The six black soldiers, he writes,

> were forced to live in a state of abstinence . . . and it is no wonder that their thoughts and fantasies turned into impulsive action that brought them into conflict of military law . . . . Under such circumstances it is highly likely that the black men were sexually aroused when they learned that the two nurses and their white escorts were going into a restricted area. They suspected that the four whites were there for immoral purposes. **A** number of studies indicate that both rapists and non-rapists show high levels of sexual arousal to audio-taped simulations of rape and consenting sexual acts. In the Milne Bay case there was more than a taped portrayal. The men saw white women with whom they had hoped to have sex. They might also have been aroused by the natural scenery of woods, ocean and blue sky. These factors, along with their sexual deprivation and strong sex desires, might have contributed to a desire to commit rape.

Luszki is very critical of the military justice system as it existed in 1944. His points are quite valid. First, the two prosecutors were licensed attorneys and judge advocates. Two nonlawyer defense counsel, however, represented the accused. Second, these two defense counsel represented the interests of all six men. Measured by today's standards, six coaccused's having only two counsel clearly would be unfair. Luszki also is correct in being highly critical of the criminal investigation. Both the government and the defense failed to do any scientific examination of the crime scene. No fingerprints were gathered; no fingernail scrapings were obtained from the female victims; no pubic hair combings or fiber analyses were performed. Perhaps this was not practicable in New Guinea. Had these examinations been conducted, however, the six accused soldiers likely would have received a better defense.

When critiquing the court-martial proceedings, however, Luszki often undermines his arguments by relying on arguably irrelevant matters. For example, in criticizing the lack of legally trained counsel for the accuseds, Luskzi quotes the 1961 *Manual for Courts-Martial.* The 1961 *Manual* required a judge advocate defense counsel for the accused at a general court-martial. Yet the 1928 *Manual for Courts-Martial* governed mil-

itary justice in World War II. Consequently, Luszki should have noted that its provisions permitted nonlawyer defense counsel, regardless of whether the prosecutor was a judge advocate. Unfortunately perhaps, this nevertheless was all that military law required.

As to MacArthur and his racial bigotry, Luszki simply has no real evidence that MacArthur believed in racial inequality, nor does he offer evidence that any racial prejudice caused a miscarriage of justice. On the contrary, the best evidence Luszki can muster indicates that MacArthur was free of racial prejudice. William Manchester, who wrote the acclaimed *American Caesar: Douglas MacArthur, 1880-1964*, told Luszki that his research disclosed only "the recollection of one officer that MacArthur made an anti-Semitic remark." Manchester further told Luszki that he had "not found any other evidence of racial bias expressed by him."

The Rape of Justice: MacArthur and the New Guinea Hangings argues, however, that evidence of racial bias may be deduced from MacArthur's aristocratic Southern roots. It also may be deduced from the "data on hangings approved by MacArthur in the Pacific Theater during World War II." These figures show "a much higher proportion of blacks than whites [being hanged] in relation to troop strength." Consequently, Luszki concludes, "It is probable that MacArthur adopted many traditional Southern attitudes from his autocratic Southern mother, including the idea that nothing was more heinous than for a black to rape a white woman, and that no penalty, not even lynching, was too severe." Unfortunately, conclusions like this one are no more than speculation.

Assuming, *arguendo*, that like more than a few men and women of his generation, MacArthur was a racist, this book contains no evidence that MacArthur actually ordered the hangings because of any racist views. The court-martial condemned the men to death. The Commanding General of Intermediate Section (New Guinea) approved the findings and sentence. The Branch Office of the Judge Advocate General in Melbourne, Australia, referred the case to a three-lawyer board of review. That board concluded that "the evidence fully supports the approved findings of guilty as to each accused." The board members found "no extenuating circumstances." Rather, the board noted that "[a] crime of a most diabolical nature was planned and executed with cool deliberation." The recommendations of the board of review went to General MacArthur, who ordered the execution of the death sentences. In sum, Luszki may be correct that MacArthur had views on race that

ultimately caused a "rape of justice." He offers no evidence, however, that any racial prejudices MacArthur may have had resulted in the imposition of the death sentences. More likely, MacArthur simply approved the recommendations of his subordinate commander and judge advocates.

A Rape of Justice: MacArthur and the New Guinea Hangings illustrates how much military justice has changed since World War II. The safeguards and due process taken for granted today—such as legally qualified defense counsel and impartial military judges—did not exist at the court-martial of these accuseds. Would these men be hanged today? No. Was their punishment excessive? Almost certainly. This court-martial was a "wartime tragedy" when measured by today's standards. The book, however, also is a prime example of the worst kind of historical scholarship and biased writing. Luszki has no evidence of misconduct or bad faith by any government participant to the proceedings. He fails to *prove* that General MacArthur acted with any evil or improper intent. Consequently, Luszki's allegations against MacArthur suggest more that he has a personal bias against his former commander, rather than that MacArthur abused his discretion in ordering the hangings.

