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PREJUDICIAL JOINDER: THE CRAZY-QUILT WORLD OF SEVERANCES*

Major Dennis M. Corrigan""

I. INTRODUCTION

Perhaps the most important decision made by a civilian prosecutor or a military accuser is the method of charging an alleged criminal act.[1] The decision is particularly difficult where separate criminal offenses are subject to the same proof or where a group of persons is involved in criminal conduct. Joinder and severance of offenses and defendants pose significant problems in modern criminal administration because the charging decision affects the allocation of scarce legal resources and the ability of our criminal process to accord defendants a fair trial.

The problems became more troublesome during the last decade because of the increased incidence of group-oriented crime. Moreover, the increased incidence was accompanied by a concomitant increase in media attention to the trials of the group members. In the civilian sector the news media gave the trials of mass offenders wide publicity. For example, the trials of the "Chicago Seven," [2] the "Harrisburg Seven," [3] and the "Gainesville Eight" [4] were lead stories in all major news media. The military justice system was also scrutinized closely by the public. Coverage of the "My Lai

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[1] Kaplan, *The Prosecutor's Discretion—A Comment*, 60 Nw. U.L. REV. 174 (1965); Note, *Prosecutorial Discretion in the Initiation* of *Criminal Complaints*, 42 *S.* CAL. L. REV. 519 (1969); Note, ***Prosecutor's*** *Discretion,* 103 *U.* **PA. L.** REV. 1057 (1955).

[2] *See e.g.*, The New York Times Index 1969, pp. 1814-26; 1970, pp. 1585-90; *cf.*, United States **v.** Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. *970* (1973).

[3] *See e.g.*, The New York Times Index 1970, pp. 161, 1844.

[4] *See e.g.*, The New York Times Index 1974, p. 1732.

Massacre" trials,' the "Presidio Mutiny,"[6] the "Green Beret" cases' and various incidents of fraggings[8] was indeed massive. The highly publicized acquittals in these cases focused the public's and the legal profession's attention on the seeming futility of mass prosecutions on the one hand and the wasteful duplication of time, money and manpower in separate trials on the other.

It would be naive to contend that the cause of these acquittals can be traced solely to an error in the decision to proceed with separate or mass trials. However, it is significant that the prosecutors and the accusers in each case were faced with difficult charging decisions under joinder rules that on their face gave them little guidance. As the prosecutors and accusers in these cases discovered, the vague joinder rules are "among the most complex in the whole field of criminal procedure."[9]

In the light of the high acquittal rate in mass trials for group offenders, a staff judge advocate cannot confidently advise referral of charges to a joint or common trial merely because the facts would permit such referral under the vague rules governing the drafting of charges[10] and the referral of charges to joint or common trials.[11] The staff judge advocate, and the military judge reviewing the initial charging decision, must consider the more fundamental question: whether in the particular case joinder will both afford each accused a fair trial and at the same time give the Government an opportunity for an effective prosecution.

The purpose of this article is to assist the staff judge advocate and the military judge in resolving that fundamental question. The article examines the motion to sever on the ground of prejudicial joinder of defendants under paragraph *69d*, *Manual for Courts-Martial*[12] and Rule 14 of the Federal Rules of Criminal

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[5] United States v. Calley, *46* C.M.R. 1131 (ACMR), *aff'd*, 22 U.S.C.M.A. **534,** 48 C.M.R. 19 (1973). See *e.g.*, R. HAMMER, THE COURT-MARTIAL OF LT. CALLEY **(1971);** The **S e w** York Times Index 1970, pp. 2211-27; 1971. pp. 1924-35.

[6] *See e.g.*, The New York Times Index 1969, pp. 1766-67.

[7] *See e.g.*, The New York Times Index 1969. pp. 1877-78.

[8] *See e.g.*, The **S e w** York Times Index 1970, pp. 1486-87.

[9] Erickson, *The History of the Tripod of Justice*, **61** MIL. L. REV. 79 (1974).

[10] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. **26** [hereinafter cited as Alanual in text and cited as MCM, 1969 in footnotes].

[11] *Id.* at para. 331.

[12] MCM, 1969. para, *69d: Motion to Sever.*

A motion to sever is a motion by one or two or more co-accused to **he** tried sellarately from the othes or others. Occasion for the motion may arise in either a joint or common trial.

Procedure.[13] The conflicting considerations inherent in the choice of the appropriate mode of trial of group offenders most often arise and can best be analyzed within the context of the motion to sever. An examination of the judicial gloss to the Alanual and the Federal Rules will be made to discover the particular manner in which the courts have applied the vaguely worded rules to recurring fact situations. Finally, this article addresses the issue whether the use of discretionary severance rules is the most satisfactory method of accommodating the accused's and the government's competing interests.

11. PREJUDICIAL JOINDER DEFINED AND DELIAIITED

A. THE DEFINITION: MISJOINDER AND PREJUDICIAL JOINDER DISTINGUISHED

When a defendant is charged jointly with a codefendant, the court may sever their cases for trial. In justifying its action, the

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In a common trial, a motion to sever will be liberally considered. It should be granted on the motion of an accused arraigned in a common trial with other accused against whom offenses are charged ahich are unrelated to those charged against the mover (33*l*).

The motion should be granted in any case if good cause is shown: but when the essence of the offense is a combination between the parties — conspiracy, for instance the military judge or the president of a special court-martial without a military judge may properly be more exacting than in other cases as to whether the facts established in support of the motion constitute good cause. The more common grounds for this motion are that the mover desires to use at his trial the testimony of one or more of his co-accused or the testimony of the wife of one, that a defense of the other accused is antagonistic to his own, or that evidence as to the other accused will in some manner prejudice his defense.

If the motion is granted, the military judge or the president of **a** special court-martial without a military judge will decide which accused will be tried first and, in the case of joint charges. direct an appropriate amendment of the charges and specifications. For instance, if after severance the court proceeds with the trial of *B* in a case in which ***A*** and *B* have been jointly charged with an offense, the specification should be amended to allege, in effect, either that *B* committed the offense or that *B* committed the offense in conjunction with ***A***. The amendment should be formally made as a part of the proceedings, no actual alteration being made in the charge sheet itself. For an example see the procedural guide, appendix 86. When, as a result of action on a motion to sever, trial of one or more accused is deferred, the trial counsel will report the facts at once to the convening authority so that he may take appropriate action to try the deferred accused or to make other disposition of the charges as to the accused,

[13] FED. R. CRIM. P. 14: [hereinafter cited as Federal Rules in text and FRCP in footnotes] Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by **a** joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

court will assert that the defendants were "misjoined" or "prejudicially joined." The terms "misjoinder" and "prejudicial joinder" might seem simple to define, but a great deal of confusion has arisen in the case law because of the misuse of the two terms.[14] Appellate opinions are replete with admonitions to defense counsel who, in the court's opinion, failed to distinguish between misjoinder and prejudicial joinder.[15] A short description of the many uses of the terms "misjoinder" and "prejudicial joinder" is necessary to clarify the scope of our discussion.

1. "Misjoinder"

Paragraph *26d* of the Manual defines a joint offense as one committed by two or more persons acting together in pursuance of a common intent.[16] Rule 8(b) of the Federal Rules permits a joint charge where defendants are "alleged to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses."[17] Both the military and the federal practice permit charging defendants jointly where all the defendants are charged under the law of principals, aiders and abettors,

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[14] United States v. Van Scoy, 482 F.2d 347 (9th Cir. 1973); Miller v. United States, 410 F.2d 1290, 1294 (8th Cir.), *cert.* denied, 396 US. 830 (1969); United States v. Respess, 19 U.S.C.M.A. 230, 41 C.M.R. 230 (1970); United States v. McCauley, 30 C.M.R. 687 (NBR 1960). See 8 J. MOORE, FEDERAL PRACTICE ¶ 8.02[1], at 8-4 (2d Cipes ed. 1973) [hereinafter cited as MOORE].

[15] United States v. Granello, 365 F.2d 990 (2d Cir.), *cert.* denied, 386 U.S. 1019 (1967); Haggard v. United States, 369 F.2d 968 (8th Cir.), *cert.* denied *sub nom.* Alley v. United States, 386 U.S. 1023 (1966); Methaney v. United States, 365 F.2d 90 (9th Cir. 1966).

[16] MCM, 1969, para. 26d. Joint offenders may be charged on separate charge sheets or together in a single charge so long as the appropriate wording of Appendices 6A and 8 is used. United States v. Dolliole, 3 U.S.C.M.A. 101. 11 C.M.R. 101 (1953). In either event, the defendants may at the election of the Government be tried jointly or separately. United States v. Evans, 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952).

[17] FRCP 8(b): Joinder of Defendants.

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transactions or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be in each count.

Rule 13, FRCP. permits either the defendant or the Government to move to consolidate at one trial indictments mhich meet the requirements of Rule 8(b). United States v. Nystrom, 237 F.2d 218 (3d Cir. 1956).

accessories before the fact, or conspiracy.[18] If the joinder of ***defendants*** does not satisfy paragraph ***26d*** of the Manual or Rule 8(b) of the Federal Rules, respectively, the term "misjoinder" is properly used and automatic severance is required.[19]

2. *"Prejudicial Joinder"*

There are two improper uses of the term "misjoinder" where the term "prejudicial joinder" is more appropriate.

First, the term "misjoinder" has been loosely applied to common trials where the trial in common may unfairly prejudice an accused. Common trials are not permitted under a strict interpretation of

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[18] MCM, 1969, para. *26d*. See Act of October 31, 1951, 18 U.S.C. § 2 (1964). United States v. Hope, 53 F.R.D. 385 (E.D. Wis. 1971); United States v. Washington, 33 C.M.R. 505 (ABR 1963). Accessories after the fact may not be charged jointly. MCM, 1969, para 26d; United States v. Washington, 33 C.M.R. 505 (ABR 1963).

[19] Tillman v. United States, 406 F.2d 930, 933 n.5 (5th Cir.), *vacated on other grounds as to one defendant, cert. denied as to others,* 395 U.S. 830 (1969); United States v. Bodenheimer, 2 U.S.C.M.A. 103, 7 C.M.R. 6 (1953). ***But*** see United States v. Schaffer, *266* F.2d 435 (2d Cir. 1959), *aff'd,* 362 U.S. 511 (1960) (where the court ruled that if a conspiracy count fails to reach a jury, the diverse counts against individual defendants are not misjoined if subject to the same proof and there is an apparent absence of bad faith on the part of the Government). For a discussion and bibliography concerning misjoinder of defendants see Note, ***Joinder*** of *Defendants* in *Criminal Prosecutions,* 42 N.Y.U.L. REV. 513 (1967).

A second proper use of the term "misjoinder" is where the charge or indictment violates paragraph 26 of the hlanual or Rule 8(a), FRCP, respectively. These rules govern joinder of ***offenses;*** they concern the principles of duplication of charges (where two or more criminal acts are charged in a single specification of a charge or a single count of an indictment, MCM, 1969, para. 28b; see United States v. Parker, 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1973); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 142 (1969) [hereinafter cited as WRIGHT]); multiplicity (where specifications or counts are for improper sentencing purposes unnecessarily multiplied, MCM, 1969. paras. 26b and *76a(5)*; United States v. Meyer, 21 U.S.C.M.A. 310, 45 C.M.R. 85 (1972); WRIGHT at § 142); and the improper inclusion of minor offenses in the same charge sheet or indictment alleging major offenses, MCM, 1969, para. *2c*; United States v. Yelverton, 40 C.M.R. 655 (ACMR 1969); Daley v. United States, 342 F.2d 932 (D.C. Cir.), cert. ***denied,*** 382 U.S. 853 (1964). For a bibliography of commentaries on misjoinder of offenses, see Carronay, ***Pervasive Multiple*** Offense *Problems—A Policy Analysis*, 1971 UTAH L. REV. 105. While the principle of judicial economy plays a significant role in the formulation of the rules of joinder of offenses as will be discussed in relation to joinder of defendants, this article focuses on joinder of defendants.

Rule 8(b) of the Federal Rules[20] but are provided for in paragraph 331 of the Manual. A common trial is one in which defendants are tried together but are charged separately.[21] Accused may be tried in common only if (1) the same evidence is necessary to prove the guilt of all the accused on some of the charges but (2) the evidence and the charge do not establish joint or concerted action." If these conditions are not met, the accused are "misjoined." and severance is mandatory.[22] Where these conditions are satisfied but the common trial would result in unfairness to any of the accused. counsel and the courts sometimes improperly characterize the accused as "misjoined."[24] If the charges and their referral to common trial are legally proper, there is no "misjoinder," as that term is properlv

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[20] WRIGHT, *supra* note 19, at § 144. See Cupo v. United States. 359 F.2d 990 (D.C. Cir. 1966). However, n-here co-defendants are properly joined under Rule 8(b), FRCP. for a joint offense such as a conspiracy to violate interstate gambling laws, it is proper to join sepsrate and distinct charges relating to tax evasion where the proof of the tax charges requires proof of the joint and substantive gambling violations. United Statcs v. Roselii. 432 F.2d 8i9 (9th Cir. 1970).

[21] MCM, 1969, para. 33*l*. If two or more persons are charged with the commission of an offense or offenses which, although not jointly committed (26*d*), were committed at the same time and place and are provable by the same evidence. the convening authority may in his discretion direct a conimon trial for these offenses only. United States v. Bodenheimer, 2 U.S.C.M.A. 130, 7 C.M.R. 6 (1953).

[22] It is this condition, that the evidence not allege joint or concerted action. that distinguishes the Manual rule from Rule 8(b), FRCP. In McElroy v. Cnited States, 164 U.S. *76* (1896), the Court, when construing the statutory provision upon which Rules 8(b) and 13, FRCP, are based, held that joinder of separate indictments is only permitted when the defendants could be joined in one indictment. *Compare*, United States v. Colin. 230 F. Supp. 587 (S.D.N.Y. 1964), *with* United States v. Charnay, 211 F. Supp. 904 (S.D.N.Y. 1962). .Although the Court of Military Appeals has ruled that para. 33*l* of the Manual is based on Rules 8(b) and 13, FRCP, it is clear that the common trials permitted by the cases so holding would not conform with the federal practice. United States v. Davis. 14 U.S.C.M.A. 607. 34 C.M.R. 387 (1964); Unitcd Statcs v. Respess, 19 U.S.C.M.A. 230. 41 C.M.R. 230 (1970). Professor \\'right properly notes that separate indictments against one defendant can be joined or consolidated under a "same evidence" test but that Rule 8(b) joinder of defendants is not tied to similarity of proof but to similarity of transaction. WRIGHT, *supra* note 19. at § 213. *See* United Statcs v. Morarity, 327 F. Supp. 1045 (E.D. Wis. 1971).

[23] Ward v. United States. 289 F.2d 87i (D.C. Cir. 1961); United States v Respess, 19 U.S.C.M.A. 230, 41 C M.R. 230 (1970).

[24] Gorigis v. United States, 374 F.2d 758 (7th Cir. 1967); Ingram v. United States, 272 F.2d *567* (4th Cir. 1959). *Cf.* Schaffer v. United Statcs. 362 U.S. 511. 516 (1960) (where the Supreme Court perhaps gave added impetus to the confusion when it stated: "The terms of Rule 8(b) having been met and no prejudice under Rule 14 having been shown. there was no misjoinder.").

used; rather there is "prejudicial joinder" for which a court may sever the defendants in the interest of justice.

A second, related misuse of the term "misjoinder" occurs in joint trials where the charges are appropriately drawn but the trial of the defendants together would prejudice some of them.[25] Again, since the rules pertaining to the drafting of the charges and their referral to trial are satisfied, the use of the term "misjoinder" is improper. "Prejudicial joinder," the subject of this paper, is the term of art to describe the grounds for the grant of a motion for severance in joint and common trials pursuant to paragraph *69d* of the Manual and Rule 14 of the Federal Rules of Criminal Procedure.[26]

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[25] See cases cited note 14, *supra*.

[26] This article focuses on prejudicial joinder of defendants. Specifically, it deals with one method of obtaining a severance, a motion on the ground of prejudicial joinder. The assumption throughout the discussion is that the charges are properly drafted and the accused are properly ordered to stand trial together, that is, they are not misjoined. However, even if the joinder satisfies Rule 8, FRCP, and paragraph 16 and 33*f* of the Manual, there are numerous alternative methods by which the accused can obtain a severance. To delimit the article's scope, it will be helpful to list some of the other methods of obtaining severances.

First, the accused can seek severance on the ground that they are prejudiced because they are represented by the same counsel. Although interesting issues of conflict of interest and inadequate representation have arisen, their resolution is based upon ethical considerations rather than the theory of prejudicial joinder proper. United States v. Young, 10 U.S.C.M.A. 97, 27 C.M.R. 171 (1959). See Glasser v. United States, 315 U.S. 60 (1942); United States v. Thornton, 8 U.S.C.M.A. 57, 23 C.M.R. 281 (1957); United States v. Lovett, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957); United States v. Walker, 3 U.S.C.M.A. 355, 11 C.M.R. 111 (1953); United States v. Perez. 46 C.1I.R. 877 (ACMR 1972); Sore, *Joinder of Defendants in Criminal Prosecutions*, 42 N.Y.U.L. REV. 513, 527-28 (1967). In ruling upon motions to sever for prejudicial joinder, the courts have considered the factor of single representation of multiple defendants. The factor of single representation will be examined in that context. *See* note 116 and accompanying text, *infra*. *Cf*. United States v. Faylor, 9 U.S.C.M.A. 547, 26 C.M.R. 317 (1958).

Second, by selecting a mode of trial different from that selected by his co-accused, an accused can obtain an automatic severance. There are three modes of trial in the military practice: (1) the accused has a right to a court panel composed of officers; (2) in lieu of (1), an accused can request trial by military judge alone; and (3) an enlisted accused can request that the court panel consist of not less than one-third enlisted members. The legislative history reveals that the draftsmen intended to permit the accused to force severance by selecting a mode of trial different from his co-accused, although there appears to have been no discussion as to the desirability of such severances. LEGAL AND LEGISLATIVE BASES, MANUAL FOR COURTS-MARTIAL, 1949 at 71 (1951); Cnited States v. Tackett, 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966). See MCM, 1969, paras. 48e and *f*, and 53*d*(2); United States v. Donohew, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969); United States v. White,

III. THE PRACTICE: NON-CONSTITUTIONAL RULES

A. *THE TRIAL JUDGE'S DISCRETION*

Prejudicial joinder as a ground for severance has no statutory history.*' The rule is an apparent extension of a common law practice. At common law, in many jurisdictions the joinder of defendants did not increase the aggregate number of defense challenges; the defendants had to share the same number of peremptory challenges which each individual defendant would have had if he had been tried separately. In these jurisdictions, the courts developed the rule that they

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21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972). In the federal practice, Rule 23(a), FRCP, requiring the prosecution to consent to a defendant's waiver of trial by jury, effectively precludes a severance by the defendant's unilateral election of mode of trial. Singer v. United States, 380 US. 24, 26 (1969). *Compare* United States v. Tyler, 332 F. Supp. 856 (E.D. Wis. 1971) *with* United States v. Mayer, 350 F. Supp. 1291 (S.D. Fla. 1972). It would appear that the military practice permits an undesirable defense tactic. The defense attorneys can express an initial desire to have their clients tried in different modes of trial, obtain either a rereferral before trial or an automatic severance at trial and later request the type of fact finder the client actually desires. The federal rule seems to be an effective means of precluding this type of chicanery.

A third type of severance is more prevalent in the federal practice than in the military: a co-defendant may effect a severance by obtaining change of venue or transfer of jurisdiction pursuant to Rule 21, FRCP. This type of severance is particularly common in conspiracy cases where the alleged participants reside or committed overt acts in different judicial districts. The Government has been unsuccessful in avoiding this type of severance despite its contention that the severance is in violation of Rule 13, FRCP, providing for consolidation of indictments and trials. *See* United States v. Jessup, 38 F.R.D. 42 (M.D. Tenn. 1965); United States v. Erie Basin Metal Products Co., 79 F. Supp. 880 (D. Md. 1948); 8 MOORE, *supra* note 14, at ¶ 21.04; *Developments In the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920. 977 (1959). This type of severance can occur in the military practice where, for example. pretrial publicity as to one accused requires a change of venue as to him but not the co-accused. However, it would be rare because of the absence of geographic jurisdictional boundaries in military practice.

Finally, in both the military and federal practices severances can result where, as to one accused, the court grants a continuance. or a judicially ordered insanity or medical examination, United States *ex rel.* Evans v. Vallee, 446 F.2d 782 (2d Cir.), **cert.** *denied,* 404 U.S. 1020 (1971); United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973); United States v. Respess, 19 U.S.C.M.A. 230, 41 C.M.R. 230 (1970). The courts' action in these types of cases pressures the prosecution to agree to a severance to permit the other accused's trial to proceed unencumbered by speedy trial problems.

27 *See* Orfield, *Joinder In Federal Criminal Procedure*, 26 F.R.D. 23, 29 (1960); United States v. Bayaud, 16 F. 376, 386 (C.C.S.D.N.Y. 1883).

would sever if the defendants proved that the prosecution had joined them in bad faith for the sole purpose of limiting the number of peremptory challenges for each defendant.[28]

As the practice continued, courts began to recognize other possible grounds for granting severances in the interest of justice.[29] Rule 14 of the Federal Rules codified the existing case law pertaining to the trial judge's discretionary grant of severance. The Rule was adopted without apparent disagreement among the advisory committee members;[30] they were apparently more concerned with misjoinder of defendants under Rule 8(b) and the misuse of consolidation of cases under Rule 13. With the exception of the second sentence concerning the trial court's authority to examine any pretrial statements of a co-defendant prior to trial, Rule 14 has not changed since its first draft in 1940.[31] Providing for severance or other appropriate relief, the Rule grants seemingly absolute discretion to the trial judge to sever even though the joinder of defendants complies with Rule 8(b).[32]

Rule 14 of the Federal Rules was the model for paragraph *69d* of the Alanual. It lodges broad discretion in the military judge. The Manual appears to distinguish between severances in joint trials and severances in common trials, encouraging greater liberality in

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[28] *See* United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827) where Mr. Justice Story outlines the common law basis for the rule of discretionary severance where defendants have been joined in the same indictment. *Cf.* United States v. Ball, 163 U.S. 662 (1895). The limitation of peremptory challenges continues to face constitutional attack, United States v. Provenzano, 240 F. Supp. 393, 410-11 (D.N.J.), *aff'd*, 353 F.2d 1011 (3d Cir. 1965), *cert. denied*, 384 US. 905 (1966); People v. King, 240 Cal. Xpp. 2d 389, 401-02, 49 Cal. Rptr. 562, 569-70 (Dist. Ct. App. 1966).

[29] 8 MOORE, *supra* note 14, at ¶ 14.01; Orfield, *Relief From Prejudicial Joinder in Federal Criminal Cases*, 36 N. DAME LAWYER 276, 495 (1961).

[30] Robinson v. United States, 210 F.2d 29, 32 (D.C. Cir. 1954); *Notes* of *Advisory Committee*, FED. R. CRIM. P. 14 (1940).

[31] 8 MOORE, *supra* note 14, at ¶¶ 14.01 and 14.02. Professor Moore notes that the second sentence was included in the Rule effective July 1, 1966.

[32] As to joint trials, it was early argued that when the joint charge is dismissed during trial, severance of the defendants was mandatory by virtue of Rule 8(b), FRCP. The Supreme Court ruled that where there is no evidence of prosecutorial misconduct or unfairness, the joint trial was proper and severance is required only where required by Rule 14. Schaffer v. United States, 362 U.S. 511 (1960). *See* Note, *Dismissal* of *Conspiracy Charge Does Not Require Separate Trials* of *The Substantive Counts*, 45 MIL. L. REV. 1066 (1961); Note, *Joinder* of *Defendants In Criminal Prosecutions*, 42 N.Y.U.L. REV. 513, 515 (1967).

granting severances in common trials.[33] However, the Court of Military Appeals has qualified the policy of liberality:

> We recognize, as paragraph 69*d*, Manual for Courts-Martial, United States, 1951, states, that a motion for severance at a common trial should be liberally considered and that an accused whose case is to be tried in that manner need not present so cogent a reason to be tried separately as an accused in a joint trial, Nevertheless, the underlying rules are the same in both instances, and good cause must be shown if the accused in a common trial seeks to have a valid order of joinder modified.[34]

The court relied heavily on its earlier opinion in *United States v. Evans*.[35] In *Evans*, the court held that in a joint trial the defendant must do more than merely allege good cause to obtain a severance; the court insisted that a *showing* of good cause must be made. In short, it appears that accused in both joint and common trials face a difficult burden to obtain a severance.

In order to obtain a discretionary severance or a reversal of a conviction based upon the trial court's abuse of discretion in denying a severance, the movant must *affirmatively* show *specific* prejudice,[36] or, as stated in paragraph 69*d*, good cause.[37] As a practical matter, the likelihood that his showing will persuade the trial or appellate court is rather small.

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33 United States v. Davis, 14 U.S.C.M.A. 607, 34 C.M.R. 387 (1964); United States v. Bodenheimer, 2 U.S.C.M.A. 130, 7 C.M.R. 6 (1953); United States v. Evans, 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952).

34 United States v. Jones. 28 C.M.R. 885 (AFBR). *aff'd sub nom.* United States **v.** Fears, 11 U.S.C.M.A. 584, 588, 29 C.M.R. 400, 404 (1960). The Manual does contain a mandatory provision concerning the severance of defendants in a common trial where one accused is charged with offenses unrelated to the common offenses. However, this severance is properly due to a misjoinder for trial under para. 331 and not prejudicial joinder.

35 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952).

36 Opper v. United States, 348 U.S. 84, 99 (1954); United States v. Nakadadski, 481 F.2d 289 (5th Cir. 1973); United States **v.** Lipowitz, 407 F.2d 597 (3d Cir.), *cert. denied rub nom.* Smith v. United States, 395 U.S. 946 (1969); United States **v.** Borner, 3 U.S.C.M.A. 306, 12 C.M.R. 62 (1956); United States v. Evans, 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952); United States **v.** Brange. 10 C.M.R. 682 (**AFBR** 1953).

37 United States **v.** Jones, 28 C.M.R. 885 (AFBR), *aff'd* **rub** *nom.* United States **v.** Fears, 11 U.S.C.M.A. 584, 29 C.M.R. 400 (1960); United States **v. Wilson,** 2 U.S.C.M.A. 248, 8 **C.M.R**48 (1953).

When an accused moves for severance, the trial court assigns him the burden of proving specific prejudice caused by joinder. There is authority for the proposition that the burden is a particularly heavy one where there is a conspiracy charged in the federal courts[38] or where, in the military, the charge is a joint offense."' Conversely, the courts recognize that the burden of proof is somewhat less in civilian practice where any other joint offense is charged[40] and in military practice where the accused are tried in common.'" Even where the courts apply a less stringent standard, they require that an accused do more than make a mere allegation of prejudice.[42]

Moreover, the courts indicate that even if the accused clearly proves specific prejudice, the trial court may still properly deny him a severance in the exercise of the court's discretion.

B. THE COURTS RELUCTANCE TO EXERCISE DISCRETION IN THE ACCUSED'S FAVOR

One commentator has opined that the rules provide an accused a remedy "more theoretical than real." [43] For example, the courts have applied the rules pertaining to the timing of a motion to sever on the ground of prejudicial joinder to the disadvantage of an accused. Where the accused moves before trial to sever his case from those of his co-accused, the trial courts often treat the motion as premature. The treatment is especially baffling in light of recent amendments to Rules 14 and 17 of the Federal Rules.[44] These amendments provide for *in camera* inspection of defendants' pretrial statements; the amendments were designed to provide the trial court with the necessary evidence to make a pretrial evaluation of the potential for prejudice flowing from joinder. However, courts continue to reject

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38 United States **v.** Branan, 457 F.2d 1062 (6th Cir. 1972); United States **v.** Addonizio, 313 F. Supp. 486 (D.N.J. 1970), *order aff'd*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 US. 936 (1971).

39 United States **v.** Bodenheimer, 2 U.S.C.M.A. 103, 7 C.M.R. 6 (1953).

40 *Cf.* United States v. Van Scoy, 482 F.2d 347 (9th Cir. 1973).

41 United States v. Jones, 28 C.M.R. 885 (AFBR 1959), *nff'd sub nom.* United States **v.** Fears, 11 U.S.C.M.A. 584, 29 C.M.R. 400 (1960).

42 United States **v.** Robinson, 432 F.2d 607 (D.C. Cir. 1970); United States **v.** Marquez, 319 F. Supp. 1016 (S.D.N.Y. 1970); United States **v.** Jones, 28 C.M.R. 885 (AFBR 1959), *aff'd sub nom.* United States **v.** Fears, 11 U.S.C.M.A. 584, *29* C.M.R. 400 (1960).

43 8 MOORE, *supra* note 14, at ¶ 8.04.

44 *Id.* ¶ 14.04.

motions as premature[45] or deny them without any evaluation of evidence.[46]

If the defense counsel fails to renew the motion later at trial, appellate courts tend to deny appellate relief because the motion is considered waived even if the defense counsel's pretrial prediction of prejudice comes to pass at trial.[47] And although appellate courts have held that a trial judge has a continuing duty to grant a severance where prejudice because of joinder infects any stage of the trial,[48] a failure of counsel to move for severance will be held to be waiver and appellate relief will be denied.[49] Surprisingly even if the defense counsel makes his trial motion, the court may treat his motion as untimely. If the defense counsel does not perceive a need for a pretrial motion but events dictate the need during the trial, courts are prone to deny the motion as untimely.[50] The result of these rules

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45 United States v. Isaacs, 351 F. Supp. 1323 (N.D. Ill. 1972); United States v. Withers, 303 F. Supp. 641 (N.D. Ill. 1969); United States v. Dioguardi, 20 F.R.D. 10 (S.D.N.Y. 1956).

46 United States v. Harary, 329 F. Supp. 1404 (S.D.N.Y. 1971); United States v. Addonizio, 313 F. Supp. 486 (D.N.J. 1970), *order aff'd*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); United States v. Sessions, 283 F. Supp. 746 (N.D. Ga. 1968). The defense is placed in a peculiar dilemma mhere a court is prone to deny a motion to sever because it is made prematurely. Where the defense refuses to disclose its evidence in support of its motion, a denial on the basis of prematurity may result. Primill v. United States, 297 F.2d 34 (8th Cir. 1961); Young v. United States, 288 F.2d 398 (D.C. Cir. 1961); Belvin v. United States, 273 F.2d 583, 587 (5th Cir. 1960). Where the defense chooses to disclose its evidence in only vague terms, courts are prone to deny the motion as unfounded. United States v. Wilson, 4 U.S.C.M.A. 3, 8 C.M.R. 48 (1953); United States v. McCauley, 30 C.M.R. 687 (NBR 1960). And where an accused discloses all evidence. he is unlikely to obtain a severance in any event and has lost his tactic of surprise during the case in chief.

47 United States v. Rickey. 457 F.2d 1027 (3d Cir. 1972). *But* see United States v. Oliver, 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963) (Court of Military Appeals recognizes a waiver by a failure to object in a later portion of the trial or to renew the motion upon the occurrence of the alleged prejudice at trial but discusses the merits of the motion and makes no ruling).

48 Jackson v. United States, 412 F.2d 149 (D.C. Cir. 1969); Russell v. United States, 288 F.2d 520 (9th Cir. 1961). *See* United States v. Guterma, 181 F. Supp. 195, 196 (S.D.N.Y. 1960).

49 United States v. Franklin, 452 F.2d 926 (8th Cir. 1971); Mee v. United States, 316 F.2d 467 (8th Cir. 1963), ***cert. denied***, 377 U.S. 997 (1964); United States v. Oliver, 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963).

50 United States v. Morales, 477 F.2d 1309 (5th Cir. 1973); Belvin v. United States, 273 F.2d 583, 587 (5th Cir. 1960); United States v. Oliver, 14 U.S.C.M.A.

regarding the motion's timeliness is to severely limit the availability of relief under paragraph *69d* and Federal Rule 14. The defense counsel must urge a specific, recognized ground for severance and satisfy the burden of proof at every stage of the proceedings.

Even if the defense counsel identifies a specific ground for severance, the courts may simply reject his argument out of hand. Many courts, after stating the particular ground advanced by counsel, dismiss the ground as, in effect, a mere assertion that "there is a better chance of acquittal in separate trials." [51] After dismissing the assertion, they generally add little, if any, analysis of the merits of counsel's particular complaint in light of the specific facts of the case. For example, in *United States v. Calabro*,[52] some defendants contended that their trials should be severed from that of a *pro se* co-defendant, who ineptly cross-examined certain female witnesses. The movants *and the court* characterized the cross-examination as "disastrous." The court, relying upon the rubric of "a better chance of acquittal," rejected the contention without even describing what the testimony was or how it could prejudice the movants. The court simply held: "The difficulties of which these five defendants complain are not essentially different from those which any defendant might suffer in a joint trial if the efforts of counsel are not coordinated." [53] In reviewing the denial of severance motions, appellate courts are prone to rely upon other phrases as trite as "a better chance of acquittal." Thus, in place of critical analysis, assertions

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192, 33 C.M.R. 404 (1963). It is clear that in many cases the circumstances which give rise to a motion to sever may not arise until trial and would justify an immediate motion to sever or, upon the conclusion of the case, a motion for mistrial. See United States v. Bentrena, 288 F.2d 105 (2d Cir. 1961) (illness of co-accused); Aratari v. Caldwell, 357 F. Supp. 681 (S.D. Ohio 1973). However, even in these situations courts are prone to rely on the tardiness of the motion as a factor in considering the merits of the particular claim. See United States v. Mayr, 350 F. Supp. 1291 (S.D. Fla. 1972) (where co-defendant moved for severance upon completion of trial on the ground his co-defendant would have testified on his behalf at a separate trial. Motions for a new trial were also denied); United States v. Steed, 465 F.2d 1310 (9th Cir.), *cert. denied*, 409 U.S. 1078 (1972) (motion denied when made on second day).

[51] Tillman v. United States, 406 F.2d 930, 935 (5th Cir.), *vacated in part*, 395 U.S. 830 (1969); United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973).

52 467 F.2d 973 (2d Cir. 1972), *cert. denied*, 410 U.S. 973 (1973).

[53] *Id.* at 988; WRIGHT, *supra* note 19, at § 223. See United States v. Martinez, 479 F.2d 824 (5th Cir. 1973).

such as "a defendant is entitled to a fair trial, not a perfect one" [54] or "separate trials are a privilege, not a right" [55] are commonplace. Nor is the use of such phrases limited to the courts, for paragraph *69d* of the Manual specifically states that the mere possibility of a better chance for an acquittal is not a ground for granting a severance in a joint or common trial.

C. CATEGORIZATION OF THE FACT SITUATIONS RAISING PREJUDICIAL JOINDERISSUES

Despite the voluminous number of case reports on prejudicial joinder, there has been little attempt to categorize the fact situations raising the issue of prejudicial joinder. The treatises and commentators typically provide only short lists of the most typical grounds for severance, adding only a minimum of discussion or analysis of the underlying principles.[56]

Professors Kalvin and Zeisel's study of juries provides a convenient basis for a categorization. They concluded that every jury, although unique, makes decisions colored by sentiments concerning the accused, counsel for either side, and the law of the case.[57] The prosecution is often able to take added advantage of these sentiments in a joint or common trial, a forum wherein accused often create unfavorable sentiments in regard to their co-accused. Sometimes the prosecutor need only present evidence of wrongdoing by someone and then sit back; the co-accused, by accusing and contradicting one another, aid the prosecutor by creating jury sentiments toward conviction.[58] Such sentiments, together with problems of evidence confusion and complexity, are the most common grounds alleged by accused seeking severance.

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54 Lutwok v. United States, 344 U.S. 604, 618 (1952).

55 United States v. Bumatay, 480 F.2d 1012 (9th Cir. 1973); Parker v. United States, 404 F.2d 1193, 1196 (9th Cir. 1968); United States v. Wilson, 4 U.S.C.M.A. 3, 8 C.M.R. 48 (1953).

56 *See* 8 MOORE, *szrpra* note 14, at ¶ 14; WRIGHT, *supra* note 19 at § 223, Note, *Joint and Single Trials Under Rules 8 and 14 of The Federal Rules* of *Criminal Procedure*, 74 YALE L.J. 553 (1965).

