

**MILITARY LAW
REVIEW
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Articles

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JUROR SELECTION UNDER THE UNIFORM CODE OF
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MILITARY LAW REVIEW

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THE OFFENSE OF PERJURY IN THE MILITARY

By Lieutenant Colonel Leo Kearney O'Drudy, Jr.**

And a Council in England, here in the year One Thousand and Nine, call'd Concilium Aenhamense, ranks 'em [perjurers] with Witches, Sorcerers, Necromancers, egregious Strumpets, &c And Decrees thus against 'em . . . as unworthy to enjoy the priviledge and benefit of their Native Countrey; Turn them out, and Banish 'em, that the Land may be cleansed, and the rest preserved from the infection. If this good English Cannon were now in force; if this course were taken with those, that are notoriously guilty of this Crime; we might have a fair riddance of the perfidious disturbers of our Peace and Government

Of Perjury, A sermon Preached at the Assizes held at Chester, England, April 4, 1682, by John Allen, Chaplain to the Lord Bishop of Chester.

I. INTRODUCTION

Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue of matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct.¹

While hardly endemic to the **military**,² perjury nevertheless

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

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¹ UNIFORM CODE OF MILITARY JUSTICE art. 131 [hereinafter cited as "UCMJ"].

² Since the turn of the century, civilian commentators have waxed wroth anent what they saw as rampant perjury in the courts. (Strangely, such fulminations have been relatively rare in the past two decades, suggesting either amelioration of the condition—which seems highly unlikely—or resignation of the critics.) See, e.g., Black, *A Report on Perjury*, 49 ILL. B. J. 574 (1961) (a study of perjury in Illinois courts); Blatt, *Raise Your Right Hand*, 24 J. AM. JUD. SOC'Y 60 (1940) (perjury in Massachusetts. Professor Blatt noted, ". . . there probably never was a lengthy trial in which wit-

nesses did not commit technical perjury and I mean not a mere deviation from the truth, but a deliberate and intentional misrepresentation of fact which can be demonstrated to an intelligent jury." Among other things, the author cites virtually incredible instances where wholly disinterested *moot court witnesses* patently lied about their observations of controlled "occurrences".); Boston, *Drastic Change in Law Necessary to Curb Perjury in Our Courts*, 13 THE PANEL 6 (1935) (perjury in New York. Assistant District Attorney Boston observed, "The omnipresence of perjury in the courts of this State is attested by all who come in contact with trial machinery, civil or criminal. The late Judge Joseph E. Corrigan of the Court of General Sessions estimated that perjury occurred in more than 90% of the cases in his court, and Justice Philip J. McCook has stated that of 257 cases tried before him in 1927 in the Supreme Court there were, through perjuries, actual miscarriages of justice in 33—unsuccessful perjuries must have been committed in far greater numbers." (footnotes omitted)); Burdick, *Perjury Problem and Needed Changes in New York Laws*, 12 THE PANEL 3 (1934) (Cornell Dean Burdick noted that the New York Crime Commission in 1930 found perjury to be prevalent in that State and that similar commissions for Indiana, California, Michigan, and Massachusetts reached the same conclusions in regard to their respective jurisdictions.); Greenberg, *Perjury is YOUR Concern*, 24 THE PANEL 3 (1950) (New York State Supreme Court Justice Greenberg attributed what he felt was widespread perjury, in part, to a breakdown of religious belief. His article is followed by a quotation from a former United States Attorney: "Criminal Justice today is enmeshed in a web of perjury. The pea in the old shell game was often easier to find than is the truth in our courts of law. Fake swearing has become a daily, and therefore almost unremarked episode."); Hibschan, *"Do You Solemnly Swear!" Or That Perjury Problem*, 24 J. A. INST. CRIM. L. AND CRIMINOLOGY 901 (1934) (lawyer, writer and legal reformer Hibschan claimed perjury in over fifty percent of all civil cases, seventy-five percent of criminal cases and ninety percent of divorce cases.); Hinshaw, *Perjury*, 40 ILL. B. J. 197 (1952) (perjury in Illinois); McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727 (1940) (Law Professor McClintock states, "The opinion that perjury is common in our trial courts is one on which all the writers on the question seem to be in complete agreement. Though the extent to which witnesses in our judicial proceedings willfully testify falsely as to material matters is a question as to which facts can never be ascertained so as to be made the basis for statistical investigation, we may accept the opinion of those who have examined the question as to the seriousness of the problem, especially when it is confirmed by everyday conversations of judges and trial lawyers. . . . [T]here seems to be no reason to doubt that perjury is common enough to constitute a major problem in the administration of the law." (footnotes omitted); Purrington, *The Frequency of Perjury*, 8 COL. L. REV. 67 (1908) (turn-of-the-century perjury problems in New York); Scott, *Nothing But the Truth*, 7 L. Soc. J. 12 (1936) (perjury "common" in Massachusetts.); Whitman, *Proposed Solution to the Problem of Perjury in Our Courts*, 59 DICK L. REV. 127 (1955) (observations by an Assistant District Attorney in Philadelphia commenting on the widespread incidences of perjury in Pennsylvania and elsewhere.); 30 L. NOTES 223 (1927) (perjury a "daily occurrence" in New York); Article, *Is Perjury Increasingly Prevalent?*, 14 L. NOTES 44 (1910) (the famed attorney Samuel Untermyer is quoted: "I really believe the crime of perjury is committed in at least three out of every five cases tried in the courts in which an issue of fact is involved. It has become so general that the courts regard it as almost a part of the inevitable accompaniment of a trial."); Article, *Perjury in Judicial Proceedings*, 64 U.S. L. REV. 1 (1930) (perjury in New York.); Article, *Perjury—The Commonest Felony*, 1 L. NOTES 170 (1898)

seems seriously, if not egregiously, widespread in courts-martial. In a survey made by the writer of fifty-four general and special court-martial military judges of the Army, Navy and Marine Corps,³ almost 40% were of the opinion that perjury had been committed in 10–29% of the courts-martial (during the trial proper) in which they had participated as judge or counsel. Over 25% estimated the incidence of such perjury to be between 5 and 9% of trials proper in which they had so participated. The estimations of perjuries committed during the presentencing procedure were, oddly, lower, but still sufficiently high to approximate the figures cited for incidences of perjury in the trial proper.⁴

Few major crimes since the turn of the century—indeed, few legal subjects in general—have spawned so niggardly a collection

(the high frequency of perjury in New York and Philadelphia.); Address by the Honorable Walter Brower, July 1, 1931, in *PROC. ALA. ST. B. ASS'N* (1931), at 57; Address by the Honorable Eugene O'Dunne, Sept. 20, 1934 in *PROC. W. VA. B. ASS'N* (1934), at 253; Address by J. J. McCarthy, July 16, 1901, in 35 *AM. L. REV.* 684 (Iowan McCarthy urges as a remedy, *inter alia*, greater solemnity to oath-giving; Report of the New York Law Revision Commission, Legislative Document (1935), No. 60, 229–343; Report of the Commission on the Administration of Justice in New York State, Legislative Document (1934), No. 50, 834–838. Foreign tribunals appear to be similarly plagued. See, *e.g.*, 94 *JUST. P.* 778 (1930) (England); 64 *IR. L. T.* 304 (1930) (England); 94 *JUST. P.* 853 (1960) (England); 48 *L. NOTES* 66 (1929) (England); 78 *SOL. J.* 423 (1934) (“[H]undreds of persons . . . perjure themselves in the courts every day except Sunday . . .”) (England); Wallace, *The Prevalence of Perjury*, 42 *CAN. L. J.* 249 (1906) (Canada); 60 *IR. L. T.* 192 (1926) (Ireland); *Sc. L. T.*, Nov. 30, 1957, at p. 190 (Denmark).

³ Of the total survey questionnaires mailed, fifty-four were returned. In several of these, however, not all questions were replied to; consequently, the data presented is sometimes not based on a compilation of the opinions of all fifty-four military judges. Therefore, whenever the phrase, “military judges surveyed” is used in this study, it shall be meant to refer to those of the fifty-four judges who sent replies to the particular question or matter under discussion.

⁴ The question posed, and the replies thereto, were as follows (the figures inserted in the parentheses show the number of judges who checked each): “In what percentage of courts-martial in which you have participated as either counsel or judge do you believe that at least one witness (whether the accused or another) committed perjury:

<i>During the trial proper</i>	<i>During the presentencing procedure</i>	
(1)	(0)	80%—100%
(2)	(2)	50%— 79%
(2)	(5)	30%— 49%
(19)	(13)	10%— 29%
(14)	(12)	5%— 9%
(14)	(19)	0%— 4%

of incisive, scholarly legal commentary as perjury.⁵ Which puts the legal writers nicely in tandem with the prosecutors: both assiduously ignore it.⁶ This, though perjury is universally conceded to be one of the most pervasive, oft-committed serious crimes in the United States.; As pithily noted by an assistant district attorney in Philadelphia sixteen years ago, "Few crimes except fornication are more prevalent or carried off with greater impunity." ⁷ The military is, apparently, wholly *d'accord*: over

⁵As above noted, during the early decades of the century there were not infrequent railings against the high incidences of perjury in the courts. Note 2, *supra*. Neither then nor in more recent years, however, has there been much published of a scholarly jurisprudential or helpful recommendatory nature (with the possible sole exception of the now largely dated and New York law-oriented Report of the New York Law Revision Commission, Legislative Document (1935), No. 60, 229-343 [hereinafter cited as the New York Report, 1935]. The military, with the exception of short comments of the case note variety, has published nothing whatsoever in the field.

⁶The shocking paucity of prosecutions for perjury has been notorious for years. See, e.g., THE CHALLENGE OF CRIME IN A FREE SOCIETY, President's Commission on Law Enforcement and Administration of Justice (1969), 468; Burdick, at 3; McClintock, at 753; Whitman, at 127; McCarthy, at 684; 84 Just. P. 418 (1920) all at *supra* note 2; New York Report, 1935, 285-294. A recent U.S. Senate Report which dealt with the subject of perjury in the Federal system concluded that the possibility of prosecution for perjury is not likely. Based on a study of the U.S. Attorney General's Annual Reports from 1956 to 1965, the Report noted, "Indeed, out of 307,227 defendants only 713 were even charged with perjury during this period." S. REP. No. 617, 91st Cong., 1st Sess. 57-58 (1969). According to figures released by the United States Army Judiciary, in the five years encompassing 1964-1968, there were eight prosecutions for perjury by general court-martial of which three ended in acquittal.