A Rape of Justice: MacArthur and the New Guinea Hangings is a short book. It is easy to read, although not well written. The author quotes extensively from the record of trial in the court-martial, and also has tried to give the reader an idea of what life was like in New Guinea in **1944.** Readers will find the book thought-provoking and controversial in content.

GABBY: A FIGHTER PILOT'S LIFE*
RETURN WITH HONOR**
STUKA-PILOT HANS-ULRICH RUDEL***

REVIEWED BY MAJOR FRED L. BORCH****

"To be a successful soldier, you must know history." In writing these words in a letter to his son, General George **S.** Patton

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* FRANCIS GABRESKI & CARL MOLESWORTH, GABBY: A FIGHTER PILOT'S LIFE (1991). Orion Books, New York; **277** pages; $20.00 (hardcover).

** GEORGE E. DAY, RETURN WITH HONOR (1990). Champlin Fighter Museum Press, Mesa, Arizona; 268 pages; **$28.50** (hardcover).

*** GUENTHER JUST, STUKA-PILOT HANS-ULRICH RUDEL (1990). Schiffer Publishing, West Chester, Pennsylvania; 277 pages; $31.60 (hardcover).

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meant that success on the battlefield comes from studying the great captains and campaigns of the past. Above all, however, the study of leadership is important because although weapons and technology may change, human nature remains the same. The newer and more sophisticated weapons do not win battles—men and women do. Each soldier's courage, perseverance, skill, and strength of will win wars. Consequently, those who want to lead soldiers in combat must understand what motivates men and women to excel, despite hardships and obstacles. The study of leadership, however, is no less important for a judge advocate in today's Army. Sooner or later, a military lawyer will supervise others. Experience shows that the best bosses know both how to manage and how to lead. Consequently, all military attorneys must strive to be the best possible leaders.

In *Nineteen Stars,* Dr. Puryear explains one way by which soldiers learn leadership, noting that MacArthur, Marshall, Eisenhower, and Patton read biographies and memoirs to discover how Alexander, Napoleon, Lee and others developed the decisiveness and confidence that are the hallmarks of leadership. Reading biographies reveals the breadth of human experience. It shows what a man or woman can accomplish in life. Military biographies, in particular, let a reader see how someone conquered fear, overcame a disability, or otherwise triumphed in the face of seemingly overwhelming odds. **As** they show what is humanly possible in war, these books provide valuable insights into human nature in a stressful environment. A biography of a great commander or highly decorated hero, moreover, will show the type of combination of knowledge, training, experience, and character that makes a person a great leader. In sum, leading is about understanding people. Biographies are about people. Those who hope to be better leaders must read—and learn—from biographies and memoirs.

Three recent books, *Gabby: A Fighter Pilot's Life, Return with Honor,* and *Stuka-Pilot Hans-Ulrich Rudel,* show how three men from entirely different backgrounds became successful leaders. All three were officers and pilots. All three were prisoners of war. All three showed unparalleled courage under fire and devotion to duty. Their lives reveal the mix of character traits necessary for successful leadership. They point the way to successful soldiering in the field, and in garrison.

Gabby: A Fighter Pilot's Life, details the life of Francis Gabreski, the top American fighter ace in Europe in World War II. "Gabreski's life is a classic American success story.'' Born

in 1919 to Polish immigrant parents, he grew up in a poor neighborhood in Oil City, Pennsylvania. His father and mother were hard workers and devoutly religious. They spoke Polish at home; his mother never learned English. Gabreski's parents, however, recognized the value of higher education; therefore, they encouraged him to enroll at Notre Dame. He nearly flunked out his first year. He made friends with some better students, however, and they who helped him to bring his grades up.

While at Notre Dame, Gabreski decided that he should learn to fly. His reason was simple—he would be able to fly home to Oil City from South Bend during vacation. Gabreski began to take flying lessons and when an Army Air Corps team came to Notre Dame looking for recruits, he also signed up for aviation cadet training. Gabreski had a tough time in flight school, but got his wings.

He was at Pearl Harbor when the Japanese attacked on December 7, 1941. He did not, however, remain in the Pacific. Rather, after reading about the Polish squadron flying with the Royal Air Force, Gabreski decided that he best could aid the war effort by learning about successful combat flying from the Poles. He convinced the Army Air Corps that his ability to speak Polish would let him quickly learn flying from the Poles and pass this important knowledge on to American fighter pilots.