57 H. KALVIN & H. ZEISEL, THE AMERICAN JURY 105-17 (1966).

58 Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Mr. Justice Jackson concurring). See E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 105 (1956); O'Dougherty, *Prosecution and Defense*

1. Sentiments Concerning the Defendants

Because of the common assumption that "birds of a feather flock together," [59] the joinder of defendants with varied backgrounds and character traits can prejudice an accused joined with an unsavory co-defendant. Courts have recognized that the mere character of a co-defendant may potentially justify a severance, but rarely grant one solely on that ground.[60] Thus the motion was denied where one of the accused was handcuffed in the presence of the jury,[61] and where some accused became so unruly that they had to be bound and gagged before the jury.[62] Courts are hesitant to grant a severance on the ground that co-accused are disruptive at trial because it would, in effect, encourage them to obtain severances through intentional misconduct before the jury.[63] But even where that factor is not present, courts generally deny a severance to one accused joined with others who are habitual criminals[64] or whose prior criminal record includes convictions or uncharged misconduct admissible at trial.[65] So too, it has been held that a defendant is not entitled to severance where his co-defendant has been the subject of

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Under Conspiracy Indictments, 9 BROOKLYN L. REV. 263 (1940); *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 980-85 (1959).

59 Authorities cited note 58 *supra.*

60 United States v. Hanlon, 29 F.R.D. 481 (W.D. Mo. 1962); United States v. Bentvena, 193 F. Supp. 485 (S.D.N.Y. 1960); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 319 (1947).

61 United States v. Marshall, 458 F.2d 446 (2d Cir. 1972); United States v. Bamberger, 456 F.2d 1119 (3d Cir.), *cert. denied,* 406 US. 969 (1972); McDonald v. United States, 89 F.2d 128 (8th Cir.), *cert. denied,* 301 US. 697 (1937). *But* see Aratari v. Caldwell, 357 F. Supp. 681 (S.D. Ohio 1973) (habeas corpus granted although the court ruled that the disruption of the co-defendants would not be a ground for a grant of severance).

62 United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied sub nom.* Ormento v. United States, 375 U.S. 240 (1963). *Cf.* United States v. Dellinger, 472 F.2d 340, 385-91 (7th Cir. 1972), *cert. denied,* 410 US. 970 (1973).

63 United States v. Aviles, 274 F.2d 179, 193 (2d Cir.), *cert. denied sub nom.* Evola v. United States, 362 U.S. 974 (1960).

64 United States v. Johnson, 298 F. Supp. 58 (N.D. Ill. 1969); United States v. Barber, 296 F. Supp. 795 (D. Del. 1969); United States v. Hanlon, 29 F.R.D. 481 (W.D. Mo. 1962).

65 United States v. Early, 482 F.2d 53 (10th Cir. 1973) (uncharged misconduct); United States v. Hanlon, 29 F.R.D. 481 (W.D. Mo. 1962) (prior convictions similar to the offense charged). *See* Spencer v. Texas, 385 U.S. 554 (1967); H. KALVIN & H. ZEISEL, THE AMERICAN JURY 180 (1966).

pervasive pretrial publicity[66] or where the co-defendant's reputation for criminal activity is known throughout the community.[67]

Even where one co-defendant evinces by his actions a consciousness of guilt of a joint offense by fleeing during trial, a severance will not be granted.[68] Similarly, courts consistently reject a motion to sever where one co-accused pleads guilty to a joint offense, rejecting as speculative any contention that the jury, finding the co-actor has committed the crime, will tend to find the other named defendant guilty under a "birds of a feather" theory.[69]

2. *Sentiments Relating to Prosecutors and Defense Counsel*

During the trial, jury deliberations can be colored by sentiments of antagonism or sympathy towards the advocates for either side.[70] The general impression of a strong prosecutor, assisted by the government's powerful investigatory agencies, usually creates some sympathy toward the accused.[71] However, in a joint or common trial, the government's advantages can be downplayed and sym-

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[66] Application of Gottsman, 332 F.2d 975 (2d Cir. 1964); United States v. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960). Courts generally regard such a motion as premature until completion of voir dire of the jury. United States v. Balistriere, 346 F. Supp. 341 (E.D. Wis. 1972). As a practical result, voir dire will reveal pervasive publicity requiring a change of venue or will reveal that the argument is unsound.

[67] United States v. De Farosa, 450 F.2d 1057 (3d Cir. 1961); United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966), *vacated on other grounds sub nom.* Giordano v. United States, 394 US. 310 (1969); United States v. Greater Blouse, Skirt & Neckwear Contractor's Ass'n, 177 F. Supp. 213 (S.D.N.Y. 1959). *Cf.* United States v. Addonizio, 451 F.2d 49 (3d Cir.), *cert. denied,* 405 U.S. 936 (1972).

[68] United States v. Henderson, 472 F.2d 157 (6th Cir. 1973); United States v. Cranchetti, 315 F.2d 584 (2d Cir. 1963).

[69] Hudson v. North Carolina, 363 U.S. 697 (1960); United States v. Early, 482 F.2d 53 (10th Cir. 1973); United States v. Baca, 14 U.S.C.M.A. 79, 33 C.M.R. 291 (1963) (plea of co-accused known by court panel); United States v. Aponte, 45 C.M.R. 522 (ACMR 1972) (plea of co-accused known to military judge sitting alone). The entry of a guilty plea by a co-accused to a joint offense is cited by an accused who moves for severance as constitutionally requiring severance, see note 142 and accompanying text *infra*, or as creating unfair inference of guilt by operation of the substantive law of principals, conspiracies and aidors and abettors, see note 107 and accompanying text *infra*, or creates confusion in the jury's deliberations because of the complexity and difficulty in folloaing limiting instructions, see note 122, and accompanying text *infra*.

[70] H. KALVIN & H. ZEISEL, THE AMERICAN JURY 351-72, 392-93, 441, 477-80 (1966).

[71] *Id.* at ch. 28.

pathy can be engendered toward the prosecution. Arrayed against a battery of defense attorneys, the prosecutor can portray himself as an underdog. Add to this the ordinary laymen's aversion to group crimes or crimes plotted in secrecy, the prosecution by proceeding with a joint trial can orchestrate the sentiments of the jury toward conviction.[72]

In the extreme tension of a joint or common trial, defense counsel often assume a combative attitude. Such an attitude can severely damage the defense in the jury's eyes. For example, in the famous espionage trial of Julius and Ethel Rosenberg, the defense counsel at times were overbearing in examining witnesses and in remarks to the judge and the jury. At least one commentator has suggested that this overbearing was as damning as any of the evidence against the accused.[73]

These subtle tactical considerations are not recognized as independent grounds for severance. However, an astute defense counsel will point to these considerations as additional support for a severance motion based upon the occasionally recognized ground of prosecution overreaching. This overreaching can take several forms.

One form consists of forcing an accused who is a minor participant in a joint offense to expend time and money he would not otherwise expend but for the lengthy trial of his co-accused.[74] The major participant also claims unfairness in these cases. He generally argues that the prosecution, aware of the financial burden a lengthy trial will impose on minor participants, is attempting to force the minor participants to plead guilty. Then the prosecutor may use them as witnesses against the co-defendants in return for recommendations for leniency. Courts have generally rejected this harassment contention.[75] In *United States v. Biondo*[76] an analogous contention

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[72] *See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 BROOKLYN L. REV. 263 (1940).

[73] L. NIZER, THE IMPLOSION CONSPIRACY 286 (1973).

[74] United States v. Wolfson, 294 F. Supp. 267 (D. Del. 1968); United States v. Allen, 28 F.R.D. 329, 339 (S.D.N.Y.), *aff'd*, 288 F.2d 825 (2d Cir. 1961); United States v. Berman, 24 F.R.D. 26 (S.D.N.Y. 1959).

[75] *See* United States v. Dioguardi, 332 F. Supp. 7 (S.D.N.Y. 1971); Vamplew, *Joint Trials*, 12 CRIM. L.Q. 30, 33 (1969); Tandrock, *Joint Trials: A Short Lesson From Little Vermont*, 9 CRIM. L. BUL. 612. 614 (1973). *Cf.* United States v. Domau, 356 F. Supp. 1091 (S.D.N.Y. 1973); United States v. Wolfson, 294 F. Supp. 267 (D. Del. 1968).

[76] 483 F.2d 635 (8th Cir. 1973).

was made. There a minor participant was originally charged jointly with a major participant in an extortion scheme. Just before commencement of the expected lengthy trial, the minor participant's trial was severed and he had not yet been tried. The major participants claimed (1) that the prosecution had named the minor participant as a co-conspirator and co-defendant solely to prevent him from testifying at the major participants' trial and, (2) that the prosecution never intended to bring the minor participant to trial if convictions were obtained against the major participants. The court rejected these contentions as speculative without discussion.[77]

Another form of alleged prosecution overreaching is the use of the joint or common trial to take advantage of rules of evidence or procedure to the detriment of some of the co-accused. In *United States v. Clark,"* two accused, Clark and Ellis, were jointly tried for bank robbery. Clark sought a severance from Ellis on the ground that a letter written by Ellis while in jail to another co-accused and introduced to impeach Ellis, "prejudiced" his alibi defense. A line in the letter referred to Ellis and Clark sitting in a car outside the bank. While the court refused to overturn the trial court's denial of severance on Clark's argument of general prejudice, it recognized that Clark could have raised procedural prejudice as a ground for severance. The court pointed out that Clark could have argued that the evidence against Ellis was so strong that Ellis would have felt obliged to take the stand and subject himself to impeachment. Because the prosecution knew this, it proceeded to a joint trial so that the damning letter as to Clark could be offered as impeachment. In separate trials, the prosecution would probably have not called Ellis in the Clark case because (1) his testimony was favorable to Clark and *(2)* the prosecution could not impeach its own witness. To Clark's chagrin, after succinctly framing the contention on Clark's behalf, the court rejected it as speculative.[79]

Just as the defense counsel cite pretrial forms of prosecution overreaching as justification for severance. prosecution overbearing at trial is often cited as a cause for severance. In the notorious case of the "Chicago Seven,"[80] the appellate court reversed the convic-

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[77] *Id.* at *638.*

[78] 480 F.2d 1249 (5th Cir. 1973).

[79] *Id.* at 1253.

[80] *In re* Dellinger, 472 F.2d 340 (7th Cir.), *cert. denied,* 410 U.S. 970 (1973)

tions of the accused where the prosecutor in objections to defense questioning of witnesses made such remarks as, "We are not in some kind of kindergarten," and "This crybaby stuff he goes through, your honor, every time he asks a wrong question, . . ."[81] The court was critical of the United States Attorney for using such phrases as "evil men," "liars and obscene hater" and "profligate extremists" in his closing argument.[82]

3. Sentiments Generated by the Law of Substantive Crimes or Evidence

This general category includes cases wherein the prosecution attempts to capitalize on the jurors' sentiments regarding the nature of the offense charged. Also included are cases where the alleged prejudice is the confusion of the jurors due to the unique evidentiary rules applicable in joint offenses or the procedure of offering evidence in multiple defendant trials.

a. Sentiments concerning the nature of joint offenses

Joint offenses such as conspiracy have long been regarded as more dangerous to society than single offender crimes, A typical statement of societal aversion to such crimes is found in *United States v. Rabinowich*,[83] where the Supreme Court stated:

> . . . For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.[84]

The danger exists, then, that a jury may be more prone to convict the accused in a joint or common trial than where each of the participants in a joint crime is tried separately and the entire story of the criminal conduct is not revealed because of evidentiary limitations.

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[81] *Id.* at 389.

[82] *Id.* at 390.

[83] 238 U.S. 78 (1915).

[84] *Id.* at 88. *See* R. PERKINS, CRIMINAL LAW 535-36 (1957).

Minor participants in joint offenses typically seek a severance to avoid the possibility of conviction engendered by juror aversion to joint offenses. However, as previously stated, while courts recognize that a minor participant or an accused against whom the evidence is weak may suffer prejudice from joinder with the major participants or those against whom there is substantial evidence, the courts usually deny severance on the theory that such general prejudice is not qualitatively different from that suffered by any accused.[85] In truth, it is in these types of cases that the phrase "a better chance of an acquittal at a separate trial" [86] accurately describes the fact of the matter; the jurors' sentiments toward many of the defendants might be more favorable if they were tried separately, but the prosecution's use of the "drag net" offenses[87] in joint and common trials does not create unlawful prejudice in the court's opinion.

b. Juror confusion

A second striking feature of the joint trial of the participants in joint offenses is the liberality of evidence admissibility. Substantial jury confusion can result from the admission of evidence competent against one co-accused but incompetent against other co-accused. Further, in any crime where concert of action and common intent are key elements, such as in conspiracy cases, the introduction of otherwise inadmissible hearsay evidence against the co-actors works to the substantial benefit of the prosecution.[88] In these situations, defense counsel allege prejudicial joinder on the grounds that: (1) the case is so complex that the jury is unable to keep evidence separate as to each accused; (2) the defenses of the co-accused are antagonistic; or (3) the jury is unable to follow limiting instructions.

(1) Prejudice due to complexity

The jury at any criminal trial may be instructed to ignore inadmissible evidence or comment.[89] However, the jury in a joint or common trial has an even more difficult task: it must categorize

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[85] *See* United States v. hlartinez, 479 F.2d 824 (5th Cir. 1973).

[86] *See* Tallman v. United States, 406 F.2d 930, 935 (5th Cir.), *vacated in part*, 395 US. 830 (1969); United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973).

[87] *See Developments in the Law–Criminal Conspiracy*, 72 HARV. L. REV. 920, 977 (1959).

[88] *Id.* at 983. *See* O'Dougherty, *Prosecution and Defense at Conspiracy Trials*, 9 BROOKLYN L. REV. 263 (1940).

[89] Frazier v. Cupp, 394 U.S. 731, 733-36 (1969); Spencer v. Texas, 385 U.S. 554 (1967); United States v. De Sapio, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

evidence to be considered against each accused. In the simplest multiple defendant trial, with two co-accused, who we will designate as *A* and *B*, there are four categories of evidence: (1) evidence admissible against both *A* and *B; (2)* evidence heard by the jury, inadmissible against both *A* and *B*, and which must be disregarded in deliberations; (3) evidence admissible against *A* but inadmissible against *B;* and (4) evidence admissible against *B* but inadmissible against *A*. As the number of defendants increases, the categories of evidence proliferate with each added defendant.[90] Complex criminal conspiracies, involving large numbers of jointly tried co-conspirators make the jury's task next to impossible.

Courts appear more willing to grant a severance based upon the complexity of the case than in any other situation." However, the cases reveal that the willingness is limited to situations where the numbers of defendants or charges compel the conclusion that a mass jury trial would be unmanageable. Thus, regardless of the number of charges or defendants, both military and federal courts have ruled that a joint trial can never be too complex for trial by judge alone.[92] Where the court finds that clear and adequate instructions will assist the jury in separating the evidence, a severance on the ground of complexity will not be granted.[93]

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[90] *Cf.* United States v. Addonizio, 313 F. Supp. 486 (D.N.J. 1970), *order aff'd*, 415 F.2d 43 (3d Cir.), *cert. denied*, 405 U.S. 936 (1971); United States v. Cummings, 49 F.R.D. 160 (S.D.N.Y. 1969).

[91] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 983-87 (1967); Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 387, 392 (1957). *See* United States v. Cruz, 478 F.2d 418 (5th Cir. 1973) (severance granted where one co-defendant charged with two counts was joined with eleven other co-defendants charged in a three-year conspiracy); United States v. Balistriere, 346 F. Supp. 336 (E.D. Wis. 1972) (severance granted where one co-defendant charged in one count of conspiracy but joined with co-defendants in a ten count tax fraud indictment); United States v. Moreton, 25 F.R.D. 262 (W.D.N.Y. 1960) (seventeen co-defendants charged with 11 counts of conspiracy and a total of 2,553 substantive counts). *But see* United States v. McNamara Trading Co., 213 F. Supp. 704, 707 (S.D.N.Y. 1963) (severance denied where 21 co-defendants were charged in a 58 count indictment on customs violations).

[92] United States v. Cruz, 478 F.2d 408 (5th Cir. 1973); United States v. Aponte, 45 C.M.R. 522 (ACMR 1972). Despite this rule, there is a conflict of authority in the military practice as to whether a military judge is required to recuse himself in a separate trial of joint offenders. *Compare* United States v. Hodges, 47 C.M.R. 424 (ACMR 1973), *rev'd*, 22 U.S.C.M.A. 506, 48 C.M.R. 923 (1974) *with* United States v. Jarvis, 22 U.S.C.M.A. 260, 46 C.M.R. 260 (1973).

[93] United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973); United States v. Harris, 458 F.2d 670 (5th Cir. 1973).

Another line of cases shows that the courts deny severance where the defendant, while invoking complexity, in fact is contending that his defense is antagonistic to that of his co-defendants[94] or that the joinder will unfairly permit the use of government-oriented evidentiary rules against them.[95]

(2) *Prejudice caused by jury confusion as to antagonistic defenses*

As indicated, a co-accused often contends that he is prejudiced by being jointly tried with a co-accused whose defense is antagonistic to his own. A typical example can be found in *United Stntes v. Johnson.*[96] There two accused were charged with uttering counterfeit bank notes. One accused admitted that in the company of the co-accused he passed the bank notes. He defended on the theory that he thought he was acting as a government agent and, therefore, he lacked the requisite *mens rea.* The co-accused relied upon the defense of alibi, that is, that he was not present when the bank note was passed. This co-accused moved for severance on the ground that his defense was rendered unbelievable because of the antagonistic defense. The court upheld the denial of a severance on the basis that the jury had been clearly instructed. In these cases. the defense is really concerned that the jury might unjustifiably infer from the antagonism that both are guilty.[97] The courts. however, are unwilling to ascribe to the jury an improper fact finding methodology. Thev routinely reject motions to sever where one co-accused implicates the other in the course of presenting a defense of insanity," entrapment," or lack of specific intent.'"'

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94 United States v. hlartinez, 479 F.2d 824 (5th Cir. 1973); United States v. Garrison, 348 F. Supp. 1112 (E.D. La. 1972).

95 United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973). See Note, *Joint and Single* **Trials** *Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 71 YALE L.J. 553 (1965).

96 478 F.2d 1129 (5th Cir. 1973).

97 Cnited States v. George, 477 F.2d 508, 515 (7th Cir. 1973).

98 United States v. Carlson, 423 F.2d 421 (9th Cir.), ***cert.*** *denied*, 400 U.S. 847 (1970); United States v. Satterfield, 410 F.2d 1351 (7th Cir.), *cert. denied*, 399 U.S. 934 (1969).

99 United States v. Ellsworth, 481 F.2d 864 (9th Cir. 1973).

100 United States v. Donoway, 447 F.2d 940 (9th Cir. 1971); Cnited States v. Wolfson, 437 F.2d 862 (2d Cir. 1970); United Stares v. Oliver. 15 U.S.C.M.A. 192, 33 C.M.R. 404 (1963); United States v. Aponte, 45 C.M.R. 522 (ACMR 1972); United States v. Despanie, 36 C.M.R. 671 (ABR 1966). It was suggested that a

The potential prejudice is even greater when the accused defend by casting blame on each other.[101] A good example of casting blame is *United States v. Oliver*.[102] There two accused were charged with housebreaking and larceny. One of the accused claimed he was coerced by the other. The court was fairly sympathetic to the latter defendant's severance claim, The court ruled that (1) the accused who alleged coercion was not entitled to severance but that (2) the other accused should have been severed because his co-accused had unfairly characterized him as a "bad man" and the court may have convicted him because of this characterization. However, most courts evince little sympathy for the accused: "When men get together to rob a bank, and do so, they take chances, one of which is that if they are caught, there may no longer be honor among thieves." [103]

Finally, the antagonistic defense ground is often raised by a defense counsel representing two or more accused. Courts generally suggest that the proper remedy is the appointment of separate counsel for each accused, rather than severance.[104]

(3) *Prejudice caused by the jury's inability to follow limiting instructions*

A jury in almost every criminal trial must follow limiting instructions pertaining to inadmissible evidence or impermissible comment

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severance was proper on the basis of conflicting evidence where the evidence as to one co-defendant *A* is overwhelming but was weak as to co-defendant B and *A's* tactic was to cast blame on *B*. This test has been rejected. McHale v. United States, 398 F.2d 757 (D.C. Cir.), *cert. denied*, 393 U.S. 985 (1968).

[101] United States v. Satterfield, 410 F.2d 1351 (7th Cir.), *cert. denied*, 399 U.S. 934 (1969); Dauer v. United States, 189 F.2d 343 (10th Cir.), *cert. denied*, 342 U.S. 898 (1951).

[102] 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963). *See* United States v. George, 477 F.2d 508 (7th Cir. 1973) (One accused claimed blackmail by his accomplice. The latter claimed prejudice because the jury was liable to remove him from society as a blackmailer rather than for guilt on substantial charges.).

[103] Parker v. United States, 404 F.2d 1193, 1197 (9th Cir. 1968). *See* United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973); United States v. Prepgrass, 425 F.2d 194 (9th Cir. 1970); United States v. Despanie, 36 C.M.R. 671 (ACMR 1966).

[104] United States v. Jarvis, 22 U.S.C.M.A. 260, 46 C.M.R. 260 (1973); United States v. McCluskey, 6 U.S.C.M.A. 545, 560, 20 C.M.R. 261, 266 (1955); United States v. Aponte, 45 C.M.R. 522 (ACMR 1972). The Court of Military Appeals has interpreted Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827 (1970) as not requiring the appointment of separate counsel for each accused at a joint

or argument by counsel.[105] In a joint or common trial, the quantum of evidence admissible against one accused but inadmissible against co-accused can complicate jury deliberations. Where the evidence is weak against all the participants, the courts occasionally order a retrial; the courts do so if the relaxed rules of evidence pertaining to co-conspirator hearsay evidence have been abused[106] or the Government has unduly emphasized evidence admissible against one accused but technically inadmissible against the co-accused.[107]

Courts have reasoned that limiting instructions prevent any prejudice arising from the use of evidence that would be inadmissible but for the multiple defendant trial.[108] Pleas of guilty and confessions have caused considerable concern among commentators and courts. They question whether a jury can resist transferring the implication of guilt to the co-accused who has not confessed or pleaded guilty.[109] Courts have generally held that since a guilty plea does not amount to a complete factual admission of the alleged offense, a limiting instruction, cautioning the jury not to consider the co-accused's plea as evidence of guilt of the accused pleading not guilty, cures any prejudice.[110]

At first glance, one would suppose that a co-accused's guilty plea would be more damaging to the accused than a co-accused's extrajudicial confession. The courts have adopted the rule that limiting instructions adequately protect the accused from improper

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or common trial but suggests that it would be a better practice, United States v. Parker, 6 U.S.C.M.A. 75, 84, 19 C.M.R. 201, 210 (1955).

[105] *See* Spencer v. Texas, 385 U.S. 554 (1967); Meltzer, ***Involuntary*** *Confessions: The* ***Allocation*** of ***Responsibility Between Judge and Jury,*** 21 U. CHI. L. REV. 317 (1954).

[106] United States **v.** Varelli, 407 F.2d 735 (7th Cir.), ***cert. denied,*** 405 US. 1040 (1969); United States v. DeCesaro, 54 F.R.D. 596 (E.D. Wis. 1972). ***But see*** United States v. Ravich, 421 F.2d 1196 (2d Cir.), ***cert. denied,*** 400 U.S. 834 (1970).

[107] United States **v.** Donoway, 447 F.2d 940 (9th Cir. 1970); United States **v.** Magnotti, 51 F.R.D. 1 (D. Conn. 1971); United States **v.** Zentgraf, 310 F. Supp. 268 (N.D. Cal. 1970).

[108] *See* United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973); United States **v.** Harris, 458 F.2d 670 (5th Cir. 1973).

[109] *See* United States **v.** Early, 482 F.2d 53 (10th Cir. 1973); United States **v.** Kahn, 381 F.2d 824 (7th Cir. 1967); Koolish **v.** United States, 340 F.2d 513 (8th Cir.), ***cert. denied,*** 381 US. 951 (1965).

[110] Hudson **v.** North Carolina, 363 U.S. 697, 702 (1970); United States **v.** Baca, 14 U.S.C.M.A. 79, 33 C.M.R. 291 (1963). See Oden v. United **States,** 410 F.2d 103 (Sth Cir.), *cert.* ***denied,*** 396 U.S. 839, and 3% U.S. 863 (1969).

inferences which the jury might otherwise draw from a co-accused's guilty plea. The courts should naturally extend the same rule to co-accused's extrajudicial confession. However, as the next section of this article explains, the admission of a co-accused's extrajudicial confession poses serious constitutional problems.

IV. THE PRACTICE: CONSTITUTIONAL RULES

As previously stated, defense counsel often urge the juror's inability to separate a complex body of evidence as a ground for severance. Many legal theorists had long been concerned about problems in a joint or common trial created by the admissibility of evidence competent as to one defendant but incompetent against another. The law traditionally permitted the introduction of such evidence with instructions limiting its consideration to the case of the accused against whom it was admissible.[111] Leading jurists began to question a jury's ability to follow such instructions. They questioned whether the accused, against whom the evidence was inadmissible, could obtain a fair trial, particularly where the evidence consisted of an extrajudicial statement of the co-accused implicating the accused.[112]

A. CIVILIAN PRACTZCE

1. The Right of Confrontation

In Delli Paoli v. United States,[113] the Supreme Court rejected the notion that the admission of a co-conspirator's post-conspiracy confession implicating a co-defendant denies the latter a fair trial. The Court ruled that any potential prejudice is cured by a limiting instruction and rejected Judge Learned Hand's famous remark in *Nash*

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111 Evans v. United States, 375 F.2d 355 (8th Cir. 1967); Nash v. United States, 54 F.2d 1006 (2d Cir. 1932). See Delli Paoli v. United States, 352 US. 232, 242 (1957); Lutwok v. United States, 344 U.S. 604, 618 (1952); Blumenthal v. United States, 332 U.S. 539, 553 (1947).

112 Judge Learned Hand addressed the subject in Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) and United States v. Gattfried, 165 F.2d 360, 367 (2d Cir. 1948) as did Judge Jerome Frank in United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) and Chief Justice Traynor of the California Supreme Court in People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965). *See* 8 WIGMORE, EVIDENCE § 2272 (3d ed. 1940), at n.416; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177 (1948).

113 352 U.S. 232 (1957).

v. United States[114] that following a limiting instruction in such circumstances is a mental gymnastic impossible to perform.

Ten years later, as a part of the Warren Court's reexamination of criminal procedure, the Court in *Bruton v. United States*[115] overruled *Delli Paoli.* The Court held that unless an extrajudicial statement falls within the co-conspirator exception to the hearsay rule, its admission denies a co-defendant his sixth amendment right to confrontation.[116] Although the Court repudiated the notion that a limiting instruction cures any encroachment on an accused's sixth amendment guarantees, it did not go so far as to rule that any cautionary instruction pertaining to any evidence of limited admissibility is ineffective to the point of unconstitutionality.[117] Nor did the *Bruton* Court absolutely adopt the contention of many scholars that it must be assumed that juries follow limiting instructions and arrive at verdicts based solely upon the evidence properly admissible against each accused. Those proposing this contention conclude that unless it is assumed that limiting instructions are obeyed, the basic concept of trial by jury is questionable,[118] because the jury in every trial is required to follow a host of instructions limiting its consideration of matters heard at trial.[119]

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[114] 54 F.2d 1006, 1007 (2d Cir. 1932). *See* Comment, *Delli Paoli v. United States, Implicating Confession of Co-Conspirator Held Admissible In Joint Trial,* 56 COLUM. L. REV. 1112 (1959); Comment, *Delli Paoli v. United States, Admission of Co-defendant's Confession in Criminal Proceedings,* 43 CORNELL L.Q. 128 (1957); Comment, *Delli Paoli v. United States, Post-Conspiracy Admissions In Joint Prosecutions—Effectiveness of Instructions Limiting The Use of Evidence To One Co-Defendant,* 24 U. CHI. L. REV. 710 (1957); Comment, *Paoli r. United States, Post-Conspiracy Confession—Efficacy of Limiting Instructions In Joint Trial,* 23 BROOKLYN L. REV. 314 (1957). *Cf.* Krulowitch v. United States, 336 U.S. 440, 445, (1948) (Jackson, J., dissenting); People v. Feldman, 296 N.Y. 127, 71 N.E.2d 433 (1947).

[115] 391 U.S. 120 (1968).

[116] *Id.* at 125.

[117] *Id.* at 135.

[118] United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956) (Opinion by Chief Judge Medina); Cwach v. United States, 212 F.2d 520, 526-27 (8th Cir. 1954); R. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 385 (1966); *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 983-90 (1967); Comment, *Paoli r. United States, Admissibility of Confessions As To Co-Defendants,* 22 Mo. L. REV. 317 (1957).

[119] *See* Spencer v. Texas, 385 U.S. 554 (1967); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. CHI. L. REV. 317 (1954).

While there is a plethora of articles examining *Bruton*,[120] a short examination of *Bruton's* progeny will suffice for our purposes.

Soon after *Bruton* was decided, the lower courts applied their ingenuity to limit its scope. The courts received assistance from scholars who suggested several methods of avoiding a separate trial for each accused where one has made an extrajudicial confession implicating his co-accused.[121] Three principal methods, soon adopted by trial courts, were suggested: (1) redaction,[122] (2) deletion, [123] and (3) oral summary.[124]

Moreover, *Bruton* was also limited severely by other means. The Supreme Court itself just one year later held that where there was

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[120] Note, *The Admission of A Co-Defendant's Confession After Bruton v. United States: The Questions and a Proposal* For *Their Resolution,* 1970 DUKE L.J. 329; Note, *Bruton v. United States, A Belated Look At The Warren Court Concept* of *Criminal Justice,* 44 ST. JOHN'S L. REV. 54 (1970); Note, *Co-Defendant's Confessions,* 3 COLUM. J.L. & SOC. PROB. 80 (1967); Comment, *Co-Defendant's Confession In a Joint Trial,* 35 Mo. L. REV. 125 (1970).

[121] Authorities cited note 120 *supra.*

[122] Redaction is the substitution of another name, or the phrase "a named person," or "Mr. X" for the co-defendant. *Compare* Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964) (holding the use of the term "named person" under the circumstances was prejudicial because the jury's attention had been directed by other evidence to the accused) *with* Posey v. United States, 416 F.2d 545 (5th Cir. 1969) (holding *Bruton* did not prohibit the use of the word "blanks" in a trial of nine defendants where only one confessed. The court relied on the fact that the jury returned a verdict of guilty against only seven of the remaining eight defendants and opined that there was no evidence connecting the defendants to the term "blanks"). *See* People v. Aranda, 407 P.2d 265, 272, 47 Cal. Rptr. 533 (1967), Note, *Bruton v. United Stntes, A Belated Look At The Warren Court Concept of Criminal Justice,* 44 ST. JOHN'S L. REV. 54 (1970).

[123] Deletion is the process of striking any and all references of co-defendants from a confession, in an effort to make it appear as if the confessed defendant operated independently. Government of Virgin Islands v. Ruiz, 354 F. Supp. 245 (D.V.I., 1973). Prosecutors dislike this procedure because the jury could often infer that one accused acted alone and acquit the co-defendants and there is the further risk that the alteration so affects the substance of the statement that it is rendered inadmissible. Note, *The Admission of a Co-Defendant's Confession After Bruton v. United States: The Questions And A Proposal For Their Resolution,* 1970 DUKE L. J. 329.

[124] An oral summary is the process of having the witness who heard or took the declarant's statement, summarize it on the stand at trial and delete all references to co-defendants. United States v. Rickey, 457 F.2d 1027 (3d Cir. 1972); Close v. United States, 450 F.2d 152 (4th Cir. 1971). The oral summary procedure is

evidence independent of the extrajudicial confession, which overwhelmingly indicated guilt, the admission of the extrajudicial statement was harmless error.[125] Further, the Court in *Nelson v. O'Neil*[126] held that *Bruton* is inapplicable where the confessing co-defendant takes the stand, subjects himself to cross-examination, denies that the confession was made, and testifies favorably to the co-accused. These and other exceptions to *Bruton,* such as the admission of a co-accused's extrajudicial statement exculpatory to the accused,[127] its

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favored by the courts because it is more flexible than redaction or deletion and there is less likelihood that the jury would arrive at the conclusion that the spaces in the redaction process are the co-defendants or in the deletion process that the declarant acted alone. See notes 122 and 123, ***supra.*** This is so even though the danger of an inadvertent slip of the tongue might involve a violation of the *Bruton* precept. See United States v. Keishner, 432 F.2d 1066 (5th Cir. 1970) (where the witness making an oral summary in a murder trial inadvertently stated "He (declarant) told me 'Smith' (co-defendant) almost killed the man." The court ruled that there was insignificant prejudice to the co-accused in light of the overwhelming evidence of guilt independent of the impermissible evidence.).

[125] Harrington v. United States, 395 US. 250 (1969).

[126] 402 U.S. 622 (1971). Although *Nelson* deals only with the situation where the declarant denied making the extrajudicial statement and testified favorably to the accused, an earlier case in the Sixth Circuit had made no distinction between the situation n-here the defendant affirmed or denied his extrajudicial statement at trial, holding that the *Bruton* rationale does not apply in either case. United States v. Sims, 430 F.2d 1089 (6th Cir. 1970). Later cases applying *Nelson* have split on the issue whether *Bruton* is violated by admitting the declarant's extrajudicial statement where he affirms the statement. *Compare* United States v. Figueroa-Paz, 468 F.2d 629 (8th Cir. 1971), *with* United States v. Cassidy. 457 F.2d 428 (8th Cir. 1972). *Cf.* United States *ex rel.* Haynes v. McKendrick, 350 F. Supp. 940 (S.D.N.Y. 1972). At least one court has recognized a "trilemma" where the declarant testifies, *i.e.*, does the accused adopt his testimony, dispute it where it is unfavorable, or remain silent. Rhone v. United States, **365** F.2d 980 (D.C. Cir. 1966) (holding no prejudice to the accused where he adopts the declarant's testimony). Another court has recognized without specific discussion, the "trilemnia." particularly in the situation where the declarant and the accused are represented by the same counsel, holding that *Nelson* has no application whether the declarant affirms or denies his extrajudicial statement. Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972). *Cf.* United States v. Holt, 483 F.2d 86 (5th Cir. 1973).

[127] United States v. Roberts, 483 F.2d 226 (5th Cir. 1973); United States **v.** Tomprez, 472 F.2d 860 (7th Cir. 1972), *cert. denied,* 411 U.S. 965 **(1973).** In *Roberts* the court was unconcerned that the declarant's extrajudicial statement, while absolving the accused of the crime charged, contained prejudicial testimony concerning similar uncharged crimes.

admission for purposes of impeachment,[128] and waiver by the accused's failure to object,[129] significantly limit *Bruton.*

Since the courts busied themselves limiting *Bruton,* it was to be expected that they would refuse to extend its holding. It had been argued that once a jury has been impaneled and one defendant enters a guilty plea, the plea is equivalent to an extrajudicial confession and the precept of *Bruton* is violated. While the analogy between a co-accused's guilty plea and confession appears logically and legally sound,[130] courts have almost uniformly rejected it.[131]

These limitations and exceptions to *Bruton* have sharply reduced the number of cases in which *Bruton* has required a severance or exclusion.[132] The prosecutor can proceed with a multiple trial and seek admission of an edited form of a confession.[133] He can also offer

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[128] United States v. Budzanoski, 462 F.2d 443 (3d Cir. 1972) (where references to the co-accused were innocuous); United States v. Clark, 480 F.2d 1249 (5th Cir. 1973); Lewis v. Youger, 411 F.2d 414 (3d Cir. 1969).

[129] United States v. Figueroa-Paz, 468 F.2d 1055 (9th Cir. 1972); United States v. Muller, 460 F.2d 582 (10th Cir. 1972); United States v. Rickey, 457 F.2d 1027 (3d Cir. 1972); *Cf.* United States v. Isaacs, 351 F. Supp. 1323 (N.D. Ill. 1972) and United States v. Withers, 303 F. Supp. 641 (N.D. Ill. 1969) (holding that an objection to the prosecution's intended use of a co-defendant's confession made at a pretrial hearing is premature). These cases raise the problem of the defense having to wait until the prosecution offers the statement, at which time the evidence may be so overwhelming that the *Harrington* harmless error rule will make appeal a fruitless exercise. United States v. Morales, 477 F.2d 1309 (5th Cir. 1973).

[130] Hudson v. North Carolina, 363 U. S. 697, 702 (1960).