⁷See notes 2 and 6, *supra*. One of the most arresting—certainly the most acerbic—observation in this regard that the writer has come across was that of Dr. John M. F. Gibbons, general attorney of the New York, New Haven and Hartford Railroad, who is quoted by the Honorable Walter Brower in an address by the latter appearing in the Proceedings of the Alabama State Bar Association, 1931: "After a broad and varied experience covering a period of twenty years within the courts of this enlightened country, I am only able to report two cases in which there was no perjury or subornation of perjury to be found or suspected. Moreover, in reaching this shocking conclusion, I have been most careful to distinguish between malignant false swearing and benign inaccuracy." Brower, note 2, *supra*, at 58.

⁸Whitman, *supra* note 2 at 127. Whitman observed, "[P]rosecutions for perjury are rare. One writer [Hibschman, note 2, *supra*] declares: 'The latest statistics issued by the U.S. Government giving the number of inmates in American penal institutions do not even have a classification for perjury; and I venture the assertion that there are not more than 150 persons in the whole United States serving sentences for this crime.' Of the 50,729 cases of major offenses reported by twenty-eight states and the District of Columbia in 1937 to the Census Bureau, only 187, or 3/7 of one percent, were prosecutions for perjury. McClintock [McClintock, note 2, *supra*] found only 313 cases, about twenty-two a year, of perjury or associated crimes in the years 1935 to 1939 reported in the Fourth Decennial

60% of the military judges surveyed are of the opinion that the number of perjury prosecutions in the military is inordinately low in relation to what they believe to be the frequency of the offense.⁹

In the civilian community, explanations for the dearth of perjury prosecutions and convictions can generally be lumped under the following categories:¹⁰

(1) *Grand juries are reluctant to indict.* A recurring theme among commentators reflecting upon the low incidence of perjury prosecutions is the apparent reluctance of grand juries to return indictments for this offense. The genesis of this attitude has been variously explained: some commentators attribute it to a feeling of empathy on the part of jurors towards a perjury defendant, a there-but-for-the-grace-of-God-go-I attitude of permissiveness engendered by the thought that even the most principled of us might lie, or at least dissemble, where personal interest of import or a friend's welfare is at stake." As a corollary, many jurors feel that it is unfair for one person to be punished for perjury when so many equally guilty of the offense go free.¹² In addition, many grand jurors appear to view a perjury trial as a rehashing of matters which should properly be considered as having been put to rest by the previous adjudication.

Most especially is the attitude of jurors empathetic where the State seeks a true bill against a witness-accused from the previous trial. If he has been acquitted, there is the feeling that the State is trying to end run the acquittal. If he has been convicted, a reaction sets in against heaping further punishment against one already under penal sanction. Of especial interest in this regard is an apparently widespread attitude that not only does a witness-

Digest. The District Attorney of New York disposed of only 107 such cases between 1900 and 1906." (footnotes omitted) *Id.*

⁹ The question posed was, "Do you believe the number of perjury prosecutions in the military is inordinately low in relation to what you believe to be the frequency of the offense?" Replies were, "yes" from thirty-one military judges, "no" from twenty. Several respondents apparently felt that implicit in the question was a comparison of the frequency of perjury in military as opposed to civilian courts. This was unfortunate and certainly not intended. It is perhaps appropriate at this juncture to observe that, based upon his experience in both civilian and military courts, as well as that gained making this study, the writer would strongly disagree with **any** assertion that courts-martial are more perjury-prone than civilian trials. *See, e.g., H. JAMES, CRISIS IN THE COURTS*, 180-190 (1968).

¹⁰ What follows synthesizes opinions expressed in the sources and authorities cited in footnotes 2, 5, 6, and 8, *supra*.

"*See, e.g., Boston*, note 2, *supra*."

"*See, e.g., Burdick*, note 2, *supra*; *Brower*, note 2, *supra*."

accused have an unspoken right to lie on the stand to save himself but that it is rather expected that he will.¹³

(2) *Difficulty of proof.* Perjury is the only crime, with the exception of treason, which requires a certain quantitative norm of proof be met before a conviction may be gotten: mere proof beyond a reasonable doubt is insufficient. Since this subject will be dealt with in some depth later,¹⁴ suffice it to say at this point that both the civilian and military legal systems require, in order to convict of perjury, that the accused's guilt not only be established by proof beyond a reasonable doubt, but, also, that the said proof be based on the testimony of at least two witnesses, or of one witness plus evidence of corroborating circumstances. Moreover—and again in both the civilian and military spheres—the falsehood must have been material to an issue before the court. The feeling was widespread among civilian commentators that these requirements make proof of perjury inordinately difficult, thereby discouraging prosecutions and thwarting convictions.¹⁵

(3) *Severity of punishment.* Frequently, according to experienced civilian prosecutors, jurors will acquit because they are aware of the severe penalties attendant upon a perjury conviction and simply do not believe the crime warrants such draconian sanctions.¹⁶ New York, which wrestled with this problem for years, modified its perjury statute to provide for second degree perjury with lesser punishment (and, incidentally, no materiality requirement) thus, in effect, providing the reluctant or sympathetic jury which finds guilt beyond a reasonable doubt but shies from convicting because of the severity of the punishment, a comforting escape hatch from its moral dilemma.

As for the military, the military judges surveyed generally attributed the lack of prosecutions primarily to three factors: (1) a widespread feeling among convening authorities, staff

¹³ Until 1898, a prohibition existed in English courts against a criminal defendant testifying in his own behalf springing from the assumption that he would certainly lie under oath to save himself and thereby endanger his immortal soul. Among the military judges surveyed, it was not infrequently asserted that convening authorities, military judges and counsel rather took it for granted that an accused would perjure himself.

"Seep. 31, *infra*.

"See, e.g., Report of the Commission on the Administration of Justice in New York State, Legislative Document (1934), No. 50, 834-838 [hereinafter cited as the New York Report, 1934].

"See, e.g., Boston, note 2, *supra*; Brower, note 2, *supra*; Burdick, note 2, *supra*; 13 THE PANEL 6 (1935); 30 L. NOTES 223 (1927); Commissioner's Note, *Model Act on Perjury*, 9B U.L.A. 540 (1953).

judge advocates and trial counsel that it is simply a waste of time and money to try — (a) *a convicted accused* for perjury because justice has been done in his case and, moreover, it should almost have been expected that he would have lied on the stand when he testified in his own behalf,¹⁷ or (b) *an acquitted accused* because *res judicata*¹⁸ will probably provide a complete defense and, even if it does not, the witnesses against the perjury accused most likely testified at the original trial, as did the witnesses supporting his story, and thus there would be little reason to expect a different result; (2) the proof impediments facing the prosecution as a result of the materiality and the two-witness rules; and (3) a feeling on the part of the authorities that a perjury prosecution is an undesirable retrial of matters which should have been fully adjudicated at the previous trial and, except in the most egregious instances, are not worth the time or expense to reopen.¹⁹

Thus, in contemplating the offense of perjury, we confront the following unsavory melange :

(1) Perjury, as probably all would agree, in striking at the heart of the legal system, perforce undermines the very foundations of society, whether civilian or military. It is thus a crime of extreme gravity, indeed, one of almost ineffable reprehensibility when its effects are considered.

(2) As all who have taken occasion to comment in the civilian sphere agree, perjury riddles our courts; it would seem courts-martial are similarly plagued.

(3) The conceded high incidence of perjury is wholly disproportionate to the low rate of prosecutions and convictions for its commission.

(4) The crime is, nevertheless, virtually ignored — perhaps even winked at — by military and civilian prosecuting authorities.

How did we get to this impasse? And what can be done about it? It is to these questions that this study will be directed.²⁰

¹⁷ See note 13, *supra*.

¹⁸ See p. 54, *infra*.

¹⁹ Over half of the military judges surveyed who expressed the opinion that the number of perjury prosecutions in the military is inordinately low in relation to the frequency of the offense, attributed the dearth of prosecutions to the "difficulty of proving" the crime. Whether the "difficulty" alluded to was meant to refer to the obstacles put in the path of the prosecutor by certain evidentiary restrictions unique to perjury, or by the very nature of the crime itself, was not made clear.

²⁰ No attempt will be made herein to deal with other than *forensic* falsifying of the oath; cognate offenses such as false swearing and subornation of perjury are outside the scope of this study.

11. HISTORY OF THE OFFENSE

A. ANCIENT LAW

Hammurabi, King of Babylon, **2285–2242 B.C.**, explicitly proscribed perjury in his renowned Code as follows, “If a man has borne false witness in a trial, or has not established the statement that he has made, if that case be a capital trial, that man shall be put to death,” and, “If he has borne false witness in a civil law case, he shall pay the damages in that suit.”²¹

Indeed, mere loss of a suit brought draconian sanctions into play. As one commentator has observed,

An unsuccessful suitor was not allowed to get *off* merely with the loss of his suit. He had been put on his oath and been unable to justify himself, or the word that he had spoken. According to the Code, if the suit was a capital suit, this was punished with death. But even if the case was less serious, it was slander to have brought a false accusation, and the penalty for slander was branding.”

The Greeks permitted a civil action for perjury to be brought by an unsuccessful litigant against a witness who had testified adversely to his case. The action was quasi-criminal in nature and, at the same time, a procedure for obtaining a new trial: for if the previously unsuccessful litigant succeeded in this action, the witness “convicted” of perjury was fined (three such “convictions” resulted in loss of civil rights) and a new hearing was held on the original issue.²³

B. ROMAN LAW

Partial reconstruction by Roman civil law scholars of the famed Twelve Tables²⁴ reveals that among the delicts and attend-

²¹ C. JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* 44 (1904).

²² *Id.* at 14 .

²³ R. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* 196 (1927); G. CALHOUN, *THE GROWTH OF CRIMINAL LAW IN ANCIENT GREECE* 117 & n. 33 (1927); J. JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS* 149–151 (1956).