Gabreski flew to England and began a remarkable career. In seventeen months he shot down twenty-eight German airplanes to become the top American ace. The Army then decided to send Gabreski back to the United States on leave. He and his fiancee were to be married when he got home. On the day he was to depart, however, Gabreski decided to fly one last mission. Unfortunately, he flew too low, struck the ground with his propeller, and crashed. After evading the enemy for several days, he was captured. He spent the remainder of the war in a German prisoner of war camp.

After the war, Gabreski spent a short time as a civilian. He missed flying and life in uniform, however, and rejoined the Air Corps. In the Korean War, Gabreski piloted F-86 Sabre jets, and shot down six and one-half "MIGs." This made him one of a few men to "achieve ace status in two wars and in both propeller and jet aircraft." Colonel Gabreski retired from the Air Force in 1967, and worked in the civilian aviation industry for the next twenty years.

Gabby: A Fighter Pilot's Life shows that a man or woman can achieve greatness regardless of economic or social background. Gabreski was successful because he was "[c]ool, fearless, aggressive, and determined to shoot down the enemy and not be shot down." He also understood people and how to motivate them. In talking about leading, Gabreski says that

> . . . you can't lead from the rear. You've got to get up front and have your team follow you. Those people behind you must have respect for your abilities, and you can't impose that on them. They have to see for themselves how good you really are, and when they find that out they'll follow you no end.

Gabby: A Fighter Pilot's Life, is well-written, informative, and a pleasure to read. It is much more than a chronological recitation of "Gabby" Gabreski's life, for he actually comes alive in its pages. Readers who pick up this book will come away with a better understanding of human nature.

Return With Honor is the autobiography of George E. Day, the most highly decorated living American. The book, however, does not tell Colonel Day's whole life story. Rather, it focuses on his sixty-seven months in captivity as a prisoner of war in North Vietnam.

Return with Honor chronicles Day's "shootdown, capture, escape, and his recapture and brutal imprisonment.'' The book begins with Colonel Day's account of his fourteen-day escape. After his F-100 Super-Sabre jet took a direct hit from enemy flak, Day ejected. Apparently he blacked out. When he awoke, he was a prisoner of the North Vietnamese. He had no sight in his right eye, his left knee was twisted, and his right arm was broken. Realizing that if he were to escape, he must do so before reaching Hanoi, Day tricked his guards into believing he was unable to move. Shortly after nightfall, he worked free of his bonds and slipped away.

Twice during the next fourteen days, Day was caught in the middle of United States Air Force B-52 attacks. On the second night of his escape, an incoming artillery round threw him in the air, ruptured his eardrums, and left a deep gash in his right leg. For two days, violent nausea and dizziness prevented his travelling. Not until the fifth day was he able to catch his first meal—-a frog, which he ate raw. After that, he only had water, a few berries, and some fruit.

Despite frequent periods of delirium caused by injuries and lack of food, Day continued travelling south. He crossed the demilitarized zone into South Vietnam, and was within a few miles of a Marine Corps base when he was recaptured by two enemy soldiers. They promptly shot him in the left leg and hand.

Following his recapture and transfer to Hanoi, Colonel Day repeatedly was tortured by the North Vietnamese. He spent thirty-seven months in solitary confinement. *Return With Honor* tells this amazing story of captivity. "It is a chilling story of atrocities, torment, and terror."

What gave Day the mental and physical strength to survive as a prisoner? He says that "God, honor and country [are] the cornerstones of my philosophy." As a senior ranking officer, Day was called upon to lead his fellow prisoners. To Colonel Day, this meant enduring beatings to protect the safety and well-being of his men. It required him to put the needs of his fellow prisoners ahead of his own desires and health. "No one was tougher or smarter. No one encouraged the men around him to greater efforts." Colonel Day thought last about himself. This selflessness was the key to his success as a leader in captivity.

The writing in *Return with Honor* is uneven at times. Certainly the prose could be clearer and crisper. The book is worth reading, however, because it is an inspiring tale of unparalleled courage and will power. Day does not refrain from criticizing by name those individuals he believes betrayed or otherwise were disloyal to the American war effort. These criticisms make for interesting reading.

Stuka-Pilot Hans-Ulrich Rudel is the biography of Germany's most highly decorated hero. Rudel, who flew a phenomenal 2530 missions as an assault and dive bomber pilot in World War 11, is arguably the greatest combat pilot of all time. No other pilot has flown more sorties in war. **"As** 1000 combat missions equals a total flying distance of 180,000 miles, or seven times around the earth at the equator, Rudel's 2530 missions is truly amazing." He single-handedly destroyed some 519 tanks, one battleship, one cruiser, one destroyer, and seventy landing craft. Rudel shot down nine aircraft and destroyed over 800 vehicles and more than 150 artillery, antitank, and flak positions. Colonel Rudel was wounded five times and shot down by ground fire some thirty times. He also used his amazing skills as a pilot to "rescue six downed crews from death or capture by the Soviets.''

