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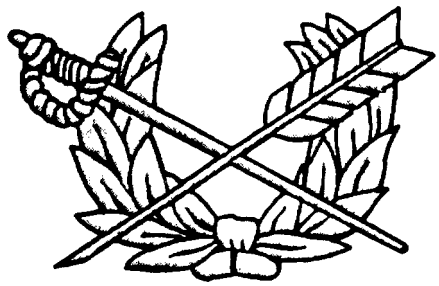

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MILITARY LAW REVIEW—VOL. 113

The ***Military Law Review*** has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since **1958.** The ***Review*** provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The ***Review*** encourages frank discussion of relevant legislative, administrative, and judicial developments.

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MILITARY LAW REVIEW

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Footnotes also must be typed double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (13th ed. 1981), copyrighted by the *Columbia, Harvard,* and *University of Pennsylvania Law Reviews* and the *Yale Law Journal,* and to *A Uniform System of Military Citation* (TJAGSA Oct. 1984)(available through the Defense Technical Information Center, ordering number AD B088204). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of grade or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

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The Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. However, minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

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PROFESSIONAL WRITING AWARD FOR 1985

Each year, the Alumni Association of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The award consists of a citation signed by The Judge Advocate General and an engraved plaque. The award is designed to acknowledge outstanding legal writing and to encourage others to add to the body of scholarly writing available to the military legal community.

The award for 1985 was presented to Major Richard D. Rosen for his article, "Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial," which appeared at 108 Mil. L. Rev. **5** (1985). The article, which had originally been submitted in fulfillment of the Thesis Program of the 32d Judge Advocate Officer Graduate Course, discusses the history and legal development of the involvement of the federal civilian courts in the review of the military justice system. The lack of a uniform approach among the federal courts to the proper scope of review to be accorded determinations of the military justice system is noted and a standard approach is posited.

THESIS TOPICS OF THE 34TH GRADUATE COURSE

Sixteen students in the 34th Judge Advocate Officer Graduate Course that graduated on 16 May 1986 participated in the Thesis Program. The Thesis Program is an optional part of the graduate course curriculum. The purpose of this elective is to provide students the opportunity to exercise and improve analytical, research, and writing skills and, equally as important, to produce publishable law review articles that will materially contribute to the military legal community.

All theses written by graduate course students, including those of the 34th Graduate Course, can be read in the library at The Judge Advocate General's School. They are interesting and are excellent research sources. Also, many are published in the *Military Law Review*. In this issue, Major Kevin Carter's excellent thesis on fraternization is published; many of his classmates' theses will be published in future issues.

Following is a list of the theses written by members of the 34th Graduate Course:

THESIS TOPICS OF THE 34TH GRADUATE COURSE

1. Carroll, *Insanity Defense Reform.*
2. Carter, *Fraternization.**

3. Deardorff, *Informed Consent, Termination of Medical Treatment, and the Federal Tort Claims Act—A New Proposal for the Military Health Care System.**

4. Dickey, *Admission of Computer Generated Evidence Through the Vehicle of an Automatic Teller Machine Case.*

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*Co-recipients of the award for the best thesis of the 34th Graduate Course.

THE THIRD ANNUAL WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW: CONTEMPORARY TERRORISM AND THE RULE OF LAW

by the Honorable Louis G. Fields, Jr.
Ambassador of the United States of America, Retired

I. INTRODUCTION

On 15 April 1986, The Judge Advocate General's School was honored to be addressed by Ambassador Louis G. Fields, Jr. As the Third Waldemar A. Solf Lecturer in International Law, Ambassador Fields spoke on the serious threat posed to democratic government and the rule of law by contemporary terrorism. Coincidentally, Ambassador Fields delivered his lecture the morning after the U.S. air strike against Libya.

Ambassador Fields holds a Bachelor's Degree from the University of Florida, a Juris Doctor Degree from the University of Virginia, and completed a year of graduate study in international relations at the Woodrow Wilson School of Foreign Affairs at the University of Virginia. He served in the Army as a lieutenant during the Korean War.

He served as a Consultant-Expert in Economic Warfare to the Vietnam Bureau of the Agency for International Development from 1967 until 1969. From November 1969 until September 1981, he served in the Legal Adviser's Office, Department of State. During that time, he was Assistant Legal Adviser for Politico-Military Affairs (1970-74) and Assistant Legal Adviser for Special Functional Problems, providing legal counsel to the Department's Office for Combatting Terrorism and the Bureau for International Narcotics Matters.

In September 1981, he was appointed United States Representative to the Conference on Disarmament with the rank of Ambassador. He served in that capacity until January 1985, when he retired from the Foreign Service to enter the private practive of law.

Ambassador Fields has lectured in legal medicine at the Medical College of Virginia, in international law at The Judge Advocate General's School, and in economic warfare, terrorism, and crisis management at the Air Force Special Operations School. He has contributed to several publications on terrorism, foreign policy, and political military subjects. In August 1984, the American College in Switzerland instituted a scholarship in his name for a student who has demonstrated an active in-

terest in advancing better understanding among nations and promoting international security.

Following is the text of Ambassador Field's lecture.

II. THE LECTURE

I am most grateful for the honor of presenting to The Judge Advocate General's School the Third Annual Waldemar A. Solf Lecture in International Law. This honor is heightened by the fact that 'Wally" Solf is an esteemed friend and former colleague with whom I have collaborated on many occasions during my years in the Legal Adviser's Office of the Department of State. Even then Colonel Solf was a legend within the ranks of international lawyers and there was some trepidation when I, as the newly-appointed Assistant Legal Adviser for Politico-Military Affairs, had the mission to challenge the Pentagon on some obscure interpretation of a SOFA agreement and was informed that Colonel Solf was the one I had to convince. Legend had it that Colonel Solf took great delight in dismantling lawyers from "the fudge factory"—as we are affectionately dubbed across the Potomac. Much to my surprise—and pleasure—I found him to be a most cordial and helpful gentleman who set me straight on the matter in a most obliging way. Thus, I can justifiably feel I have attained true recognition by this invitation and, despite the friendship formed in that encounter, I have cautiously chosen a subject on which I think—at least I hope—we agree.

My public career in international law spent in the Department of State was rather unique in that it focused largely on weapon-related issues. As Assistant Legal Adviser for Politico-Military Affairs (1970-mid 1974), I had legal responsibility in foreign military sales, bases, and arms control. As Assistant Legal Adviser for Special Functional Problems (mid 1974-81), I spent a major portion of my time dealing with what has been called "the weapon of the weak"—terrorism. And my twilight years were served as the United States Ambassador to the Conference on Disarmament in Geneva and simultaneously as a U.S. Representative to the First Committee of the United Nations (late 1981-1985) where my responsibilities centered on trying to limit or eliminate weapons. As you can imagine, these responsibilities were both difficult and challenging. Dealing with issues so close to the heart of national security limits one's options and circumscribes one's range of compromise when these issues are on the negotiating table.

Since my final public role was at the most responsible level and in a period of heightened international tension, it provided unique insights not only into the heady climate of multi-lateral negotiating gamesmanship, but also into the frustrations of trying to achieve consensus within

a diverse body of national representatives comprising a microcosm of the ***melange internutionule.***

On my return to the private sector I was inexorably drawn back to the subject of my primary focus in the State Department—international terrorism. I am intently interested—even amazed—by what has occurred in this area during my four year hiatus and thus my current focus is on the new direction which this macabre phenomenon has taken in that period and will likely take in the near term.

Contemporary terrorism poses a serious threat not only to lives and property but to institutions of democratic government and the rule of law. It is this challenge that I wish to examine with you today.

I was, to use the words of Dean Acheson, "present at the creation" of our nation's initial efforts to grapple with an awesome new phenomenon emerging on the world scene—international terrorism perpetrated by subnational groups.

Terror itself was not new. There have been acts of terror down through the ages. Terror was institutionalized by Robespierre, chief spokesman of France's Jacobin Party, who through his Committee of Public Safety governed France after the Revolution. The period between September 1793 and July 1794 became known as the "Reign of Terror," during which an estimated 20,000 persons were killed and some 300,000 arrested. The most notable victim was Marie Antoinette, whose public execution by the guillotine is generally regarded as one of the first incidents to be called "terrorism." Although perhaps it would not fall within today's definition of terrorism, it would embody some of the elements found in contemporary terrorist acts. Marie Antoinette was a symbolic victim and her public execution was designed to rid France of suspected traitors through fear of meeting a similar fate. Thus, by using a symbolic figure, fear was instilled within a much wider group than this Unfortunate victim.

It was precisely the same ***modus vivendi*** which led Irish Republican Army (IRA) terrorists to assassinate Lord Louis Mountbatten in 1979. His brutal murder served no direct political objective of the IRA, but, as a symbolic victim, his death sent shockwaves across the Irish Sea and demonstrated that Britain had—and would—pay a dear price if she maintained her present policy in Northern Ireland. As Neil Livingstone observed in his book, ***The War Against Terrorism:*** "Thus, public opinion, not the victim, is, in the case of Mountbatten as it is in most instances, the real target of the terrorists."[1]

[1] N. Livingstone, The War Against Terrorism **130** (198211986).

This objective of today's terrorist to involve a wider public dimension than the target or victim is the most distinguishing factor between a terrorist act and a common crime. It tends to blur the legal approaches to deal with terrorist crimes. This is especially true in the cases arising under extradition laws, particularly in recent United States court decisions.

Extradition is the means of rendering fugitives between the parties to such treaties. These treaties stipulate precisely the agreed offenses for which extradition is authorized. Most treaties, however, also contain an exception, referred to as the "political offense" exception. The typical language of this exception states:

> Extradition shall not be granted if. . . (i) the offense for which extradition is requested is regarded by the requested party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.[2]

Conceptually, this exception to the extradition obligation created by the treaty was intended to relieve a requested party from returning political dissenters or activists to stand trial for acts which that party did not perceive as criminal in any ethical or moral sense. Such passive offenses as treason, sedition, and espionage became known as "pure" political offenses. British court decisions later expanded the exception by devising a "relative" political offense, in which a common crime is so related to a political act that the entire offense is regarded as political in nature. It is the "relative" political offense which has been complicated by the advent of contemporary terrorism, due to the proclaimed political motivation for many terrorist acts.

William M. Hannay suggests that the "political offense" exception has become a useful mechanism by which "states may avoid being forced to favor one side over another during uncertain civil wars or being compelled to assist the winner wreak vengeance on the losers after a political coup."[3]

Hannay cautions, however, that

> The "political offense" exception, just as the concept of political asylum, is not a recognition of some inalienable right of the

---

[2] Treaty on Extradition, Oct. 21, 1976, United States-United Kingdom, art. V., 28 U.S.T. 227, T.I.A.S. No. 8468.

[3] Hannay, *Legislative Reform of U.S. Extradition Statutes: Plugging the Terrorists' Loophole,* 13 Den. J. Int'l L. & Pol. 53 (1983).

> fugitive to commit crimes in another country and escape extradition merely because the offenses were committed with a political purpose. The right involved is that of the state which has an interest in being able, when the state deems it appropriate, to give political asylum for humanitarian reasons or simply to refuse to become involved in the domestic political disputes of other states.[4]

Hannay asserts that "[r]ecent U.S. court decisions have sent out a message to the world that the American judicial system accepts the notion that the end justifies the means and that political violence is an acceptable method of accomplishing political goals."[5] He points to the fact that our courts have been blindly and mechanically applying the "relative" political offense test established by the nineteenth-century English case of *In re Castioni*[6] which held that a political offense is a crime which is "incidental to and formed a part of political disturbances.'"

Three cases, cited by Hannay to prove his point, involved members of the outlawed Provisional Irish Republican Army (PIRA): Peter McMullen, Desmond Mackin, and William Quinn. Each of these individuals was charged with criminal offenses related to the dispute over Northern Ireland by British authorities and their extradition was sought by Her Majesty's Government under the United States—United Kingdom Extradition Treaty. The magistrates in the *McMullen*[8] and *Mackin*[9] cases and the district court in the *Quinn*[10] case denied extradition on the ground that a political "disturbance" or "uprising" was taking place in Northern Ireland and that the criminal acts charged against these fugitives were "incidental to" these disturbances.

Following the *McMullen* decision in May of 1979, I was contacted by U.S. Attorney Thomas Sullivan from Chicago who requested assistance in an extradition hearing involving a young Palestinian, Ziyad Abu Eain. Abu Eain, a member of the Palestinian Liberation Organization (PLO), had been arrested in Chicago on August 21, 1979 pursuant to the request of the Israeli Government. He was charged with murder, attempted murder, and causing bodily harm with aggravated intent. The charges stemmed from a bomb allegedly planted by Abu Eain in a public marketplace in Tiberias which exploded, killing two youths and injuring

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[4] *Id.* at 59.
[5] *Id.* at 56.
[6] *In re* Castioni, [1891] 1 Q.B. 149.
[7] *Id.* at 153.
[8] *In re* The Extradition of McMullen, No. 37-81-099MG (N.D. Cal., filed May 11, 1979).
[9] *In re* Extradition of Desmond Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., fiied Aug. 13, 1981).
[10] Quinn V. Robinson, No. C-82-6688, slip. op. (N.D. Cal., filed Oct. 3, 1983).

thirty-six persons, many of whom were international tourists. Sullivan anticipated a defense effort to use the "political offense" exception under the *McMullen* precedent and insisted that the Department of State provide testimony as the appropriate authority of the "requested party" with respect to the "political character" of the offense charged.

In view of the precedent-setting nature of this request, there was some reticence to provide a departmental witness; however, the *McMullen* decision made it essential that a major effort be undertaken to establish a new judicial precedent dealing with contemporary terrorism. It was clear to almost all that our failure to cooperate fully in this case would be tantamount to putting out the "welcome mat" to terrorists around the world. Thus, as the chief advocate of a change in a traditional policy in the Department, I was appointed.

After several hours of grueling examination on the question of my credentials and defense efforts to expand the scope of my testimony beyond the Department's view of the "political character" of the offense charged, I finally was permitted to testify. The crux of that testimony was:

> By Mr. Sullivan [U.S. Attorney Thomas P. Sullivan]:
>
> Q. Mr. Fields, does the United States Department of State regard the offense described in Government Exhibits 1, 2, and 3 [Israeli extradition documents] as one of a political character?
>
> A. It does not.
>
> Q. And how does the Government regard that offense?
>
> A. As a common crime."
>
> . . .
>
> Q. . . . Will you please state the reasons for the answers you just gave, namely, that the Department of State regards the act described in [the Israeli extradition documents] as common criminal acts [sic] and not as an offense of a political character?
>
> A. . . . It is the view of the Department of State that the indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act and, as such, is a common crime of murder. And it is punishable in both states.[12]

[11] *In re* Extradition of **Abu** Eain, Magis. No. 79M 175 (N.D. Ill, filed Dec. 18, 1979) [Transcript Record for Oct. 10, 1979, at 1038.1

[12] *Id.* at 1040-41.

My intention was to suggest a basis under U.S. extradition law to remove "innocent civilians" as legitimate targets of terrorists. This approach had been adopted by the Geneva Conventions negotiated after the First World War in order to protect civilians during armed conflict. The magistrate accepted this approach in her memorandum opinion ordering Abu Eain's extradition. The magistrate's ruling was sustained by the U.S. district court when Abu Eain sought to test that ruling by a writ of habeas corpus. The U.S. Court of Appeals, Seventh Circuit, affirmed the district court's denial of Abu Eain's writ.[13]

The *Abu Eain* case achieved our desired result and Abu Eain was returned to Israel where he was tried, convicted, and imprisoned for his crimes. In his opinion for the Seventh Circuit, Judge Harlington Wood takes a strong stand against terrorists' use of the "political offense" exception to evade prosecution when it states:

> [T]he evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure as an incident of the expulsion of a certain population from the country, and thus directs its destructive efforts at a defined civilian populace. That, it would be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere."

Notwithstanding this unique—and laudable—judicial outcry against terrorism, the opinion based its correct ruling on the inapplicability of the "political offense" exception in this case upon flawed logic and archaic precedent.

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[13] Eain v. Wilkes, 641 F. 2d 504 (7th Cir. 1981).
"*Id.* at 520.

The court relied on the nineteenth century Queen'sbench case of *In re Meunier*[15] in which England returned an anarchist to France for having allegedly bombed a cafe and Army barracks in the cause of anarchy. Equating modern terrorism to anarchy in the last century, the opinion states:

> *Anarchy presents the extreme situation of violent political activity directed at civilians and serves to highlight the considerations appropriate for this country's judiciary in construing the requirements of our extradition laws and treaties.* But we emphasize that in this case, even assuming some measure of PLO involvement, we are presented with a situation that solely implicates *anarchist-like activity, i.e.*, the destruction of a political system by undermining the social foundation of the Government. The record in this case does not indicate that petitioner's [Abu Eain] alleged acts were anarchist-inspired, Yet the bombing, standing detached as it is from any substantial tie to political activity (and even if tied, as the petitioner insists, to certain aspects of the PLO's strategy to achieve its goals), is so closely analogous to anarchist doctrine considered in cases like *In re Meunier,* as to be almost indistinguishable.[16]

Viewing today's terrorists as yesterday's anarchists is patently wrong because it measures him and his acts in nineteenth-century terms. This ignores both fact and logic. If one must attempt to fit the usual contemporary terrorist into some historic mold, he comes closer to a revolutionary than to an anarchist.

An anarchist believes in the complete absence of government and law and uses political disorder and violence in achieving his nihilistic objective; whereas the revolutionary would use violence in order to overthrow a constituted authority or government in order to replace it with his own political alternative. Modern terrorists generally "seek not to overthrow the state but to change its policies in a particular area."" The common denominator is, of course, the resort to violence.

A significant distinction, however, between today's terrorist and both yesterday's anarchist and revolutionary is the transnational character of the modern terrorist. Anarchists and revolutionaries generally operated within their own national boundaries, occasionally with outside support.

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[15] [1894] 2 Q.B. 415.

[16] *See id.* at 521-22 (emphasis added).

[17] Jenkins, ***Terrorism and Beyond,*** F, **95,** Rand Corp. Rept. (Dec. **1982). A** report of the proceedings of an international conference on terrorism and low-level conflict sponsored by U.S. Departments of Energy, Justice, and State.

Today's terrorist is highly mobile and generally operates in third countries-often countries having no relationship to the national situs of the terrorist's objective or grievance. There is increasing evidence that the contemporary terrorist is also more often than not in fact a surrogate of a patron state utilizing terrorism as an extension of its foreign policy. This then is the intersection of contemporary terrorism and international law.

International law, must, therefore, modernize its approach to this novel and threatening phenomenon. It is a mistake for international law, just as it is for our domestic law, to attempt to deal with contemporary terrorism in terms of outmoded precedent, logic, or approach. Courts, like governments, must treat today's terrorism in contemporary terms.

Terrorism itself has undergone an evolution over the past two decades. For example, the first Palestinian-related hijacking (November, **1968)** was of an El Al Airliner commandeered by members of the Popular Front for the Liberation of Palestine (PFLP) and directed to Algeria. Women and children passengers were released and the male passengers and crew were held hostage for the release of Palestinian prisoners by Israel. The demands were met and the incident was ended without death or injury.

The first major terrorist media event took place in September, **1970** when Palestinian hijackers assembled three hijacked Boeing **707s,** one operated by TWA, at Dawson Landing Field in Jordan. Passengers and crew were evacuated and the multi-million dollar booty was exploded in a spectacular display, dutifully recorded by an army of international journalists. The terrorists were then launched on the world media stage and the Palestinian cause was catapulted from relative obscurity into international prominence. Palestinian terrorism had gotten our attention, without shedding a drop of blood.

Two years laters, however, in September, **1972,** terrorism moved into a bloodier and more dramatic mode. Palestinian "Black September" terrorists stormed the facility housing Israeli athletes participating in the **1972** Munich Olympic Games, taking a number of hostages. There ensued a media event obscuring the usually well-followed Games as the ski-masked terrorists flaunted and intimidated their hostages on balconies which provided a wondrous worldwide stage, beamed around the globe by a teaming and eager array of international journalists. This "theatre," as Brian Jenkins of Rand Corporation aptly described it, became a bloody nightmare when German authorities attempted to rescue the hapless athletes. When the smoke died down the world was treated to one of the goriest scenes outside of warfare since Chicago's St. Valen-

tine's Day Massacre—all through the magic of modern satellite communication.

The use of violence now had an established international means to influence political change. The terrorist now possessed power and impact beyond the wildest dream of anarchists or revolutionaries of yore.

The random acts of terror violence of the 60s and the 70s have escalated into a systematic pattern of violence. The terrorists have demonstrated skill, flexibility, innovation, and an insatiable desire for blood. The shift in terrorist tactics and strategy has not gone unnoticed. Our view of terrorism, as well as our nomenclature, has changed also. Ambassador Robert Oakley, Director of the State Department Office for Combating Terrorism, calls it "a form of low-insensity warfare."[18] Secretary of State George Shultz described it as "ambiguous warfare."[19] And, Rand's Brian Jenkins, referring to the terrorist bombing of the Marine barracks in Beirut, wrote, "On October 23 (1983), it became war."[20] Thus, terrorism has now become warfare. Certainly it is not conventional warfare, nor even does it fit the classical forms of guerrilla warfare, but, warfare it is.

I would describe it as "phantom warfare,'' principally because I think that it should find a new niche in the annals of warfare and enable us to tailor new strategies and tactics to deal with it. "Phantom warfare" takes into account the surrogate nature of much of today's terrorism where it is often difficult to identify the patron state. It also correctly describes the "hit and run" or "hit and die" tactics employed by most terrorist groups. It also conveys the novelty of this new form of conflict, which would enable us to craft novel and innovative responses and devise new approaches under international law to deal with it.

President Reagan, speaking before the American Bar Association, challenged us, as lawyers, to address the task of assuring that terrorists will stand before the bar of justice. He said,

> We can act together as free peoples who wish not to see our citizens kidnapped, or shot, or blown out of the skies—just as we acted together to rid the seas of piracy at the turn of the last century.

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[18] Address to the Issues Management Association, Chicago, Ill., Sept. 13, 1985.

[19] Address to the Low-Intensity Warfare Conference, Natl Def. Univ., Washington, D.C., Jan. 15, 1986.

[20] Jenkins, *Combatting Terrorism Becomes War,* Rand Corp. Paper [P-69881, May 1984.

> There can be no place on earth left where it is safe for these monsters to rest, or train, or practice their cruel and deadly skills. We must act together, or unilaterally if necessary, to ensure that terrorists have no sancturary anywhere.[21]

Of patron state support, he said,

> For those countries which sponsor such acts or fail to take action against terrorist criminals, the civilized world needs to ensure that their nonfeasance and malfeasance are answered with actions that demonstrate our unified resolve that this kind of activity must cease.[22]

The challenge and the course to deal with terrorists within the rule of law seems clear. Initially, we must find effective means to bring terrorists before the bar of justice and hold them accountable for their acts. This is accomplished by looking at deeds and not motivations. Motivations, especially those of political character, should not be considered in mitigation and not accepted as an excuse. Terrorist crimes, like all crimes, should be universally condemned and universally prosecuted.

In respect of our extradition laws, courts and magistrates should view terrorists and their acts in contemporary terms, not by analogy to ideological violence of the past. The forms and consequences of twentieth century violence are too awesome to be measured in nineteenth century terms. While the "political offense" exception has merit, in my view, it should only be allowed in cases were the charge does not involve violence. I would limit its application to "pure" political offenses and to those cases where the person sought proves that his extradition is being sought solely to try or punish him for a "political offense." It seems clear that the courts are finding it too difficult to apply the "relative political offense'' exception in the complex, politically charged milieu of contemporary terrorism. In this connection, it is interesting to note that Judge Robert P. Aguilar confirms this conclusion when he wrote in his opinion in *Quinn v. Robinson* that the "advent of the popularity of terrorism raises some serious questions as to the propriety and coverage of the political offense exception in extradition treaties."[23]

In fact, the United States and the United Kingdom concluded a Supplementary Extradition Treaty on June 25, 1985 which amends the po-

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[21] Dep't of State Pub. Aff. Cur: Pol. No. 721: Pres. Reagan, *The New Network of Terrorist States*, July 8, 1985.

[22] *Id.*

[23] Slip op. at 39.

litical offense exception contained in the **1972** Extradition Treaty between them. The amendment excludes specified offenses typically committed by terrorists[24] from the political offense exception in the earlier treaty. This Supplementary Treaty is before the Senate for advice and consent. Despite vigorous opposition to the treaty by politicians and academicians, it will hopefully pass, and lead to other amendatory efforts for older extradition treaties, where appropriate.

There have been congressional efforts to eliminate the political offense exception or to transfer its determination out of the courts and into the Department of State. The prospects of these legislative initiatives are in doubt, but could be improved if the courts continue to allow the "political offense" to thwart extradition of terrorists and terrorism continues to increase.

On the broader question of patron-state support of terrorism, the solutions or responses become more complex. The use of surrogate terrorism to extend foreign policies of states has the advantage of allowing the patron state to issue a "plausible denial," thereby evading culpability. States like Libya, Syria, Iraq, and Iran have been less adept at concealing their ties with acts of international terrorism and the perpetrators of those acts. This, of course, makes any denials issued by them less plausible and renders them culpable in the eyes of many around the world. It also enhances their prospects for becoming the targets of retaliation or preemption. Even so, the "smoking gun" with the fingerprints of the patron state will often remain elusive and an incredulous and apprehensive world will demand hard evidence to justify force in dealing with terrorists and, particularly, their patrons.

Preemption almost always presents problems under international law. Preemptive attacks on suspected terrorist training sites or headquarters will be difficult to defend due to the intelligence methods and sources used in locating these sites. Moreover, their location in third countries presents additional complications in choosing the preemptive option. Nonetheless, some victim states will use that option given the ephemeral nature of world opinion and the diversionary tide of world event. The ability to use this option seems to diminish with the size and power (political and military) of the employing state.

*'Aircraft hijacking and sabotage; crimes against internationally protected persons, including diplomats; hostage-taking; murder; manslaughter; malicious assault; kidnapping; and specified offenses involving firearms, explosives, and serious property damage.

Retaliation is less troublesome in that it is the response to an attack or violence done to citizens or national interests. Retaliation, however, must be proportional and appropriate to the nature of the act for which the response is made. It should be employed with great care. The Israeli retaliations in Lebanon to PLO attacks in Israel have generally been viewed as proportional and appropriate by most international commentators; however, the Israeli incursion to Beirut was seen to be excessive by many international legal writers and within the international community in general. The Israeli raid on the PLO headquarters in Tunis as a retaliatory measure following the murder of three Israeli citizens in Cyprus by Palestinian terrorists was likewise deemed excessive by most of the international community. Israel escaped security council censure only by a United States veto.

Acts of retaliation should be an option in our counter-terrorism policy wherever and whenever it meets the "proportional and appropriate" test. The proportionality will, of course, depend upon the nature and extent of the terrorist act triggering the response and the appropriateness will be viewed generally on the basis of culpability. Making evidence public will generally pose problems in relation to intelligence gathering methods and techniques, but this should not be an inhibiting factor given the growing menace of international terrorism to American citizens and interests around the world. The adage that "force must be met with force" applies to terrorist violence, but within the constraints of international legal norms. There are, however, dangers in its use and non-use. Cries of excess will be leveled where there is the appearance of disproportionality; but, conversely, timidity in appropriate use of force will be seen as weakness or lack of resolve in dealing with this pervasive phenomenon.

Self-help, like retaliation, is recognized under international legal norms and regarded as a legitimate use of force under the Charter. The best successful example of contemporary self-help was the Israeli operation at Entebbe Airport in Uganda. There was a classic situation in which Israeli and American citizens were held hostage and threatened with death by terrorists and the Government of Uganda was found to be aiding the terrorists. Self-help was the appropriate remedy and the Israeli use of force was proportional. Self-help is the remedy of choice when nationals of a state are held hostage in another state which is unwilling or unable to secure their release.

Addressing the nation in a televised broadcast on April **14,** 1986, President Ronald Reagan announced a series of air strikes on Libya aimed at Qadhafi's headquarters, terrorist facilities, and military assets which supported terrorist operations. The President stated that, "Self-defense is not only our right, it is our duty."

Although he justified the strike by citing the April 5th bombing of La Belle Discotheque in West Berlin which killed an American soldier and wounded fifty other individuals, the President did not describe the action as retaliatory. He warned that, 'When our citizens are abused or attacked anywhere in the world on the direct orders of a hostile regime, we will respond. . . ." While President Reagan established selfdefense as a response to terrorism directed against United States military personnel in this case, he implied that it would also be used when "U.S. installations and diplomats'' are attacked. This is consistent with the February 1986 "Public Report of the Vice President's Task Force on Combatting Terrorism" that affirmed that "the U.S. Government considers . . . terrorism . . . a potential threat to its national security and will resist the use of terrorism by all legal means available."

Selfdefense is a permitted use of force under Article 51 of the United Nations Charter "[i]f an armed attack occurs against a member of the United Nations. . . ." Armed attacks would include acts against national interests and would not be relegated only to attacks against the territory of the member; hence the President intended his use of force against Libya to fall within the ambit of Article 51 and so stated in his televised address.

There is a body of international law which regulates the relations among states and there are norms of international behavior for states and individuals. However, there is a clear and present danger to these institutions of civility in a small, vicious minority of self-proclaimed "freedom fighters" who, with the support of a handful of extremist states, seek to disrupt the fabric of society in order to bring about change in certain parts of the world. Change can be desired and beneficial, but change born of violence wreaked upon innocent civilians can never be condoned. Policy dictated by guns and bombs is an abomination and must be rejected by civilized men and nations. Terrorism has altered the way we live, travel, and even think. Our social fabric has been rent by a desperate band of renegades to a degree unmatched by the pirates of old—regarded in legal writings of the day as *hostes humani generis* [enemies of the human race]. Customary international law evolved to deal with this scourge of yesterday and piracy has largely faded into the bloody annals of history. It is appropriate to note that those pirates of yore were the Barbary pirates whose operations emanated from Tripoli, and the terrorists of today also utilize Tripoli for nurture and support. The United States is considering a similar response to today's scourge "on the shores of Tripoli."[25] How will international law view our response?

[25] Editor's note: The text was prepared before the U.S. air strike against Libya.

We, as international lawyers, must accept our President's challenge and be moving forces to create international legal norms to confront this modern threat to civilized behavior. Must we not urge the universal adoption of legal restraints on the use of violence against innocent civilians? There can be no motivation or cause so worthy that it can be legitimately advocated by slaughtering travelers in airports and airplanes, tourists in historic sites, diners in restaurants, and common people anywhere who are pursuing their lives. We must act now, lest our very way of life be jeopardized.

THE FIFTEENTH KENNETH J. HODSON LECTURE IN CRIMINAL LAW: A CRIMINAL JUSTICE SYSTEM DIVIDED AGAINST ITSELF

by Dean James E. Bond

I. INTRODUCTION

On 27 March 1986, Dean James E. Bond of the University of Puget Sound School of law delivered the Fifteenth Kenneth J. Hodson Lecture in Criminal Law at The Judge Advocate General's School.

Dean Bond is a graduate of Wabash College (B.A. 1964), Harvard Law School (LL.B. 1967), and the University of Virginia School of Law (LL.M. 1971 and S.J.D. 1972). He clerked for a U.S. district court judge and was an instructor at The Judge Advocate General's School, U.S. Army, from 1968 to 1972. He was an Associate Professor of Law at Washington and Lee University from 1972 until 1975, a Professor of Law at Wake Forest University School of Law from 1975 until 1986, and became Dean of the University of Puget Sound School of Law in 1986. Dean Bond has taught constitutional law, criminal law, criminal procedure, jurisprudence, professional responsibility, international law, comparative law, and administrative law, His published books include *Plea Bargaining and Guilty Pleas* (2d edition 1982) and *The Rules of Riot: Internal Conflict and the Law of War* (1974). In 1986 he will publish *James Clark McReynolds: I Dissent.* Also, Dean Bond has published over a dozen scholarly articles in various law reviews.

The text of Dean Bond's Hodson Lecture follows.

II. THE HODSON LECTURE

Ours is a criminal justice system divided against itself. On the one hand, the Supreme Court has dictated what has been called a due process model of the criminal justice system.[1] And the suggestion that the Burger Court has dismantled that system—a system imposed upon us by the Warren Court—is simply not true. Rather, the present court has at some points called a "stop" to further changes in the criminal justice system. In the lineup area, for example, it has not extended *United States v. Wade*[2] in the ways that the opinion ought logically to be extended if one

[1] *See generally* H. Packer, The Limits of the Criminal Sanction (1968).
[2] 388 U.S. 218 (1967).

accepts the rationale of the Court's decision in *Wade*.[3] In other areas the Court has limited the application of some Warren Court decisions. In the interrogation area, for example, it has not overruled *Miranda v.* Arizona[4] but has repeatedly limited the application of that decision.[5] Yet, in other areas the Burger Court in fact has moved the Warren Court model forward, as, for example, in the decision requiring appointment of a psychiatrist to assist the accused in his defense.[6] In short, the due process model of the criminal justice system dictated to us by the Warren Court is very much alive and well in recent decisions of the Supreme Court of the United States.

At the same time that the Court has dictated this version of the criminal justice system, the police, the prosecutors, the judges, the parole and probation officers, and the wardens of our prisons continue to operate a different kind of criminal justice system.[7] This alternative system has been called the crime control system. It is a system that puts much more emphasis on efficiently ferreting out crime and expeditiously prosecuting and punishing those found guilty of crime than it does on protecting the constitutional rights of those charged with crime.

How has this problem evolved? What accounts for a criminal justice system divided against itself? The problem has grown out of the tension between law enforcement experience and a revolution in the Court's perception of its role and its construction of the Constitution. The crime control system emerged out of the actual experiences of those charged with the administration of criminal justice. Their experience has been that quick investigation and effective interrogation are important to the solution of crime and to the punishment of those who have committed crime. At the same time, the Court since the early sixties has adopted a revolutionary view of its own role and has construed the Constitution very differently from its predecessors.

Let me elaborate on that last point. The Justices in the last twenty-five years increasingly have come to view themselves as statesmen who must fashion sound public policy, not just in the area of criminal proce-

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[3] *See, e.g.*, Kirby v. Illinois, 406 U.S. 682 (1972) (defendant who has been arrested but not formally charged is not entitled to counsel at police station identification). *Cf.* United States v. Gouveia, 467 U.S. 180 (1984) (prison inmates held in administrative detention while prison authorities investigate criminal charges against the inmates are not entitled to assistance of appointed counsel prior to the initiation of formal adversary proceedings).

[4] 384 U.S. 436 (1966).

[5] *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (officer need not give *Miranda* warnings if public safety requires immediate interrogation of the suspect); Michigan v. Tucker, 417 U.S. 433 (1974) (testimony of witness whose identity was learned by questioning defendant in the absence of full *Miranda* warnings was admissible).

[6] Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

[7] *See generally* Crime and Public Policy (J. Wilson ed. 1983).

dure, but across the board by wisely balancing the competing interests involved in any particular area. A majority of these judicial statesmen have convinced themselves that the appropriate model for the criminal justice system is the due process model, a model that puts enormous time and resources into "quality control"; that is, into ensuring that only the guilty are convicted.

If you think of the criminal justice system as an industry, it is easy to see the difference between the due process and crime control models of the criminal process. Under the due process model, most resources are put into "after checks" because you want to assure yourself that the end product—the conviction—is not only valid in terms of the merits but also is fashioned in a procedurally correct way. Contrariwise, the crime control model places more confidence in the people who are on the assembly line. It assumes that because of their expertise at every stage of the process—investigation, prosecution, incarceration—we can justifiably rely on the validity of their professional judgments.

In any case, the Court has, as I have said, come to see itself as a group of statesman rather than as craftsmen. Beyond that, of course, the Court has construed the Constitution very differently from its predecessors, in two significant ways. First, it has insisted that the due process clause of the fourteenth amendment incorporates and makes applicable against the states the fourth, fifth, sixth, and eighth amendments, the amendments that deal chiefly with criminal procedure.[8] Consequently, we are now operating under a common, uniform system of criminal procedure in this country, a system of criminal procedure dictated by the Supreme Court of the United States. Second, the Court has construed the substantive provisions of the fourth, fifth, sixth, and eighth amendments very broadly. Consequently, that common uniform code of criminal procedure is an extremely liberal one, infused with all of the values and all of the biases inherent in the due process model of the criminal justice system.

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[8] *E.g.*, Duncan v. Louisiana, **391** U.S. **145, 147-48 (1968):**

> In resolving conflicting claims concerning the meaning of this spacious [fourteenth amendment] language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments of the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects [the] Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses and to compulsory process for obtaining witnesses.

See generally Friendly, ***The Bill of Rights as a Code of Criminal Procedure,*** **53** Calif. L. Rev. **929 (1965).**

There are those who, of course, praise this development. Just last year at a conference on the role of the Court in the criminal justice system Professor Henry Clor said:

> The application of the constitution to criminal procedure is another area of tense current controversy in which a measure of judicial statemenship is imperative. Here courts frequently encounter conflicting claims of great magnitude, claims on behalf of law enforcement and claims on behalf of the rights of persons threatened with criminal punishment, both representing vital desiderata of a decent society.*

In short, the professor believes that the Court should balance those competing considerations and then in the form of decided cases dictate its conclusions to the rest of us.

I have a rather different view of the role of the Court. In this and in all other areas, I believe that the Court should confine itself to the craftsmanlike discharge of its responsibilities.[10] In other words, the Court should confine itself to an explication of the Constitution as the framers intended that it be understood and applied. In my view, the solution to the dilemma of a criminal justice system divided against itself is simple. The Court should resume that role which was originally and historically envisioned for it and should construe the fourth, fifth, sixth, and eighth amendments as their framers understood them.

As a result, the Court's decisions would generally reinforce rather than undercut the crime control model of the criminal justice system. Moreover, policy decision-making would be returned to the states and, to a somewhat lesser degree, national law enforcement agencies. Specifically, I would enjoin the Court to follow the original understanding **(1)** as to the role of the courts; **(2)** as to the incorporation of the Bill of Rights and, therefore, as to the applicability of the Bill of Rights to the states; and, finally, **(3)** as to the meaning of the fourth, fifth, sixth, and eighth amendments. This approach would constitute a principled counter-revolution in the criminal justice system.

In my view, no question of constitutional law is ever finally settled until it is settled right, and it is never settled right until it is settled according to the intentions of the framers. Now let me turn to what I understand to be the intentions of the framers with respect to the role of the Court, with respect to the incorporation of the fourteenth amendment

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[9] Clor, *Judicial Statesmanship and Constitutional Interpretation,* **26** *So.* **Tex.** L.J. **427** (1985).

[10] *See generally* Bond, *The Perils of Judicial Statesmanship,* 7 **Okla.** City U.L. Rev. **399** (1982).

against the states, and with respect to the meaning of the fourth, fifth, sixth, and eighth amendments.

A. THE ROLE OF THE COURT

The framers never intended judges to make law. Rather, they expected judges to interpret the law as its drafters intended it to be interpreted. If you will re-read the opinion with which you doubtless began your study of constitutional law, *Murbury v. Madison,"* you will realize that Chief Justice Marshall's primary justification for the doctrine of judicial review was that the judges would be bound by the constitution itself and by the framers' understanding of the Constitution. At no time in his distinguished career did that great Chief Justice ever intimate that the Justices of the Court might infuse their own policy preferences into the construction of the Constitution. Indeed, he is on record in a number of cases in addition to *Murbury v. Madison* that judges have no right to construe the Constitution other than as its framers intended it to be construed.[12] The framers understood both the importance of the rule of law and the critical role which judges played in sustaining the rule of law. They also realized that only a judge who construed the Constitution as the framers intended it to be construed could sustain the rule of law. The bottom line is that judges who respect the intentions of the framers reinforce the rule of law; judges who do not—judges who insist on acting as statesman and who ignore the intentions of the framers—undermine the rule of law.

All free societies are built on the rule of law. Justice Miller's explanation of that rule is as sound today as it was when he uttered it nearly a hundred years ago: "No man is so high that he is above the law: all officers of the government are creatures of the law and are bound to obey it."[13] Now the rule of law itself does not embody any substantive principles of justice. It simply enjoins men to act according to known, fixed rules of general applicability. To ensure the justness of the principles by which we are governed, we in this society rely on constitutionalism. American constitutionalism has three distinct features. It rests on popular sovereignty, it restricts the exercise of governmental authority through a written constitution, and it empowers courts to enforce those constitutional restrictions.

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[11] 5 U.S. (1 Cranch) 137 (1803).

[12] *E.g.*, Osborne v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when it is discerned, it is the duty of the Court to follow it.")

[13] United States v. Lee, 106 U.S. 196, 220 (1882).

This last strategic device as a bulwark of the rule of law is an important device. It has one important advantage. Courts are open to all persons. Any individual who feels himself aggrieved may go into court and demand that the government officer who in his judgment has injured him answer. Thus, the most lowly citizen can drag the highest errant government official into court and ask him to demonstrate that he had the authority to act as he did and that he exercised that authority lawfully. In this way a court serves as a forum through which an individual may insist that officials recognize his sovereign right to be governed by law rather than men. That is, after all, the essence of the rule of law.

The strategic device is nevertheless problematic. Because judges are men too, they likewise may become corrupt. To forestall that possibility, the framers created what I call "odd couple" provisions. Some provisions insulated the Justices from political pressures, like tenure and no reduction of pay while in office. At the same time other provisions subjected the Justices to political pressures, like the right of the President to appoint Justices and the right of Congress to increase or decrease the size of Court. The hope was that these odd couple provision might rein in a wayward Court. History suggests, however, that that has not worked. To date, the only effective restraint on the courts has been the Court's own perception of its role. When the Court has acted as craftsmen, the Court has sustained the rule of law. When the Court has chosen to act as statesmen, it has undermined the rule of law.

Thus, in the present debate between Attorney General Meese and Associate Justices Brennan and Stevens,[14] the Attorney General in my judgment is clearly right. For a sitting Justice to declare, as Justice Brennan did in his Georgetown speech, that to defer to the original understanding was both errant and arrogant nonsense is astonishing. It is at a minimum a confession from Justice Brennan that he at least is determined to conduct himself as a judicial statesman rather than as a judicial craftsman.

B. THE INCORPORATION OF BILL OF RIGHTS IN THE FOURTEENTH AMENDMENT

Those who drafted the fourteenth amendment did not intend the due process clause to incorporate and make applicable against the states the provisions of the Bill of Rights. Neither the congressional debates on the fourteenth amendment nor the subsequent state ratification debates sustain the proposition that the framers of the fourteenth amendment intended incorporation. Indeed, they refute the notion. You can search

[14] The debate, constituted by speeches delivered at different times and places, is collected in *Addresses—Construing the Constitution,* 19 U.C. Davis L. Rev. 2 (1985).

the congressional debates on the fourteenth amendment and you will find but one shred of evidence that it was intended to incorporate and apply against the states any part of the Bill of Rights. In one Senate speech the Senate sponsor of the fourteenth amendment (Senator Howard of Michigan) mentioned briefly that he understood the fourteenth amendment to guarantee rights of free speech and other rights in the first eight amendments.[15] Proponents of the view that the fourteenth amendment was intended to incorporate and apply against the states the entirety of the Bill of Rights have seized on that one off-hand comment as support for their arguments. It is a slender reed indeed, for the rest of the evidence in the congressional debates is overwhelmingly against the proposition.[16]

Now I can speak even more confidently about what the state ratification debates tell us because, with all due modesty, I know more about the state ratification debates than anyone else in the country.[17] Only I have been so foolish as to devote the last three years of my life to a study of those debates. The materials on the state ratification debates are widely scattered; and if I look a little pale, it is because I have spent the bulk of my time buried in the lowest sub-basements of archives and university libraries across the country, pouring over newspapers from 1866 to 1868 and going through private collections of papers and diaries and speeches and political campaign documents—all in an effort to find out what the people thought they were doing when they ratified the fourteenth amendment. Those of you who are perhaps less familiar than I am with that debate need to remember that the fourteenth amendment was the key political issue in the House and Senate elections in 1866 in the North and was a principal issue during Reconstruction in the South. In other words, the fourteenth amendment was at the center of political debate from 1866 to 1868. Virtually every politician had to declare for or against the amendment. Not surprisingly, there is a voluminous amount of information on what the people thought the fourteenth amendment meant.

The Republicans, of course, defended the fourteenth amendment. The Democrats attacked it. Unfortunately, racism was even more a fact of our public life then than it is now. The Democratic Party chose, in the parlance of the day, to "run against the nigger." They were determined

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[15] Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). *See also* Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871) (speech of John Bingham).

[16] *See, e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949); R. Berger, Government by Judiciary (1977).

[17] Bond, *Ratification of the 14th Amendment in North Carolina*, 20 Wake Forest L. Rev. 89 (1984); Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435 (1985).

to saddle the Republican Party with what was perceived to be the onus of supporting black equality. And except for the abolitionists, very few Republicans were willing to shoulder that burden. Consequently, the Republicans were on the defensive throughout the country in trying to explain what it was that the fourteenth amendment did.

You will not find in those debates any description of the due process clause as incorporating the Bill of Rights. None. Zero. There is only one shred at the national level, but there is absolutely none at the state level. When you realize that the Democrats were looking for all sorts of arguments why this amendment ought to be rejected, the absence of such descriptions is telling. Had the Democrats suspected that the due process clause was a Trojan Horse, concealing in its scope the Bill of Rights, they would have savaged that clause. Consider, for example, the right to bear arms. Nothing terrified whites more, particularly in the South, than the prospect of armed blacks. Had Democrats any reason to believe that the fourteenth amendment incorporated the second amendment and therefore guaranteed blacks the right to carry arms, they would have made that point over and over and over again. They did not. They did not because they understood, as the Republicans understood, that the due process clause was nothing more than a guarantee of procedural fairness.

There is then simply no historical justification for the assertion that the framers of the fourteenth amendment intended it to incorporate and apply against the states the provisions of the Bill of Rights, including those provisions that deal with criminal procedure. Consequently, the states should be free to fashion their own rules of criminal procedure, subject only to the very general due process and equal protection checks contained in the fourteenth amendment.

Hurtado v. California[18] is a good example of what ought to be done today. *Hurtado,* as you may recall, is a case involving the fifth amendment grand jury indictment requirement. California law did not require indictment by grand jury. The fifth amendment does. Hurtado was tried by information in California. He objected on the grounds that the fifth amendment was incorporated and applied against the states through the fourteenth amendment and that therefore he was entitled to a grand jury indictment, The Supreme Court rejected his claim.

It rejected his claim, not only because it believed that the fourteenth amendment due process clause did not incorporate the fifth amendment, but because close textual analysis also dictated that result. The fifth amendment also contains a due process clause. The Court reasoned that if a right to grand jury indictment was part of due process, the framers

[18] 110 U.S. 516 (1884).

would not have said in the same amendment that one is entitled to due process and also to an indictment by grand jury. That would have been redundant. One or the other would have been superfluous. Moreover, due process must mean the same thing in the fourteenth amendment that it means in the fifth amendment, said the Court. Because in the fifth amendment due process cannot possibly include the right to a grand jury indictment, it cannot mean right to grand jury indictment in the fourteenth amendment either. That is the kind of close, craftsman-like analysis of the Constitution which I think is not only appropriate but is required by a Justice's oath of office.

If the Court analyzed capital punishment questions as it analyzed the grand jury indictment question in *Hurtado*, the states would enjoy much greater latitude on those questions than they do presently.[19] A state would be free to impose capital punishment if it so chose. Of course, the Constitution would not require states to impose capital punishment either; it simply would not be seen as speaking to that question at all. The states themselves would be free to decide as a matter of state statute and state constitutional law whether they should impose capital punishment. Moreover, each state could choose to impose capital punishment according to whatever procedures it wished, so long as those procedures satisfied the very general requirements of due process and equal protection, the chief constraints which the fourteenth amendment imposes on the states.

The federal government also could impose capital punishment so long as its imposition did not constitute cruel and unusual punishment as the framers used that term in the eighth amendment. And there is no way that any court of craftsmen could ever conclude that the framers understood the cruel and unusual punishment clause of the eighth amendment to forbid capital punishment absolutely. In the first place, capital punishment was widespread at the time the Constitution was adopted. No one ever suggested at the time the Bill of Rights was added that it would preclude further imposition of the death penalty. Those who framed the Bill of Rights, those who sat in Congress, those who sat in the state legislatures and in the governors' chairs—in short, all those who were intimately familiar with the Bill of Rights—continued to operate systems of criminal justice in which capital punishment was a major feature. In view of that historical evidence, a court of craftsmen would necessarily conclude that the prohibition against cruel and unusual punishment permitted capital punishment.

There is also a textual argument that in my view it dispositive. The fifth amendment says, "No person shall be deprived of life, without due

[19] *See generally* G. Smith, Capital Punishment 1986:Last Lines of Defense (1986).

process of law." Now, I do not know how the state deprives one of life except by capital punishment. The fifth amendment does not bar the taking of life; it simply says that life cannot be taken except by due process of law. A person must be charged, a person must be tried, a person must have a right to present a defense against the charges: that is due process. That due process does not prevent stringing the defendant up after he has been found guilty.

C. CONSTRUCTION OF THOSE AMENDMENTS WHICH GOVERN THE CRIMINAL PROCESS

The Court should construe the fourth, fifth, sixth, and eighth amendments neither broadly nor narrowly, but as the framers intended that they be construed. Let me give you two examples. Example number one is the right to counsel. The Court should construe the right to counsel provisions rather more narrowly than they have because the original understanding of the sixth amendment guarantee of the right to counsel was simply that a defendant could have counsel present if he wanted his counsel to be present. The Court itself reviewed this history in *Powell v. Alabama*,[20] its first right to counsel case. The historical record is quite clear that the sixth amendment provision was a reaction to the absurd English rule which permitted the defendant to have counsel when he was charged with a misdemeanor but not when he was charged with a felony. The framers simply intended to abolish the indefensible English distinction by adopting a rule that said that the defendant was entitled to the assistance of counsel in all criminal prosecutions, misdemeanor or felony. In other words, if a defendant wants counsel and can afford counsel, counsel can appear; a court cannot exclude him.

The Court, however, has construed the right to counsel provision more broadly. It has insisted that the right to counsel attaches before trial, that the right to counsel continues after trial, and that in all these instances the state is required to supply counsel for indigent defendants. In *United States v. Wade*,[21] for example, the Court insisted that a defendant was entitled to the assistance of counsel at a lineup even though it is not at all clear what counsel can do for the defendant at the lineup.

Please understand that I am not opposed as a matter of public policy to the provision of defense counsel for indigent defendants. A humane and civilized society should provide indigent defendants with the assistance of counsel. Neither am I opposed as a matter of public policy to the provision of counsel and indeed to the provision of other kinds of assistance to indigents before and after trial. Again, it seems to me that a humane and

[20] 287 U.S. 45 (1932).
[21] 388 U.S. 218 (1967).

civilized society would provide such assistance generously. But I must confess I do not believe that the sixth amendment to the Constitution commands any of these public policies. And neither do I think it appropriate for nine Justices to dictate those public policies simply because in their private judgment those policies are sound and wise.

My second example is the guarantee against self-incrimination. Here, the Court should construe the privilege against self-incrimination somewhat more broadly than it has because the original understanding of the fifth amendment suggests that the framers viewed its scope very broadly.[22] Justice Fortas once summarized the import of the historic struggle to protect the individual from Star Chamber interrogations when he said:

> A man may be punished, even put to death by the state, but he should not be made to prostrate himself before its majesty. "Mea Culpa" belongs to a man and his God. It is a plea that cannot be exacted of free men by human authority. To require it is to insist that the state is the superior of the individuals who compose it instead of their servants.[23]

The privilege against self-incrimination, like the right to the assistance of counsel, grew out of a particular history; and that history suggests that the framers were very sensitive to the dangers that the oppressive hand of the state might be used to force the individual to convict himself.

If only that history was remembered, the principle against self-incrimination would be seen as a broad libertarian principle that a person may not be compelled to give evidence against himself. Thus, for example, the Court should hold that persons who are put in lineups have the right to remain silent. That is, they cannot be required to repeat the words that the alleged rapist or robber said. Furthermore, I think that the Court was mistaken in the blood sample cases when it decided that blood samples could be extracted forceably and used against the defendant." My understanding of the original intent of the framers with respect to the fifth amendment would suggest that the Court should have decided that the blood could not be taken from the defendant and used against him because it would violate the privilege against self-incrimination. Again, I reach that conclusion not because in my view

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[22] *See generally* L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968).

[23] *Cf.* Schmerber v. California, 384 U.S. 757, 779 (1966) (Fortas, J., dissenting).

[24] Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957).

that is sound public policy, but because that is what I understand the framers to have intended.

So long as the Constitution is construed as the framers intended it to be construed, we will always enjoy two options if we dislike the result. One option, of course, is statutory. If we feel that the framers were too crabbed in their view of the rights we should accord criminal defendants, then by statute we can accord criminal defendants whatever broader rights we feel they should have. Our second option is to amend the Constitution. For example, we may decide that the framers were too generous in their view of the rights which defendants should enjoy. If we conclude that the various provisions of the Constitution dealing with the rights of the criminally accused weigh the balance in favor of criminal defendants as against the state too greatly, we can redress that balance through appropriate amendments. We should not resort, however, to sub rosa amendment through judicial reinterpretation of the Constitution.

The Constitution should be construed by the Court as it came from the hands of the framers. That means, first, that the Justices should respect the framers' intentions that, as a court, they apply the Constitution as the framers understood it. Specifically, the Court should reject incorporation and return to the states the right and duty to fashion their own criminal justice systems, subject only to the general due process and equal protection constraints of the fourteenth amendment. Finally, I think, as the Attorney General has insisted, that the Court ought to return to the jurisprudence of original intention. It ought to stop looking at its own precedents because those precedents are not the Constitution.[25] And it ought to stop looking into its own sense of what is fair, what is wise, what is sound, and what is just. Instead, it should look into the text of the Constitution and the historical milieu out of which that document grew and construe the substantive provisions of the Constitution that deal with criminal procedure as their framers understood them.

The Court is not a third chamber of the Congress. It should not fashion public policy. Few questions are as important or as troublesome to us as those questions that we must answer in fashioning the criminal justice systems with which we wish to live both at the state and national levels. Nothing in the training or background of the Justices equips them to evaluate competing policies in that area, and the Court is not institutionally equipped to evaluate such difficult questions of public policy.

[25] *See generally* Easterbrook, Ways of Criticizing the Courts, 95 Harv. L. Rev. 802 (1982).

Neither do I see the Court as the moral leader of the nation. The courtroom, even the courtroom of the Supreme Court, is not a bully pulpit from which the Chief Justice and his colleagues can summon us to a moral crusade to improve and humanize the criminal justice system. The Court is not even the conscience of the country, and only arrogant Justices would presume to act as our conscience, calling us to realize our better natures. The Court is simply a group of nine judges, appointed not to impose their views on us with respect to what kind of criminal justice system we ought to have, but appointed to decide cases otherwise appropriately before them as the framers intended the Constitution to decide those questions.

Judicial craftsman, for all their modesty, reinforce the rule of law and constitutionalism and thus maximize, though they do not guarantee, the possibility of a just society. Judicial statesman, for all their confidence and vision, undermine the rule of law and constitutionalism and thus minimize the possibility of a just society. The Constitution cannot become just what the judges say it is if the rule of law is to survive. If the rule of law is to survive, the Constitution must remain what the framers intended it to be, a statement of the fundamental and enduring principles of the American political regime, not a detailed code of criminal procedure. A court of craftsmen must resist the temptation to impose any particular code of criminal procedure. Instead, a court of craftsmen must content themselves with defending those fundamental principles enshrined in the Constitution until the people choose to change them.

THE TENTH CHARLES L. DECKER LECTURE IN ADMINISTRATIVE AND CIVIL LAW: CIVIL LIBERTY AND MILITARY NECESSITY— SOME PRELIMINARY THOUGHTS ON *GOLDMAN V. WEINBERGER*

by Mr. Robert M. O'Neil
President, University of Virginia

I. INTRODUCTION

On **24** April **1986,** Mr. Robert **M.** O'Neil, the President of the University of Virginia, delivered the Tenth Charles L. Decker Lecture in Administrative and Civil Law at The Judge Advocate General's School.

Mr. O'Neil received his undergraduate degree in **1956** and his law degree in **1962** from Harvard College. He also holds a master's degree in American history from Harvard, where he served as a teaching fellow. Following graduation from law school, he served as a research assistant to Professor Paul Freund for the writing of the official history of the U.S. Supreme Court. From **1962** to **1963** he served as a law clerk to Justice William J. Brennan, Jr.

Mr. O'Neil's teaching career began at the University of California at Berkeley, where he was a member of the law faculty from **1963** to **1972.** At Berkeley he chaired the Committee on Academic Freedom of the Academic Senate, From **1970** to **1972,** he was the general counsel of the American Association of University Professors.

In **1972, Mr.** O'Neil became the Provost of the University of Cincinnati, and in **1975** he became the chief academic and administrative officer of Indiana University's Bloomington Campus. Since entering the field of administration, he has continued teaching courses in constitutional and commercial law.

As President of the University of Wisconsin from **1980** to **1985,** Mr. O'Neil led a state-wide system of **13** universities, **13** two-year centers, and a comprehensive extension program. He was also a professor of law at the University of Wisconsin at Madison.

Mr. O'Neil serves on the boards of the Carnegie Foundation for the Advancement of Teaching, the Council on Post-Secondary Accreditation, the Johnson Foundation, the Educational Testing Service, and Competitive Wisconsin. He chairs the Financial Resource Development Committee of the Center for Research Libraries and the Legal Affairs Commit-

tee of the National Association of State Universities and Land-Grant Colleges, and serves on other bodies such as the American Bar Association's Bicentennial Advisory Board.

He has published several books, including *Classrooms* in *the Crossfire*, a study of legal and policy aspects of textbook and curriculum censorship. Also, he co-authored *Civil Liberties: Case Studies and the* ***Law*** with his wife Karen.

Mr. O'Neil became President of the University of Virginia and the George M. Kaufman Professor of Law on 1 September 1985. The Judge Advocate General's School was indeed honored to be addressed by such a distinguished teacher and scholar. The text of Mr. O'Neil's address follows:

11. THE TENTH DECKER LECTURE

It is indeed an honor to be the Decker Lecturer this spring. As I have reflected upon the stature of those who have been your guests in previous years, I am humbled to be in their company. For a school which emphasizes military law and legal issues, you have surely attracted a distinguished group of civilians as your speakers over the years.

The quest for a suitable topic on such an occasion is never easy. The possibilities seem almost infinite. Quite recently, however, the Supreme Court's decision in *Goldman v. Weinberger*[1] provided precisely the vehicle that I had been seeking. Let me begin by reviewing the facts of the case, and then report as faithfully as I can what the Justices had to say on this subject in late March.

Dr. S. Simcha Goldman is an Orthodox Jew and an ordained Rabbi. More than ten years ago he entered the Armed Forces Health Professions Scholarship Program and was an inactive reservist in the Air Force while completing his degree in clinical psychology. After receiving his doctorate, Goldman entered active service in the Air Force as a commissioned officer. He had served for some years as a clinical psychologist at the mental health clinic at the March Air Force Base in Riverside, California. Until 1981 he avoided any possible controversy over wearing a yarmulke while in uniform by placing his service cap over the yarmulke when he was out of doors. In the spring of 1981, however, the first conflict arose when he appeared as a defense witness at a court-martial wearing only the yarmulke without the service cap. Trial counsel lodged a complaint with the hospital commander. The complaint cited an Air Force regulation that "[h]eadgear will not be worn, . . [w]hile indoors ex-

[1] 106 S. Ct. 1310 (1986), *aff'g*, 734 F.2d 1531 (D.C. Cir. 1984).

cept by armed security police in the performance of their duties."[2] While each of the services have detailed dress and uniform regulations, not all interpret them to forbid yarmulke wearing.[3] Even the Air Force had apparently taken a more relaxed view in the past,[4] but had recently tightened its policies.

The base commander now informed Captain Goldman that he was in violation of the regulation and ordered him not to wear his yarmulke while on duty outside the hospital. Although most of Goldman's duty time was at the hospital, he refused the colonel's request. A formal letter of reprimand followed with a warning that court-martial could result. A proposed extension of Goldman's term of active service was immediately withdrawn and replaced by a negative recommendation.

Goldman then brought suit against the Secretary of Defense in federal court, claiming that his religious liberty was infringed by the headgear rule. A district judge agreed and enjoined enforcement of the rule.[5] The Secretary promptly appealed. The District of Columbia Circuit reversed—holding that the proper test of a military rule alleged to conflict with individual rights or liberties was whether "legitimate military ends are sought to be achieved" and whether the rule is "designed to accommodate the individual right to an appropriate degree."[6] Under that test, the court concluded that the "Air Force's interest in uniformity renders the strict enforcement of its regulation permissible."[7]

Last spring the Supreme Court agreed to review this novel issue and handed down its judgment a month ago. Predictably, the Justices diverged in several interesting directions. Justice Rehnquist spoke for a majority in affirming the circuit court decision on very similar grounds—that is, by paying substantial deference to the judgment of military necessity even when a regulation to some degree abridged free exercise of religion.[8] Justices Stevens, White, and Powell concurred in the Court's opinion, but Justice Stevens wrote a separate concurring opinion for them to further explain the issue. To them, Goldman's

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[2] AFR 35-10, para. 1-6h(2)(f) (1980).

[3] *See, e.g.*, Dep't of Army, Reg. No. 670-1, Wear and Appearance of Army Uniforms and Insignia, para. 1-7b(1)(c) (16 Jan. 1986)("Religious skullcaps of plain design and standard color that do not exceed six inches in diameter [may be worn] while in living quarters, indoor dining facilities, and worship service locations.").

[4] A specific exception to the general policy was in fact granted to another Orthodox Jewish officer stationed elsewhere before Captain Goldman's troubles arose. *See* Joint Appendix at 106-118,125.

[5] Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1981).

[6] Goldman v. Secretary of Defense, 734 F.2d 1531,1536(D.C. Cir.), *reh. denied,* 739 F.2d 657 (D.C.Cir. 1984).

[7] *Id.* at 1540.

[8] 106 S.Ct. 1310,1312,1313(1986).

appeal "presents an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel."[9] Yet they declined to create such an exception because doing so for the Orthodox Jew wearing a relatively inconspicuous yarmulke would require similar treatment for members of other religious faiths whose sectarian headgear could far less readily be accommodated with military needs. It was, therefore, a different interest in uniformity-consistent treatment among religious groups—which justified denying to the Orthodox Jew a dispensation which by itself might seem innocuous.'" To require an exception in Goldman's case alone would involve disparate treatment of equally devout service personnel." It would also put the *Air* Force in the business of drawing distinctions among religious faiths on purely practical grounds.[12] Thus, if one type of uniformity did not sustain the military policy, another and quite different measure of uniformity did so.

There followed three separate dissenting opinions reflecting the variant views of four members of the Court. For Justices Brennan and Marshall, the majority's standard of review was plainly constitutionally deficient; a far higher degree of military necessity should be required before allowing enforcement of a general rule in ways that clearly abridged freedom of worship.[13] Moreover, the armed services had apparently condoned other forms of religious symbols—for example, bracelets, rings, and crosses around the neck—under a standard which broadly allowed "neat and conservative" insignia." Justices Brennan and Marshall found "no rational reason . . . why yarmulkes cannot be judged by the same criterion."[15] Finally, they took exception with the deference of their colleagues to a distinction between visible and invisible religious symbols—a distinction which in effect (if not by design) favored majority religions over minority faiths since the latter were more likely to display visible symbols.[16]

Justice Blackmun wrote alone in dissent on a slightly different theory. To him, the Air Force could not justify rejecting Goldman's claim by invoking potentially more serious or complex problems involving other faiths." In his view "the Air Force has failed to produce even a mini-

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[9] *Id.* at 1314 (Stevens, White, Powell, JJ., concurring).
[10] *Id.*
[11] *Id.* at 1316.
[12] *Id.*
[13] *Id.* at 1317 (Brennan, Marshall, JJ., dissenting),
[14] *Id.* at 1319, 1320.
[15] *Id.* at 1320.
[16] *Id.* at 1320, 1321.
[17] *Id.* at 1323, 1324 (Blackmun, J., dissenting).

mally credible explanation for its refusal to allow Goldman to keep his head covered indoors."[18]

The saga ends with a rare display of consensus by Justices O'Connor and Marshall. In their view, "the Court should attempt to articulate and apply an appropriate standard for a free exercise claim in the military context, and should examine Captain Goldman's claim in light of that standard."[19] They urged that the resolution of such claims in the military should be similar to their resolution in civilian contexts—save to the extent a special and distinctive military necessity might justify different treatment. The need for military discipline and esprit de corps they took as a given; but they added,

> [T]he mere presence of such an interest cannot . . . end the analysis of whether a refusal by the Government to honor the free exercise of an individual's religion is constitutionally acceptable. A citizen pursuing even the most noble cause must remain within the bounds of the law. So too, the Government may, even in pursuing its most compelling interests, be subject to specific restraints in doing so.[20]

One might begin analyzing *Goldman* by observing that courts are seldom comfortable with symbolic displays on uniforms. I often recall two starkly contrasting cases of the 70s. A Massachusetts court had held that an anti-Vietnam War protestor could be fined for placing a flag patch on the seat of his pants as a novel means of expression.[21] Not long after, an appellate court in Illinois sustained the dismissal of a suburban Chicago police officer for *refusing* to wear the required American flag patch on the sleeve of his jacket.[22] Those cases dealt, of course, with the American flag—perhaps the most difficult and perplexing symbol of all. Nonetheless, the startling contrast does remind us of the perilous paths which courts face in this area of the law. It should also garner some sympathy for the sharply divided *Goldman* Court.

The case before us might be said to draw upon three branches of the law. One, of course, concerns free exercise of religion—that clause of the

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[18] *Id.* at 1323.

[19] *Id.* at 1324 (O'Connor, Marshall, JJ., dissenting).

[20] *Id.* at 1325.

[21] Commonwealth v. Gougen, 279 N.E.2d 666 (Mass.). In Smith v. Gougen, 343 F. Supp. 161 (D. Mass.), aff'd, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974), the federal district court set aside the conviction on a writ of habeas corpus.

[22] Slocum v. Fire & Police Comm'n of East Peoria, 290 N.E.2d 28 (1972). *But* see Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983), cert. denied, 104 S. Ct. 3471 (1984) (dismissal of black police officers for public removal of American flag from their uniforms to emphasize racially discriminatory practices within the department violates the first and fourteenth amendments).

first amendment which we have most recently celebrated in marking the bicentennial of the Virginia Statute for Religious Freedom.[23] The case draws secondly upon precedents in the military—including a number of cases in which the Court has sought to balance individual rights or liberties with special needs of the armed services.[24] Third, and perhaps least obviously, the case draws upon a body of public employment law—after all, members of the armed forces are public employees, even if of a special kind, and necessarily subject to a unique set of legal constraints.

In fact perhaps I might offer first some insight from the public employment analogy.[25] Curiously no member of the Court saw public employment law as potentially useful; my own involvement with this rather esoteric branch of law has been so extensive that I cannot resist invoking it here. (Indeed, if I might be permitted a partially relevant confession, I did some ten years ago design and offer a course on constitutional aspects of pubic employment law. Ten students initially registered for the course; after the first class, six had left—expecting the course would cover collective bargaining in the public sector—and only four stalwarts remained for the balance of the semester. It was a humbling experience even for a fairly seasoned law teacher. It reminded me that not every subject which is worthy of a law professor's attention is necessarily appropriate for the law school curriculum.)

In any event I would submit that the law of public employment offers at least one potential contribution. Ten years ago, a group of male police officers challenged the authority of the county police force for which they worked to regulate the length and style of their hair. The appellate court struck down the rule because the "choice of personal appearance is an ingredient of an individual's personal liberty" protected by the fourteenth amendment.[26] While recognizing that police departments did

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[23] His "Bill for Establishing Religious Freedom" was one of the accomplishments for which Mr. Jefferson wanted to be, and is, remembered on his tombstone at Monticello. His original draft may be located in The Complete Jefferson at 946 (Padover ed. 1943). A copy of the statute as amended (only the bill's preamble was effected) by the state assembly can be found in The Portable Thomas Jefferson at 251 (Peterson ed. 1975). The story of the bill's passage two hundred years ago, in which Mr. Jefferson's lifelong friend and colleague, James Madison, was intimately involved, is especially well told in Brant, II Biography of James Madison 343-55 (1948).

[24] *See, e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983); Rostker v. Goldberg, 453 U.S. 57 (1981); Brown v. Glines, 444 US. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976); Schlesinger v. Councilman, 420 U.S. 738 (1975); Parker v. Levy, 417 U.S. 733 (1974).

[25] The starting point in almost any discussion of public employment law as it relates to the first amendment rights of employees is Pickering v. Board of Education, 391 U.S. 563 (1968). *See* Connick v. Myers, 461 U.S. 138 (1983); Branti v. Finkel, 445 U.S. 507 (1980); Mount Healthy Board of Ed. v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann, 408 U.S. 593 (1972); *see also* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (decided the year before *Pickering* and often cited).

[26] Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973), *aff'd*, 508 F.2d 836 (2d Cir. 1975) (per curiam).

have special needs for discipline and uniformity, the court found those interests insufficient to require sartorial simplicity of all police officers.

The Supreme Court reversed in *Kelley v. Johnson*.[27] The Justices assumed that the Constitution protects an ordinary citizen's choice of personal appearance (including hair style); but the issue before the Court was the personal appearance of police officers and not of plain citizens. Because the county regulated many aspects of police conduct—inter alia, by requiring the wearing of a uniform and saluting the flag, forbidding smoking—there were already substantial limits on an officer's personal range of choice. The selection of a "particular mode of organization" for law enforcement further limited the range of individual options.[28] Hair length and style rules "cannot be viewed in isolation but must be rather considered in the context of the Government's chosen mode of organization of its police force."[29] The constitutional issue thus emerged as a rather narrow one: "It is whether the police officer can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force and the promotion of safety of persons and property."[30] The Court did not search far for a negative answer. The county might well have based its rule on "a desire to make police officers readily recognizable to members of the public, or a desire for the esprit de corps that such similarity is felt to inculcate within the police force itself."[31] Either interest would provide the required rational basis to support the rule and its application.

Three Justices (all still on the Court) wrote separately. Justice Powell concurred but wished to keep open the issue of "a liberty interest within the Fourteenth Amendment as to matters of personal appearance."[32] Justices Brennan and Marshall dissented, arguing that the Constitution protects the personal appearance of public employees and that the rule in question did not sufficiently serve the asserted governmental interest ~ . ~ ~

We might now ask whether the police hair length case bears upon the yarmulke question recently before the Court. It seems to me that it inescapably does—and I will confess to some surprise that none of the Justices recalled that relatively recent case in which a majority of them had

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[27] 425 U.S. 238 (1976), *rev'g* Dwen v. Barry, 508 F.2d 836 (2d Cir. 1975) (per curiam).
[28] *Id.* at 246.
[29] *Id.* at 241.
[30] *Id.*
[31] *Id.* at 248.
[32] *Id.* at 249 (Powell, J., concurring).
[33] *Id.* at 254 (Marshall, J., dissenting).

taken part.[34] There are, however, two significant differences. On the one hand, the interest in wearing a yarmulke seems substantially stronger in constitutional terms than wearing one's hair longer than the rules permit. The yarmulke is the essence of religious exercise, as all the Justices acknowledged. Constitutional protection of deviant hair styles never got more than grudging acceptance by the Court even at the height of sartorial diffusion in the 60s and early 70s. So in terms of asserted individual interests, the claim in *Goldman* seemed far stronger than that in *Kelley*.

The second difference concerns the Court's legal standard. In both cases a majority deferred to the choice of rules by a public employer which must demand a higher degree of discipline and uniformity of its personnel than does the typical government agency. Yet the degree of deference—the willingness to accept even an asserted grooming interest—seems greater in *Goldman* than it was in *Kelley*. Perhaps a higher degree of deference is appropriate to the military than to paramilitary civilian employment; yet that is something the Court has never made explicit in this context. Let me, however, leave that issue for later discussion because it takes us from the general area of public employment to the particular topic of military necessity. It is that subject which I would reserve for final treatment after a discussion (to which we now come) of the religious freedom claim.

The status of religious liberty is less clear in Supreme Court decisions than one might expect. The Supreme Court has rendered a fair number of apposite judgments—going back at least to the case in the 1870s upholding federal criminal sanctions against polygamous marriage despite the then-prevalent (though long obsolete) view of the Latter Day Saints.[35] The intervening precedents can be summarized relatively succinctly. In the early 1960s the Court upheld laws which required businesses to close on Sunday—though acknowledging that Sunday was a uniquely Christian day of worship.[36] Even the claims of Orthodox Jews and other Sabbatarians were subordinated to the asserted government interest in a uniform day of rest.[37] The painful economic choice for

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[34] The case, in fact, received fairly extensive treatment in the briefs filed. *See* Respondent's Opposition Brief at 4, 9 (Mar. 25 1985); Petitioner's Reply Brief at 3 (Apr. 8, 1985); Respondent's Brief at 17, 28, 29, 42 (Nov. 27, 1985).

[35] Reynolds v. United States, 98 U.S. 145, 166 (1878); see also Davis v. Beason, 133 U.S. 333 (1890) (Idaho statute denying the vote to one who counseled or taught bigamy or polygamy held constitutional); *cf.* Mormon Church v. United States, 136 U.S. 1 (1890) (act of Congress repealing church's act of incorporation and reclaiming large tracts of church-land for the United States held constitutional).

[36] McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961) (decided the same day).

[37] Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961) (both also decided the same day as *McGowan v.* Maryland).

Sabbatarians was obvious; the Court conceded that Orthodox Jews and others might suffer substantial economic loss by being unable to do business on Saturday for reasons of conscience or on Sunday for reasons of civil law.[38] Nonetheless, the conflict was resolved in favor of a strong government interest in a uniform day of repose.

Only two years later, the Court sharply distinguished the *Sunday Law Cases.* Now a majority held that states may not force citizens to choose between observing their day of religious worship and remaining eligible for unemployment compensation.[39] Thus a Sabbatarian could constitutionally refuse to accept Saturday employment without losing her jobless benefits. More than a decade later, an even clearer majority reached a similar conclusion in a case involving religious objection to manufacturing of munitions and other war material.[40] Once again the Court gave primacy to the individual's claim of religious liberty—even though in such cases the government asserted substantial administrative inconvenience in recognizing a conscientious exemption. (Incidentally, this might be a proper point at which to explain something clear to those familiar with either military or constitutional law, but perhaps not obvious to others. Courts have never been required to grant a conscientious objection from military service since Congress has from the start exempted those who have consistent religious objections to war." In the 1960s, the exemption was judicially broadened to cover certain persons who have philosophical objections akin to the more traditional theological constraints.[42] So it is that conscientious objection arises only in other settings, such as the munitions manufacture/unemployment case of which I spoke a moment ago.)

There is one other case from the 70s that surely has some bearing. The Old Order Amish insist on religious grounds that their children should not be sent to school beyond the eighth grade. After that time the community provides its own instruction in farms, fields, and shops; it is against religious doctrine to have them in secular classrooms. Many states simply excuse Amish and other children under these conditions.

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[38] *See* Justice Stewart's dissent in Braunfeld v. Brown, 366 U.S. 599, 616 (1961).

[39] Sherbert v. Verner, 374 U.S. 398 (1963)(7:2 decision with one concurring opinion and one opinion concurring in result).

'Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981)(8:1 decision with one concurring opinion).

"Exemption from military service on religious grounds, it has been observed by the Court, is based on congressional policy rather than constitutional right. ***See*** United States v. Macintosh, 283 U.S. 605, 623-25 (1931)(dicta), ***overruled on other grounds,*** Girouard v. United States, 328 U.S. 61 (1946); ***see also In re*** Summers, 325 U.S. 561 (1945); Hamilton v. Regents, 293 U S. 245 (1934)(both supportive of the dicta alluded to in *Macintosh*).

[42] *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U S. 163 (1965). But *cf.* Gillette v. United States, 401 U.S. 437 (1971)(objections to a "particular war" do not entitle the objector to an exemption).

Wisconsin, almost alone among states with significant Amish populations, does not. The inevitable clash between the Amish and compulsory education came before the Supreme Court in the mid 1970s, and to the surprise of most observors, the Amish prevailed.[43] Despite the strong state interest in compulsory education, the Justice found the religiously based claim for exemption to be overpowering. On that basis the Court simply created an exception for the Amish—noting not only the depth of conscience behind the claim but also the quality of the parallel educational experience which the Amish community afforded its own young people.[44] While the case may not have much meaning except for a few small and dwindling sects—and has been consistently distinguished in other tests over compulsory schooling[45]—it marked a major step in the evolution of religious freedom.

In the 80s there have been few major decisions and the results may not seem entirely consistent. Several years ago, the Supreme Court rejected an Amish farmer's religiously based objection to Social Security coverage on essentially practical grounds; to admit one such exception, it warned, would risk opening the flood gates for many others of a similar kind.[46] Yet only last summer an evenly divided Court held that Nebraska could not require photographs on driver's licenses of people who on religious grounds believe such a rule would force them to "make a graven image."[47] And this year the Court has reviewed the analogous question of whether the federal government may require applicants for various welfare programs to use Social Security numbers if religious objections intervene.[48] Lower courts have upheld the religious freedom claim.[49]

Clearly none of these decisions sheds direct light on Captain Goldman's constitutional claim. And there is one federal court of appeals case which further complicates the picture.[50] It is the only one which, to my knowledge, addresses the conflict between general law and the wearing

[43]Wisconsin v. Yoder, 406 U S . 205 (1972).

[44]*Id*. at 215-18.

[45]*See* Duro **v.** District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983), cert denied, 465 U.S. 1006 (1984); Sheehan v. Scott, 520 F.2d 825 (7th Cir. 1975); Hatch **v.** Goerke, 502 F.2d 1189 (10th Cir. 1974).

[46]United States v. Lee, 455 U S . 252, 259 (1982).

[47]Jensen v. Quaring, 105 S. Ct. 3492 (1985), affirming *by equal* division, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

[48]Bowen v. Roy, No. 84-780 (U.S. June 11, 1986). The Court sustained the government's position on the constitutionality of using social security numbers already in its files, but were as sharply divided as in Goldman on the related question of whether the government could constitutionally deny aid to parents who refused to supply known numbers on periodic request forms.

[49]Roy **v.** Cohen, 590 F. Supp. 600 (M.D. Pa. 1984).

[50]Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982). cert. denied, 459 U S . 1156 (1983).

of the yarmulke. The case presented a challenge to an Illinois state high school athletic association rule which barred wearing any headdress during basketball games. An Orthodox Jewish student was ruled ineligible for refusing to remove his yarmulke while on the court. A federal district judge upheld his claim and required the athletic association to grant an exemption.[51] The appellate court, however, reached a different accommodation—not so much by discounting the student's interest, but by placing upon the Jewish player the burden of finding some means of accommodation—perhaps a more secure method of attachment—rather than putting the burden of accommodation on the athletic association.[52] Implicit in that judgment, of course, was a constitutional standard of somewhat lesser rigor. Practical needs of a state athletic association received an implicit measure of deference not unlike that given in *Goldman* to the claims of military necessity. Yet it is a long way from Illinois high school basketball to March Air Force Base—and to get there we must now address the third issue—the doctrine of military necessity, which proved to be the critical element in *Goldman.*

I must, of course, approach this part of the analysis with the greatest of deference as I am in the company of many who are far more knowledgeable of it than I. With that disclaimer, let me offer what observations I can before stepping back to look once more at the Supreme Court resolution of conflicting claims.

Contrasting general statements are readily found in recent Supreme Court decisions on this subject. In 1983, for example, the Justices reaffirmed that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[53] Yet the Court has often observed that "the military is, by necessity, a specialized society separate from civilian society."[54] That difference has meant that "the military must insist upon a respect for duty and a discipline without counterpart in civilian life;"[55] thus the Court has reminded us from time to time, "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."[56] Such general pronouncements do relatively little to resolve particular cases.

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[51] 527 F. Supp. 637 (N.D. Ill. 1981).

[52] 683 F.2d 1030, 1035 (7th Cir. 1982).

[53] Chappell v. Wallace, 462 U.S. 296, 304 (1983) (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962)).

"Parker v. Levy, 417 U.S. 733, 743 (1974); the same, or *similar* reasoning is adopted extensively thereafter, *see, e.g.*, Goldman v. Wienberger, 106 S. Ct. 1310, 1312, 1313 (1986); Chappell v. Wallace, 462 U.S. 296, 300 (1983); Rostker v. Goldberg, 453 U.S. 57, 66 (1981); Brown v. Glinea, 444 U.S. 348, 354 (1980); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

[55] Schlesinger v. Councilman, 420 US. 738, 757 (1975).

[56] Parker v. Levy, 417 U.S. 733, 751 (1974).

The doctrine of military necessity has a long and distinguished history. There is evidence of its origin in Alexander Hamilton's *Twenty-third Federalist* which recognized the need for special deference in framing rules and policies affecting the armed services.[57] That doctrine received modern recognition in a 1953 case which contained very strong and deferential language.[58] In the 1960s, however, the Warren Court substantially modified the doctrine and in several cases (involving both military and civilian personnel subject to military regulations) balanced claims in favor of individual rights and liberties.[59] Then in 1974 the

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> These powers [essential to the common defense] ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.
>
> The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence (sic.) [i.e., Congress and the military itself].
>
> [T]he means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.
>
> [The] government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinable limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence (sic.) and protection of the community, in any matter essential to the formation, direction, or support of the NATIONAL FORCES.

The Federalist, No. 23, at 200 (A. Hamilton) (B.F. Wright ed. 1961).

[58] Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters . . . as the [military] must be scrupulous not to intervene in judicial matters."). *See also* Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality decision) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.").

[59] For the Warren Court's treatment of civilians in military necessity cases, see, *e.g.*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); all relying heavily upon earlier Warren Court decisions, Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). For the court's treatment of a military person, see O'Callahan v. Parker, 395 U.S. 258 (1969) (decided only three weeks before the Chief Justice's retirement). Importantly, however, as Justice Douglas would indicate in his dissent to the *Parker* v. Levy opinion (to be treated subsequently), which was decided by the Burger Court, these cases dealt only with the "nature of the tribunal which may try a person and/or the procedure to be followed." Parker v. Levy, 417 U.S. 733, 768 (Douglas, J., dissenting). *But cf.* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), holding that a civilian employee's right to enter a military base may be revoked for security reasons without a hearing.

pendulum swung back once again in the often cited decision of ***Parker v. Levy***.[60] An Army captain argued during court-martial proceedings that certain provisions of the Uniform Code of Military Justice abridged his freedom of expression. He would certainly have prevailed were he a civilian employee of almost any government agency. Yet when it came to the armed forces, the Supreme Court majority now invoked the doctrine of military necessity in rejecting the captain's constitutional arguments. In addition to the language which I quoted a moment ago, the majority went to to declare:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[61]

Since that time the Court has on several occasions sustained convictions for violation of military rules—for example, one which prohibits distribution of political material on a military base[62] and another that bars a person's reentry to a base for reasons of protest after having once been asked to leave.[63] Through these cases runs a rather substantial deference which had been under doubt only during the 1960s. Most recently the Court has held that military personnel may not maintain suits to recover money damages from superior officers for alleged violation of constitutional rights;[64] the unique disciplinary structure of the armed services and the scope of congressional oversight make it inappropriate to give military personnel remedies comparable to those available to civilians aggrieved by official actions.[65] This judgment, incidentally, was unanimous; even Justices Brennan and Marshall did not demur.

What guidance does any of this give us in the *Goldman* case? It is surely a more difficult case than most of those in which the Court has recently affirmed military necessity. On one hand, the individual religious freedom claim is at the core of Orthodox Judaism. No Justice questioned either the traditional nature or the personal sincerity of the wearing of the yarmulke. Moreover, it is a particularly quiet and unobtrusive form of religious display. Indeed, some of the armed services have historically

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[60] 417 U.S. 733, 758 (1974).
[61] *Id.* at 752.
[62] Greer v. Spock, 424 U.S. 828 (1976).
[63] United States v. Albertini, 105 S. Ct. 2897 (1985).
[64] Chappell v. Wallace, 462 U.S. 296 (1983).
[65] *Id.* at 304.

allowed the wearing of yarmulkes—just as each service apparently permits Catholics to wear crosses around their necks and members of other sects to wear rings or other forms of symbolic jewelry.[66] It is only headgear which creates a problem—and that only because the yarmulke inadvertently runs afoul of a general rule drafted with no thought of religious practices.

On the other hand there is no question that such an issue must be approached differently in military and civilian contexts. Every Justice has accepted the need for greater deference to the armed forces and their needs. That difference is implicit in the very structure of our government and has been reaffirmed repeatedly from the earliest cases in this field.

I will confess I remain troubled by the majority view. Let me illustrate two of my concerns. Suppose it was Captain Goldman's practice to wear a yarmulke only on the holiest of days during the year. Would the Court's rationale still apply if the Air Force insisted it could not tolerate such a display of headgear even one or two days a year? And what of the distinction between visible and invisible religious symbols—the cross around the neck and the yarmulke on the head? Is the governmental interest in the one substantially greater when the individual interests have a comparable constitutional foundation? These are among the questions that have led me to wonder whether the dissenters might have struck a balance no less satisfactory to the military but more sensitive to individual liberty.

I find myself in particular sympathy with Justice O'Connor's view. For her, the majority's failing was its lack of a test for military rules which would comport with civilian rights and liberties. She argued that "the test that one can glean from this Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending."[67] She would, in other words, have asked the military to prove more than did the majority—to show that some compelling interest justified not only the general headgear ban, but specif-

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[66] *See* Goldman v. Weinberger, 739 F.2d 657, 659 (Starr, J., dissenting); Brief for Amicus Curiae, American Jewish Congress (Sept. 3, 1985) (AFR 35-10 permits crucifixes under shirts and Masonic rings). Among the more liberal practices of other branches of the armed services was the **Army's** allowance for Sikhs to wear beads, unshorn hair, turbans, and religious bracelets. The exception lasted from 1958 to 1981, when it was ended because it became evident significant numbers of additional exceptions would have to be granted, ***see generally*** Folk, ***Military Appearance Requirements and Free Exercise of Religion,*** 98 Mil. L. Rev. 53.62 (1982).

[67] ***Goldman,*** 106 S. Ct. at 1325 (O'Connor, Marshall, JJ., dissenting).

ically justified the application of that ban to an Orthodox Jewish officer.[68] The Air Force might well have done so had it been required by the Court to meet a higher standard. The result under any alternative test might well have been the same. The difference would lie in the formulation of a standard for military regulations which does show a higher deference but does not break the continuum between constitutional analysis in civilian and military roles. That is Justice O'Connor's point and one which seems to me well-founded.

These discussions may be rendered moot. Before the case, legislation went through Congress requiring the Secretary of Defense to form a study group "to examine ways to minimize the potential conflict between the interests of members of the armed forces in abiding by their religious tenet and the military interest in maintaining discipline."[69] The joint study group reported last spring," but the ***Goldman*** litigation overtook its work. On April 9 of this year more explicit legislation was introduced in the United States Senate.[71] The new bill provides that a member of the military may wear any "neat conservative and obtrusive" item of apparel that is "part of the religious observance" of the member except that the Secretary of any service branch may nonetheless prohibit "religious apparel that he determines significantly interferes with the performance of the member's military duties."[72] Should that bill pass, it would probably solve Captain Goldman's problem—but would not necessarily bring peace to the larger field of law. Indeed few areas seem to me more intriguing or potentially lively for constitutional scholars than this fascinating intersection between freedoms of speech and religion on the one hand and military necessity on the other.

I am delighted and honored to have been able to offer some modest thoughts on that subject—and you may be certain that I will be following future developments in this area with an interest no less keen than that of my colleagues at The Judge Advocate General's School.

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[68] *Id.* at 1325. Justice O'Connor would have the government show, whenever it attempts to counter a free exercise claim, that an "unusually important interest is at stake," and that "granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the least restrictive' or 'essential'or that the interest will not 'otherwisebe served.'"

"Department of Defense Authorization Act, Pub. L. No. 98-525, § 554, 98 Stat. 2532, 2533 (Oct. 19,1984).

[70] Joint Service Study on Religious Matters (Mar. 1985); see Respondent's Brief at 11-15 (Nov. 27,1985).

[71] S. 2269, 99th Cong., 2d Sess., 132 Cong. Reg. 3785,3786 (1986)(sponsoredby Senators D'Amato and Lautenberg).

[72] *Id.* at 3786. On April 9, Senator Lautenberg commented, ["T]his legislation is not confined to the wearing of yarmulkes, but addresses the wearing of any item of apparel that is part of the member's religious observance." 132 Cong. Reg. at 4007.

CURRENT LEGAL TRENDS IN THE AREA ADMINISTERED BY ISRAEL

by Brigadier General Ben-Zion Farhy
Military Advocate General
Israel Defense Forces

On May 6, 1986, The Judge Advocate General's School had the honor of hosting Brigadier General Ben-Zion Farhy, the Military Advocate General of the Israel Defense Forces, Following is the text of the address presented by General Farhy to the TJAGSA Staff and Faculty and to students of the 34th Judge Advocate Officer Graduate Course.

I. INTRODUCTION

The entertainer George Burns once told a clergyman that the secret to a good sermon is to have a good opening and a good ending and to keep the two as close together as possible. I have always found that to be sound advice, so I will keep my remarks relatively brief.

It is a particular pleasure to be here in Charlottesville, an area which produced so many of the greatest thinkers and the greatest leaders in American history. Being here so near to the home of **Mr.** Jefferson, your third President, the principal drafter of the Declaration of Independence, the founder and architect of the University of Virginia, and the author of the Virginia Statute of Religious Freedom, one cannot help being overwhelmed by thoughts of liberty and a sense of the spirit and values of the American Revolution. In weighing these thoughts, I have been reinforced in my belief in the great importance of our profession—the lonely and often thankless job of the military advocate. To survive in this world, liberty must be defended both from within and without. From within by the determined preservation of the rule of law and from without by military forces willing and able to stand up to the threat posed by the forces of tyranny. In our double role as soldiers and military lawyers, we participate in the preservation of the rule of law and we help create a more disciplined military which will be better able to defend Western values from totalitarian aggression. In this, we serve not only our profession but also our democratic heritage and we endeavor in the words of your founding fathers "to secure the blessings of liberty to ourselves and our posterity.''

11. THE MILITARY ADVOCATE AS INTERNATIONAL LAWYER

In my talk today, I will dwell upon one particular task of the military advocate: the role of the military advocate as international lawyer, or

more specifically, the role of the military advocate as legal advisor to the military government established in territories occupied in war. In discussing this I will be able to draw from the wealth of experience in this field which has been accumulated by the Israel Defense Forces in recent years.

As you probably recall, the Israeli military administration of the Gaza District and West Bank (or Judea and Samaria Region), captured from Egypt and Jordan, respectively, in the Six Day War of 1967, is now nearing the end of its nineteenth year. During this period, the Israel Defense Forces have insisted that the military administration in these territories be governed by the rule of law and conducted in accordance with international law. The task of ensuring this has been entrusted to the Military Advocate General's Unit, which I command. The fact and length of the military administration in the Gaza District and Judea and Samaria have forced military advocates to deal with many situations and fields of law that normally would not fall within their writ.

The length of the Israeli presence in the West Bank and Gaza District has also raised various questions which are, or course, of interest to the student of international law, but which are also of immediate importance to the daily running of military government. For example, the well known rule of customary international law, as laid out in Article **43** of the Hague Regulations appended to the Fourth Hague Convention in 1907 Respecting the Laws and Customs of War on Land, is that a military occupant "shall take all measures in his power to restore, and insure as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country.''

That provision was conceived with a short-term military occupation in mind. To what extent does an extended occupation—nearly twenty years so far in our case—require or justify a liberal interpretation of the obligation to respect existing laws, particularly when rapid technological advancement and economic development make existing laws obsolete and insufficient for the adequate regulation of social and economic activity in a changing society? To what extent is it incumbent upon the military occupant to take cognizance of the evolving social and economic realities in order to better provide for the safety and well-being of the local population?

III. JURISDICTION OF ISRAELI COURTS

One feature **of** military government unique to the Israeli experience has been the willingness of the Isaeli courts to hear petitions and actions filed by residents of the administered territories, including petitions against the military government, filed directly in the Israeli Supreme Court under its original jurisdiction as High Court of Justice to issue

writs of injunction, certiorari, quo-warranto, and habeas corpus against any public body in Israel.

In the first years of Israeli military administration of the West Bank and Gaza, these petitions were relatively few in number and the military commander, as respondent, agreed to acquiesce in the question of an Israeli court's jurisdiction over a military government in a territory administered by military government and in the justiciability of the "acts of the state" of the military government outside the borders of the country. The High Court began hearing these petitions based on the acquiescence of the respondents to the jurisdiction of the Court and the justiciability of the cases. Eventually, these petitions became regular features of Israeli jurisprudence and an important element in the preservation of the rule of law in the administered territories. Last year alone, more than one hundred petitions were submitted to the High Court regarding the West Bank and the Gaza District; one of the major tasks of military advocates serving in the international law branch in the offices of the legal advisors of the administered territories is to assist in preparing respondent pleadings and affidavits in these High Court cases. The decisions of the Supreme Court, for their part, have served as valuable guidelines in interpreting the provisions of international law applicable to military occupation, particularly in the hard cases in which developing economic and technological realities have required the replacement of existing local laws with more updated legislation.

I would add that the dynamics of this situation have taken on a life of their own. Certain lawyers have become specialists in this type of law, petitions to the High Court have become an almost automatic form of due process in certain types of cases, and the High Court itself has remarked in obiter dicta in various recent cases that it no longer views its jurisdiction in these as open to question.

In regard to the substantive law applied by the High Court, it is necessary to explain a couple of things. First, for various reasons of constitutional law, principally concerning the treaty ratification power (in Israel, treaties are ratified by the executive rather than the legislative branch), international treaties to which Israel is a party are not considered part of our internal law unless specifically incorporated into that law by an act of Parliament. A distinction must be made between customary international law which is deemed to be part of our internal law, even if it originated or was codified in a treaty to which Israel is not a party, and conventional international law which is generally not a part of our internal law and is not binding on our courts even if Israel is a signatory of the given treaty and legally bound thereby on the international level.

Our Supreme Court has ruled, for instance, that the Hague Regula-

tions of 1907 are customary international law applicable in our own courts, whereas the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War—to which Israel is a signatory—is conventional international law, binding upon Israel internationally but not applicable by our own courts as municipal law.

I would add, however, that the observance of all the provisions of all four Geneva Conventions of 1949 is standard procedure in our military and that all of those provisions have been incorporated into the standing orders of the IDF General Staff. The same is true of the 1957 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The second clarification regards the specific status of the West Bank and Gaza District. While in 1967 Israel had no reservations about regarding the Sinai Peninsula and the Golan Heights as "occupied territories," our position regarding the West Bank and Gaza are different. Both of those regions were illegally occupied in an offensive war in 1948: Gaza by the Egyptians and the West Bank by Jordan. In neither territory was there a legitimate sovereign in 1967. Egypt never claimed sovereignty over Gaza, and Jordan—although it applied its law to the West Bank-declared before the Arab League that the application of its laws in the territory was undertaken without prejudice to the question of legal sovereignty over the region. Furthermore, the boundaries deliniated in the 1949 Armistice Agreements between Israel and Egypt and Israel and Jordan, were defined as "military lines" and not as political borders. As a result, in 1967, these regions were not the territory of a "high contracting party" in the words of Article 2 of the Fourth Geneva Convention and that Convention, therefore, is not applicable to those areas. Further, since these territories were not in the legitimate sovereignty of any country, Israel does not regard them precisely as "occupied territories."

Nonetheless, Israel has declared officially on many occasions that it would apply the humanitarian provisions of international law to these territories as if they were "occupied territories." Despite the political complexities involved and the declarations of the Israeli Government, the Supreme Court has applied customary international law applicable to belligerent occupation as the standard by which to judge the actions of the military government. Actually, though, the High Court went beyond the application of mere international law and extended far greater protection to the inhabitants of the administered territories by ruling that the Israeli authorities are also subject to the general and far more stringent rules of Israeli public administrative law. This field of law has been developed by the courts; part of the development has paralleled the development of this area in England.

This, in the 1978 case of ***Al Taliah Weekly Magazine v. Minister of Defense,*** a case arising from the refusal of the military commander to allow—for security reasons—an Arabic language newspaper published by West Bank residents to be distributed in the West Bank, the Court held that the military commander is bound not only by the relatively limited provisions of customary international law (which do not guarantee freedom of the press), but also by the much further reaching provisions of Israeli public law which does not recognize that and other civil liberties.

Another interesting example of our experience with the Israeli High Court came in the 1983 case of the ***Teachers Neighborhood Assn v. Minister of Defense,*** a planning and zoning case in which privately owned land was expropriated for the purpose of building a highway interchange. In dismissing the petition, the High Court, relying on *Al Taliah* and other precedents, ruled that any action of the military government must stand up to a triple test:

1. It must be legal under international law;

2. It must be legal under local laws in force in the territory at the time in question.

3. It must conform to the rules of public administrative law in force in Israel, which "every Israeli soldier carries with him in his back pack," when he serves outside the borders of the country.

The importance of this attitude was demonstrated in the High Court's 1981 decision in the ***Jerusalem District Electric Co. v. Minister of Energy & Infrastructure and the Regional Military Commander,*** a case arising from the decision by the Israeli Government and the Judea and Samaria Regional Commander to acquire the concession of the petitioner to provide electricity in the Judea and Samaria Region and in part of Israel. While the Court upheld the action insofar as it provided electricity in Israel, it struck down the action as far as it regarded supply of electricity in the West Bank, holding that the provisions of international law were more restrictive of governmental powers than Israeli law itself. It can be seen, therefore, that to some extent the inhabitants of the administered territories have the best of both worlds.

I will now give a few specific examples of fields of law in which Israel military advocates have applied their efforts as a result of our role in maintaining the rule of law in these territories.

IV. MILITARY COURTS IN THE ADMINISTERED TERRITORIES

Another interesting issue which arose in the course of our work as legal advisors to the military administration is the question of whether

we should establish a court of appeal to the military courts in the territories administered by the military government. Shortly after the IDF entered the administered territories in June 1967, the commander of each area published an order establishing military courts. The model for those courts was basically the historic example of the Allies in the Second World War, that is, a court of one judicial instance. The Allies in Germany and, similarly, in the Far East, Italy, and France, did not grant the right of appeal to a higher court to those who were convicted in the military courts. The convicted person was only entitled to have his case reviewed by an officer who had power to modify the findings and sentence of the military court, except that he was not empowered to set aside a finding of not guilty. As I already mentioned, the IDF applied the same principle, that is, not entitling the convicted person the right to appeal to a military court of appeal, but only allowing him to submit certain requests to a military commander, or to the commander of the region (*e.g.,* to acquit him, to mitigate the punishment, or to annul the trial and to order a new trial). It should be mentioned that the courts established in these areas consist of a single military judge, who is always a lawyer, or of three military judges, at least one of whom is a lawyer, the others being officers. The judgments of the three judge court are subject to approval by the commander of the region. It should be emphasized that the legal advisor of the region reviews the requests of the convicted persons and that his opinion is usually accepted.

It goes without saying that the Israeli procedures for military courts are the rules of public international law. There is not one proviso in the 1907 Hague Convention (and Regulations) Respecting the Laws and Customs of War on Land dealing with this matter. Article 73 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949, states:

> A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.
>
> The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

Jean Pictet, author of the official interpretation of the Convention, says of this article that in countries where the law makes no provision for appeal either in or outside the court, an extra-judicial appeal proce-

dure should be instituted. As I already said, this is exactly the way Israel chose to apply the rules of international law.

The military courts were established almost nineteen years ago and in the last few years we have been hearing stronger voices calling for the creation of a forum of judicial appeal above the military courts. The issue of the establishment of a court of appeal in the administered territories became more tangible last year when two defendants, who were brought before a military court in Judea and Samaria on charges of security offenses, petitioned the Israeli High Court of Justice to order the commander of the region to show cause why he should not establish a court of appeal. Among their many arguments was a claim that the right of appeal is one of the basic rights of any person who is on trial and a claim that had they been tried in any other court in that area or in Israel, they would have been entitled to an appeal.

The position of the Military Advocate General's Unit has been for many years that in the case of an extended occupation, there arises a growing need to create a court of appeal in these territories. On the other hand, the position of all of the security forces in Israel was that the security situation in the administered territories does not permit the institution of a court of appeal at this stage. Although we did not share this position, we recently fulfilled our duty of presenting it to the High Court of Justice, and we are now awaiting the decision of the Court. The question is whether the High Court will give greater weight to the aforementioned arguments regarding international law or to the extended occupation argument and to the "right" of every person to have his verdict reviewed by an appeals court rather than a military commander.

V. ADMINISTRATIVE MEASURES WITHIN THE AREAS ADMINISTERED BY ISRAEL

As you well know, on the 20th of May 1985, Israel released from its prisons 1150 prisoners, 1000 of which were criminals convicted of extremely serious crimes against civilians. One of the terrorists released was a Japanese national by the name of Koso Okamoto, who was responsible for the murder of thirty civilian passengers during a barbaric raid at the Lod Airport near Tel-Aviv. The decision to order the release was made by the Israeli Cabinet after almost two years of turbulent and arduous negotiations under the auspices of the International Committee of the Red Cross. In taking this unprecedented decision, the Government of Israel proved its limitless commitment to ensure the safe return from captivity of those soldiers who put their lives in jeopardy defending the State of Israel and its people. In accordance with the release agreement, the prisoners were asked by representatives of the ICRC whether they wished to be flown to Geneva on their way to an Arab State or whether

they preferred to remain in the area. Unfortunately, most of those released chose to remain in Judea, Samaria, and the Gaza District. I say unfortunately because shortly after this massive release of terrorists into the territories administered by Israel, the Israel Defense Forces were faced with a turbulent wave of violence and terrorism.

This new wave of violence had to be met with an adamant response. Administrative measures put in abeyance in the past five years had to be employed once again in order to return the state of public order and security to its status quo ante. I am specifically referring to administrative detention and deportation. Regrettably, Israel was forced to deal severely with individuals holding dominant positions in the hierarchy of the terrorist organizations who used their influence to incite others and to disturb the public life and order of the civilian population in Judea, Samaria, and the Gaza District. I am referring to individuals who stand in a position which enables them to give orders which are immediately executed by their followers. These people are far more dangerous than those who actually commit the offense in question. Of all the administrative measures the military commander is empowered to impose, administrative detention and deportation are without doubt the most serious. Bearing this in mind, the authorities try first to put an end to activities of individuals who endanger public order by restricting their movement. The restriction is imposed by an order which can be appealed to a committee headed by a military judge who is a member of the Military Advocate General's Unit, exactly as envisioned by Article **78** of the Fourth Geneva Convention.

If the restriction order fails to achieve its purpose, the next measure the military commander is empowered to employ is administrative detention. When an administrative detention order is imposed, the detainee must be brought before a military judge within ninety-six hours for judicial review of the order. If the order is confirmed by the judge, the detainee has the right to appeal the judicial decision to the chief military judge of the area, who is usually a colonel in the Military Advocate General's Unit. The detention order has to be reviewed automatically after three months and the maximum period of detention is six months.

As explained before, the Israeli Supreme Court is receptive to petitions coming from inhabitants of Judea, Samaria, and the Gaza District. When a detainee has exhausted the judicial redress available in the territory, he is free to contest the legality of the order in the Israeli High Court. I believe that these judicial guarantees are more than compatible with those envisioned in Article 78 of the Fourth Geneva Convention.

Unfortunately, detention and imprisonment have proven to be ineffective in stopping those few leading personalities who hold total sway over

their followers and who incite them into committing acts of terrorism. It should be pointed out that almost all of those individuals have served long prison terms. This should not come as a total surprise when one considers the fact that we are dealing with people who do not actively participate in acts of hostility, but rather give the orders, incite people to commit these acts, plan them, and distribute funds to facilitate them. When we imprison them, our prisons turn into terrorist academies and headquarters where terrorist acts are planned, ordered, and conveyed to the outside for commission. Faced with this dangerous wave of terrorism, Israeli authorities felt they had no other alternative but to oust the most dangerous of these individuals, who numbered no more than fifteen. It should be noted that all the dozen or *so* individuals expelled to Jordan due to severe security reasons hold Jordanian citizenship and thus were deported to their own country.

Finally, I would like to stress that the decision making process of deciding to deport an inhabitant of Judea, Samaria, or the Gaza District is sufficiently complex to ensure that if the measure is employed at all, it is used very sparingly and only in the most severe cases when there is no other means of safeguarding public security and order.

Legal officers of the Military Advocate General's Unit are involved in every stage of this decision making process—an extremely important safeguard. If it should be decided to order the expulsion of an individual, the deportee has a right to have a military review committee headed by a judge—a member of my unit—review the order. The committee hears the deportee, who may be represented by counsel, reviews the files of the authorities, and on that basis announces its verdict. If the order is upheld during that process, the deportee can petition the Supreme Court of Israel for review of that order.

I would like to conclude this point by expressing hope that the need to use such administrative measures will not arise again and that we can look forward to another long period without deportations or administrative detention.

VI. THE ESTABLISHMENT OF A LOCAL BAR ASSOCIATION

An interesting development that has taken place in the past year is the formation of a bar association for West Bank lawyers. When the IDF entered Judea and Samaria in **1967,** the lawyers of the area boycotted the Israeli administration and refused to represent their clients in the courts. As a result, the military commander was forced to enact legislation that allowed members of the Israeli Bar to appear in the different courts in existence in the area. Throughout the years, more and more local West Bank lawyers have refused to abide by the total boycott im-

posed by the Jordanian Bar Association in Amman, Jordan. Appropriate legislation to establish a bar association for West Bank lawyers was drafted by officers of my unit and has been enacted. This is yet another instance of the legal changes necessitated by a changing society in an extended occupation.

VII. ECONOMIC LAW

A. CURRENCY

Following the Six Day War, the Israeli Government instituted the "Open Bridges" policy which encouraged trade and travel between the West Bank and the Gaza District on the one hand and Jordan and the Arab world on the other. At the same time, the territorial contiguousness between Israel and the administered territories led to the development of large scale trade and economic relations between the territories and Israel. These developments required legislation in the fields of foreign currency and monetary regulation. The Jordanian currency was left in place as legal tender in the Judea and Samaria Region along with the Israeli currency. This required the institution of unprecedented legislative arrangements and original legal thinking. An example of this arrangement in action is that the local population can employ either or both of the two currencies, while Israelis trading in the areas are confined to our own Israeli New Shekels.

Meanwhile, in the Gaza District, Egyptian currency was replaced by Israeli currency. Currency regulations in the territories were instituted to parallel Israel's and to prevent the use of the administered territories as a gateway for the flight of capital from Israel.

While all this was going on, the military government was trying to prevent the spread of influence in the territories of the P.L.O. and other terrorist organizations. Because much of this influence was purchased through the inflow of terrorist organization cash originating in the petro-dollars of the Arab oil-producing states, currency regulations were used to prevent the unrestricted influx of money from undeclared sources. This, however, was having an adverse effect upon the military government's policy of stimulating and encouraging economic investment and development in the administered territories. Eventually, the desire to encourage economic development prevailed and local currency regulations were loosened up to allow greater freedom to import foreign currency without declaring its sources. Further legislative steps were taken to facilitate the investment of funds by foreign or international private voluntary organizations interested in the development of the administered territories. These are further examples of cases in which military advocates were required not only to be specialists in military justice, but in currency regulations and general monetary law as well.

B. TAXATION

When the value added tax was introduced in Israel in 1976—it stands at 15% today—the fear arose that, due to the lack of a corresponding value added tax in the territories and the resultant inability of Israeli merchants and businessmen to deduct these taxes from the value added tax payable by them, Israelis would cease most of their purchases from the administered territories. Two possibilities arose—the imposition of an identical value added tax in the territories or acquiescing in the de facto closing off of trade between the territories and Israel. The former option was chosen as considerably less harmful to the economies of the West Bank and Gaza. Of course, it eventually became the subject of a High Court petition with no less a figure than Professor Gerhard Von Glahn submitting an affidavit for the petitioners.

The decision three years ago in the case of ***Abu-Itta v. Judea and Samaria Regional Commander*** was a landmark case in the history of Israeli jurisprudence regarding the administered territories. The argument in court and the decision of the court itself centered upon the proper interpretation of Article **48** of the Hague Regulations of **1907** which states that, "If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do so, as far as possible, in accordance with the rules of assessment and incidence in force. . . ." The key phase was "as far as possible." The opinion of the Court was written by Justice Meir Shamgar, who is today the Chief Justice and was himself a former Military Advocate General of the IDF, which should serve as an inspiration to all of you who harbour high ambitions. In the decision, the Court held that the phrase "as far as possible" had to be interpreted as subjecting the duty to maintain existing rules of assessment and incidence to the occupant's overriding duty under Article **43** "to restore and insure, as far as possible, public order and safety." The Article **43** obligation to ensure "public order and safety" had been broadly interpreted by the Supreme Court in numerous prior cases as including the regulation of economic activity for the general welfare of the local population in a rapidly changing economic, technological, and social environment. Thus, by subjecting Article **48** (taxation) to Article **43** (general duties of the military occupant regarding laws in occupied territories), the Supreme Court ruled that in the case of an extended occupation, a new indirect tax, such as the value added tax, could be imposed consistently with international law so long as it could be shown that the welfare of the local population was advanced or protected by the action. Because the alternative option of cessation of trade between Judea and Samaria and the Gaza District and Israel would have had a demonstrably devastating effect on the economies in the administered territories, the imposition of the value added tax was held to be ac-

ceptable and valid under international law. In accordance with the provisions of international law, the revenues raised from this tax and all other taxes in the administered territories are used only for public spending within those territories themselves.

Another case which is currently pending before our High Court of Justice, ***Bank of Palestine v. Minister of Defense,*** concerns an increase in the rate of corporate income tax in the Gaza District from a flat rate of 25% to a flat rate of 37.5%. The increase was imposed to prevent tax avoidance by non-corporate businessmen, merchants, and craftsmen who were subject to personal income tax on a progressive scale of up to 55%. In order to pay a lower tax rate, these taxpayers were registering their businesses as corporations. To make this less attractive, the rate of corporate income tax was increased to 37.5%.

The largest local corporation, the Bank of Palestine, submitted a petition to the High Court of Justice challenging this increase on various grounds, including alleged illegality under Article 48 of the Hague Regulations of 1907. The petitioner has received an order nisi. In our affidavit in response, we will be citing the opinions of numerous international legal scholars (including the late Professor Julius Stone, Professor Gerhard von Glahn, and Ernst H. Feilchenfeld, author of ***The International Economic Law of Belligerent Occupation)*** who have stated that Article 48 prevents the imposition of new taxes, but not increasing the rates of existing taxes.

Again, we see that the requirements of an extended occupation present interesting challenges for the military advocate.

C. *BANKING*

Another category of economic law with which military advocates have had to deal is the complicated field of banking law.

In both regions—the West Bank and Gaza-existing banking laws were outdated and insufficient for proper supervision of modern banking institutions providing state-of-the-art financial services in the technological and economic environment of the contemporary banking world. The establishment of these institutions and their governmental regulation and supervision required new legislative frameworks and provisions. In both cases, it was military advocates—as legal advisors—who did the work.

In 1981, after several years of planning and negotiating with the military government in the Gaza District, a local banking corporation, the Bank of Palestine, opened for business. Today, even as I speak, negotiations are underway with a group of West Bank corporate promoters for the establishment of an Arab-owned bank in the West Bank.

VIII. CONCLUSION

Military government is, of course, an unfortunate and regrettable consequence of war. It is no replacement for a political solution reached through negotiation, It is well known that Israel has been trying for years and continues to try to open up a negotiating process which will lead eventually to such a solution. Sadly, *so* far these overtures have been unsuccessful. Until a political settlement is reached, there is no resource other than continuing the military administration of the West Bank and Gaza. Such an administration, of course, is not tantamount to a liberal democracy and great weight must be given to the exigencies of maintaining public order and security. Nonetheless, such considerations must not be allowed to come at the expense of the rule of law and basic human rights. In ensuring that they do not, and in safeguarding an appropriate balance between security concerns and human rights, military advocates have been given a challenging and vital task to perform.

Looking back upon the nineteen years of Israeli administration of the West Bank and the Gaza District—and taking the lawyer's view—I would point to three elements which have proven most influential in shaping our administration there and most fascinating from a legal analytical standpoint:

(1) The willingness of Israel's own courts—and particularly its High Court of Justice—to hear the actions and petitions of residents of the administered territories against the military government, and the willingness of the military authorities to allow such actions and petitions to be brought against them in the Israeli courts, a willingness which has left the military government open to ongoing judicial review and brought our country's finest legal minds to bear on questions of law regarding these territories;

(2) The application by the Israeli High Court of Justice of the requirements of both customary public international law and Israeli public administrative law to the actions of the military government in the West Bank and Gaza, giving local inhabitants the double protection of both the more basic humanitarian principles of international law and of the more advanced—more stringent—rules of Israeli public law; and

(3) The ever increasing necessity—in an extended occupation—of replacing, amending, and updating existing legislation to meet the changing needs of a growing society in a state of social, economic, and technological flux,

These three elements together have helped ensure the maintenance of the rule of law and the respect for human rights in territories under mili-

tary administration. More than that, however, they have made for fascinating jurisprudence and have posed for the military advocate professional and intellectual challenges which are both stimulating and exciting.

FRATERNIZATION

by Major Kevin W. Carter*

I. INTRODUCTION

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and . . . this case is not that.'

This famous quotation from U.S. Supreme Court Justice Potter Stewart described his inability to define pornography despite his ability to recognize it on sight. Many commanders and judge advocates have encountered similar difficulties when dealing with fraternization. Fraternization is a term commonly used to describe dating between officers and enlisted personnel, but it also includes many other types of relationships.

Prior to 1978 the Army's fraternization policy was based solely on custom. In 1978 the Army published its first written fraternization policy, Subsequent conflicting interpretations of that policy by the Office of the Deputy Chief of Staff for Personnel, the Office of The Judge Advocate General, and the Office of the General Counsel greatly contributed to the confusion surrounding fraternization,

1984 was a pivotal year for fraternization for two reasons. First, in August the 1984 Manual for Courts-Martial acknowledged for the first time a specific criminal offense of fraternization for certain officer-enlisted relationships. Second, on 23 November 1984 the Army published Headquarters, Department of the Army, Letter 600-84-2 and ended the era of conflicting interpretations of the Army's administrative fraternization policy.

This article outlines the history of the custom against fraternization and the development of the Army policy and examines the different

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'Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

types of conduct that constitute administrative or criminal fraternization under current Army rules. "he analysis of the Army's current administrative policy includes individual discussions of specific types of relationships, commanders' options in disciplining violators, and appeal procedures for disciplined soldiers. "he article discusses the elements of the criminal offense of fraternization and related criminal issues. It also examines possible constitutional challenges to the Army's fraternization policy. Finally, the article examines possible options for further clarifying the Army's administrative fraternization policy and proposes a more specific regulatory provision.

II. HISTORICAL DEVELOPMENT OF FRATERNIZATION

A. THE ROMAN EXPERIENCE

No one knows precisely when or where the prohibition against fraternization began. The term fraternization is a fairly recent one,[2] but the custom it embodies is generally considered to be at least centuries old.[3] Perhaps the first attempt to regulate relationships between soldiers of different rank existed in Roman military law. Under ancient Roman law an officer who served in the position of military tribune could not subsequently serve in the same unit in the lower grade of captain.[4] Prior to this law some officers apparently were serving annual appointments as tribune, followed by a year as a centurion or captain, then another year as tribune.[5] This law recognized that undue familiarity between military personnel of different ranks had an adverse effect on military discipline.[6]

B. EUROPEANARMIES IN THEMIDDLEAGES

Notwithstanding the Roman experience, the class distinction between nobles and peasants during the Middle Ages generally is considered the

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[2] *See* United States v. Bunker, 27 B.R. 385, 389 (1943) and *infra* text accompanying notes 96-101 for first recorded use of the term "fraternization."

[3] Flatten, *Fraternization*, 10 The Reporter 109 (1981).

[4] B. Ayala, Three Books on the Law of War and on the Duties Connected with War and on Military Discipline 175, 180 (Douay 1582) (J. Bate trans. 1912).

[5] *Id.* at 180.

[6] A similar law provided that a captain in a unit could not later be forced to serve in the same unit in the rank of private. Interestingly, this provision was raised as a defense by a soldier who was enrolled as a private and refused his military duties because on earlier expeditions he had served as a captain with the same unit. *Id.* at 175. This soldier's ultimate fate is unknown.

origin of our custom against fraternization.' By the middle of the twelfth century, the wealthiest families of Europe were very class conscious and considered the title of nobility as a privilege which could only be inherited.[8] Usually this wealth was based upon huge tracts of land called fiefs. These great nobles granted smaller fiefs to lesser vassal nobles to ensure their allegiance and military support. Each lesser noble granted smaller fiefs to his own vassels, who in turn did the same thing. Thus a multi-level caste system was created with most persons having a dual social status: serving as a vassal to his lord while simultaneously serving as a lord to his vassals.[9] The knight's fief, which usually consisted of a small tract of land supported by the work of five peasant servant families, was the smallest fiefdom one could possess and still have some claim to nobility.[10]

Fiefs could be acquired through warfare, marriage, gift, heredity, exchange, or purchase.'' Every possessor of a fief was a gentleman, even if the fief was smaller than a knight's fief and did not confer the status of nobility upon ita owner.[12] The phrase "an officer (*i.e.* a noble) and a gentleman" currently contained in Article 133 of the Uniform Code of Military Justice[13] apparently had ita inception from this distinction between a noble and a gentleman.

The social caste system not only precluded nobles and peasants from associating with one another, but it also prohibited social interaction between different levels of nobility. Offices of trust and power were conferred only upon those who acquired the status of nobility through proven hereditary lines.'' Children could not inherit the family fiefs unless both of their parents belonged to the same high class of nobility.[15]

The privileges associated with being a gentleman were subject to forfeiture for improper conduct. A gentleman in France or Germany, for example, could not exercise any common trade without losing the advantages of his rank.[16] The children of a gentleman and a peasant woman

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'*See* Dep't of Army Letter No. 600-84-2, DAPE-HRL (M), subject: Fraternization and Regulatory Policy Regarding Relationships Between Members of Different Ranks, 23 November 1984, enclosure at 2 (hereinafter cited as HQDA LTR 600-84-2); S. Rose, The Military Offense of Wrongful Fraternization—Updating an Old Custom 3, 3 n.7 (April 1983) (unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

[8]G. Sellery & A. Krey, The Founding of Western Civilization 136 (1929).

[9]*See id.* at 137-39.

[10]*Id.* at 139.

[11]*Id.*

[12]*See* H. Hallam, View of the State of Europe During The Middle Ages 85 (6th ed. New York 1858)(1st ed. n.p. n.d.).

[13]10 U.S.C. §§ 801-940 (1982) (hereinafter cited as UCMJ).

[14]Hallam, ***supra*** note 12, at 86.

[15]*Id.*

[16]*Id.*

were considered no better than a bastard class because of the deep taint from their mother.[17]

Every class within the feudal caste system had its own customary notions and habits regarding social relationships.[18] To understand the apparent harshness of the customs of the higher nobility, one must recognize that society in the Middle Ages was attempting to restore a degree of moral discipline into social relationships after emerging from the moral depravity of the Dark Ages where vices such as deceit, treachery, and ingratitude were commonplace.[19] Violation of these socially accepted rules of conduct was considered a breach of faith. Breach of faith was the most repugnant crime in a feudal society founded upon loyalty to one's superiors and it was severely and promptly punished by general infamy and dishonor.[20]

The custom against fraternization evolved from this background. The concept was simple: an officer and a gentleman was entrusted with certain duties and responsibilities over the soldiers under his supervision. An officer violated that trust by becoming too familiar with his subordinates. While the custom was clear and simple, its application remained more difficult.

C. EARLY BRITISH RULES

The U.S. Army custom against fraternization was assimilated from the British Army during the Revolutionary War. The British Articles of War of 1765 were substantially adopted by six of the American colonies during 1775-1776 and, more importantly, by the Second Continental Congress on 30 June 1775.[21] An examination of the early British rules on fraternization thus provides a meaningful insight concerning the scope of the custom at the time of the Revolution.

The British Articles of War of 1765 contained no express prohibition against fraternization. These articles did prohibit a commissioned officer from "behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman."[22] They also pro-

[17] *Id.* at 86-87.
[18] The Legacy of the Middle Ages 287 (C. Grump & E. Jacob ed. 1926).
[19] Hallam, *supra* note 12, at 124.
[20] *See id.*
[21] W. Winthrop, Military Law and Precedents 21-22, 22 n.32 (2d ed. 1920 reprint). The six colonies were Massachusetts, Connecticut, Rhode Island, New Hampshire, Pennsylvania, and South Carolina.
[22] British Articles of War of 1765, sec. 15, art. 23, *reprinted in id.* at 945. A subsequent amendment to this article provided "that in every charge preferred against an officer for such scandalous or unbecoming behavior, the fact or facts on which the same is grounded shall be clearly specified." A. Tytler, An Essay on Military Law, 211-13 (2d ed. London 1806)(1st ed. n.p. 1779). This provision was added to provide the accused officer due process type notification of how his conduct was scandalous. *Id.*

hibited any soldier from committing any act or neglect "to the Prejudice of good Order and Military Discipline."[23]

During the period 1795-1820, there were twenty-four British general courts-martial cases against officers involving fraternization type offense. The most frequent charge was drinking with or in the presence of enlisted personnel, both in military and public places.[25] Other officer misconduct charged in conjunction with drinking with soldiers included smoking,[26] dancing,[27] fighting about women of bad character,[28] dressing in a sergeant's jacket and associating with privates in the guardroom,[29] and watching and encouraging several privates in "the commission of an act of extreme violence and brutality on the person of a female" in the barracks.[30] Charged officer misconduct unrelated to drinking included "sitting in company and associating with" a private in an officer's barracks room,** borrowing money and "necessaries" from noncommissioned officers and soldiers,[32] using noncommissioned officers and sol-

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[23] British Articles of War of **1765,** sec. **20,** art. **3,** *reprinted in* Winthrop, *supra* note **21,** at **946.** These provisions are the forerunners to similar provisions in Articles **133** and **134** of our current Uniform Code of Military Justice. **10** U.S.C. §§ **933-934 (1982).**

[24] C. James, A Collection of the Charges, Opinions, and Sentences of General Courts-Martial **36-39, 121-22, 143-46,** 204-07, **220-23, 234-35, 238-40, 249-51, 315-17, 337-38,** 363-**65,368-70,375-76, 392-93,405-06,** 489-92, **511-12,515-18, 518-21,535-41, 583-85,** 729-**30, 730-33,** 786-87 (London **1820).** This book is an unofficial reporter of official documents concerning all British officer general courts-martial cases during this period. It contains virtually no editorial comments. *See id.,* Introduction at vii-xvii.

[25] *Id.* at **36-39** (LTC drank and smoked with NCOs and privates in camp and in public canteens and suttling booths); **238-40** (CPT drank and associated with privates in a public canteen); **249-51** (ensign got drunk in a public canteen while officer-of-the-day then entered soldiers' barracks and in the presence of privates tried to get a SGT to procure more grog and drink with him); **337-38** (LT drank with men of the castle guard while he was officer of that guard); **368-70** (LT, while under sentence of a general court-martial, drank and fought with privates in a public petty pot-house about women of bad character; LT also induced his private soldier guard to quit his post and drink and dance with the LT in the barracks); **392-93** (LT, while orderly officer of the day, repeatedly ate and drank with soldiers in the barracks); 405-06 (cornet, while under arrest for drinking with privates in camp, tried to bribe the corporal of the guard to purchase more liquor for him and the other men in confinement); 511-12 (ensign associated familiarly with and drank with private); **515-18** (surgeon witnessed and promoted privates' drunkenness in barracks); **518-21** (CPT witnessed and promoted privates' drunkenness in barracks); **729-30** (LT ordered soldier to drink with him in a citizen'shome).

[26] *Id.* at **36-39.**

[27] *Id.* at 368-70.

[28] *Id.*

[29] *Id.* at 238-40.

[30] *Id.* at 515-18, 518-21.

[31] *Id.* at **315-17.**

[32] *Id.* at **204-01,220-23,489-92,730-33,**

diers for private gain,[33] messing with noncommissioned officers,[34] and playing billards with a soldier in a public tavern.[35]

On three occasions officers were court-martialed for associations with civilians whose social station in life was below that of an officer in the British service. These convictions for walking with an actress on a public street,[36] playing cards with a superintendent of convicts,[37] and associating with a journeyman baker and a tinman's apprentice[38] demonstrate the strong social class foundation of the custom against fraternization.

While the punishments varied in the foregoing cases depending on the seriousness of the offense and the maturity of the officer concerned, they usually included dismissal from the service and from one's social station in life as an officer in the British service.[39]

D. EARLY AMERICAN RULES

> Be easy and condescending in your deportment to your officers; but not too familiar, lest you subject yourself to a want of that respect, which is necessary to support a proper command.[40]

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[33] *Id.* at **143-46** (during an eight month period a LTC head of recruiting district used **30** different NCOs, soldiers, and recruits for his own domestic concerns); **363-65** (an assistant surgeon put two hospital patients who were soldier-tradesmen to work in his private quarters); **535-41** (CPT used various soldier-tradesmen as personal servants).

[34] *Id.* at **121-22, 786-87.** ***See*** *also* ***id.*** at 392-93 (officer-of-the-day ate and drank with soldiers in the barracks).

[35] *Id.* at 375-76.

[36] *Id.* at **234-35.**

[37] *Id.* at 583-85.

[38] *Id.* at **204-07.**

[39] Actually the sentence usually indicated that the officer be "cashiered" rather than dismissed. Cashiering included "depriving an officer of his commission, breaking him, by taking from him the honourable character of a soldier and reducing him to the station of a private citizen" and was considered the most severe penalty short of death. Tytler, ***supra*** note **22,** at **315-16.**

[40] "Maxims of Washington; Political, Social, Moral, and Religious **152-53 (**J. Schroeder ed. **3d** ed. New York **1859)** (1st ed. New York **1854).** This was one of five maxims for officers sent by General George Washington to Colonel Williams Woolford in the year **1775.** The other four maxims are quoted below as a matter of historical interest:

> Be strict in your discipline. Require nothing unreasonable of your officers and men; but see, that whatever is required be punctually complied with. Reward and punish every man according to his merit, without partiality or prejudice. Hear his complaints. If they are well-founded, redress them; if otherwise, discourage them, in order to prevent frivolous ones.
>
> Discourage vice, in every shape.
>
> Impress upon the mind of every man, from the first to the lowest, the importance of the cause, and what it is he is contending for.

> One circumstance in this important business ought to be cautiously guarded against; and that is, the Soldiers and Officers being too nearly on a level."

These two quotations from General George Washington reflect the American custom against undue familiarity between officers and enlisted men as it existed during the Revolutionary War. The social class justification for the custom began to shift to one founded upon the needs of military discipline and order.

The American Articles of War of 1775, like their British predecessor, contained no express prohibition against fraternization. Cases were prosecuted under the general article predecessors to Articles 133 and 134 of the current Uniform Code of Military Justice.[42] While there are no reported American fraternization cases prior to 1810, there are more than 100 nineteenth century cases concerning fraternization type offenses.'$

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[41] *Id.* at 159. Statement made in the year 1777.

[42] American Articles of War of 1775, art. 47 provided: "Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service." *Reprinted* in Winthrop, *supm* note 21, at 957. In 1806 the words "scandalous" and "infamous" were deleted, thereby expanding the scope of this provision. *Id.* at 710. American Articles of War of 1775, art. 50, provided:

> All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

Reprinted in id. at 957.

"It is difficult to research nineteenth century fraternization cases because there is no available index to the many volumes of General Orders and General Court-Martial Orders where such records are contained. The cases cited in the Early American Rules section of this paper include cases cited generally in Winthrop, *supra* note 21; cases discovered by archivist Timothy Nennigner, National Archives, as cited in Rose, *supra* note 7, at 6 n.n. 19-24; cases cited in K. Allen, The Adaptation of The Custom Prohibiting Wrongful Fraternization To Regulate Social Relationships In The Enlisted Training Environment (Memoirs of a Fraternization Lawyer) (April 1983) (unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia); and cases I discovered while generally examining these unindexed volumes. I am certain that many other cases in fact exist; however, the cases cited are sufficient to illustrate the scope of the custom against fraternization as it existed in the nineteenth century. Whenever possible I checked the original record and provided a few words of parenthetical explanation with the first citation to each order. When original records were not available, I included cases cited by Winthrop, Rose, or Allen, in an effort to consolidate all previous research in the area. As a result, some citations are cryptic and not in correct "bluebook" format, but are included for other researchers with better access to the original records. Some of the old Gen. Orders and Gen. Court-Martial Orders contain the cases of several officers in the same order.

Like the British experience, the most frequent charge concerned officers drinking with, drinking in the presence of, or appearing drunk before enlisted men, in military or public places.“ Other officer miscon-

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“Gen. Orders (no number), Adjutant and Inspector General's Office (22 Apr. 1815)(MG acquitted of being intoxicated in front of his Army thereby endangering discipline and preventing his discharge of duties as commanding general); Orders No. 72, Adjutant General's Office (21 Nov. 1826)(LT was intoxicated in view of private citizens and recruits while riding an Erie Canal boat); Orders No. 72, Adjutant General's Office (21 Nov. 1826)(LT “in the habit of familiarly associating,” playing cards, and drinking with enlisted men in his quarters); Orders No. 13, Adjutant General's Office (26 Feb. 1827)(LT was intoxicated on a public boat in the presence of soldiers who had to carry the LT from the wharf and through the street in view of many citizens); Orders No. **64,** Adjutant General's Office (29 Dec. 1827) (LT was drunk while in charge of enlisted work party; also dismissed from 4th of July parade for arriving in a state of intoxication); Gen. Order No. 72 (headquarters unknown) (1836); Gen. Order No. 6 (headquarters unknown) (1840); Gen. Order No. **1** (headquarters unknown) (2 Jan. 1847)(C.M. No. EE-280, Second Lieutenant Raguet) (drinking, gambling, and allowing an enlisted man to wear an officer's coat); Gen. Order No. 39, Army of the Potomac (2 Nov. 1861)(drinking and gambling); Gen. Order, No. 4, Army of the Potomac (13 Jan. 1863); Gen. Orders No. 52, 156, and 187 (headquarters unknown) (1863); Gen. Order No. 199 (30 June 1863)(C.M. No. MM-267, Second Lieutenant Colerick) (LT invited enlisted men to come to his quarters and drink); Gen. Orders No. 209, War Dep't (7 July 1863)(LT, with two NCOs of his company, did “visit and drink whiskey at a low hovel, kept by Irish and negro women, thereby degrading himself in the opinion of the men”); Gen. Orders No. 261, War Dep't (1 Aug. 1863) (LT appeared in a regiment march “in a beastly state of intoxication”); Gen. Orders No. 380, War Dep't (24 Nov. 1863)(LT became drunk and insulted LTC in front of enlisted men); Gen. Orders No. 380, War Dep't (24 Nov. 1863)(LT, while in command of the guard, became drunk and had “ 'sexual intercourse' with a negro, or colored woman, in the presence of his guard, and did remain on said negro, or colored woman, thirty minutes or more until Corporal. . . made him get off”); Gen. Court-Martial Orders No. 100, War Dep't (16 May 1864)(LT become drunk and disorderly in the quarters of the enlisted men of his company); Gen. Court-Martial Orders No, 109, War Dep't (20 May 1864) (CPT was drunk while in charge of an enlisted burial party detailed to bury a PVT and conducted the “burial ceremonies in a manner wholly unbecoming an officer and a gentleman”); Gen. Court-Martial Orders 114, War Dep't (24 May 1864)(LT was intoxicated in the presence of enlisted men); Gen. Court-Martial Orders No. 240, War Dep't (18 May 1865)(LT became drunk in the presence of enlisted men); Gen. Court-Martial Orders No. 472, War Dep't (25 Aug. 1865)(LT became drunk with an enlisted man of his regiment, rode through their camp together while drunk, and received the “jeers and derision of his inferiors in rank, the enlisted men of his regiment”); Gen. Court-Martial Orders No. 599, War Dep't (30 Oct. 1865)(MAJ appeared “in the undress uniform of **his** rank” on a public street while drunk and hit an old man in the presence of many citizens and soldiers); Gen. Court-Martial Orders No. **15,** War Dep't (18 Jan. 1866)(LT was drunk and disorderly in company with enlisted men; arrested by the patrol guard); Gen. Court-Martial Orders No. 35, War Dep't (3 June 1867)(post commander (CPT)while under the influence of liquor participated in a horse race against a civilian for the amusement of enlisted men); Gen. Court-Martial Orders No. 59, HQ of the Army (16 Aug. 1867) (post commander (CPT) was so drunk while inspecting his troops that “he was supported from falling by a noncommissioned officer of his company”); Gen. Court-Martial Orders No. 45, HQ of the Army (2 July 1868)(assistant surgeon, while intoxicated, quarreled with his family so

duct charged in conjunction with these sixty drinking cases included

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loudly "as to disturb the sleep of and wake up a portion of the inmates of the camp");Gen. Court-Martial Orders No. 49, HQ of the Army (14 July 1868)(LT drank with enlisted men; on another occasion "while intoxicated did associate with and ride through the streets of San Antonio, Texas, in plain daylight, in an open carriage, with common prostitutes");Gen. Copt-Martial Orders No. 62, HQ of the Army (22 Sep. 1868)(LT, while drunk and in uniform, fell out of a buggy in which he was riding onto a public street in the presence of citizens and enlisted men); Gen. Court-Martial Orders No. 23, HQ of the Army (20 Apr. 1869) (LT drank and became drunk with enlisted men in a public bar; on another occasion LT and two other officers became *drunk,* assaulted a citizen, and encouraged "armed enlisted men in riotious demonstrations"); Gen. Court-Martial Orders No. 27, HQ of the Army (15 May 1869)(CPT was drunk near sutler's store in the view of enlisted men and citizens and remained there until removed and placed in a wagon by an NCO and two enlisted men of his own company); Gen. Court-Martial Orders No. 37, HQ of the Army (3 June 1869)(LT got *drunk* with enlisted men and had to be carried and put to bed by two enlisted men); Gen. Court-Martial Orders No. 48, HQ of the Army (16 July 1869)(CPT became intoxicated and "did appear upon the parade grounds and streets of the post riding a mule"); Gen. Court-Martial Orders No. 60, HQ of the Army (18 Sep. 1869)(LT became drunk then crashed NCO ball, "waltzing or dancing with an enlisted man for a partner"); Gen. Court-Martial Orders No. 6, HQ of the Army (29 Jan. 1870)(CPT was *drunk* in the presence of enlisted men); Gen. Court-Martial Orders No. 15, HQ of the Army (2 Mar. 1870)(LT was drunk in the store of the post trader, assaulted the post trader, and had to be separated from him by enlisted men; on another occasion, while *drunk,* visited "a house of ill fame in the city of Jackson, kept by a colored woman, in company with an enlisted man");Gen. Court-Martial Orders No. 28, HQ of the Army (20 Apr. 1870)(LT "was *so drunk* at the paymaster's table as to incapacitate him from the proper discharge of his duties"; also was drunk on post parade grounds); Gen. Court-Martial Orders No. 4, War Dep't (18 Mar. 1872)(LT was drunk at company muster; also was drunk while officer of the day); Gen. Court-Martial Orders No. 43, War Dep't (11 Oct. 1873)(CPT was *drunk* "upon the parade grounds staggering in the presence of enlisted men"; later entered 1st SGT's quarters and fell asleep on his bed); Gen. Court-Martial Orders No. 41, War Dep't (21 May 1874)(CPT was drunk "before the enlisted men of his company who were paraded for payment"); Gen. Court-Martial Orders No. 34, War Dep't (27 May 1875)(LT, *drunk* and asleep on a mattress in a public store, remained there until "carried away in a wagon by the enlisted men of his command); Gen. Court-Martial Orders No. 58, War Dep't (23 Aug. 1875)(LT became drunk and visited an enlisted ball); Gen. Court-Martial Orders No. 84, War Dep't (2 Nov. 1875)(LT, while drunk, visited a disreputable dance house and danced and associated familiarly with enlisted men and notorious Mexican women); Gen. Court-Martial Orders No. 114, War Dep't (31 Dec. 1875)(CPT found a party of enlisted men drinking and sat down and "repeatedly" drank with them); Gen. Court-Martial Orders No. 34, HQ of the Army (16 Mar. 1877)(LT "was drinking and associating with enlisted men of his company . . . in a public saloon" and was later drunk and disorderly with them on a public street); Gen. Court-Martial Orders No. 39, HQ of the Army (28 Apr. 1877)(CPT "was publicly *drunk* and drinking and associating with enlisted men" at the trader's store; additional charges were referred for appearing before his court-martial for the above offenses in "an intoxicated and drunken" condition); Gen. Court-Martial Orders No. 46, HQ of the Army (22 May 1877)(LT was intoxicated in the presence of enlisted men of the command); Gen. Court-Martial Orders No. 57, HQ of the Army (12 July 1877)(CPT "did, in broad daylight and in full view of officers, their families, and enlisted men, in a drunken condition, stagger and reel across the parade ground"); Gen. Court-Martial Orders No. 61, HQ of the Army (11 Aug. 1877)(CPT was grossly intoxicated in the presence of officers and enlisted men); Gen. Court-Martial Orders No. 75, HQ of the Army (22 Nov. 1877)(CPT was drunk and slept on the floor in a portion of a post trader's bar reserved for enlisted men); Gen. Court-Martial Orders No. 39, HQ of the Army (13 Aug. 1878)(battalion commander (MAJ) appeared before his men and officers at a bat-

dancing or disrupting enlisted dances;[45] gambling;[46] playing cards;" assaulting a civilian;[48] engaging in a shooting affray with an enlisted man over a prostitute;[49] inciting "armed enlisted men in riotious demonstration~' associating with prostitutes;[51] familiarly associating with enlisted men;[52] allowing an enlisted man to wear an officer's coat;[53] sleeping on a first sergeant's bed;[54] on the floor of an enlisted bar,[55] or in a post ex-

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taliondrill in a drunken condition); Gen. Court-Martial Orders No. **53,** HQ of the Army (10 Dec. **1878)** (post commander (CPT) was drunk on 4th of July and entered enlisted men's ball "dressed only in his undershirt, drawers, and socks, and did attract attention to his partially nude state by calling loudly for his First Sergeant and for his servant"); Gen. Court-Martial Orders No. **40,** HQ of the Army (18 June 1880) (CPT was drunk on duty and sat in front of his tent in camp in view of enlisted men; also was drunk at a dance attended by soldiers and Mexicans); Gen. Court-Martial Orders No. **42,** HQ **of** the Army **(21** July 1880) (CPT "did become drunk, and did, while in that condition, yell, roll, and wallow, and did swear, cry, and give forth in an exceedingly loud tone of voice, profane, insulting, and vulgar utterances, in the presence **of** enlisted men and officers"); Gen. Court-Martial Orders **No. 50,** HQ of the Army **(23** Aug. **1880)** (LT became drunk and engaged in a "disgraceful shooting affray" with an enlisted man over a Mexican prostitute, who was the enlisted man's mistress); Gen. Court-Martial Orders No. **59,** HQ of the Army **(17** Oct. 1881) (CPT was drunk in the presence of enlisted men); Gen. Court-Martial Orders No. **53,** HQ of the Army **(24** Aug. 1882) (LT was drunk on the public streets and required enlisted men to assist him to his quarters); Gen. Court-Martial Orders **No. 16,** HQ of the Army **(13** Mar, **1888)** (CPT was drunk in the presence of enlisted members of his command); Gen. Orders No. **185,** HQ of the Army **(24** Oct. **1899)** (LT drank with an enlisted man in the post exchange and fell asleep there).

[45] Gen. Court-Martial Orders No. **60,** HQ of the Army (18 Sep. **1869);** Gen. Court-Martial Orders No. **58,** War Dep't **(23** Aug. **1875);** Gen. Court-Martial Orders No. **84,** War Dep't **(2** Nov. **1875);** Gen. Court-Martial Orders No. **53,** HQ of the Army (10 Dec. **1878;** Gen. Court-Martial Orders No. **40,** HQ of the Army (18 June 1880) **See *supra*** note **44** for parenthetical explanations of the orders cited in notes **45-62.**

[46] Gen. Order No. 1 (headquarters unknown) **(2** Jan. **1847)** (C.M. **No. EE-280,** Second Lieutenant Raguet); Gen. Order **39,** Army of the Potomac **(2** Nov. **1861).**

"Orders No. **72,** Adjutant General's Office **(21** Nov. **1826).**

[48] Gen. Court-Martial Orders No. **599,** War Dep't **(30** Oct. **1865);** Gen. Court-Martial Orders No. **23,** HQ of the Army **(20** Apr. **1869).**

[49] Gen. Court-Martial Orders No. **50,** HQ of the Army **(23** Aug. 1880).

[50] Gen. Court-Martial Orders No. **23,** HQ of the Army **(20** Apr. **1869).**

[51] Gen. Court-Martial Orders **No. 49,** HQ of the Army **(14** July **1868);** Gen. Court-Martial Orders No. **15,** HQ of the Army **(2** Mar. **1870);** Gen. Court-Martial Orders No. **50,** HQ of the Army **(23** Aug. **1880).**

[52] Orders No. **72,** Adjutant General's Office **(21** Nov. **1826);** Gen. Court-Martial Orders No. **84,** War Dep't **(2** Nov. **1875);** Gen. Court-Martial Orders No. **34,** HQ of the Army **(16** Mar. **1877);** Gen. Court-Martial Orders No. **39,** HQ of the Army **(28** Apr. **1877).**

[53] Gen. Order No. **1** (headquarters unknown) **(2** Jan. **1847)** (C.M. No. **EE-280,** Second Lieutenant Raguet).

[54] Gen. Court-Martial Orders No. **43,** War Dep't (11 Oct. **1873).**

[55] Gen. Court-Martial Orders No. **75,** HQ of the Army **(22** Nov. **1877).**

change;[56] being carried or otherwise assisted by enlisted men;[57] riding through camp on a horse,[58] a mule,[59] or in a horse race;[60] engaging in sexual intercourse in view of a guard detail while commander of that guard;[61] and improperly conducting an enlisted burial ceremony.[62]

Improper officer conduct towards enlisted men unrelated to drinking included gambling,[63] but not necessarily just playing cards;[64] allowing a notorious civilian gambler to wear an officer's cap and coat while the civilian gambled with enlisted men in the presence of other enlisted men;[65] fishing;[66] playing billiards;[67] messing;[68] dancing or visiting a dance house

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[56] Gen. Orders No. 185, HQ of the Army (24 Oct. 1899).

[57] Orders No. 13, Adjutant General's Office (26 Feb. 1827); Gen. Court-Martial Orders No. 59, HQ of the Army (16 Aug. 1867); Gen. Court-Martial Orders No. 27, HQ of the Army (15 May 1869); Gen. Court-Martial Orders No. 37, HQ of the Army (3 June 1869); Gen. Court-Martial Orders No. 34, War Dep't (27 May 1875); Gen. Court-Martial Orders No. 53, HQ of the Army (24 Aug. 1882).

[58] Gen. Court-Martial Orders No. 472, War Dep't (25 Aug. 1865).

[59] Gen. Court-Martial Orders No. 48, HQ of the Army (16 July 1869).

[60] Gen. Court-Martial Orders No. 35, War Dep't (3 June 1867).

[61] Gen. Orders No. 380, War Dep't (24 Nov. 1863).

[62] Gen. Court-Martial Orders No. 109, War Dep't (20 May 1864).

[63] Gen. Order (number and headquarters unknown) (10 Dec. 1812) (pitching dollars for money); Gen. Orders No. 26, Army of the Potomac (23 Jan. 1862); Gen. Orders No. 16, Mountain Dep't (23 Apr. 1862); Gen. Orders. No. 25, Dep't of the South (4 Aug. 1862) (cheating a soldier of $3.00 at cards); Gen. Orders No. 22, Dep't of the Gulf (7 Mar. 1863) (CPT played cards for money with an enlisted man); Gen. Orders No. 112, Dep't of the Missouri (7 Oct. 1863) (MAJ gambled "for money, at a game of cards, with private soldiers of his regiment"); Gen. Orders No. 47, Dep't of Washington (29 Oct. 1863); Gen. Orders No. 234, War Dep't (25 July 1863) (LT played at cards for money with enlisted men under his command); Gen. Orders No. 34, Army of the Potomac (30 Jan. 1862) (played cards and gambled); Gen. Orders. No. 15, Dep't & Army of the Tennessee (14 July 1864) (LT played cards and gambled with privates); Gen. Orders No. 149, Dep't of the Gulf (1864) Gen. Orders No. 29, HQ, Dep't of N. Carolina (Army of the Ohio) (4 Apr. 1865) (CPT established a "chuckaluck bank" and gambled the game "chuckaluck" with officers and enlisted men); Gen. Court-Martial Orders No. 14, HQ, Dep't of Kentucky (11 Apr. 1865) (LT played cards for money with enlisted men of his company); Gen. Court-Martial Orders No. 93, War Dep't (15 Nov. 1875) (LT gambled at gambling table with enlisted men); Gen. Court-Martial Orders No. 78, HQ of the Army (30 July 1885) (LT gambled at "faro" game in soldier's clubroom, bank of game being owned and run by enlisted men).

[64] Gen. Orders No. 380, War Dep't (24 Nov. 1863) (court found LT guilty of playing cards with enlisted men but "attach no criminality to the act"); *but* see Orders (number unknown), War Dep't (2 Jan. 1810) (Second Lieutenant Cannan) (convicted of playing cards with an enlisted servant).

[65] Gen. Court-Martial Orders No. 53, HQ of the Army (27 Aug. 1869).

[66] Gen. Orders No. 10, HQ, Dep't of the Army (1825) (LT convicted of compromising his position as a commissioned officer by going on a fishing trip with enlisted men of his garrison).

[67] Gen. Court-Martial Orders No. 61, HQ of the Army (2 Sep. 1867).

[68] Orders No. 37, Adjutant General's Office (31 July 1827) (LT in the "almost daily habit of living or feeding" upon company rations in the company's mess room "thereby lessening his dignity and character as an officer"; found not guilty).

frequented by enlisted men;[69] borrowing money without repaying it;[70] loaning soldiers money at usurious interest rates;[71] receiving stolen property;'* using noncommissioned officers and enlisted men for private gain;[73] using disrespectful language about another officer in the presence of enlisted men;" selling liquor;[75] engaging in sexual misconduct in

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[69]Gen. Court-Martial Orders No. **43,** War Dep't **(20** July **1867)** (LT joined in dance with enlisted men); Gen. Court-Martial Orders No. **53,** HQ of the Army **(27** Aug. **1869)** (LT did "publicly consort or associate with enlisted men, and with notorious prostitutes and lewd women, engaging in a dance with them");Gen. Court-Martial Orders No. **48,** HQ of the Army **(16** July **1869)** (CPT on several occasions did "visit a notorious baile or dancing house, and then and there associate with mechanics, employ'es of the United States, enlisted men, Mexicans, and men of low and bad character"); Gen. Court-Martial Orders No. **84,** War Dep't **(2** Nov. **1875)** (LT danced with notorious Mexican women and enlisted men and then did "associate familiarly with and accept the social company" of the enlisted men while returning from the dance hall to the post).

[70]Gen. Orders **No. 55,** Dep't of Washington **(1863);** Gen. Orders No. **110,** HQ, Dep't of Washington **(17** Nov. 1864) **(LT** borrowed **$470** from enlisted men and refused to repay debt); Gen. Orders. No. **1,** HQ, 18th Army Corps, Dep't of Virginia and N. Carolina **(5** Jan. **1864) (LT** borrowed **$75** from new enlisted man and refused to repay debt; found not guilty); Gen. Court-Martial Orders No. **87,** War Dep't **(22** Mar. **1866)** (LT borrowed and failed to repay unspecified sums from certain privates); Gen. Court-Martial Orders No. **46,** War Dep't **(20** Dec. **1872)** (CPT "Ransom" borrowed about **$475** from hospital steward, only repaid **$72.45);** Gen. Court-Martial Orders No. **50,** War Dep't **(1** July **1874)** (LT borrowed money from and failed to repay it to several NCOs and post trader); Gen. Court-Martial Orders **No.** 68, War Dep't **(25** Aug. **1874)** (CPT borrowed **$300** from a private which he failed to repay); Gen. Court-Martial Orders **No. 31,** HQ of the Army **(7** Apr. **1887)** (LT borrowed **$50** from private, repaid only **$25);** Gen. Court-Martial Orders No. **54,** HQ of the Army **(27** Oct. 1888) (LTC borrowed **$300** from private).

[71]Gen. Orders (number and headquarters unknown) **(24** Dec. **1811) (25%** interest); Gen. Orders No. **4,** Dep't of the Gulf **(1866)** (pay double amount borrowed, due at next payday).

[72]Gen. Orders No. **204,** War Dep't **(2** July **1863)** (CPT knowingly received stolen sword from a private and used it as his own; afterwards recommended the private for a sergeant's warrant); Gen. Court-Martial Orders No. **36,** War Dep't **(4** Mar. **1864)** (LT received numerous items of stolen jewelry from a SGT and a PVT in his unit).

[73]Gen. Order (unnumbered) Adjt. and Inspr. General's Office **(7** Feb. 1820) (COL in Alabama used a private as his coachman and wagoneer; used NCOs as overseers of his negros); Gen. Orders No. **71** (headquarters unknown) **(1822)** (by causing soldiers to furnish their labor to a civilian in payment of a debt due the latter by the accused); Gen. Orders No. **72** (headquarters unknown) **(1836)** (by employing soldiers to perform work for his private benefit); Gen. Orders No. **249,** War Dep't **(30** July **1863)** (LT induced soldiers to seize private property (a mule and a horse) for his personal use in time of war); Gen. Court-Martial Orders **No. 58,** HQ of the Army **(18** Aug. **1868)** (LT conspired with enlisted men to sell public forage to civilians for personal gain); Gen. Court-Martial Orders No. **65,** War Dep't **(13** Aug. **1874)** (LT used Army sawmill and enlisted men to manufacture railroad ties which he sold for private gain).

[74]Gen. Court-Martial Orders No. **45,** War Dep't **(2** July **1868)** (LT stated in the presence of an enlisted man that another named LT "was good for nothing but to drink whiskev and make a fuss").