[131] United States v. Early, 482 F.2d 53 (10th Cir. 1973); United States v. Kahn, 381 F.2d 824 (7th Cir. 1967); Koolish v. United States, 340 F.2d 513 (8th Cir.), *cert. denied,* 381 U.S. 951 (1965). Some courts have ruled that a guilty plea can be distinguished from a confession since it is sterile and does not carry with it the evidentiary tie-in of the co-defendant and therefore a limiting instruction cures any potential prejudice. See Hudson v. North Carolina, 363 U.S. 697, 702 (1970); United States v. Baca, 14 U.S.C.M.A. 79, 33 C.M.R. 291 (1963); *cf.* Oden v. United States, 410 F.2d 103 (5th Cir.), *cert. denied,* 396 US. 839, and 396 US. 863 (1969).

[132] United States v. Holt, 483 F.2d 76 (5th Cir. 1973); United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972).

[133] Rule 14, FRCP, was amended in 1969 to permit a pretrial hearing where the court *in camera* could review an extrajudicial statement or hear other evidence necessary to a decision on a motion to sever or exclude. These hearings often are concerned with the issue of whether the statement was made during the course of or in the concealment phase of the conspiracy and admissible without regard to *Bruton,* or are true *Bruton* statements. Dutton v. Evans, 400 U.S. 74 (1970). Upon retrial, courts must also determine whether the accused cross-

the confession where the maker of the confession testifies at trial, either to impeach him or, where he testifies favorably to the co-accused, as rebuttal evidence. Finally, if the prosecutor has confessions from all co-defendants, he can proceed to joint or common trial without regard to *Bruton*.[134]

2. *The Right to Compulsory Process*

The right to confrontation of witnesses has been raised by defendants seeking severances in another context. In the noted case of *United States v. Echeles*[135] a defendant claimed that joinder prevented him from calling the co-defendant to testify in his behalf. There an attorney and his client were jointly charged with subornation of perjury. The attorney contended that if they had been tried separately, his client would have testified on his behalf and exculpated him. The court recognized that Echeles' right to compulsory process was rendered void because his client could not be required to testify at the joint trial. The court ordered a retrial of the defendants separately.[136] In subsequent cases, defendants have sought to extend the *Echeles* rationale by contending that the joinder prevented them from calling the co-accused to cross-examine them and cast blame on them. However, just as they limited *Bruton*, the courts have restricted *Echeles*. The more common theories for restriction are: (1) there is no showing that the co-defendant would

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examined or had the opportunity to cross-examine the declarant, thereby rendering the most incriminating type of statements admissible. Hlancusi v. Stubbs, 408 U.S. 204 (1972); Hlendez v. United States, 429 F.2d 124, 128 (9th Cir. 1970). *But see* Simmons v. United States, 440 F.2d 890 (7th Cir. 1971).

134 United States *ex rel.* Catanzaro v. Hlancusi, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1969). Again courts are split on the rationale for the rule. *Compare* United States *ex rel.* Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973) (holding *Bruton* distinguishable on its facts) *with* United States v. Spinks, 470 F.2d 64 (7th Cir.), *cert. denied*, 409 U.S. 1011 (1972) and United States *ex rel.* Dukes v. Wallack, 414 F.2d 2% (2d Cir. 1969) (holding that *Bruton* applies but because of overwhelming evidence of guilt the *Harrington* harmless error rule also applies). In United States *ex rel.* Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971) the court permitted the prosecution to offer confessions of seven of nine co-defendants implicating Zelker in a robbery as a lookout, The accused claimed he was only at the scene of the crime and took no part in it. The court held that even though there was only slight circumstantial evidence to convict outside of the confessions, *Bruton* was distinguishable because the testimony of Zelker and the co-defendants' confessions corroborated his presence at the scene.

135 352 F.2d 892 (7th Cir. 1965).

136 *Id.* at 897.

actually testify at a separate trial;[137] (2) it is unlikely that he would testify;[138] (3) the testimony is not shown to be exculpatory, as alleged;[139] or (4) the catch-all, the contention is mere speculation.[140]

3. *The* Privilege Against *Self-Incrimination*

Just as accused have argued right to confrontation and compulsory process in support of severance motions, they sometimes rely upon the privilege against self-incrimination. For example, one accused argued that his privilege against self-incrimination was violated by his co-defendant's comment on his failure to take the stand. The Fifth Circuit Court of Appeals in *DeLuna v. United States*[141] ruled that although such a comment is an exercise of the commenting accused's right to confront his accusers it is a violation of the silent accused's privilege against self-incrimination. This precise issue has never been presented to the Supreme Court and the holding in *DeLuna* was soon weakened by courts raising a host of distinctions.[142] In fact, the same court of appeals later abandoned the rule where

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137 United States v. Noak, 475 F.2d 688 (9th Cir. 1973); United States v. Thomas, 453 F.2d 141 (9th Cir.), *cert. denied,* 405 U. S. 1069 (1971); United States v. King, 49 F.R.D. 51 (S.D.S.Y. 1970); United States v. Withers, 303 F. Supp. 641 (N.D. Ill. 1969).

138 United States v. Barber, 442 F.2d 517 (3d Cir.), *cert. denied,* 404 U.S. 846 (1971) (co-defendant cannot compel testimony); United States v. McCarthy, 292 F. Supp. 937 (S.D.N.Y. 1968); United States v. Wolfson, 294 F. Supp. 267 (D. Del. 1968). *But see* United States v. Mayr, 350 F. Supp. 1291 (S.D. Fla. 1972) (counsel submitted an affidavit that his co-accused would waive his privilege against self-incrimination at a separate trial).

139 United States v. Ellsworth, 481 F.2d 864 (9th Cir. 1973); United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973); United States v. Manetti, 323 F. Supp. 683 (D. Del. 1971).

140 United States v. Garnett, 404 F.2d 26 (5th Cir.), *cert. denied,* 394 U.S. 949 (1968); United States v. Fassonlis, 49 F.R.D. 43 (S.D.N.Y. 1969).

141 308 F.2d 140 (5th Cir. 1962), *rehearing denied,* 324 F.2d 375 (1963).

142 United States v. Addonizio, 451 F.2d 19 (3d Cir. 1972) (Defendant has no absolute right to a severance on the sole ground that joinder has prevented him from taking the stand and commenting on his co-accused's failure to testify where his counsel argued and commented on final argument.). Hayes v. United States, 329 F.2d 209 (8th Cir.), *cert. denied,* 377 U.S. 980 (1964) (co-defendant's defenses not antagonistic); United States v. Parness, 331 F.2d 703 (3d Cir.), *cert. denied,* 377 U.S. 993 (1964) (where co-defendant failed to object to the improper comment); United States v. Baggett, 455 F.2d 476 (5th Cir. 1972) (where comment would concern a failure to produce character witnesses rather than a failure to testify); United States v. De La Cruz Bellinger, 422 F.2d 723 (9th Cir.), *cert. denied,* 398 US. 942 (1970).

the co-accused sought reversal on the ground that joinder restricted their right to comment on a co-accused's failure to testify.[143]

B. MILITARY PRACTICE

1. The *Right* to Confrontation

Early military courts followed the underlying assumption of *Delli Paoli* that limiting instructions eliminate any prejudice arising from the introduction of a co-defendant's extrajudicial confession.[144] After *Bruton*, the Court of Military Appeals applied *Bruton* to military practice.[145] The Court's holding necessitated the revision of paragraph 140b of the Manual to provide for deletion or redaction of a co-defendant's extrajudicial statement.[146] It is noteworthy that both the Manual Revision Committee[147] and an Army Board of Review[148] recognized the exception that *Bruton* does not apply to the situation where the declarant testifies and is subject to cross-examination before the Supreme Court carved out the exception in *Nelson v. O'Neil*.[149] The committee and the court further recognized that the

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[143] Smith v. United States, 385 F.2d 34, 38 n.12 (5th Cir. 1967). See United States v. Barber, 297 F. Supp. 917, 970 (D. Del. 1969) (court characterizes *DeLuna* comment rule as an aberration); United States v. Krechevsky, 289 F. Supp. 290 (D. Conn. 1967) (concludes *DeLuna* improperly decided after extended analysis).

[144] United States v. Beverly, 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964); United States v. Salisbury, 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); United States v. Maisel, 8 U.S.C.M.A. 371, 24 C.M.R. 181 (1957); United States v. Long, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952).

[145] United States v. Gooding, 18 U.S.C.M.A. 188, 39 C.M.R. 188 (1969). Intermediate appellate courts were reluctant to hold *Bruton* applicable to the military prior to a pronouncement by the Court of Alilitary Appeals. See United States v. Adkinson, 40 C.M.R. 341 (ABR 1968), and United States v. Amik, 40 C.M.R. 720 (ABR 1969). In *Amik* the court was able to distinguish *Bruton* on the basis that the co-defendant testified and was subject to cross-examination. This ruling preceded the holding to the same effect in Nelson v. O'Neil, 402 U.S. 622 (1971). See discussion at note 127, *supra*.

[146] MCM, 1969, para. 1406:

> **. . . When two or more accused are tried at the same trial. evidence of a statement made by one of them which is admissible against him only or against him and some, but not all. of his co-accused may not be received in evidence unless all references inculpating an accused against whom it is inadmissible are effectively deleted or the maker of the statement becomes subject to relevant cross-examination, . . .**

[147] *See* U.S. DEP'T OF ARMY PAMPHLET NO. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES. 1969, (Rev. ed.) 27-11 (1970).

[148] United States v. Amik, 40 C.M.R. 720 (ABR 1969).

[149] Nelson v. O'Neil, 402 US. 622 (1971).

exception's application does not require that the declarant disaffirm the extrajudicial statement or that his testimony at trial be exculpatory to the co-accused.[150]

Following the lead of civilian courts, the military courts have restricted the scope of the *Bruton* doctrine. For example, they have held *Bruton* inapplicable in cases where the confessions by all co-accused are interlocking[151] and where the confession is exculpatory.[152] Guilty pleas[153] and the use of the extrajudicial statement for purposes of impeachment[154] have also been held not to be subject to the *Bruton* rule. Moreover, *Bruton* does not apply at a trial by military judge alone.[155] Although the Manual specifically suggests that an extrajudicial statement, which would otherwise be inadmissible, can be rendered admissible by deletion or redaction, apparently no cases have addressed any of the problems connected with the use of such devices. Further, it has apparently never been argued that paragraph 140b of the Manual limits the use of the co-accused's extrajudicial statements to cases where one or the other device is used by the prosecution.

2. *The Right to Compulsory Process*

Military counsel have raised the *Echeles* denial of compulsory process issue, grounded on the inability to call the co-accused in a joint or common trial to testify on behalf of their client. The argument seems especially strong in military practice in cases where the co-accused enters a plea of guilty, because of the Manual provision that an accused who has entered a plea may be compelled to testify as to the facts and circumstances of the offense to which the plea

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150 *See* cases cited ***supra*** note **19** and accompanying text. No military cases have ever decided the viability of these distinctions.

151 United States v. Halls, 40 C.M.R. 538 (ABR 1969).

152 United States v. Schreiner, **40** C.M.R. **379** (ABR **1969).**

153 United States v. Oliver, **14** U.S.C.M.A. **192,** 33 C.M.R. **404** (1963); United States v. Baca, **14** U.S.C.M.A. **79,** 33 C.M.R. **291 (1963);** United States v. Aponte, **45** C.M.R. 522 (ACMR **1972).**

154 United States v. Masemer, **41** C.M.R. **860** (AFCMR **1969).**

155 United States v. Aponte, **45** C.M.R. 522 (ACMR **1972).** See United States v. Montgomery, **20** U.S.C.M.A. **35, 39, 42 C.M.R.** 227, 231 **(1970);** United States **v.** Razor, **41** C.M.R. **708,** 777 (ACMR), ***aff'd,*** **19** U.S.C.M.A. **570, 42** C.M.R. **172 (1972).**

relates.[156] However, as in the civilian practice, the military courts have rejected the compulsory process issue, even where one accused would plead guilty at a separate trial.[157]

V. THE BALASCING PROCESS UNDERLYING THE PRACTICE

Appellate courts have stated that the trial court's first duty is to require proof of specific prejudice and secondly, to balance the specific prejudice to the accused against the governmental interests in trying criminal cases swiftly and economically.[158] This balancing process underlies the practice governing prejudicial joinder. To asses the balancing test's soundness, we must first identify the interests to be balanced.

A. THE INTERESTS TO BE BALANCED

1. Defense Interests

Previous sections have outlined some of the interests commonly cited by accused seeking severance. Each of these interests is in effect an example of alleged unfairness to defendants caused by joinder. This alleged unfairness is separate and apart from prejudicial error arising in the trial of individual accused.[159] The proponents of separate trials in all cases view a liberal joinder practice as unfair per se, because it permits both sides to plav upon juror sentiments with respect to the defendants, or counsel for either side. They also view the procedural and legal advantages of joint or common trials as factors that should not enter into the process of determining guilt or innocence. The proponents contend that every accused should be

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[156] MCM, 1969, para. 150*b*; United States v. Kirsch, 15 U.S.C.M.A. 84, 88, 35 C.M.R. 56, 60 (1964); Cnited States v. Six, 11 U.S.C.M.A. 691, 29 C.M.R. 507 (1960); United States v. Aponte, 45 C.II.R. 522 (ACMR 1972). *Cf.* Cnited States v. Perez, 46 C.M.R. 877 (ACMR 1972).

[157] United States v. Evans. 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952); United States v. McCauley, 30 C.M.R. 687 (NBR 1960).

[158] United States v. Bumatay, 480 F.2d 1012 (9th Cir. 1973); Cnited States v. Harris, 458 F.2d 670 (5th Cir. 1972); United States v. Donoway, 447 F.2d 940, 943 (9th Cir. 1971). ***But see*** United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972) (where the court rejected balancing as a technique to resolve a potential ***Bruton*** problem).

[159] *See* Note, *Joint and Single Triols Under Rules 8 and 14 of the Federal* ***Rules of Criminal*** *Procedure,* 74 YALE L.J. 553, 562-63 (1965).

granted a full and fair hearing before a fact finder that is unencumbered by the confusion and complexity engendered by the trial of several defendants at the same time.[160]

As previously stated, defendants have had little success in convincing trial or appellate courts that the alleged instances of unfairness warranted a severance. This is not to say that the courts have concluded that in fact, the joinder would not prejudice the accused. On the contrary, in many cases the court readily admits that there will be prejudice. However, the court considers the government interests, applies a balancing test, and more often than not, balances away the accused's right to a discretionary severance.

2. *Governmental Interests*

The courts usually describe the general governmental interest in joint trials as society's need for the swift, sure and inexpensive disposition of criminal conduct.[161] This societal need encompasses three specific government interests: (1) saving time and money; (2) avoiding inconsistent verdicts; and (3) preventing a reduction in the number of guilty pleas.

a. Saving Time and Money

The Government favors joint and common trials because they are expeditious and conserve prosecutorial and judicial resources; in short, they save time, money, and manpower.[162] Aside from the duplication of effort by prosecutorial and judicial officers caused by separate trials, courts often point to the citizens' loss of time and money occasioned by the increase in jurors for the separate trials and the requirements that witnesses suffer similar losses waiting to repeat their testimony in successive trials.[163]

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160 *See* Walsh, ***Fair*** *Trials* and the Federal Rules of ***Criminal*** Procedure, 49 A.B.A.J. 853, 856-57 (1963).

161 Parker **v.** United States, 404 F.2d 1193, 11% (9th Cir. 1968); Bayless **v.** United States, 381 F.2d 67 (9th Cir. 1967); United States v. Quinn, 349 F. Supp. 232 (E.D. Wis. 1972).

162 Parker **v.** United Stare;, 404 F.2d 1193, 1196 (9th Cir. 1968); Bayless **v.** United States, 381 F.2d 67 (9th Cir. 1967); United States v. Quinn, 349 F. Supp. 232 (E.D. Wis. 1972). See United States **v.** Coleman, 340 F. Supp. 451, 452 (E.D. Pa. 1972), aff'd, 474 F.2d 1337 (3d Cir.), *cert.* denied, 411 U.S. 939 (1973); United States **v.** Fassoulis, 40 F.R.D. 43 (S.D.N.Y. 1969).

163 ***See*** authorities cited ***supra*** note 162.

Despite numerous commentaries on the subject of joinder, there has not been a comparative, statistical study of the actual cost in time and money of separate and multiple trials. Those favoring separate trials for each accused assert that time is saved and expense is less for several reasons: separate trials are less complicated and shorter, resulting in a net time savings; separate trials lead to fewer appeals; and, at least where the first defendant tried is convicted, separate trials increase the number of guilty pleas.[164] Those opposed to separate trials assert that there is no necessary correlation between the number of defendants and the case's complexity; they argue that complexity inheres in the nature of the offense rather than in number of defendants and hence, separate trials only multiply the complexity, time and expense of one trial by the number of defendants tried separately.[165]

On both sides, the assertions are unadulterated and unsupported *ipse dixit*. With good reason, neither side produces any statistical support for its assertions. No such statistics are available. No reported opinion has required the prosecution to make a concrete, factual estimate of the costs of common trial as compared to separate trials for each defendant. Rather, by a pure act of faith, the court accepts the prosecution's generalization that multiple trials save time and money.

b. Avoiding Inconsistent Verdicts

A second governmental interest often cited by the commentators is the potential for inconsistent results if multiple defendants are tried separately.[166] Inconsistent results are possible not only because separate fact finders might view the evidence differentlv but also because misconduct on the part of the accused might contribute to incongruous verdicts.

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[164] *See e.g.*, Tandrock. *Joint Trinls: A Short Lesson From Little Vermont*, 9 CRIM. L. BUL. 612, 614 (1973); Note, *Bruton v. United States: A Belated Look At The Warren Court Concept of Criminal Jwtice*, 44 ST. JOHN'S L. REV. 54, 60 (1969).

[165] *Cf.* Tandrock, *Joint Trials: A Short Lesson From Little Vermont*, 9 CRIM. L. BUL. 612, 614 (1973); Note, *Bruton v. United States: A Belated Look At The Waen Court Concept of Criminal Justice*, 44 ST. JOHN'S L. REV. 54, 60 (1969). *See* Bruton v. United States, 391 U.S. 123, 131, n.6 (1968).

[166] Note, *Bruton v. United States: A Belated Look At The Warren Court Concept of Criminal Justice*, 44 ST. JOHN'S L. REV. 54, 60 (1969). *See* Bruton v. United States, 391 U.S. 123, 143 (1968) (Mr. Justice White dissenting).

One type of misconduct feared by the opponents of separate trials is successful perjury.[167] For example, *A* will provide *B* an alibi at *B's* trial. After *B* is acquitted, he will testify at *A's* trial that he, *B*, was the sole perpetrator of the offense. A second, related type of misconduct is an accused's impermissible realignment of evidence at a later trial after he discovers the evidence the prosecution presented at an earlier trial of his co-accused. The second trial creates new opportunities for subornation of perjury, obstruction of justice by tampering with witnesses, impeachment of honest witnesses by innocent, innocuous errors at the first trial, and the selection of a theory of defense tailored to meet the theory of the prosecution at the earlier trial.

There are certainly strong defense counter-arguments. Defendants point out that the same arguments have been used by the proponents of limiting defendants' pretrial discovery.[168] In that context, the more progressive courts have rejected the contentions; the courts expand defendants' pretrial discovery on the theories that the Code of Professional Responsibility effectively deters attorneys from participating in criminal activity[169] and that it is sheer speculation that such conduct will occur in a significant number of cases.[170] Further, there is nothing inherently unethical about a defense attorney's realignment of his defense theory based upon study of the record of a prior trial: indeed, a defense counsel would be lax if he did not avail himself of the opportunity to study the prior record.[171]

The problem, of course, is that the strength of each side's argument depends upon the incidence of the illegal and unethical activities the prosecutors fear, However, as was the case with the first government interest—saving time and money—the argument concerning inconsistent verdicts lacks empirical support. Neither side has taken the time to marshal statistical data to support its assertions. When a court purports to weigh this second government interest, the court is considering a vague, unquantified factor.

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167 See Vamplew, *Joint Trials,* 12 CRIM. L.Q. 30 (1969).

168 *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL 34-43 (Approved Draft, 1970).

169 *Id.* at *39.*

170 *Id.* at 38.

171 *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION AND DEFENSE FUNCTION 225-28 (Approved Draft, 1971).

c. Preventing Reduction in Number of Guilty Pleas

A third argument relied upon by the proponents of joinder is the fear that a more liberal severance rule would reduce the number of guilty pleas in multiple offender trials.[172] As previously pointed out, joinder encourages plea bargaining, particularly by minor participants in joint offenses.[173] The prosecution is especially interested in plea bargaining because in joint offenses the participants usually of necessity plot and execute the preliminary overt acts in secrecy. Thus, in return for a lenient sentence or immunity, the prosecution is interested in using the minor participant's valuable testimony relating to the covert activities.[174]

Proponents of separate trials respond that separate trials encourage plea bargaining because if the first accused tried is convicted, the subsequent accused often realize for the first time the strength of the government's case and are thereby induced to plead guilty.[175]

As in the case of the first and second government interests, neither side of the dispute concerning the third government interest presents any empirical data; and, again, they do so for good reason: none is available.

B. THE BALANCING OF INTERESTS

1. Appellate Courts

The appellate courts often describe these interests of the Government and the accused as "desirable" and then attempt to balance the interests of the accused in a fair trial against the societal need for swift, sure and inexpensive disposition of criminal conduct. However, a balancing test provides a trial court with useful, clear

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172 *Compare* Tandrock, *Joint Trinls: A Short Lesson From Little Vermont,* 9 CRIM. L. BUL. 612 (1973), *with* Vamplew, *Joint Trials,* 12 CRIM. L.Q. 30 (1969).

173 *See* Hudson v. North Carolina, 363 U.S. 697 (1960); United States v. Early, 482 F.2d 53 (10th Cir. 1973); United States v. Baca, 14 U.S.C.M.A. 79, 33 C.M.R. 291 (1963) (plea of co-accused known by court panel); United States v. Aponte, 45 C.M.R. 522 (ACMR 1973) (plea of co-accused known to military judge sitting alone).

174 *See Developments In The Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 963 (1967); O'Dougherty, *Prosecution and Defense of Conspiracy Trials,* 9 BROOKLYN L. REV. 263, 273-74 (1940).

175 Tandrock, *Joint Trials: A Short Lesson From Little Vermont,* 9 CRIM. L. BUL. 612 (1973).

guidance only if the appellate court furnishes the trial court with at least a partial list of objective factors to be balanced.[176]

In the area of discretionary severance, due to the lack of empirical data and the complexity of the interests to be balanced, appellate courts shrink from providing any list of factors to the trial court. Rather, the appellate courts strain to avoid this issue by sustaining the denial under various rationales: (1) overwhelming evidence;[177] (2) cure by verdict;[178] (3) concurrent sentencing;[179] and (4) adequacy of limiting or cautionary instructions.[180]

The rationales of overwhelming evidence, cure by verdict and concurrent sentencing provide the trial courts with little guidance since at the trial, the motion is made before a trial court can test the contention against any result of trial.[181] One would suppose that the

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[176] *See* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Reich, *Mr. Justice Black And The Living Constitution*, 76 HARV. L. REV. 673 (1963). *Cf.* Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970) (court on remand requires the trial court to answer a series of questions relating to potential prejudice).

[177] Similar to a court's use of the harmless error rule, this rationale requires the court to examine the entire evidence of record and determine if *the* jury *could have reached the same decision* without counting the prejudicial matter. *See* United States v. Vita, 370 F.2d 759, 765 (6th Cir. 1966), *cert. denied*, 387 U.S. 910 (1967); United States v. Golliher, 362 F.2d 594, 603 (8th Cir. 1966); United States v. Borner, 8 C.M.R. 483 (ABR 1952), *aff'd*, 3 U.S.C.M.A. 306, 12 C.M.R. 62 (1953).

[178] Under this device, an appellate court will look to see if any defendant has been acquitted on any count charged. If so, the court will treat any alleged prejudice as harmless. See Fernandez v. United States, 329 F.2d 899, 906 (9th Cir. 1964), *cert. denied*, 375 U.S. 943 (1965). *Cf.* United States v. Hutul, 416 F.2d 607 (7th Cir. 1969).

[179] Courts use concurrent sentencing as a device to uphold denial of severances because they consider relief in sentencing as overcoming any prejudice to the accused in the case in chief. *See* Sotc, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 555 (1965).

[180] *See* Leach v. United States, 402 F.2d 268 (5th Cir.), *cert. denied*, 393 U.S. 1193 (1968); Hanger v. United States, 398 F.2d 91 (8th Cir.), *cert. denied*, 393 U.S. 1191 (1968); United States v. Evans, 1 U.S.C.M.A. 534, 4 C.M.R. 133 (1952). Courts seem to base their conclusion that jury instructions properly cure any prejudice on a famous quote of Judge Learned Hand from United States v. Fradkin, 81 F.2d 56, 59 (2d Cir. 1935):

> A man takes some risks in choosing his associates and, if he is hauled into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.

[181] *See* WRIGHT, *supra* note 19 at § 227.

appellate court would at least provide guidance in the form of an approved limiting or cautionary instruction; appellate court approval of an instruction would provide a model.[182] However, the appellate courts have failed to provide the text of any model instruction. The appellate court will merely state that the trial court's curative instructions were appropriate.[183] The effectiveness of curative instructions is, as we have discussed above,[184] suspect.

2. Trial Courts

Aside from the frequent invocation of a waiver doctrine,[185] trial courts rarely state any rationale to support their exercise of discretion other than to restate such vague generalizations as the accused has the burden of proof as to specific prejudice; or, the grant of severance is a matter of discretion and that the court exercises its discretion by balancing the prejudice against the governmental interests.[186] Trial courts place great reliance upon curative instructions, not only because of the frequent blessing of the appellate courts, but also because it is the trial court's business to guide the jury by instructions.[187]

The primary difficulty with such reliance upon instructions is that, even when properly documented, the alleged prejudice is usually prospective, its occurrence or supposed impact on the jury has not occurred at the time the motion is made. Thus, the trial court is really guessing at the value of curative instructions.

Another difficulty with such reliance is that the reliance is misplaced unless juries in fact follow such instructions and, as we have seen, there is serious doubt that lay juries are even capable of following the instructions in complex, multiple defendant trials.

3. The Weakness of the Balancing Test

This review of the appellate and trial courts' application of the balancing test serves to highlight the test's weakness. For the appellate

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182 *Id.*

183 *See* Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 556 (1965); WRIGHT, *supra* note 19, at § 226.

184 *See* notes 110-20 and accompanying text, *supra*.

185 *See* notes 45-50 and accompanying text, *supra*.

186 *See* WRIGHT, *supra* note 19, at § 223.

187 *See* Spencer v. Texas, 385 U.S. 554 (1967); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954).

courts' part, we certainly cannot assume that the appellate judges refuse to give the trial courts more definite guidance because the appellate judges maliciously desire to make the trial judge's job harder. Rather, it seems more reasonable to conclude that the appellate courts' inability to formulate the balancing test more precisely evidences their *inability* to do so. The trial courts' experience with the balancing test demonstrates that like their appellate brethren, the trial judiciary cannot develop a clear, judicially manageable statement of the balancing test. The trial courts seek to avoid the necessity of a clear statement of the test by relying upon strained applications of the waiver doctrine and dubiously effective curative instructions.

In truth, the history of the balancing test for severance has been characterized by complexity and confusion. The test has only one singular achievement to its credit: it has united prosecutors and defense counsel in their criticism of the test because of its lack of predictability.[188] This dissatisfaction has led to a number of proposals for alternatives to the discretionary severance practice.

C. ALTERNATIVES TO A BALANCING TEST

Various approaches have been suggested or attempted without real improvement over the results under Rule 14 of the Federal Rules or paragraph *69d* of the Manual. Certain state jurisdictions have experimented with but are abandoning mandatory severance rules in prejudicial joinder situations. These rules usually provide for an automatic severance upon request of a defendant.[189] However, like the abandonment of the mandatory severance in the military practice, the states have with but a few exceptions abandoned these rules for a discretionary process.[190] Some states which had statutory rules adopted the discretionary practice after the state judiciary gained criminal procedure rule-making authority,[191] or by legislative

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[188] *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE 1 (Approved Draft 1968) [hereinafter cited as STANDARDS].

[189] **See** note **236 infra.**

[190] *See e.g.*, GA. CODE ANN. 4 27-2103 (1953), as amended by § 27-2103 (1971); VT. STAT. ANN. 4 6507 (1958), repealed Act of October 31, 1973; VA. CODE ANN. 4 19.1-202 (1960), repealed § 8-208.30 (1973).

[191] *See e.g.*, WYO. STAT. ANN. 4 7-230 (1959), repealed by enactment of WYO. R. CRIM. PROC. 13, effective February 11, 1969. See Lumm v. Stare, 505 P.2d 1270 (Wyo. Sup. Ct. 1973).

enactment,[192] or by judicial interpretation.[193] As a result, only Alabama presently provides for severances in all cases,[194] and only three states permit such severances in all felony cases.[195]

This abandonment of mandatory rules is a reflection that the complexity of the issues raised in any motion to sever is better left to the trial judge. Due to the same lack of empirical data,[196] the legislatures are in no better position to strike the necessary balance between individual and societal needs. Thus, the trial courts in these jurisdictions are again left to their own devices without appropriate guidance.

To provide courts with the necessary guidance, the American Law Institute's Model Penal Code[197] and the American Bar Association's Standards for Criminal Justice[198] have attempted to restate the rules established by the courts in interpreting and applying Federal Rule 14.

The Model Penal Code, Section 5.03(4), liberalizes the prosecution's authority to join, in a single trial, defendants, some of whom are not co-conspirators in one conspiracy count, but are parties to a complex criminal scheme consisting of a number of separate conspiracies but related to a common goal.[199] Although Section 1.2 of the Standards adopts a provision for common trials,[200] it does not go so far as to permit joinder of unrelated defendants' conspiracies.[201]

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192 Authorities cited note 191 ***supra.***

193 COLO. REV. STAT. ANN. § 39-7-11 (1964) interpreted to describe a discretionary practice despite language to the contrary in Brown v. People. 124 Colo. 412, 238 P.2d 847 (1951).

194 15 ALA. CODE ANN. § 319 (1959).

195 ARK. STAT. ANN. § 43-1802 (1964); Vault v. Adkinson, 491 S.W.2d 609 (Ark. Sup. Cr. 1973); KAN. GEN. STAT. ANN. § 62-1429 (1950); State v. Sullivan. 504 P.2d 190 (Kan. Sup. Ct. 1972); MINN. STAT. ANN. § 631.03 (1947); State v. Robinson, 271 Minn. 477, 136 N.W.2d 401, *cert. denied*, 283 U.S. 918 (1965).

196 *Cf.* STANDARDS, *supra* note 188, at 2.

197 MODEL PENAL CODE § 5.03(4) and Comment (Tent. Draft *So.* 10. 1960) [hereinafter cited as MODEL PENAL CODE].

198 STANDARDS, ***supra*** note 188, at § 2.3.

199 MODEL PENAL CODE, supra note 197, at 137.

200 STANDARDS, *supra* note *188.* at 15.

201 MODEL PENAL CODE, ***supra*** note 197, at 135-38; STANDARDS, ***supra*** note 188, at 3143.

It would permit a common trial where the criminal conduct of all accused was "interrelated," [202] that is, although not a part of a common scheme or plan, the conduct of all defendants was criminal in respect to a particular occurrence, and the same evidence is required to prove the guilt of each defendant. As an example, the Standards' Advisory Committee cites *Miciotto v. United States*,[203] wherein the driver of a bus and the driver of an automobile were both charged with negligent homicide arising out of a collision.

Both the Model Penal Code and the Standards attempt to provide guidance as to when a court should grant a severance motion.[204] However, the guidance in reality is a restatement of the vague grounds already established by the courts. Thus, jurisdictions adopting the Standards or the Model Penal Code would be using a discretionary practice not unlike the federal and military practice. Because both committees emphasize that the intent of their draft rules is to liberalize the joinder practice,[205] it appears probable that Severances would perhaps be even less likely and decisions even less predictable than under current practice.

The commentators are usually correct when they argue, in a particular case, that the identifiable prejudice should have been recognized as a ground for severance. They are certainly on firm ground when they contend that fair trials ought not to be sacrificed for monetary reasons.[206] On the other hand, the prosecution is probably correct in its view that separate trials are a waste of judicial assets and taxpayers' money or that in many cases the jury properly follows the court's instructions.[207]

These conflicting interests have created a dilemma for the courts, and as long as the courts attempt to balance speculative, vague interests, the balancing tests will not provide the trial courts with a just means of resolving the dilemma in a predictable fashion. Fortunately, an ingenious district court judge has devised an approach which at

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[202] STANDARDS, *supra* note 188, at 4.

[203] 198 F.2d 951 (D.C. Cir. 1952).

[204] MODEL PENAL CODE, *supra* note 197, at § 5.03(4)(iii); STANDARDS, *supra* note 188, at 35-43.

[205] MODEL PENAL CODE, *supra* note 197, at 137; STANDARDS, *supra* note 188, at § 2.3.

[206] WRIGHT, *supra* note 19, at 223. *See* Comment, *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966), 28 OHIO ST. L.J. 356 (1967).

[207] Note, *Bruton v. United States: A Belated Look at The Warren Court Concept of Criminal Justice*, 44 ST. JOHN'S L. REV. 54, 60 (1969).

the same time substantially protects the accused's and the government's interests and makes it unnecessary to resort to the balancing test.

VI. REFORMING THE PRACTICE: MULTIPLE FACT FINDERS

A. *UNITED STATES V. SIDMAN*[208]

A novel approach to the problem of prejudicial joinder was recently taken by a district court in California in a case involving armed bank robbery. Two co-defendants, Sidman and Clifford, were jointly charged and tried contemporaneously. Separate juries were impaneled to try Sidman and Clifford, ostensibly to avoid a *Bruton* problem, because a third accomplice had entered a guilty plea to another robbery at the same bank.[209] The case originally began before a single jury. The trial judge had cautioned counsel that any evidence involving the accomplice would be permitted only as a matter of impeachment. This first trial resulted in a mistrial because of a Jencks Act violation.[210] The second trial was conducted before two separate juries "in an abundance of caution."[211]

The trial proceeded in the following mode. Both accused and counsel were present at the selection of veniremen. Both juries were given the preliminary instructions simultaneously and the government's opening argument was made to both in the presence of the accused and their counsel. Although both counsel for the accused were offered the opportunity to make an opening statement immediately upon the conclusion of the United States Attorney's, both declined and reserved opening argument. It is not clear from the opinion whether counsel would have been permitted to argue in the presence of both juries. In any event, evidence admissible against both accused was offered to the juries simultaneously and one or the other jury was dismissed from the courtroom while evidence

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208 470 F.2d 1158 (9th Cir. 1972), *cert. denied,* 409 U.S. 1127 (1973).

209 *Id.* at 1167.

210 *Id.* The court made no reference to the substance of the Jencks Act (18 U.S.C. § 3500) violation.

211 *Id.* The court recognized that *Bruton* would only be applicable if the third accomplice Carroll had given a post-conspiracy confession implicating Sidman in the robbery charged. Carroll had only confessed and entered a plea of guilty to a previous robbery at the same bank.

only as to one accused was offered to the appropriate jury. Counsel and the accused were permitted to be present throughout the entire proceeding and took an active role in cross-examination of witnesses even when their jury was not present. The case as to one accused, Clifford, was completed two days prior to that of Sidman. The Clifford jury was charged, deliberated and rendered its verdict prior to the completion of Sidman's trial. The verdict was sealed and not announced until the verdict in Sidman's case was rendered. In effect, Sidman received a joint trial as to the evidence admissible against Clifford and himself, and a separate trial as to evidence inadmissible against Clifford but admissible as to himself,

Because of a *Bruton* error prejudicial to Clifford, his case was remanded for retrial.[212] Only Sidman objected to the multiple jury procedure. He challenged the procedure on several grounds.