²⁴ The *Lex Duodecim Tabularum*, 451–449 B.C., was a collection of rules of private, public, sacred, and criminal law published on twelve tablets and compiled by a commission of ten experts as a result of political foment on the part of the plebeians who complained, *inter alia*, of the general uncertainty of the law and of unfair interpretation and administration of this largely customary law by the patricians in their own interests. Preserved through subsequent frequent reference in the writings of classical literarists and jurists, the remaining fragments provide us with one of our earliest sources of Roman Law. A. BURGER, *ENCYCLOPEDIA DICTIONARY OF ROMAN LAW* 551 (1953); A. JOHNSON, P. COLEMAN-NORTON, F. BOURNE, *ANCIENT ROMAN STATUTES* 9 (1961).

ant sanctions listed therein is the following: "Whoever gives false evidence must be thrown from the Tarpeian Rock": this was a sentence of **death**.²⁵ Similar proscriptions against perjury were repeated in later enactments.²⁶

It is of interest that it was not every genre of perjury—that the word be used in its widest, generic sense—that was amenable to Roman penal sanction; only false testimony before a tribunal (in contradistinction to a false oath without the courtroom) invoked the criminal penalty.²⁷

C. ENGLISH LAW

In order to understand the historical development of the law of perjury from its inception under Anglo-Saxon monarchs through its fruition by the enactment of the Elizabethan statute which is the forebearer of the present English Perjury Act of **1911**, we must consider, at the same time, the evolution of the English jury through the centuries mentioned to the form we know it today. Originally, jurors were summoned by the authorities to be questioned on their oaths by justices trying crimes *because they had personal knowledge of the guilt or innocence of the accused*. Consequently, until the evolution of the jury in the modern

²⁵ 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 11 (1883) [hereinafter cited as STEPHEN, HISTORY]; 1 J. STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW, 41–42 (1912); R. CHERRY, LECTURES ON THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES 59 (1890); JOHNSON, *supra* note 24, at 16, footnote 87. In this regard, *see* also, O'Dunne, note 2, *supra* at 253–260 for an informal, lively and wide-ranging discourse on legal sanctions against perjury in ancient law.

²⁶ JOHNSON, note 24, *supra*, at 65.

²⁷ Hunter's explication in this regard is of interest:

"The first great step in the progress of law is when the distinction between acts that are harmful to human society, and acts that may not be so, but are hateful to supernatural beings, is thoroughly grasped. The distinction between *sin* and *crime*, between an offense against some god, and an offense against the State, lies at the root of all legal development. It is impossible to make any advance towards a rational classification of offences until the elementary conception of an offence—as an act injurious to man living in society—is thoroughly apprehended and firmly applied. The distinction is illustrated in a very striking manner by the way in which perjury was dealt with in the Roman Law. Perjury is the *sin* of invoking a divine being to attest a falsehood. False testimony is the *crime* of perverting the administration of justice. The Roman Law appears from the earliest times to have contained provisions for punishing false testimony; but it was not considered necessary to punish perjury by human laws. It was the business of the gods, said Tacitus, to punish those that despise them; and the same sentiment appears in a constitution of the Emperor Alexander. . . . W. HUNTER, ROMAN LAW IN THE ORDER OF A CODE 904 (1876). 1 J. STRACHAN-DAVIDSON, note 25, *supra*, at 48–49; 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 138–140 (2d ed. 1905); F. NICHOLS, BRITTON 503–504 (1901); J. BEAMES, A TRANSLATION OF GLANVILLE 67–68 (1812).

sense, i.e., a tribunal whose members are charged with weighing evidence in order to determine whether a certain quantum of proof has been attained regarding an Occurrence about which they have no firsthand knowledge, jurors passed upon matters with which they were personally and specifically acquainted. Indeed, it was precisely this personal knowledge which caused their being called as jurors. They were, in a sense, "official" witnesses, fulfilling much the same function as today's witnesses and usually residents of the immediate district where the alleged crime had taken place.²⁸ Consequently, for centuries the only "perjury" cognizable under English common law was that committed by the juror who rendered a false verdict to the presiding justices, i.e., lied about the guilt or innocence of the defendant. This crime was punished by the writ of attaint which could result, among other things, in the loss of chattels and imprisonment. Further, the successful bringing of the writ entailed reversal of the verdict, which was, in fact, the main object of the writ.²⁹

The function of the jurors gradually evolved, however, from bearing witness as to the guilt or innocence of the defendant to determining such guilt or innocence based upon evidence presented to them. As a result, the writ of attaint which, as we have seen, provided criminal sanctions for violation of an oath by a juror-witness only, fell into desuetude since it could not reach the "new", nonjuror witness. This, it goes without saying, left a serious gap in the law: since there was no criminal sanction which covered this new type of nonjuror witness, he could lie under oath with temporal impunity."³⁰

²⁸ J. SMITH, CRIMINAL LAW 503 (2d ed. 1969); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 317, 332 (3d ed. 1922); 4, *id.* 515-516; 3 STEPHEN, HISTORY 241; J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 16, 17 (2d ed. 1890) [hereinafter cited as STEPHEN, A GENERAL VIEW]. The institution of the jury developed gradually in the post-Conquest era, replacing its antecedents, the ordeal (trial by combat) and compurgation (the swearing by neighbors that they believed the accused's sworn affirmation of his innocence), as a vehicle to determine guilt or innocence 3 STEPHEN, HISTORY 241.

²⁹ 1 STEPHEN, HISTORY 337-343; 3 STEPHEN, HISTORY 241. The offense of perjury by jurors was specifically proscribed by early English Statutes. Stephen notes its mention in several very early English enactments, citing laws of Canute, Edward 111, Ethelred and Henry 1. 1 STEPHEN, HISTORY 54; 3 STEPHEN, HISTORY 240-241. See also F. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 109, 117, 141 (1963) (decrees going back to King Alfred, as well as Edward 1 and Althelstan II proscribe the crime); J. BEAMES, *supra*, note at 67-68; 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 400 (5th ed., 1942) [hereinafter cited as HOLDSWORTH].

³⁰ STEPHEN, A GENERAL VIEW 96, 97. It is true that the ecclesiastical courts could in theory punish perjury by a witness, but for several reasons

The first statute referring to perjury in the sense that we know the crime today, *i.e.*, the false swearing by a witness, was enacted as early as 1487 in the reign of Henry VII.³¹ The Star Chamber³² construed the statute as conferring exclusive jurisdiction on its tribunal to mete punishment for the offense regardless of the court before which it was committed.³³ Before this time, "there was not any punishment for any false oath of any witness at the common law."³⁴ However, the Star Chamber, it must be remembered, was an ecclesiastical court; the first temporal penalties were imposed during the reign of Henry VIII by an enactment in 1540 which punished **subornation**.³⁵ It was not until 1562, during the reign of Elizabeth, though, that there was added a penalty for perjury proper. This was the first comprehensive statute covering the crime of perjury and its adjuncts, and prescribing the punishments therefor, ever enacted in England.³⁶ The present English law is found in the Perjury Act of 1911³⁷ which codified the common law and abrogated sections scattered throughout 130 British statutes which had theretofore dealt with the **crime**.³⁸

D. AMERICAN LAW

1. Federal.

The present Federal perjury statute, 18 U.S.C. § 1621, was enacted as part of the criminal code of 1948 following the Act of 1909. The latter was an improvement on the Act of March 3, 1825, chapter 65, section 13, which in turn had improved the original Act of April 30, 1790, chapter IX, section 18, 1 Stat. 116.

their doing so was impracticable. 3 **HOLDSWORTH**, at 400; (5th ed. 1942); 4 **HOLDSWORTH**, at 516 (3d ed. 1945).

³¹ 3 Hen. 7, c. 1.

³² Parenthetically, it should be observed that the Star Chamber probably does not merit its infamous reputation. See Barnes, *Star Chamber Mythology*, 5 **AMER. J. LEGAL HISTORY** 1; 1 **HOLDSWORTH**, at 32-42 (7th ed. (rev.), 1956).

³³ 3 **STEPHEN**, HISTORY 244; **R. CROSS, P. JONES**, AN INTRODUCTION TO CRIMINAL LAW 305 (5th ed., 1964).

"Devonport v. Sympton, **Cro. Elizabeth** 620 (1956). See **STEPHEN**, A. GENERAL VIEW 96-97 (1890); 4 **HOLDSWORTH**, at 273 (3d ed. 1945).

³⁴ 32 Hen. 8, c. 9, § 3.

³⁵ 5 **Elizabeth** c. 9; **STEPHEN**, A GENERAL VIEW, 18. For a general exposition of the historical development of the law of perjury through the enactment of the cited statute of Elizabeth, see 4 **HOLDSWORTH**, at 515-519 (3d ed., 1945).

³⁶ 1 & 2 **Geo. 5**, c. 6. See analysis of the Perjury Act of 1911 in 4 **L. WAKMINGTON**, **STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND** 147-150 (21st ed. 1950).

³⁷ **SMITH**, at 503-510; **J. TURNER**, **KENNY'S OUTLINES OF CRIMINAL LAW** 437 (19th ed. 1966); 1 **J. TURNER**, **RUSSELL ON CRIME** 323-337 (11th ed. 1958).

The Act of 1790 was a limited transposition into statutory form of the common law offense of perjury.

The successive Federal perjury statutes show a gradual departure from the English common law offense initiated in the Star Chamber in the time of Queen Elizabeth I. As has been indicated, England broke away, to great extent, from common law perjury concepts with the enactment, in 1911, of its present Perjury Act.³⁹

The current Federal perjury statute provides as follows :

Whoever, having taken an oath before a competent tribunal, officer *or* person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.⁴⁰

A major change in the Federal law of perjury, hereinafter discussed,⁴¹ was wrought with the enactment of Section 1623 of Title 18 of the U.S. Code on October 15, 1970, as part of the Organized Crime Control Act of 1970. Suffice it to say at this point that Section 1623—which applies to all Federal trials and grand jury hearings—effects a revolutionary innovation in proof requirements for perjury: proof of guilt beyond a reasonable doubt now suffices, i.e., there is no longer a requirement that the crime be established by the testimony of two witnesses or of one witness plus evidence of corroborating circumstances.

2. State.

Perjury is a statutory crime in all States,⁴² with the perjury statute of Elizabeth I being the historical progenitor in several of these.⁴³ Although there are a variety of definitions of the crime set forth in the different State penal codes, none vary significantly from the common law definition of the crime: “[T]he wilful assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence,

³⁹ See notes 37 & 38, *supra*.

⁴⁰ 18 U.S.C. § 1621 (1970).