[75]Gen. Orders No. **49,** HQ, Dep't of Washington (14 Nov. **1863)** (CPT and enlisted men sold liquor in the CPT's tent and 'cabinto other enlisted men).

the presence of enlisted men;[76] visiting a "house of ill fame" in company with an enlisted men and a city jailor;[77] and familiarly associating with enlisted men by using a nickname[78] or by walking together arm-in-arm.[79]

The shift in justification for the fraternization custom from social class to military discipline and order permitted the beginning of the expansion of the custom to include undue familiarity between officers of different ranks or enlisted members of different ranks. Noncommissioned officers were court-martialed for gambling with enlisted men[80] or for permitting them to gamble.[81] An officer was convicted of using disrespectful language to a superior officer in the presence and hearing of several other officers.[82]

On at least two occasions presidential intervention was necessary concerning convictions for undue familiarity. A captain was convicted for asking noncommissioned officers and privates about the conduct of their commanding officer, "thereby degrading himself as an Officer and a Gentleman, and destroying all military discipline and subordination."[83] President John Quincy Adams concluded that asking enlisted men about a superior officer's conduct was not culpable unless done with malicious or injurious intent with regard to the superior officer.[84] In a more unusual case, President Adams approved a lieutenant's conviction for challenging a colonel to a duel, but remitted the sentence because of the colonel's practice of declaring his readiness to waive his rank and duel

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[76]Gen. Orders No. 10 (headquarters unknown) (11 Feb. 1825) (First Lieutenant Evans); Gen. Court-Martial Orders No. 665, War Dep't (22 Dec. 1865) (LT found not guilty of having sexual intercourse in the presence of enlisted men but guilty of allowing himself "to be treated with improper familiarity" by the unit's civilian female cook in the presence of enlisted men "thereby forfeiting the respect of the men of the regiment, and bringing disgrace upon his uniform as an officer in the U.S. service").

[77]Gen. Court-Martial Orders No. 15, HQ of the Army (2 Mar. 1870).

[78]Gen. Court-Martial Orders No. 43, War Dep't (20 July 1867) (LT told enlisted men at a dance, "Don't call me Lieutenant, call me Shorty").

[79]Gen. Court-Martial Orders No. 61, HQ of the Army (2 Sep. 1867) (LT did "associate with, engage in familiar conversation with, and walk arm in arm with enlisted men of his regiment, at a late hour of the night, outside the United States reservation, and on the public highway").

[80]Gen. Court-Martial Orders No. 8, HQ, Dep't of Texas (10 Feb. 1874) (SGT of the guard gambled with members of his guard and his prisoner; SGT was busted to PVT); Gen. Court-Martial Orders No. 39, HQ, Dep't of the Missouri (18 Dec. 1890) (two SGTs gambled with enlisted men in the barracks).

[81]Gen. Court-Martial Orders No. 30, HQ, Dep't of the Platte (29 Mar. 1886) (1st SGT provided gambling implements for enlisted men's use in company barracks).

[82]Gen. Court-Martial Orders No. 425, War Dep't (16 Aug. 1865) (while confined in a confederate POW prison a CPT told a LTC, "You suck my _____" in the presence and hearing of other Union officers in the Confederate prison).

[83]Order No. 51, Adjutant General's Office (4 Sep. 1828).

[84]*Id.* at 3. In this case the inquiries confirmed the superior officer's reported acts of intemperance and the CPT "took measures to suppress the licentious discourse among the men." *Id.*

any of his inferior officers who might be dissatisfied with his conduct.[85] President Adams found that the colonel's declarations were subversive of discipline and degraded him to the level of his inferiors.[86]

E. TWENTIETH CENTURY DEVELOPMENTS

1. Pre-UCMJ Court-Martial Cases.

The custom against fraternization continued to evolve during the first half of this century. There were more than 200 twentieth century fraternization type cases[87] prior to the enactment of the Uniform Code of Military Justice in 1950.[88]

As in prior eras, the most frequent charge concerned officers drinking with, drinking in the presence of, appearing drunk before, or selling alcohol to enlisted men, in military or public places.[89] Other improper of-

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[85]*Orders No. 64, Adjutant General's Office (29 Dec. 1827).

[86]*Id.* at 12-13.

[87]The cases cited in this section are by no means a complete listing of such cases during this period. As indicated in ***supra*** note 43 there is no index to the vast majority of the many volumes of General Orders and General Court-Martial Orders during this period. Appellate board of review decisions generally are published and indexed for the period 1929-1951. Acknowledgment is made to the compilation of 237 appellate decisions from 1929-1983 in United States v. Johanns, 17 M.J. 862, 882-85 n.15 (A.F.C.M.R. 1983) (Miller, J., concurring in part and dissenting in part), which served as an excellent starting point for researching this section. For consistency with prior sections of this article where only the specifications were available, I excluded cases listed in Judge Miller's compilation which did not expressly charge that the misconduct occurred with or in the presence of enlisted men. Once again I have provided a short parenthetical explanation after each citation whenever the original records were available,

[88]Act of May 5, 1950, ch. 169, 64 Stat. 108. Current version at 10 U.S.C. §§ 801-940 (1982).

[89]Gen. Orders No. 142, HQ of the Army (29 Dec. 1900) (LT drank and brawled with enlisted men in a public place in the presence of other enlisted men); Gen. Orders No. 95, War Dep't (17 June 1905) (CPT, in uniform, drank with prostitutes in the presence of enlisted men); Gen. Orders No. 90, War Dep't (5 May 1909) (LT, while officer of the guard, drank with enlisted men in public saloon); Gen. Orders No. 109, War Dep't (1 June 1909) (LT, in uniform, was drunk in the presence of enlisted men and had to be assisted to his quarters); Gen. Orders No, 198, War Dep't (26 Oct. 1910) (LT was drunk in uniform in the presence of enlisted men); Gen. Orders No. 2, War Dep't (20 Jan. 1912) (LT drank with enlisted men in one of their tents; also was drunk in public saloon and had to be carried out by enlisted men); Gen. Orders No. 8, War Dep't (5 Feb. 1913) (CPT was drunk while serving as a member of a general court-martial); Gen. Court-Martial Orders No. 104, War Dep't (18 May 1920) (LT was drunk "while in the company of enlisted men"); Gen. Court-Martial Orders No. 2, War Dep't (27 Jan. 1927) (LT was drunk in exchange restaurant "while in uniform and in the presence and hearing of several enlisted men"); United States v. Hammond, 1 B.R. 83 (1929) (LT was "drunk and disorderly and drinking in company with enlisted men"); United States v. Raymond, 10 B.R. 169 (1939) (LT, while on duty, drank with SGT and enlisted man); United States v. Cromer, 15 B.R. 17 (1942) (LT drank with enlisted man); United States v. O'Malley, 16 B.R. 285 (1943) (LT did "offer, furnish, and supply" liquor to a PVT on duty as a sedan driver); United States v. Granosky, 17 B.R. 193 (1943) (LT did "publicly associate and drink intoxicating beverages with enlisted men of his squadron," did knowingly permit an enlisted man to wear his LT insignia, and did "associate publicly" with the enlisted man while he wore the LT's insignia); United States v. Paradise, 19 B.R. 43 (1943) (LT drank with enlisted man); United States v. Brennan, 19

ficer-enlisted relationships charged in conjunction with these drinking

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B.R. **139 (1943)** (LT was drunk at retreat, in the presence of the troops, and while in uniform); United States v. Slaughter, **20** B.R. **9 (1943)**(LT drank with enlisted men in a public bar in uniform and wore a private's uniform on the public streets the next morning); United States v. Murphy, **21** B.R. **13 (1943)** (COL did, "while drinking and under the influence of intoxicating liquor, wrongfully and to the prejudice of military discipline, drill and cause to be drilled" the enlisted personnel of his command); United States v. Westcott, **21** B.R. **41 (1943)**(LT drank with enlisted men); United States v. Nelson, **21** B.R. **55 (1943)** (LT drank with enlisted men); United States v. Singletary, **21** B.R. **389 (1943)** (LT used a private to sell his whiskey to enlisted personnel); United States v. Johnston, **23** B.R. **57 (1943)** (LT drank and gambled with enlisted men and NCOs in a railway passenger car); United States v. Hyre, **23** B.R. **115 (1943)** (LT, in uniform, drank with enlisted men and NCOs in a public bar and fondled an enlisted man); United States v. Minton, **23** B.R. **159 (1943)** (LT persuaded enlisted men to drink with him while they were on duty); United States v. Reid, **26** B.R. **391 (1943)** (LT was drunk in the presence of enlisted men and asked them for money like "a common beggar"); United States v. Bunker, **27** B.R. **385 (1943)** (MAJ drank with enlisted men in a public bar); United States v. Bradford, **30** B.R. **279 (1944)** (LT gave liquor to, and drank with, enlisted men); United States v. Norren, **32** B.R. **95 (1944)**(CPT drank with enlisted man); United States v. Fiedler, **33** B.R. **189 (1944)**(LT was drunk and disorderly in a public bar frequented by enlisted men); United States v. Watts, **33** B.R. **195 (1944)**(LT, while in uniform on a passenger train, drank with enlisted men, including a prisoner and his enlisted military guard); United States v. McPheron, **33** B.R. **325 (1944)** (LT removed his insignia of grade from his uniform and drank with enlisted men in a public cafe); United States v. Bates, **34** B.R. **147 (1944)** (CPT drank and gambled with enlisted men under his charge); United States v. Martin, **34** B.R. **223 (1944)** (LT drank and gambled with enlisted men); United States v. MacFarlane, **38** B.R. **339 (1944)** (LT drank with enlisted men); United States v. Lillis, **39** B.R. **395 (1944)** (LT was drunk in uniform in the presence of enlisted men); United States v. Nettles, **40** B.R. **385 (1944)** (WAC LT drank whiskey with, and later found nude with, an enlisted man in a hotel room); United States v. Parker, **2** B.R. (A-P) **33 (1944)**(LT drank and gambled with PVT and condoned his impersonating a LT); United States v. Price, **42** B.R. **243 (1944)** (LT used NCO to sell a **$5** quart of whiskey to enlisted men on Guadalcanal for **$30);** United States v. Whalen, **10** B.R. (ETO) **201 (1944)**(LT went to enlisted barracks on Christmas, repeatedly drank with enlisted men, and wore a fatigue uniform bearing staff sergeant's chevrons); United States v. Buck, **11** B.R. (ETO) **187 (1944)**(MAJ, while on a train, was drunk and engaged in flagrant "petting" with a nurse under his command, all in the presence of officers and nurses in his command); United States v. Gardner, **13** B.R. (ETO) **127 (1944)** (CPT was drunk in corps command post in the presence of officers, enlisted men, and female American Red Cross personnel); United States v. Long, **13** B.R. (ETO) **291 (1944)**(CPT drank and committed sodomy with enlisted man); United States v. Glover, **14** B.R. (ETO) **67 (1944)** (CPT drank with NCO); United States v. Wright, **44** B.R. (ETO) **183 (1945)** (LTC drank "in the company of enlisted men" and made "unnatural advances" upon an enlisted man with his hands and by kissing him on the mouth); United States v. Foster, **46** B.R. **295 (1945)** (LT drank with NCOs); United States v. Futrell, **47** B.R. **339 (1945)**(WAC CPT did drink with, "wrongfully associate with, and entertain" enlisted men overnight in her quarters with other WAC officers); United States v. Ponder, **51** B.R. **47 (1945)** (CPT drank and gambled with NCOs and enlisted men); United States v. Katz, **54** B.R. **135 (1945)** (LT drank with WAC PVT); United States v. Mann, **55** B.R. **381 (1945)**(LT drank with enlisted man at a public drive-in); United States v. Walker, **18** B.R. (ETO) **33 (1945)**(MAJ "during the progress of an attack" drank in the presence of an enlisted man); United States v. Leonard, 16 B.R. (ETO) **279 (1945)** (LT drank "in the company of three enlisted men"); United States v. Sirois, **20** B.R. (ETO) **21 (1945)**(LT drank in the presence of enlisted men of his command); United States v. Wetherford, **22** B.R. (ETO) **47 (1945)**(MAJ drank with **13** enlisted men); United States v. Patton, **23** B.R. (ETO) **75 (1945)**(CPT drank in the presence of and with enlisted men); United States v. Petroski, **23** B.R. (ETO) **81 (1945)** (LT drank with enlisted man); United States v. Roberson, **23** B.R. (ETO) **149 (1945)**(LT drank "in company with enlisted men"); United States v. St. George, **25** B.R. (ETO) **367 (1945)**

cases included fighting," associating with prostitutes,[91] engaging in homosexual[92] or heterosexual activities,[93] gambling,[94] and condoning or participating in the improper wearing of the military uniform.[95]

One of these drinking cases, *United States v. Bunker*,[96] contains the earliest recorded use of the term "fraternize" in the officer-enlisted context?' "[I]t has long been recognized as a custom of the service that an of-

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(MAJ drank in company with NCOs and enlisted men); United States v. Ingham, 30 B.R. (ETO) 83 (1945) (LT, "while in command of a platoon, during the course of an attack drank in the presence of an enlisted man); United States v. Bryant, 30 B.R. (ETO) 291 (1945) (LT was drunk in uniform on a public street in the presence of civilians and military personnel); United States v. Marrs, 31 B.R. (ETO) 243 (1945) (LT drank with enlisted man); United States v. Powell, 33 B.R. (ETO) 221 (1945) (CPT drank with and entered an off-limits house of prostitution with enlisted men); United States v. Parkinson, 34 B.R. (ETO) 11 (1945) (LT drank with two enlisted men of his command in his quarters); United States v. Epperson, 58 B.R. 323 (1946) (LT drank with four enlisted men in a public nightclub); United States v. Pasquariello, 60 B.R. 179 (1946) (LT sold whiskey to enlisted man); United States v. Glass, 60 B.R. 185 (1946) (LT sold whiskey to NCO); United States v. Hart, 60 B.R. 247 (1946) (LT drank with and masturbated an enlisted man); United States v. Clouatre, 60 B.R. 381 (1946) (LT drank with and entered an off-limits house of prostitution with NCOs and enlisted men); United States v. Skirley, 63 B.R. 65 (1946) (LT offered to sell whiskey to enlisted men); United States v. Heaton, 64 B.R. 3 (1946) (LT drank with enlisted men in enlisted club without his insignia of rank on his uniform); United States v. Dotz, 67 B.R. 281 (1947) (LT drank in public bar, in uniform, with NCOs); United States v. Ward, 72 B.R. 301 (1947) (CPT sold $1400 worth of liquor to NCO for $5510 in Japan); United States v. Slater, 74 B.R. 371 (1947) (LT drank with enlisted man); United States v. Becker, 78 B.R. 329 (1948) (LT sold two bottles of whiskey to enlisted man); United States v. Hansen, 10 B.R.-J.C. 165 (1951) (LTC was drunk in uniform at NCO club). *See* United States v. Johanns, 17 M.J. 862, 882-885 n.15 (A.F.C.M.R. 1983) (Miller, J., concurring in part and dissenting in part) for similar cases in which the presence of enlisted personnel was not charged but was demonstrated by the evidence presented.

[Ed. note: The orders and cases in footnotes 89, 102-117, 141-145, 147-152, and 159 are listed chronologically to illustrate the development of this issue and to make this information easier to use as a research tool.]

[90] Gen. Orders No. 142, Headquarters of the Army (29 Dec. 1900). *See supra* note 89 for parenthetical explanations of the cases cited in notes 90-95.

[91] United States v. Clouatre, 60 B.R. 381 (1946); United States v. Powell, 33 B.R. (ETO) 221 (1945); Gen. Orders No. 95, War Dep't (17 Jun. 1905).

[92] United States v. Hart, 60 B.R. 247 (1946); United States v. Wright, 44 B.R. (ETO) 183 (1945); United States v. Long, 13 B.R. (ETO) 291 (1944); United States v. Hyre, 23 B.R. 115 (1943).

[93] United States v. Futrell, 47 B.R. 339 (1945); United States v. Nettles, 40 B.R. 385 (1944); United States v. Buck, 11 B.R. (ETO) 187 (1944).

[94] United States v. Ponder, 51 B.R. 47 (1945); United States v. Bates, 34 B.R. 147 (1944); United States v. Martin, 34 B.R. 223 (1944); United States v. Parker, 2 B.R. (A-P) 33 (1944); United States v. Johnston, 23 B.R. 57 (1943).

[95] United States v. Heaton, 64 B.R. 3 (1946); United States v. McPheron, 33 B.R. 325 (1944); United States v. Whalen, 10 B.R. (ETO) 201 (1944); United States v. Granosky, 17 B.R. 193 (1943); United States v. Slaughter, 20 B.R. 9 (1943).

[96] 27 B.R. 385 (1943).

[97] Fraternization is also used to describe certain actions involving giving aid or comfort to, or socializing with, the enemy. *See, e.g.*, cases cited in United States v. Johanns, 17 M.J. 862, 881-82 n.8 (A.F.C.M.R. 1983) (Miller, J., concurring in part and dissenting in part). The use of the term in this context is beyond the scope of this paper.

ficer should not fraternize with enlisted men to the extent that it will affect or prejudice good order or military discipline. . . . Drinking intoxicating liquor with another is one form of social intercourse or fraternization."[98] The *Bunker* case held that, absent aggravating circumstances, an officer who simply drank with an enlisted man did not act in the disgraceful or dishonorable manner required to constitute conduct unbecoming an officer and a gentleman, but did act in a manner prejudicial to good order and discipline.* Prior to this holding, charges were successfully prosecuted under either of the general Articles of War, with the majority of cases charged as conduct unbecoming an officer and a gentleman because of the social class foundation of the fraternization custom.[99] The *7 Xg Cyc* holding completes the shift in the justification for fraternization from social class to maintenance of discipline and order. From this point on, the routine fraternization type convictions were approved as conduct prejudicial to good order and discipline rather than conduct unbecoming an officer and a gentleman, absent additional aggravating circumstances.[101]

Charged officer misconduct with enlisted personnel unrelated to alcohol included **gambling;**[102] borrowing **money;**[103] engaging in **homosexual**[104]

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[98] 27 B.R. **385, 389 (1943).**

[99] *Id.* at **388.**

[100] *See* ***supra*** text accompanying notes **22-39** and **42-99** and case cited therein. The Judge Advocate General of the Army previously opined that "Drinking in the presence of several enlisted men and where other people would have no difficulty in viewing the conduct of the officer constituted a violation of A.W. **95"** (conduct unbecoming an officer and a gentleman). Dig. Op. JAG **1912-1940,** sec. 453(9) at **342.**

[101] *See, e.g.*, United States v. Ponder, **51** B.R. **47, 50 (1945)** where drinking and gambling with enlisted men which "occurred in a private place at nighttime, in the presence of only military personnel, and apparently while none of the players was engaged in military duties" was prejudicial to good order and discipline but was not aggravated enough to compromise the officer's character and standing as a gentleman.

[102] Gen. Orders No. **95,** War Dep't **(17** June **1905);** Gen. Orders No. **73,** War Dep't **(23** Apr. **1909)** (LT found not guilty of gambling with a civilian and an enlisted man "by playing cards, dice, and spitting at a line or mark for money"); Gen. Orders No. **109,** War Dep't **(1** June **1909)** (LT gambled with native Filipinos in the presence of enlisted men); Gen. Court-Martial Orders No. **38,** War Dep't **(20** Feb. **1920)** (two LTs gambled with NCO and enlisted men); United States v. Van Huss, **14** B.R. **271 (1942)** (LT played craps with enlisted men on duty in the target area of a rifle range while firing was in progress); United States v. Thompson, **14** B.R. **133 (1942)** (LT gambled with enlisted men from his company); United States v. Marinelli, **18** B.R. **377 (1943)** (LT gambled at dice with enlisted men); United States v. Black, **20** B.R. **345 (1943)** (LT played craps with enlisted men and borrowed money from them during the game); United States v. Campbell, **24** B.R. **215 (1943)** (CPT, while prison officer, played craps and blackjack with enlisted men under his command); United States v. Petty, **26** B.R. **213 (1943)** (LT gambled with NCO and enlisted men); United States v. Phillips, **26** B.R. **299 (1943)** (LT played poker with enlisted men); United States v. Desjardins, **1** B.R. (A-P) **207 (1943)** (LT played poker with enlisted men); United States v. Murray, **31** B.R. **389 (1944)** (LT gambled at pool with SGT and enlisted man); United States v. Lillis, **39** B.R. **395 (1944)** (LT played dice and poker with enlisted men); United States v. Garris, **48** B.R. **39 (1945)** (LT played blackjack with NCOs and enlisted men); United States v. Stallworth, **55** B.R. **97 (1945)** (LT gambled at cards with enlisted

men); United States v. Welch, 56 B.R. 233 (1945) (LT gambled at dice with enlisted men); United States v. Stanley, 20 B.R. (ETO) 319 (1945) (LT gambled at dice with enlisted men); United States v. Porter, 24 B.R. (ETO) 286 (1945) (CPT gambled with SSG); United States v. Hoover, 3 B.R.-J.C. 39 (1949) (LT bet $30 against $60 with an enlisted man on the outcome of a unit basketball game); United States v. Bazanos, 8 B.R.-J.C. 33 (1950) (CPT gambled with enlisted men); United States v. Weller, 10 B.R.-J.C. 381 (1950) (CPT gambled with enlisted men of his command).

[103] Due to the large number of cases and the relative unimportance of the amounts involved, I did not individually capsulize each of these borrowing cases. Gen. Orders No. 41, Headquarters of the Army (27 Mar. 1903); Gen. Orders No. 8, War Dep't (10 Jan. 1906); Gen. Orders No. 29, War Dep't (21 Feb. 1910); Gen. Court-Martial Orders No. 408, HQ, Philippine Dep't (31 Oct. 1913); Gen. Court-Martial Orders No. 191, War Dep't (9 Dec. 1920); Gen. Court-Martial Orders No. 4, War Dep't (3 Apr. 1925); Gen. Court-Martial Orders No. 6, War Dep't (22 May 1926); Gen. Court-Martial Orders No. 12, War Dep't (21 July 1926); United States v. Strickland, 1 B.R. 329 (1930); United States v. Johnston, 4 B.R. 211 (1933); United States v. Sullivan, 5 B.R. 83 (1934); United States v. Gould, 7 B.R. 49 (1935); United States v. Crist, 12 B.R. 49 (1941); United States v. Curran, 15 B.R. 129 (1942); United States v. Folk, 15 B.R. 307 (1942); United States v. Delbrook, 18 B.R. 29 (1943); United States v. Addison, 18 B.R. 171 (1943); United States v. Brunkella, 19 B.R. 289 (1943); United States v. Tillotson, 20 B.R. 149 (1943); United States v. Black, 20 B.R. 345 (1943); United States v. Westcott, 21 B.R. 41 (1943); United States v. Nelson, 21 B.R. 55 (1943); United States v. Hart, 23 B.R. 373 (1943); United States v. Skeen, 24 B.R. 373 (1943); United States v. Peck, 25 B.R. 205 (1943); United States v. Churchich, 26 B.R. 199 (1943); United States v. Hedgess, 27 B.R. 223 (1943); United States v. Bedwell, 28 B.R. 229 (1943); United States v. Morrison, 28 B.R. 355 (1943); United States v. Benfield, 29 B.R. 365 (1944); United States v. Maeef, 30 B.R. 53 (1944); United States v. Bohlin, 30 B.R. 209 (1944); United States v. Bradford, 30 B.R. 279 (1944); United States v. Steele, 30 B.R. 331 (1944); United States v. Van Epps, 31 B.R. 193 (1944); United States v. Young, 31 B.R. 249 (1944); United States v. Murray, 31 B.R. 389 (1944); United States v. Norren, 32 B.R. 95 (1944); United States v. Clift, 33 B.R. 263 (1944); United States v. Elliot, 34 B.R. 293 (1944); United States v. Robertson, 34 B.R. 321 (1944); United States v. Edwards, 35 B.R. 143 (1944); United States v. Sears, 37 B.R. 39 (1944); United States v. Lowden, 39 B.R. 109 (1944); United States v. Gross, 39 B.R. 133 (1944); United States v. Corcoran, 40 B.R. 235 (1944); United States v. Allgood, 40 B.R. 353 (1944); United States v. Price, 42 B.R. 243 (1944); United States v. Gilson, 43 B.R. 235 (1944); United States v. Hambright, 5 B.R. (ETO) 287 (1944); United States v. Collins, 8 B.R. (ETO) 219 (1944); United States v. Witmer, 9 B.R. (ETO) 237 (1944); United States v. Crane, 1 B.R. (A-P) 393 (1944) (repayment by CPT of $150 "with a substantial profit to the lender (enlisted man) in no manner detracts from the offense"); United States v. Moore, 45 B.R. 141 (1945); United States v. MacDonald, 46 B.R. 1 (1945); United States v. McGovern, 46 B.R. 305 (1945); United States v. Jamieson, 47 B.R. 369 (1945); United States v. Wilson, 48 B.R. 71 (1945); United States v. Morris, 51 B.R. 29 (1945); United States v. Giardina, 51 B.R. 291 (1945); United States v. Murray, 53 B.R. 93 (1945); United States v. Phillips, 55 B.R. 31 (1945); United States v. Burbank, 57 B.R. 41 (1945); United States v. Coates, 57 B.R. 157 (1945); United States v. Kuse, 15 B.R. (ETO) 73 (1945); United States v. Stanley, 20 B.R. (ETO) 319 (1945); United States v. Vollmer, 24 B.R. (ETO) 281 (1945); United States v. Porter, 24 B.R. (ETO) 286 (1945); United States v. Wickerson, 25 B.R. (ETO) 295 (1945); United States v. Powell, 33 B.R. (ETO) 221 (1945); United States v. Hicks, 58 B.R. 139 (1946); United States v. Zaleski, 58 B.R. 349 (1946); United States v. Bryant, 65 B.R. 119 (1946); United States v. Sandsness, 65 B.R. 337 (1946); United States v. Thomas, 65 B.R. 57 (1947); United States v. Dye, 70 B.R. 385 (1947); United States v. Fears, 71 B.R. 37 (1947); United States v. Lach, 71 B.R. 303 (1947); United States v. Vanover, 79 B.R. 189 (1948); United States v. Crank, 81 B.R. 289 (1948); United States v. Johnson, 1 B.R.-J.C. 343 (1949); United States v. Wilkens, 2 B.R.-J.C. 153 (1949); United States v. Cole, 3 B.R.-J.C. 159 (1949); United States v. Storm, 11 B.R.-J.C. 127 (1951).

[104] United States v. Leavit, 15 B.R. 51 (1942) (LT engaged in "lewd and lascivious behavior" with a sailor); United States v. Samuels, 22 B.R. 229 (1943) (LT made homosexual advances and propositions to enlisted man); United States v. Fahey, 26 B.R. 305 (1943) (LT committed sodomy with enlisted man); United States v. Fowler, 27 B.R. 21 (1943) (LT

or heterosexual activities;[105] associating with prostitutes;[106] making sexual advances towards enlisted men's wives;[107] fighting with or in the presence of enlisted men;[108] misappropriation of enlisted labor for per-

made homosexual solicitations to SGT); United States v. Kappes, **27** B.R. **87 (1943)** (LT committed sodomy with NCOs and enlisted men); United States v. McFarlane, **28** B.R. **217 (1943)** (LT attempted sodomy with and fondled SGT); United States v. Sebastian, **28** B.R. **267 (1943)** (MAJ committed sodomy with enlisted men); United States v. Breymann, **50** B.R. **1 (1943)** (LT kissed and fondled SGT); United States v. Gage, **1** B.R. (ETO) **299 (1943)** (LT committed sodomy with SGT); United States v. Suckow, **2** B.R. (ETO) **199 (1943)** (LT committed sodomy with enlisted man); United States v. Jenna, **1** B.R. (A-P) **53 (1943)** (LT committed sodomy with several NCOs and enlisted men); United States v. Fitch, **1** B.R. (A-P) **105 (1943)** (CPT made sexual advances towards and committed sodomy with NCOs); United States v. Ritner, 18 B.R. (ETO) **189 (1945)** (LT made homosexual advances upon NCO and PVT).

[105] United States v. Hooey, **27** B.R. **5 (1943)** (LT took WAC enlisted woman into bachelor officers' barracks); United States v. Porter, **39** B.R. **49 (1944)** (LT wrote letter to WAC PFC asking to perform cunnilingus on her); United States v. Ochs, **40** B.R. **339 (1944)** (WAC LT occupied quarters with a married SGT not her husband); United States v. Clark, **2** B.R. (A-P) **343 (1945)** (two LTs "openly and wrongfully" associated with two enlisted women by kissing and fondling them in the cab and bed of a truck in a motor pool in the presence of enlisted men); United States v. Kroh, **2** B.R. (A-P) **405 (1945)** (LT wrongfully associated with and entertained enlisted women in his quarters); United States v. Wicks, **4** B.R. (A-P) **171 (1945)** (LT had sexual intercourse with Okinawan female civilian in the presence of enlisted man in violation of local directive prohibiting fraternization with civilians); United States v. Thompson, **31** B.R. (ETO) **235 (1945)** (LT held civilian woman at gunpoint and ordered her to strip in front of him and two enlisted men); United States v. Bonet, **60** B.R. **191 (1946)** (LT permitted enlisted men to keep and have sexual intercourse with two civilian women in the barracks for over a week; LT had sexual intercourse with these women in the presence of enlisted men); United States v. McMillen, **69** B.R. **113 (1947)** (LT shared bedroom with SGT where each slept with civilian women not their wives); United States v. Rabb, **81** B.R. **77 (1948)** (LTC transport commander made sexually suggestive comments to female enlisted member of ship's crew).

[106] United States v. Kelly, **11** B.R. **257 (1941)** (LT appeared "in uniform in a well known place of prostitution in the presence of enlisted men"); United States v. Desjardins, **1** B.R. (A-P) **207 (1943)** (LT accompanied enlisted man to house of prostitution).

[107] Gen. Orders No. **63,** War Dep't **(4** Apr. **1904)** (LT repeatedly attempted to win the affections of a SGT's wife with promises, presents, and letters); Gen. Orders No. 80, War Dep't **(3** May **1904)** (LT told a Philippine scout's wife that he would place her husband in confinement if she did not accept the LT's solicitations for sexual favors); Gen. Orders No. **60,** War Dep't **(21** Mar. **1907)** (LT used his position to rape the wives of two Philippine scouts); United States v. Sansweet, **42** B.R. **355 (1944)** (MAJ solicited "careases and attention" from the wife of a private under his command who was pending court-martial); United States v. Harvey, **48** B.R. **239 (1945)** (CPT engaged in sexual intercourse on five separate occasions with the wife of an enlisted man who was on active duty in North Africa); United States v. Grzegorowicz, **52** B.R. **273 (1945)** (CPT had sexual intercourse with wife of enlisted man who was shot down over enemy territory).

[108] United States v. Parks, **17** B.R. **11 (1943)** (LT engaged "in a fight and brawl with an enlisted man" on a public sidewalk); United States v. Robinson, **36** B.R. **379 (1944)** (LT offered to "take off my bars" and fight PVT).

sonal gain;[109] accepting gifts;[110] loaning money;[111] and soliciting or condoning improper acts such as nepotism,[112] stealing,[113] making false statements,[114] impersonating an officer,[115] and preventing the attendance of a court-martial witness.[116]

Only three cases during this period actually charged fraternization in a specification.[117] United States *v. Jones*[118] reversed a finding that a lieutenant did "wrongfully fraternize with enlisted men" because the record

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[109]United States v. Patka, **44** B.R. **265 (1944)**(CPT ordered corporal to wax his private automobile); United States v. Mackay, **37** B.R. **129 (1944)**(MAJ ordered enlisted personnel to paint and fix up his home); United States v. Campbell, **41** B.R. **49 (1944)**(CPT obtained passes for enlisted men who performed painting and carpenter work upon his private property); United States v. Fisher, 1B.R. (CBI-IBT) **59 (1944)**(LT ordered enlisted man to load **30** cases of beer belonging to the LT onto a truck); United States v. Sansweet, **42** B.R. **355 (1944)**(MAJ used enlisted men to work on his home; also gave them furloughs from Florida to New York to purchase tires for the Major's car, for which he later failed to pay); United States v. Allen, **56** B.R. **273 (1945)**(MAJ paid four enlisted men **$100** for three weeks work in and around his private home during duty hours); United States v. Delano, **1** B.R. (POA) **263 (1945)**(MAJ used enlisted men to repair and maintain his private automobile); United States v. O'Conner, **75** B.R. **51 (1947)**(CPT required enlisted men to build a house for him, primarily with embezzled Government supplies).

[110]United States v. Mayers, **18** B.R. **65 (1943)**(MAJ solicited and received numerous gifts of alcohol from his brother-in-law PVT whom he subsequently promoted to SSG); United States v. Price, **42** B.R. **243 (1944)**(LT accepted four fountain pens from an enlisted man in his company); United States v. Sansweet, **42** B.R. **355 (1944)**(MAJ accepted free paint job for his car and a cigarette lighter from enlisted members of his command); United States v. Gilliam, **4** B.R. (A-P) **163 (1945)**(LTC solicited and accepted a "little silver watch" from an enlisted member of his command); United States v. Waggoner, **8** B.R.-J.C. **149 (1950)**(LT accepted a check for **$61.20** from a PVT under his control).

[111]United States v. McNeil, **48** B.R. **287 (1945)**(LT repeatedly loaned small amounts of money to enlisted men at exorbitant rates of interest running as high as **100%** per month).

[112]United States v. Mayers, **18** B.R. **65 (1943)**(MAJ caused the transfer, reassignment, and promotion (PVT to SSG) of his brother-in-law).

[113]Gen. Court-Martial Orders No. **49,** War Dep't **(3** Nov. **1922)** (CPT entered into conspiracy with enlisted man to steal Government property); United States v. Stoddard, **2** B.R. (CBI-IBT) **177 (1944)**(LT solicited SSG's assistance in larceny of twelve refrigerators).

[114]Gen. Court-Martial Orders No. **4,** War Dep't **(3** Jan. **1920)**(LT gave PVT an order to lie when asked about property stolen by the LT); Gen. Court-Martial Orders No. **39,** War Dep't **(25** Aug. **1922)** (LT was caught cheating in Field Artillery School and tried to get PVT to sign a blank sheet of paper "for the purpose of inserting a statement over this signature"; found not guilty); United States v. Petrie, **33** B.R. (ETO) **133 (1945)**(LT persuaded enlisted man to commit perjury regarding their presence at a house of prostitution); United States v. Harpole, **3** B.R. (A-P) **133 (1945)**(LT told enlisted man to make a false statement if questioned about LT's misconduct); United States v. Huston, **4** B.R. (A-P) **7 (1945)**(LT caused PVT to make a false affidavit in connection with an investigation of the LT).

[115]Gen. Orders No. **96,** War Dep't **(14** July **1911)**(LT, under arrest in his tent, requested PVT to go to LT's tent and impersonate him so he could go AWOL).

[116]United States v. Perry, **10** B.R.-J.C. **275 (1951)**(MAJ solicited a PVT to prevent the attendance of another PVT as a witness at the MAJ's court-martial).

[117]Four additional board of review decisions did use the term fraternization in their opinions: United States v. Bunker, **27** B.R. **385, 389 (1943);** United States v. Fiedler, **33** B.R. **189, 192 (1944);** United States v. Bates, **34** B.R. **147, 157 (1944);** United States v. Leonard, **16** B.R. (ETO) **279,293 (1945).**

[118]40 B.R. **149,151 (1944).**

contained "no substantial evidence whatsoever of his wrongful fraternization with enlisted men."[119]

In *United States v. Patterson*[120] a lieutenant was convicted of two specifications stating he did "fraternize socially" with enlisted men in a public hotel and country club. The board of review determined that the accused's conduct in driving enlisted men to a distant town where they attended a dance together, shared a hotel room, drank and talked with women, and swam in an Officer's Club pool did not constitute conduct compromising his position as an officer and a gentleman, but was conduct prejudicial to good order and discipline. "Social fraternization between officers and enlisted personnel is prohibited by military custom and not by any specific provision of the Articles of War. The basis of the custom is military discipline. It is not a question of social equality."[121]

United States v. Penick[122] upheld a finding that a lieutenant did "wrongfully and willfully fraternize and associate socially with" two sergeants. The evidence showed that the "accused spent much time talking, drinking, and playing darts with the enlisted men in a public place."[123] A dissenting opinion concluded that the specification failed to state an offense and did not give the accused fair notice of the charged miscon-

2. *Women in the Army.*

The changing role of women in the Army during the first half of this century also had a significant impact on the custom against fraternization.[125] Although a few women had served with the armed forces in some capacity since the American Revolution, it was not until World War II that the role of women in the Army significantly impacted upon the fraternization custom.[126] The number of women serving in the Army in World War II increased from 939 in 1940 to 153,644 in 1945.[127] For the first time the Army was faced with dating and other heterosexual relationships between officers and enlisted personnel on a large scale.

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[119] *Id.* at 155.
[120] 41 B.R. 365 (1944).
[121] *Id.* at 368.
[122] 19 B.R. (ETO) 257 (1945).
[123] *Id.* at 260.
[124] *Id.* at 261 (Burrow, J., dissenting in part).
[125] For detailed narrations of the evolution of the role of women in the Army, see J. Holm, Women in the Military, An Unfinished Revolution (1982); M. Treadwell, The Women's Army Corps (1954).
[126] *See* Holm, *supra* note 125, at 1-20 and Treadwell, *supra* note 125, at 3-15 for reviews of the role of women in the armed forces prior to World War II.
[127] Dep't of Army (ODCSPER) Report, Women in the Army Policy Review 2 (12 Nov. 1982) (hereinafter cited as WITAPRG Report). Women constituted three percent of the force in 1945. *Id.*

Despite this change in demographics, the Army continued to adhere to its unwritten custom prohibiting social associations between officers and enlisted personnel. The custom made no allowances for relationships with members of other services or allied armies, friends, relatives, or even spouses.[128] This unrealistic approach created some absurd results. Army enlisted women were punished for dating U.S. Navy or allied officers, even though those officers had committed no offense under the rules of their service.[129]

An Army captain married to an enlisted woman received a letter of reprimand which began: "It has come to the attention of this headquarters that you are living with your wife. This must cease at once."[130] Publication of this letter in the *Washington Post*[131] typified the public relations nightmare created by the Army's position on fraternization.

The lack of an Army-wide written policy resulted in different rules in different theaters of the war. For example, even though dating was generally restricted, officer-enlisted marriages were permitted in the North African and Mediterranean theaters; permitted in Europe provided husband and wife subsequently were "stationed at widely separated posts"; prohibited in the Far East Asia Service Command unless the woman became pregnant; and completely prohibited in the China-Burma-India theater.[132]

In some theaters, relatives and fiancees carried official "letters of authorization" permitting officer-enlisted socializing with specified family members.[133] For example, an enlisted WAC trainee requested a letter authorizing her to have a public dinner with her lieutenant general father "to avoid apprehension by the military police for 'socializing' with an officer."[134]

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[128] Holm, *supra* note 125, at 74.

[129] Treadwell, *supra* note 125, at 512. The Navy had a written policy concerning officer-enlisted relationships between personnel of opposite sexes:

> The custom of the Service requires great circumspection in social relationships in order to avoid any compromising of their relative military positions. However, the commanding officer of the WAVES has ruled that officers and enlisted personnel of opposite sexes may attend social functions together so long as they conduct themselves in accordance with the general rules of conduct applicable to ladies and gentlemen in any social or nonmilitary situation.

Bupers Info. Bull., Jan. 1943, SPWA 335.11(24 Dec. 1943), *quoted in id.* at 513.

[130] Treadwell, *supra* note 125, at 404.

[131] "Washington Post, Mar. 2, 1947 (page unknown), *quoted in id.*

[132] Treadwell, *supra* note 125, at 376, 403, 449, 469.

[133] *See, e.g., id.* at 402.

[134] Holm, *supra* note 125, at 74.

Despite personal support from Generals Eisenhower[135] and Marshall,[136] all efforts during world War II to promulgate a uniform, written Army policy on fraternization, or at least male-female fraternization, failed. It was more than thirty years later in 1978 when the Army published its first written fraternization policy.[137]

3. ***The*** *Doolittle Board.*

In 1946 the Secretary of War appointed a special board chaired by Lieutenant General Doolittle "to study officer-enlisted man relationships and to make recommendations, . . [for] changes in existing practices, laws, regulations, etc., which are considered necessary or desirable in order to improve relations between commissioned and enlisted personnel."[138] After two months of study the board concluded that the primary causes of poor relationships between commissioned and enlisted personnel were traceable to poor leadership by a few officers and to a "system that permits and encourages a wide official and social gap between commissioned and enlisted personnel."[139]

The Board's recommendations included:

> . . . .
>
> **4.** That all military personnel be allowed, when off duty, to pursue normal social patterns comparable to our democratic way of life.
>
> 5. That the use of discriminatory references, such as "officers and their ladies; enlisted men and their wives," be eliminated from directives and publications issued in military establishments.
>
> . . . .
>
> **7.** That the hand salute be abandoned off Army installations and off duty. . . .

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[135] Eisenhower's thoughts on heterosexual fraternization: "I want good sense to govern such things. Social contact between sexes on a basis that does not interfere with other officers or enlisted persons should have the rule of decency and deportment—not artificial barriers." ETO Bd. Rpt., Vol. III, Apps. 136, 146 (11-23 May 1945), ***quoted*** *in* Treadwell, *supra* note 125, at 403.

[136] General Marshall: "The situation between the sexes is very different from that in the male Army." *Id.* at 724. General Marshall's deputies subsequently persuaded him to make no policy change regarding fraternization in view of the unsettled postwar conditions and the prospective demobilization of the Women's Army Corps. *Id.*

[137] *See infra* text and accompanying notes, Part II, Section E.5, for a discussion of the Army's first written fraternization policy.

[138] Report of the Secretary of War's Board on Officer-Enlisted Man Relationships, S. Doc. No. 196, 79th Cong., 2d Sess. 1 (1946). LTG Doolittle commanded the Eighth Air Force and led the first bomber raid on Tokyo. *Id.* at 22.

[139] *Id.* at 17.

. . . .

11. The abolishment of all statutes, regulations, customs, and traditions which discourage or forbid social association of soldiers of similar likes and tastes, because of military rank.

12. That necessary steps be taken to eliminate the terms and concepts, "enlisted men" and "officer," that suitable substitutes be employed (*e.g.*, members of noncommissioned corps, members of commissioned corps, etc.), and that all military personnel be referred to as "soldiers."[140]

Although these recommendations were never adopted, they demonstrate that the original social class justification for the custom against fraternization was no longer valid or desirable.

4. Fraternization Under the UCMJ.

The Uniform Code of Military Justice does not mention fraternization. This term also is missing from many court-martial specifications from 1950 to the present involving improper officer associations with enlisted personnel such as drinking,[141] using drugs,[142] gambling,[143] borrowing money,[144] showing pornographic movies,[145] associating with prosti-

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[140] *Id.* at 21-22.

[141] *See, e.g.*, United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952) (LT drank with and made homosexual advances towards enlisted man); United States v. Jackson, 8 C.M.R. 215 (A.B.R. 1952) (LT drank and became intoxicated with an enlisted man in a public place); United States v. Sloan, 14 C.M.R. 375 (A.B.R. 1953) (LT drank with enlisted man).

[142] *See, e.g.*, United States v. DeStefano, 5 M.J. 824 (A.C.M.R. 1978) (LT MP smoked marihuana off-post with enlisted MPs; conviction reversed because specification did not contain words alleging criminality); United States v. Conn, 6 M.J. 351 (C.M.A. 1979) (LT smoked marihuana with enlisted men under his authority); United States v. Grahm, 9 M.J. 556 (N.C.M.R. 1980) (Navy LT smoked marihuana off-base with enlisted members of his ship's crew); United States v. King, CM 440003 (A.C.M.R. 30 Apr. 1981) (CPT smoked marihuana and engaged in sexual intercourse with enlisted woman of his battery).

[143] *See, e.g.*, United States v. Pryor, 2 C.M.R. 365 (A.B.R. 1951) (CPT played craps with enlisted men in the barracks on payday); United States v. Reed, 9 C.M.R. 269 (A.B.R. 1952) (MAJ played poker with NCO's under his command); United States v. Atkinson, 10 C.M.R. 443 (A.B.R. 1953) (LT played craps with enlisted men in the day room); United States v. Britton, 13 C.M.A. 499, 33 C.M.R. 31 (1963) (CPT gambled with enlisted man).

[144] *See, e.g.*, United States v. St. Ours, 6 C.M.R. (A.B.R. 1952) (CPT borrowed $300 from enlisted man); United States v. Galloway, 8 C.M.R. 323 (A.B.R. 1952) (CPT borrowed money from three NCOs under his command); United States v. Wetzell, 12 C.M.R. 269 (A.B.R. 1953) (LT borrowed $100 from enlisted subordinate).

[145] *See, e.g.*, United States v. Jewson, 7 C.M.R. 213 (A.B.R. 1951) (LTC battalion commander permitted and assisted in showing a pornographic movie to officers and enlisted members of his battalion); United States v. Cowan, 12 C.M.R. 374 (A.B.R. 1953) (LT, CPT (company commander), and WO solicited and accepted donations from enlisted men for the exhibition of an obscene and lewd motion picture film and then showed the film in the company dayroom).

tutes,[146] and engaging in homosexual[147] or heterosexual[148] activities. Yet specifications in other cases charged that officers improperly fraternized with enlisted personnel by drinking,[149] using drugs,[150] and engaging in homosexual[151] or heterosexual[152] activities. Accordingly, fraternization

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[146]*See, e.g.*, United States v. Rice, **14** C.M.R. **316** (A.B.R. **1953)** (CPT went to off-limits house of prostitution with his jeep driver, an enlisted man).

[147]*See, e.g.*, United States v. Bennington, **12** C.M.A. **565, 31** C.M.R. **151 (1961)** (LT MP drank and committed sodomy with enlisted *MP);* United States v. Livingston, 8 C.M.R. **206** (A.B.R. **1952)** (LT drank with and made homosexual advances towards enlisted man); United States v. Yeast, **36** C.M.R. **890** (A.F.B.R. **1965)** (Air Force MAJ solicited airman to photograph MAJ in the nude and to patronize homosexual establishments with him); United States v. Newak, **15** M.J. **541** (A.F.C.M.R. **1982)** (Air Force female LT encouraged use of marihuana and other drugs among Air Force personnel and committed numerous acts of sodomy with an enlisted woman).

[148]United States v. King, CM **440003** (A.C.M.R. **30** Apr. **1981)** (CPT smoked marihuana and engaged in sexual intercourse with enlisted woman of his battery).

[149]United States v. Free, **14** C.M.R. **466** (N.C.M.R. **1953)** (Marine CPT drank with, slept in the same room with, and made homosexual advances towards enlisted man in CPT's BOQ room); Staton v. Froehlke, **390** F.Supp. **503** (D.D.C. **1975)** (Army CWO drank with an enlisted woman in a bar, and later in his quarters undressed and bathed her); United States v. Mangan, NCM No. **800999** (N.M.C.M.R. **12** Sept. **1981)** (Navy ensign invited enlisted man to his BOQ where he served beer and offered a place to sleep); United States v. Tedder, 18 M.J. **777** (N.M.C.M.R. 1984), *petition granted*, 19 M.J. 115 (C.M.A. 1984) (Marine CPT, the "squadron legal officer," dated, drank in a bar with, and had sexual intercourse with female corporal who came to him for legal advice).

[150]United States v. Rodriguez, **18** M.J. **363** (C.M.A. **1984)** (female Air Force LT offered marihuana to enlisted personnel in her squadron, smoked it in their presence, and solicited homosexual and heterosexual acts with enlisted men and women); United States v. Rosario, **13** M.J. **552** (A.C.M.R. **1982)** (CPT convicted of possessing and using heroin and marihuana and of fraternization with enlisted men).

[151]United States v. Rodriguez, **18** M.J. **363** (C.M.A. **1984)** (female Air Force LT offered marijuana to enlisted personnel in her squadron, smoked it in their presence, and solicited homosexual and heterosexual acts with enlisted men and women); United States v. Lovejoy, **20** C.M.A. 18, **42** C.M.R. **210 (1970)** (Navy LT committed sodomy in LT's off-base apartment with enlisted member of his crew and fraternized with him by having the sailor as his guest in the apartment and sharing with him the cost of food); United States v. Free, **14** C.M.R. **466** (N.C.M.R. **1953)** (Marine CPT drank with, slept in the same room with, and made homosexual advances towards enlisted man in CPT's BOQ room); United States v. Pitasi, **20** C.M.A. **601, 44** C.M.R. **31 (1971)** (Navy LT committed sodomy with enlisted men); United States v. Vilches, **17** M.J. **851** (N.M.C.M.R. 1984), *petition denied*, **19** M.J. **57** (C.M.A. **1984)** (Navy LT CDR committed nonconsenual sodomy and indecent assault on enlisted man).

[152]Staton v. Froehlke, **390** F. Supp. **503** (D.D.C. **1975)** (Army CWO undressed and bathed an enlisted woman in his quarters); United States v. Mayfield, **21** M.J. **418** (C.M.A. **1986)** (LT asked enlisted woman for a date on three occasions); United States v. Jefferson, **21** M.J. **203** (C.M.A. **1986)** (CPT had sexual intercourse with enlisted woman under his command in troop living area during duty hours while both were married to other persons); United States v. Walker, **21** M.J. **74** (C.M.A. **1985)** (female LT platoon leader engaged in sexual intercourse on various occasions in her on-post quarters with married NCO who was one of her subordinate section sergeants); United States v. Johanns, **20** M.J. **155** (C.M.A. **1985)** (Air Force CPT had sexual intercourse with female NCOs not in his chain of command; specification failed to state an offense under Air Force custom); United States v. Rodriguez, **18** M.J. **363** (C.M.A. **1984)** (female Air Force LT offered marijuana to enlisted personnel in her squadron, smoked it in their presence, and solicited homosexual and heterosexual acts with enlisted men and women); United States v. Cooper, CM **438700** (A.C.M.R. **11** Aug. **1980)** (CPT had sexual intercourse with two enlisted women who were formerly under his command); United States v. Brauchler, **15** M.J. **755** (A.F.C.M.R. 1983),

case lists frequently include cases that never mention fraternization.[153]

Only a few of these cases provide any meaningful discussion of the custom. In *United States v. Free*[154] the Navy Board of Review in 1953 stated that the time, place, and circumstances of the conduct, rather than the conduct itself, determines its criminality.[155]

> Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.[156]

Applying this test, the Board listed several officer-enlisted relationships that usually would not violate the fraternization custom: playing on the same athletic team; riding in the same vehicle; dancing together at a service dance; eating, drinking, or sleeping together under dignified conditions; or exercising simple courtesies.[157] Other relationships usually would violate the custom: lending money, bestowing gifts, or taking an enlisted person in uniform to dinner at an officer's mess.[158] The *Free* decision is frequently quoted[159] and remains the foundation case for UCMJ fraternization law.

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petition denied, 18 M.J. **21** (C.M.A. **1984)** (male nurse CPT committed indecent liberties with female enlisted subordinates while he was on duty at his place of duty and in military uniform; conviction partially reversed for judge's failure to instruct on meaning of indecent liberties; conviction for indecent acts with enlisted women in a car off-post during lunch hour was sustained); United States v. Tedder, **18** M.J. **777** (N.M.C.M.R. 1984), *petition denied,* **19** M.J. **115** (C.M.A. **1984)** (Marine CPT, the "squadron legal officer," dated, drank in a bar with, and had sexual intercourse with female corporal who came to him for legal advice); United States v. Smith, **18** M.J. **786** (N.M.C.M.R. **1984)** (Marine CPT had sexual intercourse with two subordinate enlisted women); United States v. Van Steenwyk, **21** M.J. **795** (N.M.C.M.R. **1985) (LT** CDR dated and had sexual intercourse with enlisted woman); United States v. Moultak, **21** M.J. **822** (N.M.C.M.R. **1985)** (CPT, legal officer, dated and had sexual intercourse with female lance corporal); United States v. Callaway, **21** M.J. **770** (A.C.M.R. **1986)** (LTC had sexual intercourse with female LTs under his command during ROTC summer camp).

[153] *See, e.g.*, Criminal Law Deskbook, **2-27** to **2-28** ("he Judge Advocate General's School, U.S. Army, Aug. **1985).**

[154] **14** C.M.R. **466** (N.B.R. **1953).**

[155] *Id.* at **469.**

[156] *Id.* at **470.**

[157] *Id.* at **469,471.**

[158] *Id.* at **469.**

[159] *See, e.g.*, United States v. Lovejoy, **20** C.M.A. **18, 42** C.M.R. **210 (1970);** United States v. Pitasi, **20** C.M.A. **601, 44** C.M.R. **31 (1971);** United States v. Tedder, **18** M.J. **777** (N.M.C.M.R. 1984), *petition* **granted, 19** M.J. **115** (C.M.A. **1984);** United States v. Smith, 18 M.J. 786 (N.M.C.M.R. **1984).**

In United States *v. Lovejoy*,[160] one judge on the Court of Military Appeals in 1970 acknowledged that "fraternization may have a pernicious influence on military discipline,"[161] but believed that "undue familiarity between an officer and a subordinate is susceptible of correction by administrative action."[162] In United States *v. Pitasi*[163] the same court stated that even if the fraternization custom is normally enforced by administrative action, military authorities still have "the obligation of providing some guidelines by which an officer, or those who are called upon to sit in judgment as members of a court-martial, may test what conduct is or is not violative of the 'custom.'"[164] "While the drafting of an appropriate regulation might be difficult, we recommend it to the responsible military authorities."[165]

Failure to heed this warning was in large part responsible for the appellate decisions in United States *v. Johanns*.[166] In 1985 the Court of Military Appeals affirmed the holding of the Air Force Court of Military Review that, "as a matter of fact and law, the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, nondeviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable."[167]

Captain Johanns was an unmarried missile crew commander stationed at Minot Air Force Base, North Dakota. Officers at Minot were authorized to use the Noncommissioned Officers' Open Mess because the Officers' Open Mess was closed for redecoration. Johanns frequented the NCO Mess where he met three female NCOs, one of whom was married. He dated and ultimately had sexual intercourse with all three NCOs.[168]

During the course of his amorous adventures, Johanns asked his supervising colonel about the propriety of his involvements with enlisted women. The colonel told Johanns that, in his opinion, dating enlisted women was "actionable fraternization" but acknowledged that he did not know if that was the Air Force policy. The colonel then gave Johanns an article on fraternization that explained the *Air* Force policy. The Air Force Court of Military Review subsequently determined that this article concluded that it was no longer a violation of Air Force cus-

[160] 20 C.M.A. 18, 42 C.M.R. 210 (1970).
[161] *Id.* at 21, 42 C.M.R. at 213 (Darden, J., concurring in result dismissing fraternization conviction).
[162] *Id.*
[163] 20 C.M.A. 601, 44 C.M.R. 31 (1971).
[164] *Id.* at 608, 44 C.M.R. at 38 (emphasis in the original text).
[165] *Id.*, 44 C.M.R. at 38.
[166] 20 M.J. 155 (C.M.A. 1985); 17 M.J. 862 (A.F.C.M.R. 1983).
[167] 20 M.J. 157-58, 161 (C.M.A. 1985) (emphasis in the original text).
[168] 17 M.J. 862, 864 (A.F.C.M.R. 1983).

tom to fraternize with enlisted members, absent a command or supervisory relationship.[169]

The Court of Military Appeals opinion, written by Chief Judge Everett, chastised the Air Force for not writing a regulation specifically dealing with fraternization as had been recommended fourteen years earlier in *Pitasi*.[170] He noted that "clear directives as to permissible contacts between officers and enlisted persons will obviate the issues present in this case."[171] He specifically stated that "restrictions or contacts—malelfemale or otherwise—where there is a direct supervisory relationship, can be imposed."[172]

Judge Cox, in a concurring opinion, stated that when "the relationship between an officer and several enlisted members of the opposite sex does ripen into obvious and open sexual relationships,"[173] it constitutes conduct unbecoming an officer and a gentleman in violation of Article 133, regardless of whether it violates any Air .Force custom of fraternization.[174] Judge Cox was "astounded" at the "remarkable" findings of the Air Force Court of Military Review in this case.[175] He clearly stated that his "deference to their factfinding expertise in the customs of the service in no way forecloses a different result from other service courts, should the circumstances of a particular case so dictate."[176]

The impact of *Johanns* on the other services remains to be seen since "[c]ustoms differ among the armed services."[177] In *United States v. Tedder*[178] the Navy-Marine Corps Court of Military Review rejected the Air Force decision in *Johanns* and held "that the custom which prohibits wrongful fraternization continues in its vitality and remains necessary for the maintenance of an effective Navy and Marine Corps."[179] The *Tedder* decision is currently pending review by the Court of Military Appeals.[180]

The Army Court of Military Review has not yet applied *Johanns* to determine the validity of fraternization as a criminal offense in the

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'"*Id.* at 868-69 n.20. The article was written by Flatten, *supra* note 3.

[170]20 M.J. 155, 160 (C.M.A. 1985).

"'*Id.* at 161.

[172]*Id.*

[173]*Id.* at 162.

[174]*Id.* The Army Court of Military Review considered this analysis in United States v. Callaway, 21 M.J. 770, 777-78 (A.C.M.R. 1986).

[175]*Id.* at 165.

[176]*Id.*

"'*Id.* at 160.

[178]18 M.J. 777 (N.M.C.M.R. 1984), *petition granted*, 19 M.J. 115 (C.M.A. 1984).

[179]*Id.* at 781.

[180]19 M.J. 115 (C.M.A. 1984) (review granted on issues of whether fraternization specifications fail to state an offense or are void for vagueness).

Army.[181] In *United States v. Jefferson*[182] the Court of Military Appeals avoided determining whether fraternization is a punishable offense in the Army by concluding that "appellant's adultery under the circumstances alleged constituted conduct unbecoming an officer."[183]

In light of *Johanns* and the Court of Military Appeal's repeated requests that the services publish clear directives on fraternization, it appears increasingly likely that written directives will be required if other services wish to avoid the Air Force's fate.

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[181] In United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984), the Army Court of Military Review noted "without comment" the *Johanns* decision of the Air Force Court of Military Review. *Id.* at 828 n.3. Stocken held that Article 134 specifications alleging that an NCO wrongfully fraternized with enlisted women by socializing, drinking, smoking marijuana, and engaging in sexual intercourse failed to state offenses because they did not allege that the conduct was unlawful. *Id.* at 827,829. The court concluded that proper fraternization convictions were "grounded upon the special status held by officers and the different standard required by law and custom." *Id.* at 828. This rationale failed to recognize the shift in justification for the fraternization custom from social class to military discipline and order. *See generally* text accompanying notes 2-101. The court's rationale seemed to be predicated upon an overreliance on the then-pending 1984 Manual for Courts-Martial fraternization specification, which applies only to officers. 17 M.J. 826, 830 n.5. In United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986), the court distinguished Stocken and *Johanns* and upheld a LTC's fraternization conviction for dating and having sexual intercourse with female 2LTs under his command during ROTC summer camp. The court specifically found:

> that, at the time of appellant's offenses (1983-84), a custom existed in the U.S. Army which proscribed a social relationship amounting to "dating" between an officer and another officer who was his military subordinate, where the senior officer occupies a position of command or supervision over the subordinate officer. Further, we find that by fair implication, such a relationship gives the appearance of partiality and undermines discipline, authority and morale.

Id. at 777. The court also upheld LTC Callaway's conviction for fraternizing with senior NCOs under his command. *Id.* at 779. (LTC Callaway invited two male MSGTs and three female LTs, all members of his command, to his executive officer's home where they paired off and slept together in three different bedrooms. *Id.* at 773.) Recently, in United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986), the Army Court of Military Review upheld the conviction of a captain who was charged with fraternization under UCMJ art. 134 for an offense that occurred after implementation of the 1984 Manual for Courts-Martial. The court stated that Lowery's reliance on *Johanns* was without merit because this case was based on the criminal offense of fraternization properly added as a model specification in Part 111, para. 83 of the 1984 Manual. *Id.* at 1000-02. Indeed, the court stated: "Assuming with substantial reservation that the guidance contained in *United States v. Johanns* . . . is still viable concerning offenses of fraternization . . . committed after 1 August 1984 . . . . *Id.* (citation omitted). *See* text and accompanying notes *infm* Part IV, for a discussion of fraternization under the 1984 Manual for Courts-Martial and related criminal issues.

[182] 21 M.J. 203 (C.M.A. 1986).

[183] *Id.* at 204. *See also* United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986) which upheld a LT's fraternization conviction for asking a female trainee for a date on three occasions. The court distinguished *Johanns* noting that appellant was prosecuted for violating a local policy of which he was aware and not for a violating an Army custom.

5. Army Administrative Policy.

For almost seven years the Army, like the other services, ignored the Court of Military Appeal's recommendation in *Pitasi* to publish some clear guidelines on fraternization. On 22 November 1978 the Army promulgated its first written policy concerning superior-subordinate relationships:

> Relationships between service members of different rank which involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. Such relationships will be avoided. If relationships between service members of different rank cause actual or perceived partiality or unfairness; involve the improper use of rank or position for personal gain; or can otherwise reasonably be expected to undermine discipline, authority, or morale, commanders and supervisors will counsel those involved or take other action as appropriate.[184]

On 6 December 1978 unofficial supplementary guidance on this new policy was disseminated in the form of a Chief of Staff *Weekly Summary* article.[185] Unfortunately, these two documents were not completely consistent. The regulation prohibited any relationship that "can otherwise reasonably be expected to undermine discipline, authority, or morale."[186] In lieu of this language, the *Weekly Summary* article required "some demonstrable impact on discipline, authority, or morale."[187]

The discrepancy between these two conflicting standards remained unnoticed until early 1980 when a Congressman asked the Secretary of the Army to investigate a case concerning one of his constituents.[188] The constituent was a captain in Germany who was dating an enlisted woman from another unit and not in his chain of command.[189] The enlisted woman's battalion commander was embarrassed when she and the cap-

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[184] Dep't of Army, Reg. No. 600-20, Personnel-General, Army Command Policies and Procedures, para. 5-7*f* (23 Mar. 1973) (IC 2221262 Nov. 1978) (hereinafter cited as AR 600-20).

[185] Weekly Summary No. 49 (6 Dec. 1978).

[186] AR 600-20, para. 5-7f (IC, Nov. 1978).

[187] Weekly Summary No. 49 (6 Dec. 1978).

[188] Letter from Representative G. William Whitehurst to the Secretary of the Army, 30 January 1980.

[189] Office of the General Counsel, Dep't of Army, Memorandum For the Inspector General, subject: Fraternization Policy, 1 May 1980, at 1, 2 (hereinafter cited as Lister Memorandum).

tain appeared together at a social gathering.[190] The battalion commander subsequently concluded that the relationship "was having an adverse impact at the battalion headquarters" and transferred the enlisted woman to another unit.[191]

The Army General Counsel, Sara Lister, reviewed the case and signed a memorandum that adopted the unofficial guidance in the *Weekly Summary* article. She concluded that there was no "evidence of a demonstrable impact on discipline, authority, or morale."[192] Based upon this memorandum, the Secretary of the Army personally determined that the transfer was improper and directed corrective action.[193]

The significance of this action stems from the last paragraph of the Lister memorandum wherein the General Counsel provided the standard for future fraternization cases:

> We hope that this memorandum will provide some guidance for future investigations concerning the Army's fraternization policy. With more women entering the service, increasing numbers of senior-subordinate relationships are a natural consequence. Our policy is clear that generally such relationships are not improper—only those which involve the specific criteria set forth in *AR* 600-20 should be subject to regulation. An inquiry into whether a commander has acted properly in taking adverse action against an individual for violating the fraternization policy must include a finding that the subject relationship did in fact involve one of the characteristics—actual or perceived partiality or unfairness, improper use of rank or position for personal gain, or a clearly demonstrable impact on discipline, authority, or morale—that make the relationship improper. Unsupported conclusions of the commander involved are insufficient.[194]

This memorandum effectively deleted the "can otherwise reasonably be expected to" language from the regulation and substituted the "clearly demonstrable impact on" language from the *Weekly Summary* article. The problem, of course, was that the regulation still contained the "can otherwise reasonably be expected to" standard.

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[190] *Id.* at 2.
[191] *Id.*
[192] *Id.*
[193] Letter from the Secretary of the Army to Representative G. William Whitehurst, 30 April 1980.
[194] Lister Memorandum, *supm* note 189, at 4.

The problem was compounded on 15 October 1980 when the regulatory provision was republished in a new format, but with no substantive change to the standards involved.[195] Another article and message incorporating and explaining the *1978 Weekly Summary* article and the Lister memorandum guidance was approved for distribution but was never disseminated to the field.[196]

Fraternization was one of nineteen issues referred to the Women in the Army Policy Review Group for study and recommendation in May 1981.[197] Unfortunately, this group referred fraternization back to the Army staff for resolution through normal staff procedures because this issue was not "female-specific."[198]

What constituted fraternization between 1980 and 1984 depended upon whom one asked. The Office of the Deputy Chief of Staff for Personnel (ODCSPER), the proponent of the policy, frequently relied upon the Lister memorandum demonstrable impact standard when answering informal inquiries from the field concerning the scope of the policy.[199] Judge advocates, both in the field and in the Office of The Judge Advocate General (OTJAG), and commanders tended to rely upon the regulatory language and found a violation of Army policy anytime a reasonable commander could in good faith believe that the situation could be expected to undermine discipline, authority, or morale.[200] Under this interpretation commanders did not have to wait until a situation had an adverse and demonstrable impact upon their units before taking corrective action. As far as the Office of the General Counsel (OGC) was concerned, if there was no demonstrable impact, there was no violation of Army policy.[201]

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[195] AR 600-20, para. 5-7*f* (15 Oct. 1980) now reads:

> Relationships between service members of different rank which involve (or give the appearance of) partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. Such relationships will be avoided. Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between Service members of different rank—
>
> (1) Cause actual or perceived partiality or unfairness,
>
> (2) Involve the improper use of rank or position for personal gain, or
>
> (3) Can otherwise reasonably be expected to undermine discipline, authority, or morale.

[196] Roland, *Army Shows Split Interpreting Fraternization,* Army Times, Jan. 30, 1984, at 10, col. 2-3 (hereinafter cited as Army Times).

[197] WITAPRG Report, *supm* note 127, at 1-14.

[198] *Id.* at 1-14, 1-15.

[199] Army Times, *supra* note 196, at col. 2.

[200] *Id.* at col. 2-4.

[201] *See generally* Lister Memorandum, *supra* note 189.

This situation came to a head when the entire fiasco was reported in the *Army Times* on *30* January 1984.[202] On 14 March 1984, the Assistant Secretary of the Army for Manpower and Reserve Affairs directed that the fraternization policy in AR 600-20 be reviewed to ensure that it was "of sufficient clarity to preclude individual interpretation leading to inconsistent determinations and the appearance of unfairness."[203]

A three member task force, headed by then-Colonel William K. Suter,[204] reviewed historical policy and legal files on fraternization and conducted field visits at Fort Jackson and Fort Bragg.[205] The Suter Commission prepared a comprehensive report of their investigation, which recommended, inter alia, that:

> Paragraph 5-7*f*, AR 600-20, not be changed.
>
> The emphasis of the policy should be on the results of the relationship and not on the relationship itself. . . .
>
> The guidance given in the 1978 *Weekly Summary* was definitive in 1978 but was not widely disseminated. We need to maintain that relationships are not improper except when there is actual or perceived partiality, misuse of rank, or undermined authority, discipline and morale. Before taking corrective or adverse action, commanders must demonstrate factually the impropriety which results from the relationship. . . .
>
> The policy needs to be published to the Army.[206]

The senior Army leadership, both civilian and military, favorably received the recommendations of the Suter Commission.[207] Nevertheless,

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[202] Army Times, *supra* note 196.

[203] Dep't of Army, Office of the Assistant Secretary, Memorandum for the Director of the Army Staff, 14 March 1984.

[204] Major General Suter currently is The Assistant Judge Advocate General of the Army.

[205] Dep't of Army, Office of the Deputy Chief of Staff for Personnel (DAPE-HRL), Decision Memorandum for the Chief of Staff, Army, subject Relationships Between Military Members of Different Ranks, 25 Apr. 1984, at 1 (hereinafter cited as the Suter Commission Report). The other two members of the task force were from ODCSPER.

[206] *Id.* at enclosure D, at 1.

[207] This and other comments in this section concerning the reception of the Suter Commission Report are based upon personal observation and information I was given by individuals who attended various high-level briefings on fraternization. During this period I was the principal action officer for OTJAG on all fraternization matters. Obviously, this article reflects only my beliefs and perceptions and may not be an accurate reflection of the personal beliefs of every individual who was involved in promulgating the new fraternization guidance contained in HQDA LTR 600-84-2.

the Commission's adoption of the demonstrable impact standard coupled with their recommendation not to change the regulatory language caused concern in OTJAG and OGC. These seemingly contradictory recommendations reflected ODCSPER's concern that any official change in the regulatory standard from "reasonably be expected" to "demonstrable impact" would send the wrong signal to the field that HQDA was loosening the fraternization standards.

A compromise was reached after weeks of negotiation among OTJAG, OGC, and ODCSPER. AR 600-20, paragraph 5-7*f*(3) would be changed to *clarify* that "an actual or clearly predictable adverse impact upon discipline, authority, or morale"[208] was required under this subparagraph. The change would not acknowledge that this was a new compromise standard which replaced two previously existing conflicting standards.

Headquarters, Department of Army Letter 600-84-2 announced this clarification on 23 November 1984.[209] This letter also stated that the term "fraternization" should be used only when referring to the criminal offense described in the 1984 Manual for Courts-Martial[210] "and that the criminal offense of fraternization, as set out in the Manual for Courts-Martial, is not governed by AR 600-20."[211] An article outlining the history of, philosophical basis for, and hypothetical fact situations interpreting the Army policy was included as an enclosure to this letter.[212]

HQDA LTR 600-84-2, and its enclosure, was distributed to every brigade and battalion commander in the U.S. Army.[213] Press releases also announced the new policy and explained that it had been "clarified—not relaxed."[214]

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[208]HQDA LTR 600-84-2, at 2.

[209]HQDA LTR 600-84-2. I co-authored this letter with Mr. Hank Shea, OGC. Paragraph 4 of the HQDA LTR 600-84-2 stated that AR 600-20 would be changed to reflect the new Army policy as explained in the letter. As of March 1986, paragraph 5-7f of AR 600-20 had not been changed even though interim changes were issued for this regulation on 26 August 1985 (Interim Change 105) and 23 December 1985 (Interim Change 106). HQDA LTR 600-84-2 expires on 23 November 1986.

[210]Id. at 1. See infra text and accompanying notes Part IV for a detailed discussion of fraternization under the 1984 Manual for Courts-Martial.

[211]*Id.* at 2. This language was necessary to ensure that this change would not impact upon several fraternization cases than pending before military appellate courts.

[212]*Id.* The article and hypothetical fact situations were drafted by the ODCSPER proponent for fraternization, CH(LTC) Herman Keizer, who was also a member of the Suter Commission.

[213]Dep't of Army, Office of the Deputy Chief of Staff for Personnel (DAPE-HRL-L), Memorandum for All Brigade and Battalion Commanders, subject: Fraternization and Relationships between Members of Different Rank, 29 Nov. 1984.

[214]*Fraternization* policy clarified—not relaxed, Commanders Call, DA Pam 360-887, March-April 1985, at 15.

III. ADMINISTRATIVE POLICY

A. SCOPE AND GENERAL GUIDELINES

The Army's current administrative policy is contained in AR 600-20, paragraph 5-7f, as clarified by HQDA LTR 600-84-2.[215] Under this guidance, there is no such thing as an administrative fraternization policy. The term fraternization is to be used only when discussing officer-enlisted relationships which satisfy the five elements for the criminal offense of fraternization under the 1984 Manual for Courts-Martial.[216] The Army regulatory policy should be referred to as the superior-subordinate relationships policy, the senior-junior relationships policy, the policy regarding relationships between members of different ranks, or some similar phrase.[217]

The scope of the regulatory policy is much broader than the old fraternization custom. It applies to all active and inactive units of the Regular Army, Army Reserve, and Army National Guard.[218] The superior-subordinate relationships policy also applies to all types of relationships within these units: officer-officer, officer-enlisted, enlisted-enlisted, officer-NCO, NCO-NCO, and NCO-enlisted.[219] There is no superior-subordinate relationship in the Army that is not covered by this policy.

Normally, the senior ranking soldier is held more responsible for violations of the policy. This is because the superior, by virtue of rank and experience, is expected to demonstrate sound judgment and maturity. This is particularly true in officer-enlisted or noncommissioned officer-enlisted relationships. However, either the superior, or in unusual cases only the subordinate, or both may be held responsible for violations.[220] When both are held responsible, there is no requirement that the same corrective action be taken against both individuals.[221]

The superior-subordinate relationships policy is not limited to dating and other heterosexual relationships. All male-male, female-female, and male-female relationships, regardless of any sexual overtones, are also covered.[222]

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[215] AR 600-20, para. 5-7f (15 Oct. 1980) and HQDA LTR 600-84-2. A consolidated copy of the new regulatory provision is reprinted at Appendix A.

[216] HQDA LTR 600-84-2, paras. 2 and 4. See infm Part IV for a discussion of the elements of criminal fraternization. See *supra* note 211 for an explanatin of the reason for reserving the term fraternization to criminal offenses.

[217] *See* HQDA LTR 600-84-2, para. 2, and enclosure at 1.

[218] AR 600-20, para. 1-2 (15 Oct. 1980).

[219] HQDA LTR 600-84-2, enclosure at 4.

[220] *See id.* enclosure at 6-12 for examples where corrective action could be taken against the superior (problems 1, 2, 6, 7, 9, 10, and 11), the subordinate (problem 12), or both (problems 3, 4, 5, 6, 8, and 12).

[221] *See id.* enclosure at 8-10, 12 (problems 5, 6, 8, and 12).

[222] *Id.* enclosure at 4.

The focus of the policy is on those situations where the "senior member has direct command or supervisory authority over the lower ranking member or has the capability to influence personnel or disciplinary actions, assignments, or other benefits or privileges."[223] Yet, even in these relationships it is the consequences or behavior that results from the relationship, rather than the relationship itself, which dictates the degree of required corrective action.[224]

Responsibility for enforcing this policy lies with the commanders and supervisors of those involved in the relationship.[225] Thus, a civilian supervisor, who is not subject to the policy, would nevertheless be responsible for enforcing it in superior-subordinate relationships involving military personnel under his supervision. Resort to criminal sanctions under the Uniform Code of Military Justice for violations of this policy would rarely be appropriate. It is contemplated and intended that the vast majority of violations of this policy be handled using one or more of the wide range of administrative options available to the commander or supervisor.[226]

The most important general principle is that each case must be decided on its own particular facts and evaluated with common sense and good judgment.[227] Careful coordination and consultation by the commander or supervisor with the supporting judge advocate should be accomplished at the earliest possible moment.

B. PROHIBITED RELATIONSHIPS

Superior-subordinate relationships are prohibited under current Army policy if they "(1) [clause actual or perceived partiality or unfairness, (2) [i]nvolve the improper use of rank or position for personal gain, or (3) [clause an actual or clearly predictable adverse impact upon discipline, authority, or morale."[228] The first two prohibitions remain unchanged from those first promulgated in 1978.[229] The third prohibition was created by HQDA LTR 600-84-2, as a result of the Lister memorandum controversy.[230]

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[223] *Id.* at para. 3a, enclosure at 5.