First, he contended that the mere presence of two juries suggests that the two accused should be treated differently or that one is more guilty than the other. Sidman pointed out that the prosecution had more evidence implicating him in the robbery than it did against Clifford; he also noted that his case took three days longer than did Clifford's. Sidman argued that because of the disparity in evidence and the presence of a separate jury for Clifford, "his jury" might have been more prone to convict him. The court conceded that the jury might infer Sidman's guilt from the greater evidence against him and the fact of two separate juries. However, the court pointed out that the Sidman jury may not have inferred anything from the fact of two juries, or on the contrary, it might have inferred from the fact of two juries that it must carefully weigh the evidence only as to Sidman because the Clifford jury is available for Clifford. Because the court concluded that it was purely speculative whether the jurors drew either or neither of the inferences, it rejected Sidman's contention.[213] This rejection seems correct. In a joint trial Sidman would have stood before a single jury which could have inferred from the disparity of evidence that Sidman was more culpable or that

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[212] *Id.* at 1170-71. In redirect examination of Carroll, the U.S. Attorney elicited a hearsay declaration that Sidman had told Carroll that he and Clifford had robbed the bank. Because Carroll was not alleged as a party co-conspirator of the robbery charged, the court properly ruled the declaration hearsay and because Sidman did not testify before the Clifford jury, *Bruton* required reversal of Clifford's conviction.

[213] *Id.* at 1160.

he, as the driving force in the robbery, deserved conviction. Either of these inferences would have worked to Sidman's disadvantage when the jury began its deliberations.[214]

Second, Sidman contended that he was denied a fair trial because the proceeding was an "experiment," "an operation carried out under controlled conditions in order to discover an unknown effect or law." [215] The court rejected this argument not only because of its vague allegation of prejudice but also because the court found no violation of the Federal Rules or the Constitution.?" Sidman claimed that his counsel was surprised and stultified because of the uniqueness of the procedure. Calling Sidman's attorney "experienced," the court pointed to his skillful cross-examination of the accomplice out of the presence of the Sidman jury and his use of this information to adroitly cross-examine the same witness before his own jury. After reviewing the constitutional requisites of trial by jury and the appropriate Federal Rules, the court found that Sidman was tried by a 12-man jury,?" properlv supervised and instructed by the judge,[218] operating under a unanimous verdict rule.[219]

Next, the court rejected Sidman's contention that he was denied the right to have his jury hear the testimony of his co-defendant Clifford, who testified before his own jury but out of the presence of the Sidman jury. Since the same testimony was elicited by Sidman through his wife and children, the court found that he was not prejudiced.[220] More significantly, Sidman did not call Clifford as a witness. Even if he had, and Clifford had refused to testify before both juries simultaneously, or had refused absolutely, Sidman would

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214 See notes 114 and 115 supra and accompanying text.

215 United States v. Sidman, 470 F.2d 1158, 1169 (9th Cir. 1972), *cert.* denied, 409 U.S. 1127 (1973).

216 The court cited FRCP 23 governing the right of trial by jury and FRCP 43 requiring the presence of the defendant at all stages of the proceeding as fully satisfied.

217 FRCP 23. But see Johnson v. Louisiana, 406 U.S. 356 (1972) (due process does not require a 12-man jury in felony cases).

218 Patton v. United States, 281 U.S. 276, 288 (1930). See United States v. Mickel, 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958).

219 Patton v. United States, 281 US. 276, 288 (1930). But see Apodaca v. Oregon, 406 U.S. 404 (1972) and Williams v. Florida, 399 U.S. 78 (1970) (sixth amendment does not require unanimous verdicts in felony cases).

220 United States v. Sidman, 470 F.2d 1158, 1170 (9th Cir. 1972), *cert.* denied, 409 U.S. 1127 (1973).

be in no better position than defendants in *Echeles*[221] type cases where courts have consistently denied a claim of prejudice.

B. ADVANTAGES OF THE MULTIPLE FACT FINDER APPROACH

The Ninth Circuit Court of Appeals did not give complete or blanket approval to the multiple jury procedure. It was troubled by the *Bruton* error as to Clifford[222] and the lack of predetermined rules of the game in consonance with Rules 50 and 57 of the Federal Rules.[223] The *Sidman* court recognized that the Federal Rules provide no affirmative authority for a trial with multiple fact finders but found no prohibition either.

If nothing else, the procedure may provide an avenue of escape from the unproductive and unpredictable balancing technique. The procedure substantially protects both sides' interests and makes it unnecessary to balance vague interests which defy objective comparison. By shielding the accused from inadmissible evidence, the procedure eliminates many, if not most, of the sources of prejudice to the accused. By permitting the Government to try multiple defendants in the same forum, the procedure satisfies the societal need for the swift disposition of multiple offender crimes. The procedure makes it unnecessary for the trial judge to struggle with a balancing test that neither the appellate nor the trial courts have been able to formulate precisely.

The multiple jury procedure may be appropriate in all but a very few multiple trial situations. The multiple fact finder approach eliminates any claims of prejudice arising from jury confusion or the mere complexity of the issues. While the governmental need for resolution of the criminal conduct in one proceeding is served, the

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221 352 F.2d 892 (7th Cir. 1965). See cases cited notes 137-40 and accompanying text, *supra*.

222 United States v. Sidman, 470 F.2d 1158, 1170 (9th Cir. 1972), ***cert. denied,*** 409 U.S. 1127 (1973).

223 FRCP *50* requires the district courts to maintain trial dockets which will reflect a priority in docketing of criminal cases. FRCP 57 requires the disrrict courts to formulate rules of court for the trial of criminal cases and file these rules with the appropriate U.S. Court of Appeals. The court in *Sidman* apparently was concerned that future disrrict courts in the circuit would proceed with multiple fact finder trials under rules of court not properly filed with it pursuant to Rule 57. ***See*** Witherspoon v. Walsh, 463 F.2d 951 (D.C. Cir, 1972).

court's instruction as to each accused can be tailored to the evidence presented to each jury, unencumbered by ineffective limiting or cautionary instructions. While the more complicated cases involving numerous defendants and charges may create physical limitations where all defendants desire trial by jury or court panel,[224] the procedure could feasibly be employed in most multiple defendant trials.

Sentiments of jurors concerning the prosecution, the law or the defendants will continue to influence the outcome of cases under a multiple fact finder procedure. However, the procedure would be an improvement over a single jury which is burdened not only with the play upon its sentiments but also with the task of ignoring evidence it has heard but cannot consider. Where the court determines that an accused is prejudicially joined notwithstanding his independent fact finder, it would continue to have the authority to grant a severance under the traditional discretionary rules.

Finally, the procedure has incidental benefits for both the accused and the Government. Under the multiple jury procedure, should a co-defendant desire to testify on behalf of his co-defendant but not desire to testify before his own jury, he could do so. If he refuses to testify before all juries on the ground of self-incrimination, no claim of prejudice would be applicable because he would not have testified in single separate trials. The procedure therefore eliminates the tactical maneuver of one accused obtaining an acquittal and testifying perjuriously for his co-accused at a later trial.[225]

C. THE ADOPTION OF THE MULTIPLE FACT FINDER APPROACH IN THE MILITARY

In military practice, the subject of multiple fact finders has arisen in the context of the improper referral of charges to courts-martial rather than the context of an alternative to severance. In *United States v. Pratt*[226] four accused were charged with unrelated crimes. They had negotiated pleas of guilty with the convening authority. They were

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[224] United States v. Sidrnan, 470 F.2d 1158, 1170 (9th Cir. 1972), ***cert. denied,*** 409 US. 1127 (1973). See United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972) (The court declined to use multiple fact finder procedure in three-defendant robbery trial because it is awkward. The court's opinion provides no further discussion.) ***See also*** United States v. Crane, 499 F.2d 1385 (6th Cir. 1974).

[225] ***See*** notes 137-40 and accompanying text, ***supra.***

[226] 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968).

arraigned together and later were sentenced separately after individual hearings on extenuation, mitigation, and aggravation. The Court of Military Appeals, denominating the procedure "bull pen justice," ordered the practice ended forthwith.[227] The court questioned the logic of the procedure employed, finding no specific provisions of the Code or the Manual authorizing it. But, despite a rather strong dissent by Judge Ferguson,[228] the court found the procedural error harmless.

It is clear that both the majority and the dissent in *Pratt* were most concerned with the pro forma nature of the law officer's inquiry into the providency of each accused's plea. Although there is strong language, such as "assembly line'' procedures and "bull pen" justice, indicating a disapproval of multiple trial per se, it is clear that the rote inquiry on providency was the primary procedural error in the case:

> We echo, therefore, the appraisal of others that ignorance on the part of any one accused may well be concealed hy a sheeplike following in the refrain of others. Further, this same arraignment will detract significantly from the law officer's efforts to instill in an accused that personal relationship so vital and necessary if the latter is to benefit from the advice and experience that the law officer might favorably bring into play in behalf of an accused. (citation omitted) In short, the utilization of ***en masse*** examinations is a procedure that should be ended forthwith.[229]

Similar sentiments were the basis of the court's decision in *United States v. Care*[230] where the court required a more personal and in-depth inquiry into plea providency. It is arguable that should the court again be confronted with a *Pratt* type multiple arraignment, but conducted in compliance with *Care*, the court would reach a different result.

More closely in point, an Army Court of Military Review found no prejudicial or jurisdictional error in a multiple fact finder trial. In *United States v. Petro*,[231] two accused were tried together. One record of trial was prepared, despite the fact that each of their charges had been referred to different courts. The court, quoting

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[227] *Id.* at 466, 38 C.M.R. at 264.
[228] *Id.* at 468, 38 C.M.R. at 266.
[229] *Id.* at 467, 38 C.M.R. at 265.
[230] 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969).
[231] 44 C.M.R. 511 (ACMR 1971).

Pratt, disapproved the practice but was of the opinion that the real error was administrative in nature, since the case should have been referred to a single court, naming the different defense counsel in the same order.[232] Again, the court used strong language to condemn the practice, but seemed more concerned with the improper referral than with multiple fact finder procedure.[233]

The *Pratt* and *Petro* courts recognized that the Manual does not specifically provide for *en masse* trials. However, paragraph 53*c* of the Manual, which lists the procedural rights of accused at joint or common trials, does not specifically bar multiple fact finders. The military and federal procedural rules are similar in that there is no specific prohibition.[234] It is arguable that since there is no specific prohibition, the multiple fact finder court-martial is permissible so long as the accused are not thereby deprived of any procedural or constitutional rights, the position taken by the court in *Sidman*.[235] However, the better practice would be to expressly authorize the procedure by a Manual provision, This could be accomplished by simple additions to paragraph *26d* and 331 of the Alanual permitting referral of joint or common offenders to a court including multiple panels of court members.[236]

The concern of the *Sidman* court with the absence of "rules of the game" would not pose a hurdle in the military because Alanual

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232 *Id.* at 514 n.8.

233 *Id.*

234 ***Compare*** United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), *cert.* denied, 409 US. 1127 (1973); *with* United States v. Pratt, 17 U.S.C.M.A. 464, 467. 38 C.M.R. 262, 265 (1968) and United States v. Petro, 44 C.M.R. 511, 514 (ACMR 1971).

235 See notes 215-21 and accompanying text, ***supra.***

236 MCM, 1969, para. 26*d*: *Joint Offenses.*

The following sentence concerning use of multiple fact finders should be adopted and added to the end of the last paragraph :

"However. the convening authority may, in an appropriate case, include in the indorsement to the charge sheet (33*j*) a direction that each accused will be tried simultaneously, by a court of members (37*a*) different from those of the other joint accused."

MCM, 1969, para. 331: *Common Trial.*

The following sentence concerning use of multiple fact finders should be adopted and added: (New proposed sentence in italics)

"If two or more persons are charged with the commission of an offense or offenses, which, although not jointly committed (26*d*), were committed at the same time and place and are provable by the same evidence, the convening authority may in his discretion direct a common trial for these offenses only ***and may direct by indorsement to the charge sheet (33j) a direction that each accused will be tried simultaneously by o court of members (37a) different from those of the other accused to be tried in common.***

paragraph 53c delineates specifically the procedural rights to be accorded to joint or common offenders tried together in a single trial.[237] All the advantages the multiple fact finder approach provides in civilian practice[238] would be realized in the military. In addition, the existence of multiple fact finders would avoid the "automatic" severance of joint or common offenders based upon their request for different modes of trial.[239] Each accused would be provided a court panel to try his case; each could request that enlisted members be detailed to his court panel; or each accused could request trial by military judge alone. In this latter case, the military judge could in the same trial sit as a fact finder as to one or more accused while at the same time acting as trial judge for the accused tried before court panels. Because of this, defense counsel would no longer need to advise an accused of a need for trial in a different mode from that of a co-accused solely on the basis that prejudice caused by joinder could thereby be avoided. On the other hand, the staff judge advocate would not be faced with rereferral of cases to satisfy the accused's desires with respect to mode of trial.

VII. CONCLUSION

An examination of the current severance practice under Manual paragraph 69d and Federal Rule of Criminal Procedure 14 reveals that the rules governing discretionary severance are in a state of confusion and unpredictability. At each step of a joint or common trial, from the drafting of charges to final appellate review, improvement must be made to satisfy the need for fair trials without waste of judicial resources. The most promising hope for improvement is

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[237] MCM, 1969, para. 53c: *Joint* and *Common Trials.*

In joint trials (28d) and in common trials (33l) each of the accused must In general be accorded every right and privilege which he would have if tried separately. For example, each accused may, if he desires, be defended by individual counsel, make individual challenges for cause (62h), make Individual peremptory challenges (62d), cross-examine witnesses, testify in his own behalf, introduce evidence in his own behalf, make an individual request that the membership of the court include enlisted persons, if an enlisted accused (4b, 61h), and, if a military judge has been detailed, make an individual request for trial by the military judge alone. In a joint or common trial, evidence which is admissible against only one or some of the joint or several accused may be considered only against the accused concerned. For example, see 140b. When the evidence is equally applicable to several or all accused, however, needless repetition may be avoided by the use of appropriate language and consolidation of evidence pertinent to all accused.

[238] See notes 222-25 and accompanying text, *supra*.

[239] See note 26 and accompanying text, *supra*.

the advent of the multiple fact finder procedure. It provides a viable alternative to the use of Rule 14 and paragraph 69*d*. On the one hand, it accords the accused an independent fact finder shielded from inadmissible evidence. On the other hand, the Government is accorded a single trial conserving judicial resources as well as juror and witness time. The multiple fact finder trial curbs tactical chicanery by both the Government and the defense counsel. While offenses involving very large numbers of accused may not be manageable in a single trial with multiple fact finders, the procedure is certainly feasible in trials of two or three accused who can be grouped according to the extent of their participation or upon similarity of evidence. Although the multiple fact finder approach would not completely prevent the manipulation of jury sentiments, it is superior to the present system; at least the problem of the manipulation of sentiments will not be compounded by evidentiary confusion. Further, the ordinary severance rules would still be available to prevent injustice.

Where a multiple fact finder trial would be physicallv unmanageable, the trial court must resort to the rules of prejudicial joinder.

The preceding analysis not only discloses the rules' weaknesses but more importantly, suggests possible directions for reform.

First, the courts must insist that the accused present more than a general assertion of possible prejudice: the judge should force the defense counsel to specify the source and type of prejudice. Second, the Government should not be permitted ti answer motions to sever with generalizations. The judge can and should demand that the prosecutor furnish an estimate of the additional costs to the Government of proceeding with separate trials. In short, the judge should insist upon a greater degree of specificity and a higher quantum of supporting evidence from both parties. Such insistence would better enable the appellate courts to develop a formulation of the balancing test that will guide trial courts in exercising their discretion. Further, where an appellate court rules that a limiting instruction cured prejudice, the text of the instruction should be stated in the opinion so that future courts will have a model.

It is clear that unless the discretionary practice is reformed or a viable alternative such as the multiple fact finder procedure is adopted, accused who are tried jointly or in common will not be accorded a fair trial, nor will society be justly served. The present system permits prosecutorial authorities to either deny an accused a fair trial by improperly taking advantage of joinder or to waste

judicial assets on mere whim. Accused and their counsel can frustrate legitimate joinder through chicanery in selecting a mode of trial or by frivolous motions to sever, wasting even more judicial resources at trial and on appeal. Thus far such defense machinations have been met by the "cop out"—prosecutors proceeding with separate trials or judges granting severances to avoid complicated litigation. A multiple fact finder trial provides a viable alternative to the abuse of the vague standards under the current rules. Though novel, it should stop the unraveling of the quilt.

RETURNING VETERANS' RIGHTS TO FRINGE BENEFITS AFTER FOSTER v. DRAVO CORPORATION*

David Bennet Ross**

I. INTRODUCTION

Section 9 of the Universal Military Training and Service Act,[1] requires that a former employee who has satisfactorily completed military service must be reemployed, upon timely application, in his former position or "a position of like seniority, status, and pay."[2] He does not merely have the right to his old job, as stated in section 9(c)(I) of the Act, but must be "restored" to employment in a fuller sense "without loss of seniority" and with a right to participate in "insurance and other benefits offered by the employer" to the same extent as employees on furlough or leave of absence.

In *Fishgold v. Sullivan Drydock & Repair Corp.*,[3] the Supreme Court interpreted the language now contained in section 9(c)(1) by stating that the veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[4] The rule in *Fishgold,* later known as "the escalator principle," was ratified by Congress when it

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

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1 50 U.S.C. App. § 459 (1952).

2 50 U.S.C. App. 4 459(b)(B)(i) (1952). If the serviceman is not qualified to perform his former duties because of a disability sustained during his military service, then he must be restored to "the nearest approximation" of his former position. 50 U.S.C. App. § 459(b)(B)(ii) (1952).

3 328 US. 275 (1946).

4 *Id.* at 284-85.

reenacted the prior statute and included the following new provision as section 9(c)(2):

> It is declared to be the sense of the Congress that any person who is restored to a position . . . should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.[5]

Since *Fishgold*, federal courts have run into difficulty in attempting to apply the escalator principle in determining employment rights under section 9(c) whenever conditions of employment are involved that are not dependent on seniority alone. It has often been observed that the term "seniority" is not defined in the Act;' rather, "seniority" derives its meaning in each individual case from the job perquisites and the effects on employment that flow from them. However, the perquisites and effects of seniority, found either in the practices of an employer or in collective bargaining agreements, are often commingled with the effects of other employee attributes. In cases involving promotion opportunities, for example, the employee's individual merit is usually a factor equal to or more important than seniority; and in cases involving rights to fringe benefits, a specified amount of work performed for the employer in a given year is frequently an eligibility requirement in addition to "seniority."

Concerning promotion opportunities, the Supreme Court has generally held that a serviceman is entitled to a promotion "if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur."[7] Promotions based on judgments of individual merit, rather than mere longevity, are not reasonably certain "as a matter of foresight," and cannot be claimed by a serviceman upon his return.[8] A

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[5] 50 U.S.C. App. § 459(c)(1) is a reenactment of the provisions formerly contained in The Selective Training and Service Act of 1940, 50 U.S.C. App. § 308(c).

[6] *E.g.*, Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1949); Accardi v. Pennsylvania R.R., 382 U.S. 225, 229 (1966).

[7] Tilton v. Missouri Pac. R.R., 376 U.S. 169, 181 (1964). See *generally Veterans' Re-employment Rights Under The Universal Military Training And Service Act—Seniority Provisions*, 1 GA. L.J. 293, 301-309 (1967); Haggard, *Veterans' Re-employment Rights and The Escalator Principle*, 51 B.U.L. REV. 539 (1971).

[8] McKinney v. Missouri–Kansas–Texas R.R., 357 U.S. 265 (1958). *See* Tilton v. Missouri Pac. R.R., 376 U.S. 169, 179-80 (1964).

promotion that is automatic after a minimum period of employment training can be claimed, but only after successful completion of the training period. Having completed the training period upon his return, a serviceman can then insist on a retrospective seniority date reflecting the delay caused by the military.[9]

Fringe benefit rights raise more difficult problems. They accrue only in part as a result of mere longevity, and in part, in proportion to and as a direct reward for the amount of work performed. To this extent, fringe benefits share the characteristics of wages rather than perquisites of seniority.

Insofar as eligibility requirements for benefits relating primarily to seniority or to work performed can be segregated, the escalator principle can be applied to the requirements relating to seniority alone. Yet, a set of problems still remains in cases in which the employer's practices or the collective bargaining agreement makes fringe benefits dependent on a minimum amount of work performed, regardless of seniority. In such cases, completion of some, but not all, of the minimum requirements due to the intervention of military service results in loss of all rights to that benefit, even to a proportional amount. Unlike cases of promotion opportunities, the work requirement for a fringe benefit cannot be completed retroactively; the opportunity to earn a benefit, once missed in any year, is totally lost.

Until the Supreme Court rulings in *Accardi* v. *Pennsylvania Railroad Co.*[10] and *Eagar v. Magna Copper Co.*,[11] federal courts had consistently denied the claims of veterans for vacation or holiday benefits for the year of their departure or return from military service whenever the requirements for vacation eligibility were not fulfilled. *Accardi* and *Magma Copper* did much to change this result but ultimately failed to establish principles of decision for a uniform approach in fringe benefit cases. Now, by a brief opinion in *Foster v. Dravo Corporation*,[12] the Supreme Court has turned the rights of veterans around again without saying much about the problems of interpreting collective bargaining agreements under the Act which had produced a split in circuit court opinion. While the result dictated by *Foster v. Dravo* may be clear enough, at least in

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[9] Tilton v. Missouri Pac. R.R., 376 U.S. 169, 179-80 (1964).
[10] 383 U.S. 225 (1966).
[11] 389 U.S. 323 (1967) (per curiam).
[12] 420 US. 92 (1975).

the context of vacation benefits which the case involved, the Court's opinion may not be easily applied in cases involving more complex fringe benefit structures.

This article examines the evolving principles underlying the decisions pertaining to vacation and holiday benefits; the impact of *Foster v. Dravo* on their development; and finally, attempts to apply the principles in light of *Foster* to related problems involving "qualified benefits" administered through trust funds, such as pension, profit-sharing, and supplemental unemployment benefit funds. Claims by servicemen for lost payments of funded benefits, administered through trusts qualified under the tax code, have not yet been extensively litigated, although they present the most serious individual inequities and potential employer liability.

II. CONVENTIONAL ANALYSIS OF VACATION PAY

Section 9(c)(1) contains two apparently separate mandates. The first requires that returning servicemen be restored to their former jobs or like position "without loss of seniority" and the second entitles returning servicemen to participate "in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence." For almost twenty years, the conventional analysis of federal courts under this section of the Act has been to determine whether the benefits involved should be characterized as "perquisite[s] of seniority," and thus due to servicemen unconditionally under the first mandate, or characterized instead as "insurance or other benefits," and, therefore, under the second mandate, due to servicemen in accordance with the employer's treatment of other employees on furlough or leaves of absence.[13]

Following this analysis, annual paid vacation benefits have been classified under the category of "insurance and other benefits," rather than as a "perquisite of seniority," whenever the eligibility requirements for the vacation benefits included more than mere

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[13] *See, e.g.*, Alvado v. General Motors Corp., 229 F.2d 408 (2d Cir.), *cert. denied*, 351 U.S. 983 (1956); Siaskiewicz v. General Electric Co., 166 F.2d 463 (2d Cir. 1948); Tuttle v. U.S. Plywood Corp., 293 F. Supp. 401 (D. Ore. 1968). See *also* Kasmeier v. Chicago, Rock Island and Pac. R.R., 437 F.2d 151, 156 (10th Cir. 1971).

longevity of service but also a minimum amount of work performed in a preceding year. As a result, vacation benefits would not be due to returning servicemen unless employees on leave or furlough for a like period would also be entitled to the vacation benefit under the same circumstances.

In *Siaskiewicz v. General Electric Co.*,[14] five veterans returned to their jobs during the latter half of 1945 and 1946 and claimed a full year's vacation pay for the calendar year in which they returned. The collective bargaining agreement provided that employees "re-engaged" after being off the payroll must work a period of six months before they are eligible for vacation pay. Since the veterans returned later in the year than July, they were unable to work the prescribed six months and were denied vacation pay by their employer.

The Second Circuit Court of Appeals rejected the veterans' claim for vacation pay, reasoning that paid vacations were "not merely a perquisite of seniority." While the amount of the vacation pay, concededly, was conditioned upon seniority, the eligibility for vacation pay in any year depended upon a minimum of six months' work actually performed in that year. Therefore, the right to the vacation in the court's view did not depend on seniority alone and "must fall under the heading of 'other benefits,'" which neither employees on leave nor returning veterans would be entitled to under the applicable collective bargaining agreement. The argument that the veterans would never have lost their vacation eligibility in the first place but for their military service and would not have had to requalify by six months' work did not persuade the court to the contrary.

In two decisions contemporaneous with *Siaskiewicz*, the Third Circuit tentatively sought a more pragmatic approach.[15] Nevertheless, other courts eventually followed the reasoning in *Siaskiewicz*, until the Supreme Court opinions in *Accardi v. Pennsylvania Railroad Co.*,[16] and *Eagar v. Magma Copper Co.*[17] interpreted 9(c) in a new light.

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[14] 166 F.2d 463 (2d Cir. 1948).

[15] Mentzel v. Diamond, 167 F.2d 299 (3d Cir. 1948); McLaughlin v. **Union** Switch & Signal Co., 166 F.2d **46** (3d Cir. 1948). *But* see Dougherty v. General Motors, 176 F.2d 561 (3rd Cir. 1949).

[16] 383 US. 225 (1966).

[17] 389 US. 323 (1967) (per curiam).

Had the approach of the Third Circuit in *McLaughlin v. Union Switch & Signal Co.*[18] prevailed, the later problems in *Accardi* or *Magma Copper* might have been totally avoided. McLaughlin was a member of an electricians' union and had worked for the Union Switch and Signal Company more than five years prior to his induction on October 3, 1942. He failed to receive vacation pay for 1942 because he was not on active employment status as of December 31, as required by the collective bargaining agreement with the union, having been inducted into the Army. The Third Circuit had no difficulty disposing of this technicality, stating that December 31 was not a "magic day" that could defeat a vacation which McLaughlin had otherwise earned by the terms of the agreement.

In granting vacation pay for the year of induction, the court recognized that vacation rights under the agreement "were gauged by work actually performed" for the company. On this basis, the court denied McLaughlin's further claim for vacation pay with respect to years of military service in which he performed no work at all for the company. Yet assuming, as did the Third Circuit, that vacation rights were dependent on work actually performed and not merely on seniority, the reasoning in *Siaskiewicz*, if applied to the *McLaughlin* case, must have led to the conclusion that McLaughlin was not even entitled to vacation pay for the year of induction. Vacation pay would have been categorized by the Second Circuit as "insurance or other benefit" which would not have been paid to employees on leave or furlough as of December 31.

III. ACCARDI AND MAGMA COPPER

The analysis of seniority rights in cases concerning fringe benefits developed in a new direction after *Accardi v. Pennsylvania Railroad Co.*[19] The issue that arose in *Accardi* involved the payment of varying amounts of severance pay to tugboat firemen whose jobs were abolished when diesel engines were installed on tugs. The amount of severance pay due the firemen under their collective bargaining agreement increased proportionately to their number of years of "compensated service," which was defined as any year in which an employee worked for at least one day in no less than seven different

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[18] 166 F.2d 46 (3d Cir. 1948).

[19] 383 U.S. 225 (1966). *See generally Reemployment Rights for Veterans, The Supreme Court 1965 Term*, 80 HARV. L. REV. 142 (1966).

months. Six veterans, employed as tugboat firemen, brought suit for additional severance allowances when the company refused to consider their period of military service as years of "compensated service" under the railroad's severance plan,

The Second Circuit Court of Appeals, following its earlier approach in *Siaskiewicz*, found that the severance allowances were "other benefits" rather than "perquisites of seniority," because they were dependent on work performed, and, therefore, that the additional severance allowances were not due veterans since they would not be given to employees on furlough or leave of absence under the same circumstances. In reversing the circuit court's decision, the Supreme Court found it "unnecessary to discuss in detail" the theory of the Third Circuit because it concluded that the severance allowances were, indeed, mere "perquisites of seniority" and not actually dependent on an amount of work performed in any given year:

> As the Government points out, it is possible under the agreement for an employee to receive credit for a whole year of "compensated service" by working a mere seven days. There would be no distinction whatever between the man who worked one day a month for seven months and the man who worked 365 days in a year. The use of the label "compensated service" cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority.... We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of layoff and recall.[20]

The Supreme Court also stated concerning the insurance and other benefits clause of 9(c)(1) that "without attempting in this case to determine the exact scope of this provision... it is enough to say that we consider that it was intended to add certain protections to the veteran and not to take away those which are granted to him by [9(b)(B)] and the other clauses of [9(c)]."[21]

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[20] 383 U.S. at 230.
[21] *Id.* at 232.

The accepted analysis prior to *Accardi* was premised on a false dichotomy between "perquisites of seniority" and "other benefits," which denied the possibility that a fringe benefit could be, in some respects, both one and the other. On finding that a benefit accrued in proportion to work performed, and not solely to longevity, the reasoning in *Siaskiewicz* removed that benefit entirely from the protections of the seniority provision of the statute. To the extent that this interpretation of section 9(c) results in such denial of statutory protection for any class of benefits, the interpretation would seem to have been disapproved in *Accardi*.[22]

Not long after *Accardi*, the Supreme Court, in a five to three decision, reversed the Ninth Circuit Court of Appeals in a one sentence opinion and upheld the right of the plaintiffs to vacation pay: *Eagar v. Magma Copper*.[23] The collective bargaining agreement in *Magma Copper* required that employees must have worked at least seventy-five percent of their available shifts within the last year and been continuously employed by the company for at least one year immediately preceding their application for vacation pay. To obtain holiday pay, the agreement required an employee to have been on the company's payroll continuously for three months prior to the holiday in question. A year for the purpose of vacation and holiday eligibility was measured from the anniversary of the date of hire.

Eagar had actually worked more than seventy-five percent of the available shifts since his employment with Magma Copper on March 12, 1958, but was called into the service on March 6, 1959, seven days before he could complete one year of continuous employment and more than three months prior to the Memorial Day and Independence Day holidays. The requirement of continuous employment that Eagar failed to meet was arguably related only to seniority, since the eligibility requirement based on the number of shifts worked was stated in the collective bargaining agreement as

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[22] *See* Locaynia v. American Airlines, Inc., 457 F.2d 1253, 1255 (9th Cir. 1972); Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983, 987 (5th Cir. 1970); Morton v. Gulf Mobile & Ohio R.R., 405 F.2d 415, 419-20 (8th Cir. 1969); *cf.* Edwards v. Clinchfield R.R., 278 F. Supp. 751 (E.D. Tenn. 1967), *aff'd*, 408 F.2d 5 (6th Cir. 1969). *But cf.* Kasmeier v. Chicago, Rock Island and Pac. R.R., 437 F.2d 151, 156 (10th Cir. 1971).

[23] 389 U.S. 323 (1967) (per curiam).

an additional and separate requirement from that of continuous service. Considering work performed, Eagar had fully earned his vacation pay.

Nevertheless, the Court of Appeals for the Ninth Circuit followed the analysis in *Siaskiewicz* and classified vacation pay as "insurance or other benefits," which could only be claimed by veterans if it could be similarly claimed by employees on leave or furlough.[24] In denying Eagar's claim, the court thus reached the opposite result from the opinion in *McLaughlin*, in which the requirement of being on the payroll on December 31 was properly recognized as a mere technicality, unrelated to work performed. On petition for rehearing in light of *Accardi*, the court of appeals upheld its first decision.[25] Judge Madden, dissenting, stated that "the distinction.. . which this court makes in the instant case, between 'seniority, status and pay' on the one hand, and 'fringe benefits' on the other does not seem very vital to the Supreme Court."[26] The Supreme Court subsequently reversed per curiam.

The critical factual distinction between *Accardi* and *Magma Copper*, which the three dissenting Justices in *Magma* ***Copper*** hastened to point out, is that the former case involved a determination of the length or amount of a fringe benefit, while the latter involved solely the question of when was he eligible to receive it. Magma Copper Company did not contest the fact that once petitioners had earned their benefits, their time spent in military service would be credited towards determining the amount of those benefits.

The question of when fringe benefits are payable must depend, at least in part, on when they are "earned." Definitions of vacation and holiday eligibility may reasonably reward an amount of annual work performed and, in that sense, they cannot be only "perquisites of seniority" under the Act. As Judge Augustus Hand observed:

> **A** vacation with pay **is** in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered . . . so that the week's vaca-

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[24] 380 F.2d 318 (9th Cir. 1966).

[25] *Id.* at 321.

[26] *Id.* at 322.

> tion with pay was completely earned and only the time of receiving it was postponed.[27]

The contrary premise, that vacation or holiday benefits are solely "perquisites of seniority," leads logically to the absurd result that servicemen are entitled to receive full vacation or holiday benefits, not just for years in which they rendered partial service to the employer—years in which they left for the military or in which they returned—but even for the years spent in military for which no work for the company was performed at all.[28] Furthermore, if vacations should be paid for each pear of military service, then why not wages?

On the other hand, considering eligibility requirements for premiums in length or amount of vacation benefits, it is difficult not to conclude that all such premiums, no matter how worded in collective bargaining agreements, substantially accrue by virtue of longevity and are, therefore, exclusively "perquisites of seniority." While the benefit itself, in Judge Hand's view, is compensation for work performed, the amount of the benefit is a reward for loyalty and length of service.[29]

IV. VACATION PAY PARTIALLY EARNED

The decisions in *Accardi* and *Magma* **Copper** charge courts to look beyond mere "labels" and to determine the true nature of eligibility requirements for a given benefit. In these cases, however, the Supreme Court did not answer the question of what extent a returning serviceman is entitled to vacation for a year in which he

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[27] *In re* Wil-Low Cafeterias, Inc., 111 F.2d 429, 432 (2d Cir. 1940). See Note, *Treatment* of *Monetary Fringe Benefits and Post Termination* **Survival** of *the Right to Job Security*, 72 TALE L.J. 161, 163-64 (1962).

[28] ***See***, *e.g.*, Foster v. Dravo Corp., 420 U.S. 92 (1975); Kasmeier v. Chicago, Rock Island and Pac. R.R., 437 F.2d 151, 155 (10th Cir. 1971) (dictum); Connett v. Automatic Electric Co., 323 F. Supp. 1373, 1379 (N.D. Ill. 1971) (dictum). One court has also observed that servicemen on active duty are entitled to thirty days paid vacation each year, and therefore, granting a claim for vacation pay for periods in which no **work** is performed for an employer would be duplicating the vacation pay provided by the armed services. Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983, 989 n. 17 (5th Cir. 1970).

[29] *E.g.*, Morton v. Gulf, Mobile & Ohio R.R., 405 F.2d 415 (8th Cir. 1969); Edwards v. Clinchfield R.R., 278 F. Supp. 751 (E.D. Tenn. 1967), *aff'd*, 408 F.2d 5 (6th Cir. 1969).

partially fulfills a bona fide eligibility requirement reasonably related to an amount of annual work performed. Federal courts that considered this question after *Accardi* and *Magma Copper* interpreted the Supreme Court's guidance with varying results.

In *Kasmeier v. Chicago, Rock Island and Pacific Railroad Co.*,[30] the Tenth Circuit Court of Appeals denied the plaintiff's claim for vacation pay in the year in which he returned to work on the grounds that he had only fifty-three days of "compensated service" in that year, substantially fewer than the one hundred and ten days required by the collective bargaining agreement.

The Tenth Circuit distinguished both *Accardi* and *Magma Copper*, finding that the eligibility requirement in this case was neither a "mere label" nor a "facade to veil the true nature of the benefits; it [was] a legitimate uniformly applied condition precedent to vacation benefits."[31] To hold for the plaintiff, in the court's view, would discriminate in favor of servicemen as compared to employees on leave or furlough.

The plaintiff argued, to the contrary, that he was himself the object of discrimination because of his military service. Having been discharged on September 1, 1967, he could hardly have worked one hundred and ten days in 1967. Therefore, his military service prohibited him from satisfying the vacation eligibility requirement. This argument, however, proves too much. A serviceman can hardly expect to earn vacation pay with respect to time spent in the military, any more than he can expect to earn wages for the same period.[32] Any unfairness results, instead, from the fact that he cannot

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30 437 F.2d 151 (10th Cir. 1971).

31 *Id.* at 154. See *also* Foster v. Dravo Corp., 490 F.2d 55 (3d Cir. 1973); Li Pani v. Bohack Corp., 368 F. Supp. 282 (E.D.K.Y. 1973).