⁴¹ See p. 44, *infra*.

⁴² 1 W. BURDICK, *THE LAW OF CRIME* 482 (1946).

⁴³ For example, Pennsylvania adopted 5 Eliz. c. 9 in 1718. BURDICK, *supra*, note 42 at 493.

either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding.”⁴⁴

3. *Military.*

Formerly, perjury by a witness before a court-martial was not made a specific offense by any of the Articles of War. It was, however, considered conduct to the prejudice of good order and discipline and, as such, could be prosecuted under the then General Article, Article 62 of the Articles of War.⁴⁵ The Articles for the Government of the Navy were not similarly lacking and specifically made false swearing before a naval court-martial punishable.⁴⁶

Perjury was first mentioned with the enactment of the 1916 Articles of War. Article 93, entitled “various crimes”, listed over a dozen offenses cognizable by court-martial, and among these was perjury.⁴⁷ Article 131, UCMJ, the present military penal provision on perjury, came into being with the enactment in 1951 of the Uniform Code of Military Justice and is based upon the former Article of War 93.⁴⁸ The discussion of perjury in paragraph 210 of the *Manual for Courts-Martial, United States, 1969*

⁴⁴ 2 F. WHARTON, *CRIMINAL LAW 1780-1781* (12th ed. 1932).

⁴⁵ G. DAVIS, *MILITARY LAW OF THE UNITED STATES 455* (1901); E. DUDLEY, *MILITARY AND THE PROCEDURES OF COURTS-MARTIAL 400* (3d ed. 1910). See also W. WINTHROP, *MILITARY LAW AND PRECEDENTS 553, 702* (2d ed. (rev.) 1920), which inferentially indicates the lack of a specific proscription against perjury. The British prosecuted perjury committed before courts-martial through civilian criminal indictment where the offense was committed in places where the British civil judiciary was functioning. In all other areas of the world where British armed forces were located, perjury prosecutions were brought under Article 2 of § 20 of the British Articles of War of 1774. J. SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE 722* (1953). Snedeker attributes the absence of such a provision in early American military law to our lack of overseas possessions. *Id.*

⁴⁶ See *NAVAL COURTS AND BOARDS 81, 115* (1917); DAVIS, *supra* note 45 at 455.

⁴⁷ Former Section 1565 of Title 10 of the United States Code. 2 *THE MILITARY LAWS OF THE UNITED STATES 93* (6th ed. 1921). Perjury had been mentioned specifically but one time previously in military legislation, One section of an 1814 enactment applicable for the duration of the War of 1812 to members of the militia called into the service of the United States explicitly proscribed perjury in courts-martial. 3 *THE MILITARY LAWS OF THE UNITED STATES 134* (2d ed. 1863).

⁴⁸ *INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 1234* (1950).

(*Rev.*)⁴⁹ is derived from paragraph 210 of the 1951 *Manual*⁵⁰ which, in turn, was patterned on paragraph 180b of the 1949 *Manual*.⁵¹

III. ELEMENTS OF THE OFFENSE

A. GENERAL

The elements of Article 131, **UCMJ**, Perjury, as set forth in the *Military Judge's Guide*,⁵² are, in paraphrase, as follows :

(a) That the accused took an oath in a certain judicial proceeding ;

(b) That such oath was administered to the accused in a matter in which an oath was authorized by law ;

(c) That the oath was administered by a person having authority to do so ;

(d) That upon such oath the accused willfully made a statement, namely :

(e) That such statement was material ;

(f) That such statement was false ; and

(g) That the accused did not then believe the statement to be true.⁵³

The elements listed in the *Proof* section of the *Manual* explication of the offense are basically similar.⁵⁴

The elements set forth in both the *Military Judge's Guide* and the *Manual* are of recent drafting, embody all those cases decided prior to 1969 which effected significant elemental changes (there have been no such cases since), and, when read in conjunction with the elucidating material set forth in the *Guide* immediately after their listing, present no major problems—with the exceptions of falsity and materiality, hereinafter discussed.⁵⁶

⁴⁹ Hereinafter referred to as the *Manual* and cited as "MCM, 1969 (REV.)."

⁵⁰ *Manual for Courts-Martial, United States, 1951.*

⁵¹ *Manual for Courts-Martial, United States Army, 1949.* See Legal and Legislative Basis, *Manual for Courts-Martial United States 289, 290, (1951)*; U.S. DEP'T OF ARMY, PAMPHLET NO. 27-2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION 28-16, 28-17 (1970) [the latter reference will be hereinafter referred to and cited as "ANALYSIS, MCM, 1969 (REV.)"].

⁵² U.S. DEP'T OF ARMY, PAMPHLET No. 27-9, MILITARY JUDGE'S GUIDE (1969) [hereinafter cited as MILITARY JUDGE'S GUIDE].

⁵³ *Id.* at 4-136.

⁵⁴ MCM, 1969 (REV.) para. 210.

⁵⁵ ANALYSIS, MCM, 1969 (REV.) at 28-16, 28-17.

⁵⁶ See p. 15 *infra*. For a detailed discussion of each element of the crime of perjury in the civilian sphere, a good deal of which is applicable to the

B. FALSITY

1. *Falsity-in-Fact* ; *Falsity-in-Mind*.⁵⁷

On its face, the penultimate element of the offense of perjury found in the Military Judge's Guide that "[the accused's] statement was false" ⁵⁸ could hardly seem subject to dispute as a prerequisite to conviction for perjury, nor one which could possibly give rise to conceptual difficulty. After all, is this not the very crux, the *sine qua non* of perjury: that the accused's statement be false, i.e., that it did not coincide with factual reality?

It is submitted that the answer is in the negative: that whether the statement was false *in fact* is irrelevant to the crime of perjury. The important consideration in regard to falsity is whether or not the accused *believed* his statement to be true when he made it (the last of the elements listed by the Military Judge's Guide). Consequently, the retention of the requirement of falsity-in-fact is not only superfluous and inartificial, but could conceivably lead to very unpalatable results: the acquittal of one who has willfully testified to what he *believed* to be an untruth, because it subsequently comes to pass—much to his surprise, delight and relief—that his testimony was, providentially, true *in fact* all the while, or close enough to the truth to bar successful prosecution.

What appears to be a falsity-in-fact element of the offense of perjury, found in both the *Proof* section of the *Manual* paragraph on perjury and in the Military Judge's Guide listing of elements of the offense, is based on the lamentably obfuscous *Discussion*

military, *see* W. BURDICK, *THE LAW OF CRIME* 484-500 (1946); 2 F. WHARTON, *CRIMINAL LAW 1780-1830* (12th ed. 1932); 41 *AM. JUR. Perjury* §§ 5-18 (1942); 70 *C.J.S. Perjury* §§ 3-24 (1951). Analyses by British commentators of the elements of the English Perjury Act of 1911 are also useful. *See* citation to English textual material in note 37, *supra*. For a somewhat dated, rather brief discussion of the elements of the military crime of perjury, *see* J. SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE 723-726* (1953). Although apparently several military lawyers once believed that false swearing should properly be considered a lesser included offense of perjury, the matter has now been definitively settled by decision of the Court of Military Appeals and the *Manual*: there are no lesser included offenses to the offense of perjury. *United States v. Smith*, 9 U.S.C.M.A. 236, 26 C.M.R. 16 (1958); MCM, 1969 (REV.), app. 12, A12-5.

⁵⁷ Throughout this discussion, the terms "falsity-in-fact" and "falsity-in-mind" will be used. The former means, "not in accord with objective reality," the latter, "not in accord with the speaker's conception of, or what the speaker believes to be, objective reality."

⁵⁸ *MILITARY JUDGE'S GUIDE*, 4-136. The same element is found in the *Proof* section of the *Manual* discussion of the offense. MCM, 1969 (REV.) para. 210.

section on the point in the *Manual*, which itself struggles with the following wording of the Code:

Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue of matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct."

The ultimate source for the falsity-in-fact requirement appears to be a decision of the Court of Military Appeals, *United States v. McCarthy*,⁶⁰ in which the specification alleging the cognate offense of false swearing in violation of Article 134, UCMJ, set forth that the accused had executed a written sworn statement, "which statement he did not then believe to be true."⁶¹ The Court held the specification inadequate in not alleging the accused's declaration to be *false*, adding that the statement must be, "*infact* false."⁶² The decision is based on a very questionable interpretation of three Federal perjury cases, none of which stands for the proposition, as the Court apparently believed each did, that falsity-in-fact is an element of the Federal crime of perjury and that it need be pled. On the contrary, all that need be set forth in a Federal perjury indictment is that the defendant testified to matters as true which he did not believe to be true. Falsity-in-fact is *not* a requisite allegation.⁶³ Nevertheless, it is the dubious construction and reasoning in *McCarthy* which provides the basis for the present Military Judge's Guide enunciations of falsity-in-fact as an element of the Code offense of perjury because that decision brought about the addition, in the 1969 (Rev.) *Manual*, of *Proof* element "f" to the offense of perjury under Article 131, UCMJ, viz.: "(f) that the testimony was false."⁶⁴

And, yet, on at least two occasions in post-*McCarthy* decisions, the Court of Military Appeals has held that failure of the law

⁵⁹ UCMJ art. 131. To compound the conundrum, the Code specification does *not* allege falsity-in-fact, only that the accused testified as to "a material matter which he did not then believe to be true." MCM, 1969 (REV.), form 113, appendix 6 at A6-18. Compare form 149, appendix 6 at A6-22.

⁶⁰ 11 U.S.C.M.A. 758, 29 C.M.R. 574 (1960). In this regard, see in addition, *United States v. Crooks*, 12 U.S.C.M.A. 671, 677, 31 C.M.R. 263, 267 (1962).

⁶¹ *United States v. McCarthy*, 11 U.S.C.M.A. 758, 760, 29 C.M.R. 574, 576 (1960).

⁶² *Id.*, at 761, 29 C.M.R. at 577 (emphasis added).

⁶³ *United States v. DeBrow*, 346 U.S. 374 (1953); *Flynn v. United States*, 172 F. 2d 12 (9th Cir. 1949).