[224] *Id.* at para. 3c, enclosure at 5-6.

[225] AR 600-20, para. 5-7f (15 Oct. 1980).

[226] HQDA LTR 600-84-2, para. 3d. Additionally, AR 600-20 is not punitive. See text and accompanying notes infra Part IV, for a discussion of the criminal applications of this policy. *See* text and accompanying notes Part III, Section E, for a detailed discussion of administrative options available to commanders and appeal procedures for soldiers.

[227] HQDA LTR 600-84-2, enclosure at 3.

[228] *See* infra. Appendix A.

[229] *See* text and accompanying notes *supra* Part 11, Section E.5, for a detailed discussion of the historical development of the Army's administrative policy.

[230] *Id.*

The first prohibition is violated when a superior uses his or her authority or influence to effect actual favoritism or preferential treatment for a subordinate as a result of their relationship. Examples of improper favoritism could be manifested by relief from duty details, reassignment to a preferred duty position, influencing promotion actions, or creating special privileges.[231] Adverse administrative action against the superior normally would be appropriate in such cases.[232]

The first prohibition also is violated when an otherwise permissible superior-subordinate relationship creates a perception of partiality or unfairness. These types of relationships are more difficult to identify and correct. A relationship violates this prohibition if it causes soldiers to believe, even if untrue, that special treatment is occurring as a result of the relationship. Rumors of preferential treatment can be just as devastating to unit morale and discipline as actual favoritism. Relationships between members of different but adjacent units and mentoring relationships are particularly susceptible to such perceptions.[233] Because the soldiers involved in the relationship have not actually done anything improper, counseling is normally the most appropriate initial action.[234] Nevertheless, a commander is not required to counsel first.[235] If rampant rumors of special treatment exist, other options such as reassignment of one of the individuals may be necessary as an initial action to restore unit readiness and morale.

The prohibition against using rank or position for personal gain is the easiest to recognize and to understand. Normally, only the senior member violates this provision by using rank or position for improper purposes such as soliciting gifts, borrowing money, coercing sexual favors, or acquiring the personal services of subordinates on his private property.[236] Subordinate members in key duty positions also could violate this provision; for example, a clerk in charge of preparing duty rosters offers to manipulate those rosters for superiors willing to pay for such services. Adverse administrative action generally is the appropriate corrective action in personal gain cases.[237]

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[231] *See* HQDA LTR 600-84-2, enclosure at 8-9, 11-12 (problems 6, 10, 12) for examples of such relationships.

[232] *Id.* at para. 3c, enclosure at 5-6.

[233] *See id.* enclosure at 6, 7, 10 (problems 1, 3, 8) for examples.

[234] *Id.* at para. 3b, enclosure at 5.

[235] *See id.*,

[236] *See id.* enclosure at 7 (problem 2) for an example.

[237] *Id.* at para. 3c, enclosure at 5-6. Local regulations may make the use of rank or position a criminal offense under the, UCMJ art. 92, particularly when the relationship involves training cadre and trainees.

The third prohibited relationship is one that causes an actual or clearly predictable adverse impact upon discipline, authority, or morale. Relationships which cause an actual adverse impact upon discipline, authority, or morale often will also violate one of the first two prohibitions. The more difficult question is what constitutes a "clearly predictable" adverse impact. Although not well-articulated, "clearly predictable" is intended to cover relationships involving superiors in the subordinates' command or rating chains, training cadre and trainees, military instructors and students, or any other supervisory or influential type relationship.[238] Even if no actual adverse impact exists in such relationships, "[i]t is difficult to image relationships between such individuals which would not eventually become improper because they are so fraught with the possibility of perceived favoritism."[239] Adverse administrative action generally is appropriate in such cases.[240]

In analyzing superior-subordinate relationships, commanders and judge advocates must determine which one, or more, of these three prohibitions was violated in the case under consideration. Additionally, they should review any applicable local policies or regulations supplementing these prohibitions.[241]

C. EXAMPLES OF PROHIBITED RELATIONSHIPS

1. General.

There are no relationships that are prohibited *per se* under the Army superior-subordinate relationships policy. The policy merely provides general guidelines which must be applied by commanders, using good judgment, to the facts of each case. Nevertheless, certain types of relationships normally would violate the superior-subordinate relationships policy either because of the consequences of the activity or other Army regulations covering the conduct. This section identifies those relationships. The fact that a type of relationship is listed here does not excuse a commander, working with his judge advocate, from his or her responsibility to evaluate independently each case based on its own facts.

2. *Gambling.*

Gambling between soldiers of different rank historically has been viewed as prejudicial to good order and discipline.[242] The Army's

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[238] *See id.* at para. 3a, enclosure at 2, 5.

[239] *Id.* enclosure at 5.

[240] *Id.* at para. 3c, enclosure at 5-6.

[241] Army policy encourages the use of local policies or regulations to meet the specific needs of a particular command such as a training installation. *See id.* enclosure at 5.

[242] *See supra* notes 46, 63, 80, 81, 94, 102, 143 and accompanying text.

standards of conduct regulation expressly prohibits Army personnel from participating in any gambling activity while on duty or on government controlled property.[243] The Manual for Courts-Martial describes criminal offenses for noncommissioned officers or officers who gamble with subordinates.[244] Gambling with a subordinate, especially if an officer or noncommissioned officer is involved, will almost always cause an actual or clearly predictable adverse impact upon discipline, authority, or morale. Some gambling cases may also involve the improper use of rank or position for personal gain.

3. *Borrowing or Loaning Money.*

The borrowing and lending of money between soldiers of different ranks often creates disciplinary problems.[245] This is particularly true when the situation involves officers or noncommissioned officers, trainees, unpaid debts, or usurious interest rates. While unique circumstances may warrant a small, short-term loan by an officer or noncommissioned officer to a subordinate, most borrowing-lending cases violate the adverse impact and personal gain prohibitions.

4. Soliciting or Offering Gifts.

Superiors who solicit gifts from subordinates violate the prohibition against improper use of rank or position for personal gain. Subordinates who offer gifts to superiors will be perceived as currying favors, thereby violating the prohibition against actual or perceived partially. In this context gifts can include money, tangible items of value, and donations of personal labor or services for the superior's personal gain. Except for truly voluntary gifts or contributions of a minimal value, a subordinate who solicits donations for a gift to a superior, or a superior who accepts such a gift, also violates the Army's standards of conduct regulation.[246]

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[243] Dep't of Army, Reg. No. 600-50, Personnel-General, Standards of Conduct for Department of the Army Personnel, para. 2-7 (20 Nov. 1984) (hereinafter cited as AR 600-50). Exceptions are granted by HQDA in specified regulations and on a case by case basis. Failure to comply with AR 600-50 may subject the offender to administrative action or punishment under the Uniform Code of Military Justice. *Id.* at para. 1-4f.

[244] Manual for Courts-Martial, United States, 1984, Part IV, para. 84 (hereinafter cited as MCM, 1984), prohibits a noncommissioned officer from gambling with an enlisted person of less than noncommissioned officer rank. An officer cannot commit this offense. Gambling by an officer may be a violation of Article 133 or the new fraternization specification under Article 134. ***See*** text and accompanying notes ***infra*** Part IV.

[245] *See, e.g., supra* notes 32, 70, 71, 103, 111, 144 and accompanying text.

[246] AR 600-50, para. 2-3*a*:

> This paragraph does not prohibit truly voluntary gifts or contributions of minimal value (or acceptance thereof) on special occasions such as marriage, transfer, illness, or retirement, if any gift acquired with such contributions will not exceed a nominal value. Gifts of nominal value are those of a sentimental nature, with little or no intrinsic value to one other than the recipient.

5. Commercial Activities.

A superior who uses his or her rank or position to persuade subordinates to participate in, or buy something from, some private commercial enterprise clearly violates the prohibition against using rank or position for personal gain. Such conduct also violates standards of conduct provisions.[247] The solicitation of commercial activities, even between soldiers of equal rank, may create an adverse impact on morale within a unit in the nature of harassment or a nuisance.

6. Homosexual Activities.

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a tendency to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale. . . .[248]

By definition, homosexual activities, even with a civilian, adversely impact upon discipline, authority, and morale. The adverse impact of such activity is aggravated when two soldiers are involved, and is further aggravated if a superior-subordinate relationship exists between those two soldiers, especially if officers and noncommissioned officers are involved. Homosexual activity is the closest thing we have to a per se prohibition. Virtually any superior-subordinate relationship involving homosexual activity would violate the adverse impact prohibition. Homosexual acts also constitute the crime of sodomy under Article 125 of the Uniform Code of Military Justice.

7. Drug Activities.

Commanders combat daily the adverse consequences of drug use and transactions on unit discipline, authority, and morale. Superior-subordinate relationships involving wrongful drug use and activities related thereto will almost always cause an actual, or at least a clearly predictable, impact upon discipline, authority, or morale. This is particularly true when an officer or noncommissioned officer sells or otherwise provides or encourages the use of the drugs.[249] Although wrongful

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[247] AR 600-50, para. 2-1e and *i. See also* Dep't of Army, Reg. No. 210-7, Installations, Commercial Solicitations on Army Installations (15 Dec. 1978).

[248] Dep't of Army, Reg. No. 635-100, Personnel Separations, Officer Personnel, para. 5-47a (19 Feb. 1969) (C27, 1 Aug. 1982) (hereinafter cited as AR 635-100), Dep't of Army, Reg. No. 635-200, Personnel Separations, Enlisted Personnel, para 15-1a (5 July 1984) (hereinafter cited as AR 635-200).

[249] *See, e.g., supm* notes 142, 150 and accompanying text.

drug activities usually are processed under the Uniform Code of Military Justice, commanders and judge advocates should remember that administrative sanctions for violations of the superior-subordinate relationship policy are also available when warranted by the circumstances of the case.

8. Drinking.

Historically, the conduct most reported as an improper superior-subordinate relationship concerns the sale or use of alcohol.[250] In recent years, the focus has shifted from drinking relationships to sexual relationships. Nevertheless, drinking activities can violate Army policy by creating the appearance of favoritism, as in the case of a regular drinking partner. Overfamiliarization between superiors and subordinates as a result of drinking or becoming intoxicated can cause an adverse impact on discipline and authority.

Soldiers of different ranks drinking together at unit sponsored social or recreational activities, promotion parties, or consolidated clubs normally would not violate this provision. Bar-hopping relationships would be inappropriate.

In any drinking relationship, all soldiers must be mindful of the Army's strict policy concerning driving while intoxicated (DWI).[251] Officers and noncommissioned officers should set the example by drinking in moderation, particularly at unit functions. The number of DWI incidents resulting from superior-subordinate drinking relationships would constitute evidence of the adverse impact of such relationships upon discipline and authority.

9. Sexual Harassment.

> Any military member or civilian employee is engaging in sexual harassment who—
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> a. Through behavior of a sexual nature attempts to control, influence, or affect the career, pay, or job of a military member or civilian employee.
>
> b. Makes deliberate or repeated verbal comments or gestures of a sexual nature that are offensive to the person to whom addressed.
>
> c. Makes abusive physical contact of a sexual nature.[252]

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[250] *See* ***supra*** notes 25, 44, 89, 141, 149 and accompanying text.

[251] *See* Dep't of Army, Reg. No. 190-5, Military Police, Motor Vehicle Traffic Supervision, para. 4-5*h* (1 Aug. 1983)(CI06, 17 Jul. 1985).

[252] Dep't of Army, Reg. No. 600-21, Personnel-General, Equal Opportunity Program in the Army, para. 2-2 (30 Apr. 1985).

Sexual harassment of a subordinate by a superior obviously violates the adverse impact prohibitions, at least as far as that subordinate is concerned. Such actions may also constitute improper use of rank or position for personal gain by seeking sexual favors or may create perceptions of favoritism by other subordinates who witness the harassment, particularly if the victim makes no objection.

Note that a subordinate may sexually harass a superior. There is no requirement that the offending individual be senior to the victim. Such cases would violate the adverse impact prong of the superior-subordinate relationships policy.

10. Nepotism.

There is no written Army policy expressly prohibiting the assignment of members of the same family to the same unit.[253] As a practical matter, personnel officers usually avoid any such conflicts by assigning family members to different units. Occasionally, such conflicts are unavoidable, especially in the Reserve Components, due to geographical limitations. If such familial relationships do exist in the same or related units, there is a real danger of perceived favoritism.

Cases of actual favoritism based on nepotism can have a devastating adverse impact on unit discipline, authority, or morale. A recent case[254] involved an Army Reserve division commander and his daughter, who was a lieutenant in her father's division. When the lieutenant raised allegations of sexual harassment against her company commander, the father immediately relieved the company commander without an investigation. During a subsequent congressional inquiry, the division commander misrepresented the facts in a letter to a member of Congress, stating that the company commander was reassigned pursuant to his voluntary request for such action.

While the possibility of such cases is remote, they occasionally occur. If confronted with such a situation, the senior member should avoid taking any action concerning the subordinate family member until consulting with the supporting judge advocate. In most cases, the problem can be avoided by the senior member disqualifying himself from taking any

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[253] *See generally* AR 600-50; Dep't of Army, Reg. No. 614-100, Assignments, Details, Transfers, Officer Assignment Policies, Details, and Transfers (15 July 1984) (hereinafter cited as AR 614-100); Dep't of Army, Reg. No. 614-200, Assignments, Details, and Transfers-Selection of Enlisted Soldiers for Training and Assignment (5 July 1984) (hereinafter cited as AR 614-200).

[254] Dep't of Army Inspector General Investigation (1985) (No. and date not available). Information obtained from my review of the investigation for legal sufficiency while assigned to the Administrative Law Division, Office of The Judge Advocate General, U.S. Army.

action concerning the subordinate family member. Even if the superior officer handles the matter in an entirely professional manner, perceptions of favoritism frequently will still exist.

11. Good Old Boy ***Relationships.***

Otherwise permissible relationships may become improper when the superior engages in a pattern of repeated personal or social contacts with one particular subordinate, excluding other subordinates of similar rank who are equally interested in those activities. For example, a commanding general plays golf every Saturday morning with the staff judge advocate and two particular battalion commanders. Playing golf with subordinates is a healthy form of relaxation for a commander. In our example, suppose that all of the general's principle staff officers and the battalion and brigade commanders play golf, but none has ever been invited to play with the general. At some point this permissible recreational activity evolves into a prohibited relationship that smacks of favoritism and preferential treatment.

Similar problems could arise when the superior repeatedly hunts, fishes, plays racquetball, etc., with the same subordinate. An awareness by the superior of the potential problem coupled with occasionally inviting another subordinate to participate, should avoid a regulatory violation.

Mentoring is also an area that requires a delicate touch. While the Chief of Staff recognizes the value to the Army of carefully tutoring our young leaders with exceptional potential, this must be done in a manner that avoids demoralizing other subordinates.[255]

Newly promoted E-5s often try to retain good-old-boy relationships with their former enlisted buddies. Commanders and superiors must counsel these new sergeants to make sure they understand the authority and responsibilities of a noncommissioned officer. A new sergeant's activities with his former enlisted buddies will be watched carefully by other members of the unit for signs of favoritism or preferential treatment.[256]

12. Criminal ***Activities,***

Any superior-subordinate relationship that exists for the purpose of engaging in criminal activity obviously would have an adverse impact on discipline and authority, particularly when the superior's rank or position was used to further the purpose of the criminal activity. Com-

[255] *See* HQDA LTR 600-84-2, enclosure at 6 (problem 1) for an example of improper mentoring.

[256] *See id.* enclosure at 10-11 (problem 9) for an example of such a relationship.

manders may resort to administrative sanctions for violations of the superior-subordinate relationships policy in those rare cases when criminal options are not available or are inappropriate.

D. EXAMPLES OF PERMISSIBLE RELATIONSHIPS

1. General.

This section identifies those superior-subordinate relationships that normally are permissible because the consequences of these relationships do not violate the Army's administrative policy. As indicated in the prior section, the fact that a relationship is listed here does not mean that a soldier is not accountable for his or her actions in such relationships. The commander, working with the supporting judge advocate, must decide the propriety of each relationship on its own facts.

2. *Dating.*

"Our policy is one of tolerance in matters of dating."[257] While many officers in the Army today personally disagree with this statement, it is Army policy which we are all bound to accept and enforce.

Although dating, by itself, is not a prohibited superior-subordinate relationship, it is not totally unrestricted. Dating relationships involving superiors in the subordinate's command or rating chains, training cadree and trainees, military instructors and students, or any other supervisory or influential relationships are almost always improper. Yet, even in these situations, there is no per se violation. The facts must establish that one or more of the three regulatory prohibitions has been violated. Normally, such relationships will at least constitute a clearly predictable adverse impact upon discipline, authority, or morale.[258]

The rules remain the same even when the relationship evolves from dating to sexual intercourse. The fact that sexual intercourse is involved may be considered, with the other facts of the case, in determining whether there is a clearly predictable adverse impact or other regulatory violation.

A permissible dating relationship must still comply with other Army regulations and customs. Soldiers may not hold hands, kiss, or fondle each other while in uniform[259] or engage in sexual intercourse in public.

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[257] *Id.* enclosure at 6.

[258] *See id.* enclosure at 7-12 (problems 3, 4, 5, 6, 7, 8, 11, 12) for examples and discussions of dating relationships.

[259] *See id.* enclosure at 8 (problem 5) for an example of improper hand holding while in uniform.

Superior-subordinate couples must also comply with Army and local regulations concerning their joint use of enlisted, noncommissioned officer, or officer clubs and facilities;[260] or family housing facilities.[261] In short, such couples must make an effort to minimize the potential adverse impact of their conduct. An otherwise permissible superior-subordinate dating relationship can create the perception of partiality if regularly flaunted before members of other units, especially if those members assume there is a duty relationship between the couple. The exercise of common sense and good judgment are critical by all concerned when dealing with dating between members of different ranks.

3. ***Simple*** *Courtesies.*

Simple courtesies that we show to one another as members of a civilized society are permissible, regardless of the rank of those involved. Examples include shaking hands when meeting someone; opening doors for someone; helping another carry a heavy item; saying "thank you" for something, even if it was required to be done; praising a job well done; or offering or providing automobile transportation, either on an occasional basis or as part of a regular carpool. Such courtesies many times will actually enhance the duty relationship and working environment.

4. *Command Social Functions.*

Command social functions improve morale, enhance unit cohesion, and are part of Army tradition. Unit members of different rank may participate together in such activities. Examples include hail and farewells, dining-ins, diningouts, dances or balls, receptions, and office parties. Similar activities, though not command sponsored, such as promotion parties, wives clubs events, or socials sponsored by private organizations are also permissible.

Although a commander may dance with all of his female officers at a brigade ball, it would be inappropriate for him to bring one of his female officers as his date. Again, the exercise of good judgment with an awareness of the perception of others is essential in such situations.

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[260] *See* **Dep't of Army, Reg. No. 215-2, Morale, Welfare, and Recreation—The Management and Operations of Army Morale, Welfare and Recreation Programs and Nonappropriated Fund Instrumentalities, para. 5-13*d*(1) (20 Feb. 1984) (hereinafter cited as AR 215-2). 'When spouses have different membership eligibility, e.g., one spouse is an officer and the other is an NCO, each may join the club for which he or she is eligible."** *Id.*

[261] *See* **Dep't of Army, Reg. No. 210-50, Installations, Family Housing Management, para. 3-9 (1 Feb. 1982) (hereinafter cited as AR 210-50). When one spouse "is enlisted and the other is an officer, assignment will be to officer quarters."** *Id.*

5. Unit Recreational Activities,

Soldiers of different rank may participate together in unit recreational activities such as fun runs, athletic leagues and tournaments for either individual or team sports, *volksmarches,* or individually arranged athletic matches. Superiors must be sensitive to perceptions of favoritism by regularly using the same subordinate as a partner.[262] Commanders must avoid granting special favors, either actual or perceived, to star athletes on unit sports teams.[263]

6. Community Organizations and Activities.

Soldiers of different rank may belong to the same community organizations and participate together in community activities, both on and off post. Permissible associations include parent-teacher associations; scouting groups; dependent youth activity events; fraternal, civic, or private organizations; sports teams; swim clubs; neighborhood housing associations; religious services; church groups; or charity events.

7. *Familial Relationships.*

We no longer require a young enlisted woman to have a letter of authorization before she can dine with her general officer father.[264] Relatives and family members may interact with one another just like any other family, regardless of their differences in rank. Care should be exercised in such relationships to avoid any allegations or perceptions of nepotism,[265] especially when one family member is considerably senior in rank.

8. Relationships Sanctioned by Army or Local Regulations.

Army and local regulations may authorize certain superior-subordinate relationships. Marriage by members of different rank is recognized in several Army regulations.[266] Limited local facilities may require consolidation of facilities normally separated by rank such as club systems or government furnished housing. Any such relationship authorized by an Army or local regulation does not violate the superior-subordinate relationships policy, absent some additional aggravating circumstances.

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[262] *See supm* text and accompanying notes, Part 111, Section C.11, for a discussion of good old boy relationships.

[263] *See* HQDA LTR 600-84-2, enclosure at 11 (problem 10) for an example of improper favoritism for a star athlete on a unit sports team.

[264] *See supra* notes 133-134 and accompanying text.

[265] *See supra* text and accompanying notes, Part III, Section C.10, for a discussion of nepotism.

[266] *See, e.g., supra* notes 260, 261, and accompanying text; AR 614-100, para. 5-8 (policy on assignment of married Army couples).

9. Professional Development Courses and Activities.

Any bona fide effort by a superior to assist the professional development of one or more subordinates is in the Army's best interest. Such relationships do not violate the superior-subordinate relationships policy. Examples include organizational instruction, individual tutoring, providing special assistance in preparing for an SQT test, or mentoring. Superiors providing such assistance should be sensitive to perceptions of favoritism arising from too much attention to one particular subordinate.[267]

E. SANCTIONS FOR VIOLATIONS AND APPEAL PROCEDURES

1. General.

This section outlines a commander's options when confronted with a violation of the superior-subordinate relationships policy. It also discusses appeal procedures for soldiers under each option. The options generally are listed in order of severity.

Significant adverse actions such as adverse evaluation reports, administrative reduction in grade, bar to reenlistment, relief for cause, or administrative elimination are inappropriate

> unless there can be demonstrated and documented either actual favoritism or the improper exploitation of rank or position by the superior, or some actual or clearly predictable adverse impact on discipline, authority, or morale. The adverse action must address the behavior that results from the relationship, or the actual or clearly predictable results of the relationship, and not merely the relationship itself.[268]

Commanders should use the least severe option, or combination of options, necessary to correct the situation. Administrative options in addition to those discussed in this section may be available in a particular case.[269]

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[267] *See supra* text and accompanying notes, Part III, Section C.11, for a discussion of good old boy relationships.

[268] HQDA LTR 600-84-2, para. 3c.

[269] Other options that might be appropriate in a particular case include: revocation of security clearance [see Dep't of Army, Reg. No. 604-5, Personnel Security Clearance, Department of the Army Personnel Security Program Regulation, ch. 8 (1Feb. 1984)]; removal from Personnel Reliability Programs (nuclear or chemical weapons duty) [see Dep't of Army, Pamphlet No. 600-8, Military Personnel, Management and Administrative Procedures, para. 3-4 through 3-19 (25 July 1985)]; Military Occupational Skill (MOS) reclassification [*see* Dep't of Army, Reg. No. 600-200, Personnel General, Enlisted Personnel Management System, para. 2-28 through 2-32 (5July 1984) (hereinafter cited as AR 600-200)]; relief from active duty (REFRAD) of nonregular officers [*see* AR 635-100, ch. 3]; and nonjudicial punishment or court-martial under the UCMJ [*see infra* Part IV, text and accompanying notes.

2. Counseling.

"If the commander becomes aware of a relationship that has the potential of creating an appearance of partiality or preferential treatment, counseling the individuals concerned is the most appropriate initial action."[270] Counseling also is appropriate for those "relationships that involve only the appearance of partiality and have had no adverse impact on discipline, authority, or morale."[271]

The purpose of counseling is to ensure that the individuals understand the Army policy and the potential consequences of an improper superior-subordinate relationship, both for the unit and themselves. Such counseling should be conducted whenever it appears that a superior-subordinate relationship might evolve into one prohibited by Army policy.[272] Counseling may include an oral admonition or reprimand if warranted. Commanders should maintain written records reflecting counseling sessions for future use if the counseling is not successful. Since counseling is not considered punishment,[273] there is no appeal procedure. Soldiers who are counseled may discuss with their commander why they believe their relationship is permissible. If any doubt exists, soldiers should take advantage of counseling sessions to clarify questions regarding the scope of permissible relationships.

3. Reassignment.

Reassignment is an attractive option when a command or supervisory relationship between a superior and a subordinate is or may become improper.[274] Removing the duty relationship usually eliminates any potential problem. Reassignment is appropriate when a couple voluntarily comes forward and tells the commander that they would like to date one another. Commanders should cooperate in reassigning one of the members, if consistent with the needs of the Army. If reassignment is denied, there is a good likelihood that they will date anyway, thereby causing potential morale and discipline problems in the unit.

Soldiers who are involuntarily reassigned may challenge such actions by making an oral or written complaint to the local inspector general's

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[270] HQDA LTR 600-84-2, para. 3b, enclosure at 5.

[271] *Id.*

[272] *See id.* enclosure at 6-12 (problems 1, 3, 4, 5, 6, 9, 11) for examples where counseling was appropriate.

[273] *See* Dep't of Army, Reg. No. 27-10, Legal Services, Military Justice, para. 3-3a (10 Dec. 1985) (hereinafter cited as AR 27-10).

[274] *See* generally AR 614-100, ch. 5 (officer reassignments); AR 624-200, chs. 2 and 3 (enlisted reassignments).

office under the Inspector General Action Request System.[275] Relief also is available under the statutory grievance system created by the Uniform Code of Military Justice, Article 138.[276]

4. Extra Training or Instruction.

One of the most effective nonpunitive disciplinary measures available to a commander is the inherent authority to order extra training or instruction.[277] The training or instruction must directly relate to, and be designed to correct, a soldier's particular deficiency.[278] Commanders may order soldiers involved in improper superior-subordinate relationships to research and write papers or teach classes on the subject. This option has the additional benefit of educating other soldiers in the unit about the Army policy. If the extra training or instruction satisfactorily corrects the improper superior-subordinate relationship, commanders may not comment upon the incident in the efficiency reports or other official records of the soldiers concerned.[279]

Soldiers ordered to perform extra training or instruction may challenge those orders by filing inspector general or Article 138 complaints.[280]

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[275] *See* Dep't of Army, Reg. No. 20-1, Assistance, Inspections, Investigations, and Followup-Inspector General Activities and Procedures, ch. 4 (6 June 1985) [hereinafter cited as AR 20-1]. This system is maintained "under the law, regulations, and the requirements of due process, through which Service members or others may request aid in resolving problems related to the Army, without fear of compromise, reprisal, or unnecessary disclosure of information." *Id.* at para. 1-5h.

[276] UCMJ art. 138 provides:

> § 938. Art. 138 Complaint of wrongs
>
> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

See also Dep't of Army, Reg. No. 27-14, Legal Services, Complaints under Article 138, UCMJ (1 Feb. 1979) (hereinafter cited as *AR* 27-14). 'The procedures prescribed in this regulation are intended to ensure that an adequate official channel for redress is available to every member of the Army who believes himself wronged by his commanding officer." Id. at para. 1-5*a*.

[277] AR 27-10, para. 3-3*c*; AR 600-20, para. 5-6*c*.

[278] AR 27-10, para. 3-3*c*; AR 600-20, para 5-6*2*.

[279] AR 600-20, para. 5-6*d* (15 Oct. 1978).

[280] *See supra* notes 275-276 and accompanying text.

5. *Denial of* Pass or Leave.

If a commander can establish that soldiers are going to violate the Army's superior-subordinate relationships policy during a particular pass or leave, he may deny that pass[281] or leave.[282] The difficulty will be to develop a sufficient factual basis to support such a determination. Revocation of pass or leave based upon mere speculation would constitute an abuse of the commander's discretion.

Soldiers may challenge denials of pass or leave through Inspector General or Article 138 complaint channels.[283]

6. *Administrative Letter of* Reprimand.

"Any credible derogatory information that may reflect on a person's character, integrity, trustworthiness, or reliability"[284] may be recorded in an administrative letter of reprimand. Violations of the Army's superior-subordinate relationships policy constitutes such unfavorable information. Letters of reprimand may be filed in a soldier's Military Personnel Records Jacket or the Official Military Personnel File, depending upon the severity of the offense.[285]

The proposed letter of reprimand must be referred to the soldier for acknowledgment and rebuttal.[286] Any document submitted in rebuttal must be filed with the letter.[287]

Soldiers may seek removal of letters of reprimand filed in their Military Personnel Records Jacket or their Official Military Personnel File by appealing to designated appeal authorities.[288] If an appeal is unsuc-

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[281] *See* Dep't of Army, Reg. No. 630-5, Personnel Absences, Leaves and Passes, ch. 11 (1 July 1984) (hereinafter cited as AR 630-5). "Passes are not a right to which one is entitled, but a privilege to be awarded to deserving members." Id. at para. 11-1*a*.

[282] *See* AR 630-5, ch. 2. "The judicious application of Army leave policies is an important command responsibility. Care must be exercised to prevent abuses of the purpose for which leave is provided." *Id.* at para. 2-1. "[M]embers have an obligation to execute military programs and policies." *Id.* at para. 2-3d.

[283] *See supm* notes 275-276 and accompanying text.

[284] Dep't of Army, Reg. No. 600-37, Personnel-General, Unfavorable Information, para. 1-4*a* (15 Nov. 1980) (hereinafter cited as AR 600-37). Commanders may also use oral reprimands or admonitions, Oral reprimands or admonitions should be combined with verbal counseling to ensure that the soldiers concerned fully understand the Army policy. See text and accompanying notes infm Part III, Section E.2 for a discussion of counseling.

[285] *See* id. at para. 2-4. Letters filed in the "MPRJ only may be filed for a period not to exceed 3 years or until reassignment of the person to another general court-martial jurisdiction." Id. para. 2-4*a*(4). Letters may be filed in a soldier's OMPF only by a general officer or an officer exercising general court-martial jurisdiction over that soldier. *Id.* at para. 2-4b.

[286] *Id.* at para. 2-6.

[287] *Id.* at para. 2-4*a*(5) (MPRJ) and 2-4*b*(1)(a)(OMPF).

[288] *Id.* ch. 7. The Department of Army Suitability Evaluation Board is the appellate authority for OMPF appeals. Appeals to remove letters from the MPRJ may be made to the commander or supervisor who directed filing of the letter or a higher level commander or supervisor of that chain of command.

cessful, a soldier may petition the Army Board for Correction of Military Records to correct or remove the letter because of an error or injustice.[289]

7. Suspension of Favorable Personnel Actions.

Commanders are responsible for ensuring that favorable actions are not initiated or completed "when such actions would not serve the best interests of the Army."[290] Favorable personnel actions include reenlistment, reassignment to a new installation or major overseas command, promotion, awards and decorations, attendance at service schools, bonus payments, and assumption of command.[291] The commander must suspend favorable personnel actions in a long list of circumstances including when:

> An investigation is initiated by military or civilian authorities concerning creditable allegations or incidents that reflect unfavorably on the character or integrity of the member. It is initiated when these authorities make a conscious decision, based on available information, to investigate the involvement of the Army member. Suspension will be initiated on all members when the investigation is formal or E4 through E9 and all commissioned and warrant officers when the investigation is informal and may result in administrative, punitive, or disciplinary action.[292]

Accordingly, when a commander investigates an allegation of an improper superior-subordinate relationship, suspension of favorable personnel actions almost always will be required.

There is no direct appeal to a suspension of favorable personnel action. A soldier indirectly challenges a suspension by using the available due process in the underlying action that forms the basis for the suspension.

8. Adverse Evaluation Reports.

Rating officials may make adverse comments in evaluation reports of soldiers involved in improper superior-subordinate relationships, unless the problem was corrected satisfactorily by extra training or instruc-

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[289] *Id.* at para. 7-6; *see also* Dep't of Army, Reg. No. 15-186, Boards, Commissions, and Committees Army Board for Correction of Military Records (18 May 1977) (hereinafter cited as *AR* 15-185). The ABCMR is a statutory civilian board that may correct any error or injustice in a military record. *See* 10 U.S.C. § 1552 (1982).

[290] Dep't of Army, Reg. No. 600-31, Personnel-General, Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings, para. 1and 9 (1 July 1984) (hereinafter cited as AR 600-31).

[291] *Id.* at para. 1.

[292] *Id.* at para. 5a(5). For soldiers in grades E-1 through E-3, a commander has discretionary authority to suspend favorable personnel actions. *Id.* at para. 5a(12). Soldiers may file an Article 138 complaint to challenge these discretionary suspensions. *See supm* note 276.

tion.[293] No reference may be made to "unproven derogatory information" or to incomplete investigations or corrective actions.[294] Rating officials may state their honest judgments regarding how the soldier adhered to the moral and professional standards expected of officers[295] or senior enlisted personnel.[296] Rating officials may prepare special performance deficiency reports for enlisted personnel when a performance deficiency is "so serious that it should not await reporting through the normal reporting schedule."[297]

Soldiers have several methods of challenging adverse evaluation reports. Any officer evaluation report with negative comments about the officer's professional ethics or otherwise containing derogatory remarks that may adversely impact upon the officer's career must be referred to the rated officer by the senior rater for acknowledgement and comment before it is forwarded for filing in the officer's record.[298] Any rated soldier may request a commander's inquiry if he believes an evaluation is illegal or unjust.[299] Soldiers may appeal evaluation reports to DCSPER Special Review Boards,[300] and then to the Army Board for Correction of Military Records.[301]

9. Administrative Reduction in Grade.

Enlisted personnel may be administratively reduced one grade for inefficiency.[302] Inefficiency consists of those "characteristics that show that the person cannot perform duties and responsibilities of the grade and MOS."[303] Inefficiency "may include any act or conduct that clearly

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[293] *See supm* note 279 and accompanying text.

[294] Dep't of Army, Reg. No. 623-105, Personnel Evaluation Reports, Officer Evaluation Reporting System, para. 4-21 (15 Nov. 1981) (hereinafter cited as AR 623-105); Dep't of Army, Reg. No. 623-205, Personnel Evaluation Reports, Enlisted Evaluation Reporting System, para. 2-15 (5 July 1984) (hereinafter cited as AR 623-205).

[295] AR 623-105, para. 4-3*a*. Officers are evaluated on eight professional ethics: dedication, responsibility, loyalty, discipline, integrity, moral courage, selflessness, and moral standards. Id. at para. 4-13*b*(6). Moral standards include the maintenance of "high standards of personal conduct on and off duty." *Id.* at para. 4-13*b*(6)(h).

[296] AR 623-205, para. 3-2*a*. Enlisted personnel are evaluated on seven professional standards: integrity, loyalty, moral courage, self-discipline, military appearance, earns respect, and supports EOIEEO. *See* DA Form 2166-6, Enlisted Evaluation Report, Part III.B., sample in id. at 16.

[297] AR 635-205, para. 2-10*a*(2). This option recently was rescinded for officers. *See* AR 623-105, para 5-25 (C7, 1 Nov. 1985).

[298] *See* AR 623-105, paras. 4-27 and 5-28.

[299] *See* id. at paras. 3-15 and 5-30; AR 623-205, para. 2-18. A commander's inquiry is an informal examination by a commander into allegations that one of his subordinates rendered an efficiency report that is illegal, unjust, or otherwise in violation of the applicable regulation (AR 623-105 or AR 623-205).

[300] *See* AR 623-105, ch. 9; AR 623-205, ch. 4.

[301] *See* AR 15-185.

[302] *See generally* AR 600-200, ch. 6. Id. para. 6-1 identifies reduction authorities depending on the grade of the soldier.

[303] *Id.* at 71 (glossary).

shows that the soldier lacks those abilities and qualities required and expected of a person of that grade and experience. Commanders may consider misconduct . . . as bearing on efficiency."[304] Reductions for inefficiency may not be used to reduce soldiers for a single act of misconduct, for actions they were acquitted of in courts-martial proceedings, or in lieu of Article 15proceedings.[305]

This option is available when an improper superior-subordinate relationship demonstrates that an enlisted member cannot properly perform the duties and responsibilities of his or her grade. It is particularly appropriate for relationships involving the abuse of direct or supervisory authority or the improper use of rank or position for personal gain. Commanders should consider this option when confronted with improper relationships by drill instructors with trainees.

Soldiers are entitled to written notice of the proposed reduction and the reasons therefor.[306] Soldiers may present any pertinent matters in rebuttal.[307] Soldiers in grades E-5 through E-9 may request to appear before a reduction board.[308] Reductions for inefficiency may be appealed to designated higher authorities,[309] and ultimately to the Army Board for Correction of Military Records.[310]

10. Bar to ***Reenlistment.***

"Only personnel of high moral character, personal competence, and demonstrated adaptability to the requirements of the professional soldier's moral code will be reenlisted in the Regular Army."[311] Soldiers involved in improper superior-subordinate relationships who are no longer suitable for military service can be barred from reenlistment. Bar to reenlistment procedures may not be used instead of other appropriate disciplinary or administrative action.[312] This option may be used, however, even though a court-martial or administrative separation action resulted in a decision to retain a soldier.[313]

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[304] *Id.* at para. 6-4*a*.
[305] *Id.* at para. 6-4*c*.
[306] *Id.* at para. 6-4*d*.
[307] *Id.*
[308] *Id.* at para. 6-4*d*(2). "If appearance is declined, it will be in writing and will be considered as acceptance of the reduction action." *Id.*
[309] *Id.* at para. 6-10. The appellate authority for grades E-6 and below is the next higher authority or the officer exercising general court-martial jurisdiction. The appellate authority for grades E-7 through E-9 is the first general officer in the chain of command above the officer who approved the reduction.
[310] *See* AR 15-185.
[311] Dep't of Army, Reg. No. 601-280, Personnel Procurement, Army Reenlistment Program, para. 6-2*a* (5 Jul. 1984)(hereinafter cited as AR 601-280).
[312] *Id.* at para. 6-3*c*.
[313] *Id.* at para. 6-3*d*.

Soldiers may appeal bars to reenlistment to designated authorities[314] and may not be separated involuntarily while an appeal is pending.[315] Commanders must review approved bars to reenlistment at least once every six months and thirty days before the soldier's scheduled departure from the unit or scheduled separation.[316] Soldiers who believe they will be unable to overcome a bar to reenlistment may apply for immediate discharge.[317]

11. Relief for Cause.

A commander or supervisor may relieve a soldier from command or a duty position whenever the commander or supervisor determines that the soldier's "personal or professional characteristics, conduct, behavior, or performance of duty warrant removal in the best interest of the US Army."[318] Relief for cause is one of the most severe adverse actions available and normally should be preceded by formal counseling, unless immediate action is warranted by the circumstances.[319]

Only the most egregious violations of the superior-subordinate relationships policy should result in a relief for cause. Gross abuse of rank or position for personal gain or a highly publicized romantic involvement between a commander and a direct subordinate usually would warrant such action.[320]

After exhausting any available administrative appeal procedures, soldiers may challenge a relief for cause by filing inspector general[321] or Article 138[322] complaints.

12. Administrative Separation.

The most severe administrative sanction is the initiation of administrative separation proceedings. Commanders can correct the vast majori-

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[314] *Id.* at para. 6-5e. For soldiers with less than 10 years of active Federal service at expiration of term service (ETS) the appellate authority is the first general officer in the soldier's normal chain of command, or the commander exercising general court-martial jurisdiction, whichever is in the most direct line to the soldier. For soldiers with more than 10 years of active Federal service at ETS, the appellate authority is the Commander, U.S. Army Enlistment Eligibility Activity.

[315] *Id.* These safeguards are limited to soldiers who are otherwise qualified under the criteria of chapter 2 of AR 601-280, including those with approved waivers. *Id.*

[316] *Id.* at para. 6-5*i*.

[317] *Id.* at para. 6-5f. Soldiers' requests for early separation because of bars to reenlistment are processed under AR 635-200, para. 16-5.

[318] AR 600-20, para. 3-13*a* (15 Oct. 1980).

[319] *Id.* at para. 3-13b. A relief for cause also generates a special relief for cause efficiency report. *See* AR 623-105, para. 5-18; AR 623-205, para. 5-8.

[320] *See* HQDA LTR 600-84-2, enclosure at 9-10 (problem 7) for an example of a romantic involvement in the chain of command which warranted a relief for cause action.

[321] *See supra* note 275 and accompanying text.

[322] *See supra* note 276 and accompanying text.

ty of improper superior-subordinate relationships by using one or more of the previously discussed options, without resort to administrative separation.

Officers involved in improper superior-subordinate relationships may be administratively separated from the Army for either: **(1)** substandard performance of duty or **(2)** misconduct, or moral or professional dereliction.[323] An improper superior-subordinate relationship constitutes substandard performance of duty to the extent it involves a "[f]ailure to exercise necessary leadership or command expected of an officer of his grade[sa]" or a "[f]ailure to conform to prescribed standards of military deportment."[325] It constitutes misconduct, or moral or professional dereliction, if it involves "[m]ismanagement of personal affairs to the discredit of the service,"[326] "[a]cts of personal misconduct,"[327] or "[c]onduct unbecoming an officer."[328]

Each nonprobationary officer separation case requires three different boards of officers, the second of which gives the officer a full due process hearing.[329] Officer separation cases generally take between six and nine months to complete.

Enlisted personnel involved in improper superior-subordinate relationships may be separated for unsatisfactory performance[SSo] or misconduct.'" An enlisted person generally is entitled to a full due process board unless an other than honorable discharge is not warranted and he has less than six years of service.[332]

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[323] *See* AR 635-100, ch. 5.
[324] *Id.* at para. 5-11c.
[325] *Id.* at para. 5-11h.
[326] *Id.* at para. 5-12a(3).
[327] *Id.* at para. 5-12a(6).
[328] *Id.* at para. 5-12a(10).
[329] The three boards are: **(1)** an HQDA selection board (see *id.* at paras. 5-14 through 5-16); **(2)** a board of inquiry (see *id.* at paras. 5-17 through 5-21); and **(3)** an HQDA review board (see *id.* at paras. 5-23 through 5-27). See *id.* at paras. 5-28 through 5-30 for streamlined separation procedures for probationary officers. Probationary officers generally include Regular Army officers with less than five years of active commissioned service and Reserve Component officers with less than three years of commissioned service. *Id.* at para. 5-28.

[330] *See* AR 635-200, ch. 13. See *id.* at para. 13-2 for specific determinations a commander must make before using this provision. A general discharge under honorable conditions is the least favorable discharge a soldier can get under chapter 13. *Id.* at para. 13-12.

[331] *Id.* ch. 14. Improper superior-subordinate relationships would either constitute "minor disciplinary infractions" or a "pattern of misconduct" involving discreditable involvement with military authorities or conduct prejudicial to good order and discipline. *Id.* para. 14-1% and *b*.

[332] *See id.* ch. 2, Section II (Notification Procedure) and Section III (Administrative Board Procedure).

IV. FRATERNIZATION AND RELATED CRIMINAL ISSUES

A. INTRODUCTION

In addition to administrative options, commanders may resort to criminal sanctions to discipline improper superior-subordinate relationships. Commanders should use criminal options only after determining that no combination of administrative options discussed in the preceding section would properly correct the situation.

B. FRATERNIZATION IS A CRIMINAL OFFENSE

The 1984 Manual for Courts-Martial for the first time established a specific criminal offense of "fraternization" for certain officer-enlisted relationships. The elements of this offense are:

> (1) That the accused was a commissioned or warrant officer;
>
> (2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;
>
> (3) That the accused then knew the person(s) to be (an)enlisted member(s);
>
> (4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and
>
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[333]

These elements are taken from the *Pitasi* and *Free* cases and are "based on longstanding custom of the service."[334]

The first three elements require proof of the status of the officer and enlisted personnel involved in the relationship; knowledge by the officer of the enlisted status; and evidence that the officer "fraternized on terms of military equality" with the enlisted member(s). Although the quoted phrase is not defined or explained, any common sense interpretation conveys its meaning. It includes any association where the officer fails to

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[333] MCM, 1984, Part IV, para. 83b.

[334] Dep't of Defense, Joint Service Committee on Military Justice, Analysis of the Draft Proposed Revision of the Manual for Courts-Martial 240 (Jan. 1984) (hereinafter cited as MCM, 1984, Joint Service Committee Analysis). *See supra* notes 154-59, 163-65 and accompanying text for a discussion of the *Pitasi* and *Free* cases.

maintain a professional superior-subordinate relationship with an enlisted person. Evidence that the officer was unduly familiar with, dated, or otherwise acted as a buddy or a peer towards an enlisted person will satisfy the fraternized on terms of military equality element. Only an officer may commit the criminal offense of fraternization under this specification.

The fifth element is identical to that found in nearly every other Article 134 offense.[335] "Conduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline. Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem."[336]

The problem arises in interpreting the fourth element, *i.e.*, that the fraternization violated the custom of the accused's service. As noted in the *Johunns* case, customs vary from one service to another.[337] Undoubtedly, these differences prevented the drafters of this specification from agreeing upon any uniform definition of what constitutes the custom against fraternization.[338] Each service must determine its own parameters for the custom against officer-enlisted fraternization.

The Manual does provide a general explanation of the offense:

> The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted person is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been

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[335] *See* MCM, 1984, Part IV, para. 60c for an explanation of the three categories of offenses punishable under the three clauses of Article 134, UCMJ. The vast majority involve the first two categories or clauses. "Clause 1 offenses involved (sic) disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces." *Id.*

[336] Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook, p. 3-257 (May 1982). This quotation, taken from the Article 134 adultery instruction, is the same as every other Article 134 offense based upon clauses 1 and 2 thereof. See *infra* Part V, text and accompanying notes for a discussion of the constitutional issues involving fraternization and Article 134 offenses.

[337] *See supra* note 177 and accompanying text.

[338] The drafter's analysis does not discuss the fourth element of fraternization. See MCM, 1984, Joint Service Committee Analysis, at 240.

> prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.[339]

Notice the similarity between the fourth sentence of the quoted language and the Army regulatory policy prior to HQDA LTR 600-84-2.[340] At first blush it appears that the Army has a fairly consistent administrative and criminal fraternization policy.

Recall, however, what the Army published in HQDA LTR 600-84-2. Army policy now is that "the criminal offense of fraternization, as set out in the Manual for Courts-Martial, is not governed by AR 600-20."[341] "From now on, the term 'fraternization' should be used only to refer to this criminal offense and should not be confused with the regulatory policy established by AR 600-20, paragraph 5-7f."[342]

It will now be extremely difficult for any trial counsel to introduce evidence to prove the scope of the Army's fraternization custom. The language in HQDA LTR 600-84-2 should effectively preclude a trial counsel from introducing the Army *policy* in AR 600-20, paragraph 5-7*f*, or HQDA LTR 600-84-2 and its enclosure, as evidence of the Army *custom* against fraternization. Also, a military judge cannot take judicial notice of any adjudicative fact that is "subject to reasonable dispute."[343] In light of the guidance in HQDA LTR 600-84-2, it appears that the scope of the Army's unwritten fraternization custom is still subject to reasonable dispute, thereby eliminating the possibility of judicial notice to establish the scope of what, if anything, is left of the unwritten custom against fraternization.

The problem is further compounded by the discussion in the Manual for Courts-Martial concerning prosecutions under Article 134 for breaches of customs of the service:

> In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation.

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[339] MCM, 1984, Part IV, para. 83c(1).
[340] *See supra* notes 184, 195 and accompanying text.
[341] HQDA LTR 600-84-2, para. 4.
[342] *Id.* at para. 2.
[343] Mil. R. Evid. 201(b): "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

> A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned.[344]

HQDA LTR 600-84-2 attempted to outline an administrative policy, which would not be called "fraternization," while simultaneously preserving our ability to use any different definition of fraternization that the appellate courts might define. I believe that the courts will not, and should not, permit us to have our cake and eat it too. Army Regulation 600-20 and HQDA LTR 600-84-2 should be interpreted for administrative and criminal purposes as the Army's sole fraternization policy and

C. ALTERNATIVES TO FRATERNIZATION

In light of the limited application of the fraternization specification to officers only and the difficulties with proving the Army custom, counsel should consider alternative methods of charging improper superior-subordinate relationships.

The best solution is a well-written local punitive regulation that applies to improper superior-subordinate relationships between all soldiers of different ranks. Such regulations cover not only officer-enlisted relations but also enlisted-officer, enlisted-enlisted, and officer-officer relationships. Most organizations in the Army where fraternization is a problem already have such regulations and have been successfully enforcing them.[346] Local fraternization regulations are specifically contemplated and authorized by the Manual for Courts-Martial.[347]

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[344] MCM, 1984, Part IV, para. 60c(2)(b).

[345] The Court of Military Appeals informally may have adopted such a position already. *See Johanns*, 20 M.J. at 161, where Chief Judge Everett noted the Army Court of Military Review's determination in the *Stocken* case (17 M.J. 826 (A.C.M.R. 1984)) that there is no criminal offense of fraternization between enlisted personnel of different ranks. Judge Everett continued: "Subsequently, on November 29, 1984, the Army issued new guidelines with examples in order to clarify the limitations on social contacts between officers and enlisted persons. *See* HQDA LTR 600-84-2." *Id.* This comment suggests that Chief Judge Everett may not agree that the guidelines in AR 600-20 and HQDA LTR 600-84-2 are separate and apart from any criminal offense of fraternization in the Army. *See* supra notes 210-11 and accompanying text.

[346] *See, e.g.*, United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985) (Fort Jackson regulation); United States v. Moorer, 15 M.J. 520 (A.C.M.R. 1983) (Fort Gordon command policy letter); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), *petition denied*, 13 M.J. 31 (C.M.A. 1982) (Fort Dix regulation). For considerations to consider when defending soldiers prosecuted under such local regulations see Davis, *"Fraternization" and the Enlisted Soldier: some Considerations for the Defense*, The Army Lawyer, Oct. 1985, at 27.

[347] MCM, 1984, Part IV, para. 83c(2) provides:

> Regulations, directives and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. *See* paragraph 16.

Another alternative for incidents involving officers is to charge the incident as conduct unbecoming an officer under Article 133 without referring to the term fraternization. Such unbecoming conduct includes any

> action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.[348]

Judge Cox's concurring opinion in the *Johanns* case indicates that he would be receptive to this approach.[349] This approach could be expanded to include charges against enlisted personnel and officers for other underlying offenses connected with the fraternization such as sodomy, adultery, gambling, or drug use.

A third approach would be to create a new Article 134 offense by charging that the "improper superior-subordinate relationship" was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. By charging an improper superior-subordinate relationship rather than fraternization, trial counsel should be able to introduce HQDA LTR 600-84-2 and AR 600-20 to establish the standards of required conduct. Again, such an approach arguably is authorized, or at least not precluded, by the Article 134 fraternization offense.[350]

A fourth alternative is to prosecute violations of the superior-subordinate relationship policy as violations of a lawful general order or regulation under the Uniform Code of Military Justice, Article 92. Although AR 600-20 does not contain any provision expressly stating that it is a punitive regulation,[351] such a provision is no longer required for successful prosecution under Article 92.

In *United States v. Blanchard*[352] the Court of Military Appeals unheld an Article 92 conviction for violation of a regulation that did not say that violators could be punished under the UCMJ because it was "direc-

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[348] MCM, 1984, Part IV, para. 59c(2). See generally Nelson, Conduct Expected of an *Officer* and a Gentleman: An Ambiguity, 12 A.F.JAG L. Rev. 124 (1970).

[349] 20 M.J. 155, 161-65 (Cox, J., concurring in part, concurring in the result in part) (C.M.A.1985). See supra notes 173-76 and accompanying text.

[350] *See* supm note 347 and accompanying text. This approach was used successfully to draft fraternization specifications prior to the 1984 Manual for Courts-Martial. See supra notes 149-152 and accompanying text.

[351] *See* generally AR 600-20.

[352] 19 M.J. 196 (C.M.A.1985).

tory in nature" and gave "sufficient definition of the conduct it purports to control."[353] The Court focused on language in the regulation indicating that its purpose was "to regulate" and "to establish positive prohibition~."~~'

The Army's superior-subordinate relationship policy contains the same type of "directory" language. The policy begins with an explanation of why certain relationships between soldiers of different ranks are improper and states that "[s]uch relationships will be avoided."[355] The regulation then requires commanders and supervisors to "counsel those involved or take other action, as appropriate,"[356] if one of three prohibitions is violated. Applying the *Blanchard* holding to the language of the Army's superior-subordinate relationship policy, trial counsel should be able to make a very strong argument that violations of that policy are punishable under the Uniform Code of Military Justice, Article 92.

D. MULTIPLICITY

A detailed analysis of the various theories of multiplicity and their possible impact on fraternization cases is beyond the scope of this article.[357] Nevertheless, because fraternization specifications often are alleged either in alternative fashions or together with other charges stemming from the same or related misconduct, counsel and judges must be alert for multiplicity issues. The existence of multiplicity in a particular case depends upon the particular misconduct alleged in the related specifications.

Fraternization specifications have been held multiplicious for findings with adultery specifications,[358] and vice versa.[359] Yet under other facts fraternization and adultery specifications were not multiplicious for findings or sentencing.[360] Accordingly, the facts of each case must be examined carefully in light of the multiplicity theory then in vogue.[361].

[353] *Id.* at 198.
[354] *Id.*
[355] AR 600-20, para. 5-7f.
[356] *Id.*
[357] For detailed discussions of the theories and issues involved in multiplicity cases, see United States v. Ridgeway, 19 M.J. 681 (A.F.C.M.R. 1984); McAtamney, *Multiplicity: A Functional Analysis,* 106 Mil. L. Rev. 115 (1984); Raezer, *Trial Counsel's Guide to Multiplicity,* The Army Lawyer, Apr. 1985, at 21; Uberman, *Multiplicity Under the New Manual for Courts-Martial,* The Army Lawyer, June 1985, at 31.
[358] United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986).
[359] United States v. Walker, 21 M.J. 74 (C.M.A. 1985).
[360] United States v. Smith, 18M.J. 786 (N.M.C.M.R. 1984).
[361] *See* United States v. Rodriguez, 18 M.J. 363 (C.M.A. 1984) for an application of the *Blockburger* test for multiplicity in a fraternization case.

V. CONSTITUTIONAL CHALLENGES

A. GENERAL

Fraternization specifications have been challenged on at least five different constitutional grounds: void for vagueness, overbreadth, impairment of free association, denial of equal protection, and invasion of the right to privacy. This section examines each of those grounds and their potential impact upon the Army's fraternization policies.

B. VOIDFOR VAGUENESS

The most frequent[362] and the only successful[363] constitutional challenge to fraternization specifications has been that such specifications are unconstitutionally vague. This argument stems from a long existing controversy, both in the courts and among commentators, concerning the constitutionality of Articles 133 and 134 of the Uniform Code of Military Justice and their predecessors in the Articles of War.[364] In 1974

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[362] *See, e.g.*, Staton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975); United States v. Pitasi, 20 C.M.A. 601, 44 C.M.R. 31 (1971); United States v. Lovejoy, 20 C.M.A. 18, 42 C.M.R. 210 (1970); United States v. Adams, 19 MLJL 996 (A.C.M.R. 1985); United States v. Moultak, 21 M.J. 822 N.M.C.M.R. 1985); United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985); United States v. Tedder, 18 M.J. 777 (N.M.C.M.R.), *petition* granted, 19 M.J. 115 (C.M.A. 1984); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), *petition* denied, 13 M.J. 31 (C.M.A. 1982).

[363] United States v. Johanns, 20 M.J. 155 (C.M.A. 1985).

[364] UCMJ arts. 133 and 134 now provide:

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer or a gentleman shall be punished as a court-martial may direct.

§ 934. Art. 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

See supra note 42 for their predecessors in the first American Articles of War. For differing views on the validity of these articles and discussions of cases examining their constitutionality see Cutts, Article *134:* Vague or Valid, 15 A.F. JAG L. Rev. 129 (1974); Everett, Article *134,* Uniform Code of Military Justice—A Study in Vagueness, 37 N.C.L. Rev. 142 (1959) (the author is now the Chief Judge of the U.S. Court of Military Appeals); Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 Hastings L.J. 259 (1971); Hewitt, General Article Void for Vagueness, 34 Neb. L. Rev. 529 (1958); Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 A.F. JAG L. Rev. 124 (1970); Nichols, The *Devil's* Article, 22 Mil. L. Rev. 111 (1963); Wiener, Are the General Military Articles Unconstitutionally Vague? 54 A.B.A.J. 357 (1968).

the Supreme Court resolved this controversy in ***Parker v. Levy***[365] which specifically held that Articles **133** and **134** are not unconstitutionally vague under the due process clause of the fifth amendment.[366] "Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs."[367] This reduced standard merely requires that the accused have reasonable notice that criminal responsibility may attach to his or her conduct.[368]

In light of this minimal standard, void for vagueness challenges to fraternization specifications generally have been unsuccessful.[369] Nevertheless, vagueness was the basis for the successful challenge to the Air Force's unwritten fraternization policy in ***United States v. Johanns***:[370] "Captain Johanns lacked the notice from custom or otherwise which even under the relaxed standard of review established by ***Parker v.*** Levy . . . is constitutionally necessary to meet the due process requirements of the Fifth Amendment."[371]

If the Army adheres to its current position that the guidance in AR **600-20** and HQDA LTR **600-84-2** has no bearing on a fraternization specification under Article **134,** we may soon have our own ***Johanns*** case. If this restriction is either removed by the Army or ignored by the courts, the Army's administrative policy should provide sufficient notification of prohibited conduct to overcome a constitutional attack alleging vagueness.[372]

C. OVERBREADTH

Local fraternization policies have been unsuccessfully challenged as unconstitutionally overbroad regulation of conduct protected by the first amendment.[373] The overbreath doctrine permits an accused to chal-

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[365] 417 U.S. 733 (1974). For a more detailed analysis of the impact of this decision, see Everett, ***Military Justice in the Wake of Parker v. Levy,*** 67 Mil. L. Rev. 1 (1975); Note, Military Law—The Standard of Constitutionality, 11 Wake Forest L. Rev. 325 (1975). ***See also*** Secretary of the Navy v. Avrech, 418 US. 676 (1974) (per curiam) (citing Parker v. Levy to reverse Court of Appeals' holding that Article 134 is unconstitutionally vague).

[366] 417 U.S. at 752-57.

[367] *Id.* at 756.

[368] *Id.* at 757.

[369] ***See*** cases cited *supm* note 362.

[370] 20 M.J. 155 (C.M.A. 1985).

[371] *Id.* at 161.

[372] The Court of Military Appeals has already commented upon HQDA LTR 600-84-2 in a manner indicating it is applicable to criminal cases involving fraternization. ***See*** supm note 345. ***See also*** United States v. Callaway, 21 M.J. 770, 777 (A.C.M.R. 1986).

[373] ***See*** United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), *petition denied*, 13 M.J. 31 (C.M.A. 1982).

lenge a statute or regulation, even though it clearly prohibits his or her conduct, if it also unlawfully restricts the first amendment rights of other ~ . ~ "

In Parker *v. Levy*[375] the Supreme Court greatly restricted the application of the overbreath doctrine to the military:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[376]

The court concluded that the policy considerations which grant a civilian defendant standing to challenge a statute on the grounds that it might violate someone else's first amendment rights "must be accorded a good deal less weight in the military context."[377]

In United States *v. Hoard*[378] the Army Court of Military Review applied Levy and rejected appellant's argument that a Fort Dix fraternization regulation was an overbroad restriction on speech, freedom of association, and marriage.[379] *Levy* and *Hoard* should preclude a successful attack on the Army's fraternization policy on the grounds that it is constitutionally overbroad.

D. IMPAIRMENT OF FREEDOM OF ASSOCIATION

In Staton *v. Froehlke*[380] a federal district court rejected an argument that a warrant officer's conviction for "wrongfully fraternizing" with enlisted women violated his first amendment right of freedom of association.

> Persons certainly do not forfeit constitutional protections upon entrance into the military. Still, the different character of mili-

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[374] For an analysis of the overbreadth doctrine, see Note, The *First* Amendment Overbreadth *Doctrine*, 83 Har. L. Rev. 844 (1970).

[375] 417 U.S. 733 (1973).

[376] *Id.* at 758.

[377] *Id.* at 760.

[378] 12 M.J. 563 (A.C.M.R. 1981), *petition denied*, 13 M.J. 31 (C.M.A. 1982).

[379] Id at 566-67.

[380] 390 F. Supp. 503 (D.D.C. 1975). The specifications alleged that the warrant officer wrongfully fraternized with three enlisted persons by socializing and drinking with them in a bar, and thereafter, in his quarters, where "he undressed and bathed. . . (one of the enlisted persons), a woman not his wife. . ." Id. at 505. This is the only reported case involving a review of a fraternization conviction by a federal district court.

> tary life and of the military community may require a restriction of certain conduct that is considered to adversely affect discipline and the proper performance of duties. . . . While similar limitations might be offensive if applied to civilians, in the context of military life the prohibition on specified types of fraternization serves a valid and necessary purpose. For this reason, the Court rejects the freedom of association argument advanced by plaintiff.[381]

Considering the special needs of the military concerning mission, obedience, and discipline, as noted in the *Levy* and *Staton* decisions, it is unlikely that the Army's fraternization policy can be attacked successfully as an unlawful infringement of the first amendment right of freedom of association.

E. DENIAL OF EQUAL PROTECTION

Application of the equal protection guarantees of the due process clause of the fifth amendment hinge upon the nature of the regulated activity.[382] Those regulations involving suspect classes or fundamental rights are subject to strict judicial scrutiny and must be supported by a compelling state interest.[383] Certain "intermediate" classifications must be supported by and designed to achieve an "important governmental interest."[384] Any rationale basis or "minimum scrutiny'' is a sufficient justification for all other classifications.[385] There is no relaxed rule for military cases in the equal protection arena, although the courts have considered the special needs and requirements of a military force.[386]

In *United States v. Hoard*,[387] appellant challenged his conviction under a Fort Dix fraternization regulation as a denial of his rights to equal pro-

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[381] *Id.* at 506-07.

[382] For a contrary analysis see Maltz, The Concept of Equal Protection—A Historical Inquiry, 22 San Diego L. Rev. 499 (1985). This article suggests that the function of equal protection is to guarantee the right to "protection of the laws" to all persons rather than to outlaw discrimination against a specific class or classes.

[383] Suspect classes include race, religion, national origin, and alienage. See generally Comment, Suspect Classification: A Suspect Analysis, 87 Dick L. Rev. 407 (1983).

[384] Classifications requiring an intermediate standard of review include gender and legitimacy. See generally Blattner, The Supreme Court's *"Intermediate" Equal* Protection Decisions: *Five* Imperfect Models of Constitutional Equality, 8 Hastings Const. L. Q. 777 (1981).

[385] *See* generally Leedes, The Rationality Requirement of the Equal Protection Clause, 42 Ohio St. L.J. 639 (1981).

[386] *See* Rostker v. Goldberg, 453 U.S. 57 (1981) (permissible for Congress to consider the special needs of the military when enacting male only draft registration law); see also Comment, Rostker *v.* Goldberg: A Step Backward in *Equal* Protection, *or* a *Justificiable* Affirmation *of Congressional* Power? 9 Pepperdine L. Rev. 441 (1982) (two different authors' analysis of both sides of the *Rostker* decision).

[387] 12 M.J. 563 (A.C.M.R.), *petition denied*, 13 M.J. 31 (C.M.A. 1981).

tection as guaranteed by the fifth amendment. He claimed that the regulation arbitrarily authorized training cadre and trainee social relationships between soldiers who had a preexisting familial relationship or bona fide friendship, while prohibiting training cadre like himself who had no preexisting relationship from socializing with trainees.

In a rather curt analysis the Army Court of Military Review determined that the regulatory exception did not involve a suspect classification or a fundamental constitutional right and therefore need be supported only by any "reasonable grounds."[388] The court concluded that the regulatory "exception serves laudably to lessen the degree to which the rights of those having relationships formed at a time and place beyond the purview of the regulation would be impaired by becoming subject to the regulation. The distinction thereby created is judicious rather than capricious."[389]

Army and local fraternization policies should continue to withstand equal protection challenges provided they are written and interpreted to avoid arbitrary or unreasonable restrictions upon soldier's personal affairs.

F. INVASION OF THE RIGHT TO PRIVACY

Over the last thirty years the Supreme Court has determined that the Constitution protects an individual's right to privacy in certain personal relationships.[390] In *United States v. Adams*,[391] a drill instructor argued that the Fort Dix fraternization regulation that prohibited his fraternization with trainees was an impermissible restriction of his constitutional right to privacy.[392] Citing *United States v. McFarlin*,[393] the Army

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[388] *Id.* at 568.

[389] *Id. See also* United States v. Moultak, 21 M.J. 822, 834-36 (N.M.C.M.R. 1985) (rejecting marine CPT's assertion that his conduct would not sustain a conviction in another branch of the armed forces and thus deprives him of equal protection of law).

[390] The right to privacy is not mentioned in the Constitution. Beginning with Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court has developed individual rights to privacy in certain conduct based upon the penumbras of the Constitution, the ninth amendment, fundamental human rights, or substantive due process. There are literally hundreds of legal articles addressing various aspects of the development or application of this constitutional right to privacy. The following articles provide a good overview of the development of this right: Gaugush, *The Ninth Amendment in the Federal Courts, 1965-1980: From Desuetude to Fundamentalism?* 61 Den. L.J. 25 (1983); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983); Note, *Due Process Privacy and the Path of Progress*, U. Ill. L. F. 469 (1979).

[391] 19 M.J. 996 (A.C.M.R. 1985).

[392] The trial court found that appellant socialized, kissed, and embraced a female trainee (Specification 1) and socialized, kissed, and had sexual intercourse with a female trainee (Specification 2). *Id.* at 997. The A.C.M.R. dismissed specification 2 for insufficient evidence to support the finding of guilty. *Id.* at 999.

[393] 19 M.J. 790 (A.C.M.R. 1985). The court also cited Dronenburg v. Zech, 741 F.2d 1388

Court of Military Review summarily rejected appellant's argument as "patently fallacious."[394] "A compelling state interest, such as the fundamental necessity for discipline within the military, justifies governmental regulation limiting the right to privacy."[395]

McFarlin involved a male drill instructor at Fort Leonard Wood who was convicted of nonforcible sodomy and indecent assault upon a female trainee. The Army Court of Military Review rejected appellant's claim that Article 125[396] was an unlawful infringement upon his constitutional right of privacy:

> [D]iscipline is essential to an effective military force. . . . [Appellant was both the victim's military superior and her direct supervisor. Generations of leaders have learned that sexual liaisons with subordinates are fatal to discipline in any organization. We hold that the governmental interest in preventing such liaisons is sufficiently compelling to justify governmental regulation and that therefore appellant's privacy rights were not improperly curtailed. The same analysis and result applies to other sexual offenses committed in such circumstances.[397]

The *Adams* and *McFarlin* cases should effectively preclude a soldier's successful challenge to a fraternization specification as a violation of his or her constitutional right to privacy, especially one involving sexual offense~.~~~

VI. ANALYZING THE POSSIBLE STANDARDS

A. GENERAL

This section analyzes the various approaches a military service may take in regulating the fraternization custom. The purpose of this analy-

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(D.C. Cir. 1984), which held that the Navy's mandatory discharge policy for homosexual conduct does not violate any constitutional right to privacy. This case presents a good historical summary and analysis of the constitutional right to privacy as applied to the special needs of the military. 741 F.2d 1391-98.

[394] 19 M.J. 996,998 (A.C.M.R. 1985).

[395] *Id.*

[396] UCMJ art. 125 provides:

> § 925 Art. 125 Sodomy.
>
> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

[397] 19 M.J. 790,792 (A.C.M.R. 1985).

[398] *See also* *Dronenburg*, 741 F.2d 1388 (D.C. Cir. 1984), for cases involving homosexuality.

sis is to weigh the advantages and disadvantages of each possible standard to determine the best standard for the Army today.

B. GENERAL GUIDELINES—SUBJECTIVE STANDARD

The first possible approach is to provide general guidelines without any specific prohibitions. The advantage of this standard is that it gives the commander maximum flexibility to deal with any situations that may arise. The disadvantage is that even though a commander's determination is based on principles of military discipline and sound judgment, it remains very much a subjective standard. Different commanders in good faith will apply the guidelines differently to the same fact situations. These inevitable conflicting interpretations confuse soldiers as to what constitutes fraternization and raises constitutional issues of unequal protection and void for vagueness.[399] This is the standard currently employed by the Army,[400] the Air Force,[401] and the Marine Corps.[402]

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[399] See text and accompanying notes *supra* Part V, Sections B and E.

[400] *See infm* Appendix A. While the Army policy does establish three prohibited types of relationships (*see* text and accompanying notes *supra* Part III Section B), the commander must make a subjective determination in each instance whether the particular relationship violates the policy.

[401] Dep't of Air Force, Reg. No. 30-1, Personnel-Air Force Standards, para. 7 (4 May 1983) (hereinafter cited as AFR 30-1) provides:

> 7. Professional Relationships:
>
> a. Professional relationships are essential to the effective operation of the Air Force. In all supervisory situations there must be a true professional relationship supportive of the mission and operational effectiveness of the Air Force. There is a long standing and well recognized custom in the military service that officers shall not fraternize or associate with enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States.
>
> b. In the broader sense of superior-subordinate relationships there is a balance that recognizes the appropriateness of relationships. Social contact contributing to unit cohesiveness and effectiveness is encouraged. However, officers and NCOs must make sure their personal relationships with members, for whom they exercise a supervisory responsibility or whose duties or assignments they are in a position to influence, do not give the appearance of favoritism, preferential treatment, or impropriety. Excessive socilization and undue familiarity, real or perceived, degrades leadership and interferes with command authority and mission effectiveness. It is very important that the conduct of every commander and supervisor, both on and off duty, reflects the appropriate professional relationship vital to mission accomplishment. It is equally important for all commanders and supervisors to recognize and enforce existing regulations and standards.
>
> c. Air Force members of different grades are expected to maintain a professional relationship governed by the essential elements of mutual respect, dignity, and military courtesy. Every officer, NCO, and airman must demonstrate the appropriate military bearing and conduct both on and off duty. Social and personal relationships between Air Force members are normally matters of individual judgement. They become matters of official concern when such relationships adversely affect duty performance, discipline and

C. PER SE PROHIBITIONS—OBJECTIVE STANDARD

A second approach is an objective standard that per se prohibits certain types of relationships. The advantage of this approach is that there is no question as to what types of relationships are encompassed by the policy. Everyone clearly knows the rules; violations are easy to identify; and the policy is short and crisp. A disadvantage is that blindly applying a set of rigid rules can produce unfair or absurd results in certain unique

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morale. For example, if an officer consistently and frequently attends other than officially sponsored enlisted parties, or if a senior Air Force member dates and shows favoritism and preferential treatment to a junior member, it may create situations that negatively affect unit cohesiveness, that is, positions of authority may be weakened, peer group relationships may become jeopardized, job performance may decrease, and loss of unit morale and spirit may occur.

This regulation was in effect at time of the *Johanns* decisions but was not cited in either case. *See* 17 M.J. 862 (A.F.C.M.R. 1983) and 20 M.J. 155 (C.M.A. 1985). The predecessor to this regulation, which was in effect at the time of CPT Johanns' misconduct in 1981, was cited by the Air Force Court of Military Review but that version did not expressly mention fraternization. *See* 17 M.J. 862, 865-66 n.6 (A.F.C.M.R. 1983).

[402] Dep't of Navy, Marine Corps Manual, para. 1100.4 and 1100.5 (21 Mar. 1980) (C2, 11 Jan. 1984) provides:

> **4.** Regulations Between Officers and Enlisted Marines. Duty relationships and social and business contacts among Marines of different grades will be consistent with traditional standards of good order and discipline and the mutual respect that has always existed between Marines of senior grade and those of lesser grade. Situations that invite or give the appearance of familiarity or undue informality among Marines of different grades will be avoided or, if found to exist, corrected. The following paragraphs written by the then Major General Commandant John A. Lejeune appeared in the Marine Corps Manual, Edition of 1921, and since that time have defined the relationship that will exist between Marine officers and enlisted members of the Corps:
>
> a. Comradeship and brotherhood.—The World War wrought a great change in the relations between officers and enlisted men in the military services. A spirit of comradeship and brotherhood in arms came into being in the training camps and on the battlefields. This spirit is too fine a thing to be allowed to die. It must be fostered and kept alive and made the moving force in all Marine Corps organizations.
>
> b. Teacher and scholar.—The relation between officers and enlisted men should in no sense be that of superior and inferior nor that of master and servant, but rather that of teacher and scholar. In fact, it should partake of the nature of the relation between father and son, to the extent that officers, especially commanding officers, are responsible for the physical, mental, and moral welfare, as well as the discipline and military training of the young men under their command who are serving the nation in the Marine Corps.
>
> c. The realization of this responsibility on the part of officers is vital to the well-being of the Marine Corps. It is especially so, for the reason that so large a proportion of the men enlisting are under twenty-one years of age. These men are in the formative period of their lives, and officers owe it to them, to their parents, and to the nation, that when discharged from the services they should be far better men physically, mentally, and morally than they were when they enlisted.

fact situations, as it did in the 1940s.[408] Another disadvantage is that a strict objective standard gives a commander no flexibility to consider any mitigating or exculpatory circumstances that might exist. No service currently employs a strictly objective standard.

D. 'HEME OF 'RESU

A third approach is to identify relationships that are presumed to be permissible and those that are presumed impermissible. Under this presumption scheme, the burden is on the government to establish that a presumably permissible relationship is prohibited in a particular situation. Similarly, soldiers involved in a presumably prohibited relationship must establish some unique circumstances justifying their relationship in a particular case. The advantage of this scheme of presumptions is that it provides more specific guidance than a general guidelines approach, yet it retains a commander's ability to consider unique circumstances. The disadvantage is that a scheme of rebuttable presumptions and shifting burdens of proof is too legalistic. The Army fraternization policy should be for commanders and soldiers, not lawyers.

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d. To accomplish this task successfully a constant effort must be made by all officers to fill each day with useful and interesting instructions and wholesome entertainment for the men. This effort must be intelligent and not perfunctory, the object being not only to do away with idleness, but to train and cultivate the bodies, the minds, and the spirit of our men.

e. Love of corps and country.—To be more specific, it will be necessary for officers not only to devote their close attention to the many questions affecting the comfort, health, military training and discipline of the men under their command, but also actively to promote athletics and to endeavor to enlist the interest of their men in building up and maintaining their bodies in the finest physical condition; to encourage them to enroll in the Marine Corps Institute and to keep up their studies after enrollment; and to make every effort by means of historical, educational and patriotic address to cultivate in their hearts a deep abiding love of the corps and country.

f. Leadership.—Finally, it must be kept in mind that the American soldier responds quickly and readily to the exhibition of qualities of leadership on the part of his officers. Some of these qualities are industry, energy, initiative, determination, enthusiasm, firmness, kindness, justness, self-control, unselfishness, honor, and courage. Every officer should endeavor by all means in his power to make himself the possessor of these qualities and thereby to fit himself to be a real leader of men.

5. Noncommissioned officers. The provisions of paragraphs 1100.3 and 1100.4 above, apply generally to the relationships of noncommissioned officers with their subordinates and apply specifically to noncommissioned officers who may be exercising command authority.