32 Compare, for example, the treatment Congress has given to federal employees. According to 5 U.S.C. §§ 6302 and 6303, a federal employee must earn each segment of his paid vacation (or accrue his annual leave) by being actually employed every workday during a full biweekly pay period. Under 5 U.S.C. §§ 5551 and 5552, a federal employee entering military service can either collect the vacation pay he has already earned or leave it to his credit until he returns. Congress has written no provision for him to earn any vacation pay, or to be treated as if he had earned any vacation pay, while he is actually absent from his job in military service. Since 50 U.S.C. § 459(b)(A)(i) covering federal employees is almost identical to 50 U.S.C. § 459(b)(B)(i), the treatment of governmental employees, as provided by Congress, should lead to a similar treatment of nongovernmental employees under the similar statutory scheme. See Brief in Support of Defendant's Motion for Summary Judgment, Connett v. Automatic Electric Co., 323 F. Supp. 1373 (N.D. Ill. 1971).

accrue vacation pay on a pro rata basis with respect to the work he is able to perform in the year he returns from service. In effect, while the Act gives him the unequivocal right to return to his former job, he is obliged to work for a time without vacation pay and, therefore, at a lower income,

The comparative treatment of servicemen and employees on leave or furlough had been previously considered in a similar case affirmed by the Fifth Circuit, *Dugger v. Missouri Pacific R.R.*[33] In *Dugger,* the plaintiff returned to work on September 1, 1965 and managed to complete eighty-five days of compensated service by the end of the calendar year. The district court denied the claim for vacation pay in 1965, since Dugger, like Kasmeier, had failed to work one hundred and ten days. "This interpretation," the court observed, "places veterans and non-veteran employees on a parity, as required by the Act."[34] While the collective bargaining agreement could have provided an exception for returning servicemen, it did not do so. The court stated that it could not create such an exception itself and noted: ". . . Congress did not intend to take the employees' position at the bargaining table."[35] The Fifth Circuit affirmed the district court's decision, and the Tenth Circuit in *Kasmeier* also found this reasoning of the district court in *Dugger* to be persuasive.[36]

Nevertheless, discrimination in favor of veterans over non-veterans has been enforced by the Supreme Court in both *Accnrdi* and *Magma Copper.* To the extent that any benefit is found to be a "perquisite of seniority," the pertinent eligibility requirements (such as being on the active payroll on December 31) are waived in the case of returning servicemen, but not for employees on leave or furlough. It may also be argued from legislative history and extensive judicial dicta that, no matter what management and unions provided, Congress did intend to take the veteran's position at the bargaining table.[37] The distinction made in any case between

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33 276 F. Supp. 496 (S.D. Tex. 1967), *affd,* 403 F.2d 719 (5th Cir.), *cert. denied,* 395 **U.S.** 907 (1969).

34 276 **F.** Supp. 496, 499.

35 *Id.* at 499.

36 437 F.2d 151, 155.

37 *See, e.g.,* Fishgold v. Sullivan Drydock & Repair Corp., 328 **U.S.** 275, 285 (1946) ("And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."); Palmarozzo v. Coca-Cola Bottling Co., 490 F.2d 586,

"perquisites of seniority" and "insurance or other benefits" may be seen, in effect, as a judicial conclusion on how far the Act requires courts to intercede in the veteran's behalf.

In reaching an entirely different result from that in *Dugger* and *Kasmeier*, other courts have intervened to invalidate virtually all eligibility requirements for fringe benefits in the case of returning veterans. For example, in *Locaynia* v. *American Airlines, Inc.*,[38] the Ninth Circuit granted plaintiffs full vacation pay although, under the terms of the collective bargaining agreement, full vacation pay had not even been substantially earned. The collective bargaining agreement in *Locaynia* permitted an employee to take sixty calendar days' leave without reducing his annual vacation pay but provided that full vacation pay would be reduced by one day for each thirty calendar days of leave in excess of sixty days. In effect, the agreement conferred vacation benefits on a prorated basis, in accordance with the amount of work performed.

The plaintiffs returned from military service in June and October of 1967. Based on their years of continuous employment, including two years' credit for the time spent in service, none of the plaintiffs would have been entitled to more than ten days' vacation pay if each had worked during all of 1967. The ten days' pay to which they were entitled by length of service was reduced by three days and seven days, respectively, in proportion to the amount of work actually performed for the employer in 1967 and conforming to the treatment of employees on furlough or leave of absence. The Ninth Circuit found that *Magma* **Copper** compelled payment of the full ten days' vacation pay for each plaintiff in *Locaynia.*

Having previously held in *Magma* that vacation pay was not a "perquisite of seniority" but considered in the category of "other benefits," the Ninth Circuit Court of Appeals interpreted the

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592 (2d Cir. 1973) ("The Act was premised on the recognition that the man in the military is not represented at the bargaining table. . . .").

38 457 F.2d 1253 (9th Cir. 1972), *cert.* denied, 409 U.S. 889 (1973). *Cf.* Ewert v. Wrought Washer Mfg. Co., 477 F.2d 128 (7th Cir. 1973). The Seventh Circuit in *Ewert* would not admit that there could be no conceivable contractual provisions under which vacation rights would fall into the class of "other benefits," but nevertheless upheld the plaintiffs entire claim for vacation pay despite an apparently valid work requirement and a provision that any employee entering military service could receive a proportionate amount of vacation pay based on the day of his leaving the company. 477 F.2d at 129, *aff'g* 335 F. Supp. 512 (E.D. Wis. 1971).

Supreme Court's reversal of its holding in *Magma* as requiring the converse proposition that vacation pay always be deemed a "perquisite of seniority." In effect, the opinion in *Locaynia* again adopted the premise that a benefit such as vacation pay must fall wholly within one category of the Act or the other.

The decisions of the Supreme Court in *Accnrdi* and *Magma Copper*, on the contrary, appeared to reject such a dichotomy. *Locaynia* swung to the opposite extreme from the former decision of the Ninth Circuit in *Magma*, and in so doing, arguably made the same error. As Judge Battin points out in his dissent in *Locaynia*, neither *Accmdi* nor *Magma Copper* precludes "the possibility that compensated service can be a valid requirement for an employee benefit, if it is not a mere label or subterfuge;" nor do those decisions require "that all attributes of vacation fall within 'seniority, status, and pay.' "[39] Indeed, if "perquisite of seniority" were given such an all-inclusive definition, Judge Battin argues, then the Supreme Court's scrutiny of eligibility requirements for "mere labels or subterfuge" would be unnecessary.[40]

Moreover, unlike the circumstances in *Kasmeier*, the circuit court in *Locaynia* did not confront a situation in which vacation pay partially earned had to be either granted in full under the collective bargaining agreement or totally forfeited. The applicable agreement in *Locaynia* expressly provided a method of proration. Thus, the court in *Locaynia* could have given effect to the agreement without depriving the veterans of any vacation pay earned and thus have maintained the equality of treatment between veterans and employees on leave or furlough. Only when the collective bargaining agreement does not expressly provide proration of vacation pay for employees on leave or furlough is a court faced with an all or nothing dilemma.[41]

V. FOSTER v. DRAVO CORPORATION

In *Foster v. Drnvo Corporation*[42] the plaintiff left for military service in hlarch 1967 and returned to work in October of the

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39 457 F.2d 1253, 1258-60.

40 *Id.* at 1260.

41 While review of *Foster* was pending in the Supreme Court, the Ninth Circuit in Austin v. Sears, Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974) departed from its earlier approach in *Locaynia*, which it made only a half-hearted attempt to distinguish.

42 420 U.S. 92 (1975), *aff'g* 490 F.2d 55 (3d Cir. 1973).

following year. He worked nine weeks in 1967 and thirteen weeks in 1968. but the collective bargaining agreement between the company and union required compensation in at least twenty-five weeks in any calendar year to qualify for vacation pay. The Third Circuit dismissed the claim for vacation pay in both years, deciding that the vacation pay, in view of the work requirement in the collective bargaining agreement, was more properly a "part of a worker's current or short term return for labor" than the result of accrued seniority. More significant, perhaps, was the circuit court's view that the Act, as interpreted by the Supreme Court, compelled it "to venture into that unclearly 'marked terrain of labor contract interpretation" which has been the peculiar province of private arbitrators, however destructive of a normal judicial preference for uniform and certain rules in the administration of statutory rights.[43] Exactly the opposite approach had been taken by the Ninth Circuit in *Locaynia*, which viewed vacation benefits, presumptively, as perquisites of seniority, and by the Second Circuit in *Palmorozzo v. Coca Cola*,[44] which rejected a case-by-case contractual analysis in a similar case involving severance pay.

Finally, the Supreme Court, in affirming the Third Circuit's decision in *Foster*, used the very approach which the circuit court avoided and criticized, that of categorizing benefits under the statute a priori, without the necessity for case-by-case analysis of contract provisions:

> Generally the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation. . . . [W]here the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.
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> . . . **[As]** the common conception of a vacation [is] reward for and respite from a lengthy period of labor . . . the statute should be applied **only** where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company.[45]

This language implicitly rejects the possibility that vacation pay may have the attributes of both a seniority benefit and compensation

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[43] 490 F.2d 55, 61 (3d Cir. 1973).

[44] 490 F.2d 586 (2d Cir. 1973), *cert. denied*, 417 U.S. 945 (1974), *aff'g* 81 L.R.R.M. 2650 (S.D.N.Y. 1972).

[45] 420 U.S. 92, 99-100 (1975).

for work performed. It adopts the easier approach by raising a presumption that vacations are solely "other benefits" under the Act if the work requirement is at all legitimate (except in the trivial case presented by *Magma Copper).* The Court's decision thus seemingly reverts to the dichotomous logic of *Siaskiewicz v. General Electric Co.*[46] that as long as the right to the vacation does not depend on seniority alone, it must fall into the "other benefits" category.

The plaintiff's argument that the Act must, at least, protect a veteran's partially earned vacation pay was also rejected by the Supreme Court. This could lead to harsh results if, for example, Foster had narrowly missed qualifying for vacation after working twenty-four weeks before compelled to enter military service. Foster argued in the alternative that he should be entitled to a pro rata share of vacation pay in proportion to the twenty-five week requirement he had completed, although it was not clear that the collective bargaining agreement provided for pro rata payment to employees who were unable to accumulate work in the minimum number of weeks.

No court prior to *Foster* had taken the inviting solution of granting pro rata vacation pay to returning veterans where the employer's practice or the collective bargaining agreement did not provide for it.[47] The Court in *Foster* could "find nothing in the statute, independent of the rights conferred in the collective bargaining agreement that would justify such a Solomonic solution." Nevertheless, if federal courts have power to grant one hundred percent of vacation pay, through a waiver of any eligibility requirements, as in *Accardi* or *Magma Copper,* they should have the power to grant less. By enforcing the serviceman's right to benefits under the collective bargaining agreement in proportion to the extent to which the benefit was earned, the Court could have achieved the effect for which the Act was presumably intended, that he who is "called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job."[48]

The decision in *Foster* raises further problems when applied to other benefits in which valid work requirements also play some

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46 166 F.2d 463 (2d Cir. 1948).

47 See Horan v. Todd Shipyards Corp., 20 L.R.R.M. 2465 (S.D.N.Y. 1947)

48 Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

part but which, prior to *Foster*, had been broadly characterized as perquisites of seniority by circuit courts.

VI. FUNDED BENEFITS

Pension, profit-sharing, and supplemental unemployment benefit (SUR) trusts present many of the same problems as vacation benefits under section 9 of the Act due to the fact that such trusts often contain eligibility requirements that defer the payment of benefits until some future date. If an eligibility requirement specifies so many years of "continuous service" before an individual's right to future payment vests, as typically found in pension plans, this requirement may readily be viewed as a perquisite of seniority status creating an incentive for long service. Such a "vesting" provision, which guarantees the right to future payments, depends on an employee's length of service, but the amount of work performed often determines the size of the future payments.

In *Litwicki v. PPG Industries*,[49] for example, "continuous service" under the company pension plan was credited at the rate of one-twelfth of a year for every 125 hours actually worked, not to exceed one full credit in any calendar year. An employee's right to pension payments vested after ten years of continuous service and the amount of his payment was computed by multiplying the years of continuous service against a stated dollar figure. The district court held that for the purpose of the vesting of rights "veterans should be entitled to be treated as if they were continuously employed during their period of military service," [50] but "[a]s to the computation of his pension,, . . and the amount of payments, the court finds these to be matters dependent upon work actually performed and compension earned" [51] for which the veteran earns no credits while in the militarv.

Employer contributions to special purpose trust funds have the character of deferred compensation to the employee. These contributions are usually made in direct proportion to the amount of

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[49] 84 L.R.R.M. 2538 (W.D. Pa. 1973), *denying petition for clarification*, 85 L.R.R.M. 2340 (1974).

[50] *Id.* at 2543.

[51] *Id.* at 2544.

work an employee actually performs, that is, on a cents per hour basis, exactly as wages. The formula for payments out of such trusts is also work-related. As noted in *Litwicki*, the amount of payments to an employee, when the contingency for which the fund was created eventually occurs, depends on the number of credits that employee has previously accrued; and credits usually accrue in direct proportion to the amount of work performed, on the same basis as the employer's contributions.

Nevertheless, when the contingency for which a trust was created occurs before a returning serviceman has had the opportunity to furnish the minimum number of credits required to receive a payment, can the serviceman still claim the payment, despite its work-related character and the fact that he has not fully earned it? **As** in cases involving vacation benefits, a serviceman may argue that anv minimum credit requirement, like the vesting period in *Litwicki*, is merely a perquisite of seniority which must be "restored," at least to the extent that the requirement could have been fulfilled but for the intervention of military service. In at least one case, *Palmarozzo v. Coca Cola*,[52] such an argument proved successful.

The plaintiff in *Palmarozzo* was covered by a collective bargaining agreement with a Teamster local that required the employer to contribute to an area retirement fund, for each of his employees, a sum of twenty cents per hour for each hour worked up to forty hours per week. The rules adopted by the trustees of the fund granted service credits to employees on the basis of hours worked, a calculation presumably based on the number of hours for which the employer contributed to the fund. A minimum $200 severance benefit was payable to an employee with five years of "credited service" and no benefits at all to an employee who had accrued less than five years.

The plaintiff had accumulated only four and one-half years of credited service during his five years' of employment because of a six-month absence in the militarv between 1962 and 1963. In fact. he needed only 2 16 additional hours in 1962 and 64 additional hours in 1963 to have acquired the one-half credit needed to qualify for the minimum severance pay.

In holding that the plaintiff was entitled to an additional one-half credit for the six months spent in the military, the Second Circuit,

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52 490 F.2d 586 (2d Cir. 1973) (2-1 decision), *cert.* denied, 417 U.S. 917 (1974), *aff'g* 81 L.R.R.M. 2650 (S.D.N.Y. 1972).

affirming the district court in *Palmarozzo* found that the $200 severance payment was the same type of "separation allowance" as that involved in *Accardi*.[53] A comparison of the character of the benefit in both cases, however, reveals important differences not mentioned in the opinions of either the district court or the court of appeals. In the first place, the definition of "compensated service" in *Accardi* was not directly related to work performed. As the Supreme Court in *Accardi* pointed out, an employee could receive credit for a whole year by working a mere seven days: ". . .There would be no distinction whatever between the man who worked one day a month for seven months and the man who worked 365 days in a year." [54] In contrast, both employer contributions to the retirement fund in *Palmarozzo* and the employee credits were solely proportional to "each hour actually worked."

Moreover, the severance benefit in *Accardi* was negotiated retrospectively following the introduction of automated equipment and the discharge of twenty employees, including the plaintiff. The circumstances giving rise to the benefit as well as the lack of a direct relationship between the amount of the benefit and the work performed supplied the rationale for the Supreme Court's determination that "the real nature of [the separation allowances] was compensation for loss of jobs." The severance benefits in *Palmarozzo*, on the contrary, were negotiated as part of the hourly economic compensation for work performed, and applied to the purchase of a future payment.

The only apparent seniority-related aspect of the benefit in *Palmarozzo* was the fact that the trust rules required five years of work to earn the minimum severance payment from the fund and an additional five years to earn each successive increment in severance payments. Nevertheless, unless the severance payment is a fixed sum, wholly invariant to years of service, the court of appeals suggests the real nature of the payments must be deemed "compensation for forfeited seniority rights." [55] This rule would apply, presumably, even in the case in which severance payments are based solely on cents per hour actually worked, without any increments or "vesting," so as to be virtually indistinguishable from wages.

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[53] 383 U.S. 225 (1966).
[54] *Id.* at 230.
[55] 490 F.2d 586. 590 n.3.

In reaching this conclusion the Second Circuit expressly eschewed a case-by-case analysis, which *Accardi* compelled, and based its decision on its a priori concepts of seniority, cautioning lower courts to avoid "confusion" that results from looking at the parties' collective bargaining agreements.[56] Like the opinion in *Locaynia,* the court in *Palmarozzo* also interpreted *Accardi* as requiring the view thar severance payments (other than lump sums) must be treated wholly as perquisites of seniority, ignoring even predominant, work-related attributes.

Whether or not *Palrnarozzo* is still good law after *Foster v. Dravo* depends on whether the Supreme Court's decision in *Foster* is based primarily on a presumption as to the nature of the benefit, or on the principle that whenever there is a bona fide work requirement, even loosely correlated with the benefit, that benefit is not guaranteed unless the requirement is completely fulfilled. There would certainly appear to be more than enough reasonable, work-related requirements in the Teamster's severance plan that, presumptions aside, the result in *Palmarozzo* can be questioned.[57]

Individual credits under supplemental unemployment benefit trusts, designed to augment state unemployment compensation benefits during periods of layoff, have similarly been held to accrue during military service even though such plans confer benefits in approximate proportions to work performed.[58] A widely copied SUB plan

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[56] *Id.* at 591-92. *Contra*, Foster v. Dravo Corp., 490 F.2d 55, 58, 61 (3d Cir. 1973).

[57] The district court in *Palmarozzo* imposed a unique remedy by ordering only enough additional hourly contributions to the fund to permit the plaintiff to qualify for the maximum benefit he could have earned, but for his military service, and not to require any further contributions with respect to extra hours the plaintiff might have worked. It could not be assumed that contributions for work not performed could be made with respect to individual servicemen, either during their service or retrospectively, under the terms of the applicable trust agreement. The trustees could refuse to accept contributions under such circumstances or refuse to make corresponding payments to the employees. Foreseeing this possibility, the court in *Palmarozzo* held, alternatively, that the employer be assessed the full payment that the employee should have received as damages for failing to restore his seniority status. 81 L.R.R.M. 2650, 2654.

[58] *E.g.*, Hoffman v. Bethlehem Steel Corporation, 477 F.2d 860 (3d Cir. 1973); Akers v. General Motors, 501 F.2d 1042 (7th Cir. 1974), *aff'g* 83 L.R.R.M. 2926 (S.D. Ind. 1973). The GM-UAW SUB plan now provides for accrual of SUB credits during military service.

in both the steel and automobile industries calls for one-half credit to be earned for each week an employee works any amount for the company. Under such a plan the Third Circuit Court of Appeals ordered Bethlehem Steel to pay a plaintiff **42.5** credits for the two years he spent in the military, notwithstanding the fact that he performed no work at all for the company during this time.[59]

While noting a distinction between "rights which accrue with the passage of time and those for which some further act is required,"[60] the Third Circuit nonetheless found that the SUB payments did not belong in the latter category, since no distinction was made in the plan between an employee who works forty hours during the week and one who works only one hour. By analogy to the situation in *Accardi*, the court decided that this "bizarre" result[61] was sufficient to warrant the conclusion that the payment was not work-related.

Foster made a similar argument, noting that one hour per week over twenty-five weeks would satisfy the vacation requirement as well as forty hours, and cited both *Hoffman v. Bethlehem Steel Corporation* and *Accardi;* but the Third Circuit and the Supreme **Court** found the reliance on the possibility of "bizarre" results to be misplaced.

Under the Third Circuit's earlier rationale in *Hoffman*, the employer's only apparent mistake had been his failure to specify precisely that SUB credits would be earned at rhe rate of .0125 per hour instead of .5 per week. While *Hoffman* was not overruled by the later circuit court opinion in *Foster*, it can certainly be called into question by the Supreme Court's subsequent opinion. The Third Circuit distinguished *Foster* from *Hoffman* on the grounds that SUB benefits are, by their nature, designed to protect loss of seniority. Yet, they are also paid for by contributions for each hour of work performed and do not accumulate automatically with longevity. In this case the a priori view of the benefit seems wholly at odds with the scheme of payment in the collective bargaining agreement which establishes a bona fide work requirement.

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[59] Hoffman **v.** Bethlehem Steel Corporation, 477 **F.2d** 860 (3d Cir. 1973).

[60] *Id.* **at** 863.

[61] Id. at 863-64. *Contra*, Foster v. Dravo *Corp.*, 420 U.S. 92 (1975).

VII. CONCLUSION

The patterns of collective bargaining and the institutionalization of various fringe benefit packages cannot easily conform to the vagaries of judicial interpretation in different circuits. The major qualified benefit plans, nationally negotiated and administered, must inevitably take as their common denominator the most liberal interpretation of veterans' rights, especially since substantial liability may exist in these cases, unlike cases of vacation and holiday pay. The drafters of collective bargaining agreements who must seek stable relationships and predictable costs will not unknowingly write their agreements to produce litigation in this area.

Nevertheless, problems in the area of pension, SUB, severance and insurance funds often arise unpredictably, years after the veteran returns to employment. The opinion in *Foster v. Dravo,* which categorically settles the controversy concerning vacation and holiday pay, may have created new uncertainties in these fringe benefit areas. The uncertainties for such benefits cannot be easily ignored unless the bona fide work requirements, that were essential in *Foster,* are also ignored and presumptions concerning the "nature" of the benefit adopted instead, without any reference to the method of payment specified by the parties' collective bargaining agreements. The Supreme Court in *Foster,* by relying on presumptions extrinsic to the contract language but at the same time reviving the efficacy of "work requirements" in determining the character of a benefit, pulls in two often inconsistent directions leaving the veteran's right to many benefits still in doubt.

'HELL AND THE DEVIL": ANDERSONVILLE AND THE TRIAL OF CAPTAIN HENRY WIRZ, C.S.A., 1865*

Lewis L. Laska**
and
James M. Smith"**

I. INTRODUCTION

By the late spring of 1865, the military triumph of the Union was all but complete. Peace had not been formally proclaimed; but deprived of leaders, without civil government, its economy sinking into a sea of worthless banknotes, and many-of its cities in ruins, the Confederacy was shattered.

The soldiers of the Union armies had marched in grand view at Washington on 23 and 24 May, their boots kicking up the dust of Pennsylvania Avenue into great sunlit clouds, and then most of them had gone home. But many, especially from the officer corps, remained in the capital to help with the work that was still to be done.

Even before the guns fell silent, President Lincoln had begun to plan for postwar restoration, and the policies he conceived were lenient toward the South. All that would be asked of the former rebellious states was that their citizens pledge not to take up arms against the national government, that their legislatures repudiate the Confederate debt and that they ratify the fourteenth amendment.

Then, with a single horrifying shot from Booth's revolver, the President was dead, and as the news traveled across the North, thousands became convinced that magnanimity toward the vanquished

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

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1 This metaphor succinctly states the view of Andersonville prison and its commandant held by many Northerners at the close of the war. Rutman, ***The Wm Crimes and*** *Trial of Henry Win*, **6** CIVIL W. HIST. 122 (1960) [hereinafter cited as Rutman].

rebels was wholly inappropriate. Before Lincoln's murder, those who wanted to extract retribution from the South were principally the radical members of Congress. Now these few were joined by thousands who demanded that the South be punished for causing a war that had drained both sides of so much blood and treasure. As the heat of summer settled upon Washington, the demands for revenge grew more raucous with each passing day.

Thus, the scene was set for one of the most controversial state trials in American history.

On the morning of 21 August 1865, nine officers of the United States Army, each in immaculate dress uniform and gleaming brass, and acting at the order of the President of the United States, filed into the chambers of the Court of Claims in the Capitol. They ranged in age from 25 to 61 and in rank from Lieutenant Colonel to Major General. All had commanded troops under fire. Several would later serve in governorships, Congress, or the diplomatic corps. But today they were assembling to hear charges of conspiracy and murder against eight former Confederates in connection with the horrors of Andersonville prison.[2]

Andersonville. Like Ypres and Guernica and Auschwitz, it is a name that has come to stand for human misery wrought by war.

Between February 1864 and May 1865, 13,000 soldiers of the Union army perished there in conditions of unspeakable squalor.[3] After the South was overrun in the spring of 1865 and the gates of the prison were turned open another 2,000 men, suffering from festering wounds or broken health, would die before they could reach home.

Many of those who survived internment told their stories about life and death in Andersonville. The chronicles of horror—journals, articles, memoirs, petitions for government assistance, and courtroom testimony—comprise a voluminous literature of infamy.[4] But

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[2] The official name of the prison was "Camp Sumter," but it was popularly known from the first by the name of the Georgia hamlet near which it was located.

[3] Every historian of Andersonville attempts to give figures on the number of dead, and not even those cited in the official records can be finally relied upon since they were compiled in part by The Judge Advocate General's Office in its criminal investigation. However, there are 12,912 graves at the Sational Cemetery at Andersonville of soldiers who died in the prison.

[4] Between 1862 and 1901, former Union soldiers published more than 180 books, pamphlets, and magazine articles about their experiences in Southern prisons. Even as old age turned their hair gray and caused their footsteps to falter, veterans con-

they are not unimpeachable; nor unambiguous, merely for being firsthand; nor do they tell us who, if anyone, was responsible for Andersonville, even if many, made bitter'by the losses of the war, thought they did.

II. PRISONERS, PRISONS AND ANDERSONVILLE

From the first days of the Civil War, both sides took a great number of prisoners, and as they began to accumulate both governments came under increasing pressure, principally from the press, to work out a system of prisoner exchange, following long-established military precedent. Finally, on 22 July 1862, a cartel, modeled on the one agreed upon by England and the United States in the Revolutionary War, was adopted: the cartel provided that at frequent intervals the North and the South would exchange prisoners. Despite many difficulties—mutual distrust, problems of bookkeeping, an intricate system of values whereby officers were worth a certain number of enlisted men—the cartel kept prisoner populations on both sides down to a manageable size.

In the summer of 1863, however, it began to collapse. There were several reasons. Initially the South balked at releasing under the same terms as other prisoners former slaves who had fled north and joined Negro regiments in the Union Army. The North responded by refusing to make any exchanges at all. Furthermore, each army had arrested a great number of civilians, and their governments bickered endlessly over whether those people were covered by the agreement on prisoners of war. The last straw, in the eyes of the Federals, was the restoration to duty, in plain violation of the terms of the cartel, of some 35,000 Confederate prisoners released on parole following the surrender of Vicksburg and Port Hudson in July 1863.

Lieutenant General U. S. Grant, general-in-chief of the North's forces, took a coldly realistic view of the cessation of the exchange. By mid-1863 there were more Confederate prisoners in the North

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tinued to record their experiences as captives: 27 such accounts were published between 1912 and 1921. For these statistics, the authors are indebted to W. HESSELTINE, CIVIL WAR PRISONS: A STUDY IN WAR PSYCHOLOGY 247-48 (1930) [hereinafter cited as HESSELTINE]. *See also* 1 A. NEVINS, J. ROBERTSON, JR., B. WILEY, CIVIL WAR BOOKS, A CRITICAL BIBLIOGRAPHY, 185-206 (1969). The trial of Henry Wirz was the subject of a Broadway play, *Andersonville*, by Saul Levitt, and the prison camp is the setting of McKinlay Kantor's novel of the same name, published in 1955.

than Union prisoners in the South, and the South was much more pressed for manpower than the North. Grant saw that the end of the cartel hurt the South and brought the day of Union victory nearer.[5] As he wrote to General Butler, the Union agent for exchange of prisoners, "It is hard on our men not to exchange them, but it is humane to those left in the ranks to fight our battles.. . . If we hold these caught, they count for no more than dead men." [6]

With the breakdown of the cartel, the population of the Confederate prisons around Richmond began to swell. Because every Southern soldier was desperately needed at the front, only a minimal force was detailed to guard the camps, and the citizens of the vicinity, fearing an outbreak, were clamoring for removal of the captives from their midst. Furthermore, a site away from the theatre of war would be less likely to tempt raids from the enemy.

In November 1863, Captain W. Sidney Winder was ordered by the Confederate Secretary of War, James A. Seddon, to find a prison site in Georgia at "a healthy locality, with plenty of pure, good water, a running stream, and if possible, shade trees and in the immediate neighborhood of grist and saw mills." [7] The place Winder eventually chose was at Anderson Station, about 60 miles south of Macon, amidst the low hills, marshes, and swamps of southwest Georgia.

Work on the new prison was commenced in January 1864 under the command of Captain Richard Winder (a cousin of Sidney). Using slave labor, tools, and teams impressed in the vicinity under

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[5] Catton, *Prison Camps of the Civil War,* AM. HERITAGE, August 1959, at 5-6 [hereinafter cited as Catton].

[6] Telegram from U. S. Grant to Benjamin Butler, 14 August 1864, *in* Richardson, *Andersonville,* 39 (n.s.) THE NEW ENGLANDER 769 (1880) [hereinafter cited as Richardson]. Part of Grant's message to Butler refusing to allow a further exchange of prisoners is carved on the monument erected to Wirz at Andersonville. For the Southern view of the reasons for the collapse of the cartel, see J. DAVIS, ANDERSONVILLE ASD OTHER WAR PRISONS, unpaginated (1890) [hereinafter cited as DAVIS].

[7] Order from the Confederate War Department *quoted in* Richardson, ***supra*** note ***6,*** at 745. According to Jefferson Davis, the site for the prison **was** selected after careful investigation for these reasons:

> It was in a high pinewoods region, in a productive farming country, had never been devastated by the enemy, was well watered and near to Americus. a central depot for collecting the tax in kind, and purchasing provisions for our armies. The climate was mild. and according to the best information, there was in the water and soil of the locality no recognizable source of disease.

DAVIS, ***supra*** note 6 (unpaginated).

the authority of the Confederate government, he directed that trenches be dug to enclose an area of 18 acres. (This was enlarged to 27 acres in July.) Every tree and scrub inside this boundary was cut down, and the tall straight pines that were felled were trimmed into 20-foot lengths. These were hewn into logs eight to twelve inches thick, and the hewn timbers, pointed on top, were set five feet deep into the earth, forming a wall about 15 feet high.

On the outside of the stockade there was a series of platforms and sentry boxes approximately 100 feet apart. From these the guards had an unobstructed view of the interior of the prison. At a distance of 60 paces outside the main stockade, a second wall, about 12 feet high was built. The intervening space was left unoccupied and served as an additional safeguard against escape. Surrounding the whole was a cordon of earthworks in which guns were placed, trained on the compound, and continuously manned.

On 25 February 1864, the first group of prisoners, 500 in number, were turned into the stockade even though it stood unfinished and food and equipment were in short supply. Before authorities could get the situation in hand and get the prison into proper order, they were swamped by an unceasing influx of prisoners, some 400 arriving every day.

By April 1 the stockade, designed for 10,000, held 7,160 prisoners. By the end of June over 25,000 men were huddled together under the summer sun and rain; and by August 33,000 men were confined at Andersonville.

Many prisoners arrived at Andersonville from other prisons already ill with chronic diarrhea, scurvy, and contagious diseases which rapidly spread throughout the camp. Woefully lacking in medicine, the prison hospital, which was located inside the stockade and thus provided another source of contagion, could do little to impede the epidemics and scores of prisoners died soon after they arrived.

Hundreds of prisoners had no shelter.* Others had only patchwork tents or brush huts which did not keep them dry. The Confederacy,

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[8] Apparently it was originally planned to construct barracks for the prisoners, but at least two accounts exist as to why this was not done. According to official records, Winder was forbidden by his orders to pay the inflated prices being charged for lumber by mill owners in the area. UNITED STATES WAR DEPARTMENT, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES 2, VOL. 6 at 965-66 and VOL. 8 at 732

unable to supply its own soldiers, had no clothing for the prisoners, and many had only tatters or nothing at all to wear. They also suffered grievously from dietary deficiencies: food was meagre and often served raw, for the cooking facilities of Andersonville prison could not cope with the mounting prison population. Until some of the captives managed to dig their own wells, the only source of water for the entire camp was a creek which ran through the center; but in a short time the creek bed and fully an acre of land bordering it became a putrid mass of corruption, polluted by wastes from the prison cookhouse, the hospital, and by human excrement, no plan having been devised at the outset for sewage disposal.

The miserable condition of many prisoners when they arrived at Andersonville, the introduction of disease into the camp, the pollution of the water supply, the location of the hospital within the stockade, inadequate medical care, lack of shelter, absence of sanitary regulations. short and defective rations, and overcrowding—all these contributed to the terrifying mortality rate, which in August reached 100 a day.[9]

There were other causes of death: at least 150 men were shot for allegedly trespassing over the "dead line," a short fence formed by driving stakes into the ground and nailing strips of board on top of them. Set about 20 feet inside the compound, it was erected to discourage prisoners from approaching the walls, the guards were under orders to shoot down anyone who crossed it.[10] Many prisoners were victims of a variety of mayhem at the hands of other

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(1880-1901) [hereinafter cited as O.R.]. According to testimony given at Wirz's trial, lumber was actually ordered by Colonel W. H. Persons, the officer who served briefly as the first commandant of the prison, but before any work was done, he was succeeded by General John H. Winder, who used the lumber for other purposes. 8 AMERICAN STATE TRIALS 657 (J. Lawson ed. 1918) [hereinafter cited as AM. S. T.].

[9] *O.* FUTCH, HISTORY OF ANDERSONVILLE PRISON, 3-62 (1968) [hereinafter cited as FUTCH]. Two twentieth century physicians have concluded that the majority of deaths resulted from chronic and acute dysentery combined with malnutrition, scurvy, pyoderma, and hospital gangrene. Caswell and Schwartz, *Dr. Henry Wirz and Andersonville Prison: A Matter of Justice*, 34 COLL. PHYNS. PHIL.: TRANS. 77 (1966).

[10] With the increase in the prison population, the guard was also increased, until it numbered between 1,200 and 1,500 men. General Winder was always fearful of a mass escape attempt and in an effort to discourage it, he issued orders in June that each guard would be held strictly responsible for all escapes and difficulties arising from the failure rigidly to perform his duties. Thereafter, the killings along the dead line increased. 7 O. R. (Series 2), *supra* note 8, at 393,

desperate captives who coveted their rations, shelters, or few pitiful possessions, Six men were tried by their fellow captives for terrorism, killing, and stealing, found guilty, and hanged." Some prisoners in the apparent belief that they would not live to return North took their own lives rather than struggle to subsist in the squalor of the prison.

When the Union army captured Andersonville in late April 1865, it found that there had been buried in the mass graves near the prison some 13,000 dead, nearly 40 per cent of all those who had been confined there.

Ever since the defeat of the Union armies in the Battle of Bull Run, stories of the suffering and death of Union soldiers in the Confederate prisons circulated widely in the North. As the toll from the battlefield had risen over the years and the prospect for peace receded, Northern newspapers were filled with stories of barbarities committed by the rebels upon the Union prisoners who fell into their hands. Many readers, already filled with implacable hatred toward the South, were eager to believe the embellished tales of sadistic rebel guards, acting under orders from their commanders, inflicting inhuman tortures upon loyal men.

With Lincoln's murder, public support for a policy of mercy toward the South collapsed overnight, to be replaced by a demand for vengeance, not only against the perpetrators of this latest atrocity but against all the former leaders of the Confederacy,

It was widely assumed that the two were one and the same. Secretary of War Edwin Stanton spoke for many when, within hours of Lincoln's death, he declared the assassination to be the work of Jefferson Davis and other former high Confederate officials.[12]

403-04. According to Person's testimony, the "dead line" was erected after Captain Wirz took command of the prison, but whether it was built at his order or that of Winder was not established. 8 AM. ST. T., ***supra*** note 8, at ***697.***

[11] Among the prison population was a large number of undesirables, men of unsavory character who had enlisted in the Union Army solely for the large bounty offered and then had been captured before they could collect it and desert. See FUTCH, ***supra*** note 9, at **63-74.**

[12] In April 1865, President Johnson issued a proclamation stating that from evidence in the possession of the Bureau of Military Justice, it appeared that Jefferson Davis was implicated in the assassination of Abraham Lincoln, and the President offered a reward of $100,000 for the capture of the then fugitive former President of the Confederacy. The "evidence," principally the testimony of one Conover, was proved to be false when two persons whom he had suborned turned state's evidence, and Conover was jailed for perjury.

111. CAPTAIN HENRY WIRZ

The subsequent conviction of eight persons for aiding John Wilkes Booth to kill the President did not appease Stanton's wrath or satisfy the appetite of some of his fellow countrymen for revenge against the rebels; for despite great efforts, no link had been established between the "conspirators" and former Confederate leaders. Still determined that the South would pay dearly for its "crimes," Stanton immediately set out to prove that Jefferson Davis, his cabinet, and military officers had conspired to murder prisoners of war.[13]

To answer to this charge, the War Department seized the former commandant of what was indisputably the worst of the prison camps, on either side, Andersonville. He was Captain Henry Wirz, who was to become the only American ever tried and executed as a war criminal.