This biography reveals Rudel as virtually a one-man air force. It was not unusual for him to fly "10, 15, or even 17 missions a day." He had an incredible energy level and strength of will. In February 1945, for example, Rudel was shot down by Soviet flak and crashed. His right leg was damaged so badly that it was amputated below the knee at a field hospital. Incredibly, Rudel was back in the cockpit in six weeks. Flying with a built up rudder pedal, he destroyed twenty-six more tanks while flying with one foot—no wonder a German field marshal1 said that "Rudel alone is worth an entire division!" When the war ended in Europe, he was only twenty-eight years old.

Several character traits made Rudel successful. Luftwaffe Colonel Nicolaus von Below is quoted as saying that "the driving forces behind [Rudel] were his sense of duty and his readiness for action." Rudel "believed that an officer had a career in which he belonged not to himself but to his country and the subordinates entrusted to him." He insisted that an officer "should be an example to his soldiers, even more so in war than in peacetime, without regard for himself or his life." Rudel's subordinates willingly and enthusiastically did all he asked of them because of his unselfish devotion to them and to duty. "The old soldierly virtues of loyalty and obedience determined [Rudel's] entire life."

Author Guenther Just writes that Rudel believed that "you are only lost if you give up on yourself." Rudel's exploits as a pilot prove this was his creed in war. In peace, however, Rudel also refused to "give up.'' After his release from a prisoner of war camp, Rudel became a successful businessman. Perhaps more remarkable were his athletic feats. He became an avid mountain climber, and won numerous tennis, swimming, and skiing championships. His athletic triumphs, however, were not only against other disabled athletes, but also against the nondisabled.

Stuka-Pilot Hans-Ulrich Rudel appeared originally in German. This English translation is clear, but often stilted and awkward. The book, however, has a wealth of detail and more than 600 photographs. Moreover, the author's use of chronologies, quotations, and photographs lets Rudel emerge as a three-dimensional figure.

Being a leader of men in war requires a soldier to endure the hardships of battle and display the qualities of fortitude that are beyond the average man's thought of what a man should be expected to do. Leaders must inspire their men when they

are hungry, exhausted, desperately uncomfortable, and in great danger. Only an individual of positive character and leadership ability, with the physical stamina that goes with these qualities, can function under such conditions. Gabreski, Day, and Rudel reflect these "positive characteristics of leadership," and the books about them are very much worth reading.

THE MARCH OF CONQUEST* GUDERIAN'S XIXTH PANZER CORPS AND THE BATTLE OF FRANCE**

REVIEWED BY MAJOR FRED L. BORCH***

In September 1939, the Germans unleashed a new kind of warfare. Never before had tanks, infantry, and aircraft been coordinated so closely in combat operations. Troops never before had advanced with such "lightning" speed on the field of battle. Poland was the first to fall victim to this new "lightning war" or ***Blitzkrieg.*** In the spring and summer of 1940, Scandinavia, the Low Countries, and then France fell before the German onslaught. By June **26,** 1940, the Germans were the masters of western Europe. Only Great Britain remained, but its conquest by the German ***Wehrmacht*** appeared inevitable.

The March of Conquest and ***Guderian's XIXth Panzer Corps and the Battle of France*** are about this German victory in 1940—one of the most remarkable events of modern times. Judge advocates should find these two books interesting for at least two reasons. First, their pages are filled with exciting history on a grand scale. In ***a little more than two weeks,*** for example, 123 German divisions (2.6 million men) swept through Holland, Belgium, and France. They inflicted a humiliating defeat on an Allied force of some two million men in 137 divisions. Second, Army lawyers will see that the ***Wehrmacht's*** high-velocity tactics foreshadowed today's AirLand Battle doctrine. Judge advocates can have more credibility with the commanders they advise if they understand the battlefield tenets

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* TELFORD TAYLOR, THE MARCH OF CONQUEST (1991). The Nautical and Aviation Publishing Company of America, Baltimore, Maryland; 460 pages; $19.95.

** FLORIAN K. ROTHBRUST, GUDERIAN'S XIXTH PANZER CORPS ASD THE BATTLE OF FRANCE (1990). Praeger Publishers, New York; 201 pages; $39.95.

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that guide combat decision-making. The German *Blitzkrieg* campaign of 1940 is worth studying because it has real-world illustrations of the AirLand Battle principles of initiative, agility, depth, and synchronization.