⁶⁴ MCM, 1969 (REV.) para. 210. See ANALYSIS, MCM, 1969 (REV.) at 28-16. Judge Latimer's dissent in *McCarthy* on the point is cogent. *United States v. McCarthy*, 11 U.S.C.M.A. 758, 29 C.M.R. 574, 578, 579 (1960).

officer to instruct explicitly on falsity-in-fact is not **error**.⁶⁵ The ethereal rationale of these decisions is that the members of the court may be expected to divine falsity-in-fact from the remaining instructions which include statements that, to convict, the members must find the accused testified contrary to his oath to testify truly. This is—wittingly or unwittingly—simply an oblique abandonment of McCarthy. In sum, falsity-in-fact is now ostensibly an element of the offense of perjury based on the authority of a case which, because of subsequent holdings of the Court, is now of little or no authority at all.

But to approach the analysis from the wording of the Manual and the Code themselves : the Code's proscription is against "false testimony" given "willfully and corruptly." In attempting to explain these three crucial modifiers, "false", "willfully" and "corruptly", the Manual states, "The testimony must be false and must be willfully and corruptly given [merely a paraphrasing of the Code]; that is, it must appear the accused gave the false testimony willfully [i.e., testimony which "must be false" is "false testimony" and "testimony . . . willfully . . . given" is testimony given by the accused "willfully"] *and* that he *did* not believe it to be true"⁶⁶. Thus, "corruptly"—the only modifier left not self-modified—must mean "not believed by the witness to have been true."⁶⁷

But if such is the correct definition of "corruptly", what does "false" mean? It cannot mean "false-in-the-mind-of-the-witness", since that is the meaning of "corruptly". If it means false-in-fact—the only alternative—then the Code would seem to be permitting one to lie under oath with impunity if, providentially, the intended lie actually turned out to be the truth-in-fact.

Yet, such is apparently not the case, for the *Manual* continues:

A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, *and this is true whether the thing is true or false in fact*⁶⁸

Thus: (1) one of the elements of the offense of perjury, set

⁶⁵ *United States v. Crooks*, 12 U.S.C.M.A. 677, 31 C.M.R. 263 (1962); *United States v. Chaney*, 12 U.S.C.M.A. 378, 30 C.M.R. 378 (1961), (and see Judge Ferguson's concurring opinion on the point at 383-384).

⁶⁶ MCM, 1969 (REV.) para. 210 (emphasis added).

⁶⁷ See, generally, discussion on a related point in *United States v. Zimreck*, 23 C.M.R. 714, 721 (A.F.B.R. 1966).

⁶⁸ MCM, 1969 (REV.) para. 210 (emphasis added). A *fortiori*, the witness who is far more culpable than either the one who "knows nothing about it" or is "not sure," to wit: the witness who is quite sure that what he testifies to is untrue, must be here included. Why this third, most obvious category of all was omitted, is puzzling.

forth by both the *Manual* and the Military Judge's Guide, is that the accused did not believe his statement under oath to have been true, i.e., it was false-in-mind; (2) another element is that the statement was "false", which *must* mean false-in-fact, since the false-in-mind element is already explicitly set forth, as just explained; yet, (3) the *Discussion* section on the point in the *Manual* states that a perjury conviction may be had *regardless* that the matter testified to was *not* false-in-fact.

Is there, then, a false-in-fact requirement? It is submitted that, in reason and logic, there is not. The *Manual Discussion* language quoted immediately above specifically extirpates any such requirement from military law. The element requiring that the statement made be "false" is thereby rendered meaningless surplusage and should be deleted from the *Manual*, the Code, and the Military Judge's Guide. Moreover, the misleading word "corruptly" should be dropped from the Code and in its place language substituted to make clear the false-in-mind element, which is already set out in the elements listed in the *Manual* and the Military Judge's Guide.⁶⁹

In this regard, it should be noted that the Federal perjury statute does not use the word "corruptly" and, further, makes no requirement that the testimony be false-in-fact: "Whoever, having taken an oath . . . that he will testify truly . . . willfully and contrary to such oath states . . . any material matter *which he does not believe to be true*, is guilty of perjury . . ."⁷⁰

⁶⁹ It, of course, goes without saying that proving falsity-in-fact usually provides strong circumstantial evidence of the accused's having had falsity-in-mind when he testified. This is hardly a reason, however to elevate the concept from one of probative value to that of a requisite element of the offense. To do so is to confuse desirable proof with the theory underlying sanction for perjury: punishment for misrepresenting one's knowledge or belief.

⁷⁰ 18 U.S.C. § 1621 (1970) (emphasis added). A *leitmotif* running through many Federal perjury cases is how *personal* a crime perjury is, i.e., that it is the *belief* of the individual in the truth of his sworn testimony that is crucial. "[P]erjury is as highly a personalized crime as exists upon the statute books. The response of [one] sworn to give true testimony is personal in every sense of the word." It is the belief of the individual in the verity of his sworn testimony that is crucial." (footnotes omitted) *United States v. Winter*, 348 F. 2d 204, 210 (2d Cir. 1966). Unfortunately, the perjury provision of the new Organized Crime Control Act of 1970 ("False declarations before grand jury or court"), though shunning the confusing adverb "corruptly," retains the "false statement" **concept** ("false material declaration" in the Act) without any guidelines as to whether falsity-in-fact or falsity-in-mind is intended. 18 U.S.C. § 1623 (a) (1970). For a discussion of the Organized Crime Control Act of 1970, *see* p. 44 *infra*. The Model Act on Perjury proscribes misrepresentation of belief but, paradoxically, explicitly makes truth-in-fact a defense. Model Act on Perjury, § 1, 9B U.L.A.

The English Perjury Act of 1911 likewise eschews the falsity-in-fact requirement and use of the confusing word “corruptly” :

If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding willfully makes a statement material in that proceeding, *which he knows to be false or does not believe to be true*, he shall be guilty of perjury. . . .⁷¹

This position is consonant with precedent English common law cases which did not admit of the defense to perjury that the statement made was in fact true if the accused believed it to be false when made or if it were made **recklessly**.⁷²

What meager United States authority exists on the question of whether falsity-in-fact is a proper element of the offense of perjury would appear to indicate that it is **not**.⁷³

The use of the word “corruptly” in perjury statutes such as Article 131, UCMJ, is an historical anachronism dating from the early English perjury statutes. Doubt has been cast from the start, however, on whether it is a proper element of the crime of perjury.⁷⁴ Judicial opinion could hardly be more varied as to the meaning of the word “corruptly” in perjury statutes, with most cases simply presenting no explanation whatsoever.⁷⁵ Some courts have taken the word at its ordinary meaning of importing an intention to gain some dishonest pecuniary advantage, i.e., being suborned. Others have construed “corruptly” as equivalent to “willfully”, “with fraudulent motive”, “viciously”, “wickedly”, etc. A perusal of the authorities leaves one with the impression that the word “corruptly”, is, when found in a perjury statute, virtually without meaning: it certainly is not employed in the usual sense of the word when applied to a witness, i.e., one who has been suborned. Little reason can be seen, then, for not extirpating the word from Article 131, UCMJ, as a meaningless, historical **appendage**.⁷⁶

The Model Penal Code unqualifiedly embraces falsity-in-mind. Model Penal Code, § 241.1(1).

⁷¹ 1 & 2 Geo. 5, c. 6 (emphasis added).

⁷² See J. SMITH, CRIMINAL LAW 509 (2d ed. 1969); 1 J. TURNER, RUSSELL ON CRIME 336 (11th ed. 1958).

⁷³ Commonwealth v. Miles, 140 Ky. 577, 131 S. W. 385 (1910). In the same vein, see 1 W. BURDICK, THE LAW OF CRIME 489-490 (1946); 2 WHARTON, CRIMINAL LAW 1784-1785 (12th ed. 1932).

⁷⁴ Burdick’s discussion of the history and varied meanings given the word “corruptly” found in perjury statutes is the source of the information herein. 1 W. BURDICK, THE LAW OF CRIME 493-396 (1946).

⁷⁵ No military decisions have been found which interpret the word.

⁷⁶ If the word is used, as some authorities suggest, to mean “take unfair advantage of” or “deceive,” it is submitted that it is still irrelevant: the *motivation* for the perjury should not concern us. The mens rea rests not in an intent to deceive, but in the general criminal intent to misrepresent

2. *Inconsistent Sworn Statements*

Suppose that Pvt. Prevaricator testifies under oath at a court-martial that, on the night of 16 January, he was in a certain poolhall with the accused uninterruptedly from 1800 to 2100. Subsequently, and at the same (or a different) court-martial, Prevaricator testifies under oath that, on the night of 16 January, he was in that same certain poolhall between 1800 and 2100 and at no time was the accused with him; in fact, he never so much as saw the accused during that period of time. During both appearances on the stand, Prevaricator's testimony was positive and unqualified (and, in both instances, material). Assume that no further evidence exists regarding the truth or falsity of either statement. May Prevaricator be successfully prosecuted by court-martial for perjury by introducing into evidence his two mutually exclusive, wholly contradictory sworn statements on the theory that, in at least one of the two instances—regardless which—he *had* to have committed perjury?

In the military, the answer is in the negative: “[S]worn self-contradictions are not enough to establish a charge of perjury There must be at least one witness or documentary evidence *to show which of the contradictions is false. . . .*”⁷⁷ This was, until recently,⁷⁸ the Federal rule,⁷⁹ and appears to be that of the majority of jurisdictions.⁸⁰

Despite the impeccable jurisprudential rationale which underlies the rule, viz.: (1) without such a prohibition, a specification could allege two contradictory statements without alleging *which* is false, making the pleadings disjunctive,⁸¹ thereby not sufficiently informing the accused of what he must defend against;⁸²

one's knowledge or belief. See discussion on the facet of intent at note 207, *infra*.

⁷⁷United States *v.* Evans, 4 C.M.R. 369, 373 (A.B.R. 1952) (emphasis added). In the same vein, see United States *v.* Reed, 9 C.M.R. 163 (A.B.R. 1953).

⁷⁸The Organized Crime Control Act of 1970 abrogated the prohibition as to Federal trials and grand jury hearings. See note 179 *infra*, and accompanying text.

⁷⁹United States *v.* Nessonbaum, 205 F. 2d 93 (3d Cir. 1953); McWhorter *v.* United States, 193 F. 2d 982 (5th Cir. 1952); United States *v.* Buckner, 118 F. 2d 468 (2d Cir. 1941).