His name is all but forgotten today. But for a generation after the Civil War it was an infamous synonym for all the suffering endured by the men who had fought in the Union armies.

hlodern historians have been more sympathetic to Wirz than were his contemporaries. Indeed many of them see him as a victim of xenophobia, of conditions of war which were beyond his control and his ability to ameliorate, of a hostile press—and of a rush to legal judgment. The tangled issues in the Wirz case, to be dealt with presentlv, are the subject of this article. But amidst the confusion of his trial and the hatred and bitterness which precipitated it stands the friendless and finally pitiful figure of Wirz himself.

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[13] Rutman, *supra* note 1, at 121. The charge of conspiracy in the deaths of the prisoners of war had been officially made the previous year by the Joint Committee of the U.S. Congress on the Conduct of the War, which had published chilling pictures of horribly emaciated Union soldiers who had allegedly been held in the Confederate prisons at Richmond and Belle Isle, H.R. REP. So. 67, 38th Cong., 1st Sess. (1864). Late in 1861, after an investigation, the United States Sanitary Commission issued a report containing stories of atrocities supposedly committed against Cnion prisoners of war, and concluded that there existed "a predetermined plan. originating somewhere in the rebel counsels for destroying and disabling the soldiers of the enemy who had honorably surrendered in the field." UNITED STATES SANITARY COMMISSION, NARRATIVE OF THE PRIVATIONS AND SUFFERINGS OF UNITED STATES OFFICERS AND SOLDIERS WHILE PRISONERS OF WAR IN THE HANDS OF REBEL AUTHORITIES, BEING THE REPORT OF A COMMISSION OF INQUIRY APPOINTED BY THE UNITED STATES SANITARY COMMISSION, WITH AS APPENDIX, CONTAINING THE TESTIMONY (1864).

Some have said that Heinrich Hartniann Wirz's fate was settled by his foreign birth. However that may be, he was in fact a native of Switzerland having been born in Zurich on 25 'November 1823. As a youth he attended the public schools in his native city through the lower gymnasium (high school), whereupon he suffered something of a vocational crisis. His interest lay in medicine, while his father, a tailor, insisted that his son enter the mercantile field. The older man's views prevailed for a time: Henry completed a course of commercial studies and worked with his 'father from 1843 to 1846.

In 1845 Henry married, and his wife bore him two children. It seemed that he was bound to live the life of a middle-class paterfamilias, one of modest comfort undistinguished by conspicuous achievement or notoriety. Some time between 1846 and 1849, however, Wirz ran into trouble with the law. The exact nature of the offense is unknown, but it had to do with money. He served a brief sentence in debtor's prison, his marriage ended in divorce, and apparently the Swiss government banished him. In 1849 he sailed to America.

For a short time he worked as a weaver in Lawrence, Massachusetts (apparently to learn English), and then wandered south. Early in 1854 he served brief apprenticeships to two physicians in Kentucky and shortly thereafter settled in Cadiz, set himself up as a doctor, and married a widow, Elizabeth Wolfe. Evidently his slender learning in medical science failed to win him a clientele for he was soon on the move again.[14] This time he drifted to Milliken's Bend, Louisiana, and took work as a "doctor" for the slaves on a plantation. There, caught up in the fervor of the first days of the war, he enlisted in the Fourth Louisiana Regiment on 16 June 1861.

If Wirz's life had hitherto been one of frustration, the war brought him much recognition and, perhaps, a degree of fulfillment. In any

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14 For as long as he lived, Wirz called himself a physician. However, Joseph P. Renald. a student of his life, has refuted this claim, which has been accepted by many historians. Clearly Wirz could not have graduated from any European medical school, and Rcnald has found no cridcnce that hc ever obtained an orthodox M.D. degree. It is possible, Rcnald concludes, that Wirz received some sort of diploma for completing a "medical" course while he was living in S e w England, but it seems likely that the Confederacy would have assigned him to its badly overburdened medical service if he had possessed any sort of credentials at all. Renald's study of Wirz's career is *quoted in* FUTCH, *szrprn* note 9, at 16.

case, he was promoted rapidly, attaining the rank of sergeant within a year. Then, at the Battle of the Seven Pines (31 May-1 June 1862), he sustained a severe wound just above the wrist of his right arm from which he would suffer greatly to the day of his death. That same summer he was made captain[15] and assigned the post of acting adjutant general to General John H. Winder (father of Sidney Winder), who placed him in charge of one of the military prisons at Richmond in late August. Subsequently he served as commandant of the prison at Tuscaloosa, before being appointed, in December 1862, a special ambassador of President Davis on a diplomatic mission to Paris and Berlin. (While in Europe he also underwent surgery on his arm, to no avail.) He returned to the Confederacy in February 1864, and on 27 March, he was ordered to Andersonville where he was assigned to command the interior of the prison. In charge of supply, physical facilities, and prisoner discipline,[16] Wirz reported to General John H. Winder, who had been selected by President Davis to take charge of all Confederate prisons in Alabama and Georgia and to be commander of the post at Andersonville."

The literature of Andersonville abounds with descriptions of the person of Wirz, whose features, stiff correct bearing, and Germanic accent were cruelly caricatured by Northern editorial writers and cartoonists.

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[15] Wirz had requested to be promoted in hlay 1864, in order to command the officers associated with him at Andersonville, and the request was endorsed by General Winder with the statement that Wirz's superior in diligence and efficiency could not be found. 8 AM. ST. T., *supra* note 8, at 713. hlany historians credit Wirz with having held the rank of major but there is no evidence for this. He rhetorically referred to himself as "Captain Wirz" until the end of his life.

[16] Wirz's duty to provide for order in the prison was complicated by the fact that none of the Union officers taken prisoner by the Confederates were held at Andersonville. Furthermore, hopes for release, upon reestablishment of the cartel or the end of the war, were daily raised by the active rumor mill of the prison, and few saw any need to organize into units or otherwise to make any collective efforts to ameliorate their situation.

[17] FUTCH, *supra* 9, at 16-17. This division of command responsibility contributed to the gross mismanagement of Andersonville prison. It may be seen that while Wirz was responsible for the vital needs of the prisoners, it was Winder who, by virtue of rank, was in a better position to try to obtain material from the beleaguered Confederate government. Winder did not escape the wrath of the North—he was villified in the press and formally accused in the indictment against Wirz of having conspired to kill prisoners—but he did not live to experience its retribution, dying of natural causes in February 1865.

In fact, Wirz was of medium height, about five feet eight inches and slightly stoop-shouldered. His hair was dark and shading into gray, and he wore a close-cropped beard which accented his pale complexion and high forehead. His eyes were a piercing gray, and although he was indisputably harsh and coarse in his speech, his writing was polished and precise.[18]

Fourteen months after he assumed command of the prison, however, Wirz was worn and haggard from lack of proper rest and the continuing aggravation of his wound. When in May 1865, the South was overrun by Federal troops, he was taken into custody under the local authority of General J. H. Wilson.

IV. PRETRIAL EVENTS

A. WIRZ'S ARREST

The circumstances of Wirz's arrest gave rise to one of the first questions of law raised in his subsequent trial.

Early in May, Captain Henry E. Noyes of General Wilson's staff passed through Andersonville, where he found Wirz preparing to send the last of the prisoners north. Arriving at his destination in Macon, Noyes reported this to Wilson, who ordered him to return to Andersonville and arrest Wirz. On 7 May Noyes quietly took Wirz from the midst of his family to Macon, allegedly for the purpose of collecting certain information from him. According to Noyes, he informed Wirz that if General Wilson found that he, Wirz, had done nothing more than his duty and had acted in obedience to orders, he would probably be released.[19] Whatever the content of Noyes' statements to him, Wirz believed Noyes promised him that in exchange for his cooperation he would not be arrested or held prisoner. Furthermore, Wirz believed himself under the protection of the surrender terms agreed to between Generals Johnston and Sherman, with which he was in compliance and under which he was ready to swear in writing not to take up arms against the federal government.[20]

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[18] Rutman, *supra* note 1, at 118.

[19] For Noyes' account of Wirz's arrest, see 8 AM. ST. T., *supra* note 8, at 722.

[20] Sherman had demanded the surrender of Johnston's army on the same terms given to Lee at Appomattox. Signed on 26 April 1865, the Sherman-Johnston accords (General Order No. 52, Department of the South, 1865) provided that all arms of the Confederates would be turned over to the U.S. Army; that rolls of

In his interview with General Wilson, Wirz gave an account of his life in America and his career in the Confederate army. Denying any responsibility for the conditions at Andersonville prison, he asked General Wilson for safe conduct while he completed preparations to take his family to Europe.[21]

Instead of granting his request, General Wilson placed Wirz under arrest.[22] On 10 May, he reported the capture of the "notorious commandant of Andersonville prison" to the Adjutant General's office and requested that Wirz be brought to trial before a general court-martial. Even before his request had time to reach Washington, he received orders to arrest Wirz and other Andersonville personnel. Wirz was immediately transported under guard to Washington where he was confined in Old Capitol Prison.[23] There, as a result of the overwork of the past year and the inflamed wound in his arm, his health declined.

B. THE INVESTIGATION

Some doubted that Wirz would live to see his case closed.[24] His prosecutors in the Adjutant General's office and the Bureau of Military Justice were determined that he would hang when it was.

The head of both these agencies, which assembled the evidence against Wirz and conducted his trial, was Brigadier General Joseph Holt, Judge Advocate General of the Army, a South-hating Unionist, and an ally of Secretary Stanton. Being too busy to attend to the prison issue himself, he turned the conduct of the case against

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officers and men would be made in duplicate; that each officer and man would sign an obligation not to take up arms against the Government; that officers would retain their sidearms, private horses and baggage; and that all were to return to their homes. H. HANSEN, THE CIVIL WAR 646 (1962).

[21] See 8 AM. ST. T., *supra* note 8, at 684.

[22] 47 O.R. (Series 1), *supra* note 8, at 645-646 and 49 O.R. (Series 1) *supra* note 8, at 800.

[23] According to General Wilson, some incensed soldiers at Chattanooga threatened to kill Wirz and would have done so but for the protection afforded him by his escort. 8 AM. ST. T., *supra* note 8, at 719. A drawing published in Leslie's Illustrated Newspaper on Sovember 25, 1865 shous Wirz's prison room. Although the windows were barred and the heavy wooden door was bolted, the cell was commodious. It had a fireplace, and Wirz was allowed the companionship of a white cat and a few books.

[24] New York Times, September 23, 1865, *quoted in* Rutman, *supra* note 1, at 123.

Wirz over to one of the most energetic lawyers on his staff, Colonel Norton Parker Chipman. After enjoying a meteoric rise from a lieutenant's commission in the Second Iowa Infantry, Chipman had obtained a high place in the Stanton-Holt coterie. His bitterness toward the South certainly equalled that of his superiors; and being a man of consuming ambition, he was deeply aware of the preferment they might accord him upon the successful conclusion of the government's case against Henry Wirz. He set to work on the matter with a vengeance.[25]

While Wirz languished in prison over the summer, the hatred against the former Confederates that had smoldered in the Northern press flamed up around him and his erstwhile comrades. Gloating over the recent conviction of the so-called Lincoln conspirators, the *New York Times* demanded that the national government "take in hand the ruffians who tortured to death thousands of Union prisoners... as some expiation must be exacted for the most infernal crime of the century. In respect to Captain Werz [sic] for instance . . . it may be shown that he went into his business of wholesale murder on express instruction by superior authority. . . . The persons detailed for the charge of military prisons in the Confederacy whose natural disposition especially qualified them for a brutal and base business." Other newspapers referred to Wirz as "the inhuman wretch," "the infamous captain," "the Andersonville savage," and "the most bloodthirsty monster which this or any other age has produced." [26]

Meanwhile, The Judge Advocate General's Office sought the evidence to prove the conspiracy alleged by the *Times* and by Secretary Stanton and eagerly believed by many in the North, that the Confederate high command had deliberately plotted to murder prisoners of war. The investigation was not confined to Wirz. But because he was a foreigner, because he was associated with the worst of the prison camps, because he was already guilty in the minds of so many people, he inexorably became the logical victim.

The use of Judge Advocate General Holt and his staff for the investigation and prosecution of Henry Wirz was based on ample

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[25] For the official biography of Chipman, see 8 AM. ST. T., *supra* note *8,* at *669.* For an authoritative source on Holt's attitudes toward the South, see Rutman, *supra* note 1, at 122-123.

[26] Rutman, *supra* note 1, at 117.

precedent dating from the first days of the republic. The second Judge Advocate General of the Continental Army, Colonel John Laurance, had prosecuted in important military trials, including proceedings against Benedict Arnold in 1779.[27]

V. THE TRIAL: QUESTIONS AND CONFLICT

Four questions lay at the heart of the Wirz case: With what specific crimes was he to be charged? Under what statutes or conventions did the charges arise? Were they cognizable before a civilian court or a military tribunal? If the latter, what sort?

From the hour of his arrest, Wirz was held a military prisoner. The arresting officer had recommended that Wirz be court-martialed, while the *New York Tribune,* an almost solitary voice of moderation among the newspapers of the North, demanded that he be tried by the civil courts rather than by the military.[28]

However, Stanton and Holt, concurring with the findings of the Joint Committee on the Conduct of the War, the Sanitary Commission, and the editorial position of most of the Northern papers, believed that the deaths of 13,000 Union soldiers at Andersonville were the implementation of a deliberate policy of the Confederate government, conceived in its highest councils and executed by Henry Wirz. Since they were carried out in pursuance of military objectives,[29] the alleged conspiracy and murders were acts in violation of the common laws of war, rather than of civilian laws, and therefore triable before a military court.

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[27] Fratcher, *History* of *The Judge Advocate General's Corps, United States Amy,* 4 MIL. L. REV. 91 (1959). An early comprehensive description of the powers of The Judge Advocate General's Office appeared in the Army Regulations of 1841:

> **. . . To direct prosecutions in the name of the United States; to counsel courts-martial as to the form of proceedings and the nature and limits of their authority; to admonish the accused and guard him in the exercise and privilege of his legal rights; to collect, arrange, and evolve the testimony that may be required, and when circumstances render it necessary, to present the evidence in a succinct and collected form. . . .**

These powers were substantially codified in the act of Congress which created the Bureau of Alilitary Justice in the War Department in 1861. Act of 20 June 1864, ch. 145, § 5, 13 Stat. 145.

[28] New York Tribune, July 11, 1865, *quoted in* HESSELTINE, *supra* note 4, at 238.

[29] Ambrose Spencer, a witness at Wirz's trial, quoted Richard Winder as saying, "I'm building a pen here that will kill more damned Yankees than can be destroyed at the front." Other witnesses attributed this remark to Wirz; for

A. THE PROPER FORUM

As for General Wilson's proposal to try Wirz by court-martial, the jurisdiction of courts-martial was, during the Civil War period, limited by the Articles of War[30] almost exclusively to members of the military forces and to certain offenses specified in a written code. Wirz was, of course, not associated with those forces and thus his trial did not come within the provisions of the Articles.

During the previous wars fought by the American Army where the enemy was a sovereign nation, criminal acts had also been committed by persons not in the military service, such as civilians, foreign nationals, and spies, but those individuals had been subject to the army's authority under martial law or its powers exercised pursuant to territorial occupation. In response to the exigencies of these situations, the military commission had come into being.

The distinction between a court-martial, provided for in the Articles of War and designed to implement the rules for members of the armed forces, and a military commission, arising to meet the needs of an army engaged in the field against a foreign enemy,[31] was

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Wirz's explanation of its origin, *see* 8 AM. ST. T., *supra* note *8,* at **749.** The charges ultimately placed against Wirz for the deaths of prisoners at Andersonville accused him of pursuing, with others, a design "in aid of the existing armed rebellion against the United States of America" and "to the end that the armies of the United States might be weakened and impaired." 8 AM. ST. T., *supra* note **8,** at **671.**

[30] The Articles of War, modeled on the Mutiny and Desertion Acts of England, were first adopted by Congress in **1776.** They defined military crimes, prescribed punishments for them, and provided for the creation and operation of courts-martial. *See* De Hart, ***Observations on Military Law and the Constitution and Practice*** of ***Courts-Martial,*** 211 N. AM. REV. **334-356 (1866).** Wheless says that the authority of courts-martial is derived entirely from acts of Congress, particularly the Articles of War, passed in pursuance of the constitutional power "to make rules for the government and regulation of land and naval forces." U.S. Const. art. I, § 8. **"On** the other hand," Wheless opines, "military commissions are tribunals organized under the international law of war for the trial of offenses committed during war by persons not in the land or naval forces." Wheless, ***Military Law and Courts in the United States, 15*** **GEO.** L.J. **287-88 (1927). For** a discussion of the powers of courts-martial as established by decisions of federal **courts,** see Carbaugh, ***The Separateness*** of ***Military and Civil Jurisdiction—A Brief,*** J. **AM.** INST. CRIM. AND CIV. **L. 574-88 (1918).**

[31] According to Winthrop, all operations of military commissions—composition, jurisdiction **as** to time, place, persons, offenses, pleadings, procedure, sentence, and review—"are indeed more summary . . . than are the courts held under the Articles of War." **2** W. WINTHROP, MILITARY **LAW** AND PRECEDENTS 1313 (2d ed. **1896)**

just beginning to emerge at the time of the Civil War. In America's earlier wars, cases of the sort which would later be referred to a military commission were heard before a "special court-martial." Such were the cases of Joshua Hett Smith, tried by court-martial in **1780** under a resolution of Congress for combining with Benedict Arnold in his treasonable acts; of Louis Louaillier, brought to trial for spying and other offenses, before a general court-martial convened by General Andrew Jackson in New Orleans in March 1815; and of Arbuthnot and Armbrister, tried by court-martial in Florida in April 1818, for inciting and assisting the Creek Indians to make war against the United States.[32]

The first military commission though designated a "council of war," was constituted in **1847** during the occupation of Mexican territory by United States military forces. In orders issued from the headquarters of the Army at Tampico, General Winfield Scott announced that certain specified crimes, ranging from robbery and theft to military offenses such as spying committed by Mexican citizens or other civilians in Xlexico would be brought to trial before such councils.[33] Thus initiated, military commissions were repeatedly convened by commanders in the field, but the offenses tried by these councils were not always confined to those specified in Scott's original orders.

[hereinafter cited as WINTHROP]. At the time of the Wirz trial, Colonel William Winthrop was a judge advocate in the Office of The Judge Advocate General. His monumental work, *id.,* first published in Washington in 1886, provided the most precise statement to date of the powers of military commissions to try and to punish offenses under the laws of war. Citing Scott's and Halleck's general orders, Winthrop laid down the general rule that military commissions are constituted and composed and their proceedings conducted similarly to those of courts-martial.

Winthrop's book remained so valuable that the War Department issued reprints as late as 1942. Mott, Hartnert. and Merton called it "the standard text on military **law."** Mott, Hartnett, and Morton, *A Survey of Literature* of *Military Law—A Selective Bibliogruphy,* 6 MIL. L. REV. 335 **(1953).** Other authorities have called Winthrop "the Blackstone of American military law." F. WIENER, **PRACTICAL MANUAL OF MARTIAL RULE** 106 (1910). For a biographical sketch of Winthrop, see 27 MIL. L. REV. iii (1965).

32 WINTHROP, *supra* note 31, at **1297.**

33 General Order *So.* **20** of **1817.** In issuing orders for rhe establishment of rhe "council of war," Scott, in the absence of precedential codification. was obliged to describe the authority for it as an "unwritten code." *See* Colby, *War Crimes,* 23 MICH. L. REI.. 482, 486 (1925). See *also* S. BENÉT, A **TREATISE** os MILITARY **LAW AND THE PRACTICE OF COURTS-MARTIAL** 12 (1862) [hereinafter cited as BENÉT].

Several commissions were convened in the first years of the Civil War for the trial of both enemy belligerents and combatants and noncombatant civilians for offenses against the laws of war.[34] Following the lead of Major General Halleck, who first defined at length to his command the nature and jurisdiction of a military commission,[35] it soon became recognized as an authorized tribunal for trials during time of war and rebellion.[36] During the war years, the judgments of military commissions were acknowledged as valid by the Supreme Court,[37] by several state courts,[38] and by Judge Cooley in his treatise on constitutional law.[39] Furthermore, the proceedings and sentences of military commissions were also approved by the President and in rulings and opinions of law officers of the government.[40]

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34 *See* WIKTHROP, *supra* note 31, at 796, 778-79, 780, 784, 787, and 791-92. See *also* DIG. OPS. JAG (Army), 1067 and 1070-72 (1912) and DIG. OPS. JAG (Army), 132, 133-41 and 245-48 (1866).

35 General Order No. 1, Department of Missouri, 1862. Halleck was author of one of the two major American pre-Civil War treatises on international law, INTERNATIONAL LAW, OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (1861). The other was T. Woolsey's book, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW (1806).

36 WINTHROP, supra note 31, at 1299.

37 *Ex* parte Vallandigham, 68 U.S. (1 Wall.) 243 (1864).

38 *See, e.g., Ex* parte Bright, 1 Utah 145 (1874).

39 T. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 134 (1880).

40 According to Wiener, three groupings of military jurisdiction are derived from the separate opinion by Chief Justice Chase in the 1866 martial law case, *Ex* parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Wiener, ***Martial Law*** Today, 55 A.B.A.J. 723 (1963). The matter at issue in the Milligan case involved the denial of ordinary processes of justice by the wartime use of a military commission for the trial of civilians in Indiana.

Lambdin P. Milligan was a Peace Democrat who wanted the United States to concede the independence of the Confederacy and stop the war. He was arrested, along with several others, in the fall of 1864 by the authority of the President pursuant to the act of Congress which empowered him to suspend the writ of habeas corpus and to detain persons suspected of disloyalty until 30 days after the end of the next session of a federal grand jury. In Milligan's case, the grand jury had adjourned without indicting him. Nonetheless, Milligan was not released, but was arraigned before a military commission on charges of conspiracy against the United States, affording aid and comfort to the rebels against the authority of the United States, inciting to insurrection, disloyal practices, and violations of the laws of war.

At his trial, held in Indianapolis in October 1864, he was convicted and sentenced to hang. By the time the record of the trial reached the White House

By the time of the American Revolution, there had existed a body of laws and customs imposing limits on warfare and creating a duty to treat the population and resources of occupied territory fairly. However, there existed no codification of these matters until the publication of Instructions for the Government of the Armies of the United States in the Field, General Order No. 100, April 24, 1863, popularly called the "Lieber Code" after its author Dr. Francis Lieber. The Lieber Code arose because there was a need for a body of written rules defining the rights and duties of commanders as well as those of the inhabitants of war-torn countries. Drawn largely from military practice as Lieber knew it, it was the first codification of the laws of war ever issued to a national army for its guidance, and it remained for half a century the official army pronouncement on the subject.

The judicial and police powers of the United States Army were eventually classified under four titles: the law of belligerent occupation (military government, such as had been implemented by General Scott in Mexico. As a branch of military law constituted under international law, it employed the military commission); military justice (rules and procedures for members of the C'nited States armed services. Military justice is a matter of domestic law, flowing ultimately from the United States Constitution, and makes use of the court-martial as the tribunal of enforcement.); martial law (the exercise of military power by the executive branch within the territory of the nation when the duly constituted agencies of the

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the following spring, Lincoln—who had planned merely to hold the conspirators until the war was over—was dead. President Johnson first approved the sentence of death, then at almost the final moment commuted the punishment to life imprisonment at hard labor.

Milligan petitioned the federal court at Indianapolis for a petition of habeas corpus on 10 May 1865, the same week Wirz was arrested. The court divided on the question of whether or not to grant it, and the question was certified to the Supreme Court. On 3 April 1866, the Court unanimously decided for the petitioner. In a ringing opinion delivered by Justice David Davis, the Court declared illegal the use of "martial law" in regions where the courts were open and unobstructed, and denounced the application of military justice in 1864-65 as "mere lawless violence." The important consideration here is that the military commission which tried Wirz was jurisprudentially distinct from that which tried Milligan. The latter was a martial law, the former was, at least putatively, an international law tribunal. The use of the military commission to try violations of the law of war was recognized by the United States Supreme Court in *Ex parte* Quirin, 317 U.S. 1 (1942).

government cannot function due to natural disaster, civil disorder, or enemy activity. Martial law recognizes the duty of a government to insure its own existence by whatever means necessary. Such duty is a principle of international law, but the extremity of the situation allows for flexible use of the military commission or the court-martial.); finally, the international law of war, as first codified by Lieber (International law states that every government has the duty to punish those who violate it.).[41]

Another major state trial, which in effect declared the Confederacy to be a belligerent for purposes of punishing its former leaders, was conducted in the summer of 1865, and became the precedent upon which Wirz's accusers in the War Department would rely. A military commission was convened on the order of President Johnson[42] to try eight civilians charged with conspiracy in the murder of Abraham Lincoln. The alleged conspiracy to kill the President was, of course, an offense against the criminal laws of the United States. It was not prosecuted as such, however. Instead, it was treated as an attack by enemy agents, in violation of the international law of war, upon the commander-in-chief in pursuance of military objective. As Attorney General James Speed wrote the President:

> If the persons who are charged with the assassination committed the deed as public enemies, as I believe they did . . , they not only can but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to civilian courts as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[44]

U.S. Senator Reverdy Johnson, one of the attorneys for the defendants in the Lincoln conspiracy trial, disputed the right of a military commission to try the defendants on several grounds: the President had no lawful authority to create a military commission; he was not competent to declare martial law; martial law had

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41 Costello, Book Review, 65 MIL. L. REV. 151 (1974). These four titles are substantially preserved today, although improvements in the Articles of War and the implementation of the Uniform Code of Military Justice have brought about a procedural sophistication that was unknown in 1865.

42 Special Order No. 449 of 1865, *in* WAR DEPARTMENT, COMPILATION OF GENERAL ORDERS ASD BULLETINS OF THE WAR DEPARTMENT (1865).

43 L. MAYERS, THE AMERICAN LEGAL SYSTEM 609-610 (1964).

44 8 AM. ST. T., *supra* note 8, at 495.

expired with the cessation of hostilities, but in any case it did not warrant a military commission for the trial of military offenses; it was unconstitutional to arrest upon military order and try before military tribunals in time of war or peace civilians accused of crimes; and the civilian courts of the District of Columbia were open and sitting and competent to hear the case.

The military commission trying Wirz brushed aside the defense's arguments after the reply of John O. Bingham, the co-prosecutor from Judge Advocate General Holt's staff, Bingham argued that if the commission had the power to decide whether or not it would lawfully hear the case, then in making such a determination it affirmed the authority of the President to constitute it. Citing provisions of the Constitution and authorities and precedents in English and American law, he asserted that the President and Congress, acting in the people's behalf, had the right to employ martial law and to suspend civil jurisdiction as a means of defense in time of civil war. Furthermore, while it was true that martial law did cease with the end of the insurrection, the question of when such end was at hand was a political one, and only the political departments of government could decide it. To answer the defense's contention that a military commission was not warranted by martial law and, in any case, had no authority to try civilians, Bingham cited precedents; and since men not in the land or naval forces of the United States had been tried and even sentenced to death by courts-martial, which were authorized by Congress, it was competent for Congress to prescribe for the trial of civilians for crimes committed in aid of the public enemy, and Congress had done so in the Act of 3 March 1863.[45] Finally, to Senator Johnson's assertion that the charges against his clients were cognizable by state or federal courts then sitting, Bingham strenuously reminded the commission that the war was not over[46] and asserted that civilian courts in Washington remained open only by force of the bayonet.[47]

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[45] Act of hlarch 3, 1863, ch. 81, 12 Stat. 755.

[46] Peace did not come until a year after the guns fell silent, when on 2 April 1866, President Johnson proclaimed the final suppression of the rebellion in all the Southern states except Texas. (A similar proclamation to include Texas was issued the following August.) The Supreme Court stated in Grossmeyer v. United States, 79 U.S. (12 Wall.) 702 (1872), "The suppression of the rebellion describes a political condition . . . which can only be defined and determined by the political departments . . . and is binding and conclusive upon the judiciary."

If Stanton, Holt and Chipman were not overzealous in their efforts to hang Henry Wirz, it is possible that in this period of the coming of the idea of international law, they tried him upon a jurisdictional ground not yet recognized by the courts. It may be noted that to classify the so-called Lincoln conspirators, Wirz, and the rebels generally as belligerents for purposes of punishing them for violations of the international law of war was logically to accord the Confederacy recognition as a sovereign nation, something which was anathema to the Union. However, the international character of the war was eventually recognized by the courts in the case of *Coleman v. Tennessee*.[48]

B. THE CHARGES

The appetite of the North for revenge for the deaths and alleged atrocities against prisoners of war in Southern camps effectively dictated that Wirz be charged with murder, and Stanton's obsessive wish to link the Confederate high command in some sort of general conspiracy against the captives required Chipman to present a case on that point. Therefore, when Wirz's trial finally convened on 21 August the charges against him were two: First, that he had conspired with John H. Winder, Richard B. Winder, Joseph White,[49] W. S. Winder. R. R. Stevenson,[50] Jefferson Davis, Isaiah H. White,[51] J. A. Seddon, Robert E. Lee and Howell Cobb[52] to injure the health and destroy the lives of the prisoners of war at

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[47] 8 AM. ST. T., *supra* note 8, at 247-280 and 495-555. Bingham's assessment of the military situation was, to be generous, wildly exaggerated and undoubtedly colored by his desire to hang the "conspirators." The capital remained under martial law, but the ravaged armies of the Confederacy certainly posed no threat to it. *See also* 2 OP. ATT'Y GEN. 297 (1852) on the question of the military commission's jurisdiction in the "Lincoln conspiracy" case.

[48] 97 U.S. 509, 517 (1878).

[49] White's connection with Andersonville must have been peripheral indeed, since he cannot be identified.

[50] Stevenson was named "surgeon in charge" of the hospital at Andersonville early in September 1864. His energetic administration was marred by charges that he mishandled hospital funds. See FUTCH, *supra note* 9, at 101-12.

[51] The Chief Surgeon of the prison hospital through August 1864, he was here indicted for negligence in obtaining medical supplies. See FUTCH, *supra* note 9, at 97-101.

[52] Cobb was a Major General and commander of the Department of Georgia. For a biographical sketch, see Al. BOATNER, CIVIL WAR DICTIONARY 160 (1959) [hereinafter cited as BOATNER].

Andersonville, in the manner and on the occasion described in specifications. Second, that he was guilty of murder in the deaths of 13 prisoners, the circumstances and dates of whose demise were described in specifications. Their names were not included, however, because they were not known.[53]

Neither charge was related to a specific statute or holding of a court. Rather the offenses with which Wirz was charged were said in the indictment to have been committed in "violation of the laws and customs of war." Thus, the indictment itself made clear the allegedly international nature of the case.[54]

One of the general principles expressed by the specific provisions of the Lieber Code was the prohibition of violence not necessary to secure the ends of war. Lieber wrote that military necessity allowed only the direct destruction of life and limb of armed enemies and those whose death or injury was unavoidable in the course of battle. However, military necessity did not admit of cruelty, which Lieber defined as the inflicting of suffering for its own sake or for revenge, nor for maiming or wounding except in battle.

On the matter of prisoners of war, Lieber wrote that such persons were "subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace, by cruel imprisonment, want of food, by mutilation, death or any barbarity." [54a]

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[53] The form in which the charges were framed—a description of the offense accompanied by specifications—was similar to the one used in cases prosecuted before courts-martial. Winthrop saps that persons in the military service of the enemy who have violated the laws of war by killing defenseless prisoners may be tried by a military commission. WINTHROP, *supra* note 31, at 1307. For an analysis of Stanton's desire to link the leadership of the Confederacy to the deaths of prisoners see Rutman, *supra* note 1, at 123.

[54] *See* 8 AM. ST. T., *supra* note 8, at 671-681 for the charges and specifications. The specifications of the conspiracy charge described scores of overt acts against prisoners alleged to have been committed by Wirz or carried out under his orders. Winthrop states that the jurisdiction of a military commission should be restricted to commissions of or actual attempts to commit an act in violation of the laws of war. He also says that the use of the phrases "conspiracy in violation of the laws of war" and "murder in violation of the laws of war" connotes also "crimes against society." WINTHROP, *supra* note 31, at 1312, 1314.

[54a] General Order No. 100 of 24 April 1863, art. 56. Citing English authorities, Winthrop explains that "captivity is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character." He adds that where a prisoner of war is put to death, or where unlawful, unreasonably

Whether The Judge Advocate General's Office relied upon Lieber in drawing up the specifications of the charges against Wirz is unknown, but from their content it seems likely that it did. Wirz was charged with having conspired with his co-defendants to subject prisoners to torture and suffering by putting them in unhealthy and unwholesome quarters, exposing them to the weather, compelling them to use impure water, and furnishing them with insufficient food. Wirz was further accused of willful and malicious neglect "in furtherance of his evil design" in not furnishing wood to the prisoners, in allowing the dead to remain in the prison, in countenancing cruel punishment, in ordering the guards to kill prisoners, and in using "ferocious and blood thirsty beasts dangerous to human life, called bloodhounds," to hunt escaped prisoners and "to seize, tear, mangle, and maim the bodies and limbs of said fugitives, prisoners of war."

Ten thousand prisoners were specified as having died of the bad food and water, one thousand from the "fetid and noxious exhalations" from the unremoved dead, one hundred as a result of "cruel, unusual and infamous punishment upon slight, trivial, and fictitious pretenses by fastening large balls of iron to their feet and binding large numbers of prisoners aforesaid closely together with large chains around their necks and feet, so that they walked with the greatest difficulty." Moreover, 300 prisoners were allegedly kiiled at the dead line which "the said Wirz, still wickedly pursuing his evil purpose, did establish and cause to be designated."

In the specifications on the charge of murder, it was declared that Wirz himself shot four prisoners, and in four cases he ordered a guard to commit the murder. The deaths of two prisoners resulted from their confinement in the stocks, one died after being kicked and stomped by Wirz. One death was caused by Wirz's inciting bloodhounds to attack an escaped prisoner.

Each of the killings allegedly committed or ordered by Wirz was said to have taken place "on or about" a specific date, while Wirz was charged with conspiring with his co-defendants against the health and lives of the prisoners beginning on or before the first

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harsh, or cruel treatment of prisoners is practiced or permitted by the belligerent, the other side may, as far as legally permissible, retaliate, and any individual officer resorting to or taking part in such act or treatment is guilty of a grave violation of the laws of war for which, upon capture, he may be criminally liable. WINTHROP, *supra* note 31, at 1288.

day of March 1864, "and on divers other days between that date and the tenth of April, 1865."[55]

C. *CHARGES REDRAFTED*

When his trial opened at last, on the morning of 21 August, Captain Henry Wirz stood alone before the members of the military commission appointed by President Johnson.[56] For the first time he heard the two charges against him. They were read by no less an eminence than the Secretary of War, Stanton's voice choking with rage when he came to names of General Robert E. Lee and Jefferson Davis listed among the alleged conspirators.

The setting in the Capitol building at Washington[57] riveted the attention of the nation on the proceedings, and when the specifications of the crimes with which Wirz was charged appeared in the next days' newspapers, judge advocate Chipman reported, they sent "a thrill of horror" throughout the United States.[58] In the record

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558 AM, ST. T., *supra* note 8, at 671-680. Not all of the deaths occurred immediately. Two of the prisoners lived one day, two lived six days, one lived five days, and the prisoner who died from the effects of being placed in the stocks lived ten days. HESSELTINE, *supra* note 4, at 240-41.

Winthrop says that an offense to be tried before a military commission must have been committed within the period of the war or the exercise of military government or martial law. He adds that jurisdiction cannot be maintained after the date of the peace "or other form of absolute discontinuance, by the competent authority of the war status." WINTHROP, *supra* note 31, at 1306.

[56] According to Special Order No. 453 of 23 August 1865, the commission was assembled for "the trial of Henry Wirz and other such prisoners as might be brought before it . . . by order of the President of the United States." However, the order was written on the stationery of the War Department and signed only by Assistant Adjutant General E. D. Townsend. Winthrop says that military commissions are constituted in practice by the same commanders who are empowered by the Articles of War to order general courts-martial, that is, commanders of departments, armies, divisions, separate brigades, and the President of the United States. WINTHROP, *supra* note 31, at 1302.