[408] *See, e.g.*, notes 128-34 and accompanying text.

E. COMBINATION OBJECTIVE—SUBJECTIVE STANDARD

A fourth alternative is a combination objective-subjective standard. This standard is similar to the presumption approach but without all the legal jargon. Clearly prohibited and clearly permissible relationships are identified. Other relationships must be evaluated by commanders applying general guidelines. The advantage of this combination standard is that it provides a clearer statement of permissible and prohibited relationships, while simultaneously retaining a commander's flexibility to handle unique situations. It also avoids the legal jargon of the presumptions approach. The disadvantages are that the policy tends to be longer and difficult to write. The fraternization policy at the United States Military Academy is a combination objective-subjective standard.[404]

F. NO WRITTEN STANDARD—RELIANCE ON CUSTOM

A fifth alternative is to rely upon tradition and custom without any written guidance. The advantage of this approach is that it requires no

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[404] Dep't of Army, United States Military Academy, USCC Reg. No. 600-1, Regulation for U.S. Corps of Cadets, para. 204 (13 Aug. 1984) provides:

> 204. *Fraternization.* Fraternization is not permitted.
>
> a. *Definition.* For the purpose of this regulation, fraternization is defined as:
>
> **(1)** A senior-subordinate relationship which gives the appearance of, or potential for partiality, preferential treatment or the improper use of rank or position for personal gain.
>
> **(2)** An upperclass-fourth class cadet relationship that is outside one's duties and not expressly authorized (see 204b and USCC Circular **351-1,** *The Fourth Class System).*
>
> b. Cadets must appreciate and understand that any form of familiarity and personal relationship between cadets which could interfere with the accepted senior-subordinate relationship within the Corps of Cadets or the Army in general is prejudicial to good order, discipline, and high morale. Such relationships compromise regard and respect for authority and impair the ability of the senior member to exercise fair and impartial judgment and are prohibited (see para **205,** *Social* ***Behavior).***
>
> c. Dating among cadets of the upperclasses, or among cadets of the fourth class, is permissible. Dating or establishment of a personal relationship by an upperclass cadet with a fourth class cadet is not permitted. Dating by cadets will be conducted with the same high standards of discretion and good judgment always expected of cadets. Cadets should have opportunities to enjoy informal social contact with each other, however, it must be understood that such class interaction must preserve the separation between the upper class and the fourth class. Cadets must also avoid personal relationships which interfere with proper exercise of their duties within the cadet organization or the good order and discipline of the Corps. Specifically, a cadet should not date a member of his or her chain of command. Should a *personal* relationship evolve within a chain of command, a cadet should seek remedy through the chain **of** command.

work or thought by the headquarters staff. There is no written policy to draft or for others to criticize or second guess. The disadvantage is that it dumps the entire problem on commanders, soldiers, and the courts. Different versions and interpretations of the custom will evolve in different commands. More importantly, this approach ignores the repeated warnings of the Court of Military Appeals in the *Pitasi* and *Johunns* cases that the services provide written guidance on their fraternization policies.[405]

G. THE BEST STANDARD

In my judgment, the best alternative is the combination objective-subjective standard. Only this approach provides the clear standards and flexibility needed in a workable fraternization policy. A proposed regulation incorporating this standard is included at Appendix B. For the most part, this regulation does not change existing policy, but states it more clearly. I am certain that others with more experience and expertise can refine and improve upon this proposed fraternization policy. I offer it only as a step in the right direction, not a perfect solution.

VII. CONCLUSIONS AND RECOMMENDATIONS

The social class justification for fraternization is no longer valid. In today's Army any fraternization policy must be based upon the needs of military discipline. Accordingly, there is no reason to limit the application of the Article **134** fraternization specification to officer conduct. The fraternization specification should be applicable to any soldier—officer or enlisted, superior or subordinate—who violates a service's fraternization custom.

The total separation established in HQDA LTR 600-84-2 between the Army's administrative superior-subordinate relationships policy and criminal fraternization[406] is unwarranted. This technical legal distinction will be ignored or confused by commanders, soldiers, and the courts. There should be one Army fraternization policy with criminal prosecution as the last possible option for disciplining violators.

The Army should write a new, more specific fraternization policy using a combination objective-subjective standard.[407] Fear of writing an imperfect regulation should not paralyze our ability to address a difficult problem.

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[405] *See* **supra notes 163-72 and accompanying text.**

[406] *See* **supra notes 210-11, 345 and accompanying text.**

[407] *See* **proposed new regulation at Appendix B. For a proposed regulation by another commentator, see Note, Wrongful Fraternization As An Offense Under The Uniform Code** *of Military* **Justice, 33** Clev. St. L. Rev. **547 (1984-85).**

Army fraternization policy must be determined by the Army leadership in the Pentagon, not by the courts or field commanders. They have their own duties and responsibilities. An "Army of Excellence" that wants soldiers to "Be All You Can Be" is not well-served by a staff of lawyers and policy makers afraid to tackle a difficult task. Commanders deserve more than general guidelines under which any decision they make can be second guessed by Pentagon officials. Soldiers willing to die for their country have a right to know in plain, simple terms what rules they are expected to observe.

APPENDIX A

CURRENT ADMINISTRATIVE POLICY (AR 600-20 paragraph 5-7*f*, as clarified by HQDA LTR 600-84-2)

Relationships between service members of different rank which involve (or give the appearance of) partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. Such relationships will be avoided. Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between service members of different rank—

(1) Cause actual or perceived partiality or unfairness,

(2) Involve the improper use of rank or position for personal gain, or

(3) Cause an actual or clearly predictable adverse impact upon discipline, authority, or morale.

APPENDIX B

PROPOSED FRATERNIZATION REGULATION

FRATERNIZATION

a. The old fraternization custom prohibiting all social interaction between officers and enlisted personnel is no longer Army policy.

b. The following relationships are permitted between soldiers of different ranks, including officer-enlisted relationships:

(1) Dating and other heterosexual activities, short of sodomy or sexual intercourse, between unmarried soldiers not in the following categories:

(a) Training cadre and trainees;

(b) Command or rating chain relationships;

(c) Direct supervisory relationships;

(d) Military instructor-student relationships;

(e) Relationships where one soldier has the ability to influence some official matter concerning another soldier.

(2) Simple courtesies.

(3) Carpooling or occasionally offering automobile transportation to or from work.

(4) Command social functions including hail and farewells, dining-ins, dining-outs, dances or balls, picnics, receptions, or office parties.

(5) Promotion parties,

(6) Community organizations and activities including PTA, scouting groups, DYA events, fraternal or civic organizations, sports teams, swim clubs, neighborhood housing associations, religious services and related activities, or charity events.

(7) Unit recreational activities, fun runs, volksmarches, athletic leagues, or individually arranged athletic matches.

(8) Familial relationships.

(9) Relationships authorized by Army or local regulation including consolidated clubs and housing arrangements.

(10) Marriage,

(11) Professional development courses and activities including organized instruction or individual mentoring or tutoring.

c. Any relationship between soldiers of different rank, including an otherwise permissible relationship under paragraph b above, is prohibited if it:

(1) Causes actual or perceived partiality or unfairness,

(2) Involves the improper use of rank or position for personal gain, or

(3) Causes an actual or clearly predictable adverse impact upon discipline, authority, or morale.

d. The following relationships between soldiers of different ranks are prohibited unless paragraph e below applies:

(1) Gambling.

(2) Borrowing or loaning money.

(3) Soliciting gifts.

(4) Offering or accepting gifts of more than a nominal value (see AR 600-50).

(5) Soliciting or engaging in commercial activities (except as authorized by AR 210-7 or AR 600-50).

(6) Homosexual activities.

(7) Criminal conduct or activities including wrongful possession, use, transfer, or sale of drugs.

(8) Sexual harassment (see AR 600-21).

(9) Nepotism.

(10) Dating and other heterosexual activities between soldiers in the categories specified in paragraph b.(1) above.

(11) Sexual intercourse between soldiers who are not married to one another.

e. Commanders and supervisors have the authority to determine that under the unique facts of a particular relationship, an otherwise prohibited relationship under paragraph d above is not a violation of this policy. The exercise of sound judgment and common sense is essential in all such determinations.

f. Commanders and supervisors will counsel those involved or take other action, as appropriate, if soldiers engage in relationships prohibited by this policy. This regulation is punitive in nature and may be enforced by administrative action or punishment under the Uniform Code of Military Justice, either as a violation of Article 92 or Article 134.

g. If the commander or supervisor becomes aware of a relationship that has the potential of creating an appearance of partiality or preferential treatment, counseling the individuals concerned is the most appropriate initial action. This also generally holds true for those relationships that involve only the appearance of partiality and have had no adverse impact on discipline, authority, or morale. Commanders also may use administrative tools (e.g., reassignment, oral or written admonitions, or reprimands) to assist in regulating these relationships.

h. Corrective actions should not result in an unfavorable evaluation or efficiency report, relief from command, or other significant adverse action unless there is a violation of paragraph d above or there can be demonstrated and documented either actual favoritism or the improper exploitation of rank or position by the supervisor, or some actual or clearly predictable adverse impact on discipline, authority, or morale. Except for violations of paragraph d above, the adverse action must address the behavior that results from the relationship, or the actual or

clearly predictable results of the relationship, and not merely the relationship itself.

i. Local supplementation of this regulation requires prior approval of the HQDA proponent.

PERSONAL LIABILITY OF MILITARY PERSONNEL FOR ACTIONS TAKEN IN THE COURSE OF DUTY

By Lieutenant Colonel John L. Euler, USMCR*

INTRODUCTION

A. THE PROBLEM

In recent years there has been an increasing trend by those frustrated or injured by action connected with the government to **personally** sue the officers perceived to be responsible in a tort suit for money damages. As of this writing, there are in excess of 2,800 suits pending against officials throughout the federal government. Since 1971, over 12,000 such suits have been filed and litigated. Of those 12,000 suits, thirty-two have resulted in verdicts being entered against individual defendants. Thus far, of those thirty-two, five cases have resulted in the individuals ultimately paying a judgment.

Military officers have not escaped the onslaught of personal tort litigation. A high percentage of the cases filed against federal officials are against military personnel. It behooves all commanders and military legal advisors to understand the nature of the litigation, available defenses, and prudent action to be taken. That is the purpose of this article.

B. THE CONTEXT

Initially it is important to understand the type of suit which is addressed. First, the concern, for the most part, is with *civil* as opposed to criminal suits. Second, the focus is on suits in tort for money damages.

'Currently, a Deputy Director and the Chief of the Office of Policy, Research and Analysis of the Torts Branch, Civil Division, U.S. Department of Justice. LTC Euler entered the U.S. Marine Corps in 1969 where he served for five years, including a tour of duty in Vietnam. His positions in the Marine Corps included Chief Defense Counsel, Trial Counsel, Military Judge, Chief Legal Assistance Officer, Staff Officer Headquarters Marine Corps, and Staff Attorney Presidential Clemency Board at the White House. Upon release from active duty in 1974, he engaged in private practice until he entered the Department of Justice as a trial lawyer in 1978. In December 1980, LTC Euler was promoted to Assistant Director of the Torts Branch of the Civil Division, where he was primarily responsible for the defense of government officials personally sued for actions taken in the course of their duties and became a recognized expert in the field of constitutional tort law. He assumed his current position in early 1986.

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The author wishes to acknowledge the assistance he received from Mr. John J. Farley, III, Director of the Torts Branch, in preparing this article.

The opinions and conclusions in this article reflect the views of the author and do not necessarily reflect the views of the U.S. Marine Corps, Department of Justice, The Judge Advocate General of the Army, the Department of the Army, or any other government agency.

This is to be distinguished from a suit seeking equitable or injunctive relief. Third, this article concerns suits brought personally against military personnel in their individual capacity. Such a case is to be distinguished from one brought against an officer in his or her official capacity. An official capacity lawsuit targets the United States, and the assets used to satisfy a judgment would come from the resources of the Treasury of the United States. **An** individual or personal capacity lawsuit, on the other hand, targets the individual defendant as a person and is specifically aimed at that person's personal financial resources, not those of the United States. It is because of this potential for personal legal and financial disaster that this type of litigation has become a favorite weapon of those attempting to chill, intimidate, or seek retribution for some federal decision or activity. It is also for this reason that a great deal of concern is generated within the federal service and that considerable resources of the government are devoted to mounting an effective defense.

Some definitions are in order concerning terms which appear in this article:

1. *Biuens.* This is the name of the first case in which it was held that a federal officer could be sued personally for damages for allegedly violating a citizen's constitutional rights. It has become a shorthand term for personal lawsuits generally against federal public servants, whether founded on the Constitution or some other theory.

2. Tort: A tort is a violation of a common law or constitutional right which is actionable in damages. It has elements which a plaintiff must prove: (a) a duty running from the defendant to the plaintiff (such as a doctor's duty to render reasonable medical care), @) a breach of that duty by the defendant, (c)an injury, (d)proximately caused by the breach which is, (e)compensable in money damages.

3. Constitutional Tort: This is a tort where the duty is founded on a constitutional right allegedly violated by a public official that caused the plaintiff's injury. *Biuens* was the first constitutional tort case.

4. Common Law Tort: The duty is founded on the case-developed common law as distinguished from the Constitution. Negligence, assault, libel and slander, and professional malpractice are examples of common law torts.

5. Absolute Immunity: A legal defense to a tort suit based on public policy considerations which precludes at the outset a

suit against a certain type of officer (*e.g.*, the President) or arising out of a certain type of activity (*e.g.*, prosecution),

6. Qualified Immunity: A legal defense which ***may*** terminate a suit on a motion to dismiss or for summary judgment or lead to its successful defense at trial if the defendant establishes certain elements. In constitutional tort suits, a public official may be entitled to qualified immunity if he can show that he acted reasonably under the circumstances in not knowingly violating a clearly established constitutional right,

7. Cause of Action: A viable, recognized theory of suit. A plaintiff is required to "state" a cause of action before he can proceed. One may succeed in stating a cause of action but still be barred from proceeding by absolute or qualified immunity, which are defenses to a cause of action.

C. TYPES AND RANGES OF CASES

Personal tort suits have been filed against military service members at all levels and for almost any activity likely to engender controversy or ill-feelings. Suits have been filed over speeding tickets, government contracts, alleged defamation and slander as a result of adverse personnel actions, false arrest, assault and battery, sexual harassment, as an attack on courts-martial, for medical malpractice, violations of constitutional rights in banning demonstrations, for conducting gate searches or otherwise refusing permission to enter a base, for terminating employment without due process, chemical experiments, eviction from base housing, for libeling and banning a salesman, for declaring off-base establishments off-limits, for assaults committed by military members or prisoners, for revocation of various privileges and, last but not least, for legal malpractice. Regardless of rank or activity, a commander or a service member could easily be the subject of a lawsuit.

II. HISTORICAL OVERVIEW

A. BACKGROUND

Historically, suits against present or former federal officials individually for money damages based upon official conduct, while not unknown, were rare. Those tort suits that were filed were under common law theories and generally did not survive immunity defenses to the point of trial.' This general freedom from suit also extended to the military. Great deference was given to military decisions. The attitude of the courts was best expressed in *Orloff v. Willoughby*: "Orderly govern-

'Barr v. Mateo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896).

ment requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[2] Accordingly, military tort suits were generally given short shrift.[3] This point of view culminated in the *Feres* doctrine, named for the case of *Feres v. United States*,[4] which will be discussed below.

In keeping with the general trend of modern American tort law, however, new theories of liability have arisen in recent times. These have combined with an erosion of immunity defenses, a rise in the general litigiousness of the citizenry, and a renewed skepticism or antipathy toward all federal officers. The result has been an environment of increasing legal exposure for all public servants, including those in the military. This general trend can be understood best by understanding the rise of the constitutional tort.

B. BIVENS *AND ITS PROGENY*

In 1971, the Supreme Court announced the astounding and revolutionary proposition that federal government officials could be personally sued for money damages for violating the fourth amendment constitutional rights of a citizen to be free from unreasonable search and seizure.[5] The effect of this was to declare not only an entirely new source and theory (or cause of action) of tort liability, but to impose that liability *personally* against federal public servants, even though they were carrying out official duties.

Bivens was followed by *Butz v. Economou*,[6] where the Court reaffirmed the general viability of the *Bivens* doctrine and extended it to alleged violations of the fifth amendment due process clause. The plaintiff had charged the Secretary of Agriculture and various officials within the chain of command with violating his fifth amendment rights in attempting to revoke his commodity dealer's license. The Court ruled that not only could a plaintiff state such a cause of action, but that federal officials were not absolutely immune from being sued personally on such a theory.[7] They were only entitled to a type of qualified immunity wherein they would have to prove their reasonableness and good faith in undertaking the challenged conduct.

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[2] 345 U.S. 83, 93-94 (1953).
[3] *See* Dobson v. United States, 27 F.2d 807 (2d Cir. 1928); Wright v. White, 110 P.2d 948 (Or. 1941); *but see* Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849).
[4] 340 U.S. 135 (1980).
[5] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).
[6] 438 U.S. 478 (1978).
[7] *Id.* at 504-08.

The Court in *Butz* did recognize, however, that some officials were entitled to absolute immunity, *i.e.*, freedom from suit. Judges and prosecutors were among those so protected. Importantly for the military officers, the Court also stated that the "agency equivalents" of such officials were entitled to absolute immunity. This would appear to include trial counsel, military judges, and convening authorities.* In addition, the Court recognized that federal officials generally were absolutely immune from common law, as opposed to constitutional, torts, and admonished the lower courts to grant summary judgment in the normal case against the federal officer by stating:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. . . Firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous suits.[9]

Subsequent history has shown that this comforting observation has all too infrequently come to pass. It has been properly criticized by the observation that, 'The fact is that very often insubstantial lawsuits do not appear so on their face; only at trial does the lack of merit become apparent."[10] Finally, in *Butz v.* Economou, the Court left open the possibility of a federal officer being entitled to absolute immunity in a Biuens type suit in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."" This very limited opportunity for immunity was best illustrated in *Tigue v. Swaim*,[12] where, in a military context, an Air Force psychiatrist was held immune for allegedly violating the rights of the plaintiff in disqualifying him for a nuclear weapons program on the basis of emotional instability. Thus, when the issue is national security, this type of exceptional immunity may pertain.[13]

The *Butz* case was followed in the Supreme Court by Davis *v. Passman*,[14] which further expanded the Biuens remedy by making it applicable to violations of the equal protection aspect of the fifth amendment in a case charging sexual discrimination against a Congressman. Next, in *Carlson v. Green*,[15] the Court continued to expand the Biuens

[8] *See infra* section III C2.
[9] 438 U.S. at 507-08.
[10] Rothenburg, *Qualified Immunity for Official Acts,* 21 A.F.L. Rev. 432, 447 (1979).
[11] 438 U.S. at 507-08.
[12] 585 F.2d 909 (8th Cir. 1978).
[13] *See* Harlow **v.** Fitzgerald, 457 U.S. 800 (1982); ***but see*** Mitchell **v.** Forsyth, 105 S. Ct. 2806 (1985).
[14] 442 U.S. 228 (1979).
[15] 446 U S. 14 (1980).

doctrine, again embracing the fifth amendment and, in addition, the eighth amendment's proscription against cruel and unusual punishment. There the family of a deceased federal prisoner alleged that he had been a victim of willful and wanton medical neglect. Most significantly in that case, the Court rejected the availability of a remedy under the Federal Tort Claims Act (FTCA)[16] as a reason to preclude further expansion of the *Biuens* doctrine. The Court held that the FTCA was parallel and complementary to a ***Biuens*** action and that a constitutional tort suit could be pursued for violations of rights as a general matter (even if an FTCA suit against the government was also available) unless there were "special factors counselling hesitation'' or some specific congressional prohibition.[17]

In the next case of note, the Supreme Court turned a modest corner toward the defense in favor of federal officers, recognizing for the first time that the *Biuens* doctrine had created a serious problem for public service. Reflecting on the many difficulties which the personal liability case had created for federal officials and that too many of them were, in fact, being taken to trial, the court in *Harlow v. Fitzgerald,"* modified the defense of qualified immunity with a view toward making such suits more easily defensible. In an eight-to-one decision, the Court eliminated the subjective or "good faith" element of the test for qualified immunity and held that an official need only prove by objective standards that he acted reasonably under the circumstances in not knowingly violating any "clearly established" constitutional right.'* Moreover, the Court again admonished the lower courts to be poised to dismiss these cases on summary judgment even before permitting the initiation of discovery.[20] In the companion case of *Nixon v. Fitzgerald*,[21] the President was held to be absolutely immune for activities taken within the "outer perimeter" of his office.

Better yet, in the case of *Bush u. Lucas*,[22] the Supreme Court held that a civil servant who was the victim of an allegedly illegal personnel action could *not* pursue a *Biuens* damages remedy against his individual federal superiors because of the availability of a congressionally-mandated system of comprehensive remedies. The existence of civil service regulation remedies was held to be a "special factor counselling hesitation'' against further implying a *Biuens* remedy, at least in the area of personnel management.

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[16] 28 U.S.C.§§ 1346(b), 2671-2680 (1982).
[17] 446 U.S. at 18 (citing *Biuens*, 403 U.S. at 396).
[18] 457 U.S. 800 (1982).
[19] *Id.* at 816-19.
[20] *Id.* at 815-19.
[21] 457 U.S. 731 (1982).
[22] 462 U.S. 367 (1983).

In *Davis v. Scherer*,[23] the Court further strengthened the qualified immunity doctrine by holding that the violation of a regulation did not establish that a right was "clearly established" for qualified immunity purposes and that officials who had terminated a Florida Highway Patrol Officer contrary to regulations were still entitled to the defense. In a case important for the military, the Court in *Wallace v. Chappell*,[24] held that service members could not sue superior officers for allegedly violating their fifth amendment constitutional rights with a system of racially motivated abuse and harassment. More recently, the Court held in *Mitchell v. Forsyth*[25] that a denial of a motion to dismiss or for summary judgment based on the defense of qualified immunity was immediately appealable. Finally, in a bit of a setback, the Court held that the members of a federal prison disciplinary committee were not entitled to judicial absolute immunity.[26]

If there is a trend discernible in the important Supreme Court cases in the area of federal personal liability, it is one of early (1970s) ruthless expansion of the doctrine at the expense of federal officers who appear to have been perceived as needing some check on their decisionmaking. This has more recently been followed by an apparent, although mixed, pattern of growing sympathy for the plight of conscientious public servants and the need to strengthen defenses while even eliminating some forms of action.

III. CURRENT FRAMEWORK

For purposes of understanding the law and, in particular, the nature of applicable defenses, it is useful to divide the tort suits with which modern federal officials are currently faced into two general kinds. First, there is the common law tort. This includes such alleged wrongs as negligence, libel and slander, false arrest, assault and battery, interference with a contractual relationship, legal and medical malpractice. Second, there is the *Biuens* or constitutional tort. This tort is characterized as the alleged violation of a recognized constitutional right possessed by individuals; for example, the right to be free from unlawful search and seizure or the right to due process of law before being deprived of life, liberty, or property. Because the Constitution is a statement of general fundamental principles, the constitutional tort is usually difficult to define and, consequently, easy to plead. The important point is that some defenses or immunities apply to both common law and constitutional torts. Some apply to one or the other.

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[23] 468 U.S. 183 (1984).
[24] 462 U.S. 296 (1983).
[25] 105 S. Ct. 2806 (1985).
[26] Cleavinger v. Saxner, 106 S.Ct. 496 (1985).

How a case is defended, therefore, depends on the mix of the underlying factual basis and the plaintiff's articulated theory.

A. STATUTORY IMMUNITY

By statute there are a few types of federal activities for which individuals cannot be sued. Under 28 U.S.C. § 2679(b), government operators of motor vehicles acting within the scope of their federal employment cannot be sued for any tort arising out of the operation of that motor vehicle. The exclusive permissible defendant in such cases is the United States, which must be properly sued under the Federal Tort Claims Act, Similarly, Department of Defense medical personnel cannot be sued for medical malpractice. Under 10 U.S.C. § 1089, the exclusive remedy is against the United States. There are several other statutes to this effect which protect particular medical personnel of particular agencies. Aside from these specific and narrow statutes, however, no other federal officials, including military officials, are protected by statute from suit. Resort must be had to the case law to find applicable immunities and defenses.

B. INTRA-MILITARY IMMUNITY: THE FERES *DOCTRINE*

The ***Feres*** doctrine, otherwise known as the defense of intra-military immunity, is a defense to both common law and constitutional torts. It is most accurately thought of as an absolute immunity, although some courts have applied it by stating that the plaintiff had failed to state a cause of action. It speaks to lawsuits brought by members of the uniformed services against the United States *or* against other service members ***or*** against civilian employees of the government for injuries incident to or arising out of military service. The formal genesis of the doctrine was a 1950 Supreme Court case under the Federal Tort Claims Act against the United States for a wrongful death of a service member in a barracks fire, consolidated for decision with two military medical malpractice cases. Reflecting on its view of pre-existing tort law, the Supreme Court held that: 'The government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[27] The court went on to say, 'We know of no American law which ever has permitted a soldier to recover for negligence against either his superior officers or the government he is serving."[28]

The unique characteristic of the ***Feres*** doctrine is that its application depends upon the status of the plaintiff rather than the status or func-

[27] Feres v. United States, 340 U.S. 135, 146 (1950).
[28] *Id.* at 141-42.

tion of the defendant. Thus, the courts look to whether the plaintiff was a member of the uniformed services and whether the injuries arose out of or were incident to that service.

The doctrine has been given broad application to include virtually any activity connected with military service. It precludes suits by both present and former service members for torts occurring during service.[29] It applies to recreational as well as strictly military activity.[30] It covers voluntary as well as mandated activity.[31] It applies to Reservists and the National Guard.[32] Most recently, the Supreme Court held that it covers an off-duty assault and battery perpetrated by one service member against another.[33]

Active duty personnel and dependents with derivative lawsuits such as loss of consortium are the types of plaintiffs barred from making claims under *Feres*.[34] Retired persons with a claim accruing after retirement, dependents with an independent claim, and the general citizenry are not barred under *Feres*.[35] The category of defendants who are protected includes the United States and its agencies, members of the military, and civilian employees of the government.[36]

Because the application of the *Feres* doctrine depends on the status of the plaintiff, the legal theory asserted by a plaintiff has been of little consequence. For example, intentional torts are barred.[37] Similarly, it has been established that the doctrine bars a suit alleging constitutional torts committed by individual military supervisors.[38]

Attempts to make inroads into the doctrine are continuous. In *Thornwell* v. *United States*,[39] a distinction was drawn between inten-

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[29]Henning v. United States, 446 F.2d 774 (3d Cir. 1971).
[30]Hass v. United States, 518 F.2d 1138 (4th Cir. 1975).
[31]Charland v. United States, 615 F.2d 508 (9th Cir. 1980).
[32]Herreman v. United States, 476 F.2d 234 (7th Cir. 1973); Carroll v. United States, 369 F.2d 618 (8th Cir. 1966).
[33]Shearer v. United States, 105 S. Ct. 3039 (1985).
[34]Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Harrison v. United States, 479 F. Supp. 529 (D. Conn. 1979), *aff'd,* 622 F.2d 573 (2d Cir.), *cert. denied,* 449 U.S. 828 (1980).
[35]*Cf.* Franz v. United States, 414 F. Supp. 57 (D. Ariz. 1976).
[36]Potts v. United States, 723 F.2d 20 (6th Cir. 1983); United States v. Lee, 400 F.2d 558 (9th Cir. 1968); Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965). ***But see*** Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) (permitted suit to proceed based upon actions of civilian FAA employees).
[37]Citizens Natl Bank of Waukegan v. United States, 594 F.2d 1154 (7th Cir. 1979); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd,* 604 F.2d 647 (9th Cir. 1979), *cert. denied,* 444 U.S. 1078 (1980).
[38]Wallace v. Chappell, 462 U.S. 296 (1983); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978), *aff'd,* 593 F.2d 1371 (D.C. Cir. 1979).
[39]471 F. Supp. 344 (D.D.C. 1979).

tional torts committed on the plaintiff while in the service on active duty and the negligent tort committed after his discharge of failing to warn him of the in-service intentional tort. The court permitted the plaintiff to sue for the latter. This was echoed in the radiation case of *Broudy* v. *United States*,[40] wherein the post-service tort concept was embraced by the Ninth Circuit Court of Appeals. *Thornwell* has been severely criticized, however, and generally not followed.[41]

In *Shearer v. United States*, the Third Circuit Court of Appeals refused to follow the *Feres* doctrine in a case involving the murder of a service member by another while they were both off duty and off base. The Supreme Court reversed, stating:

> Here, the Court of Appeals placed great weight on the fact that Private Shearer was off-duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions,. . . and whether the suit might impair essential military discipline. . . .[42]

Finally, in *Stanley v. CIA*,[43] a federal district court sua sponte drew a questionable distinction between volunteer and non-volunteer activities in attempting to keep alive a case concerning the testing of LSD. On appeal to the Eleventh Circuit, the ruling was affirmed.[44] The case should be watched for possible action in the Supreme Court.

In closing, it should be noted also that there are other attacks on *Feres*. In 1985, the House of Representatives passed H.R. 3174 which would abolish the doctrine for cases of medical malpractice.[45] The legislative arena bears watching.

On the whole, the *Feres* doctrine is alive, well, and extremely viable given recent Supreme Court holdings. It is an adequate protection for the commander or other service member when threatened with an individual capacity suit by a plaintiff who is also a service member. It has no application, however, to suits filed by civilians, unless the civilian plaintiff is a dependent with a derivative lawsuit arising from injury to or death of a service member.

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[40] 722 F.2d 566 (9th Cir. 1983).

[41] Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980).

[42] 105 S. Ct. at 3043.

[43] 574 F. Supp. 474 (S.D. Fla. 1983).

[44] 786 F.2d 1490 (11th Cir. 1986).

[45] H.R. 3174, 99th Cong., 1st Sess.

C. OTHER DEFENSES AND IMMUNITIES: SUITS BY CIVILIANS AGAINST SERVICEMEMBERS

Once the status of the plaintiff shifts from the service member to the civilian, no blanket defenses or immunities are available. The defense available then depends upon the nature of the activity from which the suit arose and the theory of the lawsuit. For the military officer, a suit filed by a civilian employee or member of the public would turn on these factors. It is in this area that the dichotomy between common law torts and constitutional torts become apparent.

1. Common Law Torts.

Common law claims include such forms of action as negligence, malpractice, libel, false arrest, and assault. As established by the 1959 Supreme Court case of *Burr v. Mateo*, federal officials, including those in the military, as a general rule are absolutely immune from common law torts committed within the "outer perimeter of their duties."[46] *Barr* was a defamation suit arising out of disciplinary action taken by the head of a civilian federal agency who also issued a press release. While issuing the press release was not included specifically in the defendant's job description, a plurality of the Supreme Court found it to be reasonably encompassed by his duties and therefore coined the phrase "outer perimeter."[47]

For the military officer, the contemporary case of *Howard v. Lyons*,[48] and the earlier case of *Gregoire v. Biddle* are analogous.[49] In *Gregoire* the plaintiff sued several senior government officials for his detention as an enemy alien during World War 11, alleging malice and lack of probable cause. In the classic statement justifying the doctrine of absolute immunity, Judge Learned Hand stated for the Second Circuit:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of

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[46] 360 U.S. 564 (1959).
[47] *Id.* at 576.
[48] 360 U.S. 593 (1959).
[49] 117 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

> its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. **As** is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[50]

Because the case arose out of a national defense activity, it has greater apparent relevance for the military officer than does *Burr v. Matteo*. The case of *Howard v. Lyons* has an even stronger nexus. There a civilian employee sued the commander of the Boston Navy Yard for defamatory statements contained in a memorandum forwarded to superior officers and, ultimately, to the Congress. The Supreme Court held that the case was controlled by the decision in *Burr* and that preparing and forwarding the memorandum was within the outer perimeter of the commander's duties and thus protected by absolute immunity. Therefore, the doctrine of absolute immunity is partially grounded in a military context and has strong application to the defense of a military commander.

The principle of common law immunity was reaffirmed by the Supreme Court in the previously discussed constitutional tort case of *Butz v. Economou*, and again in *Harlow v. Fitzgerald*.[51] The Court in *Butz* stated that absolute immunity continued to protect federal officials from common law torts.[52] The Court thus drew a conscious distinction between the common law tort and the *Biuens*, or constitutional, tort which only permits qualified immunity as a defense. In the circuit courts of appeal, common law absolute immunity has received almost universal application.[53]

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[50] 117 F.2d at 581.
[51] 457 U.S. 800, 807-08 (1982).
[52] 438 U.S. at 495, 522.
[53] Strothman v. Gefreh, 739 F.2d **515** (10th Cir. 1984); Wallen v. Domm, 700 F.2d 124 (4th Cir. 1983); Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979); Miller v. DeLaune, 602 F.2d 198 (9th Cir. 1979); Birnbaum v. United States, 585 F.2d 319 (2d Cir. 1978); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978); Evans **v.** Wright, 582 F.2d 20 (5th Cir. 1978); Granger v. Marek, 583 F.2d 781 (6th Cir. 1978).

"here are problems, however. The Tenth Circuit Court of Appeals has drawn a distinction between torts committed by high-level, policymaking officials taking action of a governmental nature, and torts that are committed by dow-level officials in the absence of discretion or policymaking overtones.[54] In *Chavez v. Singer*, a Department of Energy fire captain ordered a subordinate to rescue a cat stranded on a telephone pole. The subordinate was burnt by an electric wire and sued the fire captain for negligence, a common law tort. In a decision going to the heart of that particular command (albeit civilian) relationship, the Tenth Circuit held that the fire captain was not protected by absolute immunity and ordered the case to be tried.[55] The rationale of the court was that no discretionary, governmental policymaking activity was involved and, therefore, that the public policy reason for immunity did not apply. It is inevitable that this argument will surface in other circuits. Recently, the Eleventh Circuit Court of Appeals appeared to echo *Chavez* in a Tennessee Valley Authority electrocution case.[56] Hopefully, these cases will be isolated blemishes in the overall fabric of common law tort immunity. Recently, the district court in Maryland found maintenance and supervi*sory* personnel entitled to absolute immunity in an indemnity action arising out of a fatal electrical accident at the National Institutes of Health.[57]

Another problem arises out of the proposition that the federal officer claiming absolute immunity for a common law tort must have been acting within the "outer perimeter'' of his or her duties. Plaintiffs frequently allege that defendants are not entitled to immunity because the alleged conduct transcends this "outer perimeter." The argument has rarely succeeded. In cases, however, where a subordinate sues a supervisor alleging assault and battery, it may be a difficult issue. In *McKinney v. Whitfield*,[58] the D.C. Circuit held that a supervisor was not acting within the outer perimeter of his duties when he allegedly twisted the arm of a subordinate and threw a chair in her path in attempting to prevent her from leaving an office.[59]

More seriously, from the perspective of this article, an Army major general was held not to be protected by the doctrine of absolute immunity in *Amujo v.* ***Welch*** when he engaged in a heated discussion

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[54]See Chavez v. Singer, 698 F.2d 420 (10th Cir. 1983); Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977).

[55]698 F.2d at 422.

[56]Johns v. Pettibone, 755 F.2d 1484 (11th Cir. 1985), modified & portions deleted, 769 F.2d 724 (11th Cir.) *and* No. 84-7361 (11th Cir. 1986).

[57]General Electric Co. v. Klassett, No. 84-3834 (D. Md. Mar. 13, 1985).

[58]736 F.2d 766 (D.C. Cir. 1984).

[59]It is worth noting that, after trial, judgment was entered for the defendant supervisor. Finding that the plaintiff was not credible, the court stated: "[S]he had the motive to and in fact did fabricate testimony and physical evidence . . . ."

with a female civilian subordinate after a speech and allegedly forcefully poked and pushed her in the chest while using threatening and abusive language.[60] The court concluded that the allegation of battery was not protected by absolute immunity and seemed to draw the line at the inappropriate use of force under the circumstances.

The Fifth Circuit Court of Appeals, however, specifically rejected ***McKinney*** and ***Araujo*** and granted a supervisor absolute immunity when the alleged battery was only "slight" and incidental and not inappropriate under the circumstances.[61] There, the supervisor allegedly "helped" his subordinate out of the office by slamming the door into the plaintiff's backside. The court held that both serious injury and grossly inappropriate conduct had to be demonstrated in order for a plaintiff to penetrate the immunity defense.[62]

Similarly, in *Wallen v. Domm*, the Fourth Circuit Court of Appeals affirmed the granting of absolute immunity in an alleged assault case with the following language:

> Few governmental officials are authorized to commit torts as a part of their line of duty, but to separate the activity that constitutes the wrong from its surrounding context—an otherwise proper exercise of authority—would effectively emasculate the immunity defense. Once the wrongful acts are excluded from an exercise of authority, only innocuous activity remains to which immunity would be available. Thus, the defense would apply only to conduct for which it is not needed.[63]

Finally, a U.S. district court in the District of Columbia dismissed an assault and battery suit against a supervisor who forceably reclaimed an intra-office logbook, not disclosable to the public, from a disgruntled employee who was copying pages for his personal use.[64] The court harmonized its result with that in ***McKinney*** by finding the purpose of the supervisor's action to have been official and not personal.[65]

From these recent cases, it can be anticipated that at least civilian subordinates of military officers may assert an increased number of assault claims and attempt to come under the banner of ***McKinney*** and *Araujo*. Prudence would dictate the exercise of extreme discretion in any confrontational situation.

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[60] 742 F.2d 802 (3d Cir. 1984).
[61] Dretar v. Smith, 752 F.2d 1015 (5th Cir. 1985).
[62] *Id.* at 1017-18.
[63] 700 F.2d 124, 126 (4th Cir. 1983).
[64] Edwards v. Gross, No. 85-1503 (D.D.C. Mar. 14, 1986) (available May 27, 1986, on WESTLAW, DCT Database).
[65] *Id.* at WESTLAW pgs. 7-8.

2. Constitutional (Bivens) Torts

For years, suits against federal officers in their individual capacities were rare because the only known causes of action were common law torts and the doctrine of absolute immunity could be expected to provide an absolute defense. In 1971, however, the Supreme Court swept away this sanguine state of affairs by ruling in ***Biuens v. Six Unknown Named Agents of the Fedeml Bureau of Narcotics*** that federal officials could be sued personally for violations of constitutional rights.[66] The ***Bivens*** case was premised upon violation of one of the core "fundamental" rights protected by the Constitution: the fourth amendment freedom from unreasonable search and seizure. Since then the cause of action has been recognized to include virtually all of the fundamental rights outlined in the first thirteen amendments. Moreover, absolute immunity is generally not available to federal officials as a defense in suits alleging constitutional violations. Rather, the normal resort is to the affirmative defense of qualified immunity.

There are two possible theoretical exceptions and several specific exceptions to this general rule of no absolute immunity for constitutional torts. The first theoretical exception is that previously discussed in conjunction with the case of ***Butz v. Economou***. It concerns, in the Court's words, "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."[67] This exception rarely has been tested. It has found voice as the clear basis of an actual holding in but one case. As previously recounted, the Eighth Circuit Court of Appeals in ***Tigue v. Swaim*** found it to apply to psychiatric evaluations for fitness in a nuclear weapons program.

The underlying concept of national security, which prompted the holding in ***Tigue,*** is itself a second theoretical exception to ***Biuens*** nonimmunity. In several cases—most notably in ***Harlow v. Fitzgerald***[68]—the Supreme Court has paid lip service to the proposition that federal activities founded in national security may warrant absolute immunity. In the recent decision of ***Mitchell v. Forsyth***,[69] however, the Court curtailed this possibility by rejecting absolute immunity for the Attorney General with respect to his national security endeavors, at least as a per se matter. The possibility for successfully asserting this immunity in the appropriate factual setting remains, particularly in a military case. The Department of Justice, however, will take great care in selecting the proper case as a vehicle.

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[66] 403 U.S. 388, 397 (1971).
[67] 438 U.S. at 507.
[68] 457 U.S. 800, 812 (1982).
[69] 105 S. Ct. 2806 (1985).

In addition to these theoretical absolute immunities available in constitutional tort suits, there are a series of specific absolute immunities, largely derived from the common law, which protect an official even in a constitutional tort case. In 1982, the Supreme Court decreed that the President was absolutely immune from civil damages for acts taken within the outer perimeter of his authority.[70]

Judges are also absolutely immune from suit for actions undertaken in their judicial capacity.[71] But, judicial immunity does not protect a judge from having to pay personally an award of attorney's fees to a successful plaintiff under the civil rights statute.[72] Additionally, a panel of the Eleventh Circuit held that immunity for judicial acts may be lost if a judge knows that he lacks subject matter or personal jurisdiction or he acts in the face of a clear statutory or case law deprivation of jurisdiction.[73] The panel decision was reversed, however, upon en banc consideration in a per curiam decision.[74]

Prosecutors are absolutely immune from suits arising out of their role as judicial advocates.[75] This can be, however, an exceedingly gray area. The immunity may not extend to those aspects of the prosecutor's responsibility that cast him or her in the role of an administrator or investigative officer.[76] Once the prosecutor strays from the prosecutorial role, such as giving a press conference, he does so at his peril.[77] There is also an established but blurred distinction between prosecutorial advocacy and mere investigation, the latter not protected by absolute immunity.[78]

Finally, in addition to the criminal prosecutor, there is law developing on the point of absolute immunity for the government attorney who prosecutes civil cases, either in a defensive or offensive posture.[79] If the law continues to develop positively, it may be applicable to the military legal assistance officer. The Southern District of New York in *Barrett v.*

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[70]Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[71]Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

[72]Pulliam v. Allen, 466 U.S. 522 (1984).

[73]Dykes v. Hosemann, 743 F.2d 1488 (11th Cir. 1984).

[74]776 F.2d 942 (11th Cir. 1985).

[75]Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 275 U.S. 503 (1927).

[76]*Imbler*, 424 U.S. at 430-31.

[77]Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1984).

[78]*See* Ybarra v. Reno Thunderbird Mobile Home, 723 F.2d 675 (9th Cir. 1984); Henderson v. Fisher, 631 F.2d 1115 (3d Cir. 1980); Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979).

[79]Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983) *cert. denied,* 465 U.S. 1100 (1984); Barrett v. United States, C.A. No. 76CIV381 (CBM) (S.D.N.Y. Nov. 8, 1985); Aronson v. Bell, 595 F. Supp. 178 (E.D. Pa. 1985); Bulloch v. Pearson, C.A. No. C-820230W (D. Utah June 21, 1983).

United States, however, distinguished between agency attorneys whose client (the Army) was not a party and the public attorney actually representing a party in court.[79a]

Also from the military perspective, an important point with respect to judicial and prosecutorial immunity is that the Supreme Court decreed in ***Butz v. Economou*** that "agency equivalents" of the prosecutor and the judge likewise are immune.[80] Thus, the other participants in military judicial, administrative, and quasi-judicial proceedings should likewise be protected by immunity.

Witnesses, like judges and prosecutors, perform an integral part in the judicial and administrative process and are absolutely immune from suits resulting from testimony.[81] There is common law support in most jurisdictions as well for the immunity of witnesses. This immunity could be expected to extend to military tribunal witnesses, including the witness at an administrative discharge board or similar proceeding.[82]

Finally, to complete the circuit, federal legislators are absolutely immune for activities embraced by the speech or debate clause of the Constitution.[83] This immunity does not extend to press releases.[84] As previously noted, it does not extend to discrimination in personnel decisions.[85]

One other "immunity" deserves mention in this section. It is not really an immunity, but a pronouncement by the Supreme Court, similar to its treatment of ***Feres*** in ***Wallace v. Chappell,*** that a plaintiff could not state a cause of action arising out of federal personnel matters." In *Bush,* the Supreme Court held that there was no right of action under the Constitution for retaliatory personnel practices within the federal employment system. The exclusive remedy, it was held, lies in the administrative procedures which exist under the civil service regulations and statutes.[87] Thus, a plaintiff could not personally sue his supervisors for an unlawful demotion because of the existence of an extensive administrative remedial system established by Congress. This, said Justice Marshall in a concurring opinion, was a "special factor counselling hesi-

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[79a] C.A. No. 76 CIV 381 (CBM)(S.D.N.Y Nov. 8, 1985).
[80] 438 U.S. at 511-17.
[81] Briscoe v. LaHue, 460 U.S. 325 (1983).
[82] *See also* Charles v. Wade, 665 F.2d 661 (5th Cir. 1982); Brower v. Horowitz, 535 F.2d 830 (3d Cir. 1976).
[83] Tenney v. Brandhove, 341 U.S. 367 (1951).
[84] Hutchinson v. Proxmire, 443 U.S. 111 (1979).
[85] Davis v. Passman, 442 U.S. 228 (1979).
[86] Bush v. Lucas, 462 U.S. 367 (1983). See *also* Vest v. Dep't of Interior, 729 F.2d 1284 (10th Cir. 1984); United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983).
[87] 462 U.S. at 390.

tation" against implying a *Bivens* action against a federal supervisor for personnel action.[88] In an earlier related holding the Court held that a Title VII action against an agency head in his or her *official* capacity was the exclusive remedy for civilian personnel discrimination.[89]

While the *Bush* holding can be a useful defense for the commander in dealing with disgruntled civilian employees, it has experienced some erosion.[90] Most importantly, the erosion has occurred in cases where the defendants are alleged to have conspired or acted to deprive the plaintiff of the administrative remedies and procedures otherwise available within the civil service. The two cases most illustrative of this problem both involve military superiors dealing with civilian employees. In *McIntosh v. Weinberger*,[91] the alleged destruction of documents by first-line supervisors which might have been used in the administrative process was held to vitiate the protection afforded by *Bush v. Lucas* and a substantial judgment was awarded the plaintiffs. Similarly, in a case that preceeded *Bush*, the Seventh Circuit Court of Appeals held that a civilian plaintiff could state a cause of action by alleging that her military superiors had conspired to and, in fact, had harassed her into early retirement and thus deprived her of her civil service procedural rights.[92] Thus, care must be taken in the civilian personnel area to scrupulously afford such rights and procedures as are available.

D. QUALIFIEDIMMUNITY

In a constitutional tort case, when other immunities are not available or have fallen, the "final protective fire" of the defense (short of hand-to-hand combat on the merits) is qualified immunity. To call it an immunity is a bit of a misnomer. It is in the nature of an affirmative defense. Conceptually, qualified immunity does not immunize a defendant from suit as do the absolute immunities but, rather, from a full trial and liability. First, the burden is on the defendant affirmatively to both plead and establish entitlement to the defense.[93] If that burden is met, the defendant is entitled to judgment, hopefully a summary judgment short of trial, even in a constitutional tort case. The defense is usually first asserted in a motion to dismiss and then by a motion for summary judgment, using affidavits of the parties and witnesses. Until recently, there was both a subjective and an objective element that had to be satisfied.

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[88] *Id.*
[89] Brown v. GSA, 425 U.S. 820 (1976).
[90] *See* Doe v. Dep't of Justice, 753 F.2d 1092, 1118-19, 1127 (D.C. Cir. 1985); Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984).
[91] C.A. No. 82-491C(5) (E.D.Mo. 1984).
[92] Sonntag v. Dooley, 650 F.2d 904 (7th Cir. 1981).
[93] Gomez v. Toledo, 446 U.S. 635 (1980).

The defendant had the burden of proving that he acted both in good faith (subjectively) and with the reasonable belief that his actions were constitutional (objectively). For example, if a defendant could show that he acted in good faith but his conduct was unreasonable under the circumstances, he could be found liable.[94]

In 1982, the Supreme Court changed the test. In Harlow *v. Fitzgerald,*[95] the Supreme Court eliminated the subjective, or good faith, element of the test. Thus, an official's entitlement to qualified immunity now is established if it is proved by objective standards that there was no violation of "clearly established statutory or constitutional rights of which a reasonable person would have known."[96] The Court seemed to be implementing an earlier statement in another context from another case that an official has no duty to anticipate unforeseeable constitutional development.[97] Moreover, in Harlow the Supreme Court strongly indicated that the usual disposition of a constitutional tort case should be summary judgment and that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed."[98]

Harlow was followed by ***Davis*** *v. Scherer,*[99] where the Supreme Court held, in a civil rights case against state officials, that the Harlow qualified immunity remained available even when the conduct of the official violated a state administrative regulation. Thus, if the right is not "clearly established" as a matter of constitutional law, the official is immune even if he or she violated administrative or statutory direction.

The Harlow test is not without its problems. The criteria set forth by the Supreme Court was in terms of reasonable action in attempting to determine whether a constitutional right would be violated by a proposed course of action. The inquiry and analysis of the putative defendant, then, would be essentially legal in nature. For example, it had earlier been held that the objective prong of the former test could be established by reliance on the advice of counsel.[100] In the kinds of actions that frequently must be taken by commanders and other federal officers, however, the issue is often whether there was a reasonable factual basis to take the action. In such a case, if the commander turns out to have been wrong in making the factual judgment and thereby violated a constitutional right, he should nonetheless be afforded immunity if his

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[94]Nees v. Bishop, 524 F. Supp. 1310 (D. Colo. 1981), *rev'd on* ***other grounds,*** 730 F.2d 606 (10th Cir. 1984).
[95]457 U.S. 800 (1982).
[96]*Id.* at 817.
[97]O'Connor **v.** Donaldson, 422 U.S. 563 (1975).
[98]457 U.S. at 818.
[99]468 U.S. 183, 104 S. Ct. 3012 (1984).
[100]Schiff **v.** Williams, 519 F.2d 257 (5th Cir. 1975).

judgment was reasonable under the totality of the circumstances, i.e., "the objective reasonableness of [his] conduct."[101] This has yet to be decided in an authoritative way. However, there are troubling cases out of the Third and First Circuits which seem to equate a dispute over probable cause with the objective qualified immunity standard, thereby denying motions for summary judgment when there was a factual dispute, regardless of the constitutional reasonableness of the officer's action.[102] Even more troubling is a recent Supreme Court holding, devoid of analysis, that a police officer who obtained a warrant did not necessarily meet the "objective reasonableness" test. Rather the question would be "whether a reasonably well trained officer. . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."[103] The military analog to the officer seeking authority for a search or apprehension on post is readily apparent.

There is a final thought with respect to qualified immunity, worth noting as a general matter. It assumes "official error." The doctrine of qualified immunity takes it for granted that a constitutional right has been violated but nonetheless protects the conduct of the official on the ground that he acted reasonably in attempting to avoid the violation of a constitutional right. It has also been said to shield protected illegal conduct or mistake. Again, in *Chagnon v. Bell*,[104] the Court said that the doctrine protects "honest error." Thus, the fact that a constitutional right has been violated by a military officer does not end the question of liability. Far from it; it is then that the issue of qualified immunity comes to the fore. As the Supreme Court recently put it, "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."[105]

Finally, it should be noted that the Supreme Court has recently ruled that a denial of qualified immunity like absolute immunity is appealable. In this regard, the Court likened qualified immunity more to an immunity from trial rather than an affirmative defense and held that an immediate appeal right was necessary in order to prevent insubstantial lawsuits from going to trial.[106]

'"Davis v. Scherer, 104 S. Ct. at 3018.

[102]Deary v. Three Un-Named Police Officers, 746 F.2d 185 (3d Cir. 1984); B.C.R. Transport Co. v. Fontaine, 727 F.2d 7 (1st Cir. 1984).

[103]Malley v. Briggs, 106 S. Ct. 1092, 1102 (1986).

[104]642 F.2d 1248 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981).

[105]Davis v. Scherer, 104 S. Ct. at 3020.

[106]Mitchell v. Forsyth, 105 S. Ct. 2806 (1985).

E. OTHER LEGAL DEFENSES

Having focused on the immunity defenses that are available to federal officials, including military officers, one must not lose sight of the fact that there are other legal defenses which frequently resolve the case in favor of the defense. These include those *personal* defenses available under Rule 12 of the Federal Rules of Civil Procedure, such as insufficiency of service of process and lack of personal jurisdiction.[107]

It is critical never to lose sight of the fact that the defendant is an *individual* and not the government. Thus, the federal attorney defending the suit must always look to defenses and tactics applicable to individuals which may or may not apply to the government.[108] For example, in cases asserting personal liability, one should immediately look to the nature of the attempted service of the complaint and summons with a view toward asserting defenses under Rule 12. If not done promptly and properly with the first responsive pleading, these defenses can be waived, to the lasting discomfort of the individual client and his attorney.

In addition, Rule 8 of the Federal Rules of Civil Procedure outlines several affirmative defenses which must appear in the answer to the complaint or be waived. As a matter of practice, the list of these defenses should always be carefully reviewed and any questions about their assertion resolved in the affirmative. Moreover, the rule requires the assertion of any defense "in the nature of an affirmative defense." Qualified immunity would fit into that category and should always be asserted in the first responsive pleading.

Rule 8 also requires that a plaintiff make a short and plain statement showing in the complaint why he or she is entitled to relief. In the constitutional tort area, a plaintiff is required to specifically state the facts which by law demonstrate a valid cause of action. If the complaint is too vague or conclusory, it may be subject to dismissal.[109] Along the same lines, an argument can be made in the constitutional tort case that the conduct of which the plaintiff complains does not rise to the dignity of a constitutional violation.[110] In other words, if plaintiff cannot make out a federal case and simply has a lament cognizable under state tort law, it may not support a federal cause of action."[111] For example, the Supreme Court has now held that negligence does not equate to a violation of the fifth amendment.[112]

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[107] Fed. R. Civ. P. 12(b).
[108] *See* Stafford v. Briggs, 444 U.S. 527 (1980).
[109] Butz v. Economou; Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985); Ostrer v. Aronwald, 567 F.2d 551 (2d Cir. 1977).
[110] Baker v. McCollan, 443 U.S. 137 (1979).
[111] Paul v. Davis, 424 U.S. 693 (1976).
[112] Daniels v. Williams, 106 S. Ct. 662 (1986); Davidson v. Cannon, 106 S. Ct. 668 (1986).

Ultimately, of course, there is the defense on the merits. In any tort case, a plaintiff has to prove the elements of duty, breach of duty, injury, proximate cause, and damages. Plaintiff's failure to prove any of those elements or the establishment of an affirmative defense by the defendant would result in a judgment for the defense. For many reasons, including the fact that persons who bring ***Bivens*** actions frequently are not sympathetic parties, there is often grounds for optimism, even when a case has to be tried on the merits.

IV. REPRESENTATION

Pursuant to 28 U.S.C. §§ 516-519, the Attorney General of the United States is responsible for attending to the interests of the United States in litigation in any court in the land. When individual federal officers are sued, their representation by the Attorney General is among the legitimate interests of the United States.[113]

Although not an obligation, it has been the practice and policy of the Department of Justice to represent federal employees who are sued personally for money damages in their individual capacities for actions taken in their official capacities. "he guidelines for this representation are published at 28 C.F.R. § 50.15.

There are two criteria to be met in order for the Department of Justice to represent a federal employee. The first is "scope of employment." The employee'sactions giving rise to the suit must reasonably appear to have been performed within the scope of federal employment. In other words, the military member must in some way have been attempting to carry out military duties. The second criterion is "interest of the United States." It is generally in the interest of the United States to represent federal personnel in order to establish the legality of the performance of the federal mission in question and to promote the vigorous performance of duty by relieving employees of the burden of having to defend suits personally. Procedures to be followed by Department of the Army personnel to obtain representation are outlined in the applicable Army regulation."[114] As a practical matter, representation is provided in the great majority of civil cases and, frequently, in state criminal actions (particularly where the supremacy clause of the Constitution is at issue). Department of Justice representation is never available, however, in federal criminal proceedings or in agency disciplinary actions.

The Department of Justice is responsible for making the "scope" and "interest" determinations after benefiting from agency recommendations. After remand from the Supreme Court, the D.C. Circuit in the

[113] Booth v. Fletcher, 101 F.2d 676 (D.C. Cir. 1983).
[114] Dep't of Army, Reg. No. 27-40, Litigation, paras 3-1, 3-2 (4 Dec. 1985).

case of *Falkowski v. EEOC,*[115] ruled that the Department of Justice's decision on representation is not reviewable.

The procedures for obtaining representation are as follows. Representation is neither automatic nor compulsory. Federal employees are free to retain counsel of their choice at their own expense. If representation by the Department of Justice is desired, the federal employee must submit a written request for representation through the employing agency which, in turn, forwards the request to the Department of Justice with its recommendation and all supporting factual materials. The Civil Division or, if appropriate, another litigating division, makes the necessary determinations on scope of employment and interests of the United States. If the determinations are in the affirmative, the United States Attorney in whose district the litigation is filed is usually authorized and requested to provide representation. In some cases the representation is handled directly by attorneys from the Department of Justice in Washington, D.C.

There are limitations on Department of Justice representation. Primarily, a Department of Justice attorney represents the United States and must assert all appropriate legal positions and defenses which would establish the non-liability of the United States if it is also a party to the suit. This is true even when securing the dismissal of the federal entity leaves the individual defendant in the case by him or herself. Moreover, Department of Justice attorneys will not assert any legal position or defense which is not in the interest of the United States, even if it might be in the interest of the individual defendant. The department will generally neither institute suit on behalf of federal employees nor provide representation in affirmative counterclaims for money damages. Where conflicts in the factual or legal positions of a number of defendants make representation by a single attorney impossible, private counsel may be retained by the department to represent the individual defendants, subject to the availability of funds.[116] If funds are not available, however, the department will still withdraw from such a case, leaving the defendants to their own resources.

Finally, regardless of whether representation is provided by the Department of Justice, a federal employee remains personally responsible for the satisfaction of a judgment entered solely against him or her. There is no right to indemnification from the United States or from an agency. While this remains among the harshest realities of personal liability litigation against federal officers, efforts to date to obtain systemic congressional relief have proved unavailing. The only specific re-

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[115] 764 F.2d 907 (D.C. Cir. 1985).
[116] 28 C.F.R. § 50.16 (1985).

lief possibly available would be a private bill in the Congress authorizing payment of a particular judgment out of federal funds.

Because officials are personally responsible for paying judgments, interest has arisen concerning insurance. There are now several liability policies on the market available to federal employees which purport to insure against judgments for both common law and constitutional torts. Those officers and employees who are involved in decisions which are likely to engender controversy, ill-feeling, or questions of professional judgment may wish to consider obtaining insurance. Any insurance policy should be carefully scrutinized, however, to determine if it meets the specific needs of the individual.

V. AGENCY AND INDIVIDUAL ACTION

The first and best defense to any personal liability litigation is to make every attempt to undertake every official action in a professional and conscientious manner. This includes providing basic elements of fairness such as notice and an opportunity to be heard where appropriate. It also includes seeking the advice of counsel and making a genuine attempt to know and follow the law.

When a suit is filed, the critical element to effective defensive action is often timing. The court papers and a request for representation should be forwarded as soon as possible through The Judge Advocate General or agency general counsel, as appropriate, along with an explanation of the case (time permitting), and some outline as to the manner in which the summons and complaint were served. Copies of this package should be provided to the United States Attorney in the locality where the suit was filed and to other appropriate offices in the employee's agency. Affidavits and witness statements should be promptly collected with a view toward establishing a firm basis for dismissal or summary judgment. Above all, cases of this nature must be given a high priority because individual liability is on the line. Time is often of the essence. Summonses requiring a twenty-day response, instead of the normal sixty days allotted to the federal government, are not unusual. If the suit is filed in state court (a not infrequent occurrence), prompt action should be taken to remove it to federal court.[117] Accordingly, swift and effective action must be taken. If necessary, conditional authority for personal representation may be sought over the telephone.[118] This authority is to be used only in emergencies and must be followed up with the normal written materials.

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[117] 28 U.S.C. §§ 1442-1446 (1982).

[118] 28 C.F.R. § 50.15(a)(1) (1985). The telephone number of the Torts Branch is (202) 724-8246.

VI. CONCLUSION

In attempting to secure a judgment against a military or civilian federal officer for actions taken in the course of duty, a plaintiff has a long and difficult road to follow. If the plaintiff is a member of the uniformed services, the ***Feres*** doctrine should provide an effective defense. Other specific immunities such as prosecutorial or judicial immunity may be available in a given case. If a plaintiff couches all or part of the case in terms of common law tort, there is a good chance that dismissal may be achieved based on the doctrine of absolute immunity for common law torts. If a plaintiff pleads a constitutional cause of action, various immunities and defenses may be brought to bear. Ultimately, the defense of qualified immunity will normally prove an effective final protection. Thus, it can be generally stated with confidence that the military officer who makes a genuine attempt to carry out his or her duties in a conscientious, professional and reasonable manner has little to fear from the courts.

OVERLOOKED TEXTBOOKS JETTISON SOME DURABLE MILITARY LAW LEGENDS

by Lieutenant Colonel William R. Hagan*

As the ordonnances of war and martial regulations of our early kings, so far as they can be recovered, give great insight into our Military History; I shall lay before my readers such as I have been able to procure.

2 F. Grose, Military Antiquities Respecting a History of the English Army 57 (London 1786-88)

I. INTRODUCTION

Many believe that military law was, in the past, primitive and barbarous.' I make no attempt to dissuade those who hold that our system is so today. But as most of us know, the light of progress did not dawn on the day that we were born or were admitted to the bar. Ignorance breeds

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'Brutality all too often has been a part of military justice and civil criminal law also has many dark pages. Justice and compassion are not, however, new components of military law. In an English work of the early nineteenth century, R. Scott, The Military Law of England (London 1810), Scott said:

> Every man, of ordinary intelligence, who enters an army, in whatsoever species of force, must quickly be impressed, that military discipline, to become effective, must address the soldier as a moral agent; and regard "a proud submission,—that dignified obedience, that subordination of the heart," which attaches him to the service, and enables him to support and overcome every difficulty and danger of war,—in preference to the operation of terror. This cannot be effected without the correct ***execution*** of those admirable regulations which have, from time to time, arisen out of the collective experience of the army,—without the due administration of military justice.

Id. at xvi. Those who deprecate what has been called the "Historical School" of military jurisprudence may be surprised by Scott's words. By looking to the roots of military law, we learn that great military leaders of every age have reached out to soldiers as human beings of worth. Today, cadets of the United States Military Academy at West Point are reminded of that as they pass the statue dedicated 'To the American Soldier." Chiseled upon the statue's base are the words: 'THE LIVES AND DESTINIES OF VALIANT AMERICANS

arrogance. Our judge advocate forebears and the law that they practiced was more sophisticated than has been recognized. Today's law is considered to be better, but, given the different society which it serves, we should not be too smug in this judgment. Military law's past is worth studying because it is more closely linked to the present than is the past of civil law. Many of the articles of the Uniform Code of Military Justice[2] are virtually mirrored by provisions of earlier military codes. In fact, as will be seen later, Roman military codes contained phrases which sound remarkably like those of our articles.

There is another, more practical reason to learn about our military legal heritage. Legal links to history mean that we will better understand our present system and ensure that progress is progress; that is, improvement, not merely change. In the law, too, the "new" may have been tried before and discarded. We can learn much by studying how our system developed, who developed it, and how law was practiced.

Whether history does indeed repeat itself can never be indisputably established, however much it remains a query that continues to fascinate the philosophers. But it is sadly true that historians constantly repeat each other, generally by uncritical copying of what had earlier been written. And, all too often, the original assertion that is later regularly and faithfully copied can be shown to be lacking in validity, primarily because easily available data was overlooked in the first instance.

The history of military law, in numerous aspects, constitutes an example of just that phenomenon. For many decades it has been regularly asserted, first, that the court-martial of today is the direct descendant of the medieval Court of the Constable and Marshal;[3] second, that the *Constitutio Carolina Criminalis* promulgated in 1532 by Charles V, then

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ARE ENTRUSTED TO YOUR CARE AND LEADERSHIP." That statue and, in a greater sense, those words were gifts of the USMA classes of 1935 and 1936. Successful leaders have long known that soldiers have souls and that to discipline, one must care; to care, one must discipline. For a different view of the "Historical School," *see* Costello, Book Review, 65 Mil. L. Rev. 151, 153-55 (1974). Wherever the balance lies, we would all be served better if military lawyers looked more frequently to the rich history of our law. Our first obligation, of course, is to know the law of today. That duty is best discharged by undestanding the past. I call upon others to delve into and write about this fascinating and surprisingly unexplored area of the law.

[2] 10 U.S.C. §§ 801-940 (1982) (hereinafter cited as UCMJ).

[3] *See, e.g.*, J. Snedeker, A Brief History of Courts-Martial 11 (1954). Snedeker was, however, neither the first nor the last to make that assertion. *See, e.g.*, Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5, 11-13 (1985). Snedeker's little book is full of interesting information about the origins of military law. Unfortunately, the author did not disclose his sources. Snedeker is flawed by more than an absence of footnotes. In fact, he should be ignored. The current, inexplicable enthusiasm for Snedeker may readily be dampened by reading F.B. Wiener, *The Teaching of Military Law in a University Law School*, 5 J. Legal Ed. 475, 488-98 (1953). Snedeker is cited elsewhere in this paper for attribution, not authority.

Holy Roman Emperor, had a profound effect on future military codes;[4] third, that the articles of war enacted in 1621 by King Gustavus Adolphus of Sweden constituted an innovative code whose provisions demonstrably influenced all future English, and hence all American, military provisions;[5] and, fourth, that in the Constitution of the United States, military jurisdiction was in part grounded on a provision of the fifth amendment.[6]

Legend number one was exposed about a quarter of century ago by Squibb's, ***The High Court of Chivalry.*** Squibb demonstrated pretty conclusively, on the basis of what was done in Britain under the Commonwealth, that courts-martial and heraldic tribunals were wholly separate institutions. In other words, courts-martial and a court of heraldry coexisted; the former did not evolve from the latter.[7]

Legend number four was laid to rest by the Supreme Court of the United States in ***Toth v. Quarles,***[8] which demonstrated what should always have been obvious: the Bill of Rights was a limitation of the powers of the new government established by the Constitution, so it could not possibly have been a further grant of power.[9] Indeed, Winthrop had written to that effect, although until ***Toth*** and the other decisions limiting military jurisdiction over civilians in time of peace had been decided, many simply wrote him off on the asserted ground that "the world about which Colonel Winthrop wrote no longer exists."[10]

This article will deal with legends two and three.

With respect to legend number two, dealing with Emperor Charles V's ***Carolina,*** it will be shown that this was simply a general criminal code, one silent about either military forces or military discipline. Earlier commentators, obviously, never troubled to examine the text of ***Carolina.***

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[4] *Constitutio Carolina Criminalis* (hereinafter cited as *Carolina*). *See, e.g.*, E. Byrne, Military Law 6 (2d ed. 1976) and D. Walker, Military Law 107 (1954).

[5] *See, e.g.*, Cooper, *Gustavus Adolphus and Military Justice,* 92 Mil. L. Rev. 129, 134 n.6 (1981), *citing* G.B. Davis, A Treatise on the Military Law of the United States, at iv (1906).

[6] An interesting discussion of this fable may be found in F.B. Wiener, Civilians Under Military Justice 305-09 (1967).

[7] G. Squibb, The High Court of Chivalry (Oxford 1959).

[8] 350 U.S. 11 (1955).

[9] *Id.* at 14.

[10] Wiener, *supm* note 6, at 306-09 (1967). Winthrop had said as much years before: "In the view of the author, the Amendment, in the particular indicated, is rather a *declaratory recognition and sanction* of an existing military jurisdiction than an original provision initiating such a jurisdiction." W. Wmthrop, Military Law and Precedents 48, *52-53 (2d ed. 1896 & reprint 1920). While it is beyond the purpose of this article to dwell at length on this issue, the myth of the fifth amendment as a source of military jurisdiction sometimes seems to have a life of its own. Appendix IV to Wiener's, Civilians Under Military Justice should be reread now and then by judge advocates who wish to know how and why it just is not so. The quotation in the text is from Br. for Appellant, Reid v. Covert, U.S. Sup. Ct., Oct. T. 1955, No. 701, p. 44.

As to legend number three, the influence of Gustavus Adolphus's articles of war on Anglo-American military law, earlier authors simply reversed cause and effect. Far from Gustavus Adolphus in **1621** setting up a beacon to lead those who followed, far from being either a pioneer or an innovator, the Swedish King was in fact a follower who built upon, and simply revised and improved, provisions that English and Continental predecessors had formulated in the preceding century. It is these sixteenth century English texts, overlooked by nearly all later writers on military law, that dispose of the legend." Much of what follows will set forth the substance of those seminal English publications.[12]

The immediate antecedents of the British articles of war which were

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"Colonel Frederick Bernays Wiener, Army of the United States (Ret.),seems to be one of the few who is aware of the military writers of the sixteenth century. In his classic work, Civilians Under Military Justice, Colonel Wiener cites Matthew Sutcliffe, of whom more will be said later. Wiener, *supra* note 6, at 166. There are few recent trails in the study of the development of military law that were not blazed by Colonel Wiener. The biographical summary that preceded his famous article about courts-martial and the Bill of Rights, F.B. Wiener, The Bill *of* Rights: The *Original Practice*, Bicent. Mil. L. Rev. 170 (1975)makes it evident why he is a respected authority:

> Frederick Bernays Wiener, Army Colonel (Retired) and advocate before the Supreme Court, is the most prolific, widely-quoted and authoritative writer on military law of this century. His major works span the period from 1940 to 1969. Included in that period is his effort as counsel to secure reargument and eventual victory in the landmark cases, Reid *v. Covert* and *Kinsella v. Kruger*. These cases overturned apparently settled law concerning courts-martial jurisdiction over dependents of military personnel in peacetime and provided the foundation for one of the best books available on military law and legal history.
>
> Much of Wiener's finest work has been done on the historical analysis of courts-martial jurisdiction and military crimes, a subject which fascinates both constitutional lawyers and scholars.

I am honored to add that he has been most helpful during the research and writing of this article.

[12]One of these writers, Barnaby Riche, may be almost unknown to lawyers today, but yesterday's lawyers were well known to Barnaby Riche: "The Lawyer makes no plea but for privat profitte, and buildes goodly houses, and purchaseth whole countries about him .... The souldiour serves his countrye for a small stypende, and would be contended with alowance but to buie meate, drinke, and cloath." B. Riche, A Pathway to Military Practise B,3 (London 1587). All contemporary works quoted in this article reflect complete fidelity to the original spelling, capitalization, and punctuation. The only exception is the lower case "longs" which appears in early texts to be a modern "f." A modern lower case "s" is used instead. Unless otherwise noted, names of persons remain as spelled in the original texts.

Riche was not alone. Thomas Digges introduced his book, Stratioticos, by saying that he would have written more books sooner "had not the Infernal1 Furies, envying such his Foelicitie, and happie Societie with his Mathematical Muses, for many years so tormented him with Law Brables, that he hath bene enforced to discontinue those his delectable Studies." T. Digges, Stratioticos at n.p. (London 1579). "Stratioticos was published by Thomas Digges from a manuscript written by his father, Leonard, which he had reworked and to which he had added." H.J. Webb, Elizabethan Military Science: The Books and the Practice 182n.1 (1965).

Barnaby Riche was more eloquent and stinging:

in force at the time the United States declared its independence from Great Britain[13] are well known. "he focus of this study, however, is the evolution of military law from the fifteenth century to Gustavus Adolphus's[14] Articles of War of 1621.[15] Recent articles in the *Military Law Review*[16] have followed the lead of many American authorities and have given much credit to the Swedish king for being an innovator in military law. While recognizing his legitimate and substantial contributions, this article questions the conclusions of those who see Gustavus Adolphus as the major source of original change to the military law of the period. Such findings flow from excessive reliance upon Colonel Winthrop's famous treatise" and from the corresponding failure of more recent authors to consider writers who published profusely in the sixteenth century and, therefore, before Gustavus Adolphus.

This article is limited to the development of military codes. The great political dispute over the existence of a standing army in England in peacetime and the power of military courts over ordinary citizens are both important factors which led to the Mutiny Act of 1689,[18] its succes-

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> Lawyers make their Plea accordyng to the peney, and not to the truthe: They coyne delaies for private advantage: they make straight crooked, and crooked straight . . . .[Lawyers cause] such delays from court to court, such dilatorie pleas, suche judgement with prouiso that the poore-suiter findes his purse soner emptied, then his cause ended. [T]hei affectat eloquence to maintaine bad causes, thei are studiously affable to procure new clientes, thei are devitlishly subtill to cloke inconveniences, . . . , seemying to be ministers of light, they hunt after continuall darknesse, concluding the truthe within a golden cloude, makyng blacke white, and white blacke, darkenyng al thinges with their distinctions that should give light: so that in all thynges thei seem civil, yet in all thynges thei are most incivill.

Riche at n.p.

[13]Rules and Articles for the Better Government of Our Horse and FootGuards, and All Other Our Forces in Our Kindgoms of Great Britain and Ireland, Dominion Beyond the Seas, and Foreign Parts (1765). *Reprinted in* Winthrop, *supra* note 10, at 931, '1448. G.B. Davis, the Judge Advocate General from 1901 to 1911, disagreed that it was the 1765 articles. The practice of capitalizing *"The* Judge Advocate General" began in 1924. The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975, 139 (1975). The statute establishing the position of The Judge Advocate General does not capitalize the "the." 10 U.S.C. § 3036 (1982).

[14]Gustavus II Adolphus (1594-1632), King of Sweden from 1611 to 1632. Some will cringe at "Adolphus's." I refer them to W. Strunk and E. White, The Elements of Style 1 (3d ed. 1979). There is no triple sibilant.

[15]Code of Articles of King Gustavus Adolphus King of Sweden; Articles and Lawes to be Observed in the Warres (1621). *Reprinted in* Winthrop, *supm* note 10, at 907, '1416.

"Schlueter, *The Court-Martial: An Historical Survey,* 87 Mil. L. Rev. 129 (1980); Cooper, *supra* note 5.

[17]Winthrop, *supm* note 10.

[18]An Act for punishing Officers and Soldiers who shall Mutiny or Desert their Majestyes Service, 1689, 1 W. & M., ch. 5. The centennial of Wmthrop's first edition will occur in 1986; that of the more important second edition will be in 1996. But it is the tricentennial of the First Mutiny Act on 12 April 1989 that truly deserves celebration. American military and civilian lawyers should join our British counterparts in recognizing this important event and what it has contributed to the rule of law.

sors, and, ultimately, to our own system of military justice. Any serious student of military law must understand those tensions and the ultimate, happy triumph of the civil power over the military. They should be kept in mind as one considers the arrival of modern armies in the early seventeenth century. Aversion to a permanent military establishment in England and, more particularly, to martial law, led Parliament to declare the exercise of such martial law illegal by the Petition of Right in 1628.[19] Before that act, the legal existence of the army and its codes—in England and overseas—had been questionable. That uncertainty was a real problem for Parliament and a theoretical but vexing annoyance to the Crown. The rule was clear after the Petition of Right; the result was untenable. It was cured, albeit only annually, by the first of the Mutiny Acts in 1689 and by the accompanying articles of war.[20] The history of that legislation, including its necessary annual renewal and its supplantation by the Army Act of 1881,[21] has been told elsewhere.[22] The story began much earlier.

11. CURRENT VIEW OF THE ORIGINS OF MILITARY LAW

In 1846, Captain William C. DeHart, U.S. Army, wrote: "In considering the military laws of the United States, it is not necessary to refer to a

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[19] Petition of Right, 3 Car. 1, ch. 1.