⁸⁰“See McWhorter *v.* United States, 193 F. 2d 982 (5th Cir. 1952) and cases cited therein. *But see* 3 F. WHARTON, CRIMINAL EVIDENCE 398 (12th ed. 1955). English prosecutors are similarly burdened. J. SMITH, CRIMINAL LAW 509 n. 3 (2d ed. 1969).

⁸¹For the view contra to this assertion, see text accompanying note 93, *infra*.

⁸²“See Whitman, *supra* note 2, at 132.

(2) it is a violation of the two-witness rule;⁸³ and (3) it lifts the burden of proof as to falsity of a *specific statement* from the prosecution, the rule's detractors assail it as legalistic and against sound reason.⁸⁴

Wigmore is for abolition of the prohibition :

Suppose that the accused has *sworn contraries* on two different occasions; does the [two-witness] rule still require a corroborated witness, when as against the oath charged in the indictment is produced the other oath to the contrary?

Perhaps the two contraries are reconcilable, or perhaps the accused's knowledge of the falsity on the one occasion does not of itself appear from the contrary oath. But it is not a question whether additional corroborative evidence *may* be needed. The question is whether it is invariably needed, as a rule, even when the nature of the fact sworn to makes it perfectly clear that the falsity must have been stated knowingly. Furthermore, the difficulty of framing an indictment (arising from the uncertainty whether the one or the other assertion should be alleged false) has nothing to do with the rule of evidence; for it may be impossible to allege which of the two is false, while it may still be an incontrovertible fact that the accused has in either the one or the other assertion spoken with knowing falsity. Is it then not proper, without more, to allow the jury, merely by comparing assertions, to determine that one of them was perjured? The question is practically the same even where the second assertion was not under oath; for the nature of the fact asserted remains the same, and the comparison may equally suffice to convince the jury.

It seems clear that the [two-witness] rule here suffers an exception, and that by mere comparison the jury may determine the falsity. The purpose of the [two-witness] rule is to protect the accused from the false testimony of a single witness swearing against him; here no attempt is made to condemn him upon the

⁸³ See discussion of the two-witness rule p. 31 *infra*.

⁸⁴ See criticisms of the rule in authorities cited *supra*, note 2, particularly Whitman, at 130-131; Model Act on Perjury, § 2 and Commissioner's Note thereon, 9B U.L.A. Federal Court of Appeals Judge Augustus N. Hand has noted, "It seems strange that in the federal courts an indictment for perjury may not yet be drawn in the alternative and that there may not be a conviction for deliberately making oath to contradictory statements unless the prosecutor shows which of the statements was false." *United States v. Buckner*, 118 F. 2d 468 (2d Cir. 1941). Even where the second contradictory statement *is accompanied by an admission that the previous testimony was false*, a conviction may not properly be had on the admittedly false statement. *McWhorter v. United States*, 193 F. 2d 982 (5th Cir. 1952). See Annot., 25 A.L.R. 416 (1923). This situation is to be distinguished from those cases where the defendant takes the stand *in the perjury trial itself* and formally recants and asserts under oath the falsity of the prior testimony. Such recantation is "the practical equivalent of a plea of guilty to the indictment." *United States v. Buckner*, 118 F. 2d 468, 469 (2d Cir. 1941).

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credit of another person; the rule's protection is not needed; and the rule should fall with its reason."

While several arguments against abolition of the prohibition against charging, proving and convicting of perjury on the basis of two sworn contradictory statements have been advanced,⁸⁶ the trend of the law would seem to presage a gradual abandonment of the prohibition. The Model Act on Perjury explicitly permits a perjury conviction based on sworn contradictory statements, noting in its Commissioners' Note that both New York and Louisiana have done so statutorily. Belief in the truth of each statement by the defendant when it was made is set forth as a defense.⁸⁷

The Organized Crime Control Act of 1970⁸⁸ provides as follows:

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information. . . . that the defendant at the time he made each declaration believed the declaration was true.⁸⁹

The existence of the rule against conviction of perjury on contradictory sworn statements is based primarily on the two-witness rule with which it is inextricably entwined: specifically, the falsity of the alleged perjured statement must be shown by the testimony of at least one witness plus evidence corroborating the falsity, in contrast to mere evidence that the accused has made a contradictory sworn statement. For the reasons which follow, it is submitted that this rule is as bankrupt as the two-witness rule which underlies it and should be abolished with it.⁹⁰

(1) The requirement that the prosecution prove by independ-

⁸⁶ 7 J. WIGMORE, EVIDENCE 282-283 (3d ed. 1940).

⁸⁷ Whitman, at 131-141.

⁸⁸ Model Act on Perjury, § 2 and Commissioner's Note thereon, 9B U.L.A. The Model Penal Code also permits conviction for perjury on sworn contradictory statements. Model Penal Code, § 241.1(5) (1962).

⁸⁹ Discussed at p. 44, *infra*.

⁹⁰ 18 U.S.C. § 1623(c) (1970). This enactment was the culmination of a long effort to extend the Federal perjury sanctions to encompass contradictory sworn statements. Bills of same or similar import had been introduced in each Congress since 1941. *Hearings on S. 30, and related proposals Relating to the Control of Organized Crime in the United States, Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 581 (1970).

⁹⁰ See critical discussion of the two-witness rule, beginning p. 31, *infra*.

ent evidence *which* of two irreconcilably contradictory sworn statements of the accused is false, is, to put it quite simply, an outrage to common sense.⁹¹ Permitting conviction for perjury on sworn contradictory statements would at last invest the prosecutor with a powerful weapon against the witness whose testimony at the pretrial hearing or investigation and at trial, for reasons best known to himself, bear little relation one to the other.

(2) The objection that to permit criminal pleadings in which it is alleged that one of two statements set forth was perjured, without specifying which, is pleading in the disjunctive and is thus constitutionally objectionable in failing to inform the accused of the crime with which he is charged, is misplaced. As pointed out by the Supreme Court of New Jersey in a trenchant analysis of the issue⁹² in a case where the constitutionality of a New Jersey statute explicitly permitting such pleading was challenged :

The indictment is not, we think, disjunctive or in the alternative in the sense argued. The classical instances to which we are referred are that it could not be lawfully charged against A that he murdered B or caused B to be murdered, or that he murdered or wounded B, or that he forged an instrument or caused it to be forged, or that he erected a nuisance or caused it to be erected. But the illustrations do not carry through; [the petitioner] is not disjunctively charged with one or the other crime; he is definitely and clearly charged with the single offense of false swearing. He is accurately informed of precisely what he is to meet. We know of no prohibition against the authority of the legislature to declare that it shall be a crime for a man willfully and under oath to make statements *so* diametrically opposite that one must of necessity be false, and that the accusation may be made by setting forth the contradictory statements and alleging that one or the other, without specifying which, is false. That is substantially what the legislature has said in the present statute, directly requiring, however, that the jury shall be satisfied beyond a reasonable doubt not only of the falsity but of the willfulness of it. We consider that the underlying purpose is both clear and rational. The statute leaves the defendant under no uncertainty as to that with which he is charged.

⁹¹ In *United States v. Hull*, 17 C.M.R. 722 (A.F.B.R. 1954), a false swearing case, the accused gave two mutually exclusive, flatly contradictory accounts under oath explaining his possession of an automobile which he had allegedly wrongfully appropriated. The Board found the Government had not produced evidence sufficient to establish the falsity of the first statement of the accused (upon which the charge was based) and since "the deficiency is not overcome by the accused's second statement," the findings of guilty were set aside. Certainly, sound reason would dictate that the Government should have been allowed to prove its case merely by introducing both statements, without alleging which was false.

⁹² *State v. Ellenstein*, 121 N.J.L. 304, 2 A. 2d 454 (1938).

It does not shift the burden of proof to him and it does not deprive him of any reasonable opportunity for defense. If it be that the statute designates the legal effect to flow from the proof of the contradictory statements, there is precedent, as, e.g., . . . the "bad check" statute . . . wherein the drawing of the check is made *prima facie* evidence of intent to defraud.⁹³

In any event, whatever doubts may have existed regarding the constitutionality of abandonment of the prohibition against allowing conviction of perjury by proving contradictory sworn statements could not have been very persuasive to the jurisdictions — numbering at least fifteen,⁹⁴ including the United States⁹⁵ — which have abrogated the rule statutorily or by decision.

(3) The rights of the accused are fully protected. It goes without saying that no statute or decision permitting proof of perjury by introduction of sworn contradictory statements even so much as hints that the reasonable doubt standard be in the least violated. It is clear the abolition of the prohibition permits the trier of fact to draw an inference of the accused's guilt from the two sworn contradictory statements placed before it. This, however, is hardly to be equated with shifting the burden of proof, as the New Jersey Supreme Court noted in *Ellenstein*.⁹⁶ Indeed, were the *Manual* revised to permit such proof, the military lawyer who accepts the five-day rule of Article 123a, UCMJ, which establishes "prima facie evidence" of intent to defraud or deceive and knowledge of insufficient funds, should experience no intellectual conflict. Moreover, both the Model Act on Perjury⁹⁷ and the False Declarations Title of the Organized Crime Control Act,⁹⁸ which have abrogated the prohibition, explicitly provide the accused with the defense of truth, *i.e.*, no conviction may obtain if the accused, at the time he made each declaration, believed each declaration to be true: a protection for the witless, naive, gullible, and easily confused who might otherwise be ensnared in a perjury prosecution though guiltless of purposely committing the crime.

In sum, the prohibition against proving perjury on the basis of

⁹³*Id.*, at 464.

⁹⁴3 F. WHARTON, CRIMINAL EVIDENCE 398 (12th ed. 1955). New Jersey, New York and Louisiana are examples of States which have statutorily abrogated the prohibition.

⁹⁵See note 89 *supra*, and accompanying text. The United States now permits conviction on proof of contradictory sworn statements made in a Federal trial or grand jury hearing. As has been noted, however, the military still prohibits conviction based on such proof alone.

⁹⁶See notes 92 and 93, *supra*, and accompanying text.

⁹⁷See note 87, *supra*, and accompanying text.

⁹⁸See note 89, *supra*, and accompanying text.

contradictory sworn statements seems defensible neither on a jurisprudential nor strictly logical basis. Indeed, the rule's very presence in our law springs from the existence of the now besieged two-witness rule, in serious trouble itself.⁹⁹ A valueless historical impediment defying logic and practicality, it should be abandoned.