Both books analyze the reasons for the German victory in 1940 *from a German perspective*. This analysis, however, is quite different in scope. *The March of Conquest* is a general study of the 1940 campaigns, whereas *Guderian's XIXth Panzer Corps and The Battle of France* is very narrow in scope. The latter focuses exclusively on Colonel-General Heinz Guderian and his corps' armored spearhead into France between May 10th and May 15th, 1940. The two vastly different treatments of the same campaign give the reader both a "macro" and a "micro" perspective.

Telford Taylor's *The March of Conquest* first was published in 1958. It has been out of print for many years, and its 1991 republication makes this "classic" history available again. *The March of Conquest* "traces the background and course of the apocalyptic events in the spring and summer of 1940." Taylor shows that neither superiority in men, nor numbers in arms gave the Germans victory. Similarly, neither secret weapons, nor "fifth columns," nor "Hitlerian intuition" caused the Allies defeat. Rather, the Germans were better led and better armed. More importantly, the *Wehmacht* had developed an ingenious, high-velocity attack. Using armor and aircraft, the Germans planned an attack designed to shatter any defending force, instead of just pushing it back. The resulting breakthrough allowed the *Wehmacht* to thrust deeply into the Allied rear. After attacking units in this high-speed, deep penetration they then bypassed and encircled defending units in the rear. This occurred so quickly that the Allies had no time to retreat and regroup.

In contrast to this *Blitzkrieg* tactic, the Allies "were tied to a rigid and ill-conceived defensive pattern." Remembering the carnage of World War I, the French and British were convinced that offensive war was suicidal. Consequently, the Allies concentrated on building highly fortified defensive positions such as the Maginot Line. They planned and trained under the assumption that the Germans still would use World War I tactics, in which front lines remained static. In sum, the Allies in 1940 had a fighting doctrine based on their World War I trench warfare experiences.

Taylor begins by tracing the development of the *Wehrmacht* and its organization. He then examines each campaign in

chronological order. He examines the brilliant invasion of Denmark and Norway, and follows with the five-day conquest of Holland. He concludes with a careful analysis of the Battle of France. Each campaign was an extraordinary triumph. *The March of Conquest* concludes, however, that the German campaign of 1940 was a strategic failure because the Germans failed to pursue and destroy the enemy. Taylor argues convincingly that the "miraculous" escape of the British Expeditionary Force (BEF) at Dunkirk revealed the Germans' most serious shortcomings as war fighters. He writes that the *Wehmacht* "was fatally handicapped by its psychological deficiencies." German leaders planned for war with France or other central European countries. They lacked the strategic vision needed to conquer the island fortress of Great Britain, or the seemingly endless steppes of the Soviet Union. The BEF escaped at Dunkirk because the Germans failed to conceive the possibility of a sea evacuation. The French coastline was the end of the world in German strategic thinking. As a result, the BEF escaped before the Germans realized what had occurred. Had the *Wehrmacht* pushed to the Channel, it would have captured the vast majority of Great Britain's professional Army. This would have meant that no professionals would have remained to train a new Allied army. Britain would be undefended against invasion and the war in Europe would be over.

The March of Conquest shows that the Germans were superb tacticians, but poor strategists. Taylor makes clear that the Germans never developed a strategic vision for the war. He believes this failure inevitably led to Germany's defeat in 1946.

Taylor, who was the chief counsel for the prosecution at the Nuremberg war crimes trials, is an exceptionally fine writer. His prose is clear, crisp, and concise. The chief shortcoming of this book, however, is that it is simply a reprint; it has no new introduction or summary. Either would show the reader that new scholarship still supports Taylor's basic conclusions about the "march of conquest" in 1940. Taylor also should have updated the bibliography. His most recent secondary source dates from 1967, and much new material has appeared since then. Additionally, new primary sources — principally at the National Archives — have been catalogued in the last thirty years. This new book would have been more valuable had an updated bibliography been written. These, however, are minor criticisms of an otherwise excellent book. All who read *The March of Conquest* will enjoy it.

Using original German war records, diaries, memoirs, and other documents, Florian K. Rothbrust has pieced together an "operational history" for General Heinz Guderian's XIXth Panzer Corps from May 10th to May 15th, 1940. Guderian spearheaded the German tank breakthrough in the Ardennes. Certainly, his *panzers* were the key to the German victory in the Battle of France.

Rothbrust shows that Guderian, the creator of the German tank force, was a remarkable man. He exhibited "an almost reckless daredevil attitude" that translated into bold, decisive leadership in combat. The French were convinced that the Ardennes, a hilly region that lies between Germany and France, was impassable to tanks. Consequently, they put a weak force there to defend against any attack. Guderian thought otherwise. He told Hitler his tanks could advance through the Ardennes. On May 10, 1940, they did just that. Guderian's XIXth Corps blitzed through the weak French forces defending the Ardennes sector. The *Blitzkrieg* was a total success. In a short five days, Guderian and his tanks achieved "what the German Army of 1914 could not accomplish in four years."