[20] All of this is, of course, distorted by compression. First came the declarations of martial law by the first two Stuarts, subjecting pure civilians to trial by court-martial. It was this that led to the Petition of Right. Next came the quarrel between Parliament and Charles I over the control of the militia; that was one of the factors that led to the Civil War. After the Restoration, Charles I and James II maintained standing armies without the consent of Parliament. This was followed by the (English) Bill of Rights, a part of the Glorious Revolution that deposed James 11. The First Mutiny Act was simply an immediate response to the fact that a Scottish regiment, strongly Jacobite, refused to obey the orders of the new monarchs, *See* F.B. Wiener, *supm* note 6, at 6.

[21] Winthrop, *supra* note 10, at 20-21, '9-11.

[22] *Id.* at 19-20, *8-9. *See also* Schlueter, *supra* note 16, at 144; F.B. Wiener, *supra* note 6; and G. Lieber, Observations on the Origin of the Trial by Council of War, or the Present Court-Martial (1876). This last little tract, written by G. Norman Lieber, son of Francis Lieber, and later Judge Advocate General, has been overlooked by most who study the history of military law. Lieber's book lacks footnotes and the short work suffers from the defect of virtually all (including Winthrop and many today) who believe that the court-martial descended directly from the Court of Chivalry. Winthrop was wrong as many have been since. *See, e.g.*, Cooper, *supra* note 5, at 133. I am indebted to Colonel Wiener for pointing out to me how authoritatively Squibb's, The High Court of Chivalry dispels that myth. *See* Squibb, *supm* note 7, at 4-12 Wiener's review of Squibb's book may be found at 45 A.B.A. J. 957 (1959). *But see* J. Stuart-Smith, *Military Law: Its History, Administration and Practice,* Mil. L. Rev. Bicent. Issue 25, 28 (1975). As an Assistant Judge Advocate General in the British Army, Gen. Stuart-Smith may have been more surprised than not persuaded. His short and standard account of the history of early English military law does not confront Squibb's exhaustive findings.

period anterior to that when they ceased to be English colonies."[23] Captain DeHart gave short shrift to history. Nevertheless, his book was perhaps the best of the American military law books written before the American Civil War. In fact, as late as 1893 one prominent commentator upon military law preferred DeHart's book to Winthrop's abridgement[24] as a law text for cadets at the United States Military Academy.[25] By limiting himself to looking at American articles of war, DeHart made his task easier. When he wrote there had been but two major codes, those of 1776[26] and 1806.[27] The latter was still in effect when DeHart published his book and, with some changes during the Civil War, remained the basic law until 1874.[28]

There were other writers on military law in the nineteenth century. Colonel Winthrop acknowledged many in the preface of his famous treatise.[29] Neither those writers nor the many since put as much effort as did Winthrop into telling the history of military law. But Winthrop's thoroughness made those who followed less careful and too reliant upon his work.

In the twenty-eight years during which the *Military Law Review* has been published, a recurring theme in its articles has been that Gustavus Adolphus deserves almost all the credit for bringing military justice out of the Dark Ages. The explanation for Gustavus Aldophus's high standing in the development of military law is at least partly attributable to what may be called the 'Winthrop gap." For reasons set forth in greater detail below, most discussion of the development of military law has overlooked the period from 1385 to 1621. Colonel Winthrop skipped that era in the appendices to his treatise published in 1896.[30] He included two primitive codes drafted prior to 1385[31] and then leaped cen-

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[23] W. DeHart, Observations on Military Law 1 (New York 1846). DeHart's treatise has been reprinted. The 1856 edition appears as one of publishing company W.S. Hein's Classics in Legal History Reprint Series. W. DeHart, Observations on Military Law (1856 & photo. reprint 1973).

[24] W. Wmthrop, An Abridgement of Military Law (1887).

[25] Birkhimer, Book Review, 14 J. Mil. Service Institution U.S. 683, 686 (1893).

[26] American Articles of War of 1776. *Reprinted in* Winthrop, *supm* note 10, at 961, '1489. The 1786 articles deserve mention, but did not constitute a major change.

[27] The American Articles of War of 1806 "were adopted by Congress mainly for the reason that the changed form of government rendered desirable a complete revision of the code." Winthrop, *supm* note 10, at 23, *14. What was done fell far short of the complete revision that Winthrop postulated. F.B. Wiener, *Courts-Martial and the Bill of Rights: the Original Practice*, Mil. L. Rev. Bicent. Issue 171, 188 (1975).

[28] The American Articles of War of 1874 were, with some amendments, those in effect at the time Winthrop wrote. *See* Winthrop, *supm* note 10, at 986, '1523.

[29] Winthrop, *supm* note 10, at 13, *n.p. The quality of writers on that list is uneven. Francis Lieber, his son, G. Norman Lieber, George B. Davis, and William T. Sherman should have been added to the list. Those who are surprised by the last name should see 1 J. Mil. Service Institution U.S. 1 (1879).

[30] Winthrop, *supm* note 10, at 906-07, *1415-16.

[31] *Id.* at 903, *1411.

turies to Gustavus Adolphus's articles of 1621.[32] All significant British and American articles of war that followed were included in the remainder of the appendices.[33] Whether accidental or intentional, Winthrop's omissions have tended to conceal an evolutionary period of military law from scholarly attention.

III. COLONEL WILLIAM WINTHROP

The impact of Winthrop's treatise[34] can be better understood by knowing something about Colonel Winthrop. Winthrop was a judge advocate from the Civil War until his retirement for age in 1895. He ended his distinguished career as Assistant Judge Advocate General. Born in New Haven, Connecticut, in 1831, Winthrop was descended from prominent New Englanders on both sides of his family.[35] His younger brother, Theodore, was a writer who, after his heroic death early in the Civil War, received fleeting posthumous acclaim for his novels.[36] William, who was educated at Yale and Harvard, fought as a private in the same New York regiment as his brother, but later accepted a commission in the 1st U.S. Sharpshooters where he remained until becoming a judge advocate in 1864.[37] His scholarly, two-volume treatise was first published in 1886. It was reissued in a second edition in 1896, and it was that edition which became the classic. In 1920 it was reprinted by the U.S. Government Printing Office with new pagination, but it still indicated the pages of the second edition; it is therefore generally cited by star pages. In 1942, the 1920 reprint was lithographically reproduced for the benefit of the World War II Army, a rare tribute to a treatise nearly a half century old.[38] Winthrop's works are the required starting

[32] *Id.* at 907, * 1416.

[33] *Id.* at 919-1000, * 1432-1542.

[34] Winthrop, *supra* note 10.

[35] Fratcher, *Colonel William Winthrop*, 1 JA. J. 12 (1944). The Judge Advocate Journal (JA. J.), published quarterly by the Judge Advocates Association from 1944 to 1948, should not be confused with the Navy JAG Journal (JAG J.). The latter was the Navy's law review until recently retitled The Naval Law Review. The Judge Advocate Journal became the Judge Advocate Bulletin and was published as such from 1948 to 1972. A special Bicentennial issue appeared in 1976. The Judge Advocates Association still exists and thrives. It deserves the support of all military lawyers. The group publishes a quarterly newsletter.

[36] Prugh, *Colonel William Winthrop: The Tradition of the Military Lawyer*, 62 A.B.A. J. 126 (1956).

[37] *Id.* at 127. The 1st U.S. Sharpshooters was a volunteer infantry regiment in the Army of the Potomac. It was also known as "Berdan's United States Sharpshooters" after its commander, Colonel Hiram Berdan. Berdan's Sharpshooters were just that: an elite unit of marksmen. Among other battles, the regiment and Winthrop fought at Gettysburg. Wearing their distinctive green uniforms and equipped with Sharps carbines, these special soldiers were particularly useful as pickets and skirmishers. Coddington, The Gettysburg Campaign 352-53 (1984).

[38] As a part of the "American Military Experience" series of the Arno Press, Winthrop's treatise once again has been reprinted. W. Winthrop, Military Law and Precedents (Reprinted. 1979).

point for anyone who seeks to understand the roots of military law and, especially, how military law was administered in the second half of the nineteenth century. The 1896 treatise (usually seen in its widely-distributed, one-volume reprint of 1920) is still cited by the United States Supreme Court, military courts, other federal courts, and even by state courts. His authority is unquestioned. This article is not intended to denigrate Winthrop, but rather to question the findings of those who have relied upon his conclusions without examining his sources.

IV. CURRENT VIEW OF GUSTAVUS ADOLPHUS AND MILITARY LAW

Two articles in the ***Military Law Review*** document the contributions of Gustavus Adolphus to military law. Colonel Norman Cooper declared that Gustavus Adolphus was an important innovator in military justice whose original code became a model for subsequent British and American articles of war.[39] Shortly before Colonel Cooper's article was published, Captain David Schlueter published an article about the history of the court-martial. He, too, pointed to Gustavus Adolphus's code as an original contribution to military law.[40]

Colonel Cooper examined provisions of Gustavus Adolphus's code and compared those sections with later British and American articles of war. In addition, Colonel Cooper noted similarities between certain articles of the Uniform Code of Military Justice and the code of Gustavus Adolphus. He concluded that the Swedish code was an original work which became the model that drafters of later codes, including our own, copied."

Cooper and Schlueter are the most convincing of those who extol Gustavus Adolphus, but they are not alone. They echo the current view that credits Gustavus Adolphus with exceptional creativity in military law.[42] Before we join that chorus, it behooves us to look to an even earlier period and to examine writings of that time.

V. GUSTAVUS ADOLPHUS THE WARRIOR

Gustavus Adolphus was a remarkable man in a remarkable time, Some mention of his accomplishments is appropriate. Born in 1594 in Stockholm, Gustavus Adolphus had a broad, liberal education, was well-traveled, and was fluent in several languages. He read, as did all gentlemen of the era, the Greek and Roman classics.[43] Maurice of Nassau, who was

[39] Cooper, *supra* note 5.
[40] Schlueter, supra note 16, at 132-35.
[41] Cooper, supra note 5, at 137.
[42] *See, e.g.*, Snedeker, supra note 3, at 2, 4, 7-9. See *also* W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice 6 (1955).
[43] N. Ahnlund, Gustav Adolf the Great 34 (1940).

also a great military leader, was a favorite role model of the young prince. In fact, perhaps only Gustavus stands out more brilliantly than Maurice of Nassau during this period of military progress."

Gustavus Adolphus, like Maurice, studied the military classics; unlike Maurice, he did not merely copy them.[45] Both were innovative commanders who were directly influenced by the ancients. Gustavus Adolphus inherited a relatively weak army and transformed it into the most effective force of its time. His ideas spanned nearly all aspects of the military art.[46] One illustration of his bright and flexible mind may serve to represent many. Confronted with a need for more mobile artillery, yet burdened with casting technology that was incapable of creating sufficiently light and safe tubes, Gustavus Adolphus proposed and fielded leather cannon!"

Like Maurice's army in the Dutch wars, but unlike most other contemporary forces (especially the Imperial forces that Gustavus Adolphus fought), the Swedish army was well-organized, -paid, and -disciplined.[48] The army was not, however, wholly Swedish. English, Irish, Scottish, and officers and soldiers of other nationalities fought for Gustavus Adolphus ~ ~Unemployed since the wars in the Low Countries,[50] skilled in warfare, and often unwelcome back home, they brought much to the Swedish army and learned much, too.[51] Of course, nationality was not determinative of service in a particular force until after the Napoleanic Wars. Certainly foreigners in military service were commonplace in the seventeenth and eighteenth centuries. Our own nation owes much to von Steuben, Lafayette, Kosciusko, and others who were "foreigners" in our young country.

VI. GUSTAVUS ADOLPHUS AND DISCIPLINE

Given the fanfare with which Gustavus Adolphus's 1621 code was issued, it would seem reasonable to infer that whatever military law had governed the Swedish army before 1621 had been primitive or ineffec-

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[44] *Id.* at 39. See also L. Montross, War Through the Ages 269 (3d ed. 1960).

[45] U.S. Mil. Acad. Dep't of Hist., The Dawn of Modern Warfare 69 (1979).

[46] *See, e.g.*, R.E. & T.N. Dupuy, The Encyclopedia of Military History 522, 529 (rev. ed. 1977).

[47] Montross, ***supra*** note **44,** at 273.

[48] *Id.* at 265-68.

[49] *See, e.g.*, R. Munro, His Expedition with the Worthy Scots Regiment n.p. (London 1636).

[50] "Present day Netherlands and Belgium were the scene of bloody battles long before the World Wars of the 20th century. Claimed and occupied by the Spanish from the early 16th century, they were the stage for clashes between the defending Spanish and attacking French and, rather ineffectually in the 16th century, the English.

[51] W. Harte, The History of Gustavus Adolphus, **King** of Sweden, Surnamed the Great 255 at n. (London 1807).

tive or both. As will be seen below, that inference would be wrong. Before going to Riga (and not *at* Riga as some writers believe),[52] Gustavus Adolphus first had his articles of war read to and subscribed by the court and the chief officers of the army. Then, in what must have been an impressive ceremony, the articles were read aloud to the perhaps as many as 20,000 men of the assembled army and its followers.[53]

Gustavus Adolphus was one of those rare men for all seasons. In addition to his tactical innovations and strategic successes, he was keenly interested in discipline. As do fine leaders in all armies, he probably liked soldiers. "He devoted particular attention to improving discipline and to raising the army's morale, which he found rather low. . . . Gustavus Adolphus was adored by his soldiers, with whom he shared the dangers and hardships of war and whom he liked to lead in daring attacks."[54]

Of course, a group of uniformed people with weapons is but a well-dressed and dangerous mob. The bond that converts the mob into an effective fighting force is discipline. And, as with most truisms, that lesson needs to be relearned rather often. Adye, a British judge advocate of the late eighteenth century,[55] wrote movingly of Parliament's dispute with Charles I about the army: "[T]hey soon found that armies without discipline and military subordination, were like bodies without souls, and that these were only to be acquired by establishing martial law amongst them."[56]

There is considerable agreement that Gustavus Adolphus's articles of war were a substantial contributing factor to the success of his army.[57] Furthermore, these articles were widely copied.[58] Both British and American military law owe much to Gustavus Adolphus. This article will examine the Swedish articles and compare them with earlier codes to as-

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[52] *See, e.g.*, J. Stevens, History of Gustavus Adolphus 129 (1884).

[53] *Id.* at 130-31.

[54] T.N. Dupuy, The Military Life of Gustavus Adolfus 56 (1969).

[55] Colonel Wiener includes a fascinating biography of this early judge advocate in his Civilians Under Military Justice. Wiener, *supm* note 6, at 182-88.

[56] S. Adye, Treatise on Martial Law 15 (2d ed. London 1810). The original edition was published in 1769, at New York! It was *how* to establish discipline that p e d the problem. *Sir* James Turner approvingly quoted an unnamed English general who said that discipline by terror alone would not do. "[A]ll hanging, and no money will not keep any Army together, a little hanging, and a little money will do better." J. Turner, Pallas Armata: Military Essays of the Grecian, Roman, and Modern Art of War 145 (London 1683 & photo. reprint 1968). But terror had its place. Turner also quoted Vegetius: 'There is no pardon for a neglect where men fight for the common safety." *Id.*

[57] Keegan and Wheatcroft, Who's Who in Military History from 1453 to the Present Day 150 (1970).

[58] Snedeker, *supm* note 3, at 2.

certain their originality. For it is in the codes of Cinquecento[59] that we will find the sources of Gustavus Adolphus's articles.

The evidence is convincing that Gustavus Adolphus's articles of war did not spring fully-grown from his able mind. Instead, that code had many sources: the classic writers of antiquity, the rebirth of unfettered thinking, new weaponry and tactics, Continental and English military writers of the Renaissance, earlier Swedish articles, and the experienced English, Scottish, and Irish officers and soldiers who served with Gustavus Adolphus.

VII. THE WINTHROP GAP

Colonel Winthrop traced the history of military law in the second chapter of his treatise. In the text he noted that, "[T]he celebrated penal code of the Emperor Charles V . . . has been viewed as the model of the existing military codes of Continental Europe."[60] The "elaborate Articles of Gustavus Adolphus framed in 1621," Winthrop told us, succeeded that code.[61] Later, in chapter 5, Winthrop discussed the history and nature of the court-martial. According to Winthrop, the origin of British and American courts-martial may be traced properly to earlier codes, "especially the articles of Gustavus Adolphus, in Appendix."[62] Sixteen of the twenty-six appendices to his treatise were devoted to articles of war. The first was the Ordinance of Richard I issued in 1190;[63] the last were the amendments of 1892 to the 1874 American Articles of War.[64] The most significant appendices, from the perspective of this article, are the second (the Articles of War of Richard II, issued in 1385)[65] and the third (Code of Articles of King Gustavus Adolphus of Sweden, issued in 1621).[66]

The code of Richard II had twenty-six articles that were considerably more detailed than those of Richard I two centuries earlier. They are primitive, however, when set beside the 167 articles of Gustavus Adolphus. But, as the passage of 195 years may explain the difference between the codes of the two Richards, would not the 236 years separating the rules of Richard II from the elaborate articles of Gustavus Adolphus warrant an inference other than that the Swedish king's undeniable genius was solely responsible for this improved code?

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[59] Cinquencento is an Italian word that has become accepted in English as denoting the sixteenth century, especially when referring to Italian art. It is short for *millecinquecento*, i.e., one thousand five hundred. As will be seen, the military art owes much to Italy.

[60] Winthrop, *supra* note 10, at 18, '5.

[61] *Id.*

[62] *Id.* at 46 n.7, *48.

[63] *Id.* at 903, '1411.

[64] *Id.* at 1000, *1542.

[65] *Id.* at 904, '1412.

[66] *Id.* at 907, *1416.

Colonel Winthrop overlooked developments in England between 1385 and 1621. His treatise is otherwise the product of decades of laborious and accurate research.[67] That many have thus relied upon his version of the development of military law and his appendices as the final word on the subject is understandable. It is also wrong.

VIII. THE MISSING CODES

Even enthusiastic admirers of Gustavus Adolphus's contributions to military justice agree that there were many military legal codes before the Swedish articles of 1621.[68] Virtually nothing is known of military law before the Romans. We simply surmise that there must have been rules, even if only summary ones.

The unknowable passage of time from the birth of civilization to the present may make us unduly vain about our progress. Military law in Mesopotamia was not unsophisticated.[69] Roman military law has been extensively treated in a welldocumented book by that name.[70] At least one author has asserted that "military law had no existence in the Middle Ages."[71] Colonel Brand was less certain. He told us that:

> In point of fact, little is known with any exactitude of the actual administration of justice in the armies of antiquity. In such a social order as existed in the days of feudalism, however, when there were no standing armies, when one's landlord was at the same time local law-giver and military commander, and when attending the wars was a regular part of the business of "manoring," it is clear that there could be no sensible distinc-

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[67] Major General Walter A. Bethel, The Judge Advocate General during 1923 and 1924, bore witness to Winthrop's accuracy:

> I was the Professor of Law at West Point from 1909 to 1914 and the then Judge Advocate General (Crowder)requested me to prepare to write a third edition of Military Law and Precedents. General Crowder contemplated an early revision of the Articles of War and the third edition was to conform to the new articles. In order to prepare myself as well as possible I made a close study of all cases cited by Winthrop which had been decided by a Federal Court, of the Attorney General's opinions so cited, and of many State Court cases, though by no means all of them so cited. In but one single case did I find that Winthrop had overlooked a principle announced in a decision of a Federal Court and had stated as his opinion the opposite of what was there held.

katcher, *supm* note 35, at 13 (quoting Gen. Bethel).

[68] Schlueter, supm note 16, at 131-32.

[69] Matthews, *Legal* Aspects *of Military* Service in Ancient Mesopotamia, 94 Mil. L. Rev. 135 (1981).

[70] C. Brand, Roman Military Law (1968). Neither Cooper nor Schlueter mentions Colonel Brand's fine study.

[71] M. Cockle, A Bibliography of English Military Books Up to 1642 and of Contemporary Foreign Works xxii (1900).

> tion between military and civil law; and none, in fact, was made. Without doubt, in time of war, some more or less rough-and-ready system of summary justice was resorted to by the military commander, both in feudal times and in the citizen armies of antiquity; and this beginning of military law came in time to be regularized and codified.[72]

Colonel Wiener discovered the first reference to English military law in action. It may be found in the record of the Yorkshire eyre of 1218: "[A]nd he denies definitely that Thomas was ever maimed through him, on the contrary he lost his hand in the war by judgment of the marshal1 of the army for a cow which he stole in a churchyard."[73]

Winthrop, among others (although the others usually copy or quote from Winthrop), notes the Salic codes of the German tribes, the code of Emperor Charles V, and briefly mentions other Continental codes.[74] The best documented and most scholarly discussion of this period of military legal history in England appears in Squibb's seminal study, *The High Court of Chivalry:*

> There seems to be but little evidence of any judicial procedure for the enforcement of military discipline during the Middle Ages. Probably much of it was by the 'summary course' referred to in the commission of martial law issued by Charles I in **1625.** There is, however, an indication in Henry V's Ordinances of War that the more serious offences were the subject of judicial proceedings. . . .
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> The medieval Ordinances of War were the forerunners of the later Articles of War, which only differed from the Ordinances in that their provisions became progressively more detailed. . . . In the absence of positive evidence of a change in the procedure it seems more likely that discipline under the medieval Ordinances of War was enforced by military officers in substantially the same manner as it was enforced under the later Ordinances and Articles, which successively replaced them.[75]

In a note at the foot of the 1385 articles of Richard 11, Winthrop says: "'The Rules and ordonnances of War' of Henry V are printed in Upton's 'De Studio Militare' and Grose's Antiquities of England and Wales,' vol.1, p. **34.** The military code of Henry VIII is said to be pre-

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[72]Brand, supm note 70, at ix.
[73]Wiener, supra note 6, 164-65.
[74]Winthrop, *supra* note 10, at 17-18, *5-6.
[75]Squibb, *supra* note 7, at 4-5.

served, in MS, in the College of Arms, London."[76] That note has been ignored. As a result, the military writers of England and elsewhere during the Renaissance have been overlooked.

Colonel Winthrop apparently relied upon Grose's *Military Antiquities*? the premier English work of the eighteenth century on the military art.[77] There is much of Grose in Winthrop and much of Winthrop in everyone else. Grose earlier said virtually the same thing as Winthrop about the manuscript edition of King Henry VIII's articles of war.[78] One infers from Winthrop's footnote that he believed that the claimed existence of the ancient Tudor code awaited proof. Winthrop traveled to Europe twelve times.[79] On at least one of those trips he apparently visited England because he wrote that he discussed military law with Clode, the eminent but overrated British chronicler on military law.[80] He had the opportunity to confirm the existence of the alleged manuscript. Inexplicably, Winthrop seemed to overlook that Grose had transcribed the articles from manuscript and printed them![81] For whatever reason, Winthrop did not include Henry VIII's code in his appendices. The articles date from 1513 and were apparently intended for use in the army during Henry VIII's expedition that year to France.[82] The first printed version, unknown to Grose in 1788, appeared in 1544.[83]

Even earlier, in about 1509, Henry VIII had issued a brief set of articles to govern a special household unit.[84] Grose says: 'The band of gentlemen pensioners was a corps of cavalry instituted by King Henry VIII for an honourable body guard, and to form a nursery for officers of his army and governors of his castles and fortified places."[85] Presumably,

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[76] Winthrop, *supra* note 10, at 906, *1415.

[77] F. Grose, Military Antiquities (London 1786-88).

[78] 2 id. at 85.

[79] Note, William Winthrop: Acting Judge Advocate Geneml *1881,* 28 Mil. L. Rev iii, v (1965).

[80] Winthrop, supm note 10, at 58 n.7, '67. Clode is worth a book, albeit not a complimentary one. Prolific and oftquoted, Clode was, at least during his lifetime, the undisputed authority on English military law. As a rough analogy, he may be called the British Winthrop. To do so, however, diminishes Winthrop. See Wiener, supm note 6, at 22 n.80. At this point, some readers may agree with Clode who dismissed as "a long digression" any project to trace the development of military codes in detail! Wiener, supm note 6, at 9.

[81] 2 Grose, supm note 77, at 85-106.

[82] Leslie, The Printed Articles *of* War *of 1544,* 7 J. of the Society for Army Historical Research 222 (1928). This article by Lieutenant Colonel Leslie reproduced in facsimile a few pages from the printed articles that Grose never saw.

[83] *Id.* Grose confused the issue by an apparent typographical error when he said that the articles were printed in 1524. 2 Grose, supra note 77, at 85.

[84] 1 Grose, supra note 77, at 115-20. These rules were entitled: Certain ordinances and statutes devised and signed by the king's majestie for a retinewe of speres or men of arms, to be chosen of gentlemen that be commen and extracte of noble blood. With a forme of their othe.

[85] *Id.* at 115.

such trustworthy young gentlemen needed fewer formal rules than did their unruly counterparts in the occasionally-formed army.

The pace quickened after Henry. The Renaissance had already shaken Europe. In England, too, it had been felt for some time. Sir Thomas More and Erasmus had exchanged ideas decades before; the Reformation had swept away medieval cobwebs in thinking about more than just religion; the New World beckoned. The middle of the sixteenth century was tempestuous.

The Renaissance was a heady time during which humans rediscovered their worth. This revival of the classical influence did not occur throughout Europe at the same time; it was felt more strongly in some places than in others. Beginning in Italy in the thirteenth century, it later spread throughout Europe ending—if it may be said to have had an end—in the sixteenth century. This rebirth was not limited to statues, painting, and poetry. Remember that da Vinci put drawings of weapons between his more well-known sketches. The art of war was profoundly affected by the Renaissance, as evidenced by the rise of modern armies and warfare.[86] Indeed, a recent writer said that the art of war "underwent a revolution'' between the end of the sixteenth century and the middle of the seventeenth.[87] "In Italy first arose the scientific treatise dedicated to the arts of war."[88] The *condottieri* of Italy began the modern theoretical study of warfare. They "were the medium through which the Renaissance, both as a classical and as a scientific movement, influenced the development of the art of war in Europe."[89]

There were a number of classical military works. Perhaps the best known was a fourth century Roman work, ***De Re** Militari* by Vegetius, first printed in Europe in 1473.[90] 'The Middle Ages had accepted such books as authoritative and had failed to improve upon them."[91] Gunpowder—the use of which was, obviously, not treated by the Greek and Roman classics—and the new spirit of intellectualism of the Renaissance required going beyond the likes of Vegetius.[92]

It is here that myth number two does its work. We have been asked to believe that Charles V (1500-1558), Holy Roman Emperor from 1519 to 1556, promulgated a great military legal code in 1532. That code, the *Carolina,* we have also been told, became the model that was admired and copied throughout Europe. The precise impact has been left untold,

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[86] Dupuy, *supra* note 46, at 582.
[87] J. Hale, The Art of War and Renaissance England 1 (1961).
[88] F. Taylor, The Art of War in Italy, 1494-1529, 157 (1921).
[89] *Id.* at 7.
[90] F. Vegetius, De Re Militari 1 (J. Clarke trans. 1944).
[91] Taylor, supra note 88, at 156.
[92] *Id.*

comfortly enshrouded and almost enshrined by the mists of time. Winthrop says that Charles V's *Carolina* was "celebrated."[93] After Winthrop, others who discuss the development of military law fall into step by also calling the *Carolina* "celebrated."[94] One soon wonders how many of these later writers have seen that code. The *Carolina* is not easy to find. The Library of Congress has copies in French, German, Latin, Polish, and Russian. Of the four versions that I have examined, two are written in German,[95] one is in Dutch,[96] and one is in French.[97] Fortunately, a German scholar in 1967 converted a German language *Carolina* into modern typeset. The original spelling and syntax were retained.[98] German would have posed no barrier to Winthrop; he was adept in that language. In fact, he translated the German *Militarstrafgesetzbuch* into English.[99] Nonetheless, there is no evidence that Winthrop saw or read the *Carolina*. It goes without saying that those who have written of the *Carolina* since Winthrop adopted his statement without further research.

Apparently, an English translation of the *Carolina* does not exist. Examination of the Radbruch edition'[100] reveals a comprehensive crimi-

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[93]Winthrop, supra note 10, at 18, '5.

[94]*See, e.g.*, F. Munson, Military Law 5 (1923). Munson was free with the word; he also said that Gustavus Adolphus's code was "celebrated;" W.B. Aycock & S.W. Wurfel, ***supra*** note 42, at 6. These authors list a number of codes as "celebrated;" and Rollman, ***Of*** Crimes, Courts-Martial *and* ***Punishment—a*** Short History *of* Military Justice, 2 A.F. JAG L. Rev. 212.213 (1969).

[95]G. Radbruch, Die Peinliche Gerichtsordnung Kaiser Karls V. von **1532** (Carolina) (Stuttgart 1967); H. Hofmann, Quellen zum Verfassungsorganismus des Heiligen Romischen Reiches Deutscher Nation, 1495-1815 (Darmstadt 1976).

[96]P. Pappaus, Corpus Juris Militaris (Amsterdam 1674).

[97]I gratefully acknowledge the assistance of Brigadier General and Professor José Luis Fernández-Flores, Director, General Auditor, Escuela de Estudios Juridicos del Ejercito, Madrid. A biography of this distinguished jurist and the text of his recent address of international law given at The Judge Advocate General's School may be found at **111 Mil.** L. Rev. **1** (1986). There are only two copies of the Carolina in Spain. Through the generosity and efforts of General Fernández-Flores, I was able to examine an early version of the Carolina written in the French language. Vogel, Code Criminel de L'Empereur Charles V (n.p. n.d.). There are military articles in the appendix to this Carolina. Unfortunately, the date of publication is unknown. It appears that the book was printed during the reign of King Louis **XV** of France (1710-1774) because the dedication refers to the then king's predecessor as the "Sun King," the well-known appellation of King Louis XIV (1638-1715). Vogel, supra this note, at iii. Vogel was the "Grand-Juge des Gardes-Suisses du Roi," the organization in which he served seems to have been a special household unit that had protected a number of earlier French monarchs. Captain William E. Scully, Jr., Office of the Staff Judge Advocate, 24th Infantry Division (Mechanized) and Fort Stewart, Fort Stewart, Georgia, deserves recognition for the difficult work that he did so well in translating the dedication, preface, and articles of this edition of the Carolina.

[98]Radbruch, *supra* note 95.

[99]W. Winthrop, Military Penal Code for the German Empire (1873).

[100]Radbruch, supra note 95. I am indebted to Staff Sergeant Ronald E. Wagner, Office of the Staff Judge Advocate, 24th Infantry Division (Mechanized) and Fort Stewart, Fort Stewart, Georgia, for his able assistance. His talent, enthusiasm, and diligence made a preliminary translation of the Carolina a reality.

nal code, not military articles of war. In fact, there seem to be no provisions which apply, expressly or by necessary implication, only to the military.'[101] The *Carolina,* then, appears to have been a penal code for the entire Holy Roman Empire rather than just for its armies. Of course, soldiers are citizens in uniform and commit crimes like ordinary citizens. To that extent, the *Carolina* would be as useful as any criminal code. But what about discipline? On that point the *Carolina* is silent. Could the Imperial armies have been better behaved than those that they fought? The ways of the world suggest that that could not have been so. Obviously, something is missing. Perhaps, like an English translation of the *Carolina,* that something never existed, no longer exists, or awaits discovery.

So much for myth number two. But what about number three? How original were the articles of war of Gustavus Adolphus? Thus far, we have sketched the development of military law through the first half of the sixteenth century. The truth about myth number three lies ahead in the story of military law on the European Continent and in England.

A full study of Continental usages and of their influence upon the British system awaits. It seems, however, that military legal procedures were more sophisticated in France than in Britain, at least by the sixteenth century.

> [T]he supreme direction of military operations was combined in the person of the *connetable* with absolute jurisdiction over criminal, civil, and administrative cases arising within the armed forces. The vesting of these diverse powers in one officer was the basis of the later composition of the tribunal which bore the name of the *connetable* . . . . In the fourteenth and fifteenth centuries the *connetable* was at the height of his glory . . . and took precedence over after the monarch himself.
>
> *Marechaur* are mentioned in the laws of the barbarians. Most authorities agree that under the Merouingians and Carolingians the *marechaur* were subordinate officers, concerned with the service of the royal stables and directly dependent on the *connetable.* Throughout this period they apparently possessed neither the right to command troops nor to dispense military justice.'[102]

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[101] Radbruch, *supra* note **95,** includes **219** articles. None are purely military. Pappaus, *supra* note **96,** repeats **33** of these in his Dutch military manual of **1674.**

[102] J. Mitchell, The Court of the Connetablie 6 **(1947).** At the time his **book** was published by Yale University Press, Dr. Mitchell was Instructor in History, Wellesley College.

> As the duties of the ***marechuux*** developed during the thirteenth and fourteenth centuries, they included more than the command of part of the army under the supreme direction of the ***connetuble.*** The ***marechaux*** also had disciplinary and administrative tasks and were responsible for the proper arrangement of camps, the maintenance of good administration of the combat units, the protection of the civil population from the excesses and depredations of the soldiers, of the judicial powers inherent in the above duties . . . .[103]

> The ***marechaux,*** due to the pressure of their military duties, began to delegate their power of discipline over the army to a ***lieutenant des marechaux,*** later called the ***prevot des marechaux.*** At the outset this officer simultaneously fulfilled the duties of policing the army and of presiding over the court of the ***marechuux,*** thus freeing the latter from all except strictly military work. Embodied in this officer are the origins of an organized military justice system. Though the ***lieutenant*** and the ***preuot*** were at first identical, they later separated and formed two distinct jurisdictions: the ***Connetable et Marechaussee***, under the direction of the ***lieutenant,*** and the ***justice*** prevotale, administered by the prevot, which was . . . more strictly military justice.[104]

Winthrop's treatise reflects little familiarity with the earlier French system. In England, too, commentators upon military matters were writing what they believed, heard, copied, and experienced, or all of these.[105] While almost constant wars were absorbing the other European powers, England, from the security of her island position, was comparatively unaffected."[106] This isolation "meant that she was forced to learn from foreigners, Italian, Spanish, and French."[107] There was much to learn.

Tudor armies may not have been particularly effective,[108] but it was not for lack of advice. Renaissance writers filled pages and their books filled the saddlebags of soldier-readers.[109] These were not law

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[103] *Id.* at 7. Recall the marshal of the English army mentioned in the Yorkshire eyre of 1218. Wiener, ***supm*** note 6, at 164-65.

[104] *Id.* at *8.*

[105] Webb, ***supra*** note 12, at 21 (quoting R. Barret, The Theorike and Practike of Moderne Warres 5 (London 1598)).

[106] "Hale, ***supm*** note 87, at 3.

[107] *Id.* at 36.

[108] C. Cruickshank, Elizabeth's Army 159 (2d ed. Oxford 1966).

[109] Spaulding, ***Early Military Books in the Folger Library,*** J. Amer. Mil. Hist. Foundation 93 (1937).

books. Instead they were encyclopedias of the military art that nearly always included some, and often much, guidance about disciplining the armies that the other chapters had created, wielded, and sustained. "Authors of Elizabethan military books covered every conceivable aspect of the sixteenth century art of war. Many of these men wrote complete textbooks, as useful to the commanding general as to a noncommissioned officer, as valuable to a muster-master as to a company clerk."[110]

But to say that these books were useful is not to say that they were actually used or that they played a role in the development of the art of war.

> It is almost impossible to determine the precise affect of Elizabethan military texts upon the selection of personnel, training, organization, arming, and tactics of the English army. First of all, it must be remembered that they present diverse, sometimes violently conflicting points of view. Secondly, they were published over a long period of time, during which Englishmen came into contact with the armies of the Spanish, Dutch, French, German, and Irish, and were strongly influenced by their way of doing things.
>
> But one thing is clear. They reflected the dramatic change which the Elizabethan army was undergoing and they no doubt helped to convince Englishmen that this change was not only inevitable, but good . . . .
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> . . . .
>
> Finally, they proved repositories of technical information which commissioned and noncommissioned officers, no matter how experienced, could not readily carry in their heads; and for the inexperienced who cared to use them, they provided a thorough education in every aspect of the art of war. One is therefore tempted to conclude that, over the years. Elizabethan military books were in part—perhaps in large part—responsible for a remarkable improvement in Elizabeth's fighting force."[111]

Whether authors praised and quoted the classics or asserted that experience was the better teacher, their books were read, copied, and criticized.[112] And if their deeds were as brave as their words, these Englishmen were courageous: "He therefore that judgeth or directeth against

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[110] Webb, *supm* note 12, at 169.

[111] *Id.* at 175-76.

[112] Webb, *Classical Histories and Elizabethan Soldiers, 200* Notes and **Queries** (New **Series 2)** 466 (1955). *See* also Webb, *supra* note 12, at 170.

experience, is not in deede a man, but a foole more ignorant than a beast."[113] Of course, not all experience was of value. Captain John Smythe explained the poor performance of the English expeditionary force to the Netherlands by saying that the "force had listened too carefully to irresponsible 'Low Country captains,' and in consequence that army had no proper regard for military law.""[114]

It was difficult to find the proper balance between those who urged the view that nothing save technology had changed since the Greeks had clashed with the Persians and those who believed that the only teacher was the sixteenth century battlefield.

> Some fervently believed that to be indoctrinated by principles of war was to be moulded in the form of a perfect soldier . . . . Few educated military men, however, embraced this notion. As a matter of fact, so numerous were those who embraced the opposite point of view and extolled the efficacy of training on the

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[113] G. Langsam, Martial Books and Tudor Verse 7 (1951). The words are those of Geoffrey Gates in his 1579 work, The Defence of Militarie Profession. Sir Clement Edmunds picked up the gauntlet.

> Reading and discovrse, are requisite to make a sovldier perfect in the Arte militarie, how great soeuer his knowledge may be, which long experience and much practise of Armes hath gayned . . . . I do not maruell that such soldiers, whose knowledge groweth only from experience and consisteth in the rules of their owne practise; are hardly perswaded, that history and speculatiue learning are of any vse in perfecting of their Arte . . . . [A] meere practicall knowledge cannot make a perfect soldier.

C. Edmunds, Observations Upon the Five First Bookes of Caesar's Commentaries 1 (London 1600). Edmunds wavered a few pages later so that he "may not seeme partiall in this controversie, but carrie an equall hand betweene two so necessarie yoakefellows." His heart, however, was with "learned knowledge." *Id.* at 7.

[114] J. Smythe, Certain Discourses Military xxxix (London 1590 J.R. Hale ed. 1964). Sir John Smythe's book

> was the most original and controversial of Tudor military books at the time of its appearance, and . . . [i]t was banned as subversive within a few days of its publication in 1590. . . . Prolix and repetitious in style, truculent and overbearing in tone, it was nevertheless the most original, practical, serious, and cultivated work yet written by an Englishman.

Hale, *Preface* to *id.* at v, xxxv.

Smythe is best known as a vigorous and persuasive advocate of the virtues of the long bow over firearms. Grose, obviously thinking of Smythe and that dispute, said:

> We learn, that an innovation in our national military discipline then took place towards the latter end of Queen Elizabeth, introduced by the officers who had served in the low countries; this, it appears, was disapproved of by many ancient commanders and soldiers, a circumstance extremely natural, since they were thereby reduced from the rank of masters or teachers, to that of scholars or learners, a degradation to which it requires great philosophy to submit.

2 Grose, *supra* note 77, at 268.

> battlefield that classicists always felt called upon to defend themselves against scoffers.[115]

There was little new here. "Renaissance veneration of all things Roman doubtless played a large part in the extensive plagiarism from the classics in English martial writings." There was "heavy borrowing from continental sources either directly or at second or third hand."[116] This borrowing was more zealous than scholarly. "The English writer in one volume travels over the whole ground of the art, filching and plagiarizing without scruple, and without acknowledgement.""[117]

Whom did the English writers copy? 'The bulk of the military literature of the sixteenth century is in the Italian language, and from a technical standpoint there is more value in Spanish and in French than in English."[118]

Many of the English writers, and the foreign writers that they unabashedly copied, were veterans.

> The men who wrote in the age of Elizabeth had all seen their service in Flanders and France, and were set on teaching their fellow-countrymen the Articles of War that had been developed by Spanish and Italian captains since the commencement of the great struggle between Charles V and Francis I.[119]

> [H]owever they might imitate foreign authors, the English writers were considerably behind the times, as is proved also by a comparison of the dates of originals and translations; a book might be in continual use on the continent for a quarter of a century and more, before it was thought necessary to "do it into English." It was not till their fighting days were over that men found time and inclination to write for the instruction of their countrymen; thus while the continentals were treating of things as they actually were, Englishmen were treating of things as they had been years before.[120]

Whatever were their shortcomings when compared to their Continental counterparts, these Englishmen were enthusiastic.

> Every English Army was plagued by disciplinary problems . . . . [T]he authors of military textbooks harped on the discipline that had made the steady Roman soldiery the masters of

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[115] Webb, *supra* note 113, 466-67.
[116] Langsam, supra note 114, at 4.
[117] Cockle, supra note 71, at xiv.
[118] Spaulding, supra note 110, at 98.
[119] Oman, *Preface* to M. Cockle, *supra* note 71, at vii.
[120] Cockle, supra note 71, at xv.

> the world; they tried to produce a sense of shame by pointing out how much better behaved and obedient was the Turkish soldier than his Christian adversary. To help the provost and his men keep order, therefore, codes of martial law were drawn up from time to time and posted throughout the army, and as the sixteenth century wore on and lessons were learned from the codes of other nations (especially the Spaniards) these military laws came to cover every activity that could impede an army's efficiency or morale.[121]

The foregoing was early twentieth century speculation about what drove the English to write. Here is what Digges said prompted his writing of *Stratioticos* in 1579:

> [B]y experience euen in these dayes seene, what extreame disorders growe in those Armyes, where *Militare Luwes,* and ***Ordinances,*** haue been neglected .... In lyke sort, perusing the Aintient Romane Discipline of the Warres, their exquisite order of Trayning the Soldiorie ... together with their divine Lawes to keepe their Armies in obedience. Finding also by conferring the Romane Victories, how afterwards by the dissolute disorder of Emperours this Discipline was corrupted. ... I have therefore thought good, according to the best obseruations of oure Moderne Warres, and Seruice of this Time, to sette downe ... certayne Militare Lawes to be obserued in every well governed Armie .... [A]s heereafter more particularly I shall have cause to declare, hauing in this discourse no farther relyed upon the Discipline of the Antiquitie, than by Reason, Example, and Authoritie of the most famous Generals and Souldyoures of thys Age in Christendome, I have founde necessarie to dissent from suche brute customes as the Barbarous Gothes, &c. lefte us, and oure delicious idle ignoraunce hathe still nourished among us, embracing all such Moderne Ordinances... as are not quite repugnante to all good Discipline and by no meanes to bee allowed or tollerated.[122]

Digges spoke with authority:

> [Digges] observed the military discipline of the troops under the command of the Earl of Leicester, coming to the conclusion that the army which Elizabeth had sent to the Low Countries in the late 1580's was probably the most unbridled and disorganized force ever mustered by the English nation.

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[121] Hale, *supm* note 87, at *58.*
[122] Digges, *supra* note 12, at n.p.

> His letters to Burghley and Walsingham are filled with recommendations for the improvement of military discipline.[123]

How disorganized those armies were may be difficult to imagine today. It must have been frustrating, and occasionally dangerous, to have been a leader of such casual bands:

> The military forces of the 16th century were not remarkable for the excellence of their discipline. Even the Spanish army, in many respects the best in Europe, sometimes went on strike. . . . This sort of original indiscipline was not found among Elizabeth's troops. They showed their opposition to authority in a less orderly fashion.[124]

Books such as *Stratioticos* are useful to us because they contain commentary and articles of war. The codes, presumably, are the efforts of the writers like Digges to improve upon those that were being used in the field. In addition to these codes, which may have been copied from field codes or idealized versions or both, the actual articles of war of some of the better known commanders (*e.g.*, Essex)[125] were printed from time to time as separate tracts or as part of pamphlets extolling the prowess and exploits of the commander. It is to these books and the codes they included that we should turn to test the originality or otherwise of Gustavus Adolphus.

IX. ANALYSIS OF THE ORIGIN OF SELECTED ARTICLES FROM THE CODE OF GUSTAVUS ADOLPHUS

There is little need to analyze every line of Gustavus Adolphus's articles of war and to compare each provision with all known previous codes. Instead, this article will make its point by examining those Swedish articles which have been heralded as marking the originality of Gustavus Adolphus's code. If these can be shown to have been preceded by other articles, even if from different codes, that are substantially similar to the Swedish articles, we may reasonably conclude that Gustavus Adolphus did not invent his.

Before that story is told, another needs telling. The essence is that ignorance of the truth about Gustavus Adolphus's articles of war may be limited to lawyers looking at history. At least one historian said other-

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[123] Webb, *supra* note 12, at 24.

[124] Cruickshank, supra note 109, at 159.

[125] Essex was Robert Devereaux, 2d Earl of Essex, (1566-1601). A favorite of Elizabeth I, his intrigues brought him to the scaffold at the age of 35. "Essex was everywhere regarded as valiant, and, in spite of his youth, fatherly toward his soldiers." Webb, supra note 12, at 63.

wise. Michael Roberts' exhaustive, two-volume work on Gustavus Adolphus is the best of the biographies about the Swedish king. Some of **Dr.** Roberts' comments warrant being included here:

> From the beginning, the armies of Gustav Adolf have enjoyed in Protestant historiography a reputation for good conduct. To some extent the reputation is deserved, But the Swedish armies were in reality by no means *so* uniformly well-behaved as has been alleged, nor was Gustav Adolf himself *so* notable an innovator in the sphere of military discipline as has been supposed.
>
> The Articles of War which Axel Oxenstierna read to the army assembled on Arsta Meadow in 1621 (and which every regimental commander read to his troops once a month thereafter) were indeed in some respects new; but they were based on familiar continental models, and they had had many forerunners in Sweden. Their origins may be sought in the regulations made by mediaeval Swedish rulers for the conduct of their personal bodyguards; then in the code of discipline for the navy put out by Gustav Vasa in **1535;** and in the same monarch's Articles of War of 1545; and in similar Articles issued by his successors, and notably by **Erik** XIV. They borrow something from the code of Ferdinand of Hungary (1526), something from the famous code of Maximilian II (1570), something from the code of Maurice. The Articles of 1621 were prepared in draft by Gustav Adolf himself, and subsequently revised by Axel Oxenstierna; and the presence of numerous transcripts of continental codes in the archives at **Stockholm** makes it clear that they took care to familiarize themselves with the systems in use **abroad.**[126]

Roberts noted differences between Gustavus Adolphus's articles of war and earlier codes:

> [I]n certain important respects the articles of 1621 differ from codes of military law of that age. They were, in the first place, designed primarily for a national conscript army. They laid down the soldier's duties . . . , and the punishment for neglect of those duties; but they entirely lacked provisions defining the obligations of the commander to his soldiers. Gustav Adolf's Articles of War were orders: they were not the terms of an agreement between contracting parties. They made no provision, as was usual in the case of the Landknechts, for N.C.O.'s to be associated as assessors with the judges at a court-martial.

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[126] 2 M. Roberts, **Gustavus Adolphus** 240 (London 3d *ed.* 1968)

. . . .

> Apart from these aspects, the Articles did not differ from other Articles.[127]

For lawyers, of course, that last statement is a conclusion that requires proof. The following pages provide it.

It has been said that Gustavus Adolphus's religious fervor caused him to be the first to commission chaplains and that his zeal is the reason that his code begins with articles about religion.[128] Gustavus Adolphus's religious ardor and his desire to expand Protestantism in Europe may well explain the number (sixteen) of these religious provisions. He was not the first, however, to begin his military code with articles that protected and forced the exercise of religion. Furthermore, "[t]here has been a disposition, both among contemporaries and among historians to lay stress upon the religious provisions of the code; but it is easy to exaggerate the singularity of the Swedish armies in this respect."[129]

Matthew Sutcliffe attempted to temper the classics versus experience controversy in 1593 with his book, ***The Practice, Proceedings, and Lawes of Armes.***[130] It is unfortunate that ***Lawes of Armes*** is so little

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[127] 2 *id.* at 240-41.

[128] Cooper, supra note 5, at 132.

[129] 2 Roberts, supra note 128, at 241.

[130] M. Sutcliffe, The Practice, Proceedings, and Lawes of Armes (London 1593) (hereinafter cited as Lawes of Armes). Matthew Sutcliffe, (1550-1629), was Dean of Exeter for 40 years. He obtained an M.A. from Trinity College, Cambridge and an LL.D. (and possibly a D.D. as well) in 1581. He encouraged Captain John Smith to explore and settle parte of America and he was a member of the Council for Virginia (1606-07) and New England (1620). Professor Henry J. Webb, supra notes 12 and 113, a noted authority on the Elizabethan era, says that 'The Dictionary of National Biography has a strange omission in its account of Dr. Matthew Sutcliffe." Where, asks Webb, is evidence of experiences that could have prompted Sutcliffe to have written a comprehensive 300 page military book? Webb says that the answer lies in Sutcliffe's dedication of Lawes of Armes. Sutcliffe notes his experiences in France, Italy, Flanders, and Portugal. According to Webb, this service, which would not have been continuous, would have occurred between 1585 and 1592, "a period long enough for an intelligent and observing man to learn a great deal . . . [and] he is listed among the 'Officers serving in the Low Countries' in 1587-1588 as 'Judge Martial'." Webb, *Dr.* Matthew Sutcliffe, 23, 1 Philological Quarterly 85 (1944). Lawes of Armes is dedicated to Essex, *supra* note 127.

Sutcliffe was appointed Royal Chaplain to Elizabeth I and James I but was arrested in 1621 for opposition to the marriage between Charles I and the Spanish princess. He wrote 23 books in addition to Lawes of Armes. He was a cleric whose views—at least his religious ideas-did not appeal to all. Unrestrained criticism was normal for tracts of the time. In fact, it is that ebulence that makes those writings seem so alive after centuries. Sutcliffe suffered at the hands of one unknown critic whose pamphlet proclaimed that it was: "A Detection of Divers Notable Untruthes, Contradictions, Corruptions, and Falsifications." Sutcliffe probably struck first. On the second page, we are told that the pamphleteer will "omit [Sutcliffe's]bitter invectives, his odious accusations." E.O., A Detection of Divers Notable Untruthes Gathered Out of Mr. Sutcliffes Newe Challenge n.p. (St. Omer[?] 1602). The initials "E.O." were probably used as a play on Sutcliffe's known anonym "O.E."

known today. Usually seen only as an entry in bibliographies of early military books, it is rarely cited.[131] It makes lively reading. More importantly, it may have had greater impact upon the development of military law than has been recognized. In the preface to his classic bibliography, Cockle said:

> [W]hile English writers were borrowing from the Spaniards, Italians, French, and Germans . . . not a single English military book was thought of sufficient importance to be translated into a foreign tongue. The existence, even, of the English books seems to have been overlooked. This was due, no doubt, in great part, not to an entire lack of merit in our writers, but to our isolated position, and also to English being a tongue almost unknown outside its own coasts. But these difficulties were not insuperable; indeed, we find that there was a work on military jurisprudence, Sutcliffes's *[Lawes of Armes],* which succeeded in overcoming them, and was studied in the original by the learned, at least, among foreigners.[132]

In *Lawes of Armes,* which was critical of contemporary English military organization,[133] Sutcliffe noted that sometimes soldiers had "lived almost without exercise of Religion . . . . If there were to every two Regiments one or two Ministers allowed, it were a very commendable course. The Papists have their priests in their armes."[134] Army chaplains today may join in Sutcliffe's lament that "[t]he name of Religion, I know, will seeme strange to most of our lustie yonge souldiers."[135] Thirty years before *Lawes of Armes* was published, English soldiers at LeHavre "had to get the chaplains' permission before they could marry."[136] Sutcliffe must have convinced someone because by the turn of the seventeenth century, there were chaplains with English troops. Problems remained,

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[131] Wiener, of course, knows of and cites Sutcliffe. See Wiener, supra note 6, at 166. At the suggestion of the author, Cadet John A. Dubé, *ex* Class of 1983, USMA, in partial fulfillment of requirements of an elective course in law, wrote a short paper, The Influence of Matthew Sutcliffe on the Development of Military Law (May 1983) (unpublished manuscript available in author's files). That paper is the first work of which I am aware that notes the probable impact of Sutcliffe upon Gustavus Adolphus and, accordingly, upon the development of military law. An explanation for the sparsity of references to Lawes of Armes is the book's scarcity. Only a small number of copies exist and those are locked away in the rare book rooms of a few libraries. Those who wish to read Lawes of Armes and similar works will find it easier to obtain them in microfilm. Lawes of Armes may be found in the series entitled: Early English Books 1475-1600, University Microfilms International, Ann Arbor, Michigan. Many large libraries have this series and, if not, it may be ordered through the Interlibrary Loan System.

[132] Cockle, supm note 71, at xv-xvi.

[133] A. Bruce, A Bibliography of British Military History 70 (London 1981).

[134] Sutcliffe, *supra* note 132, at 308.

[135] *Id.* at 305.

[136] Cruickshank, supra note 109, at 160.

which is more than some of the chaplains did. "In 1600 there were supposed to be fourteen preachers allowed to the troops in Ireland—considerably fewer than one a company. Of these, three were absent in England and the rest were said to be useless."[137]

It seems then that Gustavus Adolphus was not the first to authorize ministers to accompany the troops. He was certainly not the first to begin a code with articles on religion. Styward,[138] the Earl of Leicester,[139] Garrard and Hitchcock,[140] Sutcliffe,[141] and Essex,[142] all began their regulations with similar religious provisions. In fact, the code of Richard 11, which is printed before the articles of Gustavus Adolphus in Winthrop's appendices,[143] begins with a stern call for religious order.

We have also been told that Gustavus Adolphus was the first to punish commanders who withheld subsistence from soldiers.[144] Sutcliffe[145] and Essex,[146] at least, made it clear that commanders were known to have enriched themselves at the expense of their troops.

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[137] *Id.* at 59.

[138] T. Styward, The Pathwaie to Martiall Discipline 48 (London 1581). "By the word "discipline" was formerly understood training or skill in military affairs generally; military skill and experience; the art of war; drill." Cockle, *supra* note 71, at xix (1900). *See also* Wiener, *The Militia Clause of the Constitution,* 54 Harv. L. Rev. 181, at 214 n.189 (1940). According to J.R. Hale, who, in 1964, edited Certain Discourses Military, a 1590 work by Sir John Smythe, "[o]nly Thomas Styward had attempted anything like a comprehensive survey of military techniques, and he was an obscure and uninfluential man." Smythe, *supra* note 115, at xxxvi. Sometimes the experts disagree:

> Thomas Styward . . . . wrote only one book, but [it was] a book whose popularity was attested to by the three editions in five years—1581, 1582, 1585. It was entitled The Pathwaie to Martiall Discipline . . . . Therefore, besides drawing upon his own experience, he had gone to the works and opinions of the best soldiers, Italian, German, Swiss, French, and English, to assemble his collections of military laws and constitutions.

Webb, *supra* note, at 42.

[139] Earl of Leicester, *Luwes and Ordinances, set downe by Robert Earle of Leycester, the Queenes Muiesties Lieutenant and Captaine General of her armies and forces in the Lowe Countries* 2-3 (London 1586). Leycester was Robert Dudley, 1st Earl of Leicester, (1532-1588). Elizabeth I had a long flirtation with Leicester (the spelling 'Zeycester" is from the original articles of war). Leicester's second wife was the mother of Essex, *supm* note 127. Digges, *supra* note 12, dedicated Stratioticos to Leicester. Leicester's reputation is less than splendid. "He neglected to see that his men were paid on time . . . [but] he apparently had personal courage and was more interested in the welfare of his men than most of his detractors realized. But he was certainly not a military leader of whom Englishmen could be proud." Webb, *supra* note 12, at 65.

[140] W. Garrard & R. Hitchcock, The Arte of Warre 36-37 (London 1591).

[141] Sutcliffe, *supra* note 132, at 304-09.

[142] Essex, *Lawes and Orders of Warre, established for the good conduct of the service in Ireland* 2-3 (n.p., 1599).

[143] Winthrop, *supra* note 10, at 904, *1412.

[144] Cooper, *supra* note 5, at 132.

[145] Sutcliffe, *supra* note 132, at 316, 319.

[146] Essex, *supra* note 144, at 7.

At this point, it is appropriate to sketch contemporary army structure. 'The core of English military organization . . . was the company or band of 150 men, led by a captain. Armies were thought of in terms of companies, trained by companies, paid by companies."[147] The captains were colorful and sometimes courageous; more often, they were simply corrupt.

> The last quarter of the sixteenth century saw so many corrupt and incompetent captains that numerous dramas, poems, and prose pieces were loaded with tales of their misconduct. Their crimes ranged from petty thievery to mass murder. Immorality, cowardice, absenteeism, disgraceful neglect of men and provisions, disregard for even a modicum of military discipline, ignorance of training procedures and tactics—these were but some of their faults, so that the name of captain became odious to soldier and citizen alike.
>
> . . . .
>
> Apparently, most captains went to the wars to line their purses.[148]

> It was of course in the captain's interest to have on paper the biggest possible company, and to keep it physically as small as he dared, so that he might pocket the pay of the missing ranks. In 1585, for example, it was reported from the Low Countries that although the companies there were normally 150 strong each captain had on average no more than eighty men.[149]

Sutcliffe noted that the Romans had had similar problems and had dealt with them severely. He asked:

> If then the Romanes when these offenses were yet new, and rare, for repressing them used great vigilence and severity: howe much more ought Princes use justice, and severity herein, when scarce any punishment, unless it be very peremptory, can restein mens griedy and insatiable desires: the principall caise of the neglect of military discipline proceedeth from fraude, negligence, and insufficiency of Officers. He therefore that desireth to bring things into order, must begin with reformation of Officers, who both first brought in, and since have continued many disorders, in the proceedings and practice of armes.[150]

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[147]Webb, *supra* **note 12,** at **57-58.**
[148]*Id.* at **65-66.**
[149]Cruickshank, *supra* **note** 109, **at 54.**
[150]Sutcliffe, *supra* **note 132,** at **336.**

That Gustavus Adolphus valued the law should not be doubted. We have been told that he carried a copy of *De Juri Belli* by Grotius in his pocket.[151] It is true that the Swedish articles "encouraged discipline by prohibiting plunder, abuse of '. . . churches, colledges, Schools or Hospitals.'"[152] Nonetheless, the earlier works were not silent in this regard. The Garrard and Hitchcock code prohibited the desecration of churches,[153] and all earlier codes made punishable crimes against defenseless persons.[154]

Decades before Grotius wrote, there were sophisticated and well known works on international law. One of the first, in 1563, was Pierino Belli's *De Re Militari et Bello Tracticus*.[155] Primarily a book about the law of war, Belli's treatise also included ninety articles respecting military crimes and punishments.[156] In his introduction to the 1936 reprint of the work, Dr. Arrigo Cavaglieri noted that Belli had served in an important military legal post under the Holy Roman Emperor Charles V.[157] Replete with classical and contemporary examples, Belli's book made it clear that sixteenth century minds had put much thought into the law of war. More importantly, Belli and others did not write in a vacuum; their books were read:

> Belli's treatise received ample praise from other illustrious jurists of the time. Tiraboschi wrote that 'Belli was the first to apply the science of laws at any length to the usage of war.' Possevino and Menochio likewise spoke of the work as one of great value, as being a most diligent and profound commentary *de re militari*, to be read attentively by anyone who must concern himself with matters relating to war.[158]

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[151] Cooper, *supra* note 5, at 130-31 n.4.
[152] *Id.* at 132.
[153] Garrard & Hitchcock, *supra* note 142, at 36.
[154] *See, e.g.*, Leicester, supra note 141, at 3.
[155] 2 P. Belli, De Re Militari et Bello Tracticus (n.p. 1563 & photo. reprint 1936).
[156] *Id.* at 219-46.
[157] *Id.* at 1*a*.
[158] *Id.* at 19*a*. Barnaby Riche surely read Belli: "Rich's point of view is very similar to that expressed by early writers on the law of war. See the works of Franciscus de Victoria, Pierino Belli, Balthazar Ayala, Alberico Gentili." Webb, *supra* note 12, at 185n.41. Within 20 years of the publication of Belli's book, a similar work appeared. Balthazar Ayala, "Juriconsult and Judge Advocate General of the Royal Army in the Low Countries," published his treatise on international law. B. Ayala, Three Books on the Law of War and on the Duties Connected with War and on Military Discipline (n.p. 1582 & photo. reprint Oxford 1912). Winthrop cited Ayala. Winthrop, *supra* note 10, at 45 n.2, '48. The introduction to the 1912 reprint and translation of Ayala's book had an interesting comment on the military lawyer on the Continent during the sixteenth century:

> In 1553, Charles [V, Holy Roman Emperor] created for the military forces of the Netherlands two great officers, the auditor and captain of justice. The character of the former office may be learnt from the commission of ita first

The article that proscribes the "Inchanting of Armes," that is, the practice of putting spells upon armor or weapons to protect the user from harm, does seem, however, to be unique to the code of Gustavus Adolphus.[159] Such sorcery was probably anathema to the deeply religious, Christian king.

The most glaring error made by an exponent of Gustavus Adolphus was the claim that the Swedish code contained the first forerunner of Article 134 of the UCMJ.[160] Commonly known as the general article, Article 134 punishes, among other offenses, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Even if one ignores Colonel Brand's translation of early Roman code provisions that sound startlingly like Article 134,[161] one cannot avoid seeing the last of the punitive articles mirrored in the codes of the Renaissance in England. For instance, Article 37 of the Lawes and Orders of Warre issued in 1599 by Essex for use in Ireland, provided that "[a]ll other faults, disorders and offences that are not mentioned in these articles shalbe

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> holder, Doctor Stratius, in which it is said that: 'In order that we may be the better able to keep our said army in good discipline and justice, we have found it necessary to commission some scholarly person (*personnage de lettres*), learned and experienced in the matter of justice, to be with our captain-general of our said army, and under him to execute the office of auditor of the camp and give him good advice and counsel in what shall concern justice . . . .' Thus the auditor, as military judge and judicial adviser of the chief of the army, held a position *similar* to that of the English judge-advocate-general (identification of Charles V added).

Westlake, *Introduction* to 1 *id.* at iii. The editor above probably referred to the twentieth century English judge advocate general. The description would also fit the position held by Matthew Sutcliffe in the Low Countries in the 1580s. Sutcliffe, *supm* note 132. Once established, judge advocates became indispensable. The Duke of Wellington said (or bemoaned): "I find it scarcely possible to get on without some legal person in the situation of Judge Advocate." Letter from Duke of Wellington to the Earl of Bathurst (Jun. 2, 1815) *quoted in* 5 The Oxford English Dictionary 617 (Oxford 1933 & reprint 1970).

Riche and Digges, *supm* note 12, were not the only ones to loathe lawyers. The military has often seen the legal profession as more evil than necessary. Washington Irving chronicled a story of how a commander defeated an officious notary.

> The once bustling and self-sufficient man of the law was drawn forth from his dungeon more dead than alive. All his flippancy and conceit had evaporated; his hair, it is said, had nearly turned grey with affright, and he had a downcast, dogged look, as if he still felt the halter around his neck.
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> The old governor stuck his one arm akimbo and for a moment surveyed him with an iron smile. 'Wenceforth, my friend," said he, "moderate your zeal in hurrying others to the gallows; be not too certain of your safety, even though you should have the law on your side, *and above all take care how you play off your schoolcraft another time upon an old soldier."*

W. Irving, Tales of the Alhambra 233 (1978) (1st ed. New York 1852), (emphasis added). One can almost hear the cheering.

[159] Winthrop, *supm* note 10, at 907, *1416.
[160] Cooper, *supm* note 5 at, interestingly, 134.
[161] Brand, *supra* note 70, at 183 n.11.

punished according to the Customes and Lawes of Warres."[162] Interestingly, yet logically, Essex's Article 37 was, as is Article 134 of the UCMJ, the last of the punitive articles in the code. Styward[163] and Leicester's[164] codes had similar provisions.

As with Gustavus Adolphus's articles, while the earlier articles of war were severe, not all crimes were punishable by death. One might receive "cruel punishment," simply be "punished," lose a "moneths pay," or be imprisoned for an unspecified period.[165] Sutcliffe said of one article: 'The penaltie is arbitrarie, and may be more or lesse, according to the qualities of the offense. Yet in avoyding the excesse, we must take heede that we runne not into defect, and so for want of warning be taken unprovided."[166]

It has been said that the UCMJ "even parallels Gustavus' concern with dueling" by forbidding the practice.[167] Again, Gustavus Adolphus was not the first to forbid dueling. Sutcliffe's code prohibited dueling and challenges. He explained the provision by saying that, "The Romanes contended among themselves rather who should kill most enemies, than who could overcome most of their fellows. Those that stroke their fellows with their sword died for it."[168] Sutcliffe said that the problem was a common one and should be strictly enforced. He added that, "In experience wee finde that these . . . common quarrelers prove not most resolute souldiers."[169] He closed by noting that the Spanish had a similar provision,[170]

Gustavus Adolphus seems to have made genuine and original progress by improving procedures for determining guilt or innocence and in determining an appropriate punishment. He established on-call regimental courts-martial and a permanent general court-martial.'" Courts-martial were not new, yet Gustavus Adolphus's dual system was, so far as is known now, a noticeable step forward from the presumably more arbitrary methods that had been used before. Earlier codes were not silent in this area, but provided less detail. Sutcliffe, for example, simply said:

> That the auctours of disorders may be detected and punishments awarded accordingly, it shalbe lawfull for the judge Mar-

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[162] Essex, supra note 144, at 10.
[163] Styward, supra note 140, at 64.
[164] Leicester, supra note 141, at 10.
[165] *See, e.g.*, Sutcliffe, supra note 132, at 317
[166] *Id.* at 325.
[167] Cooper, *supra* note 5, at 135.
[168] Sutcliffe, supra note 132, at 325-26.
[169] *Id.* at 326.
[170] *Id.*
[171] Winthrop, *supra* note 10, at 915, '1428.

> shall, or others that have commission from the Generall, or lord Martiall to do justice, to enquire of the auctours, and circumstances of offences committed, by the others of such, and so many as they think convenient, and shal further use all meanes for examination, and triall of persons accused, dilated, suspected, or defamed, . . . All causes and controversies arising betweene Captaines and souldiers or others within the campe, or townes of garrison, shalbe heard and discussed summarily, and execution done according to military lawes without appeale or relation, unless greatness of the cause, or other circumstance require stay, or deliberation.[172]

Sutcliffe made clear when analyzing this article what the modern reader might suspect: **"all** meanes for examination" referred to the "racke or other paine."[173]

Who determined guilt or innocence and who determined the sentence in Sutcliffe's model code? He tells us in ***Lawes of Armes:***

> The administration of justice belongeth to the Generall, and lord Marshall, or those to whom they shall give authoritie; where there is no superior commander, to Captaines joining together, as is evident by our practice, and also by the examples of the Greeks returning from the voyage with Cyrus, which appointed certain Captaines judges, and gave them authoritie to determine of matters, and to punish offenders.[174]

By "all causes," Sutcliffe meant: 'Whether the causes arise of specialties, or other contract, or act, if the parties be in camp or garrison, they are there to be heard and determined."[175] In other words, Sutcliffe's code provided for jurisdiction over criminal and civil matters as did the later articles of Gustavus Adolphus. One commentator has asserted that the same is no longer true of the UCMJ.[176] That is technically correct to the extent that courts-martial are criminal trials and do not decide civil matters. Nonetheless, Articles 138[177] and 139[178] do provide remedies for non-

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[172] Sutcliffe, supra note 132, at 339.
[173] *Id.* at 340.
[174] *Id.* at 341.
[175] *Id.*
[176] Cooper, *supra* note 5, at 136.
[177] "UCMJ *art.* 138. *See* also Dep't of Army Reg. No. 27-14, Complaints Under Article 138, UCMJ, (1Feb. 1979). Art. 138, Complaint of Wrongs, provides that:

> Any member of the **armed** forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer who shall forward the complaint to the officer exercising general courtmartial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take

criminal disputes. Article 138 permits soldiers to request redress of grievances against their commanders and Article 139 permits any person to claim and collect damages from the pay of a military wrongdoer through the perpetrator's commander.[179]

Providing for appeal from courts-martial was a salutary feature of Gustavus Adolphus's code, but it was not novel.[180] In a provision dealing with special procedures "iustice within the retinue of thardina[n]ce" (*i.e.*, the artillery, ordnance, and trains), the articles of war of Henry VIII stated:

> Always provyded yf any man fynde hym selfe greued after any fynall sentence, that he be at his appele afore the marshall at all seasons, and for all causes made betwene any of them, and any other person of the army, that than they or any of they abyde the iudgement of the marshal1 and his court.[181]

A final claim of material innovation by Gustavus Adolphus was that "Gustavus's code provided that every regimental commander read the

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proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

[178] UCMJ art. 139. *See also* Dep't of Army Reg. 27-20, Claims, Chap. 9 (18 Sept. 1970) (C18, 15 June 1979). Art. 139, Redress of Injuries to Property, provides that:

> (a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has the power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved. If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

[179] These useful and used provisions are not vestigial wings of early codes. At the 24th Infantry Division (Mechanized) and Fort Stewart, Georgia, and, no doubt, at other Army posts, trial counsel assertively seek potential art. 139 claims from military police reports in order to ensure that victims are compensated. Thugs should pay for their wrongs, not taxpayers.

[180] Gustavus Adolphus's Articles of War art. 151, *reprinted in* Winthrop, *supra* note 10, at 917, '1430.

[181] Leslie, *supra* note 82, at 235.

Articles of War to the troops once a month while today provisions of the Uniform Code of Military Justice must be explained to soldiers."[182] That statement is correct, but the practice did not originate with Gustavus Adolphus.

Styward urged that an oath be administered after the articles of war had been read to the assembled soldiers. The soldiers were to be told "in this wise, or the like wordes, to the same end and purpose, speaking unto the whole companie, and saieng. My brethren and friends that are heere present, ye have heare heard the articles of the Queene our sovereigne, conteining the chief & principal points of our rights and lawes of the field."[183]

The Lawes and Ordinances of the Earle of Leycester, used in the Dutch Wars in 1586 were "Meete and fit to be observed by all such as shall serve her Majestie under him in the said Countries, and therefore to be published and notified to the whole Armie."[184]

Even earlier, in 1513, King Henry VIII's articles of war provided that:

> And to the intent they have no cause to excuse them of their offences by pretence of ignoraunce of the sayd ordynaunces, his highnes hath ouer and aboue the open proclamation of the sayd statutes, coman[d]ed and ordeyned by way of imprint, diuers and many seuerall bokes, conteynyng the same statutes, to be made and delyuered unto the capitaynes of his hoste, chargyng them, as they woll avoyde his great displeasure, to cause the same twyse or ones at the least in euery weke holly to be redde in the presence of theyr retynue.[185]

Sutcliffe tells us that the ancient Romans and the Spanish in the Low Countries also announced their laws so that no soldier could plead ignorance.'"

One of the most significant improvements of Gustavus Adolphus's code over earlier codes has rarely been noticed. Winthrop, of course, overlooked few points of law. He noted that, "The code of Gustavus Adolphus makes punishable, as a specific military offence, the giving of an unlawful command. See his *Arts*. 27 and 46, and compare his *Art*. 45, in Appendix."[187] An imaginative trial counsel could probably allege such an offense under the UCMJ today. No punitive article, however, ex-

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[182] Cooper, *supra* note 5, at 136.
[183] Styward, *supra* note 140, at articles 2-6, n.p.
[184] Leicester, *supra* note 141, at 1.
[185] Leslie, *supra* note 82, at 240.
[186] Sutcliffe, *supra* note 132, at 303. *See also* Garrard & Hitchcock, *supm* note 156, at 50.
[187] Winthrop, *supra* note 10, at 575 n.26, *888.

pressly prohibits giving an unlawful command. Perhaps that void deserves the consideration of those who may plan revision of the UCMJ.

X. GUSTAVUS ADOLPHUS IN PERSPECTIVE

The preceding analysis places the military code of Gustavus Adolphus in perspective. The originality of his contributions can now be viewed in relation to what codes existed before and after his articles of war. His code differs in fewer important respects from prior articles of war than has been believed. That resemblance among codes permits the reasonable inference to be drawn that each followed the other in more than just time. Gustavus Adolphus's code was not the beginning of modern articles of war. It was but one of a succession of such codes, each relying heavily on those that had been used before. It was an improvement over previous codes, but it was more of a refinement rather than a dramatic departure.

Some believe that Gustavus Adolphus was the father of modern military justice.[188] They assert that the value of his code was that it was quickly copied by the British after its publication in London in 1639.[189] One writer speculated that English, Irish, and Scottish officers and soldiers who fought for Gustavus Adolphus brought these hitherto unknown articles to England.[190] Is it not more likely, given the comparison with earlier codes, that Gustavus Adolphus recognized the worth of existing codes and modified them to suit his purposes? It is illogical to think that he alone had the need for such a code and single-handedly drafted his articles of war.

Where did he get the earlier codes? As noted at the beginning, Gustavus Adolphus understood several languages. He studied classic and contemporary military leaders, including Maurice of Nassau. The Renaissance had waned by the time that Gustavus Adolphus issued his famous code. In addition, his religious zeal may mark him as more a product of the Reformation than the Renaissance. It is clear, however, that he and many other military leaders, soldiers, and writers profited from the virtual cascade of books that were written during the sixteenth century.

Gustavus Adolphus could have done no less than Digges. The 1579 edition of *Stratioticos* was revised and enlarged in 1590:

> The new edition of Stratioticos had a slightly different title from the first, being called a "Warlike Treatise" instead of a "Military Treatise," and contained the laws and ordinances is-

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[188] Cooper, *supra* note 5, at 131.
[189] *Id.* at 133.
[190] *Id.*

> sued by Leicester in the Low Countries. These laws, standing as they did side by side with those "published and practiced among the Spaniards" and those issued by the Prince de Conde, indicate Leicester's indebtedness to the Spanish and French for the discipline which he had attempted to establish in his army. They all, of course, bear a marked resemblance to Roman martial laws.[191]

There is evidence that Gustavus Adolphus borrowed some aspects of his disciplinary system directly from the Romans. Turner, in his 1683 work, discussed military punishments, including running the gauntlet. Turner said that, "Gustavus Adolphus, first began it, in imitation belike of the custome the Roman Centurions had to whip their souldiers."[192] Running the gauntlet "was a form of punishment much used in the Swedish and German armies, and copied from them by the English."[193]

There is another, telling explanation of the true origin of Gustavus Adolphus's code. One writer said that the large number of foreign officers in the Swedish army later spread the Swedish articles because they were *so* practical and just.[194] No doubt they did. "Many Scottish and English soldiers served with Gustavus Adolphus, and his military system was well-known from drill books like Barriffe's and campaign narratives like that of Robert Monro, who served with 'the invincible King of Sweden, during his Majesty's lifetime.' "[195] Indeed, one writer asserted that "the British (contributed) 6 generals, 30 colonels, 51 lieutenant-colonels, and 10,000 men (these men were mostly Scotch)" to the Swedish cause.[196]

It may also be that the officers and soldiers who served with him were responsible for giving much of Gustavus Adolphus's code to him rather than solely the reverse, as has been believed. Just as it seems reasonable to believe that Gustavus Adolphus was aware of military treatises and that he adopted and modified what he found useful, it also seems reasonable to conclude that his foreign officers brought him manuals of military art. Furthermore, because he may have been aware of many of these books, his foreign officers could have told him of their experiences with the actual operation of such codes in the Low Countries. Englishmen had fought on the European Continent since 1542 and would continue to do

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[191] Webb, *supra* note 12, at 26.