C. MATERIALITY

1. Introduction.

It is a singular fact that a witness may knowingly, willingly, and purposefully lie under oath in a courtroom—indeed, admit to the crime subsequently—and not be amenable to penal sanction should his perjured testimony not be deemed “material” to any issue in the case. Thus, for example, my false, gratuitous asseveration under oath of heir apparenancy to a vizierate may be made with impunity provided such testimony is not material to any issue before the court. The application of the rule is as universal¹⁰⁰ as the critical fire it draws. To understand the important niche materiality occupies in the law of perjury and the rationale for its existence, a note on the provenance of the rule may be of aid.

2. History and Analysis.

As the great legal historian, Sir James Fitzjames Stephen observes, “the doctrine . . . that the matter falsely sworn must be material to the issue, has a curious history.”¹⁰¹ Indeed it has.

The concept of materiality as an element of the common law crime of perjury was formulated out of the whole cloth by Lord Coke in his Third Institute as a result of his misconstruing an exposition in the premises (in Latin) by Bracton.¹⁰² It is also likely that his definition was equally prompted by a holding in

⁹⁹ See discussion of the two-witness rule beginning page 31, *infra*.

¹⁰⁰ All American jurisdictions adhere to the common law requirement of materiality with the exception of Rhode Island, South Carolina, Washington, Alaska and New York (where materiality is not required for second degree perjury). 70 C.J.S. *Perjury* § 10 (1951). Article 131, UCMJ, Perjury, provides that the perjured testimony must be “material to the issue of matter of inquiry.” The MILITARY JUDGE’S GUIDE at 4–113 lists as one of the elements of the offense of perjury, “That the statement was material.” See general discussion of the element in the Model Penal Code § 208.20 (Tent. Draft No. 6 at 104–124). The Federal statute proscribing perjury explicitly requires that the falsehood relate to “any material matter.” 18 U.S.C. § 1621 (1970). For a general explication of the Federal position, see *United States v. Edmondson*, 410 F. 2d 670 (5th Cir. 1969); Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 IND. L.J. 1 (1959). See note 113 *infra*.

¹⁰¹ 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 248 (1883) [hereinafter cited as STEPHEN, HISTORY].

¹⁰² *Id.*

1613¹⁰³ on the old law of attainr (which, as will be remembered,¹⁰⁴ was the civil-criminal remedy and sanction against perjured jurors), where the court quite logically found the whole of a jury's verdict was not to be set aside as false through writ of attainr merely because an immaterial aspect of it might have been false. As Stephen notes,

This [judicial decision] is intelligible and rational, but the modern doctrine of materiality is a mere distortion of it. It is one thing to say that a verdict is not to be treated as false because an immaterial part of it is false, and quite another to say that a willful perjury about a particular fact is not to be punished because the fact is not material to the issue. However, upon this passage of Coke's a variety of cases were decided—which introduced a doubt whether perjury could be committed about a fact which, though relevant to the issue, was not essential to its determination, and the doctrine became so well recognized as a part of the law, that an averment of the materiality of the matter on which perjury is assigned forms a necessary part of every indictment for the offense.¹⁰⁵

In a later work,¹⁰⁶ Stephen, with not uncharacteristic acerbity,""; excoriates the rule and its unwitting founder: "The doctrine of materiality in perjury deserves particular notice. It was, I have no doubt, a relic of the ancient law of attainr; ignorantly parodied by Coke. Its intrinsic absurdity, the stupid way in which it was introduced into the law, and the skill with which it was rendered inoffensive by Judicial construction¹⁰⁸ are all characteristic and instructive."

Regardless the shoddy jurisprudential credentials of the materiality requirement, not to mention Stephen's wrath, the concept

¹⁰³ Foster v. Jackson, Hobart, 53.

¹⁰⁴ See note 29, *supra*, and accompanying text.

¹⁰⁵ 3 STEPHEN, HISTORY 249.

¹⁰⁶ STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 97 (2d ed. 1890) [hereinafter cited as STEPHEN, A GENERAL VIEW].

¹⁰⁷ Parenthetically, it should be noted that the great James Fitzjames Stephen, as a perusal of his seminal works make clear, obviously found the exegesis of the history of English law far from a bloodless pursuit. Indeed, his approach could be characterized as nothing less than passionate. See note 110, *infra*.

¹⁰⁸ "Of late . . . the judges have given so wide an interpretation to the word 'material' that the rule has ceased to do much harm." 3 STEPHEN HISTORY 249. Over seventy-five years later a like observation was made by an American commentator regarding our Federal courts. See Lillich note 100, *supra*, in which the author concludes—based on an analysis of seventy-five years of Federal case law—that the Federal courts have expanded the word "material" to a point where "it might as well be omitted from the Statute." *Id.* at 1-2.

is now ensconced in British and American law.¹⁰⁹ But *should* it be? Assuming *arquendo* Stephen's explication of the "stupid way it was introduced into the law" is accurate, are there, notwithstanding, empirical or logical bases for the perpetuation of the requirement?

Most commentators would answer in the negative. Stephen's position has already been covered in some detail, and, in passing, it is submitted that his critical views merit no little attention in light of his towering position as legal historian and scholar.¹¹⁰ Modern commentators are virtually unanimous in ascribing the paucity of perjury prosecutions to the difficulty in securing convictions, which, in turn, they blame—to large degree—on the requirement that the false statement needs be material.¹¹¹

The Comment to the Model Act on Perjury, of the National Conference of Commissioners on Uniform State Laws, succinctly summarizes the major objections to the requirement:

Finally, the word "material" appears in the Federal Sec. 1621 [18 U.S.C. § 1621: The Federal Perjury Statute], but it is bracketed in the Model Act Sec. 1, with the recommendation that it be omitted. The reasons for its exclusion are numerous. It is (1) unnecessary, being mainly a historical survival; (2) it is difficult or impossible of application in many cases, leading to strained exceptions and interpretations by the courts; and (3) it is confusing when argued by counsel and applied by courts and juries, thereby leading to miscarriages of justice and to weakness in the courts in protecting themselves against obstruction by perjurers and suborners of perjury. Moreover, (4) degrees of importance or "materiality" of perjured statements can and should be recognized by courts not as an element of guilt but in apportioning sentence . . .¹¹²

This statement neatly limns the most trenchant objections to the materiality requirement and, while the rule has a large backing,¹¹³ it is nevertheless submitted that the brief for its

¹⁰⁹ See note 99, *supra*. The British Perjury Act of 1911, 1 & 2 Geo., c. 6, also imposes the requirement of materiality.

¹¹⁰ See L. RADZINOWICZ, SIR JAMES FITZJAMES STEPHEN (1957). His herculean and definitive HISTORY OF THE CRIMINAL LAW OF ENGLAND and A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, monumental works of erudition, were archetypes of the genre.

¹¹¹ See authorities cited in note 2, *supra*, especially McClintock at 742; the New York Report, 1935; the New York Report, 1934. However, see note 108, *supra*, and accompanying text.

¹¹² Model Act on Perjury, § 1, Comment, 9B U.L.A.

¹¹³ As noted in note 100, *supra*, the overwhelming majority of American jurisdictions adhere to the rule. A most telling indication of its capacity for survival is its inclusion, after much debate and discussion, as an element in the False Declarations Title of the recently enacted Organized Crime Control Act of 1970, 18 U.S.C. § 1623, which enactment will be discussed hereinafter.

abolition is difficult to refute. It may therefore be worthwhile to discuss two of the objections raised by the Comment of the Model Act on Perjury, set forth above, which are most often propounded by critics, bearing in mind that the Uniform Code of Military Justice is with the majority of jurisdictions in adhering to the requirement of materiality.¹¹⁴

In regard to (1): certainly, if any reliability is to be placed on Stephen and subsequent commentators, any claim for legitimate, rational historical basis for the rule is untenable.¹¹⁵ Even so assuming, is there nevertheless any *necessity* for the rule? That is to say, is there any justifiable reason for permitting a witness's lies under oath to go unpunished merely because it subsequently serendipitously transpires for him that his lies were not material?¹¹⁶ The argument has not infrequently been advanced that such immaterial false testimony may, as a matter of pragmatism, be disregarded on the grounds that by the very fact of its immateriality it is harmless. It is submitted that such approach is facile: first in its abandonment of any sense of justified moral outrage at a conscious, deliberate act of disdain clearly amounting to contempt of the judicial process,¹¹⁷ and, secondly—and more importantly—in its ignoring what is clearly an attempted subversion and undermining of that process.

An even more compelling objection is mirrored in (2): the difficulty or impossibility of application of the rule in many cases, “leading to strained exceptions and interpretations by the courts”. Stephen's comments in this regard, as well as that of more recent commentators, have already been noted.¹¹⁸ Certainly it would appear that judicial interpretation through the years of

¹¹⁴ As previously noted, Article 131, UCMJ, Perjury, provides in pertinent part that guilt of perjury may be predicated only upon false testimony which is “material to the issue of matter of inquiry.” The materiality requirement is also manifested in the Manual, para. 210, which provides:

The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or non-existence of a fact in issue.

See also MILITARY JUDGE'S GUIDE 4-113.

¹¹⁵ See notes 101-108 *supra*, and accompanying text.

¹¹⁶ It is assumed here that not one perjurer in a million lies with the comforting conviction that what he is testifying to is immaterial and thus unpunishable but, rather, that the immateriality of his testimony manifests itself after the act as a sort of boon, discouraging his prosecution or thwarting his conviction.

¹¹⁷ See p. 64, *infra* for discussion of perjury as contempt.

¹¹⁸ See note 108, *supra*, and accompanying text.

the word "material" in perjury statutes has so expanded its meaning as virtually to abrogate whatever restrictions the term originally embodied.¹¹⁹ If true, this is small recommendation for the continued retention of the rule.

The most frequently advanced rationale of the defenders of the rule is that no substantive harm having been effected by an immaterial falsehood, an attitude akin to "de minimis non curat lex" should prevail. Over 80% of the military judges surveyed opted for retention of the rule in military law, Those few adding comments expressed the view, generally, that a prosecution for perjury for making an immaterial sworn falsehood is a waste of time since the lie could not have had any discernible effect on the outcome of the proceedings and, further, that materiality is a necessary safeguard against petty, vindictive prosecutions. There were, however, a few fiery dissents to these views by those military judges who felt the rule a meaningless, historical appendage and an unwanted obstruction to the proper functioning of justice. In any event, should the rule meet its demise by amendment to the Code and *Manual*, as it has statutorily in several States, it will not, apparently, be the result of militancy for its abolition on the part of the military lawyer.