Rothbrust shows, however, that although the *Blitzkrieg* tactics were new and revolutionary, German war planners still wrestled with many of the same logistical, command, and control problems common to all Western armies. He stresses that although German officers such as Guderian exercised bold and decisive leadership, much more than "a dynamic personality or two" was necessary to take "100,000 motorized vehicles through the hilly and wooded Ardennes." Rothbrust's book gives the reader the day-to-day operational details that Telford Taylor and other writers overlook in their general histories of the 1940 campaigns. He explains that the successful high-velocity attack in the Ardennes—and the *Blitzkrieg* generally—reflected thorough "planning and training executed under the guidance of the German Army General Staff." The actual work of the commanders and staffs for the *Blitzkrieg* into France, for example, was not done with lightning speed; rather, it took more than six months. Furthermore, Rothbrust proves that the *Blitzkrieg* suffered from the same problems that plagued other traditional armies—"traffic jams, flawed tables of organization and equipment, recalcitrant subordinates and personal rivalries." In sum,

> the most essential lesson is that the German Army was not a myth, but was rather very similar to most other Western

armies. However, what made the German Army different was its ability and willingness to evaluate itself and undertake the necessary changes to improve both personnel and training."

The result was the creation and development of a combat doctrine that eliminated the need for lengthy operation orders. Instead, fragmentary orders were enough, and these put increased initiative in the hands of commanders already leading at the front. Guderian, for example, usually could be found at the front of his troops, in an armored vehicle. His headquarters remained in the rear, but he stayed in contact by using a radio and the famous "Enigma" code machine. Guderian took advantage of modern technical equipment, such as the radio, to *see* the battle as it unfolded. This stands in stark contrast to the French, who lacked radio communication and relayed messages and commands by dispatch riders. Consequently few can wonder why the *Wehrrnacht* overwhelmed the Allies in 1940.

Rothbrust, a career United States Army infantry officer who speaks, reads, and writes fluent German, is ideally suited to discuss German war-fighting doctrine. *Guderian's XIXth Panzer Corps and the Battle of France* is exceptionally well researched, and has a wealth of detail. It is definitely a book for the specialist. More than 100 pages are devoted to photographs, maps, charts, and tables of organization and equipment. These graphics give the reader a clearer understanding of Guderian and his panzers. The book is highly recommended.

VETERANS BENEFITS MANUAL: AN ADVOCATE'S GUIDE TO REPRESENTING VETERANS AND THEIR DEPENDENTS*

REVIEWED BY LIEUTENANT COLONEL EVERETT M. URECH **

Just as the *Manual for Courts-Martial* is essential to every judge advocate for the practice of military law, so should the

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* MICHAEL E. WILDHABER, RONALD B. ABRAMS, BARTON F. STICHMAN, DAVID F. ADDLESTONE, VETERANS BENEFITS MANUAL: AN ADVOCATE'S GUIDE TO REPRESENTING VETERANS AKD THEIR DEPENDENTS (1992). National Veterans' Legal Services Project, Washington, D.C.; **1072** pages; **$125.**

** Director of Developments, Doctrine, and Literature, The Judge Advocate General's School, U.S. Army. Member, Editorial Board, ***Military Law Review.***

Veterans Benefits Manual be to every practitioner of veterans' law. This outstanding publication recently released from the National Veterans' Legal Services Project is the most comprehensive work in the specialized field of veterans' law. As the authors indicate, the potential client base in this area of law is large. The United States has 27 million veterans, 48 million dependents, and two million survivors.

The *Veterans Benefits Manual* comes at a most appropriate time because many Vietnam-era veterans are approaching the age at which they may need to seek the services of the Department of Veterans' Affairs (VA). Like most government agencies, the VA is facing budgetary constraints in providing for their clients. Veterans will need advocates to protect their interests.

Sweeping changes have affected the practice of veterans' law. The Veterans' Judicial Review Act of 1988 (VJRA) established the Court of Veterans Appeals and allowed attorneys to charge fees for services to veterans in representing their interests before the VA. Prior to the VJRA, very few lawyers were willing to represent veterans and their dependents because a Civil War-era statute limited the fee allowable to just ten dollars.

This publication is a practice manual, a desk reference, and an issue-oriented guide to veterans' law. It is written in clear, plain language to assist all veterans' advocates — whether they are veterans' service organization representatives, paralegals, or lawyers. It brings together almost all areas of veterans' law in an extensive compendium that spans the gamut of this practice.