[192] C. Firth, Cromwell's Army 287 (4th ed. London 1920) relying on Turner, *supra* note 56.

[193] *Id.*

[194] Cooper, *supra* note 5, at 133.

[195] Hale, *supra* note 87, at 46, *quoting,* in part, W. Barriffe, Military Discipline (2d *ed.* London 1639).

[196] 2 S.B.D. Scott, The British Army 568-69 (London 1868). The issue whether it is Scots, Scotch, or Scottish is too tangled to be settled by a single "sic."

so until 1642 when they found ready employment in the Civil War.[197] It is inconceivable that they would have learned so much about discipline and not have passed it on. Gustavus Adolphus listened and learned.

Finally, Dr. Roberts tells us that earlier Swedish articles and Continental codes in Stockholm's archives prove that Gustavus Adolphus looked beyond himself for model military laws.[198] The comparison within this article of many codes makes the conclusion inescapable that Gustavus Adolphus's articles of war were original in few respects. Myth number three, which had grown more hoary with each telling, has been dispatched.

XI. CONCLUSION

Early in the nineteenth century, a British writer on military law said, with more than a light touch of irony, that:

> It would be beyond the purpose of this work, to enter into any comparative inquiry, with a view of tracing the simultaneous and parallel march of the law military to the same perfection, to which the ordinary British laws are supposed to have attained. It will be sufficient, for its end, to pursue the Military Law, from its obscure and slender source, to its present distinguished stream.[199]

This article is similarly intended. Enough information is now available to draw some new conclusions about the development of military law. After analyzing the views of those who believe that Gustavus Adolphus's articles of war of 1621 were a marked change from all that had gone before, and comparing the works of the heretofore little-known writers of the Renaissance in England and of actual military codes then in use, I conclude that Gustavus Adolphus was an important, but not revolutionary, figure in the development of military law.

The progression seems clearer now. Roman military law was detailed and sophisticated. The decline of the rule of law and the rise of the feudal legal and social order made complex written codes unnecessary to govern the relatively small military organizations of the time. The Renaissance brought about a rebirth of new thinking and a return to the

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[197] *See, e.g.*, C.R.L. Fletcher, Gustavus Adolphus and the Struggle for Protestantism for Existence ix (1890); J.W. Fortescue, 1 A History of the British Army 3-4 (London 1910); C. Oman, A History of the *Art* of War in the Sixteenth Century 549-50 (London 1937). "Soldiers were everywhere, particularly after 1585, when men were levied to serve against the Spanish in the Low Countries. Even before that date, Troops had been raised to fight the Scots, to aid the Huguenots, and to support the Dutch." Webb, *supra* note 12, at 171.

[198] 2 Roberts, *supra* note 128, at 240.

[199] E. Samuel, An Historical Account of the British Army and of the Law Military xii (London 1816).

Classics. It is still unknown what code first brought together the Roman models, later experience, and fresh thought.[200] Clearly, however, the renewal first occurred on the European Continent and was refined throughout the sixteenth century. Gustavus Adolphus profited most extensively from that which had gone before.

A most fitting closing may be found in G. Norman Lieber's pamphlet:

> There are thus many features possessed in common by the English and the continental systems which, examined in connection with the circumstances under which the English code was adopted, seem to prove the identity of their origin. The trial by council of war—the court-martial-cannot, therefore, it is believed, be regarded as a purely English, or as an originally English, institution. On the contrary, it appears to have been transplanted to England, there to have found a congenial atmosphere, and to have been at once adopted, and ever since retained, as far better adapted to its ends than any other system that could be devised; whilst, on the other hand, on the continent, where it originated, it gradually gave way to the inquisitorial method of proceeding.[201]

None of this dulls the luster of Gustavus Adolphus as a military leader or, for that matter, as a significant contributor to the law. It is in the best tradition of military leadership to find what works and use it and to change or discard what does not. Furthermore, by dint of personality if nothing else, Gustavus Adolphus did stamp his imprimatur on the specific provisions and operation of "his" code. It is probably unfair to say that previous military leaders were not interested in justice; it is nonetheless clear that Gustavus Adolphus realized that true discipline requires justice and that true justice results in discipline.[202]

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[200] The articles of war of Maximilian II in 1570 deserve an especially close look. Like the "celebrated" Carolina, Maximilian's code is often praised but seldom quoted. It would be worthwhile for someone to find and comment upon the impact of that supposedly influential military legal code.

[201] G.N. Lieber was a soldier, lawyer, and scholar who had a keen interest in the development of military law. I would be remiss, however, if I failed to include his statement that he "would disclaim the intention of conveying the idea that a direct practical advantage may be attained by following our military law back into mists of the Middle Ages. To that extent it possibly has an historical value only." G.N. Lieber, Remarks on the *Articles of War and Common Law* Military, 1 J. Mil. Service Institution U.S. 86 (1879) (emphasis in original).

[202] 5 N. Machiavelli, Art of War n.p. (English ed; trans. by P. Whitehorne, London 1560). Machiavelli was not a military leader. Still his influence was felt. When he wrote that the secret of good discipline is to pay well and to punish well, many listened. The Art of War "was the first important military book to be translated from the Italian." Hale, *supra* note 87, at 36. Sutcliffe, *supra* note 132, was a great detractor of Machiavelli. Gustavus Adol-

Setting the record straight about Gustavus Adolphus has exposed two myths about military law. The *Carolina* deserves a closer look, but it seems apparent that it was not what it has been proclaimed. More importantly, we can now pay homage to Gustavus Adolphus without blindly worshiping him. We and Gustavus Adolphus owe many who fought and wrote in the sixteenth century a long-forgotten debt that may now be considered at least partially repaid.

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phus was obviously of the view that the words "pay well, punish well" should be preceded by 'lead well." No doubt, too, he would have agreed that:

> Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.

Manual for Courts-Martial, United States 1921, III (quoting L. de Gaya, Art of War n.p. (n.p. 1678)).

COMMENT
THE YEARS OF MACARTHUR, VOLUME III: MACARTHUR UNJUSTIFIABLY ACCUSED OF METING OUT "VICTORS' JUSTICE" IN WAR CRIMES CASES*

by Colonel Frederick Bernays Wiener, AUS, (ret.)**

I. INTRODUCTION

General of the Army Douglas MacArthur was beyond any question a man of transcendent ability. Whether his talents now appear to have been substantially overrated, whether his admitted qualities were diminished by the manifestations of a flawed character, are questions that will forever remain enmeshed in controversy. I had better state at the outset that he has never been one of my own heroes.

But fair is fair, and in the third volume of Professor D. Clayton James's biography, *The Years of MacArthur, Triumph and Disaster,*[1] General MacArthur is plainly accused of inflicting "victors' justice" on his former adversaries in the war crimes trials conducted under his supervision after Japan's surrender. This review will demonstrate that the author's conclusions will not stand up, in part because he lacked the background to appreciate that General MacArthur was following a precedent fashioned by President Roosevelt that had been approved by U.S. Supreme Court, in part because James overlooked significant references, and because he did not weigh even-handedly the materials on which he rested his conclusions.

II. YAMASHITA

James writes: "During Japanese defensive operations in the Philippines in **1944-1945,** commanded by General Tomoyuki Yamashita, troops committed widespread atrocities against hapless Filipino citizens and American prisoners of war, the number of victims variously esti-

*The opinions and conclusions expressed in this comment are those of the author and do not represent the views of The Judge Advocate General's School, the Department of the Army, or any other government agency.

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[1]D. Clayton James, The Years of MacArthur: Volume III, Triumph and Tragedy, 1945-1964. Boston: Houghton Mifflin Co., 1985. Pages: xvi, 848. Price: $29.95. (Hereinafter cited as James.)

mated at 60,000 to over 100,000. About half of these people were murdered, wounded, or raped immediately before and during the battle of Manila in January and February 1945."[2]

After Japan's surrender, on General MacArthur's orders, Yamashita was brought before a military commission composed of five general officers on a charge of violating the laws of war. The specification alleged that the accused had "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command," and had "permitted them to commit brutal atrocities and other crimes."[3] The rules of procedure prescribed by General MacArthur permitted the military commission to admit any evidence that it believed "would have probative value in the mind of a reasonable man,"[4] specifically including hearsay, affidavits, and other documents.

The trial began in Manila on 29 October and concluded on 7 December 1945, continuances having been discouraged by General MacArthur. The commission declared Yamashita guilty on the footing that "where murder and vicious, revengeful actions are widespread offenses, and there is no successful attempt by a commander to discover and control criminal acts, such a commander may be held responsible, even criminally liable, for the lawlessness of his troops, depending upon the nature and circumstances surrounding them. Yamashita was sentenced to death by hanging.

Following approval by General MacArthur of the findings and sentence, Yamashita sought habeas corpus from the Phillippine Supreme Court; losing there, he applied to the U.S. Supreme Court for review. His counsel contended that the military commission was without jurisdiction because there was neither martial law, nor military government, nor active hostilities in the Phillippines when that tribunal was appointed. Otherwise stated, Yamashita argued that the military commission could not lawfully try him for the offenses with which he had been charged.

But the U.S. Supreme Court, voting 6-2, disagreed and upheld the proceeding[5] whereupon Yamashita was duly hanged on 23 February 1946.

James's account features the asserted unfairness of the trial because of the commission's virtual abandonment of the rules of evidence and General MacArthur's haste to push on the proceedings. James quoted for support the latter's final statement to the press, which asserted among other things that, 'The results are beyond challenge."[6]

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[2] James at 94.
[3] *Id.*
[4] *Id.*
[5] *In re* Yamashita, 327 U.S. 1 (1946).
[6] James at 97.

We may dismiss the flamboyant MacArthur press release as illfounded exaggeration, as hyperbole that is vintage MacArthur. The question to be examined is whether James's strictures are well founded.

First, although James quotes from the dissents in the Supreme Court, he never once sets forth, to explain that tribunal's reasoning, a single sentence from the Court's opinion, written by Chief Justice Stone. True, American constitutional law is replete with instances where questions once decided one way are later ruled otherwise. But, before the views of six Justices are ignored as plainly wrong, and as not warranting even a summary of the grounds on which they rested their decision, even-handed scholarship surely requires that the reasoning of the majority be set out with sufficient fullness to enable a reader to decide whether the six majority Justices or the two dissenters had the better argument. James never provides his readers any such opportunity.

Further, James relies on a book written by Captain **A.** Frank Reel,[7] one of Yamashita's defense counsel, whose manful efforts before both the commission and the Supreme Court failed to save his client from the gallows. Licked lawyers' laments, to be sure, are no novelty; earlier examples going back to American colonial times come readily to mind. But why should a professor of history accept as unquestionably correct the assertions of any lawyer who seeks to win in the court of public opinion a proceeding that he had already lost in the nation's highest court of law?

Let us turn to the substance, the basic four inquiries on military habeas corpus: (a) Was the tribunal properly appointed? (b) Did it have jurisdiction (lawful power) over the person? (c) Did it have jurisdiction (lawful power) over the offense? (d) Did it have jurisdiction (lawful power) to impose the sentence adjudged?

All too plainly, James does not understand the concept of jurisdiction. For even Justice Murphy's dissent had no doubts on that score: "The Court, in my judgment, demonstrates conclusively that the military commission was lawfully created in this instance and [Yamashita] could not object to its power to try him for a recognized crime."[8] James nowhere quotes this passage, nor does he quote a further excerpt on the same page where Justice Murphy seeks to extend "the traditional lines of review" on habeas corpus.

So we reach the next inquiry, was the accused charged with a recognized offense against the laws of war? Here there can be no doubt that, if Yamashita had actually ordered the murders, the woundings, and the rapes that the Japanese committed in Manila, his guilt would have been

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[7] *Id.*, A. Frank Reel, The Case of General Yamashita **(1949).**
[8] *In re* Yamashita, **327** U.S. at **31.**

so clear as not to warrant discussion. Is he to be deemed free from crime because, although the military commander, he did nothing to prevent those obliged to obey his orders from committing the same acts on their own? To answer "Yes" to that query, as the dissenting Justices did, is surely to elevate form over substance. No one ever suggested that every commander is criminally chargeable with sporadic or episodic criminal conduct by members of his force. But where, as in Manila, the victims numbered in the tens of thousands, any contention that the military leader is immunized from responsibility assuredly fails to carry conviction.

Actually, the sack of Manila was a direct consequence of ingrained Japanese attitudes. Yamashita doubtlessly issued formal orders to his command to protect noncombatants. If some subordinate commander, viewing the carnage in the city, had advised Yamashita in the latter's mountain retreat that the troops were disobeying his orders, such information would have caused the commanding general to lose face: His subordinates were disregarding his instructions. Hence no such information was forthcoming. Similarly, if Yamashita had dispatched aides or inspectors general to ascertain whether his orders to protect civilians were being properly enforced, then his subordinates would have lost face: The Old Man no longer trusted them, he sent emissaries to check up on them. That was why the ongoing butchery was neither investigated nor stopped.

In sum, therefore, Yamashita was no virtuous innocent wrongly convicted.

What about the asserted procedural defects in the trial? Here James has failed his readers because of his all but total unawareness of the 1942 case of the Nazi saboteurs, ***Ex parte Quirin***.[9]

This requires a flashback to the United States' first and most critical summer of World War 11. Briefly, in June 1942, Germany landed eight saboteurs on American soil, four in Florida and four on Long Island, N.Y.; they were men trained in sabotage and ordered to damage or destroy war plants in the United States. They buried their German Marine Infantry caps in the sand, and proceeded to their destinations in civilian clothing. Two of their number ratted to the FBI, after which all were promptly apprehended.

On 2 July 1942, President Roosevelt signed two documents. One was a Proclamation declaring that enemies who entered the United States to commit sabotage or other hostile acts and who were subject to the law of war and to the jurisdiction of military tribunals were not privileged to

[9] 317 U.S. 1 (1942).

seek any remedy on their behalf in any American court, federal or state.[10]

The other was an order, not numbered in the normal Executive Order series, but headed simply "Commander in Chief of the Army and Navy/Appointment of a Military Commission."[11] Purporting to act under "the Constitution and statutes of the United States, and more particularly the 38th Article of War," the President appointed a military commission of seven named general officers to try the eight named saboteurs, who were charged with "offenses against the law of war and the Articles of War." The Attorney General and The Judge Advocate General of the Army were designated as prosecutors and two colonels were named as defense counsel for all the accused. The Commission was empowered to make "such rules for the conduct of the proceedings, consistent with the powers of the Military Commission under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. *Such evidence shall be admitted as would, in the opinion of the President of the Commission* [Major General Frank R. McCoy], *have probative value to a reasonable man*."[12] Concurrence of two-thirds of the members was declared necessary for conviction and sentence, while the record of trial, including judgment and sentence, was ordered to be transmitted directly to the President.

Even before the conclusion of the trial before the military commission, seven of the eight accused sought habeas corpus from the U.S. Supreme Court; only Dasch, one of the eight, did not join the others. The saboteurs' counsel first applied directly to the U.S. Supreme Court, and only later undertook to perfect that Court's jurisdiction.[13] While the Supreme Court's jurisdictional requirements were being supplied that tribunal convened in Special Term, heard arguments on 29 and **30** July 1942, and on 31 July announced its conclusions, but without writing an opinion: (1) The charges against the accused alleged offenses that the President was authorized to order tried before a military commission; (2) the military commission was lawfully constituted; and (3) the petitioners were therefore lawfully in custody.[14] Accordingly, the Court unanimously denied relief. Consequently, six saboteurs were executed; the two who turned state's evidence were spared (Burger had been sentenced to life imprisonment, Dasch to a 30-year term in prison).

Where were Justices Rutledge and Murphy, the dissenters in *Yarnashita,* at this point? Justice Rutledge was not yet a member of the

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[10] "Proclamation No. 2561, 56 Stat. 1964 (1942).
[11] 7 Fed. Reg. 5.103 (1942).
[12] *Id.* (emphasis added).
[13] A.T. Mason, Harlan Fiske Stone, Pillar of the Law 654-57 (1956).
[14] *Ex parte* **Quirin,** 317 U.S. 1 (1942).

Supreme Court, while Justice Murphy was off playing soldier. Contemporary media photographs show him arrayed in the uniform of an infantry lieutenant colonel. Thus he did not participate in the decision.

It remained for Chief Justice Stone to compose a written opinion explaining and justifying the conclusions reached; this was a task that occupied him until 29 October. He had no difficulty whatever in demonstrating that the saboteurs were, under well recognized international law, unlawful belligerents, justifying the imposition of death sentences. He had no difficulty either in airily waving aside the President's ill-advised Proclamation that purported to close the courts to them. But he was in a considerable quandary to explain how the President's order establishing the commission was consistent with the Articles of War that applied to the proceedings of military commissions.

Plainly the saboteurs were unable successfully to invoke Articles of War that by their terms were applicable only to courts-martial. But two articles expressly dealt with military commissions. Article 38, specifically cited in the President's order, authorized him to regulate the mode of proof before military commissions, "which . . . shall, insofar as he [the President] shall deem practicable,'' apply the rules of evidence recognized in criminal trials in the Federal courts, rules masterfully encapsulated in the then-current Manual for Courts-Martial, 1928.

Why then did F.D.R. jettison that evidentiary code for this commission, one that was daily followed in every trial by Army court-martial? Why did he deem those settled standards impracticable? Very simple: The two saboteurs' confessions, made to the FBI, would be inadmissible against their fellows in any trial by court-martial, just as they would be excluded by any federal trial court. Hence the President found it necessary to declare not practicable for the trial of the saboteurs those virtually identical sets of rules.

Further, Article 25, also applicable to military commissions, excluded deposition testimony in capital cases except when offered by the accused. Literally applied, that would exclude significant portions of the evidence establishing the saboteurs' guilt. So Article 25 was swept away also; all that mattered was whether the evidence that the prosecution presented was determined by Major General McCoy to "have probative value to a reasonable man."

Quite understandably, the Chief Justice had heavy sledding with these provisions, and in the end his brethren failed to agree. Some Justices thought that the Articles of War could not be construed to limit a Presidential military commission trying admitted enemy invaders.[15] Others

[15] *Id.* at 47.

held that even though the trial was subject to whatever Articles of War were congressionally applied to commissions, those articles did not foreclose the procedure prescribed by the President.[16]

Consequently, and this is the core of James's misjudgment, General MacArthur did not invent the *Yamashita* procedure on his own, he was following a model fashioned by his Commander-in-Chief three years earlier, which a unanimous Supreme Court had subsequently approved. On this point, Douglas MacArthur was no innovator; priority of invention clearly belonged to Franklin Roosevelt.

But, when the Supreme Court later came to grips with the *Yamashita* case, after the war was over, after it had stayed all the proceedings in that trial, and in the face of lengthy and indeed impassioned dissent on the part of two Justices, it once again had to wrestle with the applicability of the Articles of War to military commissions.

The result was the same. Said the Chief Justice: "[Yamashita] cannot claim the benefit of the Articles. . . . It follows that the Articles of War, including Articles 25 and 38, were not applicable to [Yamashita's] trial and imposed no restrictions upon the procedure to be followed."[17] Yamashita thus lost his case, and, shortly, afterwards, his life.

Looking at the matter in the calm hindsight of forty years, it is impossible to conclude that Yamashita was an innocent victim; he richly deserved his fate. It is similarly impossible to conclude that his trial exemplified all of the finest standards of Anglo-American law as that system had developed over the centuries. And it is likewise impossible to conclude that the Supreme Court correctly interpreted the Articles of War as they were in force during World War II.

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[16] *Id.*

[17] *In re* Yamashita, 327 U.S. at 20. The Articles of War did not distinguish between the trials of prisoners of war and any other person who "by the law of war is subject to trial by military tribunals." But the 1907 Hague Regulations, the 1929 Geneva Convention, and the customary law of war drew distinctions between persons entitled to be prisoners of war and unprivileged belligerents.

As the saboteurs had forfeited their status as privileged belligerents by disguising themselves as civilians while operating in the territory of their enemy, the 1929 Geneva Convention relative to the protection of prisoners of war no longer applied to them—the only norm of international law then applicable to the procedure under which they were tried was that there be a fair trial.

Yamashita, however, was and remained a prisoner of war. Article 63 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War provided: "A sentence shall be pronounced against a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining power."

The Supreme Court got around that provision in *Yamashita* by holding that the trial procedures prescribed by the Geneva Convention applied only to cases involving offenses committed while the accused was a prisoner of war, not to war crimes committed prior to capture. The war crimes trials prosecuted in Europe and the Far East followed that precedent.

For no one, nobody but nobody but nobody, not even the dissenting Justices, ever mentioned the preamble to the existing Articles of War, right in the statute book, which should have controlled the decision: 'The articles in this section shall be known as the Articles of War *and shall at all times and in all places* govern the Armies of the United States."[18]

In that quoted preamble, there is no exception for the Commander-in-Chief, no exception for military commissions trying unlawful belligerents, no exception for any person in any circumstances.

That quoted preamble, it should be remembered, appeared at the head of the text of the Articles of War as they were reprinted in the corrected 1928 Manual for Courts-Martial, the compilation that was in force during all of World War II.[19]

One can forgive the Justices of the Supreme Court, and all of their law clerks as well, for not having a copy of the current MCM on hand, One may similarly forgive all of them for not turning to Volume 41 of Statutes at Large where the text of the existing Articles of War was most authoritatively set forth. But it is difficult in the extreme to understand how it was that no one—no one but no one but no one, as the hucksters have it—ever turned to the most easily accessible version of the governing Articles of War, the pamphlet of the red-bound United States Code Annotated that contained Title 10, the handiest key to existing statute law. For there, right at the head of "Chapter 36—Articles of War," was section 1471, which set forth verbatim the governing preamble already quoted.

James therefore has at least this consolation: His own ignorance of the preamble to the Articles of War that were in force during World War II was no greater than that of any member of the Supreme Court of the United States—or of any member of the Justices' professional staffs.

III. HOMMA

In the infamous Bataan Death March of April 1942, writes James, "Over 8000 American and Filipino troops were killed by Japanese troops or died on the forced march from south Bataan, herded without food, water, rest, or medical attention for over a week; some 2000 American and 26,000 Filipino survivors of the march died in Luzon prison camps during the next seven weeks."[20] Lieutenant General Masaharu Homma, who had led the Japanese Army's conquest of the Philippines, was ordered before another military commission and charged with violating the laws of war on two grounds. First, he had refused to grant quarter or

[18] 41 Stat. 787; 10 U.S.C. § 1471 (1940) (emphasis added).
[19] A Manual for Courts-Martial, U.S. Army 1928 (Cor.) at 203.
[20] James at 99.

to accept the surrender of the Corregidor garrison in May 1942, allowing his soldiers to kill unarmed Americans and Filipinos. Second, he "did unlawfully disregard and fail to discharge his duties as. . . commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes'' during and immediately after the Death March.[21]

In light of the *Yamashita* precedent, there could be little doubt of the result, particularly, as James says, "Homma frankly admitted that his troops committed the specified atrocities, but he denied knowing about them, much less ordering such action."[22] Homma was found guilty and sentenced "to be shot to death with musketry"[23]—which, in Japanese eyes, was a more honorable and less humiliating form of death than that adjudged against Yamashita.

After losing in the Philippine Supreme Court, Homma also appealed to the U.S. Supreme Court. That tribunal denied relief a week after its *Yamashita* decision, with a mere mention of the earlier ruling.[24] Justices Murphy and Rutledge again dissented, and James once more quotes the former's impassioned rhetoric.[25] He likewises quotes still another MacArthur statement, this time about the *Homma* proceedings: "No trial could have been fairer than this one, no accused was ever given a more complete opportunity of defense, no judicial process was ever more free from prejudice."[26]

Here also, another overblown MacArthurism. But Homma fully earned his fate. For the cruelties suffered by those taken captive on Bataan reflected the universally held Japanese belief that any soldier who preferred capture to death in combat had thereby forfeited even the slightest claim to treatment as a human being. In any hopeless military situation, the Japanese SOP was not surrender but the hopeless *banzai* charge or ***kamikaze*** flight, each to **a** certain death. Those whose values were more rational were simply beneath contempt and entitled to absolutely no consideration. It was this background that without question fashioned Homma's indifference to his prisoners' fate. But, in American eyes, that attitude simply underscored his indisputable guilt,

IV. UYEKI AND CANTOS

At this point I must, inescapably, obtrude the perpendicular pronoun, After being released from active duty at Fort Meade, Maryland, in December 1945, I returned to the Department of Justice the next day for

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[21] *Id.* at 98-99.
[22] *Id.* at 100.
[23] *Id.*
[24] Homma v. Patterson, 327 U.S. 759 (1946).
[25] James at 100.
[26] *Id.* at 101.

duty in the Solicitor General's Office, the shop that handles all of the government's Supreme Court litigation. It was the first time since April 1941 that I had worn civvies at work, and the first matter then placed on my desk was Yamashita's original application for a stay.

I worked on his case and on Homma's, and thereafter deemed the issues in their cases and similar lawsuits plainly settled by a clear majority of the Supreme Court. But, in June 1946, a stay application similar to those already decided reached that Court, following an adverse decision in the Philippine Supreme Court. I was directed by the Solicitor General to represent the United States at the hearing before Justice Black, then Acting Chief Justice following Chief Justice Stone's death in April.

Yes, I said, this case, Uyeki's, was identical in its legal aspects with those of the two now deceased generals: American military commissions had tried this Japanese officer for killing Filipino civilians at Davao on Mindanao shortly after the Japanese army had invaded that island. Uyeki's was therefore a war crimes case governed by the earlier decisions, and hence presented nothing calling for further review. Moreover, the Philippines would soon be independent and the U.S. Supreme Court would then no longer in any event be able to review judgments of Filipino courts.

To my infinite surprise, Justice Black then voiced sentiments wholly at variance with what had been said, with his concurrence, in the earlier opinions. His remarks strongly suggested that, in any future war crimes cases, he would side with the dissenters. If so, it was inevitable that he would also be joined by Justice Douglas, his ideological twin, and, along with Justices Rutledge and Murphy, might well be able to pick up a fifth vote, and thus, at the very least, weaken the earlier precedents.

Such a scenario could easily be sensed from the tenor and direction of Justice Black's remarks, although it was not until ten years later, in Professor A.T. Mason's life of Chief Justice Stone, that the public generally learned of the difficulties and differences among the majority Justices in both the *Nazi Saboteurs* and *Yamashita* cases.[27]

Very shortly afterwards, on 10 June 1946, the Supreme Court stayed the execution of Uyeki's death sentence, and granted review in his case.[28] Accordingly, with the Solicitor General's blessing, I undertook a one-man crusade up the echelons in the Pentagon to persuade the Army to turn Uyeki over to the Filipinos. After all, none of his victims had been Americans.

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[27] A.T. Mason, ***supra*** note 13; see *ch.* **xxxix**, *"Inter Arma Silent Leges*, 1942-43," at 653-71.

[28] Uyeki v. Styer, 328 U.S. 825 (1946); Uyeki v. Styer, 328 U.S. 832 (1946).

When the Supreme Court reconvened in October **1946,** it also granted review "to the Supreme Court of the Philippines" in the virtually identical *Cantos* case,[29] and this in the face of the grant of full independence to the Philippines on the preceding **4** July. While it was unlikely that the Court would completely overrule its earlier precedents—after all, those had resulted in six saboteurs being electrocuted, Yamashita being hanged, and Homma being shot—there was a strong possibility that the former dissenters and their potential new allies could greatly broaden the scope of civil review of military cases.

In the *Nazi Saboteurs* and *Yamashita* decisions, the Court had been at pains to emphasize that it was not passing on guilt or innocence.[30] But, after the trial records in *Uyeki* and *Cantos* were made available, it became apparent that the purely legal questions of jurisdiction raised therein were in fact identical with the factual issues of the guilt or innocence of each accused. This was why:

Both men contended that they were Japanese civilians living in Davao, a city with a large Japanese ethnic population; if so, their killing Filipino civilians when the war started would be simple murder, triable only in the Philippine civil courts. But if the two were, as charged, members of the Japanese Army, then the accusations against them would, with equal clarity, constitute crimes against the laws of war.

In both the *Nazi Saboteurs* and *Yamashita* cases, there was no question of the accuseds' status. But in *Uyeki* and *Cantos* the status of both was controverted. Thus if, as both contended, they were and always had been civilians, they could not be guilty of war crimes, and so the tribunals before which they had been haled would be without jurisdiction to try them. Thus, to government counsel's great concern, in their cases the issue of jurisdiction was inextricably intertwined with that of guilt-or-innocence—and that in two poorly tried cases where the normal military rules of evidence had been jettisoned.

My campaign to get rid of these two potentially dangerous causes now reached its final phase. Along with representatives of The Judge Advocate General of the Army, I appeared in Secretary of War Patterson's office shortly after review had been granted in the *Cantos* case. The Secretary, it perhaps needs to be recalled, had been a U.S. Circuit Judge when, in the summer of **1940,** Secretary of War Stimson (who had succeeded Mr. Woodring), selected Judge Patterson to replace Assistant Secretary Louis Johnson (who was gently shunted aside); the new team took over shortly after the Fall of France. Shortly afterwards, Judge Patterson became Under Secretary, serving as such throughout the war; now, in **1946,** he was Secretary of War.

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[29] Cantos v. Styer, **329 U.S. 700 (1946).**
[30] *Ex parte* Quirin, **317** U.S. at 25; *In re* Yamashita, **327** U.S. at 8.

Following full discussion, Secretary Patterson put this question to me: "Colonel, what do you think will happen if the Supreme Court proceeds to a hearing on the merits?' My reply was, "I think there will be a reversal." He then turned to Colonel William J. Hughes of JAGO, in civilian life a distinguished and experienced Washington lawyer: "What do you think, Colonel Hughes?' His reply, "I agree with Colonel Wiener."

Whereupon the Secretary said, "Very well, I will direct General MacArthur to turn those two prisoners over to the Philippine government." The Secretary did just that and General MacArthur, "much against his inclination,"[31] complied. After all, Robert P. Patterson had won a Distinguished Service Cross as a combat infantryman in World War 1. He was not an irresolute man, as were—speak it softly—the Joint Chiefs of Staff in their relationship with General MacArthur after he had successfully accomplished the Inchon landing, and was pushing to the Yalu. At that time they [the Joint Chiefs] were, all too clearly, reluctant to give direct orders to the commander who had pulled off what was close to a thousand-to-one chance, and who was so very much senior to them all in both military rank and military experience.[32]

And, as a consummate lawyer, Judge Patterson fully appreciated the soundness of not letting losing cases proceed to decision on the simplistic theory of, "We gotta back up the theater commander!" The latter had been the litigating stance in the Hawaiian martial law cases, which had been decided favorably to the government in the lower court while hostilities were still in progress. In that instance, the lawyers hung on, and in consequence backed the theater commander right into the buzzsaw of a stinging post-V-J Day Supreme Court reversal.[33]

The result of Secretary Patterson's forthright order was that the Supreme Court dismissed the *Uyeki* and *Cantos* cases as moot so that the contentions raised by those two were never determined.[34]

But—by reason of Arts, 85 and 102 of the 1949 Geneva Convention on Prisoners of War[35] no cases like *Yamashita* or *Homma* can ever arise again, Under those provisions, still in force, no prisoner of war can be validly sentenced unless "the sentence has been pronounced by the same courts according to the same procedure as in the case of the armed forces of the Detaining Power, even when his offense had been committed prior

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[31] James at 101.

[32] *See* James, chs. xi-xviii. Perhaps it needs to be recalled that, in 1950-51, the Army Chief of Staff, General J. Lawton Collins, had been a World War I captain when MacArthur was already a general officer; when Major General Douglas MacArthur had been the U.S. Military Academy's Superintendent, General Hoyt S. Vandenberg, the Air Force Chief of Staff, had been one of his cadets.

[33] Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[34] Cantos v. Styer, 329 U.S. 686 (1946); Uyeki v. Styer, 329 U.S. 689 (1947).

[35] 6 U.S.T. 3316, 3384 and 3394 (1949).

to capture." Thus, in the future, any POW charged with a war crime by the United States would be entitled to all of the lawyerized safeguards of the UCMJ, including review by the U S. Court of Military Appeals.[36]

James's discussion of the *Uyeki* and *Cantos* cases is satisfactory except in one significant respect. The U.S. Supreme Court's undertaking to review a determination of the Supreme Court of the Philippines came more than three months after President Truman had withdrawn and surrendered all rights of "supervision, jurisdiction, control, or sovereignty now exercised by the USA over the territory and people of the Philippines," and had "recognizedthe independence of the Philippines as a separate and self-governing nation."[37] It was this action by the Supreme Court of the U.S. that had caused tremors to radiate along the spines of all Washington-based government lawyers connected with the *Uyeki* and *Cantos* proceedings. And it is that reaction that James all too obviously fails to fathom.

V. MAJOR FAR EASTERN WAR CRIMINALS

James's discussion of the proceedings before the International Military Tribunal for the Far East (IMTFE), appointed by General MacArthur, pursuant to which General Tojo and six others were hanged after the conclusion of a trial lasting two and a half years, gives the impression that General MacArthur invented a tribunal that had little if any foundation in international law, that punished acts retroactively declared criminal, and that was basically flawed because it involved victors trying and punishing the vanquished.

That discussion is thoroughly unsatisfactory for a number of reasons. Although James of course knows that the IMTFE was patterned after the Nuremberg trial of the major German war criminals, he is obviously unaware of the vast narrative and analytical literature now extant on the European undertaking.

Today, more than a generation after V-E Day, the bulk of qualified commentators on the Nuremberg endeavor are increasingly in overwhelming agreement that it marked a significant and greatly needed landmark in international law. No longer could the learned and the disputatious argue, as they did after 1918,the issue of war guilt for the Second World War, the one that followed what Woodrow Wilson had

[36]Under Articles 85 and 102 of the 1949 Geneva Convention on Prisoners of War, the procedural aspects of the *Yamashita* and *Homma* cases can never arise again. However, as Article 102 of the 1949 Convention is substantially similar to Article 69 of the 1929 Convention, the critical change in the 1949 Convention is Article 85 which repudiated the *Yamashita* precedent by providing: "Prisoners of war, prosecuted under the law of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

[37]60 Stat. 1952-53.

called, "The war to end all wars." No longer could propaganda mills simply grind out fictitious tales, built on cumulative hearsay, of asserted "atrocities." At Nuremberg the evidence establishing the Nazis' war guilt was placed fully on the record; at Nuremberg the evidence of the Nazi's unspeakable barbarism was proved by eye-witness testimony, by photographs both still and moving, and by the full documentation produced by the insensate German passion for reducing to writing the daily practice of even the most revolting cruelties. In short, James never troubled to examine even the most significant studies of the law and the procedure on which General MacArthur modeled the IMTFE. Indeed, he still hints at retroactivity, as that concept is discussed in the writings of the marginal academics who up to now have published on the IMTFE.

Certainly before that tribunal, there was neither any atmosphere of haste—a trial that lasted 30 months can hardly be stigmatized as a rush to judgment—nor the slightest vestige of retroactivity. Tojo & Co., after all, were charged with attacking Pearl Harbor and waging war in the absence of a declaration of war—a plain violation of the Hague Convention of 1907, to which Japan was a party. Thus they had ample warning, as they prepared for the Day of Infamy, that what they were planning was illegal on its face.

Were Nuremberg and the IMTFE abhorrent because they were conducted by the victors? Certainy Goering and Tojo and their coconspirators could not have been expected to have judged their own misdeeds objectively. To the end, few if any of the accused at either trial showed the slightest remorse for what they had done. Trial by neutrals? What neutrals were there? Sweden and Switzerland? Spain and Argentina, both ideologically linked to the Nazis? Even to repeat such a suggestion, as James does, loses sight of reality. Yes, Nuremberg and the IMTFE were indeed trials by the victors, but they were not the worse for that, any more than the trial of Major Wirz of the infamous Andersonville prison,[38] or of the Modoc Indians who assassinated General Canby[39] were vitiated by the circumstance that each had been conducted by military commissions of the U.S. Army.

James devotes considerable space to bemoaning that General MacArthur did not see fit to commute the death sentence imposed by the IMTFE on former Prime Minister Koki Hirota. But he never once, even by way of footnote, advises his readers that Hirota, plus another under death sentence, actually sought review of their IMTFE convictions from the U.S. Supreme Court.[40]

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[38] General Court-Martial Order 607 of 1865, H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess. (1865).
[39] 14 Op. Att'y Gen. 249 (1873).
[40] Hirota v. MacArthur, 338 U.S. 197 (1948).

But there they failed, because, as the Supreme Court said, "the tribunal sentencing these petitioners is not a tribunal of the United States."[41] It "has been set up by General MacArthur as agent of the Allied Powers. Under the foregoing circumstances the courts of the United States have no power or authority to review. . . ."[42] Justice Murphy dissented without opinion; Justice Rutledge "reserves decision and the announcement of his vote until a later time"—but then died without ever having done so.[43]

VI. EMPEROR HIROHITO

Immediately after V-J Day, there was considerable discussion whether Emperor Hirohito should be tried as a war criminal. On 30 November 1945, General MacArthur was sent a JCS directive stating that the Emperor was not immune from such a trial, and requesting evidence necessary for Washington officials to make a decision for or against trying him.

MacArthur replied that to put the Emperor on trial charged with war crimes would result in passive or semi-active resistance by all of the Japanese people, such as would require an occupation force of at least a million men, plus an imported civil service of several hundred thousand, plus an overseas supply service to feed an indigent population of many millions. This of course scotched the idea for all time."

James calls that reply, which he sets out in full, obviously exaggerated.[45] It is difficult to agree. Although the Emperor had already formally renounced his divinity, a status previously believed by all of his subjects, their spiritual loyalty to him continued. Hence to have placed him in the dock after the monarch had clearly demonstrated his acceptance of the surrender and occupation by calling on General MacArthur, indeed would have produced universal chaos in the form of a nation-wide sit-down strike. Thus it is difficult to consider the Supreme Commander's fears as in any sense overdrawn. Rather, as James ultimately concludes, "MacArthur was instrumental in saving the Emperor from a humiliating trial for war crimes and in preserving one of the most effective instruments for securing Japanese cooperation during the occupation."[46]

But James is wrong, dead wrong, in stating that "Congress passed a joint resolution in late September 1945, 'declaring that it is the policy of the United States that Emperor Hirohito of Japan be tried as a war criminal.' "[47] No such measure was ever passed; nothing to that effect can be

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[41] *Id.* at 198.
[42] *Id.*
[43] *Id.* at 198.
[44] James at 106-08.
[45] *Id.* at 107.
[46] *Id.* at 108.
[47] *Id.* at 105.

found on the statute book. Indeed, if James had troubled to check Senate Joint Resolution 94 of 18 September 1945, which he cites,[48] in the Index to Bills and Resolutions of the cognizant volume of the *Congressional Record*, he would have learned that this measure was simply introduced, and, after reference to a committee, died there.

VII. CONCLUSION

With the benefit of reflections that rest on some forty years of hindsight, it is not difficult to fault General MacArthur for unduly pushing the *Yamashita* and *Homma* trials. The end result in each case would have been identical had he refrained from doing so. To have allowed both accused to say their say at length would in addition have minimized much criticism, then and later. But on the essentials of General MacArthur's stewardship of the post-World War II war crimes trials conducted under his direction and supervision, his actions were soundly based on precedents by which he was bound.

Professor James, who strongly suggests the contrary, is on weak ground. His scholarship is plainly slanted; at times it is even sloppy; and his ignorance of controlling legal materials, in what inescapably is a discussion of legal matters, can only be labeled deplorable. In short, and this final summary will be formulated in plain yet slightly inartistic language, in the area of war crimes trials General MacArthur's biographer has given the subject of his three-volume work a very bum rap.

[48] *Id.* at 737, n.40.

The following is an amazing story of survival. In early 1941, First Lieutenant John K. Wallace II, a doctor, reported for duty in the Army. His first assignment in the summer of 1941 was the Philippines. It seemed like paradise. As you will see, the idyllic existence soon ended with the fall of the Philippines in 1942. Captain Wallace would spend the next three years in Japanese prison camps.

This is his report on those three years. In 1946, his superiors asked him to write this account of his captivity. At the time, he entitled it, "Memoirs of a Convict." When reading it, please keep in mind that it was written in 1946.

This account is published in the Military Law Review *because it will help today's military lawyers put Colonel Wiener's remarks in the preceeding comment on the war crimes trials of the 1940s into perspective. Also, military lawyers often deal with the concepts of the law of war in the abstract. This account illustrates how those concepts have been applied in a combat setting.*

Captain Wallace remained on active duty after World War II in the Medical Corps and retired as a colonel.

JAPANESE PRISON CAMPS: DIARY OF A SURVIVOR

by Colonel John K. Wallace 11, USA (ret.)'

Until 23 January 1941 I had been an innocent medical student, intern, and resident in internal medicine, being in the second year of a three year residency at Milwaukee County General Hospital. Then I began my short road to ruin. On the above date I reported for duty in the Army at Fort Custer and was assigned to the 5th Medical Battalion, where one was not required to be a doctor, but was more fortunate if he had had previous training as a mechanic or a drill sergeant. Fortunately or unfortunately, it is hard to say which, I had had a little of both, so I was assigned as company supply officer and a few days later was made company commander, which required my giving the company about thirty minutes of close order drill daily. This continued until about 17 February when with twelve other officers I was sent to Camp Claiborne, Louisiana to form a new medical battalion.

The new medical battalion was the 53d, and until I left the outfit it consisted of 15 officers and 20 enlisted men. Since the post surgeon was tired of seeing this group of officers sitting around, and having complaints from the C.O. of the station hospital that we were always getting in his way and pestering him to let us do some medicine, we were attached to National Guard medical detachments as instructors. This was rather a bitter pill for us to swallow for we were all first lieutenants and all the National Guard medics were captains or majors. I know in the outfit I was attached to there were 3 majors and 7 captains and I was supposed to teach those fellows to be officers as well as teach the enlisted personnel something about field medicine. Just a question of the "halt leading the blind." This only continued until after about the 10th of April when orders arrived that I was to be sent to the bush league, namely, Manila, Philippine Islands; however, it was only a two-year sentence but it was lengthened two more years because of good behavior,

Having received my orders, a couple of the fellows and myself rushed to my home in Illinois for a few days and to pick up a few of my belongings that I wished to take with me. I visited all my friends and relations and, since starting on my road to downfall, I had become engaged and so spent a lot of time with my girl on Easter Sunday 1941. We attended church with my family and then, that afternoon, said goodbye. An odd place for a goodbye was selected by my fiancee—a stable with a pony, for the pony was only a year younger than we were, and we had both known and ridden the pony since we were kids in grade school. Little did I realize when saying goodbye in a stable that I would not see her or my family or be in my home town again until Easter Sunday 1945.

Upon returning to Camp Claiborne the fellows took me to Lake Charles to catch a train for San Francisco. That was the last I ever saw of anyone from the 53rd Medical Battalion. The trip across the country was entirely uneventful.

On 19 April, 1941, I sailed from San Francisco aboard the *USSAT* ***Washington,*** which was truly a fancy ship to be an army transport. It was the first time this boat had ever been in the Pacific Ocean and its first trip as a troop ship. ***As*** a result, it still had its night clubs, bars, ballrooms, and swimming pool; also its same civilian crew and room boys. The ***Washington*** was one of the largest liners in the U.S. Merchant Marine and supposedly the most luxurious. We had dances almost every other night until we arrived in Honolulu, but none from then on as we had 1800 troops and only one woman aboard for the voyage from Honolulu to Manila.

Hawaii, on the whole, was a very beautiful place but there were many disappointments. We steamed into sight of Diamond Head just as the sun was peaking its rays around the mountain. The water of the harbor was of the deepest blue and filled with boats and small boys screaming shrilly and diving for coins the passengers tossed over the rail of the ship. This apparently was the preliminary welcoming committee, for when we tied up at the pier an Army band serenaded us with "St. Louis Woman," "Blue Hawaii," "Aloha," and a few others. It was the first time I had ever realized that the song "St. Louis Woman" was a tearjerker but I, for one, had to shed a few tears and there were quite a few of the others that did the same. Then, as we came off the boat, we were given leis of flowers. I don't know what kind of flowers they were but I have never had flowers that were half so fragrant.

Then another officer who had been stationed in Hawaii previously and I started on a tour of the island. Of course the first spots we visited were the Royal Hawaiian Hotel and Waikiki Beach. The beach was my first disappointment. Except for the beautiful royal palms and the brilliant blue of the water, it was a complete washout. It consisted of a very narrow strip of sand and exceedingly shallow water requiring one to wade out for probably a quarter of a mile before getting into water deep enough to swim in. The bottom is of coral rock, which of course is very hard on your feet. Many bathers have numerous small cuts on their feet after bathing there. The surf board riding was very pretty to look at, however, I didn't try it. While we there in Honolulu, I saw all the ships of the Pacific Fleet tied up at Pearl Harbor. After seeing them there at that time it was very easy to see how so many of them were knocked out at the beginning of the war because they were packed in there pretty much as sardines are packed into a can and it would have been almost an impossibility to drop any bombs at all on Pearl Harbor without hitting

some ships. There was not much activity among the military forces on Honolulu at the time that we were there.

Upon leaving Honolulu we went directly to the Philippines, arriving at Manila Bay early in the morning of May 8, 1941. This was my fight sight of the Philippine Islands and it wasn't particularly pleasing. The bay was covered with low lying fog and the buildings in Manila were pretty much in a haze at the time we came into the harbor. We were greeted by officers assigned in Manila and various posts in and around Manila, and they took us ashore to the Army-Navy Club for a few drinks. That afternoon I was taken to have a full dress uniform made for a formal function to be given the following night. Later in the afternoon I went back for a first fitting on the full dress; the following afternoon it was delivered at my hotel. I wore it that night. This was very typical of tailoring in the Philippines. It was possible to get a suit made and all ready to wear in a period of 24 hours. The cost of clothing was probably one-third to one-half what it was here in the States and the quality, I believe, was superior to what it is here in the states.

The Army in the Philippines was strictly on a peace time status, ordinary duty hours were from around 7:30 to 8 o'clock in the morning until 12 noon. Then you were off for the remainder of the day. They had no intensive training program going on whatsoever. It was merely garrison duty. It was a surprise to see the outfit that I was assigned to, the 31st Infantry, after seeing the various selectee groups here in the States because in the 31st every man had tailor-made khakis. Even their fatigues were tailored and, as a result, they were a particularly snappy looking outfit. The G.I. there did very little in the way of work. He did not even bother about cleaning his rifle or cleaning his own equipment. Everyone had Filipino boys who did that kind of work. A fellow could come in off maneuvers with his clothes muddy, his shoes muddy, his equipment all muddy, his rifle all messed up, and still stand a formal inspection the next morning with spotless equipment because, just the minute that he would get in, his bunk boy would start working on it and have it all cleaned up in 5 hours, even if he had to do it in the middle of the night. None of the men ever made their own beds or ever served K.P. Everyone in the outfit chipped in approximately 24C a month. An enlisted man with a corporal's rating could live as well in Manila as the average second lieutenant could live in the United States in 1941.

My first home was the Leonard Wood Hotel, a low (only two stories), rambling building, constructed in a movie-style tropical design with shutters, fan back chairs, verandas, etc. This was my first personal experience with prices and education in the Philippine Islands. My room boy was a Ph.D. and when I asked what he was doing at that kind of work he said that he could make more money as a room boy than he could teaching school. Then another officer from near my home town

and myself moved into the Elena Apartments which was about a block from the hotel. Wondering how we would get our luggage there, the manager of the hotel told us that we could have our room boys carry it over for us. So, two men, either of whom could have walked under my arm without touching, carried two wardrobe trunks, two foot lockers, and miscellaneous gladstones and hand luggage almost a block and, because servants were not permitted to use the elevator in the apartment building, they had to carry the stuff up four floors. I was paying the men for doing the work when the hotel manager came up and asked them what I had paid them. I don't remember just how much it was, but I am sure it was less than five dollars. The manager reprimanded both of them and made them give me back enough money so that I paid them 75¢ each. Personally, I would not have carried one of the foot lockers half that far for that amount of money. We lived at the Elena Apartments until the 1st of September when my roommate was ordered out with the Philippine Army. Then I rented a home of my own and moved to 41 Porvenir (street of the future) where I lived until the war started. This home that I rented had solid mahogany floors throughout, a master bedroom, all tile bath with shower, a guest bedroom, a nice large kitchen with two sinks, new stove, electric heater, hot water heater, electric frigidaire, servant's quarters, a large dining room, large living room, and a screened-in porch. The home was screened in throughout, of course. I paid $40 a month rent for this home. The furniture was better than average as compared to states-side furniture, I believe. Here my house boy did absolutely everything for me. I didn't know what it was to order cigarettes or liquor or to put my wallet in my pocket of a morning. Every morning when I got up I found a fresh uniform laid out for me, my fountain pen and pencil in my pocket, a couple of packs of cigarettes, my cigarette lighter in my trouser pocket, my money, everything ready to step into. The ordinary saying among the fellows in the Philippines was that you weren't allowed to do anything for yourself unless you slapped your boy's hands and then you got to tuck in your shirttail. Something more about my house boy, Amador. I found that it was not fitting or proper that I should pay a bill unless he had okayed it first. When the bill collector would arrive at the house, Amador would go to the door and decide whether it was my bill or not. If it was my bill he would say, "Sir, it is the Lieutenant's bill." If it was not my bill, I would hear a lot of jabbering and a few cuss words and that would be the last of the bill collector.

As far as the social life in Manila was concerned, at that time there was not a whole lot as a result of the fact that all of the Army wives and women had gone back to the States on the Washington. About the only remaining society was that of the Europeans and the Filipinos. I believe the favorite nightspot in Manila at that time was probably Jai-alai and the next one was the Manila Hotel Winter Garden. Of course there were

numerous other night spots around town we went to occasionally. Entertainment in Manila was quite inexpensive, particularly as far as your drinks went, because the best liquor was very, very moderate in price. Dewars White Label Scotch was ordinarily around $1.50 a quart.

After 6 weeks after I arrived in the Philippines, I was sent up to Camp O'Donnell with the anti-tank company of the 31st Infantry for maneuvers and target practice. That was my first view of the spot where I was later to start my period of incarceration. Little did I know at that time that in eight to ten months I would be back on that same territory under extremely different circumstances. To give you an idea of the conditions of the military personnel in the Philippines at the time that I arrived there, there was no medical detachment whatsoever for the 31st Infantry. The 31st was the only American infantry regiment in the Islands, and it was at that time at less than half strength. It was not until August 1941 that they decided to make a provisional medical detachment for the 31st. This consisted primarily of 45 misfits from the various infantry companies. They were turned over to me for a 200-hour course to make them into medical soldiers, company aid men, and battalion aid men. Three of them could neither read nor write other than just their names; they could not write the alphabet. I asked for the training schedules such as I had before we went overseas and was told that they were not available and that they were not necessary. I don't believe they had ever even heard of them over there. I know that we never did get any. We did not have an official medical detachment until late in January of 1942. Then, to make it just a little worse for us, about the 1st of September, they took approximately 45% of the officers from the 31st Infantry and put them out with the Philippine Army as instructors. This diminished our officer personnel quite a bit, particularly in the line companies. It did not affect the Medical Corps; none of us were sent out at all. The latest word that I had from my people before the war started was on December 3rd when I called home on my father's birthday and talked to the folks at home. That was the last that they heard from me other than a couple of cablegrams I sent them immediately after the war started.

On the morning of December 8th, 1941, my house boy, Amador, awakened me to go to work and told me that he had just heard over the radio that Pearl Harbor had been bombed. I thought it was just another one of those Orson Welles deals such as had occurred about a year previously in the States when we had the "invasion from Mars." I didn't think much more about it until I got down to the post and there, of course, they had the official information and the newspapers and extras that had come out showing that Pearl Harbor had been bombed a few hours before. Of course the post was more or less a madhouse at that time because everyone expected us to be bombed, particularly there in Manila, very shortly. Around noon time we heard that Clark Field had

been hit. That night a flight of bombers came over and bombed Nichols Field in the suburbs and probably a mile-and-a-half from my home on the edge of Manila. My unit, the 1st battalion of the 31st Infantry, remained in Manila to guard the USAFEE Headquarters. The other two battalions went north for more or less a holding action. They did not go on to the beaches but were taken north in case they should be needed. Most of the beach defenses were by the Philippine Army and the Philippine Scout Regiment. Our battalion remained in Manila until December 24th and our most important duty, I believe, was probably chasing flares and running down rumors that the Japanese had landed on the Passig and had taken the post office and various other public buildings; none of them ever came true while we were there. Likewise, I don't believe we ever saw anyone who was setting off any flares. Everyone was "trigger happy" and you took your life in your own hands when you walked around the streets after dark. There was a large group of Philippine constabulary and Philippine soldiers in the city doing guard duty. They had the old idea of shouting halt three times and then shooting. It was just "Halt, halt, halt"—BANG!

The night of December 24th we went over to Corregidor with USAFEE Headquarters and stayed there until the morning of the 30th of December. While on Corregidor I had my first baptism of a true bombing raid and was caught right in the middle of it. Likewise, Corregidor was the first and only time that I saw General MacArthur during the war. We were told by several officers on Corregidor, who were stationed there permanently, that the Japanese would be unable to bomb it because of the excellent anti-aircraft defense for the island. We had daily air raids, but until the 29th no planes had ever gone over the island or had ever dropped any bombs. But, on the day of the 29th, at high noon, they laid one right in the middle of the baseball diamond. This was a 3 hour raid and apparently their main target, at least I thought so, was the barracks of the 1st battalion of the 31st Infantry which was stationed in Top Side barracks, the highest part of the island of Corregidor. General MacArthur also had his headquarters at one end of this building and remained there all during the raid which lasted until 3 o'clock. The raid, I believe, was quite intensive, with much bombing and a lot of strafing, and various figures were given as to the number of planes that had been over—all the way from 90 to 250.

About an hour after the raid started, I had been out picking up casualties in the vicinity of Top Side barracks and was returning to the barracks all covered with blood and whatnot, when I was stopped by General MacArthur. He was out walking around with no helmet on, just an ordinary garrison cap. I was very anxious to get back to some cover because they were still dropping bombs and doing plenty of strafing in that area at that time. He stopped me and wanted to know how many casualties I had, how many dead, how many seriously wounded, how many

minor wounded, He also wanted to know my name and what organization I was from, how long I had been in the Army, and stood around there for probably 2 or **3** minutes just, you might say, passing the time of day with me. It seemed to me that we stood there for **3** or **4** hours. From that, I feel that General MacArthur may be criticized for a lot of things, but he can never be criticized for cowardice or of the appellation of "Dug-out Doug." If General MacArthur is to be criticized, I think he should be criticized for exposing himself too much because if he was a big enough man to be in charge of the entire show in the Far East, then he was too big a man to be exposing himself to bombing and strafing. However, all during the raid he remained in the Top Side barracks or around it, but sent all of his staff and the enlisted personnel of his headquarters down to Malinda Tunnel as soon as the raid started. But he himself remained there all during the raid.

The following morning, the morning of the 30th, my battalion was taken by boat to Bataan. We went into a holding line up to the northern end of Bataan, near the town of Hermosa, and let the other units of the Philippine Army fall back through us into Bataan proper. We stayed there for almost a week. While there I got my first introduction to artillery fire and I, for one, prefer a dozen bombings to one artillery barrage. We were caught under one for about 6 hours. My battalion, however, suffered no casualties whatsoever, but there was one boy in the group who was extremely scared. I am not sure of his name, but I think it was that of the author. At that time, I thought that I would never worry about sleeping again; that however, proved false, thank goodness.

On the night of January 6, 1942, I had my first introduction to "strategic withdrawals to previously prepared positions,''which is entirely a figment of the imagination for there is nothing strategic about them and there are no previously prepared positions or, at least, there were none there. My own idea of the thing was that it was just a matter of taking up your equipment and running like hell. I witnessed and participated in several other "strategic withdrawals'' and they were all similar to the first one: it was just a matter of grab and run.

During January 1942, I believe the 31st Infantry reached its maximum strength of approximately **1500** men, a little less than half of the total strength as set up by the tables of organization.

The remainder of my war experiences were rather uneventful; however, I did have one period of action in which I couldn't find time to take off my clothes or to take a bath for a period of about 4 weeks. When I did finally take off my shoes and my socks, I do not know how many pairs of socks I had on after I took off the first pair, but several pair of socks just made out of skin peeled off. It was during this time that I had one of the oddest and funniest experiences of the war, at least to me. The battalion CP was set up on the lip of a very deep ravine, more or less wooded. The

bottom of the ravine was a very rocky creek bed. It became necessary for me to answer the so-called "call of nature." I had just got down into this creek bed and had my trousers down when three Japanese dive bombers that had been bombing the area apparently dove directly on that particular spot. When I heard their motors I looked **up** through the trees. They were diving directly on me and the area where I was. At the same time, just about the time they pulled out of their dive, I heard a sound that, for probably a couple of seconds, sounded exactly like a bomb falling. I rushed around trying to find cover. There, in a rocky creek bed of large boulders, I ended up with my trousers down around my ankles and my head between two rocks like an ostrich with my fanny up in the breeze. I had just about assumed this position when I realized that the sound that I had heard was not a bomb but an artillery shell probably going off three or four miles behind me. The battalion headquarters had foxholes dug into the side of this ravine and of course all the fellows were looking out to see Captain Wallace running around the bottom of the creek bed. I don't believe I've quite lived down that experience yet with the fellows in the outfit.

The next experience that I particularly remember was being a patient in Hospital # 1 at the time that it was bombed. I was in the ward that was bombed and at that time had malaria. Personally, I think the conduct of the Medical Corps at the time was one of the most despicable things I have ever seen or witnessed all during the war. The men in the ward were in fracture beds and in traction, and the corpsmen were running around like chickens with their heads cut off any time that a plane would come close enough so that they could hear its the motor. Yet, these patients were up on beds and couldn't get down on the floor, and no one, other than some of the patients in the ward that were up and around and had some combat experience, seemed to think anything at all of trying to stick with these fellows and make them feel a little bit better. The bomb that hit in the ward really caused havoc. I got **up** out of bed and gathered some of the fellows around the hospital that were from my outfit, formed litter squads, and helped during the remainder of the day by cleaning, taking patients to surgery, and the ones that were dead to the morgue. That night I was sent from the hospital to the Replacement Center. At the time, I was getting over a rather severe attack of malaria and I think that when the former regimental surgeon found me at the Replacement Center that night I had a temperature of around 104 degrees. Major Brennan and I were both there at the Replacement Center when the surrender occurred and on the night of April 10th we were given orders to get out on the road and start marching north towards Cabcaben. This was actually the beginning of the so-called "Bataan Death March." However, Major Brennan and I only marched for an hour or two when a truck stopped along side of us. We climbed on and got in under a tarpaulin and rode the rest of the way to Camp O'Donnell. On

the night that I was being brought from Bataan to Camp O'Donnell, I was searched three different times and on three different occasions three Jap guards took my wallet, counted the money that was in it, looked at the picture of my girl (who is now my wife) and myself and asked if that was my wife. I said yes and they would look very closely at the picture, look through my wallet, put the money back, and give the wallet back to me. Just a few minutes later I saw the same guard take 5-6000 pesos from another officer and put one peso back into his wallet and hand it back to the officer. I cannot explain that.

We arrived in Camp O'Donnell about **3** or **4** a.m. on April **11,** 1942 with a group of about 300 Americans. The first Americans to be put in the Camp O'Donnell Japanese prison camp was this particular group. At the time we arrived, there were only a few Filipino prisoners and a few barracks at Camp O'Donnell. There was no water system, no latrines, no nothing. However, during the first day that we were there, the Japanese, with the help of the American group that I was with, hooked up water lines so that we did have water, and about 6 or 8 hours after we got in, we were given a large serving of rice. I guess this was probably the largest meal that I had had in the past month and a half.

The first few days at Camp O'Donnell were not very bad. At the end of the first two days we only had a thousand prisoners there and the water system was not overly taxed and buildings could be found to house all of us fairly adequately. At least I feel it was adequate, as compared to how it was later. Major Brennan and myself were designated by Colonel Glattly to start a hospital at Camp O'Donnell. It consisted merely of a small building in which we could put fellows who were not able to walk around, to go to the mess lines, and whatnot. We got some of the corpsmen to come in and carry the food to the patients. The only medicine that we had at that time was what medicine the soldiers had carried in and what medicine or instruments the doctors brought in with them as they came in. I don't know what the maximum number of Americans was that were ever in Camp O'Donnell, probably in the vicinity of 6-7000. The maximum hospital census there was 1000; however, I would not say that was all of the hospital patients because every group had its own dispensary that could probably house 100 patients and a lot of patients were kept in the dispensaries rather than being sent in to the hospital. The dispensary facilities were just as good and in some instances better than what we had in the hospital. Only about half of our patients were inside the building.

We averaged, while at Camp O'Donnell, approximately 50 American dead a day and approximately 500 Filipino dead. However, as Americans we had nothing to do with the Filipinos. They were taken care of by the Filipino doctors that were with them. The diet while I was at Camp O'Donnell consisted of rice, salt, and occasionally a teaspoon of brown

sugar. The water situation was extremely acute. Drinking water was piped in. However, to get a canteen full of water you had to stand in line anywhere from 2 to 6 hours. Cooking water was carried about 5 kilometers from a nearby stream. The physical condition of the men was such that two men would be required to carry a 5 gallon container of water that distance, and those two men would only be able to make one trip a day. Therefore, you can see what a problem we had as far as getting water for cooking. Water for bathing or shaving was just out of the question. It was still the dry season and it was not until the latter part of May when the rains began that any of us used water to bathe in. We might dampen a little cloth with water out of our canteen and wipe our hands and face off, but that was the limit of it.

Colonel Glattly wrote repeated letters to the Japanese authorities at Camp O'Donnell and repeatedly went to the Japanese Headquarters to try and get medicine, food, and clothing, particularly for the patients. Finally, he was told that they did not wish to have any more letters or any more visits from him. The only thing they desired was the number of Americans that died each day. That was all that they were interested in. They did not care for the name or serial number or any other information. The Japanese, on one occasion, made an inspection of the hospital. At that time we had 1000 cases of active malaria. We asked for quinine and they gave us one bottle of 1000—3 *gr.* quinine tablets. That was to last the hospital for one week. It is very obvious the inadequacy of such medication. It was here at Camp O'Donnell that I had my first experience with the mass of edema, or beriberi or hypoproteinemia.

The buildings that we lived in were made of native structure, woven sowali for siding and thatched roofs. There were windows and doors cut in the buildings but there were no shutters to go with the windows and no doors for the doorways. It was quite open to say the least and whenever the rains came we found that the roofs were in poor repair and the rain blew in through the windows, the doors, and the roof. About the only thing you could do when it started to rain was get up; if you had a raincoat, you put it on and sat up until it stopped raining so that you could find a dry spot when it did stop where you could lie down and go to sleep.

About 10 o'clock the night of June 1st, Major Brennan and I were both notified that we were to leave Camp O'Donnell the following morning at 2 a.m. We were taken from the camp and marched about a quarter of a mile and were then loaded on Japanese trucks and taken to the railroad station at Capus Tarlac. I was much weaker than I realized at the time and when getting into the back of the truck I tried to jump up but my feet just stayed on the ground. A Japanese soldier or guard was coming by with a rifle and bayonet and he motioned to me to get into the truck, but I just wasn't able. I thought that this was where I would get my first introduction to the use of the bayonet in the Japanese Army because he

turned and came back to me with his gun in, I thought, a very menacing attitude. Major Brennan was already on the truck and the other fellows were doing their best to try and get me in. I think they were just as worried as I was. The surprise came when the fellow came up to the truck, laid his gun on the ground, and then held his hands for me to step on to and boosted me up into the truck. I think I had a lot of fecal material in my blood before he laid his gun down.

We arrived at Cabanatuan about 6 p.m. the night of June 2nd. We were admitted to the hospital there as patients and were the first patients to go into the Cabanatuan hospital. The doctors and the hospital staff were from General Hospital # 2 that had been on Bataan and they had arrived the night before. It was similar to what we had at O'Donnell; however, the buildings were in better repair and after the first week or so we always had a more than adequate water supply. Very rarely did we ever have to wait in line for more than 15 or 20 minutes to get water. There was plenty of water for cooking and it was even possible to get some water at the very beginning to use for washing. Also, it was the beginning of the rainy season and we started having almost daily rains so that it was easy to bathe just by stepping outside of the barracks with your clothes on. In some of the barracks, of course, you could have taken your bath just by staying inside and taking your clothes off. In my opinion the worst of Cabanatuan prison camp was much better than the best that I had seen at Camp O'Donnell. However, I learned that after I had left Camp O'Donnell, along about the first of July, it improved very much, particularly from the standpoint of the Americans who were too sick to be moved and who had remained there. General Hospital **# 1** from Bataan had moved in with Colonel _____ in charge and for some reason or other Colonel _____ had the number of the Nips and he got away with murder as far as they were concerned. I know that for a fact he himself had brains and eggs for breakfast every morning. He had an electric frigidaire in his own dwelling, a house boy, and electric lights. All the staff officers had electric lights in their buildings. They had piped in water and had showers and Colonel _____ was sending a truck out daily that fellows could send money with and make purchases of food on the outside of Tarlac.

On June 17th I was discharged from the hospital and returned to duty with the hospital as a ward surgeon taking charge of a malaria ward. **At** that time the hospital census was probably about 2000. The maximum census of the hospital while I was there was 3100. Until September of 1942 most of our patients were malaria patients and malnutrition. The malnutrition, however, was not as severe as the malaria. Of course all the patients were suffering from malnutrition, but they were not so marked as they were probably in October, November, or December of 1942. We had beri beri, scurvy, pellagra, ariboflavinosis; however, it wasn't until October that we began to find so many of the men with a

beri beri manifested by painful feet. Also during the summer of 1942 we had an epidemic of diphtheria and probably had 100 to 150 deaths from it due primarily to the fact that we had so much malnourishment and a very, very small amount of diphtheria antitoxin. It was during the summer and fall of 1942 that we saw our greatest number of cerebral malarias. These patients ordinarily had had numerous attacks of malaria. Almost all of them were malnourished and run down. They would become more and more weak and finally become comatose, remaining that way for maybe as long as a week before they would begin to improve or before they would die. However, some of them died in much shorter period of time than that. I never saw one of them snap out of it quickly. Ordinarily, they come out of it just about as slowly as they went in. During this time we had some quinine that Hospital # **2** had brought with them. It was not an adequate amount, but it was much more than we had had while at Camp O'Donnell. Late in the fall of 1942, however, the Japanese brought in Japanese quinine that more or less saved the day for us, because we were in desperate need of quinine at that time. In the fall we began to see more and more cases of amoebic dysentery.

During the period from the first of July to the first of January we averaged approximately 30 deaths a day at Cabanatuan. The total camp census at that time was about 9000.

At Christmas time, 1942, we received some Red Cross supplies from the American, the Canadian, and the British South African Red Cross. The total number of small, individual, **11** pound Red Cross boxes received by each man was 7½ boxes spread over the 3-year period. Ordinarily, they came in groups of three. We got 3 right after the Christmas of 1942, 3 the Christmas of 1943, and 1½ late in the spring of 1944. We received bulk fruits, individual packages, and some medications. However, we received very little in the way of antiamebic drugs and an entirely inadequate amount of vitamins. With the increase in the diet and the supplementing of the rice with meats, canned fruits that we received from the Red Cross, and with more medicines, we found that the incidence of death dropped off very rapidly. In February or March 1943 we had our first 24-hour period without a death and by the summer the Japanese rations improved quite a bit. They gave us more rice, up to as much as **550** gms. per man per day, 100 gms. of meat per man per day, and brought in quite a few fresh vegetables, cooking oil, and sugar. The maximum high in our diet was probably reached in the early spring of 1943 when we were receiving approximately 550 gms. of rice, 100 gms. of carabao, and about 100 gms. of mongo beans daily per man. This did not continue, of course, for more than probably a month. Our all time low was reached in January of 1945 just before the fall of Manila to the Americans when we received 190 gms. of rice per man per day. This was our sole ration of food by the Japanese and at that time (January 1945)

it was practically impossible to buy anything through the commissary or to get anything in through the underground. The last 3 months of 1944 were almost as bad. We were on a 200 gm. rice ration.

During the early part of 1943 they began to pay the officers and to pay the enlisted men for their work on the camp farm and for work for the Japanese. Then, too, the commissary that the Japanese had permitted us to set up had begun to function quite well. We were able to buy 100 kilos of sugar for 10-20 pesos. We could get cooking oil for about 1 peso a gallon. We were able to purchase oleomargarine, bananas, mangos, papayas, mabolas, pomelos, and various other native fruits. In the early summer of 1943 we were even able to purchase a carabao in the commissary and bring it into camp on the hoof, The various veterinary officers would butcher it for the group of fellows who had gone together to buy the carabao.

Also, the underground was working quite efficiently at this time. We were able to get money and supplies in from the outside. I know that I was able to get quite a bit of medicine in in the way of emetine, yatren, and yosan through the underground to use in the treatment of amoebics. I was placed in charge of an amoebic ward in September 1942 and remained a so-called amoebic doctor until my release in February 1945. The only cases that I treated in that interval were cases of amoebic dysentery. The Japanese insisted that all amoebics in the camp be in the hospital, and that an amoebic in the hospital be in a segregated area of the hospital. It was all a very good idea, but they would take the human excreta from the latrines and spread that on the farm as fertilizer, so I don't think their quarantine was of very much value.

It was late in the spring of 1943, when we had a hospital census of approximately 3100, that the Japanese doctor came over, walked through the hospital, and ended up by going to the hospital headquarters where he told the C.O. of the hospital that three days later we would have just half as many patients as we had and that our staff would be cut in half. Three days later we had 1550 patients and just half as many doctors and corpsmen working in the hospital. I, myself, had to send some patients to duty that were unable to walk and had to go on litters. That came to be known as the "Japanese cure by Imperial edict." This was a rather unusual procedure to us. We learned later that it was quite common and very often the Japanese doctor would come into the hospital and probably never see any of our patients, but would stop in the office and tell the C.O. that we were to discharge so many patients on such and such a date and it was necessary that we discharge them. The thing was, of course, that we would discharge those that we figured would get well the quickest. Sometimes we would keep a man that was afebrile and yet discharge a man who had a temperature of 104 as a result of dengue. We

figured that he would get well quicker than the other individual who was probably suffering from amoebic dysentery or beri beri or something more chronic than dengue.

The Japanese doctor that we had at Cabanatuan, Swhira, had never gone to a medical school. He had taken a correspondence course and then worked in a doctor's office for a couple of years, after which he entered the Japanese army as a doctor. He was a small individual even for the Japanese. He carried a huge sabre on which he invariably tripped. I have never known of him to do anything medically correct. On one occasion he had a Jap soldier that was sick and Swhira thought that the patient should have some intravenous fluids so he sent to the American hospital for fluids to give the Jap soldier. We sent an American corpsman to return the empty bottle to us. The corpsman said that when Swhira started to stick the needle in the soldier's arm that the soldier jerked, whereupon, Swhira unhooked his sabre and leaving it in the scabbard proceeded to beat the Jap soldier about the head and shoulders until he was unconscious. Then he gave him the fluids and sent the bottle back. The following morning the Japanese soldier died and was cremated in the afternoon. Swhira was also the Japanese doctor that got all the Americans who had as much as one quarter Indian blood together, lined them up, stripped them down, and went along smelling their armpits. I think that this was one of the most ridiculous things that I saw all the time that I was in prison. You see, the Japanese doctor was going along smelling these prisoners' armpits trying to determine whether they were of an Oriental origin or not.

Another thing that always amused us in regard to the Japanese, including the Japanese doctors, was that any time they made an inspection and went into the amoebic dysentery area of the hospital, they always wore rubber boots and ordinary rubber gloves as well as a mask over the nose and mouth. To get them to touch the patients was practically impossible. They just wouldn't do it unless they had on rubber gloves. They apparently were very, very scared of contamination. Another thing of interest in regard to the Japanese medical setup was that any Japanese soldier who contracted any venereal disease while outside the territorial limits of Japan proper would not be allowed to return to the homeland for a certain number of years after he had been pronounced cured. As a result, very very few Japanese soldiers with venereal disease ever turned to their Japanese doctor. This was one source of much income for the American doctors because we were always very obliging to treat them for acute venereal disease with such things as sodium bicarbonate, magnesium carbonate, and violent and long continued exercises. We also recommended at least a pint of whiskey a day and a lot of hot spicy foods.

Now as to the camp activities. In the latter part of **1942** we had the beginnings of a dance band that consisted of one guitar, and also had a small theatrical group that ordinarily consisted of one or two fellows putting on a little skit that they had either made up or remembered. Of course, as time went on, piece by piece was added to the dance band. Ordinarily, we got the instruments in underground. We ended up with a dance band consisting of **2** guitars, **2** trumpets, a saxophone, a clarinet, a trombone, **2** pianos, and a set of drums. The drums we had to make ourselves. We were able to trap some dogs, skin them, and dress the hides down and use them for drum heads. All the fellows had played previously, either with Army bands or civilian dance bands. The band leader had had a band of his own when at school in Iowa. The band gave bi-weekly concerts—once a week in the duty area and once in the hospital area. All the music and arranging had to be done by the fellows in the band as they had no sheet music. Occasionally they would get some piano scores or various pieces from which they would make their own arrangements. About once every **4-5** months, they would give a concert of semi-classical and classical music. These were really very much better than you might expect. Also, the fellows in the band and other fellows in camp wrote several pieces of popular music. We had a Iot of Mexican fellows from along the border and, of course, they wrote a lot of rhumbas, congos, tangos, and Latin American music. They tried to play one new selection each week. I think they were very good and they were certainly entertaining. Several times they had contests in regard to musical scores and then they would play the various original selections and let the audience judge which selection was the best. This, of course, would always take an entire evening which delighted us. The band continued to function up until about the first of September **1944.** By that time so many men had been sent out of camp, that is, so many men from the band organization, that we had to discontinue for lack of musicians. We also had a choral group that gave concerts, usually on Sunday afternoon or Sunday evening and once in a while an evening concert during the week.

In addition to music, we were also entertained by the famous Cabanatuan Art Club Players Theater Guild. Most of the members had been in amateur theatricals; some of them had had experience as professional actors. They would put on a play weekly; they would give it one night in the duty area and one night in the hospital. They would take a standard, such as ***Dr. Jekyll*** *and Mr.* ***Hyde,*** and make it into their own form. After they were through with it the only way that you could recognize it was by the title. They also modernized their plays and brought them up to where they fitted in with prison life very well. The stage consisted of merely a platform, no curtains, and no scenery other than a few boxes and benches. They would also take some of the more recent plays, change them and give them a new title to where it was really a circus.

One in particular that I remember was *Snowwhite and the Seven Dwarfs* which was changed to *Big Red and the Five Pixies*. The plays usually would have some reference to the war and very frequently a reference to the Japanese or to the Imperial Forces or some such remark. Of course, the Japanese always sent a Japanese officer or soldier to attend the plays and the band concerts to see if they were proper and what not, particularly as far as censorship. However, the fellows usually worked in their remarks in such a way that only Americans would catch on to it. It made a lot of fellows rather nervous to have that happen while they were in the audience and also with a bunch of Nips sitting around. Both the male and female parts were played by male prisoners. We had a couple of hair dressers and dress designers who were prisoners and these fellows would take pieces of rope, dye them, unravel them, and make wigs for the players and the dressmakers would take sheets or pieces of colored material that we were able to get in underground and design dresses. There were several formals designed that any woman here in the U.S. would feel very much dressed up in. They were not at all amateurish in design or in the way they would fit the fellows. Of course the fellows were properly padded and we had one marine with about **18-19** years service that was really a very gorgeous looking creature. He was also an excellent dancer and got along very well. The only difficulty was that his legs were extremely hairy and he had a very, very deep voice.