[57] Winthrop opines that a military commission can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander, and that the place must be the theatre of war or where military government or martial lair may legally be exercised. He notes that English authorities have held that if the trial is held in a place where the civil courts are open and available, the proceedings and sentence are *coram non judice*. WINTHROP, *supra* note 31, at 1304, 1305.

[58] N. CHIPMAN, THE TRAGEDY OF ANDERSONVILLE 28 (2d ed. 1911) [hereinafter cited as CHIPMAN]. This is a highly partisan, often self-serving, and nor always reliable account of the **Wirz** trial by the judge advocate.

of the trial they comprise most of ten pages, and over and over again, Wirz heard the words "malicious," "evil," "cruel," and "wicked" applied to him. The relentless recital must have plunged him into profound gloom over his prospects.

Nevertheless, he entered a plea of "not guilty," delivered through his attorneys, James Hughes, General J. W. Denver, Charles F. Peck,[59] and Louis Schade.[60]

With no further action, the court adjourned until the following day, when it met, minus the defendant, behind closed doors. When the public was admitted, Chipman read an order signed by Secretary Stanton declaring that the first meeting of the court had been technically irregular. The court was then adjourned *sine die,* over the objections of Wirz's attorneys.[61]

The reason for this action was not revealed to the press—nor even made clear to Colonel Chipman, who thought it "extraordinary and precipitate" [62]—but in fact Stanton was outraged at the naming of Lee, Davis, and other former members of the Confederate leadership as co-conspirators with Wirz.

At the time, the former President of the Confederacy was confined in Fort Monroe and the question of whether or how he was to be prosecuted, as leader of the rebellion, was before President Johnson and the Cabinet. For reasons of their own, Stanton and the President wanted there to be no pretext, such as the charge against Wirz furnished, for bringing Davis to Washington.

Upon hearing Stanton's latest order on the morning of 22 August, the members of the commission dispersed in some bewilderment, Wirz was returned to his cell, and Chipman was summoned before Stanton. The judge advocate found the Secretary of War "unusually disturbed," and he was directed to prepare new charges and specifications, omitting the names of Davis, Seddon, and others of Davis' cabinet and then to proceed against Wirz.[63]

Chipman and Judge Advocate General Holt went to work immediately. The charges and specifications were retained as they stood, but the names of Davis, Lee, Cobb, Isaiah White, J. A.

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59 Chipman identifies these three as members of a prominent Washington law firm. CHIPMAN, *supra* note 58, at 36.

60 For official biographical sketches of Wirz's attorneys, see 8 AM. ST. T., *supra* note 8, at 670-71.

61 Rutman, *supra* note 1, at 124.

62 CHIPMAN, *supra* note 58, at 28.

63 *Id.* at 30.

Seddon, and others were dropped from the indictment. In their places were added the words "and others unknown."[64] Stanton approved this form of pleading—presumably because it allowed him to proceed with the prosecution of the Confederate hierarchy at a later date if it became expedient—and he ordered the trial of Henry Wirz to resume the following day, 23 August.

D. MEMBERS OF THE COURT

Except for Brigadier General E. S. Bragg who was relieved on account of illness and did not participate in the trial, the members of the newly-constituted commission were the same as had sat two days previous.

At the head of the table[65] was Major General Lew Wallace, 38, the president of the commission. He was a lawyer by profession and had worked as a journalist before becoming a Union officer in April 1861. A veteran of the battles of Fort Donelson and Shiloh, he had served on the commission which investigated General Don Carlos Buell's military activities. In March of 1864 he became commander of the VIII Corps but incurring the enmity of his superior, General Halleck, he was twice removed, only to be restored both times, first by Lincoln and then by Grant. He had also been a member of the commission which tried the so-called Lincoln conspirators. Later Wallace would become widely known for his best selling novel, *Ben-Hur: A Tale of Christ.* In the summer of 1865, however, he was working "with painstaking exactness" at a book about military tactics and skirmishing, and service on yet another military commission, especially during "the hot unwholesome malarial months by the Potomac" was "an onerous duty," one that he had hoped might pass from him.[66]

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[64] There were also added to the indictment the names of certain persons of lesser note who had been connected mith the prison, but these were ultimately deleted when the record of the trial was reviewed.

[65] A drawing of the courtroom showing the trial in progress appeared in the Harper's Weekly of October 21, 1865. Prosecutor Chipman is presenting his case to the commission, which is sitting in a semi-circle, while Captain Wirz listens, guarded by two sentries. There is also depicted a small audience, made up largely of women. One of Wirz's attorneys accused Chipman of playing to the galleries. Schade, *Mr. Schade's Letter to the Public,* 14 CONF. VET. 449 (1906) [hereinafter cited as Schade].

[66] 2 L. WALLACE, AN AUTOBIOGRAPHY 853, 857 (1906) [hereinafter cited as WALLACE]. See *also* BOATNER, *supra* note 52, at 887 and 8 AM. ST. T., *supra* note 8, at 33.

To Wallace's right sat Major General Gershon Mott, **43,** a banker and commercial man by profession and a veteran of the Mexican War. Wounded at Second Bull Run and at Chancellorsville, he was an honored veteran of several other major campaigns. Years later, he would become Governor of New Jersey.[67]

Major General Lorenzo Thomas, 60, sat opposite Mott. Thomas had fought in the Seminole War, was chief of staff to Butler in the Mexican War, and later served in the same post under General Winfield Scott. In the Civil War he had organized the Negro regiments of the Union Army.[68]

To the right of Mott, there sat Major General John White Geary, 46. **A** surveyor and railroad engineer, he had fought in the Mexican War before being appointed by President Polk in 1849 to set up a postal system in California. In 1856 he accepted the territorial governorship of Kansas after declining that of Utah, and entered the service of the Union Army in June 1861. Wounded at Harper's Ferry and captured at Leesburg he later commanded the 2d Division, XII Corps at Lookout Mountain, Missionary Ridge, and Wauhatcie (at which his son was killed). He also led the 2d Division, XX Corps on the March to the Sea. From 1867 to 1873 he would serve as Governor of Pennsylvania. Geary was described as "downright opinionated" and "headstrong" and as one whose "erratic course, often marred by fits of temper, won him a number of enemies." Still, it was said, "his whole person commanded respect . . . six feet five and a half inches tall, well built (he carried) himself with military precision." [69]

Opposite Geary sat Brigadier General Francis Fessenden. The son of Lincoln's Secretary of the Treasury and a lawyer, he had been wounded at Shiloh and had lost his right leg at hilonett's Bluff." To Geary's right, there was Brevet Colonel Thomas Allcock. Born in

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[67] BOATNER, *supra* note 52, at 572. ***See also*** 8 AM. ST. T., *supra* note 8, at 667-668. According to Stibbs, Mott was also a lawyer. Stibbs, ***Andersonville and the Trial of Henry Wirz,*** 9 IA. J. HIST. & POL. 51 (1911) [hereinafter cited as Stibbsl.

[68] BOATNER, *supra* note 52, at 837. ***See also*** 8 AM. ST. T., *supra* note 8, at 668. Stibbs identifies Thomas as The Adjutant General of the United States Army and adds that he was "an acknowledged authority on military law and the rules and usages of war." Stibbs, *supra* note 67, at 51.

[69] BOATNER, *supra* note 52, at 327-28. ***See also*** 8 AM. ST. T., *supra* note 8, at 668 and 7 DICTIONARY OF AMERICAN BIOGRAPHY 203-04 (1931).

[70] BOATNER, *supra* note 52, at 278. ***See*** also 8 AM. ST. T., *supra* note 8, at 668.

England, Allcock had served as an artillery officer in the war." Finally, on the opposite side of the table was placed Lieutenant Colonel John Howard Stibbs, at 25, the youngest member of the commission. Brevetted a colonel in 1865, "for distinguished gallantry in the battles before Nashville," he would write a defense of the conclusions and the verdict of the Wirz commission half a century later.[72]

E. THE TRIAL BEGINS

On 23 August 1865 at 11 a.m., the trial of Henry Wirz opened for a second time, according to a precise ritual: first, there was the call of the roll to which all eight members of the commission[73] answered present. Then came the reading of the orders from the War Department abolishing the previous commission and establishing the present one. There followed the pro forma request of the prisoner as to whether he had any objection to the members of the court (to which his counsel, Mr. Peck, replied in the negative.)[74] The judge advocate laid before the commission the correspondence requesting the services of Alajor A. A. Hosmer, as

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[71] BOATNER, *supra* note 52, at 9. *See also* 8 AM. ST. T., *supra* note 8, at 669. No date of birth is available for Allcock, but Stibbs describes him as "a man of 40 or more" at the time of the Wirz trial. Stibbs, *supra* note 67, at 52.

[72] *See* 9 IA. J. HIST. & POL., *supra* note 67, at 149-151. *See also* BOATNER, *supra* note 52, at 779 and 8 AM. ST. T., *supra* note 8, at 669. For portraits of the members of the commission nhich tried Henry Wirz, see CHIPMAN, *supra* note 58, at 29.

[73] In his order creating a "council of war" (military commission), General Scott declared that such courts should consist of "not less than three nor more than thirteen members." General Halleck's order defining the rules governing military commissions, stated that "they will be composed of not less than three members, [though] a larger number will be detailed where the public service will permit."

Winthrop states that the military commission may legally be composed of any number in the discretion of the convening authority. He observes that during the Civil War, commissions nere most commonly constituted with five members, but three was a not unusual number and was regarded as the proper minimum. He adds that military commissions in the United States have invariably been composed of commissioned officers, with the rank of the members being immaterial. WINTHROP, *supra* note 31, at 1304.

[74] 8 AM. ST. T., *supra* note 8, at 667. Winthrop says that "as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial permit and pass upon objections posed to members, as indicated in the 88th Article of War, will formally arraign the prisoner, allow the attendance of counsel, entertain special pleas if any are

assistant judge advocate, and the approval of the judge advocate of such selection. The members of the commission were then fully sworn by the judge advocate and the judge advocate and assistant judge advocate were duly sworn by General Wallace, the president of the commission. Three reporters to the commission were named and sworn. Then, once again, Wirz was ordered to stand and to attend the lengthy reading of the scarcely-amended charges.[75]

So scrupulous an observance of the letter of the laws and customs governing the conduct of military trials was exemplary, however tedious it made the proceedings and however assured Wirz's conviction seemed to the Office of The Judge Advocate General.[76]

Yet for there to be a just inquiry into the deaths of the prisoners at Andersonville," each member of the court would now be required to examine reams of documentary evidence and listen with care to the testimony of over a hundred and fifty witnesses while his mind, free of bitterness and animosity toward the prisoner,

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offered . . . and, while in general even less technical than a court-martial, will ordinarily and properly be governed upon all important questions by the established rules and principles of law and evidence." WINTHROP, *supra* note 31, at 1313.

75 8 AM. ST. T., *supra* note 8, at 667.

76 Holt and Chipman, of course, wanted there to be no grounds for the judgment of the tribunal to be jeopardized on procedural grounds. It was for this reason, rather than out of a passion for due process on their part, that the Wirz trial proceeded so carefully. Holt's true feelings about any legal rights due the enemy were expressed in a letter he wrote to Colonel Ludlow on 16 May 1863: "This government is in no degree responsible to the rebels in arms due to the actions of its military courts. . , , This is a war on crime and criminals." *Quoted in* Richardson, *supra* note 6, at 732. After the trial, Holt wrote that the military commissions which tried the so-called Lincoln conspirators and Wirz were "most powerful and efficacious instrumentalities . . , for the bringing to justice of a large class of malefactors in the service or interest of the rebellion . . , unencumbered by the technicalities and inevitable embarrassments attending the administration of justice before civil tribunals." 5 O.R. (Series III), *supra* note 8, at 493.

77 That the objective of the Government in prosecuting Wirz was larger than his conviction (which would be "of comparatively small consequence," the judge advocate thought) may be seen in Chipman's comment that the trial would be the means of "bringing to light and giving the history and whole truth" of Andersonville prison. CHIPMAN, *supra* note 58, at 30. The "whole truth" would presumably include the complicity of Wirz's superiors in the crimes with which he was charged. In the words of General Wallace, written on the opening day of the Wirz trial, "It is expected that out of this investigation will come proof of the leaders' connection with that criminality." 2 WALLACE, *supra* note 66, at 853.

remained uncluttered with preconceptions about what would be seen and heard.

It is a hopeless ideal that a jury may bring a pristine sensibility to its work. Every human being is a bundle of prejudices, many of which abide in the unconscious and are difficult even to identify. Yet in the Wirz trial one must ask whether the intimate "old boy" relationship which existed between the prosecution and the members of the military commission was itself not enough to call the intellectual integrity of the latter into question.

Such a comraderie was inevitable, of course, For years, in some cases for a lifetime, these officers had shared the rituals, disciplines, and shibboleths of a common profession, one which by the nature of command encouraged a unanimity of point of view. Recently they had fought together, and now they were bound together in common elation at the triumph of the Union. Rloreover, it could hardly be said that they lived apart from the spite-filled atmosphere which pervaded the country or were oblivious to the voracious appetite of their superiors in the political departments of the government for revenge against the South, being witnesses to Stanton's heavy-handed interference in the prosecution of the case.

Whether these things were enough to impeach the independence of some or all of them as regards the guilt or innocence of Henry Wirz is a question that cannot be answered with certainty. Nevertheless, it must be asked. Did the shot that killed Lincoln reopen the war in their minds, as it did in the minds of so many of their countrymen? Did the pale and ailing figure standing before them bear the blame for all that they had personally lost? Were the minds of some of them—or even all of them—closed against Henry Wirz from the outset and irrevocablv settled upon his fate?[78]

In at least one case, the answer is apparently "yes.))When General Wallace looked for the first time upon the prisoner's face, he was reminded of the eyes of a cat "when the animal is excited by a scent of prey." In the entry in his diary for the opening day of the trial, he describes Wirz in terms that betray a decided prejudice, and concludes, "Altogether he was well-chosen for his awful service in the Confederacy."[79]

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[78] As has been seen, Wirz's attorneys were given no opportunity to examine the members of the conimission as to their predispositions.

[79] 2 WALLACE, *supra* note 66, at 854.

Wallace seemed prepared to defer, without apparent reservation, to the judge advocate, calling him "my venerable friend" and pointing out that he had had "more erperience than the rest of us." [80] At least one other member of the ccmmission counted Chipman as an intimate. "He was a man of superior education and refinement," Lieutenant Colonel Stibbs wrote, "and withal one of the most genial, kind-hearted, companionable men I have ever had the good fortune to meet." [81]

Having confided these opinions to their journals, these two, along with their fellow officers, distinguished themselves during the trial chiefly by their silence. From first to last, for eight weeks' time, the proceedings were in the hands of the man so highly esteemed by Wallace and Stibbs.

According to the Articles of War, the judge advocate was the prosecuting officer of the government, the legal adviser of the court, and the recorder of the proceedings. Furthermore, he was "so far counsel for the prisoner, after the prisoner has made his plea, as to object to any leading questions to any of the witnesses or any question to the prisoner, the answer to which might tend to incriminate himself." [82]

It was the duty of Colonel Norton Chipman, then, to use every means at hand to convict Captain Wirz; it was his further duty to give impartial advice to the court arising in the evidence he presented in doing so, and to instruct ir as to the correct application of the law. It was an immense difficulty, perhaps an insuperable one, to be the prosecuting officer and the judge at the same time.[83] Yet to this burden of Chipman's it appeared another would be added as Wirz's trial commenced.

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[80] *Id.* at 853.

[81] Stibbs, ***supra*** note *67,* at 52. Half a century after the Wirz Commission had sat, Stibbs was still vigorously defending its independence and declaring that he had never felt that he owed an apology to anyone, "not even to the Almighty" for its judgments.

[82] An Act for Establishing Rules and Articles for the Government of the Armies of the United States (Articles of War) § 69. BENÉT, *supra* note 33, at 350.

[83] DeHart concludes that "it is impossible to be prosecuting officer and judge at once." However, he says, the judge advocate was obliged to assume the defense of Wirz since he was not represented by counsel, "both through the dictates of common humanity and by the custom of the service, beyond the requirements of the 69th Article of War." DeHart, *supra* note 30, at 349-351. For a discussion of the powers and duties of the judge advocate, see BENÉT, ***supra*** note 33, at ch. 18.

Following the reading of the charges, Mr. Hughes, attorney for the prisoner announced that he was withdrawing from the case. Having perceived that there might be a benefit to his client from the modification of the charges, he required more time to prepare. But, he said, he had not had such time, having learned in the morning paper the commission was convening again that day. He then walked out of the courtroom.

His colleague, Alr. Peck, also asserted that the recent action would bring up a new class of defense, requiring a delay, and that Wirz was entitled to a trial on the original charges.[84] But when he was asked by the president, General Wallace, whether he was still counsel to the defendant, he replied, "No."

Thereupon Wallace announced, "The Judge Advocate is here as counsel for the prisoner, the gentlemen having withdrawn." [85] Chipman requested an adjournment—but only for twenty-four hours—to prepare to appear for Wirz.[86]

Thus it appeared for a time that the judge advocate who had spent three months assembling the case against Wirz would now be forced to throw himself on the prisoner's side—which duty, he considered, could be discharged in a single day!

Whatever parody of a defense Chipman prepared on the night of 23 August, the nation was spared it. Instead, when the court convened the next morning, Louis Schade, an indomitable and unshakable friend, announced that he was appearing as counsel for Captain Wirz.

Schade, one of the more engaging personalities to emerge from the long drama of the trial, had been born in Berlin, Germany, and was studying law at Berlin University when he was condemned to death for erecting barricades in the streets during the revolution of 1848-51. Nevertheless, he escaped to the United States, where he

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84 The defense, of course, would contend that the substitution constituted double jeopardy, inasmuch as Wirz had already pleaded to the first indictment.

85 The attorneys claimed that they had been provoked into withdrawing by the judge advocate, who had given them only cursory notices of the meetings of the commission and who had consistently failed to provide them with copies of charges and other official documents relating to the trial. See Rutman, *supra* note 1, at 124.

86 Chipman thought at the outset that the submitting of the evidence to convict Wirz was "the work of only a few days." CHIPMAN, ***supra*** note 58, at 30. Obviously, to present the evidence in his favor would, from the prosecutor's viewpoint, take even less time.

settled in Washington, D. C. Through his ability to speak four foreign languages and to translate five others with ease, he obtained a position at the Smithsonian Institution and then at the State Department. There he came to the notice of Stephen A. Douglas, who in 1856 induced him to go to Chicago as editor of the *National Demokrat*, a German-language newspaper owned by the Senator. As a result of this association, Schade became a staunch supporter of "the Little Giant." Widely known for his fluency as a speaker (which he was to demonstrate in the Wirz trial), he stumped the German-American districts in Illinois and Iowa for the Democrats in the political campaigns of the time. He was admitted to the bar at Burlington, Iowa, in 1858; then, following the Lincoln-Douglas campaign of 1860, he returned to Washington to engage in the practice of law.[87]

At 11 a.m. on 24 August 1865, he stood before Lew Wallace, whom he would later call "one of the most arbitrary and despotic generals in the country,"[88] prepared to fight for the life of his notorious client. He was 36 years old at the time, and the trial would vault him into national prominence.

Now he interposed defense motions with dizzying rapidity. First, he requested a postponement of the trial for eight days to prepare his case and to recruit another lawyer to assist him, so that he might compete with the array of legal talent on the other side. Chipman responded that Schade had been associated with the recently retired counsels "for some time," and the court refused to grant the request. Nevertheless, O. S. Baker volunteered his services as assistant counsel.

Schade had obviously anticipated such a reversal, for he went on to enter several pleas without pausing.[89] Captain Wirz, he said,

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[87] In later years Schade was editor of *Washington Sentinel* and wrote a study of immigration into the United States. In 1879, fearing that it was about to fall into the hands of speculators, Schade purchased the house where Lincoln died and lived there until 1893. 21 THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 313-14 (1931).

[88] Schade, ***supra*** note 65, at 449. Whether Schade held Wallace in such contempt at the outset of the Wirz trial is unknown, but his opening remarks to the commission, especially in their heavily ironic references to "the present enlightened statesmen who control the destinies of the nation," call to mind Marc Antony's funeral oration.

[89] Winthrop says that the entertaining of special pleas from both parties by the military commission, providing they are legally apposite, is "the only quite safe and satisfactory course for the rendering of justice." WINTHROP, ***supra*** note 31, at 1313.

should be released by reason of the promise given him by Captain Noyes of General Wilson's staff, that in exchange for certain information he would not be arrested or held prisoner. Second, the court had no jurisdiction to try Wirz on the charges and specifications. Third, the war was over and civil law was restored, and there was no military law under which Wirz could be tried. Fourth. the charges and specifications should be quashed on grounds of their being vague concerning time, place, and manner of the offenses charged. Fifth, since Captain Wirz had been put into jeopardy on these same charges previously and before a military commission composed like this one, he could not be so arraigned again and was entitled to an acquital. Sixth, Wirz should be released because, as an officer of the Southern Confederacy, he was entitled to the benefit of terms agreed to between Generals Sherman and Johnston, with which he was ready to comply.[90]

Chipman responded to the question of alleged double jeopardy first by reading an opinion from Judge Advocate General Holt. "the law expounder as far as the Army is concerned," which stated that a party who has been arraigned should not be regarded as having been tried until the Government has pursued the case to a conclusion and the defendant has been formally acquitted or convicted.[91]

On the question of Noyes' alleged promise to Wirz, Chipman asserted that it had been only a guarantee of safe passage between Andersonville and Macon, that Noyes had tendered it on his own and without the knowledge or consent of General Wilson, and that,

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[90] Under the terms of the Sherman-Johnston agreement, Confederate officers and men were usually unmolested as to criminal prosecution after the war. The arrest and trial of Henry Wirz was a notable exception. J. RANDALL, THE CIVIL WAR AND RECONSTRUCTION 803 (1953) [hereinafter cited as RANDALL].

[91] Holt's opinion was contained in a letter dated 23 October 1864 and addressed to Major J. M. Willet, Judge Advocate. Writing in reference to proceedings before a court-martial, he said,

> Under the constitutional privilege which declares that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb," it has been held that "the jeopardy spoken of can he interpreted to mean nothing short of the acquital or conviction of the prisoner, and the judgment of the court thereon." (4 Wash. **C.C.R.** 409) To the same effect are the opinions of McLean, J. in U.S. v. Shoemaker, 2 McLean R. 114, and of Story, J. in U.S. v. Perez, 9 Wheaton 579. The courts of Massachusetts, New York, Illinois, Kentucky, and Mississippi fully sustain this view. If anything less than a formal acquital or conviction cannot be treated as having even put the part [sic] "in jeopardy," a fortiori, it cannot be held as amounting, within the meaning of the 87th Article of War, to a "trial."

Letter from Joseph Holt to J. M. Willett, 23 October 1861, in 8 AM. ST. T., *supra* note 8, at 681.

in any case, it did not work a pardon of offense. And even if Wilson *bad* promised Wirz safe return and afterwards discovered that he had committed atrocious crimes, he was justified—in fact he was duty-bound—to revoke the safeguard.[92]

On the matter of the Sherman-Johnston compact, Chipman stated that neither it nor the amnesty proclamation of the President[93] intended to pardon those guilty of "great crimes." For example, he said, suppose that John Wilkes Booth had been a rebel soldier, and after murdering President Lincoln had returned to Johnston's army. Was it supposed that the terms of surrender would prevent the assassin from being brought to trial? Certainly the proclamation was not perceived by those most affected—former rebel soldiers of all ranks—as providing universal forgiveness, since they were beseiging the President in great numbers for individual pardons. Chipman further objected to the pleas on technical grounds, and then, for the time being, passed over those relating to the jurisdiction of the court and the motion to quash the charges for vagueness. Likewise, he ignored Schade's assertion that the war was ended and civil law restored, that matter evidently being treated as res adjudicata, following the disposition of it in the "Lincoln conspiracy" case.

In a rambling manner, Attorney Baker answered for Wirz, presenting for the first time the defense which the judge advocate had expected to hear.[94] The prisoner, he said, had been only "a servant in the hands of Southern authorities."[95]

General Wallace ordered the courtroom cleared that he and his colleagues might deliberate. When the doors were opened again, he announced that the court had overruled the pleas of defense counsel, except as to jurisdiction which had not yet been argued.[96] Wirz,

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92 The precise nature of Noyes' statements to Wirz at the time of his arrest was never clarified. Noyes testified early in the trial that Wirz was never under parole.

93 President Johnson issued a Proclamation of Amnesty and Reconstruction on 29 May 1865. It offered amnesty and pardon to most former Confederates and a "restoration of all rights of property except as to slaves" in exchange for an oath of allegiance. J. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 17, 29 (1961).

94 2 WALLACE, *supra* note 66. at 853.

95 8 AM. ST. T., supra note 8, at 682-83.

96 *Id.* at 683.

through his counsel, Baker, pleaded not guilty to the charges, and the commission was ready to hear the case for the Government."[97]

Chipman summoned one witness after another, and one after another they described the unspeakable conditions that had obtained at Andersonville prison: the sea of prisoners awash over the barren acres, the broiling summer sun, the effluvium from the hospital and from the unburied dead who sometimes lay piled like cords of wood, the disease-ridden bodies of their fellow captives, the raw cornbread and sour meat offered as rations, the maggot-infested swamp, the thievery and maimings and casual death on every side.

Through the testimony, the judge advocate tried to show that the Confederate government had knowledge of these conditions and that it could have done more in supplying the prisoners with shelter, clothing, fuel, food, and medical care, but that it had deliberately not done so.

Witnesses testified that there was in the vicinity of the prison pen plenty of wood from which shelters might have been constructed and cooking fires made.[98] Others told of supplies of clothing lying undistributed or appropriated for use by the authorities. including Wirz, and the guards.[99]

Every former prisoner who tool; the stand described the small, poorly prepared ration, and some said that men had starved to death for want of more and better food.[100] A number of witnesses insisted that there had been a bountiful harvest in south Georgia in 1864, and that plenty of peaches, sweet potatoes, cabbage, and corn was

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[97] Following its ruling on the pleas, the commission belatedly asked the attorneys for the defense for a list of witnesses required for the prisoner's defense, whose attendance it would procure. For the judge advocate's statement as to the resources afforded the defense in the conduct of its case, *see* 8 AM. ST. T., *supra* note 8, at 572-73. The commission also announced at this time a set of rules which mould govern the proceedings. CHIPMAN, *supra* note 58, at 42, 44. Winthrop says that in the absence of any statute or regulation governing the proceedings of military commissions, they are commonly conducted according to the rules and forms governing courts-martial. WINTHROP, *szrprn* note 31, at 1312. For a discussion of these rules and forms, see BENÉT, *szrprn* note 33, at ch. 9.

[98] 8 AM. ST. T., *supra* note 8. at 687, (testimony of Dr. John C. Bates), 719 (Major General J. H. Wilson), and 725 (Ambrose Spencer).

[99] *Id.* at 700 (testimony of James H. Davidson), 705 (Robert Merton), 706 (Frank Maddox), 709 (Charles T. Williams), and 719 (Willis Van Buren).

[100] *Id.* at 687 (testimony of Dr. John C. Bates), 700 (James H. Davidson), and 743 (Benjamin F. Dilley).

growing in the environs of Andersonville.[101] The Confederate agent for the tax in kind described the tons of foodstuffs which he had collected that year,[102] and some witnesses said they had seen goods and groceries sent by the U. S. Sanitary Commission and the Northern Relief Association piled up in storehouses in the prison or used by the rebels,[103] including Wirz.[104] Much was made of General Winder's refusal to allow some kind-hearted ladies of Americus to send vegetables into the stockade[105] and the prohibition, allegedly instituted by Wirz, against prisoners trading for food with farmers in the neighborhood or with the Confederate guard.[106]

The gross inadequacy of medical care at the prison was blamed by many witnesses for the deaths of prisoners. The hospital, they said, suffered a chronic shortage of medicine and supplies,[107] and even though the Confederates had paroled Union doctors for service, there were still not enough physicians to cope with the terrifying extent of illness in the prison,

Many of the doctors who had worked in the hospital or who had, as Confederate officers, inspected Andersonville at the order of the War Department recorded their experiences and made recommendations for improvements in the death-dealing conditions of the

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101 *Id.* at **697** (testimony of James Van Valkenburg), **698** (Andrew S. Spring), **705** (Daniel W. Burrenger), **709** (Edward Richardson), **719** (Major General J. H. Wilson), and **725** (Ambrose Spencer).

102 *Id.* at **721** (testimony of Walter T. Davenport). The Confederacy required that one-tenth of all farm products be paid into the government as a tax. Oglethorpe, **10** miles from Andersonville prison, had been a gathering point for the tax.

103 *Id.* at **690** (testimony of Dr. A. W. Barrows).

104 *Id.* at **700** (testimony of James H. Davidson).

105 *Id.* at **726** (testimony of Dr. B. J. Head).

106 *Id.* at **691** (testimony of Dr. A. W. Barrows), **698** (Nazareth Allen), 732 (John F. Heath), 733 (J. H. Persons), and **742** (Benjamin F. Dilley).

107 *Id.* at **686** (testimony of Dr. John C. Bates), 687-88 (letter from Dr. J. Crews Pelot to Dr. E. D. Elland), **689** (testimony of Dr. A. W. Barrows), and 723 (testimony of Dr. Amos Thornburg). Chipman offered in evidence a report of the Confederate Surgeon General to show that the shortages in the hospital were owing to the neglect of Dr. Isaiah White who had allegedly failed to send requisitions to the medical purveyor and was thereby negligent in the deaths of prisoners. However, Benjamin F. Clark, an employee of the medical purveyor's office, testified that it too had been without medicines from time to time and had had to resort to indigenous preparations while drugs were obtained by blockade running or importations. Clark's testimony is found *id.* at **697.**

camp.[108] These documents had been captured with the rest of the Confederate archives, and Chipman introduced them into evidence in support of the conspiracy theory. Essentially his strategy was this: these eminent scientists had clearly and unmistakably shown to the Confederate War Department that thousands of prisoners were dying because they lacked shelter, proper food, medical treatment and for other specific reasons. Yet, as the testimony of the prisoners themselves proved, nothing was done to improve conditions in the camp. Therefore, Chipman would have the commission deduce, said conditions must have been part of a plot to decimate prisoners.[109]

The judge advocate then offered what was supposedly overt evidence of this cabal. It was contained in a report of the state of Andersonville prison made in the summer of 1864 by Colonel A. C. Chandler, an inspector of prisons for the Confederate government.[110] After describing the interior of the compound, Chandler had recommended the removal of General Winder

> and the substitution in his place of someone who unites both energy and judgment with some feelings of humanity and consideration for the welfare and comfort . . . of the vast numbers of unfortunates placed under his control; someone who will at least not advocate, deliberately and in cold

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[108] Typical of the kind of medical advice offered the prison authorities was the report on the causes of diseases and mortality at Andersonville made by Dr. L. H. Hopkins, Acting Assistant Surgeon, dated 1 August 1864 and tendered to General Winder. Hopkins recommended the removal of thousands of prisoners to other sites so as to effect a drastic reduction in the population at Andersonville, parole of a number of prisoners to cultivate food, the erection of barracks, the digging of wells, the organization of squads and the appointment of sergeants, the provision of clothing to prisoners, daily inspection of cooking facilities, and the rigid enforcement of certain hygenic practices. Regarding the hospital, Hopkins recommended that it be floored, that stool boxes be installed and changed frequently, that beef soup and vegetables be furnished to the sick, and that surgeons visit the hospital twice daily. He testified that he did not know that anything was done to implement the suggestions. 8 AM. ST. T., ***supra*** note 8, at **728.**

Other physicians testified that half or more of those who died could have been saved had proper diet and accommodations been furnished. ***Id.*** at **723** (testimony of Dr. Amos Thornburg), and **687** (Dr. John C. Bates).

[109] "Up to the very close of that prison, there were no steps taken by the rebel government . . . to alleviate in any material particular the sufferings of that place. Motives are presumed from actions, and actions are louder than words." CHIPMAN, ***supra*** note ***58,*** at 801.

[110] 8 **AM. ST. T.,** ***supra*** note 8, at 714-16.

> blood the propriety of leaving them in their present condition until their number has been sufficiently reduced by death to make the present arrangements suffice for their accommodation. . . .

These views of Winder, which Chandler testified had been imparted to him by the General during his inspection trip, electrified the nation when they were reported in the press. But this one statement, however monstrous, along with the failure of the authorities of the Confederate government—which was already reeling toward collapse—to take action on the physicians' reports was the entirety of Chipman's evidence of the charge of conspiracy against Wirz and the other defendants."' He had no substantive proof.

Indeed there was evidence to show that Wirz had worked hard to better the lot of the prisoners in his charge with the few resources diverted to him from the main war effort and in the face of indifference on the part of his superiors. A letter he wrote in May 1864, described his efforts to ready the camp bakery, to

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111 Chandler's report and those of other inspectors and physicians revealing the awful state of the prison and suggesting some remedies undeniably came to the attention of the War Department at Richmond. Chandler's report was addressed to the Assistant Adjutant and Inspector General who passed it on to the Secretary of War, J. A. Seddon. Adjutant General Cooper had added this endorsement to it: "This report shows a condition of things which calls for the interposition of the Department, the prison being a reproach to the Confederates as a nation." Richardson, *supra* note 6, at **765.** Chipman offered evidence at Wirz's trial to show that Jefferson Davis knew of the situation at Andersonville, and although many in the South denied that he had seen Chandler's report, Chipman showed that it had been fairly brought before some of the highest officers in the Confederacy.

Chandler's implicating of Winder in the deaths of prisoners may have been born of personal animus, as many historians have suggested, but if so, it was one shared by many who knew the stout gray-haired old man. Winder himself questioned Chandler's honesty without replying to the issues he raised about prison conditions, and Chandler requested that a court of inquiry be convened by the War Department to settle the dispute. *So* action was taken before Winder died in the winter of **1865.** FUTCH, *supra* note 9, at **92,** 95.

Most students of the events surrounding Andersonville have found that Winder was ill-suited by experience and temperament to the task of prison administration, being "narrow, unimaginative, short-sighted, and disputatious." In the absence *of* corroborating evidence, Chandler's accusation that Winder wished to kill as many prisoners as possible cannot be given credence. On the other hand, if Winder were greatly interested in improving the plight of the unfortunates held prisoner at Andersonville, it was not apparent to his associates or to students of the events there, For a judicious estimate of Winder's character, see FUTCH, *supra* note 9, at 119-20.

enlarge the stockade, and to remove the hospital from the compound as recommended by the physicians. He also attempted to construct dams and sluices to cleanse the prison of the ordure which was accumulating along the banks of the stream. (This project was not completed for lack of tools and lumber.) On these duties and others, he wrote, he spent "all my time in the daytime and very often part of the night." [112] Wirz, had even expressed hopes that Chandler's report might "make such an impression with the authorities at Richmond that they will issue the necessary orders to enable us to get what we so badly need." [113]

But the former prisoners who testified against him had known only the suffering and nothing of his efforts or problems. Andersonville had been a hellhole and apparently he had been in charge of it.[114] Because he was a man of violent temper, often given over to raging and cursing, to making threats to starve,[115] or to shoot[116] querulous prisoners, and to saying that the squalor in which they lived was good enough for "d-----d Yankees," [117] they were easily able to make it seem that he shared the views of his superior, Winder, and was actively carrying out the terrible designs attributed to the General by Chandler.[118]

Their testimony accusing Wirz of great cruelties toward prisoners went on and on, from 24 August to *26* September, filling 900 pages in the printed record of the trial. Over and over they described

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[112] 8 AM. ST. T., *supra* note 8, at 713.

[113] H.R. Ex. Doc. No. 23, 40th Cong., 2d Sess. (1867-68) [hereinafter cited as Ex. Doc. No. 23].

[114] Catton, *supra* note 5, at 97; 8 AM. ST. T., *supra* note 8, at 740 (testimony of R. H. Kellogg).

[115] 8 AM. ST. T., *supra* note 8, at 689 (testimony of Dr. A. W. Barrows), and 698 (Andrew S. Spring).

[116] *Id.* at 699 (testimony of Calvin Huneycutt), 708 (L. S. Pond), and 709 (John W. Case).

[117] *Id.* at 692 (testimony of Thomas C. Allcock), 704-05 (Daniel W. Burrenger), and 708 (Abner A. Kellog).