The manual is a two-volume publication that is divided into six parts. Parts I through III cover an introduction to veterans' law and an overview of the criteria for the various VA benefits programs. They also contain in-depth analyses of the VA disability benefits programs to include a separate chapter devoted to injuries and deaths resulting from the provision of VA health care. In addition, these parts illustrate procedures to follow to obtain veterans benefits. Parts IV through VI discuss general advocacy issues relating to veterans' benefits. They also address practice before the discharge review boards and boards for the correction of military records of the military departments. Finally, these sections cover benefits provided by non-VA programs for veterans and their dependents, to include the interrelationship between social security benefits and VA disability benefits.

The manual is well organized and masterfully written. It shows the reader, step-by-step, how a case is handled from inception to final decision by the Court of Veterans' Appeals. Most helpful is the appendix to each chapter, which contains examples of VA forms, sample briefs, and letters. For instance, the appendices for the chapter on compensation for service-connected disabilities and deaths contains twenty-four items. The Manual also contains rate charts, listings of military hospitals in Vietnam, locations of VA-funded Veterans' Outreach Centers by state, VA forms, and combined rating tables. In addition, it includes examples from actual cases to illustrate the methods and practices in the VA system.

The chapter entitled "Agency Rules of Practice and Procedure" is most enlightening. The authors take the reader from the first step in filing a claim, through the administrative process, to the final Board of Veterans' Appeals (BVA) decisions. They explain in detail the veteran's options following an adverse BVA decision. The accompanying charts and appendices enable the inexperienced veterans' advocate quickly to learn the process from actual letters, briefs, and case histories of the VA procedures at work.

This publication is a must for any advocate who may practice in this field. From the in-depth information presented, advocates can serve better, and more confidently represent, veterans before the Department of Veterans' Affairs. All veterans owe a debt of gratitude to the authors for their outstanding work on this manual.

FRONT AND CENTER*

REVIEWED BY MAJOR FRED L. BORCH**

This collection of thirty articles from the pages of **Army** magazine is often insightful, sometimes humorous, and always educational. It represents some of the best writing to appear in Army over the past twenty-five years. L. James Binder, the long-time editor of Army, writes in the preface that ***Front and Center*** is not a "best of Army," but a reader hardly could escape that very conclusion about this potpourri of nonfiction.

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* FRONT AND CENTER (L. James Binder ed. 1991). Brassey's (U.S.), Inc., New York. 261 pages; $32.00 (hardcover).

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The book runs the gamut, from explaining the sixteenth century defeat of the Aztecs by the *conquistadors,* to war fighting in the two World Wars and Vietnam. The book also contains articles about great personalities such as Patton and Slim. Binder, however, does not omit stories of Army life that can touch us all. *Front and Center* contains stories of great personal heroism and even a piece on the role that mascots and pets play in Army life.

The theme of *Front and Center* is that a life in uniform brings with it joys, rewards, and memories that are markedly different from those experienced by men and women who live their years only as civilians. Each article in the book illustrates this theme from the perspective of Army service.

Judge advocates will be interested in references to military justice and punishment. Two episodes involving General George S. Patton, for example, show the extent to which military criminal law—-and the commander's role in it—-has changed in the last fifty years.

From 1939 to 1940, then-Colonel Patton was the reviewing authority of a standing general court-martial at Fort Myer, Virginia. This court met every Wednesday afternoon "to try deserters who, for some unknown reason, thought it was better to turn in at Washington than elsewhere in the United States." The court heard two or three cases every session, and every accused was found guilty and given the maximum sentence. Under the 1928 *Manual for Courts-Martial,* which was in effect then, the maximum punishment for "desertion terminated by surrender" was a dishonorable discharge, total forfeitures, and confinement at hard labor for one year. A deserter gone more than sixty days, however, could get up to one-and-a-half years' confinement.

This severe sentence always was reduced or suspended by Colonel Patton in his role as the court's reviewing authority. His system of justice, however, was not appreciated by the War Department. It censured Patton, and ordered him to reprimand the president and judge advocate of the court for treating each accused the same way.

Patton did as instructed. "He told us to consider ourselves reprimanded as ordered." He then explained that the War Department was wrong to take away the trial court's power to punish an accused harshly, and to make him an example for the whole command. "But far more important from his view, it put him in a bad light as it made it much more difficult for him

to exercise the quality of mercy so essential in a good commander." Consequently, Patton dismissed the panel members with the instruction that all future sentences should be one-half the maximum punishment.