We had a Kansas City lawyer by the name of Ben Mossel who had performed quite a bit in summer stock who was more or less the spark plug of the shows. There was also a fellow who played in the Triangle Shows and a Britisher who had been interested in amateur theatricals in Hong Kong and Shanghai. These three were the main stays of the theatrical productions and they made it rather miserable for the other characters because they would all start ad-libbing and the rest of the characters would just get completely lost. They would frequently get an idea for a play, say tonight, and tomorrow night they would put it. Of course in conditions like that a lot of the dialogue would have to be ad-libbed. I would occasionally see a play one night in the duty area and then the following night in the hospital area and I don't believe that I would have ever recognized it as the same play except for the fact that the fellows called it by the same name and the same prisoners were in the play both nights. Some of the plays that they put on were *The Barber of Seville, The Bride of Frankenstein, The Student Prince, The Drunkard,* and *Ten Nites in a Barroom or the Face on the Barroom Floor.* Our theatrical productions also came to a close in the fall of **1944** when our three leading stars were sent to Japan.

We also had an educational program that was going on all the time. Sometimes it was sanctioned by the Japanese and sometimes it had to be sub rosa. We had men who gave courses in mathematics all the way from

4th grade arithmetic up to calculus and analytical calculus. We had other men who gave lectures on various subjects ranging from breeding habits of mink to the manufacture of cheese to coal mining. There were also courses in history, rhetoric, and engineering. We were rather fortunate in having one individual who had taught quite a bit of history and was supposed to have had one of the finest collections of history **books** in the U.S. Queerly enough, this man was an enlisted man in the Marine Corps and had been in the Marine Corps for **20-22** years.

We had several very talented carpenters, cabinet makers, and I guess you could call them sculptors, who made many small figurines out **of** wood that were very beautiful, the ordinary subject being animals or a human figure. We had one individual also who, in peace time, had been just an ordinary carpenter and cabinet maker, and who had always wanted to make a violin. He made one and was able to get some strings through the underground. We had a man in camp who had played with the Philadelphia Symphony and he gave us a concert using this homemade violin. Afterwards, I heard him make the statement that the tone of this homemade violin was much superior to the tone of the average commercial violin that you purchase here in the U.S. He also made a balalaika and a couple of guitars. He was also the official peg-leg maker. Sometimes he was turned loose and created something that was very beautiful and also very comical. One case in particular that I remember, was an artificial leg for an old Marine, probably a man **40-45** years old, very, very muscular and very hairy. He ran around the camp with nothing on but just a g-string or a pair of shorts. His skin was very dark from being sunburned and he was tattooed almost over his entire body. However, when Ludwig got through with this artificial limb it was a very, very shapely female lower extremity which he then sandpapered and painted white. Can you imagine anything as ridiculous as seeing a man walking along with one leg very knotty, gnarled, with a lot of hair and dark brown and tattooed, and the other leg a very shapely leg in snow white?

We ran various competitions in the camp for games for individuals, such as chess, checkers, and Acy-Ducy, which is a corruption of Backgammon. These were held first in the barracks and then the champions of the barracks would hold tournaments to determine which was the best in camp, There was also quite a bit of gambling going on, mostly in poker or bridge, and very little, if any, of blackjack or dice playing. None of the poker games was very steep. We had some professional gamblers in camp who had quite a bit of money. They ran their games of course on strictly a cash basis. Most of the games, however, were run on the cuff. I know of several bridge games that were being played for a **peso** a point, which to me is a rather steep stake to play bridge for. Of course, after we got our individual packages from home that had playing cards, why we all played a lot of bridge and had a lot of fun, and used up a lot of spare

time that way. The only trouble was that we didn't have lights and frequently the only time we were able to play would be in the afternoon, but then you had work to do. Ordinarily, we played right after lunch or a little while after supper until it got dark.

It was not until the fall of 1942 that the Japanese permitted us to hold any religious meetings or any gatherings of any kind officially. As soon as the permission was granted, however, we had quite a complete religious program. There were different types of Protestant meetings almost every night of the week, prayer meeting, bible instruction, choir practice or something like that for the various denominations of the Protestant Church. Also the Catholics in probably six or seven different places of the camp held Mass every morning and Rosary or some type of religious services every evening. For a lot of the men this meant a great deal.

An odd thing, while we were in prison, some of us soon learned that we could predict the attendance over a period of time at various religious services if we knew what the diet would be in advance. As the diet went down and the fellows had less to eat and the entire morale went down, the attendance at religious services went up. The reverse of this was also true: when the morale was good, when everyone was getting more than the usual amount to eat, then the attendance at all religious services would diminish very rapidly.

One thing that was rather odd or peculiar that did happen in camp was the proselytizing by the various denominations of the Protestant Church and by the Catholic Church. They would work on some individual to try to get him to join a certain denomination and the following day some other preacher would be down to see him and maybe the next day one of the Catholic padres would be down. Of course the man's religion usually depended on which padre was giving out the most cigarettes. Some of the chaplains got very irritated about this and I know of one chaplain that did so much evangelistic work for the Episcopalian Church that the other chaplains got together and went to the C.O. of the hospital and requested that this particular chaplain be denied the privilege of coming into the hospital to visit the patients. Another odd thing, to me at least, was the fact that when we became very, very short on paper, particularly for rolling cigarettes, we had much less trouble getting permission from the Catholic chaplain to use the Bible or New Testament for cigarette paper than we did from the Protestants. Most of the Protestant chaplains were rather radical about that and frowned on it very much. However, my favorite Catholic padre thought that as long as we didn't feel that it was the Bible that we were using, it was perfectly all right, but we shouldn't consider the paper we were using as the Bible. I lived with a Protestant chaplain for a while who used to frown and look down his nose at me every time I rolled a cigarette with my little New Testament

that I always carried for that purpose.

Frequently at some of the Protestant or Catholic services we would have Japanese soldiers or Japanese officers attend. Most of them attended Catholic services. I know that on one occasion when a group of high ranking Japanese officers were inspecting the camp, one of them detached himself from the party when he was near my ward and went over to a chapel that was in the dysentery area and asked the American Catholic padre for his blessing and he got it. At the time I happened to be living with the Catholic chaplain who gave him his blessing and I asked him, "Now just be real honest about it. Did you give that man a blessing?" His answer was 'Well, Wallace, I gave him a blessing but not a real good blessing."

For Christmas of 1942 and 1943 at Cabanatuan we had midnite Mass and I feel free to say that at least 3000 men attended both of those services. They had gathered flowers that had been raised in camp and greens and sheets that had been brought in from the underground and decorated the stage or platform that had been used for theatricals and made it into an altar. As usual, three priests would say the Mass and a couple of priests would act as altar boys, while still another priest would explain the steps of the various rituals in the ceremony. I think that everyone who attended those services enjoyed them very much. Likewise, we always had Christmas carols on Christmas Eve by the choral group and nearly always the theatrical groups would have some kind of a Christmas play. I know that the one that they put on in 1943 at Christmas time was really a tear jerker. I've seen a lot of men cry in movies, but I don't believe that I have ever seen such a large percentage of men at any type of play or theatrical production cry as they did at that one. The theme of the thing was a party, set 25 years after we were released from prison, and it brought up the various fellows in the group who were in the prison and also talked about the various activities and things that we had done. It was all carried out in such a manner that I guess it just made us all homesick. I know it did me. Incidentally, at Christmas time in 1944, after I had been transferred to Bilibid, I got to know one of the Navy enlisted personnel there who had had a lot of dealings with the Japanese and who had quite a bit of food laid back. He apparently had the low down on several of the Japanese guards so that they did just about anything that he told them to do. He invited myself, Captain Brennan and Captain Naser to a little Christmas dinner. We had pork chops, candied sweet potatoes, chocolate pie, coffee with sugar and milk and chicken noodle soup. We started the dinner off with wine and ended it up with some sake. Of course, this doesn't sound like very much but remember we had been on 200 gms of rice per man per day for 3 months when he sprung this little dinner for us and had homemade place cards for each one of us which showed a figure behind the wall of a prison win-

dow with our name in under the prison window. He also had a box of Isabella Generale cigars which are the best that Manilla produces. Of course after the thing was over Doctors Brennan, Naser, and Wallace were very sad sacks.

The first mail that I received in prison was in the summer or fall of 1943, at which time I received a long application form to fill out from the Bureau for Procurement and Assignment of Physicians, Dentists and Veterinarians, wanting to know if I wanted to join the Army. The envelope was postmarked Washington, D.C., April 22,1942, two weeks after I had been captured on Bataan. The letter that accompanied this was an advertisement from the Year Book Publishing Company in Chicago wanting to know if I wanted the new 1942 Medical Year Book. It likewise was postmarked May or June of 1942, several months after I had been taken prisoner. It was merely addressed to Lt. J.K. Wallace, 53rd Medical Battalion, Camp Claibourne, La. Yet they found me. It wasn't until almost a year later that I received any word from my people in the States. The first word that they had from me was on August 17, 1943, which was almost a year and a-half after I was taken prisoner. In all, my parents and my fiancee received seven cards from me. They have received three postcards since I have been released and returned to the U.S.

There were thousands and thousands of letters which came into the camp, but only a small number of them were ever distributed to the men. For a period of 2-3 months the Japanese would only censor from 20-50 letters a day. When those are spread out among 10,000 men receiving letters, you can see how thin they would be and how long it would take them to get them censored so that everyone in the Camp would get one letter. After a time, however, they did start censoring much more rapidly, but never in any satisfactory amounts. One thing that we noticed in regard to letters was that letters which included snapshots of our friends or of our parents always came through much quicker and much easier than did those that were just written material. The Japanese are very fond of snapshots, particularly of children, and invariably when you start talking to a Nip, the first question he asks is whether you are married or not and the second question is whether you have any children and third, do you have any pictures of them.

During the three years that I was in prison I received a total of about 38 letters, more than half of which were from a distant cousin of mine that I had not seen for the past 10-12 years. I received only 18 letters during the three years from my parents or from my fiancee. At first our parents were permitted to write as much as they wanted to. Later, however, the messages were limited to 24 words. It was odd about the letters. I know of two or three individuals that during the 3 years received as many as 300-400 letters. However, those individuals who had re-

ceived more than 100 letters were very rare. I would say that about the average number of letters for each individual was around 25 letters per man. Of course when mail came out, if one of the fellows that you were living with got a letter, everyone in the building where he lived would read the mail. Sometimes we read the mail before the person to whom it was addressed got to read it, which brought on many sundry, odd remarks. One individual received a letter from his brother stating that his wife and baby daughter were living with his mother and that they were both doing very well but, "Son, why didn't you tell us before you left that you were married?" This was all very fine except the individual to whom the letter was addressed and from whose mother it was received, was not married and he did not know who the girl was, as his mother never did mention the girl's name in the letter.

All of us in the prison became quite accomplished cooks and authoritative gardeners. I know that while I was at Cabanatuan, four of us who were living together had a garden and we raised sweet peppers, hot peppers, egg plant, okra, tomatoes, onions, and we even had a few papaya trees. We also tried to raise some watermelon, but the net result was one very, very small watermelon with hardly enough for a taste for the four of us. However, we did have some fair success raising a few squash and would either make a squash pie or a squash pudding or baked squash. The main difficulty in this was getting seed and then you would have to transplant everything because of the heat or rain. During the rainy season we had to dig ditches all around our plants to keep them from flooding. Then, during the dry season we had to put our plants down into the ditch to keep them from dying from lack of water. I had one pepper plant that kept bearing continuously for two years. I think that's a record. We all learned how to make pancakes, cakes, and also various types of stews and soups. Ordinarily, the main consistency of all these things was rice. We also became very adept in substitutions. The only shortening used was mineral oil and in the latter part of 1944 we used a lot of glycerine for sweetening. We cooked corn meal mush and rice together, put some glycerine in it and let it set overnite to more or less jell and it was a pretty good breakfast dish to add to the rice that you got from the Japanese.

One evening, Ralph Hibbs and myself, had some casava flour that we wanted to use, so we decided to make a batch of hotcakes, but when we took them down to the mess hall to have them fried, the griddle was out of operation so we couldn't have them cooked. We then decided that we would make a cake. We took the stuff back to where we were living, stirred in some sugar that we had at that time, took it back down, put it in the oven and baked it. Well, it baked and it baked and it baked, and finally in about an hour Ralph went down to see about it and the enlisted men working in the mess hall, taking care of individual cooking, said to

Hibbs, "What in the world have you got in that, Captain? I raised up the door a little while ago and the thing just kept bubbling up and bubbling up and all of a sudden it would go BOOM! I'm afraid its going to blow up the oven." Ralph took a look at it and it was just like a volcano getting ready to erupt but never quite making it. The cake still wasn't done and about an hour later Ralph went back and got the cake and said, "Whether it's done or not we're going to eat it." We tried to eat it for supper but it would have been a lot easier to try to eat a sponge rubber mat than it was to eat that. You could pick the cake up, take it out of the pan, hold it by one end and wave it around and not a single crumb would fall off. You could cut it, take a small piece of it and stretch it out just like a piece of gummed rubber. That was our last attempt to make a cake with casava flour.

When we couldn't get rice to make rice flour we would take sweet potatoes that we raised, slice them up very very thin, put them out in the sun, and let them air dry for a couple of days, and then put them in the oven and finish drying them out in a very slow oven. Then we would run them through a good grinder, take the coarse powder that we got, lay it on a board and roll it with a glass bottle making sweet potato flour. This was pretty good flour for making pancakes and dough.

One of our two biggest problems during imprisonment, as far as cooking, was shortening and sweetening. We had a lot of trouble, particularly during the last year and a half we were in prison, trying to get any sugar at all. Of course it would have been fine if we could have got saccharin, but it was practically non-existent. A few fellows did get some saccharin while the underground was still functioning quite well. Naser, Brennan, and myself went to Bilibid together in October **1944.** After we got there this fellow Naser was able to get next to a couple of Jap guards and started doing some dealing with some jewelry that he had got in through the underground early in his prison stay and trading that for food we did pretty well. One particular night (there was a spot in the prison where they always met to do their trading where the Japanese officers were least apt to see the Jap enlisted men), the Jap soldier that Naser had been dealing with came up to him with a bag containing about **25** kilos of beans and told Naser to take it and get going and not to hang around. Naser told him that he didn't have anything to give him for the beans and that we didn't want them. The soldier said, "Take them anyway and get out of here with them." It wasn't until the next morning that we found out why the Jap soldier was so insistent that we take them. There was a Jap colonel coming to inspect and if the soldier had been caught with that amount of beans in his possession in his quarters he probably would have been pretty well beaten up over it. So we proceeded to start eating the beans very quickly. A few days later he came back and wanted either his beans back or something in return for them. Naser told him

that he would have to wait and come back later. When he came back later the beans were all gone. Naser put him off with some story that, 'Well, very sorry but the beans are all eaten. We can't return them and we haven't anything to give you for them." Of course the Jap guard didn't put up a squawk because he knew that if he did all we would have to say was that we had been dealing with him and that was the end of him. This same guard later deserted the Japanese. After he got away, what did he do but send a note back to Naser, Brennan and me telling us that he had deserted, that he had joined a group of Filipinos, that they had arms and ammunition, and wanted to know if we wanted him to send us some rifles or pistols, That left three individuals that were just as worried as the Jap soldier had been about being caught with the beans, because we were scared to death that the crazy little fool would try to send in guns to us and that was no time or place to be caught with a gun in your possession.

In our little group at Bilibid of Naser, Brennan, and I—Nasar was the procurer, I was the official quartermaster and cook, and Brennan—I think he just ate. I know that on one night Nasar had been out doing some dealing and, of course, we were all supposed to be in our barracks at 9 o'clock, but Nasar was out until about eleven. He came in and woke me up and said, 'Wallace, Wallace, I got 5 gallons of cooking oil. Get up and find someplace to put it."If you can imagine someone getting up in the dark and finding bottles and jars and tin cans and then pouring 5 gallons of oil in the dark into those things, you have a fair idea of the mess that I was in. Incidentally, at that time there were about **14** other fellows staying with us in the same building, all in the same room, and I didn't wake a single one of them.

I'll try to give you a schedule now of the average or ordinary day of a medical officer in Japanese prison when he was assigned to work in the prison hospital. We got up at 6 o'clock in the morning. At 6:15 we had to be on our wards for roll call. All of our patients had to come outside of the ward, line up, and stand in formation until the Japanese came down and made a show of counting. For us to leave a man in the barracks and not make him stand up for roll call the man had to be in what in the States would be a critical condition. I've had to have men stand for 15 or 20 minutes waiting for roll call that were actively chilling from malaria or who had severe diarrhea. I've had men with temperatures of 103 to 105 standing in formation in a drizzling rain waiting for some crazy Japanese to come around. All they ever did was merely make a show of counting. I don't think that they ever got an accurate count of the prisoners they had.

After roll call you would go back to your building, sort of clean up around, wash up, and have breakfast at 7 or 7:15. Then at 8 or quarter-to-eight all the ward surgeons would go to their wards, hold sick call, see

the patients, and spend the rest of the morning on the ward. At 11:30 we knocked off, had lunch at 12, and at **2** o'clock were supposed to go back to our wards and remain there until **5** o'clock when we had supper. After supper, at 7 o'clock in the evening, we would have another roll call and it was the same thing all over.

The men in the duty areas had a little different schedule. Their meals were at about the same time, but they formed up and marched out to the various places where they worked, either on the farm, or an airport that the Nips were building near the Cabanatuan Prison Camp, or out on the wood detail and chop wood for cooking the food in the prison, or on a carabao detail which went into Cabanatuan in oxcarts, a distance of about 6 miles, to bring in supplies for both the Japanese and the Americans. They would ordinarily start at 7:30 or 8 o'clock in the morning and would work until 11:30 or 11:45; they would be off until 1:30 or **2;** and then would work again until 4:30 or 5. During the rainy season this was very, very bad because very few of the fellows had rain coats, and even if you did have a raincoat it would have to be a particularly good one that would withstand the type of rain, inasmuch as you were going to be out in the rain all day long. In spite of the fact that the rain was rather warm, after you had been out in it about an hour, you got extremely cold. Then of course on Wednesday and Saturday nights we had either the band or the theatrical group from about 6:30 to 7 or 8 o'clock. Either organization would put on a show of some type. Occasionally, there might be a little program put on by the choral group on one of the other nights. This was quite unusual, however, because the Japanese stated that we should not have recreational gatherings like that every night. About once every two or three months, the Japanese would put on a moving picture for us. Most of these were Japanese pictures. Occasionally they would be some old American film which we all enjoyed very much.

We didn't get much sense out of the Japanese pictures; however, we did enjoy them because they were the most ridiculous things any of us had ever seen. They put on one show that I remember which lasted for about 30 minutes which gave the nesting arrangement and the raising of the young of the hawk cuckoo. This was described in English, apparently by a Japanese, and he made the most asinine remarks and statements that I have ever heard. He compared the hawk cuckoo to the Allied powers because the hawk cuckoo put her young in the nest of some other bird and then the young of the hawk cuckoo would push the young of the other bird out of the nest just like the U.S. and Great Britain had done. The Japanese films, however, as a whole, had very poor photography, very poor lighting effects, and their sound reproduction was very poor.

Of the sixteen doctors and the four dentists that the Japanese kept behind in the Philippines to take care of the prisoners that were not able

to go to Japan—not a single one was Regular Army. Everyone of the Regular Army medical, dental, veterinary, and MAC officers were sent to Japan and they took the last of them out on the boat that left in December of 1944,

On September 19, 1944, the first American planes were seen over the Cabanatuan Prison Camp. These planes came over in a group of about 500, as best as we could count them. They were flying extremely high and we couldn't be sure whether or not they were American planes, but we all thought that they were. Of course the wing markings could not be seen at that height and later, when we did see them lower, the wing markings were entirely new to us. We knew nothing of the Star and Bar that the Americans now use as wing markings. However, at noon time of September 19th we were convinced that they were planes that undoubtedly were friendly to us because they shot down a Japanese pursuit plane right in our own little back yard. The Japanese plane fell about a mile east of Cabanatuan Prison Camp. The American planes came over frequently after that up until the time I was sent to Bilibid in October. Almost always, one or two of the planes would come down while one would fly cover, and they would buzz the camp and maybe clear their guns or take a run over the Japanese airport and strafe it a little, then come over, clear their guns and wiggle waggle their wings at us. It was with great difficulty that we managed to keep ourselves inside the buildings and kept from cheering or putting on some sort of a show because we had been repeatedly cautioned by the Japanese that we were not to do that. Several of the fellows were slapped around for waving or yelling or jumping up and down when the Americans came over. The Japanese did not like us to acknowledge the fact that the planes were overhead at all.

The Japanese officers had radios and whenever they would break down they would bring them to the Americans for repair. Of course, we would always take an unusually long time to repair a radio and while repairing it we would get a lot of news. The radio could have been fixed in 10 minutes but the Americans would keep it for two weeks. In that way we got a lot of news. Then later a radio engineer who was a prisoner built two small radios that would fit into a canteen by putting a false bottom in the canteen. At the time that I went to Bilibid one of the fellows in our group took one of these radios along with us. He merely put it in the canteen carrier and hooked it to his pistol belt and carried it like it was a canteen full of water. The source of power for those sets we got by tapping in on Japanese electric current. Of course, we had to be very careful about using radios because I believe if we ever had been caught we would have been shot, so whenever anyone was listening to the radio, and there were only about 6 men in camp that listened to it, one fellow stood guard at each door of the barracks and one walked around outside, just in case some Japanese soldier or officer walked into the area. Of course you

couldn't have heard it because it was an earphone set, but we were always afraid that someone might walk in before we had a chance to put it away.

I think the climax of my stay in prison was an incident that happened in the latter part of November or the first part of December **1944.** The Japanese soldiers, as you know, have no conception whatsoever of sanitation. Their idea of disposal of human excreta is to step to the nearest window and either urinate or defecate out the window or throw it out the window. They did the same thing at Bilibid. The Japanese had put two high tension wires around the top of the walls of Bilibid so that prisoners trying to escape would be electrocuted. I think several of them were executed in that way. Anytime the circuit was shorted an alarm bell would ring and all the prisoners would have to get outside for a roll call. On the average, this would happen two or three times a week as the result of a dog or cat getting up on top of the wall and getting into the wires. We would turn out in the middle of the night to have an emergency count. One night about **9** o'clock we heard the bell go off and we all got up to go outside. We were just lining up outside when one of the Japanese soldiers came down and asked one or two of the American doctors to come with him. Colonel Wilson and Major Houghton went with him and they found a dead Japanese. It seems that this soldier was preparing to go to bed and had to urinate so he stepped to the window of the barracks which was a three story building right along side of the wall of Bilibid. He was on the second floor and the window was just a little bit above the level of the wall. The soldier urinated out of the window, the stream hit directly upon the high tension wire—and that was one dead Nip. So for sometime after that in Bilibid, any time that an individual would become exasperated or irritated with another the expected comeback or remark to be made was, "Oh, go pee on a wire". And I think a lot of the fellows got a big kick out of that story on finding out about it. I know I did.

At **1000** on **4** February **1945,** Colonel W. Wilson was called to the Japanese prison headquarters in Bilibid and was given a statement by the commandant that we were to be freed. This statement was written in English, in longhand, and dated **4** February **1945,** but a date of 7 January **1945** had been scratched out and the latter date placed under it. Apparently, on the first of January, when the fleet action in Philippine waters had been so heavy, the Nipponese expected a landing on Luzon and had intended to release us at that time, but then changed their minds. The statement merely stated that we were lawfully released prisoners of war, we were to remain within the confines of the prison, we were to make no demonstrations, and that we would not be molested if we remained in Bilibid. At **1300** the Japanese guards marched out the front gate of the prison and that was the last we ever saw of them. After

they left we closed and locked the gate and placed a large Red Cross flag on the arch that one of the fellows who had been in a general hospital in Bataan had carried through prison. Before leaving, the Japanese had placed a proclamation in Japanese, Filipino, and English similar to the written one they had given to Colonel Wilson.

At 1800 the same day we saw our first member of the invasion forces. The 2nd Battalion, 138th Infantry broke into the side of the prison without knowing that there were Americans there. It was a toss-up on who was the most surprised of the two groups. The Yanks had seen the prison camp on the map and decided that that would be a good place to bivouac for the night as it would give them at least a little security. There were high doings that night and more than one prisoner got sick from either drinking or eating too much, for the fellows who came in brought out everything they had and sent Filipinos to get more. Some of the fellows must have got into a good wine cellar for several had six to a dozen bottles each of excellent wine.

Four or five days later MacArthur was supposed to make his triumphant entry into Manila as the invasion forces thought the fighting would be over by then. The entry never came off as proposed, for it turned out that on that particular day it was questionable whether the Yanks would be able to retain that portion of Manila that they held. This had us all very worried for we did not like the idea of becoming Japanese prisoners again, and that is just what would have happened for the troops would have been unable to take us with them on a retreat. Most of the prisoners couldn't have walked more than a quarter of a mile. It was not until the night **of 11** February that the tactical situation became such as to permit our being taken out of Manila. We were taken to north central Luzon and flown out to Leyte. From there we sailed aboard the ***Monterey*** for San Francisco, arriving there March 16,1945.

I arrived back in my home in Marion, Illinois, the morning of Easter Sunday 1945, in time to attend church with my family, just four Easters from the last I had attended Church with them. Then on April 14,1945, exactly four years since **I** had last seen her, Vivian Fawcett became my bride.

So ends the story of a convict.

—Major J.K. Wallace, M.C.

BOOK REVIEWS*

ESSAYS ON THE MODERN LAW OF WAR*

reviewed by Major Ora Fred Harris, Jr.**

> The tolerance extended to warfare has often been viewed as international law's major weakness. . . . Although it may not stop war, international law at least attempts to curb the potential excesses of nations resorting to, or considering a resort to, violence.[1]

That war (now commonly referred to as armed conflict)[2] has been virtually in perpetual existence almost as long as humankind is hardly an exaggeration. In fact, the current debate, as highlighted by the above quoted observations, focuses not upon the legitimacy of the right to engage in armed conflict, but upon the proper and humane means and methods of engaging in this ineluctable aspect of human existence.[3] Because many are resigned to the existence of armed conflict in some form or another in various parts of the world,[4] recent emphasis has been upon formulating laws governing armed conflict to inject a modicum of reasonableness in what, quite frankly, seems to be a patently unreasonable

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*The opinions and conclusions expressed in these book reviews are those of the authors and do not represent the views of The Judge Advocate General's School, the Department of the Army, or any other government agency.

*Green, L.C., *Essays* on the *Modern Law* of War. Ardsley-On-Hudson, New York: Transnational Publishers, Inc., 1985. Price: $37.50. Pages: 281. Table of cases, index. Publisher's address: TransNational Publishers, Inc., P.O. Box 7282, Ardsley-On-Hudson, New York 10503.

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[1] C. Shanor & T. Terrell, Military Law *in* a Nutshell 183 (1980).

[2] L. Green, *Essays* on the Modern Law of War XX (1985) ("Protocol I abjures the use of the word war entirely and refers simply to armed conflicts, thus obviating the need to determine whether a war exists or not.") See *also id.* at 2, citing Schwarzenberger, From the *Laws* of War to the Law of Armed Conflict, 21 Current Legal Programs 239 (1968) "tendency to replace the concept of war by that of armed conflict") and 262 ("it has become popular in the doctrine as well as the treaties to talk of armed conflict"). Hereinafter, the concept of armed conflict will be used in lieu of war.

[3] It is generally accepted that the law of armed conflict has two branches: "*jus* ad *bellum*—the right to resort to war—and *jus* in bello—the law during war." *Id.* at XIX.

[4] Shanor & Terrell, supra note 1, at 183 ("modern scholars have reconciled themselves to acceptance of armed conflict as simply one of several options available to any nation involved in a dispute").

activity.[5] This has spawned an abundance of commentary by some very able international law scholars.[6] Professor L.C. Green is undeniably a member of this distinguished class. His revered status in the law of armed conflict component of international law is partially reflected by his current academic position as Professor of Political Science and Honorary Professor of Law at the University of Alberta. Moreover, his lofty position in law of armed conflict circles stems partially from the numerous contributions—in scholarly writings and public service as a consultant on the law of armed conflict[7]—that he has made for several years. In fact, the book which is the subject of this review is actually a collection of essays which spans a number of years and touches a variety of vital areas in the law of armed conflict. An interesting aspect of this collection of fine essays is that it reflects to some degree the magnitude of Professor Green's contribution to the legal literature of the law of armed conflict.

Essays on the Modern Law of War is a timely, well-written composite of thoughts and ideas that cuts across the broad spectrum of vital issues in the field of the law of armed conflict. The obvious benefit of the book

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Bee, *e.g.*, The Hague Conventions of 1899 and 1907 and The Geneva Conventions of 1929 and 1949, with Protocols I and II (1977) Additional to the Geneva Conventions of 1949. Also, rules of customary international law are binding upon all nations, including those that are not parties to any of the foregoing treaties and protocols. This component of the law of armed conflict can only be vaguely described as including "various 'rules and principles which had become accepted as part of customary law." Green, supra note 2, at 84. The rules of customary international law are amorphous because "they have not been embodied in treaties." *Id.* at 79.

[6] *See, e.g.*, R. Miller, The Laws of War (1975); G. Best, Humanity in War (1980); J. Stone, Legal Controls of International Conflict (1954); R. Falk, Crimes of War (1971); A. Cassesse, The New Humanitarian Law of Armed Conflict (1979); J. Toman, International Humanitarian Law (1979); Baxter, Modernizing the Law of War, 78 Mil. L. Rev. 165 (1977); Bond, Application of the Law of War to Internal Conflicts, 3 Ga. J. Int'l & Comp. L. 345 (1973); Rubin, The *Laws* of War, 76 Am. Society Int'l L. Proceedings 139 (1982); Lackey, *A* Modern Theory of *Just* War, 92 Ethics 533 (1982); and S. Amos, Political and Legal Remedies for War (1982).

[7] See, *e.g.*, International Law: A Canadian Perspective (1984); International Law Through the Cases (4th Ed.) (Textbook) Part 6: The Law of Armed Conflict (1978); Superior Orders in National and International Law (1976); *Is* There *An* International Criminal *Law?* 21 Alberta L. Rev. 251 (1983); Status of Mercenaries in International Law, 9 Manitoba L.J. 201 (1979); International Criminal Code—Now? 3 Dalhousie L.J. 560 (1976); Superior Orders and the Reasonable Man, 8 Canadian Yearbook of Int'l L. 61 (1970); Legal *Issues* of the Eichmann Trial, 37 Tulane L. Rev. 641 (1983) and Political Offenses, War Crimes and Extradition, 11 Int'l & Comp. L.Q. 329 (1962).

Some public service positions held by Green include: Secretary and Organization Tutor, London Institute World Affairs, 1946-60; Chairman, Canadian Human Rights Foundation, 1969-; Legal Advisor and Member, Canadian Delegation, Committee on Humanitarian Law in Armed Conflict, 1975-77; Academic Counsel, International Institute Humanitarian Law, 1976-; Memberships include: International Commission of Jurists; American Society of International Law; International Law Association; Canadian Institute of International Affairs; Society of International and Comparative Law; Canadian Society of International Law; and British Institute of International and Comparative Law.

to the reader is the cascade of important knowledge and information which it imparts in a rather concise, interesting fashion. Amazingly, the book is chock-full with diverse perspectives on extremely topical issues in the law of armed conflict and is, nevertheless, only 281 pages in length. However, from an organizational point of view, this creates negative overtones regarding readability; specifically, the fact that this is a collection of essays creates problems of disjointedness, lack of fluidity, and, most disturbingly, redundancy. Regarding redundancy, Professor Green notes in the preface that, "[i]nevitably, there may be a measure of overlap. But this is a field in which this cannot be avoided."[8] Given this caveat, the reader can probably tolerate this negative attribute of the book; moreover, in weighing this flaw against the publication's contribution to the law of armed conflict jurisprudence, one may conclude that the overall organization is reasonably good and adds to the quality of the publication. In fact, it is perhaps fair to say that even the redundancy may be an enhancing feature of the book, for it tends to reinforce vital precepts and themes; this seems to overshadow the slight annoyance a reader may occasionally experience from the "apparent" tautology. I hasten to add, however, that the foregoing criticisms of the organization of this publication are not intended to, and, in fact do not, depreciate its general fine quality. To the contrary, my overall assessment of *Essays On The Modern Law Of War* is quite favorable. To lend some credence to this view, each distinct essay or the separate themes developed by a group of essays will be briefly reviewed to shed light on the trenchant substantive insights on the law of armed conflict which permeate this entire book.

Beginning with the introduction and continuing with the first essay (The New Law of Armed Conflict), then moving seriatim through the eleventh essay (The Law of Armed Conflict and the Enforcement of International Criminal Law), the author adeptly chronicles the development of the law of armed conflict from its nascent stages to its current status today, emphasizing the historical evolution of the current rules and customs and the gaps that remain to be filled by either treaty, protocol, or customary rules of international law.[9] Green displays an uncanny ability to analyze the effects the current rules of armed conflict may have on some very troublesome issues such as the effect of the adherence to superior orders on war crimes liability,[10] the interrelationship of the

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[8] Green, *supra* note 2, at IX.

[9] *Id.* at 1-26. (The New Law of Armed Conflict). A particularly insightful discussion of Protocols I and II (1977) Additional to the Geneva Conventions of 1949 appears in this essay.

[10] *Id.* at 43-72 (Superior Orders and the Reasonable Man). The rules regarding adherence to superior orders seem to be solely a creature of customary international law. Attempts at

medical profession and the law of armed conflict," the precise contours of the thorny subject of mercenaries and the law of armed conflict,[12] and the legal and illegal use of certain weapons and methods of carrying out war,[13] just to name a few.

For example, Green, in connection with the questions of aerial warfare and lawful and unlawful weaponry, addresses a very debatable subject regarding the legitimate use of nuclear weapons in armed conflict.[14] Recognizing that at least one tribunal[15] has forcefully maintained that nuclear weapons contravene the law of armed conflict in that their use allegedly causes unnecessary suffering and, moreover, may amount to indiscriminate bombing of undefended places, both now in violation of Protocol I Additional to the Geneva Conventions of 1949,[16] Green, consistent with his analytical style throughout the entire book, evaluates both sides of this question, concludes that it is not squarely addressed by any provision of the law of armed conflict, and seems to agree with those who contend that the law of armed conflict applies only to conventional,

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codifying "an article regulating the validity and scope of the defense of superior orders in Protocol I" have been unsuccessful. Id. at 72. Thus, one can assume that the customary rule concerning superior orders—"while they may constitute ground for mitigating punishment, these orders cannot be accepted as justifying an illegal act—at least where the act ordered is such of a character that the order is 'palpably unlawful' "—reflects the existing law. *Id.* at 71-72.

[11] *Id.* at 103-34 (War Law and the Medical Profession). The salient question posed by Green is whether the medical profession (*i.e.*, its members) should be afforded "any special rights, or subject to any special obligations over and above those applicable to others." *Id.* at 103. In response to this query, it is generally accepted that "[m]embers of the medical profession are afforded rights which are not granted to any other members of the forces" regarding POW status, seizure of property, continuation of pay, and protection of hospitals and hospital ships. Id. at 108-10.

[12] *Id.* at 175-213 (The Status of Mercenaries in International Law). For a discussion on the status of mercenaries under the law of armed conflict, see infra notes 20-22.

[13] *Id.* at 151-73 (Lawful and Unlawful Weapons and Activities). For a discussion on the legality or illegality of nuclear weapons, *see* infra notes 14-19 and accompanying text.

[14] To say the least, the situation regarding nuclear weapons is fraught with confusion and uncertainty. Id. at 171. For example, some commentators subscribe to the idea "that such weapons fall within the prohibition on poison or their indiscriminate character, while others are prepared to concede their use by way of reprisals." Id. at 171, citing Singh, Nuclear Weapons and International Law (1959) (prohibited) and Schwarzenberger, The Legality of Nuclear Weapons 48 (1958)(not prohibited).

[15] *Id.* at 148 and 171, citing Shimoda v. Japan, (1963), *published* in 8 Jap. Ann. Int'l L. 1964, 212, 235. Of course, the dogmatic position adopted by the Tokyo District Court was predictable given that Japan is the only nation which has been the target of nuclear weapon attacks at both Hiroshima and Nagasaki. Id.

[16] It has also been surmised that perhaps the Hague Conventions of 1907 and customary international law—both in effect at the time of the Hiroshima and Nagasaki bombings—prohibited the utilization of nuclear weapons because of their "blind and indiscriminate" destructive capability and their infliction of suffering in excess of that required to attain the military objective. *See* id. at 148, citing 1963, 8 Jap. Ann. Int'l L. (1964), 212, 235, 236-37 (reproduced in 32 I.L.R. 626, Tokyo District Court in Shimoda v. The State).

not nuclear, weapons." One can discern a flaw, however, in Green's analysis of this question in that he does not seem to provide any insights as to whether Protocol I Additional to the Geneva Conventions should be modified to address specifically the problem of nuclear weapons vis-à-vis the law of armed conflict.[18] To be sure, it would be prudent to regulate by the law of armed conflict those weapons which constitute the greatest threat to humankind. To the extent this is not being done, there is a significant gap in the laws and rules regulating the method by which belligerents may engage in armed conflict. Hence, Green probably should have provided more guidance and direction on this preeminent question.[19]

The same uncertainty as to other future developments in the law of conflict is also evident upon reading the essay concerning the status of mercenaries under international law.[20] The differences of opinion as to whether mercenaries enjoy protected status during armed conflict are concisely presented;[21] moreover, Green does a very good job in elucidating the policy considerations operating on both sides of this issue. But I am not convinced that the author provides meaningful illumination as to

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[17] The author's position on the legality of 'using nuclear weapons in armed conflict is equivocal at best. It is noticeably highlighted by assumptions "that the Protocol has no application to nuclear weapons," coupled with references to the fact that many NATO countries understood that Protocol I would not apply to nuclear weapons. Id. at 147. Many commentators, however, believe that the use of nuclear weapons (at least a first use) is prohibited by international law. See, *e.g.*, Meyrowitz, The *Laws of* War and *Nuclear* Weapons, 9 Brooklyn J. Int'l L. 227 (1983).

"Although it is fairly accurate to say that the issue of the use of nuclear weapons is not squarely addressed by statutory international law and perhaps only potentially implicates the nebulous concept of customary international law, it seems that the better analysis would weigh the countervailing policy questions surrounding specifically forbidding or allowing their use under international law treaties and then make a specific recommendation regarding the treatment of this complex matter. This would be far superior to an analysis which concludes on the theme of "implication of illegality" and does no more than say that this implication "was far from being the intention of some of the major powers responsible for drafting the Protocol." *Id.* at 172.

[19] The assumption of a more forthright position by Green would have been an auspicious way to conclude the discussion of an extremely important question in the law of armed conflict and, thus, avoid the lingering (perhaps untoward) effect of ambiguity regarding nuclear weapons.

[20] Chapter IX (The Status of Mercenaries in International Law).

[21] The divergence of opinion on the status of mercenaries under the law of armed conflict has been a function of historical perspective and whether, and in what manner, a nation has been affected by the activities of mercenaries. So mercenaries, depending on the particular beholder, have been labelled everything from "criminals" in some countries without the protections normally afforded to POWs by the law of armed conflict to "combatants" in most countries entitled to the full panoply of protections of POWs. Those mercenaries who run the greatest risk of ostracism are those who intervene in opposition to a National Liberation Movement which is seeking Self-determination. The converse of this is likewise true. At this time, mercenarism is not deemed to be criminal under international law; yet Article 47 of Protocol I does not shower mercenaries with protected status. *Id.* at 209-10. For a discussion that mercenaries should be (in theory) protected under existing law, see Cotton, *Rights of* Mercenaries as POWs, 77 Mil. L. Rev. 143 (1977).

how the issues should be resolved under the existent rules of international law, and what changes, if any, should be made in either the treaties or the protocols to the treaties to address squarely the status of mercenaries and their concomitant legal rights while engaged in armed conflict.[22] Although one can be sympathetic with Green's open-ended analysis on the basis that there is no way to foretell accurately the ultimate resolution of the issue, a scholar in the field of the law of armed conflict should have perhaps shed more light on this issue, thus making a greater contribution to the legal literature.

Of primordial importance to the military's role regarding the law of armed conflict is the essay titled "The Role of Legal Advisers in the Armed Forces."[23] In view of Articles 82 and 83 of Protocol I Additional to the Geneva Conventions of 1949, the military attorney plays a vital role in ensuring that the provisions of the law of armed conflict are actually incorporated into the operational activities of military units.[24] This places a heavy responsibility on the military attorney in advising the command as to the proper rules of engagement in armed conflict and the principles concerning the treatment of prisoners of war, the sick and wounded, civilians and others *hors de combat*.[25] The policy objective for involving military attorneys in military plans and operations is to ensure that the military command and its members are apprised of their obligations so that ignorance of the law is "absolutely" no defense in the law of armed conflict as is the prevailing situation generally under civilian

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[22]Green does provide, however, some insight as to what the future may portend for mercenaries in view of the influence now being asserted by Third World countries at the United Nations. Apparently, a new draft Convention which is supported by these countries is in the development stage and it bodes ill for mercenaries, unless they fight on the "right side"—a National Liberation Movement which is seeking self-determination. As an illustration of the United Nations position on mercenaries, consider G.A. Resolution 3103 (1974): 'The use of mercenaries by colonial and racist regimes against national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals." Cotton, *supra* note 21, at 161.

[23]Chapter IV (The Role of Legal Advisers in the Armed Forces).

[24]Recognizing the renewed emphasis in integrating military attorneys in law of armed conflict issues, the U.S. Army has created a new legal staff position in its Army of Excellence (AOE) concept at Corps Level—an officer in charge of operations and training (0-5). *See also* Norsworthy, *Organization For Battle: The Judge Advocate's Responsibility Under Article 82 of Protocol I to the Geneva Conventions*, 93 Mil. L. Rev. 9, 18 (1981), where the commentator recommends "that the legal advisor be included at the highest level of planning and at the earliest feasible time."

[25]*See, e.g.*, The Judge Advocate General's School U.S. Army, Operational Law Handbook (1984) where the operational duties of military attorneys in connection with the law of armed conflict are outlined.

criminal law systems in the United States.[26] Moreover, although a military attorney will, in all likelihood, not be on the front line with the troops, the advice that he or she gives can very well enhance the possibility that those engaged in combat do not inadvertently or callously disregard the law of armed conflict in carrying out military operations.*' To the extent that the military attorney fulfills this educational function for both the command and its members about the rules of armed conflict, there is a greater likelihood that those rules will be adhered to in both the letter and the spirit.

Fortunately, Green's brief essay on the role of legal advisers vis-a-vis the law of armed conflict touches virtually all the foregoing areas of potential involvement of a military attorney. More importantly, he highlights some of the practical limitations to fulfilling the obligations outlined in Articles **82** and **83** of Protocol I. For instance, Green makes the following insightful observations: **(1)** The law of armed conflict is an extremely complex and amorphous (especially customary international law) subject, and it is a legitimate question whether an ample supply of properly trained military attorneys actually exists in this field; **(2)** The role of military attorneys under Protocol I is simply that of an adviser to the commander. It is the commander who makes the ultimate operational decision, and he will likely be influenced more heavily by notions of military necessity; **(3)** The hierarchical structure of the military society with its concomitant emphasis on military rank may undermine the effectiveness of a military attorney adviser who may be considerably junior in rank to the military commander; and **(4)** The uncertainty that exists regarding the appropriate level of the military command at which the legal adviser should function tends to thwart the smooth and efficient provision of legal advice on the law of armed conflict.

To complete a basically strong analysis of the legal adviser question, Green recommends an intensive training program in the law of armed conflict for selected military attorneys which will have the beneficial effect of making them better advisers to the command under Article 82

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[26] The dissemination **of** pamphlets on the law **of** armed conflict may sufficiently inform uniformed military personnel of their duties in this regard such that "there may now be some validity in upholding the authority of the *ignorantia juris* maxim." Green, *supra* note **2,** at **37.** Surely, additional activities such as well crafted law of armed conflict training programs should enhance the awareness level **of** military personnel as well. *See also id.* at **41** and **42** ("We would see the dawn **of** an era in which it was true of the man in the field during combat, as it is for the civilian charged with a criminal offense, that *"ignorantia juris non excusat"*).

[27] *Id.* at **77** ("The presence of a legal adviser, properly trained and knowledgeable, is to help reduce the imbalance between humanitarian law and *raison de guerre").* There is, of course, no guarantee that this balance will be achieved because the adviser's advice may be ignored by the military commander. *See supra* notes **23-26** and accompanying text.

and better teachers under Article 83. Without question, this recommendation is a proper conclusion to one of the best essays in the book.

Finally, Green's treatment of the questions concerning war crimes, extradition, and command responsibility[28] along with the law of armed conflict and its relationship to the enforcement of international criminal law[29] highlights some of the practical problems from a political point of view of adhering to the principles of armed conflict. For example, Green notes that western nations like the United States and Great Britain may have thwarted the effort after World War II to bring some Nazi war criminals to justice by blocking or not fully cooperating with extradition requests simply because the alleged criminals were experts in scientific matters or intelligence.[30] Green does not suggest any firm legal measures to counteract such problems. Perhaps this reflects some wisdom on his part in realizing that there is not much one can do legally when politics guide the conduct of nations. Along these same lines, because of the political boundaries that are drawn throughout the world, if there were actually a body of international criminal law, Green concludes that there is no distinct enforcement apparatus.[31] But the law of armed conflict may be a useful tool in enforcing to some degree the principles of international criminal law.[32]

Essays On The Modern Law Of War is a provocative and extremely valuable contribution to the legal literature regarding the law of armed conflict. It is presented in a style that—perhaps except for the unavoidable redundancies-evokes deep reflection. It punctuates the dynamic countervailing forces that are at work on the international law scene in the field of the law of armed conflict; it examines adroitly the topical issues imbuing the law of armed conflict in view of the applicable treaties, protocols and rules of customary international law with various geopolit-

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[28] Chapter X (War Crimes, Extradition and Command Responsibility).

[29] Chapter XI (The Law of Armed Conflict and the Enforcement of International Criminal Law).

[30] *Id.* at 221. (The rationale of the major allied powers in shielding these alleged Nazi war criminals was the belief that they "might prove useful to them should any conflict arise between themselves.") But "[t]he United States has recently adopted a new policy whereby those accused of war crimes have been returned to stand trial in Germany." Interestingly, this change in policy has been achieved through the application of the nation's immigration law rather than 'by way of extradition for war crimes." *Id.*

[31] *Id.* at 239.

[32] *Id.* at 93. ("From the point of view of the modern law of armed conflict, the most important documents to be considered when examining the reality of human rights during war are the 1949 Geneva Conventions and the Protocols supplementary thereto of 1977.") See *also* id. at 73 ("the history of the law of war and its enforcement . . . may to some extent be regarded as an extension of national criminal law into the international sphere").

ical forces serving as a backdrop.[33] Thus, the essays convey collectively a picture of the law of armed conflict that is multidimensional in scope and insight. That an international law scholar of the stature of L.C. Green could achieve this result is not altogether surprising. That he could do so in such a clear, relatively concise, fashion is truly remarkable. On balance, *Essays On The Modern Law Of War* is a significant contribution to the legal literature regarding the law of armed conflict.

[33] A prime example is the struggle between the Palestine Liberation Organization (PLO) and Israel (along with its sympathizers) regarding whether conflicts involving national liberation movements (N.L.M.S.) should be considered to be international armed conflicts under Protocol I. *Id.* at 5-6.

THE TRIAL MASTERS*

reviewed by Major Larry A. Gaydos**

Book reviews are an intensely personal undertaking. It is easy to critique an author, editor, or publisher, and it is surprisingly easy to suggest how they could have done a better job. When I was asked to review The Trial Masters: *A* Handbook *of* Strategies ***and*** Tactics *That* Win Cases by Bertram G. Warshaw (editor), I was skeptical. Most books on trial advocacy are superficial checklists of fundamental advocacy principles with marginal utility for the experienced courtroom attorney. Others are merely a collection of war stories by "successful" trial advocates which have no utility to any practitioner. They are fact-specific and totally devoid of methodology or analytic framework. "How I Tried the Billy Bob Buchanan Case" articles are generally useful only if you happen to get a client who choked to death on a tangerine seed while skateboarding in a shopping mall with freshly waxed floors—just the way Billy Bob did. Fortunately, The Trial Masters is not such a book.

Before I began reading the book, I looked to see if it had been previously reviewed. To my surprise I discovered that one of my old colleagues, Vince Green, had already reviewed it. I must admit to some measure of cynicism as I read the glowing review Vince wrote for publication in the Trial Diplomacy Journul-coincidentally, a periodical also edited by Mr. Warshaw. Surely the icy cold of the Dakota winters and the blistering sun of the Dakota summers had not metastasized my friend's mental faculties such that he would now prostitute his professional opinion. Vince and I collaborated on many court-martial prosecutions and defenses when we served together in Germany. He was an excellent advocate and I trusted his judgment. After reading The *Trial* Masters, I confess that I share his opinion that the **book** is a worthwhile reference for both the beginning and the experienced trial advocate.

If you are a trial counsel or defense counsel and want to improve your advocacy skills, get new ideas to use in an upcoming case, or validate your own opinion that you are doing a good job in the courtroom, I suggest that you read The Trial Masters.

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*Warshaw, Bertram G. (ed.), ***The Trial Masters: A Handbook*** *of* ***Strategies and*** Tactics ***That Win Cases.*** West Nyack, New York: Prentice-Hall, Inc., 1985. Price: $65.00 (hardbound). Pages: viii, 602. Index. Publisher's address: Prentice-Hall, Inc., Book Distribution Center, Route 59 at Brookhill Drive, West Nyack, New York 10095.

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The Trial Masters is subtitled **A** *Handbook of Strategies and Tactics That Win Cases.* The main title is deceiving—that is not a collection of biographical antecdotes. The subtitle more accurately indicates what the reader can expect. *The Trial Masters* consists of a collection of advocacy-related articles that have appeared in past issues of the *Trial Diplomacy Journal.* Mr. Warshaw has grouped the articles into ten functional areas (such as jury selection and direct examination) and provides editorial lead-ins for each chapter. Although there is a strong tort litigation bias in many of the articles (and hence the book as a whole), most of the articles are equally useful to the military criminal practitioner.

One of the greatest failings of many military practitioners is that they never take the time to do outside reading about the art of advocacy. The brand new attorney, insecure about his or her courtroom abilities, will sometimes search the legal literature for "how-to checklists'' and other basic guidance which will ensure a minimum degree of competence. *The Trial Masters* is a good resource for this purpose, particularly in the areas of opening statements, direct examination, and cross-examination. However, the real value of *The Trial Masters* is the guidance it gives concerning advanced advocacy techniques useful to experienced trial advocates.

Once counsel become accustomed to the courtroom, they may no longer feel the need to study or read about advocacy. This is a mistake. Attorneys who learn only by doing, without including a scholarly approach to advocacy, never fully develop their potential. Like the weekend tennis player or golfer who picks up the game without ever taking lessons or reading about fundamentals, the learn-by-doing advocate will pick up bad habits which get reinforced through repetition and will survive by using a limited repertoire of advocacy techniques.

Successful advocates who become comfortable with their standard repertoire of advocacy techniques run the risk of becoming too predictable. Occasionally, advocates—especially trial counsel—who practice bad advocacy habits will erroneously think they are successful because they have been achieving satisfactory results. In reality, they may be achieving satisfactory results in spite of their poor advocacy skills. *The Trial Masters* is a good vehicle for breaking bad habits and growing as an advocate.

Each chapter contains three or more articles "written" by leading trial practitioners from Louis Nizer to Gerry Spence. The articles vary widely in format and sophistication. Most are written in a treatise style—usually including a checklist or summary of advocacy tips. Other articles are actually interviews with leading advocates, published in a question-answer format. The interview-type articles tend to be more interesting reading, but are generally less useful because of the superficial treat-

ment given to any one area of advocacy. Finally, some of the articles contain sample openings, arguments, and witness examinations from actual cases accompanied by annotations from the author.

Military criminal practitioners should find the chapters on jury selection and opening statements particularly useful, but my favorite article was "Tsychological Courtroom Strategies" by Thomas Sannito. Mr. Sannito, a forensic psychologist, provides compelling advice on the art of persuasion, with special emphasis on timing and sequencing of evidence and techniques of persuasive speaking. He synthesizes the results of numerous psychological studies (concerning such things as the serial position effect and the Von Restorff effect) into practical guidance for the trial practitioner.

Although I recommend ***The Trial Masters*** as an advocacy reference for criminal trial attorneys, it is also a valuable resource for most judge advocates involved with risk management and federal litigation. Finally, I recommend the book as general reading to anyone interested in the law. The articles are generally short and easy to read, the case studies are interesting, and the interviews give insight into the personalities of some of our greatest litigators.

THE EXECUTOR'S MANUAL*

reviewed by Captain David L. Pointer**

Ever have to advise a client as to the best way to proceed as a newly qualified executor or administrator? Did the knowledge gleaned from your law school's survey course in wills and estate planning fail you in your client's moment of need?

Authors Plotnick and Leimberg have developed a **29** chapter solution to meet the needs of client and practitioner alike. Their plain language treatment of the executor's and the administrator's duties and responsibilities reduce the complexity of the estate close-out process without oversimplifying the attendant risks and liabilities.

While ***The Executor's Manual*** is by no means **an** exhaustive treatment of the subject area, it is a great starting point. The fact that the book is not written as a step-by-step guide makes it clear that the authors intended it to educate the layman rather than to replace the attorney in the probate process.

Their **book** offers cover-to-cover readability while lending itself to ready-use as a reference source through its topical coverage of such concerns as formal appointment, personal and real property, valuation. taxation, fringe benefits, debt and expense payments, and fiduciary liability, just to name a few. Further, the appendices' all-state approach to the state law of wills, state intestacy statutes and state death taxes, in addition to checklists and sample forms easily justify the purchase price of the book as an indispensible reference tool for the multi-state practitioner. The importance of adequate counseling in this area has become all too clear in the aftermath of the Gander aircrash. If you believe, as I do, that our clients deserve guidance of substance in this important area, ***The Executor's Manual*** is worth your time.

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*Plotnick, Charles K., and Leimberg, Stephan R., ***The Executor's*** *Manual*. Garden City, New York: Doubleday & Co., 1986. Pages xii, 462. Glossary, Appendices, Index. Price: $27.50 (hardbound). Publisher's address: Doubleday & Co., 501 Franklin Avenue, New York, N.Y. 10167.

**Judge Advocate General's Corps, U.S. Army. Captain Pointer is the Post Judge Advocate and Chief, Services Division, The Judge Advocate General's School.

OTHER PEOPLE'S MONEY: THE RISE AND FALL OF OPM LEASING SERVICES*

reviewed by Mr. Jayson L. Spiegel**

Subtitled the "Largest Fraud in U.S. Business History," this fast-paced and largely anecdotal book traces a massive $200 million fraud perpetrated on some of the nation's largest and most powerful corporations. Although author Stephen Fenichell writes in the cynical and smirking style of New York's Village Voice, for which he is a contributor, he maintains the reader's attention by highlighting the details of a complex fraud while simultaneously exploring the personalities of the chief protagonists and their lawyers. Perhaps the book succeeds precisely because it is superficial. Nevertheless, because it raises important questions about legal ethics, this book makes valuable reading for the attorney.

OPM Leasing Services was in the business of leasing state-of-the-art computer hardware. However, the fact that "OPM" stood for "Other People's Money" demonstrates that the real purpose of the enterprise was to serve as a vehicle for countless forms of white-collar crime. Begun on a bare-bones budget by a pair of childhood friends from Brooklyn, OPM never turned a profit and suffered from a perpetual lack of liquidity. Nevertheless, it managed to enrich its owners and secure loans and financial assistance from silk-stocking financial institutions because of the criminal ingenuity of its founders. Although their scams ranged from check-kiting to blatantly doctoring financial statements, the most common and lucrative fraud was the securing of multi-million dollar financing on computer mainframes ostensibly leased to Fortune 500 corporations. In reality, of course, the computers never existed and the documentation of the transactions consisted of crude forgeries replete with misspellings. Somehow these bogus deals were never detected by the platoon of corporate attorneys who represented the various parties.

Some of the schemes were rather amusing. At one point when OPM was particularly strapped for cash, one of its owners, Myron Goodman, sought to purchase the Boston Red Sox and sell its best players to Goodman's favorite team, the New York Yankees, for cash. The desired result, of course, was to shore up OPM and bring a pennant to the Bronx.

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*Fenichell, Stephen, ***Other People's Money: The Rise and Fall*** *of OPM* ***Leasing Services.*** Garden City, New York: Anchor Press, 1985. Pages: 305. Price: $16.95. Publisher's address: Doubleday & Co., 501 Franklin Avenue, Garden City, New York, 11550.

**Jayson L. Spiegel is an attorney with Jordan, Coyne, Savits & Lopata of Washington, D.C., and a counter-intelligence officer in the U.S. Army Reserve. Mr. Spiegel has been involved in the OPM litigation and is, therefore, very familiar with the facts of the case.

Fortunately for Red Sox fans, the owners refused to sell. Most of the scams, however, were far more sinister. Although Fenichell has little but contempt for Goodman and his henchmen, he nevertheless maintains a bemused admiration for their felonious ingenuity.

Although one may marvel at the inventiveness of the OPM management, it is nevertheless striking how much their defalcations resemble those alleged to have been committed by the heads of the various state-chartered savings and loan institutions in Ohio and Maryland. It speaks ill for our corporate regulatory structure where regulatory bodies are so easily hoodwinked and well-meaning attorneys so naively coopted.

Accordingly, the most interesting aspect of the book deals with the ethical dilemmas faced by OPM's attorneys. Once counsel learned that their client had perpetrated massive fraud, they simply accepted OPM's representation that the fraud had ceased and continued closing deals for OPM. Of course, the deals were fraudulent. The attorneys considered contacting the authorities as required by D.R. 7-101(B), but feared that doing so would disclose their client's confidential communications. They also considered resigning but balked because D.R. 2-110(A)(2) prohibits counsel from withdrawing from employment unless steps are taken to limit prejudice to the client. Resignation would have driven OPM into bankruptcy; because the firm derived **70%** of its revenue from its relationship with OPM, that was a result which the attorneys assidously sought to avoid. Meanwhile the fraud continued as before. When the firm finally did resign, it misled substitute counsel by obfuscating the reasons for the resignation and failing to identify that it resigned because it suspected that the fraud continued unabated.

These ethical dilemmas make for informative reading. While Fenichell's treatment is superficial and would not be mistaken for a satisfying analysis, he does provide an overview of how the Code of Professional Responsibility operates in a real-world environment. To those looking to explore these issues and to those simply looking for some diverting reading, I recommend this book.

PUBLICATION NOTES

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time by the editor of the *Military Law Review*. With volume *80*, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. The number of publications received makes formal review of the majority of them impossible. Description of a publication in this section, however, does not preclude a subsequent formal review of that publication in the *Review*.

The comments in these notes are not recommendations either for or against the publications noted. The opinions and conclusions in these notes are those of the preparer of the note. They do not reflect the opinions of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

The publications noted in this section, like the books formally reviewed in the *Military Law Review*, have been added to the library of The Judge Advocate General's School. The School thanks the publishers and authors who have made their books available for this purpose.

Collins, John M., *U.S.-Soviet Military Balance 1980-1985*. McLean, Virginia: Pergamon-Brassey's International Defense Publishers, 1985. Pages: xxiv, 360 (8 1/2 x 11"). Maps, graphs, figures, statistical summaries, glossary, abbreviations and acronyms, glossary of names for weapon systems, source notes, index. Price: $60.00 (hardbound), $29.95 (paperback). Publisher's address: Pergamon-Brassey's International Defense Publishers, 1340 Old Chain Bridge Road, McLean, Virginia 22101.

John M. Collins is a senior analyst on national security and defense issues for the Congressional Research Service, Library of Congress. Having written two earlier books on this subject (1976 and 1980), Mr. Collins was tasked by the Senate Armed Services Committee "to assess the military balance between our nation's forces and those of the Soviet Union. . . ." He was to set forth the elements of warfare in a comparative context and apply qualitative and quantitative measurements to the respective strengths and weaknesses of both sides. And all of this was to be embodied in an inclusive, thorough and balanced overview" (Foreword at xviii). The purpose of the report to Congress that formed the basis of the book was to provide Congress and the public a concise and impartial account of basic changes in the U.S.—Soviet military balance since 1980, with special attention to the adequacy of U.S. force deployments and employment doctrine (Background, Purpose, and Scope at xxiii).

The Foreword to this book was prepared by four U.S. Representatives and four U.S. Senators, both Democrats and Republicans. Their praise

for the book shows that Mr. Collins has succeeded in writing a complete, intelligible, objective account of all aspects of the U.S.—Soviet military balance that will be extremely helpful to our national leadership in determining our defense policy.

Engelmayer, Sheldon and Wagman, Robert, *Lord's Justice.* Garden City, New York: Anchor Press, 1985. Pages: 300. Price: $17.95. Publisher's address: Doubleday & Co., 501 Franklin Ave., Garden City, New York 11550.

The title alone is enough to make one want to read this book. *Lord's* Justice has all the elements of a prime-time soap: obstinateness, greed, power, suffering, a corporate giant, the judicial system, and victims. Sadly, it is not fiction. The book, written by two investigative reporters, chronicles the Dalkon Shield IUD litigation. It is really a tribute to Judge Miles W. Lord, the chief judge of the U.S. District Court for the District of Minnesota, who told officials of A.H. Robbins on the record just what he thought of them. Although Judge Lord subsequently was chastised by a federal appellate court for having exceeded "the proper role of a judge," and had his remarks striken from the record, others hailed his actions. Indeed, the authors credit Judge Lord's initiative in flying to Richmond, Virginia, to supervise the gathering of A.H. Robbins' company files as the catalyst for the national advertising campaign warning women wearing the Dalkon Shield to have it removed immediately, at the expense of A.H. Robins.

Giannelli, Paul C., and Imwinkelried, Edward J., *Scientific Evidence.* Charlottesville, Virginia: The Michie Company, 1986. Pages: 1226. Table of cases, index. Price: $65.00 (hardbound).

This work is based upon the premise that the "crime laboratory has been the oldest and strongest link between science and technology and criminal justice." The new era in the use of scientific evidence in criminal cases began in the 1970s and has continued into the 1980s. It is evident that this will not only continue but will increase in the foreseeable future. If there is to be a trend in this decade, the authors say, it will be the focus on social sciences as they become more predominant, for example, evidence involving the rape trauma syndrome, rapist profiles, and battering parent profiles. It has been estimated that approximately one-sixth of all trials involve scientific evidence.

The authors wrote this book because of their belief that reliance on scientific evidence in criminal trials will increase in the future. It is based upon their desire to provide a helpful overview of the problems associated with the use of scientific evidence in criminal trials. The first seven chapters, through page 229, deal with issues of general applicability to the scientific evidence area. The authors begin their work with a study of the admissibility of scientific evidence, contrasting the

judicial controversy between acceptance of the ***Frye*** standard versus the relevancy standard, while outlining arguments which can be made by both sides regarding the application of the current Federal Rules of Evidence. The second of the chapters of general applicability deals with constitutional limitations on obtaining evidence contained in the fourth, fifth, and sixth amendments. The authors provide a good, succinct treatment of the major concerns and considerations in this area. The work next deals with discovery and the relative positions of prosecutors and defense counsel regarding this area of the law as it relates to scientific evidence. The fourth chapter deals with securing expert assistance. It provides helpful insight for the practitioner in the area of court-appointed experts, indigency, and effective assistance of counsel. A general discussion of expert testimony, its subject matter, qualifications of experts, basis of expert testimony, and the ultimate issue rule follows in chapter five. Chapter six deals with laboratory reports and the applicability thereto of the Federal Rules of Evidence and the confrontation clause of the sixth amendment, The seventh, and last chapter of general applicability, addresses chain of custody, especially from the standpoint of analyzing this issue under the provisions of the Federal Rules of Evidence.

The general chapters are followed by individual chapters dealing with specific items of scientific evidence, beginning in chapter eight with polygraph and deception tests and concluding in chapter twenty-five with instrumental analysis. These treatments, though referring to scientific methods and principles, are written in a fashion which can be understood easily by the attorney. Thus, the attorney is provided with a treatment which will enable him or her to understand the legal issues associated with the individual item of scientific evidence that will facilitate ultimate exploration of the technical principles which must be considered prior to litigating any criminal case.

This work is written for the civilian practitioner. It does not specifically reference the Military Rules of Evidence or military cases in the area. It is, however, an excellent work and should be considered by any trial advocate who is facing a case in which he or she is likely to confront an issue concerning admissibility of scientific evidence.

Klieman, Aaron, S., *Israel's Global Reach: Arms Sales* as *Diplomacy*. McLean, Virginia: Pergamon-Brassey's International Defense Publishers, 1985. Pages: xiii, 241. Price: $22.50. Publisher's address: Pergamon-Brassey's International Defense Publishers, 1340 Old Chain Bridge Road, McLean, Virginia 22101.

Aaron Klieman, an expert in Israeli arms sales, is a professor of international relations and former chairman of the Department of Political Science, Tel Aviv University, and was a visiting professor at George-

town University from 1984 to 1985. He has written extensively on arms sales as an associate of the Jaffee Center for Strategic Studies at Tel Aviv University, Israel.

This fascinating book charts Israel's evolution from an ordinary Third World country to a "global power" through a foreign policy based largely on arms sales. Israel's arms sales are now estimated at more than one billion dollars a year and is one of the few bright spots in an otherwise weak Israeli economy. Professor Klieman explains why this occurred, how it has affected US.-Israel relations, and where this course is likely to take Israel in the future.

Kohn, Stephen M., *Jailed for Peace: The History of American Draft Law Violators, 1658-1985*. Westport, Connecticut: Greenwood Press, 1986. Pages xii, 169. Bibliography, Index. Price: $29.95. Publisher's address: Greenwood Press, 88 Post Road West, Westport, Connecticut 06881.

For most Americans today, the words "draft resistance'' call to mind images of college campuses teeming with students protesting the Vietnam conflict.

Now, eleven years after the last American troops left Vietnam, Stephen Kohn explores the legacy of the anti-war movement in American society. Beginning with the colonial period, the author traces the roots of the movement to the pacifist view of the Quaker religion. He describes the rise of abolitionist doctrine in the 1820s and 1830s and links it to the incidence of draft resistance through the civil war. Continuing through the two World Wars, Kohn indicates that pacifists were viewed as little more than traitors and refers to the imprisonment and mistreatment of a number of conscientious objectors. Finally he relates the dramatic shift of the anti-war movement to a popular cause in the 1960s and 1970s and sees a continued vitality in a pacifist response to draft registration in the 1980s.

Kohn sees anti-draft activity as a powerful force for social change and spreading pacifist ideals, The book's brevity prevents a convincing development of the author's theory. It relies heavily on anecdotal accounts from each period it covers without providing an in-depth analysis at any particular point. The attempt to unite these accounts as continuing manifestations of a single pacifist ideal is not always convincing. What Kohn does present is a reminder that in any armed conflict there will be those who refuse to participate.

Kohn makes no pretense that his work is an objective view of the anti-draft movement. He presents an unabashed apologia for all draft-resisters throughout American history. The book is a paean to those who oppose the use of military force at any particular time for any reason. It

is unlikely to convince the uncommitted of the merits of the anti-draft movement. Those already converted, however, will find ample grounds to reinforce these beliefs.

Krepinevich, Andrew F., Jr., *The Army and Vietnam.* Baltimore, Maryland: The Johns Hopkins University Press, 1986. Pages: xviii, 318. Illustrations, index, abbreviations and acronyms. Price: $26.50. Publisher's address: The Johns Hopkins University Press, 701 West 40th St., Suite 275, Baltimore, Maryland 21211.

The book jacket identifies the author as a U.S. Army major who has taught national security affairs at the U.S. Military Academy and who is currently (as of 14 July 1986) assigned to the Strategic Plans and Policy Division, HQDA. Major Krepinevich critiques the Army's performance during the Vietnam war both as a fighting unit and as a bureaucracy. In both areas, the author gives the Army a "failing" grade. The book is dedicated 'To those who went, and who served, in the finest tradition of duty, honor, and country." Major Krepinevich in no way attributes the Army's "failure" in Vietnam to a lack of dedication or effort by soldiers. Rather, Major Krepinevich argues that the misplaced, inflexible reliance on doctrine suitable only to a conflict in Central Europe doomed the Army to failure in Vietnam.

Major Krepinevich's research is thorough and his analysis is thoughtful, without the emotionalism one usually finds in books on Vietnam. It will be interesting to see how this book is received by those who served in Vietnam and by those responsible for the Army of Excellence doctrine. The latter's view is most important because Major Krepinevich concludes that the Army has learned little of value from its experiences in Vietnam.

Levie, Howard S., *The Code of International Armed Conflict,* Dobbs Ferry, New York: Oceana Publications, Inc., 1986. Two volumes. Pages, xxviii, 1099. Abbreviations, annex, index, table of sources, bibliography. Price: $85.00. Publisher's address: Oceana Publications, Inc., Dobbs Ferry, New York 10522.

The author, Howard S. Levie, retired as a colonel in The Judge Advocate General's Corps, U.S. Army. After serving as International Law Consultant at the Naval War College (1965-71), he held the Charles H. Stockton Chair of International Law (1971-72). Author of numerous articles on the law of war and of *Prisoners of War in International Conflict,* Colonel Levie is Professor Emeritus at St. Louis University.

Colonel Levie notes in the Introduction to this two-volume treatise that most modern works on the law of international armed conflict (*i.e.*, law of war) set forth each of the various conventions, *in toto,* in chrono-

logical order or by general subject matter. This two-volume work differs greatly from those other treatises in the way it is organized and the way the information is presented.

Having gathered all the material which constitutes the conventional rules of international armed conflict, as well as those customary rules that have attained formal status, the various articles (and ever separate paragraphs and sentences thereof) of those rules have been arranged (without regard to their source) in a logical and functional sequence, similar to the organization used for arranging domestic codes. For example, Part 13 (Ensuring Compliance With the Law of War), Chapter 13.1 (Ensuring Knowledge of the Law of War) is divided into four sections: general; dissemination and instruction; knowledge of the law of war; and complaints. Each section begins with the "black letter law" on that topic, the source of the law, and comments on the law by Colonel Levie and cross-references to other sources of information.

The method used to organize this book will seem strangely familiar to military attorneys. That is because its precise, methodical, functional approach to presenting a large, complex body of information is reminiscent of the way Department of Army pamphlets and field manuals are written. Its encyclopedicapproach to the law of international armed conflict makes this treatise especially valuable to those who are not international law scholars or to those who want a useable research tool in this area.

Office of the Federal Register, National Archives & Records Service, *The United States Government Manual 1985/86*. Washington, D.C.: U.S. Government Printing Office, 1986. Pages 933. Name index, subjectlagency index, recent changes, appendices. Price: $15.00 (paperbound). Publisher's address: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Published by the Office of the Federal Register of the National Archives since 1948, this 933-page manual is the official guidebook to the federal government. It contains up-to-date information about the missions, programs, and activities of federal agencies, as well as the names of top officials of each agency and **U.S.** Representatives and Senators.

The *Manual* also contains useful information on the legislative, judicial, and executive branches of the government with comprehensive name and subjectlagency indexes. One special feature is the Source of Information section that provides addresses and telephone numbers of each federal agency for employment, government contracts, publications, films, and other services available to the public.

There are several appendices in the *Manual*, including additional material on federal agencies and functions which have been abolished, transferred, or changed in name since March **1933;** agency organization charts; and commonly used abbreviations and acronyms.

Rowland, Judith, *The Ultimate Violation: Rape Trauma Syndrome: An Answer for Victim, Justice in the Courtroom.* Garden City, New York: Anchor Press, 1985. Pages: xii, 366. Index. Price: $17.95. Publisher's address: Doubleday & Co., 601 Franklin Ave., Garden City, New York 11650.

Judith Rowland was a prosecutor in the San Diego District Attorney's Office for four years. A strong advocate of victims' rights and justice, Ms. Rowland has written a book that shows prosecutors how to successfully use evidence of rape trauma syndrome. Using four actual cases as a vehicle to explain and support the legal strategies involved when using rape trauma syndrome evidence, she succeeds where others have failed. She succeeds because prosecutors and judges will better understand the value of this type of evidence and how it should be used.

Institut Henry-Dunant, *Basic Bibliography of International Humanitarian Law.* Geneva, Switzerland: Henry Dunant Institute, 1985. Pages: vii, 106. Price: na (softbound). Publisher's address: Institut Henry-Dunant, 114 Rue de Lausanne, 1202 Geneve-Suisse.

This bibliography of materials on international humanitarian law was published by the Henry Dunant Institute, the research and training institute of the International Committee of the Red Cross. The book is divided into lists by subject matter, and indexes, *inter alia*, U.S., French, German, Japanese, United Nations, Arab, and Spanish law review articles, papers, and other publications, including articles from the *Military Law Review* and *The Army Lawyer*.

Saltzburg, Stephen A.; Schinasi, Lee D.; and Schlueter, David A., *Military Rules of Evidence Manual, Second Edition.* Charlottesville, Virginia: The Michie Company, 1986. Pages 830. Table of cases, index. Price: $55.00 (hardbound).

This work is a comprehensive analysis of the Military Rules of Evidence in courts-martial. It is a collaborative effort of two civilian lawyers (one of whom is a Reservist in the Army JAGC) and one **Army** lawyer designed to combine practical insights with a fresh look, which results in a balanced view of the Military Rules of Evidence and identifies strengths and weaknesses of many of the Rules. The combination of amendments to the Rules and the great number of cases decided by military and civilian courts since the publication of the first edition of the manual occasion the publication of this second edition.

The work explains the background of the Military Rules of Evidence and discusses the process used to formulate these Rules. It compares the Military Rules to the Federal Rules of Evidence in a way which provides civilian lawyers interested in criminal justice, litigation, and evidence information about the military process. Supplementation of the work is planned so that military lawyers and judges can have a convenient, up-to-date reference.

The mechanics of this work lend to its utility. Specifically, each Rule receives a separate treatment in a six-part format. The official text of each Rule begins the treatment. This official text is the exact text as prescribed by President Carter in Executive Order 12,198, March 12,1980, and any amendments to the date of publication. The editorial comments section follows. This is an expansion of each Rule, indicating how it compares with the comparable Federal Rule and how it affects pre-Rules military practice. It is a starting point for an understanding of what each Rule says and how it may be applied by military courts. The third part of the format is the drafters' analysis reprinted exactly as it appears in Appendix 22 of the Manual for Courts-Martial (1984). The fourth part of the treatment consists of annotated cases reporting military decisions since the promulgation of the Rules through Volume 21, Military Justice Reporter, issue number 7 (January 28, 1986). The fifth part is an annotated bibliography of a few commentaries of particular use to lawyers and judges in military courts. The last part cites the reader to selected federal cases dealing with the particular Rule.

The first edition has proven to be an invaluable tool for the military practitioner. The second edition promises to be an even more indispensible means to provide military lawyers and judges a necessary understanding of the Military Rules of Evidence.

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