[118] On this point, it is interesting to compare the statement of a meeting of prisoners at Andersonville on 28 September 1864, which declared in part:

> Resolved, that while allowing to the Confederate authorities all due praise for the attention paid to the prisoners, numbers of our men are daily consigned to early graves in the prime of manhood . . . and this is not caused by the Confederate government, but by force of circumstances.

Quoted in Richardson, *supra* note 6, at 768.

the placing of men in the stocks[119] or binding them with chains and balls and leaving them in the sun without food or water.[120] Dozens of witnesses told of the shooting of their fellow prisoners who touched, fell on, or passed over the "dead line,"[121] and some told the court that it had been common knowledge in the camp that each guard who killed a Yankee prisoner received a 30-day furlough.[122] A number of former prisoners took the stand and swore that fierce dogs had been used to mangle the flesh of prisoners who had fled from work detail[123] and that poisoned vaccine had been dispensed from the hospital.[124]

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[119] Dr. A. W. Barrows vividly described the use and effects of the stocks. 8 AM. ST. T., *supra* note 8, at 689. In the specifications to the charge of conspiracy, Chipman estimated that 30 prisoners had died as a result of confinement in them.

[120] For representative testimony from prosecution witnesses on the use of the chain gang, see 8 AM. ST. T., *supra* note 8, at 689 (testimony of Dr. A. W. Barrows), and 696 (Joseph D. Keyser). In the specifications of the charge of conspiracy, Chipman estimated that 100 prisoners died from the effects of being placed in the chain gang or bound with a ball and chain.

[121] Jacob B. Brown testified that Wirz ordered a guard to shoot a prisoner who was across the "dead line," 8 AM. ST. T., *supra* note 8, at 694; and his testimony was echoed by dozens of witnesses. They (with the exceptions discussed later) invariably identified the alleged victims only as "a man" or "a prisoner" and could supply no details as to the time and few as to the circumstances of the shooting. Chipman, in the conspiracy specifications, said that about 300 prisoners had been killed at the "dead line." He insisted that it was not the establishment of such a line or the orders given with regard to it that constituted a crime, but the recklessness with which those orders were enforced, especially the shooting of prisoners who were in no way attempting to escape. Richardson says "the right to shoot prisoners attempting to escape, or putting themselves in an attitude that threatened escape, was exercised freely by both sides" in the war. Richardson, *supra* note 6, at 759.

[122] 8 AM. ST. T., *supra* note 8, at 698 (testimony of Andrew S. Spring), 702 (Thomas Hall), *705* (Robert Merton), and 718 (James E. Marshall).

[123] For representative testimony regarding the use of dogs, see 8 AM. ST. T., *supra* note 8, at 706 (testimony of Thomas N. Way), 693 (Boston Corbett), and 698-699 (John F. Heath). Chipman asserted in the indictment that about 50 prisoners had died from injuries inflicted by the dogs. The breed, size, and temperament of the dogs, and on whose authority they were used to hunt for escapees were matters endlessly and inconclusively discussed before the court.

[124] The court heard much lurid testimony about the effects of the vaccine. 8 AM. ST. T., *supra* note 8, at 689 (testimony of Dr. A. W. Barrows), 702 (Thomas Hall), 730 (Lewis Draper), and *706* (Frank Maddox). Maddox said that he saw Wirz looking at some corpses, some of whom had been vaccinated when alive, and laughing. Chipman said in the specifications that 100 prisoners lost the use of their arms and 200 died from the vaccine.

But Henry Wirz was accused of more than administering beatings and stampings. In fact, the court heard, he was a cold-blooded murderer.

Judge advocate Chipman had listed thirteen instances when Wirz allegedly killed a Union prisoner of war, or ordered it done. In no case did the specification give the name of the victim, even though one murder was described as occurring in broad daylight "in the presence of thousands," and in another case the victim lived five days in the care of his comrades.[125]

The testimony supporting the murder charges was equally vague, so that matters stipulated in the specifications as to the time, place, and circumstances of the alleged killing went unverified from the witness stand. Moreover, it happened that witnesses described killings supposedly done by Wirz which appeared nowhere in the specifications. For example, one former prisoner told the court that Wirz fatally shot a man named Wright of the Eighth Missouri "in February or June or along in there."[126] Another witness told of hearing from a third party the dying statement of a man who said he had been shot in the back by Wirz.[127]

There were other instances when the witness had not seen the murder in question and so swore to hearsay.[128] Some of those testifying could not positively state that the apparent victim of Wirz's revolver had died.

Finally, Chipman would sometimes produce a witness for the purpose of corroborating the testimony of another; but if he confirmed the other on the point in question, he was just as likely to contradict him on another.[129]

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125 J. PAGE AND M. HALEY, THE TRUE STORY OF ANDERSONVILLE PRISON: A DEFENSE OF MAJOR HENRY WIRZ 191-204 (1908) [hereinafter cited as PAGE & HALEY]. Page had been a prisoner at Andersonville and remembered **Wirz** as a kind and compassionate man.

126 8 AM. ST. T., *supra* note *8,* at 692 (testimony of Thomas C. Allcock).

127 *Id.* at 705 (testimony of Robert Merton).

128 For example, a witness testified that he heard shots, heard someone ask who did it, and then heard someone answer, "the captain." 8 AM. ST. T., *supra* note 8, at 868-69. On the inadmissibility of hearsay before a court-martial, see BENÉT, *supra* note *33,* at 251.

129 Such a morass of conflicting testimoriy led some observers of the trial to conclude that some witnesses for the prosecution perjured themselves, perhaps in exchange for money or offices. Chipman deigned to note and reply to speculadons to this effect in his summation. 8 AM. ST. T., *supra* note 8, at 755.

In the end, on the charge of murder, it was the testimony of only two men that mattered.

The first was something of a spellbinder who bore the resonant name of Felix de la Baume. Identifying himself under oath as a Frenchman and a grand-nephew of the Marquis de Lafayette, he was said to have held the crowd in the courtroom like an inspiration with his tale of death at Andersonville. Captain Wirz, he said, had deprived men of water, put them in stocks, fastened them with ball and chain, bucked and gagged them, and forced many to subsist on the "great delicacy" of rats. Then la Baume described Wirz's shooting a prisoner as he was drawing water and told the court that the captain had accomplished the act with the exclamation, "That's the way I get rid of you ——————!" But he was unable to identify the victim or to state positively that he had died. ("In my opinion [the man] was in a dying condition.")[130]

The stronger and more credible testimony accusing Wirz of murdering prisoners was from George W. Gray, formerly of the Indiana Cavalry.[131] His statements provided the court the only evidence that Wirz shot an identifiable prisoner and that the prisoner died. Gray, speaking in a strong, clear voice, told the court of seeing Wirz shoot, kill, and rob William Stewart of the Ninth Minnesota while he (Gray) and Stewart were carrying a body to the prison morgue.

Since early in the trial, the feeble Wirz had been reclining on a lounge,[132] sometimes lying with a damp handkerchief over his face, seemingly oblivious to everything that was taking place in the courtroom. When Gray began his story, he became interested, however. First he removed the handkerchief; then he propped himself up on his elbow; and as the story reached its climax he stood up and challenged the truth of what Gray had said. "You say I killed that man?" he asked. "Yes, sir," replied Gray. Hearing this, Wirz threw up his hands and sank back in a faint on the lounge where he was furnished with cold water and fanned by the guards. General Wallace ordered the courtroom cleared once so that the apparently

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130 8 AM. ST. T., *supra* note 8, at 720.

131 *Id.* at 729-30.

132 The precarious state of Wirz's health had forced a recess of the trial between 12 September and 19 September. He was recumbent throughout the rest of the proceedings, attended by the physician of the Old Capitol Prison who administered ether to him from time to time. 8 AM. ST. T., *supra* note 8, at 721.

dying man could have more air. Wirz's collapse, ambiguous as it was, was taken by many, and especially the press, as a confession of guilt.[133]

Unable to break the story of the stubborn Gray under cross-examination, an exasperated Schade could only write that Gray "swore falsely, and God only knows what the poor innocent prisoner must have suffered at that moment."[134] The defense lawyer was able to damage Gray's testimony slightly when he elicited from him the circumstances of an escape he made from Andersonville and his recapture. Brought before Wirz and questioned, Gray was then returned *to* the compound without punishment, an improbable fate had Wirz been the unconscionable murderer that he and la Baume described.

In any case, Gray's testimony was irrelevant to the charges against Wirz. Gray testified that the shooting occurred in mid-September. No specifications alleged any murder at that time, and the court, during its deliberations, had to amend a specification describing a fatal shooting on 13 June by substituting September for June.[135]

The cross-examination of other prosecution witnesses had also been vigorous. Wirz's lawyers tried to use Chipman's own witnesses to show that the rations served to the prisoners and to the Confederate troops guarding them had been equal,[136] and such shortages as occurred were owing to the disruptions in transportation and supply caused by the war,[137] as well as the inadequacy of the crop in the region around Andersonville.[138] Schade and Baker also

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133 For an account of this dramatic scene from the viewpoint of a member of the court, see Stibbs, ***supra*** note **67**, at **54-56.** In his summation, Chipman commended Gray's testimony **as** meriting the "highest consideration" by the court. 8 AM. **ST. T.,** ***supra*** note ***8,*** at **871.**

134 Schade, ***supra*** note **65,** at 450.

135 The military commission amended other specifications so that they **would** fit the evidence presented by the prosecution. After the defense had proved that Wirz had been away from Andersonville between **4** August and **20** August, a specification alleging that he had killed a prisoner during this period was amended **by** changing the date to 25 August. See original and amended specifications three and five in **EX.** Doc. 23, ***supra*** note 113, at **14-15** and **807-808. See *also*** Rutman, ***supra*** note **1,** at **127-28.**

136 8 AM. **ST. T.,** ***supra*** note 8, at 686 (testimony of Colonel G. C. Gibbs), **728** (U. B. Harrold), and **741** (Dr. John **C.** Bates).

137 ***Id.*** at 689 (testimony of Dr. John C. Bates).

138 ***Id.*** at **741** (testimony of Dr. John C. Bates).

extracted statements from prosecution witnesses to show that shelter was not erected in the prison for want of wood, tools, and labor[139] and that clothing sent by the U. S. Sanitary Commission had in fact been distributed to prisoners.[140]

Prosecution witnesses also testified under questioning from the defense team that they themselves had been confined in the stocks for attempting to escape.[141] Others said they never saw Wirz shoot a prisoner,[142] and two of the physicians said they never treated a gunshot wound while on duty in the prison hospital.[143] One of the judge advocate's chief witnesses told the court that he had seen nothing to indicate that prisoners were cruelly treated.[144]

When Chipman rested the case for the government on the evening of 26 September, he had called over a hundred witnesses. Given the superfluous nature of much of their testimony—so monotonous at times that it reduced horror to banality—the judge advocate apparently intended its sheer accumulation to persuade the court of Wirz's guilt.

But the president of the commission, for one, had found the proceedings merely wearisome and tedious thus far. Captain Wirz, enjoying no sympathy in General Wallace's mind, scarcely had his attention either. At one time Wallace complained to a correspondent of "the most pointless cross-examination of a witness that I have ever listened to. . . ." However, the graphic testimony of one of Chipman's witnesses, Henry C. Lull of the One Hundred and Forty-sixth New York,[145] did kindle in Wallace, who was ever the romantic, an inspiration for a sentimental painting. Lull described a killing at the deadline by sentinel of a prisoner who had sought a cupful of water from the brook beyond. "That is my scene," Wallace wrote in describing the drawing, "the fallen figure in faded-blue uniform, the stream for which the starving man longed, a portion of the stockade, the bar, the cup."

While enduring the tedious witnesses and "as a relief from the worries of the trial," Wallace was also working on his book on

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139 Id. at 699 (testimony of Judge Daniel Hall).

140 *Id.* at 719 (testimony of Dr. John C. Bates and Willis Van Buren), and 724 (Dr. Amos Thornburg).

141 Id. at 696 (testimony of Martin E. Hogan), and 719 (W. W. Crandall).

142 *Id.* at 698 (testimony of Andrew S. Spring).

143 Id. at 724 (testimony of Dr. Amos Thornburg), and 740 (Dr. G. G. Roy).

144 Id. at 718 (testimony of Colonel D. T. Chandler).

145 *Id.* at 720.

tactics and skirmishing. Finishing the book shortly after the Wirz trial, Wallace was crushed when it was quickly rejected for publication by a committee of officers in the Regular Army.[146]

The defense began its case late on the afternoon of *26* September, immediately following the retirement of the last prosecution witness.[147] Although Schade and Baker tried to respond to each of the charges and specifications, theirs proved to be a generally ineffectual and unconvincing presentation,

To the judge advocate's parade of witnesses, they opposed but 25. These were men who had served with Wirz in the Confederate Army, including physicians who had attended the prison hospital, people who lived in the vicinity of Andersonville or visited there, and a few former prisoners, Schade and Baker also introduced documents from Wirz's letter book,

Rather than attempting to impeach the testimony of prosecution witnesses on the use of the stocks or the stopping of rations, the defense effectively stipulated that these things had occurred, but that they had been disciplinary measures carried out in response to provocations by prisoners, usually escape attempts.[148] They also offered testimony and correspondence to show that clothing from relief organizations in the North had been given to prisoners,[149] and that at least in the first months of the prison operations, the ration for prisoners and the guard had been equal.[150] Other defense evidence showed that, as the prison population swelled, the quality of food

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[146] 2 WALLACE, *supra* note 66, at **854-59.** It is to be remembered that Wallace was a volunteer and probably retained notions of remaining in the Army.

[147] Press coverage of the trial, which had been very heavy during the prosecution's presentation of its case, declined during the defense's. For example, *The New York Times* shifted the story from page one to its inside columns. Even before hearing the evidence in Wirz's behalf, several periodicals resoundingly declared that he was guilty as charged. See Rutman, *supra* note 1, at 131.

[148] Wirz said that on one occasion when the whole camp was deprived of rations, **4** July 1864, it was because "there was a difficulty with the raiders, and the quartermaster could not distribute the rations." 8 AM. ST. T., *supra* note *8,* at **749.**

[149] 8 AM. ST. T., *supra* note 8, at **734** (testimony of W. D. Hammack), 735 (A. Moesner), and **739** (letter of Henry Wirz to G. W. McPhail).

[150] *Id.* at **741** (testimony of J. W. Armstrong). See *also* the testimony of Colonel F. S. Ruffin, *id.* at **740,** who described the food shortages experienced by the army of General Lee.

declined[151] but that Wirz tried to improve it[152] and allowed vegetables to be brought in from the outside to supplement the fare.[153] Some of the physicians who had attended the hospital testified that Captain Wirz could not be blamed for the deficiency of medicines,[154] and that he had shown a disposition for the surgeons to do all they could with the limited means they had.[155] On the charge of the alleged poison vaccine, a physician told the court that it was the debilitated systems of the prisoners which caused the gangrene following vaccination.[156] Regarding the use of dogs, the defense offered testimony to the effect that Wirz had had nothing to do with their employment.[157]

Many of those called by the defense told the court they had never seen or heard of Wirz mistreating a prisoner or ordering anyone else to do so. Had such things occurred, they said, they would have known of them.[158] Medical testimony was given to show that Wirz could not have committed most of the brutal acts attributed to him because of the condition of his arm.[159]

Finally there were a number of witnesses who testified to Wirz's character, to his labors to improve conditions in the prison, and to incidents of compassion and kindness shown by him toward prisoners.[160]

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[151] *Id.* at 744 (testimony of Edward Boate).

[152] Letter of Henry Wirz to A. D. Chapman *in* 8 AM. ST. T., *supra* note 8, at 739.

[153] 8 AM. ST. T., *supra* note 8, at 733 (testimony of Captain Weytt) and 738 (Mary Rawson).

[154] *Id.* at 688 (testimony of Dr. John C. Bates) and 724 (Dr. Amos Thornburg).

[155] *Id.* at 688-89 (testimony of Dr. John C. Bates).

[156] *Id.* at 741 (testimony of Dr. John C. Bates).

[157] *Id.* at 731 (testimony of Colonel Fannin).

[158] For representative testimony of this kind, see 8 AM. ST. T., *supra* note 8, at 731 (testimony of Colonel Fannin), 743 (Colonel W. H. Persons), and 734 (W. D. Hammach).

[159] 8 AM. ST. T., *supra* note 8, at 872 (testimony of Dr. C. M. Ford). See *also* Rutman, *supra* note 1, at 130.

[160] 8 AM, ST. T., *supra* note 8, at 731 (testimony of Father Hamilton), 733 (Colonel W. H. Persons), and 735 (A. Moesner). Other defense testimony provided a fascinating glimpse into the economy of Andersonville. George W. Fechnor described dealers in real estate (who sold desirable sites within the camp), whiskey, and beefsteak. He also told the court that the prison had as many as 20 barbers at one time. General Wallace asked the witness why, if clothing was so plentiful, there were so many who had none. Fechnor replied it was only because they had no money to buy it. 8 AM. ST. T., *supra* note 8, at 736-37.

Judge advocate Chipman obstructed the efforts of the defense to take a more positive stand on the conspiracy charge by revoking the subpoena of Robert Ould, the Confederate commissioner of exchange, whom Wirz's attorneys had summoned to testify on the collapse of the cartel and the subsequent burden placed on Southern prisons."' Furthermore, according to Darrett Rutman, a present-day authority on the Wirz case, defense witnesses were continually intimidated during the trial, and indeed one was arrested in the courtroom and never allowed to testify. At one time, Schade was provoked by these tactics into withdrawing and walked out of the courtroom muttering that his client was receiving no trial in law. Again the defense devolved on Chipman, who sought a day's postponement "to try to adapt myself to the interests of the prisoner." But Wirz implored his attorney, "You might stay to help me, and you should not mind even if the court does sometimes overrule you." Moved by his client's plight, Schade returned the next day.[162]

Wirz's response to the charge of murder was submitted to the court in a written statement.[163] He said that since only two cases of murder "were fixed by definiteness," those of "the actual real case of 'Chickamauga' and the mythical case . . . of 'William Stewart,' " it was on them that he would make his defense. It was a simple one indeed: he denied everything. In the former instance, he said, the prisoner had been shot for willfully trespassing over the dead line by a guard who was enforcing "a rule of prison discipline, one absolutely necessary at Andersonville, and one not unusual in nearly all militarv prisons in the South. . . ."[164] As for William

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161 Winthrop says that for the sake of rendering justice to both parties, a military commission "will receive all material evidence desired to be introduced." WINTHROP, *supra* note 31, at 1313. Clearly Chipman erred in refusing to allow the court to hear Ould. Wirz tried to turn the reversal to his advantage, declaring toward the end of his trial that he had "not attempted to complicate the case with allusions as to where the responsibility rested for non-exchange of prisoners of war." 8 AM. ST. T., *supra* note *8*, at 749.

162 8 AM. ST. T., *supra* note *8*, at 691.

163 Attorneys Baker and Schade asked for two weeks to prepare their summation when the testimony ended. When the commission allowed them only 12 days, they again withdrew from the case, although Schade continued to advise Wirz after the verdict. Wirz's statement, offered in lieu of a summation by counsel, was prepared by a Mr. Hays, one of the official reporters and submitted to the court after Wirz approved it. 8 AM. ST. T., *supra* note *8*, at 744.

164 For testimony on the killing of "Chickamauga," a cripple and mental defective, *see* 8 AM. ST. T., *supra* note *8*, at 694 (testimony of Samuel D. Brown),

Stewart, Wirz asserted that he was a phantom, since his name could not be found on the books of the prison, the hospital records, or the death register. Gray, he added, was well-known as a man who "prevaricated overmuch."

In his statement to the court, Wirz also reiterated the defense of superior orders. If there was guilt anywhere on the charge of conspiracy, he said, "it certainly lay more deep and damning on the souls of those who held high positions" than on him. He had simply obeyed their orders. If he had overstepped these and violated the laws of war and outraged humanity, he should be tried and punished according to the measure of his offense. But, he said, he could not be held responsible for the motive that dictated such orders.[165] Asserting that he was but "a poor subaltern officer who in a difficult post sought to do his duty and did it," he prayed the court to spare "the few days of my natural life to my helpless family."[166]

The existence of superior orders was no defense, judge advocate Chipman told the court at the outset of his lengthy summation, which began on 20 October.[167] A superior officer, he said, "cannot order a subordinate to do an illegal act and if a subordinate obey such an order...both the superior and the subordinate must answer for it."[168] Furthermore, he said, Wirz had followed the orders of General Winder and others willingly rather than under duress.

Chipman also argued the question of the jurisdiction of the military commission, treating it as res adjudicata, having been determined

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699-700 (O. S. Belcher), 704 (Joseph R. Achuff), 716 (Joseph Adler), and 709 (Charles T. Williams). The statements of these witnesses differ substantially as to details. One cannot determine from them whether the alleged victim was inside or outside the "dead line" when shot, whether he was shot on Wirz's direct order or on the volition of the guard, or where he took the bullet.

Chipman stipulated Wirz's account of the killing of "Chickamauga," yet argued that he "in this melancholy affair, incurred the guilt of murder." He called the killing of "Chickamauga," "one of the most despicable and indefensible" related to the commission during the trial. 8 AM. ST. T., *supra* note 8, at 861-62.

[165] 8 AM. ST. T., *supra* note 8, at 474-476. According to Friedman, the concept of command responsibility in warfare was first plainly enunciated in General McClellan's orders of 1861, which warned the officers of the aggression by those under their command and which directed the establishment of military commissions for the punishment of "the established rules of warfare." 1 L. FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY, xviii (1972) [hereinafter cited as FRIEDMAN].

[166] 8 AM. ST. T., *supra* note 8, at 750.

[167] *Id.* at 750-872.

[168] *Quoted in* 2 FRIEDMAN, *supra* note 165, at 796.

in the trial of the "Lincoln conspirators." Emphasizing especially the evidence of the physicians and the reports of the Confederacy's prison inspectors, he then reviewed the testimony on the conspiracy charge. But lacking specific proof of the alleged cabal, he could only accuse Wirz of "guilt by allegation" and stridently beg the question, in a passage that might have been lifted from one of the editorials of the day:

> When we remember that the man here charged. and those inculpated but not named in the indictment . , , are some of them who were at the head of the rebellion . . . and sanctioned the brutal conduct of their soldiers as early as the First Battle of Bull Run—who perpetrated unheard cruelties at Libby and Belle Isle—who encouraged the most atrocious propositions of retaliation in their Congress . . . who employed a surgeon in their service to steal into our capital city in infected clothing—who approved the criminal treatment of the captured garrisons at Fort Pillow, Fort Washington, and elsewhere—who were guilty of the basest treachery of sending paroled soldiers into the field—who planted torpedoes in the paths of your soldiers— . . . who organized and carried to a successful termination a most diabolical conspiracy to assassinate the President of the United States; when we remember these things of these men, may we not, without hesitancy, bring to light the conspiracy here charged?[169]

It was for the crime of murder that Wirz was "especially called to answer,"[170] and he was held by the judge advocate to be accountable for every death that allegedly resulted from the employment of dogs, stocks, and the chain gang, Recapitulating the testimony on these matters, Chipman saved the most compelling evidence *to* the end, that relating to the killings of "Chickamauga" and of "William Stewart.'' Then declaring (with some hyperbole) that "mortal man has never been called to answer before a tribunal to a catalogue of crimes like this," he yielded the case to General Wallace and the court for deliberation. The long ordeal was almost over.

F. THE TRIAL CONCLUDES: FINDINGS AND SENTENCE

The commission found Wirz guilty on both charges. To the charge of conspiracy it added several co-conspirators, including the

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[169] 8 AM. ST. T., *supra* note *8*, at 785. Even *Leslie's Illustrated*, which villified Wirz throughout the trial, could not discern the existence of a conspiracy against the prisoners. On September 23, 1865, it wrote: "That the rebel officers in Richmond did inspire the conduct of Wirz, *even if they did not specifically direct it*, scarcely admits of doubt." (emphasis added).

[170] 8 AM. ST. T., *supra* note 8, at 754.

amended indictment of Jefferson Davis, J. A. Seddon, and Howell Cobb.[171] On the charge of murder, Wirz was found guilty of 10 of the 13 specifications.[172] Three other murders not specified in the charges were added to the list, although the court declared that it had not taken these into consideration in arriving at its verdict. Wirz was condemned "to be hanged by the neck till he be dead at such time and place as the President of the United States may direct, two-thirds of the court concurring therein." [173]

VI. EXECUTION OF THE SENTENCE

The verdict came as no surprise to Wirz;[174] perhaps he yet held out some hope that he would be spared, since the record of his trial would be reviewed, first by The Judge Advocate General and then by the President.[175]

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171 According to Page and Haley, the commission also added the names of W. Shelby Reed, S. P. Moore, W. J. W. Kerr, James Duncan, Wesley W. Turner, and Benjamin Harris to the list of the convicted. PAGE & HALEY, *supra* note 125, at 213. When the trial record was reviewed by Judge Advocate General Holt and President Johnson, these names were once again removed (see 8 AM. ST. T., *supra* note 8, at 873) so that Wirz was finally convicted of conspiring with John H. Winder, Richard B. Winder, W. Sidney Winder, R. R. Stevenson, "and others unknown."

172 Wirz was adjudged not guilty of specifications four and 10, which described shootings allegedly committed by him, and specification 13, which alleged that he beat a prisoner to death.

173 The court announced its decision on 24 October and its findings were issued as General Court-hlartial Order No. 607 on 6 November. John Howard Stibbs later recalled, "There was no power on earth that could have swerved us from the discharge of our sworn duty as we saw it. Our verdict was unanimous. There were no dissenting opinions." Stibbs, *supra* note 67, at 53.

According to Winthrop, it is within the power of a military commission to impose the sentence of death, WINTHROP, *supra* note 31, at 1314-15. Benét writes that where a court-martial fixes death as the penalty for a crime "the finding of guilt must be passed by two-thirds vote because the death penalty . . . requires a two-thirds vote for its infliction." BENÉT, *supra* note 33, at 137-38.

174 According to Page and Haley, Wirz's trial had only just begun when Louis Schade turned to his client and whispered, "You will be convicted." PAGE & HALEY, *supra* note 125, at 213.

175 The record of the Wirz trial was examined by The Judge Advocate General and since the verdict involved the death penalty, it went to the President for final disposition. Winthrop says only that action taken by reviewing officers in examining the ruling of a military commission is a "wider and more varied exercise of

Their action, however, was predictable—and implacable, After commending the high character of the men composing the commission and the fairness of the trial, Holt wrote: "The conclusion reached is one from which the overwhelming volume of testimony left no escape."[176] Then on 3 November, President Johnson approved the proceedings, findings, and sentence and ordered that Wirz be executed on Friday, 10 Sovember 1865.[177]

On 6 November, Wirz wrote a last appeal to the President. Declaring once again that he was innocent of the crimes of which he had been convicted, he asked Johnson to give him liberty or to carry out the sentence.[178] There was no reply to the letter.

On the night before Wirz was scheduled to die, Louis Schade and the Reverend F. E. Boyle were informed through a third party that "a high Cabinet officer" wished Wirz to know that if he would "implicate Jefferson Davis with the atrocities at Andersonville," his life would be spared. That same night an anonymous telegram was sent to several newspapers, stating that Wirz had linked Davis to a plot and that the confession would be made public. But the next morning, Wirz denied the story and refused the offer of commutation. "I do not know anything about Jefferson Davis," he told Attorney Schade. "He had no connection with me as to what was

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authority" than permitted in ordinary courts-martial. WINTHROP, *supra* note 31, at 1319. The 65th Article of War, as amended on 24 December 1861, provided that

> no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial in time of peace, extending to the loss of life or to the dismission of a commissioned officer . . . be carried into execution until the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case. . . ."

Wirz did not have the prerogative of appealing his case to a civilian tribunal. As held by the Supreme Court in *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the leading case of the time, the proceedings or sentences of military commissions were not subject as such to be appealed to, or directly revised by. any civil tribunal. Specifically, the Court held in *Vallandigham* that it had no authority to issue a writ of certiorari to call up from The Judge Advocate General of the Army the record of a trial by a military commission.

176 EX. Doc. No. 23, *supra* note 113, at 809, 814.

177 8 AM. ST. T., *supra* note 8, at 874.

178 Henry Wirz to Andrew Johnson, 6 November 1865, *in* 14 CONF. VET. 451-52 (1906).

done at Andersonville. If I knew anything about him, I would not become a traitor against him or anybody else even to save my life." [179]

Wirz's final act was to write to his wife and children." Shortly before 10 a.m. he received the last rites of the Catholic Church from Father Boyle. When the officer who had charge of the execution came to notify him that the time had come, Wirz said, "I am ready, sir."

On the way to the courtyard Wirz stopped before the door of a fellow prisoner and asked him to take care of his family and to try to clear the stigma attached to his name.

The government had issued 250 spectator tickets for the execution; but a morbidly curious audience of several times that number perched in the trees and on nearby rooftops overlooking the prison walls. Four companies of soldiers were assembled, and they chanted over and over, "Wirz, remember Andersonville."

In company with the priest, the condemned man mounted the steps of the scaffold. To the officer who fitted the rope around his neck, he gave his pardon, "I know what orders are, Major. I am being hung for obeying them." Some had expected him to cringe and balk, but he did not. There was, said *Leslie's Illustrated,* "Something in his face and step which, in a better man, might have passed for heroism." [181]

At 10:32 the trap was sprung, but the fall did not break Wirz's neck and he dangled in mid-air until he choked to death. While his legs were writhing, the chanting went on: "Wirz, remember Andersonville."

Ten days after Wirz's execution, Felix de la Baume, whose testimony had done much to seal his fate, was exposed as a deserter from the 7th New York Regiment whose real name was Felix Oeser. On

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[179] Schade, ***supra*** note **65,** at **449.**

[180] The pathetic document, first published in the New Orleans Times on 21 November **1865,** was *reprinted in* **16** CONF. **VET. 364 (1908).**

[181] Leslie's Illustrated, November 25, 1865. For other accounts of Wirz's execution see **PACE & HALEY,** *supra* note 125. at **227-28; HESSELTINE, *supra*** note **4,** at **244-45;** Harper's, November **25, 1865;** 8 O.R., ***supra*** note 8, at **794;** and Rutman, ***supra*** note 1, at **117,** 133. Wirz's body was buried by that of George Atzerodt, one of the so-called Lincoln conspirators on the grounds of the Old Capitol Prison. Later it was transferred to the Catholic cemetery in Washington.

The site where Wirz was hanged is now occupied by the United States Supreme Court building.

11 October, even before testimony had been concluded, he had been appointed to a position in the Department of the Interior—on the signed recommendation of the members of the military commission trying Wirz! Secretary Harlan dismissed him, but no charges were filed.[182]

The discrediting of "de la Baume," the growing clamor against the use of the military commission,[183] the catharsis of Wirz's execution,[184] the subsiding of hysteria in the press[185]—all these things put an end to Stanton's hopes to try the former leadership of the Confederacy. J. A. Seddon, R. B. Winder, I. H. White, and even Jefferson Davis were all eventually released without trial.[186]

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[182] The veracity of several other key prosecution witnesses must also be doubted. Boston Corbett, who took the stand on one of the days when Wirz was without counsel except for that provided by the judge advocate, told the commission of ferocious bloodhounds pursuing escaping prisoners; but he also claimed that God had sealed the mouths of the dogs when *he* had escaped from hndersonville, just as He had sealed those of the lions and kept them from tearing Daniel to pieces. Corbett also claimed credit for the killing of John Wilkes Booth. 8 AM. ST. T., *supra* note 8, at 692-94.

Another of Chipman's witnesses, Thomas Allcock, called on the same day as Corbett, reportedly told a friend afterwards that what he had told the commission "was all a d---d lie." The defense later tried to impeach Allcock on the basis of this remark, but Chipman thwarted the effort. For Allcock's testimony, see 8 AM. ST. T., *supra* note 8, at 692. See *also* Rutman, *supra* note 1, at 129.

[183] The actions of military commissions were a chief complaint of Southerners throughout the Reconstruction period. Continuing in operation down to the termination of the Reconstruction Laws, these tribunals gave judgments in upwards of two thousand cases. WINTHROP, *supra* note 31, at 1302. The Supreme Court never reviewed the legality of their use under the Reconstruction Laws.

[184] Judge advocate Chipman wrote in 1891 that some of the findings brought out in Wirz's trial "were buried out of sight by the universal demand that this human monster on trial should not escape punishment; and aith this execution the secondary, but really most important, result of the trial passed out of mind, or was displaced by the rapidly recurring [sic] political movements of that eventful period." N. CHIPMAN, THE HORRORS OF ANDERSONVILLE REBEL PRISON 12 (1891).

[185] In October, *Leslie's Illustrated* printed a sketch of Andersonville which depicted a clean orderly community and declared it to be "the only correct view . . . ever published." It also stipulated the defense contention that Wirz had been absent from the camp during most of the terrible month of August—and it printed his name without a vicious adjective. Leslie's Illustrated, October 21, 1865. In December, *Harper's* proclaimed that Jefferson Davis' guilt in "the tortures of Andersonville" was moral, and by inference other than legal. *See* Rutman, *supra* note 1, at 133.

[186] Wirz was the only person connected with Southern prisons, save one, to suffer on that account. Private James W. Duncan, C.S.A., who had been employed

VII. CONCLUSION

Is the Wirz case really relevant to our world? Or is it a mere whirlpool in the floodtide of the Civil War, one that might just as well be forgotten?

The answer must be seen in terms of the evolution of military law in America. That evolution, paralleling the expansion and strengthening of civil liberties, has been toward guaranteeing to those accused of crimes before military tribunals the same due process rights enjoyed by civilians before civil courts. Witness the adoption of the Uniform Code of Military Justice.

However, the military commission has in general been left behind in this evolutionary process. The President still has significant discretionary powers to convene military commissions and these powers are referred to, but not specified, in the Uniform Code of Military Justice and the current *Manual for Courts-Martial.* The case of Ex parte *Quirin,*[187] provides the most significant modern statement of these powers. Ex parte *Quirin* is similar to the case of Henry Wirz in that both dealt with violations of what have now become criminal offenses under the international laws of war. The opinion in *Quirin* approved the trial of such violations before military commissions, even though civilian courts were open and operating.

Courts-martial procedures are now firmly grounded in due process. Nothing, however, guarantees that procedural abuses may not occur again in a trial before a military cornmission. It may be that "the modern spirit" precludes the operation of a military commission that fails to observe rules at least as scrupulous as those governing a court-martial. But that spirit must abide in the breasts of those who appoint and constitute the military commission. Certainly it was largely absent in the trial of Henry Wirz.

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at Andersonville, was arrested when he appeared in the courtroom as a defense witness (see 8 **AM.** ST. T., ***supra*** note 8, at 730) was convicted in the death of a prisoner on 8 June 1866 and sentenced to 15 years at hard labor. Eleven months later he escaped.

Defenders of Wirz down to the present have persisted in asking the troublesome question: how is it possible for him to have conspired by himself? Colonel Chipman, in 1911, offered the explanation that the verdict in the Wirz trial was in fact not a conviction of the other "conspirators," but "the equivalent of an indictment found against them for the wholesale and needless mortality charged." CHIPMAN, ***supra*** note 58, at 36.

187 317 U.S. 1 (1942).

But if Wirz's trial was a political one and if he was a scapegoat for the prisoner deaths at Andersonville, it does not necessarily follow that he was a hero, as some have inferred.[188] He was a man of limited intelligence and imagination, ailing in body and abusive by nature, who was thrust into a position requiring prodigious energies and administrative and diplomatic genius. Even such gifts as these might not have been enough. The immoral indifference of some Confederate leaders toward the prisoners of war and the lack of manpower and material to run a decent prison might still have brought him to the gallows.

Today Andersonville h'ational Cemetery is a place of peace, the stillness broken only by tourists and the breezes that stir the carpet grasses. The exact location of the old stockade is marked by stakes set in the earth, and the thousands who died within that space are buried about 300 yards to the northwest. Unlike the controversies and recriminations that still redound from the events that once took place there, they sleep an endless sleep.

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188 In 1909, the United Daughters of the Confederacy erected a monument to Wirz's memory in the center of Andersonville, Georgia, and the action touched off a storm of controversy. The Grand **Army** of the Republic made a vigorous protest, and some Southerners who believed the prison to have been a crime against humanity and a blight on the name of the Confederacy joined in. (Norton Chipman's account of the Wirz case was written in response to the U.D.C. memorial.) Although the obelisk was left standing, the Georgia legislature refused, in 1958, to vote funds to repair it. See FUTCH, ***supra*** note 9, at 121.

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* Mention of a work in this section does not preclude later review in the *Military Law Review.*

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