Some five years later, during the Battle of the Bulge, General Patton reviewed the record of trial of a lieutenant colonel court-martialed for "keeping a French girlfriend and transporting her, along with the outfit, in an ambulance during combat operations." The court-martial panel had sentenced the officer to be dismissed. Patton, however, learned that the accused was a good combat commander. Consequently, he reduced the sentence to a "severe reprimand" and put the officer in command of a "front-line infantry battalion," because Patton's Third Army was "rather short of fighting commanders."

Judge advocates also will enjoy reading "All in the Name of Efficiency," which offers a humorous and insightful look at officer and enlisted evaluation reports. Here are some of the gems the author read while serving on promotion boards:

> "There has been a marked improvement in this officer's use of alcoholic beverages."
>
> "Conducts himself properly in sexual relations."
>
> "Handicapped by coccidioidomycosis."
>
> "He is completely bald, and this detracts from his military bearing."
>
> "A quiet, reticent, neat-appearing officer. Industrious, tenacious, diffident, careful and neat. I do not wish to have this officer as a member of my command at any time."
>
> "Needs careful watching, as he borders on the brilliant."
>
> "Can express a sentence in two paragraphs anytime."
>
> "His leadership is outstanding, except for his lack of ability to get along with subordinates."

The chief attraction of ***Front and Center*** is that it reveals something of Army life that occurred less than a lifetime ago, yet is gone forever. Men still living today earned eighteen dollars each month while serving as privates in the late 1920's. Reserve Officer Training Corps cadets now in retirement earned seventy-five cents each day while training to be officers in the mid-1930's. This was a sizeable amount, considering that a college student might pay three dollars for thirteen meals a week in a boarding house. Soldiers alive today spent

years learning to fight and ride astride a horse. Yet this mode of transportation disappeared some forty years ago. Consequently, much about the Army has changed in less than a lifetime. Soldiering, however, continues to be "tough, dirty, amusing, depressing, uplifting, tiring, and rewarding." *Front and Center* shows this life in uniform as it was then, and as it is now.

Front and Center is well-written and easy to read. One of the articles is a mere two pages. At least five more are six pages or less, and no article is longer than fifteen pages. Accordingly, a reader who has only five minutes can pick up *Front and Center* and get a great deal of reading pleasure in a short time. It is highly recommended.

DRUG AND ALCOHOL TESTING: ADVISING THE EMPLOYER*

REVIEWED BY MAJOR FRED L. BORCH**

May employers compel their employees to take alcohol and drug tests? If so, to what extent? What federal and state laws and regulations govern employer actions in the area? *Drug and Alcohol Testing: Advising the Employer* provides practical "nuts-and-bolts" guidance for the practitioner. Active duty military lawyers will find the book of limited use. Reserve and Guard judge advocates with an active civil-law practice, however, will find the work more useful.

Author William D. Turkula writes that the "impact of drug and alcohol abuse on workplace productivity, absenteeism, security and safety is well documented." An employer is potentially liable for employees who commit on-the-job acts of negligence while under the influence of illegal intoxicants. Consequently, employers—and the lawyers advising them—need to know how to create "quality" drug and alcohol testing programs. Turkula addresses the biochemical aspects of drug and alcohol testing. He also discusses how to ensure testing accuracy, and how to educate employees about any testing program. He has separate sections on "legal issues surrounding implementation of employee drug testing" and "testing in

* WILLIAM D. TURKULA, DRUG AND ALCOHOL TESTING: ADVISING THE EMPLOYER (1990). Butterworth Legal Publishers, Salem, New Hampshire.

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heavily regulated industries." The latter section, for example, contains existing mandatory testing regulations in the Department of Transportation and the Nuclear Regulatory Commission. Some sixteen states now have drug testing legislation, and the text of these statutes also is included. ***Drug and Alcohol Testing: Advising the Employer*** also reports federal and state cases, as well as administrative decisions, that impact on employer testing of employees.

Judge advocates who examine Turkula's book will see that his ideas and suggestions for testing procedures are very similar to the procedures now used in the armed forces. He proposes, for example, that employers doing urinalysis testing use confirmatory gas chromatography-mass spectrometry testing. Turkula is an Army Reserve judge advocate; therefore, that he borrows heavily from the military's methodology in his proposals for civilian employee testing should not be surprising.

The chief problem of any legal "how-to" text is that it becomes outdated quickly. The author and publisher anticipated this and promised updates "regularly" in the initial printing of the book. A more-than-100-page "Update Issue 1" of new laws, regulations, and cases already has appeared. It easily is posted in the existing volume. Additional "updates" will guarantee that the work will remain current and useful. Consequently, ***Drug and Alcohol Testing: Advising the Employer*** is a solid effort that should continue to fill a need for judge advocates in private practice.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United Stares Army
Chief of *Staff*

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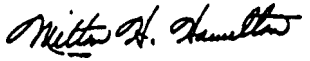

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