Few cases under the Code have dealt with the element of materiality and none of these have done so in a factual context calling for analytical opinions of an elucidatory instructive nature. *United States v. McLean*¹²⁰ is helpful, however, in adumbrating the parameters of the concept in military law.¹²¹

In that case, the appellant assigned as error the instruction

¹¹⁹ See, e.g., J. TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* 438, 439 (19th ed. 1966), wherein the author, in an interesting recounting of the British experience, notes materiality, "a rule of lenience," is construed very narrowly by the judges :

Thus [the judges] have held that the evidence need not be material to the actual issue of the litigation—a lie about his solvency by a man who merely offers himself as bail is sufficiently material to a criminal prosecution. Again, evidence may be sufficiently 'material' even though it were material, not intrinsically, but only by its facilitating the jury's acceptance of other testimony which had an intrinsic materiality, so that trivial details, mentioned by a witness in giving h's account of a transaction, may become important by their leading the jury to believe that his knowledge of the transaction is complete, and his evidence therefore likely to be accurate. On the same ground, all statements made by a witness as to matters that affect his credibility are material, e.g., his denial of having been convicted of a crime.

See note 108, *supra*, and accompanying text. For a discussion of the military rule, see notes 120–123, *infra*, and accompanying text.

¹²⁰ 10 C.M.R. 183 (A.B.R. 1953).

¹²¹ For illustrations of the application of the rule in varying factual situations, see *United States v. Martin*, 22 C.M.R. 601 (A.B.R. 1956), *affd* 8 U.S.C.M.A. 346, 24 C.M.R. 156 (1957); *United States v. Walker*, 6 U.S.C.M.A. 158, 19 C.M.R. 284 (1955).

given by the law officer on the element of materiality which included the following language, "Testimony is material when it has an effective influence or bearing on the question in issue. In other words, you must decide among other things, in order to find the accused guilty of this offense as charged, that the evidence or that the testimony was material to the extent that it had or *could have had* an effective influence or bearing on the question in issue. . . ." ¹²²

The accused urged the italicized words as error in that the alleged perjured testimony to have been material *must* have affected the issue. The Board disagreed and, referring to extensive and weighty authority, held that the test was whether the false testimony *was capable* of influencing the court on the issue before it. In sum, the Board eschewed any suggestion that the triers of fact should wrestle with the imponderables inherent in trying to decide what *were* the motivating factors in the minds of the previous court's members when they came to a decision on a given issue, as opposed to the far more manageable question of what *could have been* these factors. ¹²³

In 1957, in *United States v. Martin*,¹²⁴ the only reported military law decision under the Code on the point, an Army Board of Review squarely faced the issue of whether the decision as to the materiality of an alleged perjured statement is one properly for resolution as a matter of law by the law officer or is to be submitted to the members of the court. In that case, the law officer had instructed the court members that as a matter of law the testimony alleged to be false was material and "thus withdrew from the consideration of the court-martial an essential element of the [perjury] charged."¹²⁵ In a very succinct discussion, the Board cited several Supreme Court decisions (as well as Change 30 to The Law Officer),¹²⁶ holding that the question was one for the trier of law. Subsequently, based upon this decision, as well as those of two Federal Circuit Courts, the rule was embodied in the 1969 (*Rea.*) *Manual*.¹²⁷ This made the practice in military law on the point consonant with that of the overwhelming majority of American jurisdictions.¹²⁸

¹²² *United States v. McLean*, 10 C.M.R. 183, 189 (A.B.R. 1953) (Board's emphasis).

¹²³ *Accord, United States v. Moye*, 14 C.M.R. 720 (A.F.B.R. 1964).

¹²⁴ 23 C.M.R. 437 (A.B.R. 1957).

¹²⁵ *Id.* at 438.

¹²⁶ U.S. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUSTICE HANDBOOK, THE LAW OFFICER.

¹²⁷ ANALYSIS, MCM, 1969 (REV.) at 28-16.

¹²⁸ Annot., 62 A.L.R. 2d 1027 (1958).

The Military Judge's Guide, after listing materiality as an element, sets forth in the accompanying instructions to the elements of perjury one advising the members that, "[A]s a matter of law . . . the allegedly false statement, if in fact made, was material to the (issue) (matter of inquiry)." ¹²⁹ An explanatory note immediately preceding this instruction makes clear that materiality is a question of law which *must* be determined by the military judge as an interlocutory matter. A note immediately following the instruction directs the military judge, if he has found the statement not material, to instruct the court that the accused may not be found guilty of perjury. ¹³⁰

Nevertheless, it is anomalous to have the military judge include materiality in his reading to the members of the court of the elements of the offense and then immediately announce, as a matter of law, that it has been satisfied or, if it has not, to instruct the jury to acquit. Indeed, no comparable situation in criminal law comes readily to mind where an element of an offense is an exclusively legal question and thus wholly outside the province of the triers of fact. It would seem, therefore, a more sensible practice—and one certainly more comprehensible to the members of the court who now have the element of materiality both proffered and snatched from them within seconds—to delete materiality as an element to be read to members of the court. Should the military judge find the element exists, he could simply make a statement to that effect for the record.

IV. CORROBORATION: THE TWO-WITNESS RULE

Testis unus, testis nullus

A. INTRODUCTION

The special rules of evidence in perjury trials require that the *falsity* of the alleged false statement be proved by: (1) [the testimony of a single witness which directly contradicts the alleged false statement if such testimony is corroborated by the testimony of another witness (or other witnesses) or by other evidence, direct or circumstantial, tending to prove the falsity of the statement. . . .] ¹³¹

A peculiar characteristic of the crime of perjury—and one which makes it, along with treason, *sui generis* in Anglo-Ameri-

¹²⁹ MILITARY JUDGE'S GUIDE para. 4-113.

¹³⁰ *Id.*

¹³¹ *Id.*

can penal jurisprudence—is that *no conviction properly lies upon mere establishment of guilt beyond a reasonable doubt*. As to the crucial element of falsity, a *quantitative* norm is imposed, viz. : the falsity of the statement must be shown by the testimony of at least two witnesses, or that of one witness whose testimony is corroborated. Put simply, one witness suffices to send a man to the gallows for murder, but not to prison for perjury.¹³²

This quantitative rule, requiring, to establish falsity, two witnesses or one witness plus corroboration, has a correlative component: no conviction may be had for perjury, regardless how many witnesses testify as to falsity and no matter how compelling their testimony may be, if such evidence is wholly circumstantial. Again, the murder-perjury comparison applies: a murderer may be hanged on circumstantial evidence alone, but a perjurer will go free. Both concepts are embodied in what has come to be known as the “two-witness” rule.

The two-witness rule is followed in all but three States (several jurisdictions have abandoned or qualified the direct evidence facet of the rule, however) and is embodied in the *Manual*.¹³

¹³² As will be shown later, the rule originally required, literally, two witnesses, from whence the term, “two-witness” rule. The universal acceptance over the past century of the testimony of one witness, if corroborated, in lieu of two witnesses, obviously renders the “two-witness” appellation a misnomer. Nevertheless, it is still used as a “short-cut way of stating that in a perjury trial the evidence must consist of something more convincing than one man’s word against another’s.” *United States v. Beach*, 296 F. 2d 153 (1961). So shall it be used herein. *See* discussion on the evolution of the rule in 3 F. WHARTON, CRIMINAL EVIDENCE § 956.1, 1971 Cum. Suppl. (12th ed. 1955). In some jurisdictions, sexual offenses require a similar corroboration. 3 F. WHARTON, CRIMINAL EVIDENCE 401-418 (1955). This is true in the military only where the alleged victim’s testimony is defective. MCM, 1969 (REV.) para. 153a. The gradual evolution of the two-witness rule into a “one-witness-plus-corboration” rule and the now not uncommon abandonment, in certain circumstances, of the requirement that the witness’s testimony constitute direct evidence, is discussed in McClintock, *supra* note 2, at 745-746. *See* cases collected in 11 A.L.R. 825 (1937); 88 A.L.R. 2d 852 (1963). *See* discussion on the point in *United States v. Walker*, 6 U.S.C.M.A. 158, 19 C.M.R. 284 (1955); *United States v. Evans*, 4 C.M.R. 369 (A.B.R. 1952). *See* analysis of two-witness rule as set forth in the *Manual* at note 203 *infra*.

¹³³ *See* 41 AM. JUR. Perjury § 68 (1951), and cases collected in Annot., 88 A.L.R. 2d 852, 859 (1963). *See* discussion in Comment, Proof of Perjury: *The Two-Witness Requirement*, 35 SO. CALIF. L. REV. 86, 94-96 (1961). “The application of the [two-witness] rule in federal and state courts is well nigh universal. The rule has long prevailed and no enactment in derogation of it has come to our attention.” *Hammer v. United States*, 271 U.S. 620, 626-627 (1925). This statement is still a fair representation of the state of the law, with one very major exception at the Federal level brought about by the recent enactment of the Organized Crime Control Act

Moreover, until the recent enactment of Title IV of the Organized Crime Control Act,¹³⁴ hereinafter dealt with,¹³⁵ the two-witness rule prevailed in all perjury prosecutions in the Federal system as well.¹³⁶

The *Manual* wording generally reflects the application of the two-witness rule in most jurisdictions :

The falsity of the alleged perjured statement cannot, except with respect to matters which by their nature are not susceptible of direct proof, be proved by circumstantial evidence alone, nor can the falsity of the statement be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement.¹³⁷

of 1970. See note 134, *infra*. Subsequent to the decision in *Hammer v. United States*, Arizona statutorily abrogated the rule by enacting the Model Act on Perjury in 1953. ARIZ. REV. STAT. §§ 13-561 to 13-572 (1953). The Model Act provides in pertinent part as follows: "Proof of guilt beyond a reasonable doubt is sufficient for conviction under this Act, and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence." Model Act on Perjury, § 4, 9B U.L.A. (1952). Arizona adopted this language verbatim. ARIZ. REV. STAT. § 13-566 (1953). While Illinois also adopted the Model Act in 1953, it failed to incorporate the quoted sentence. S.H.A. ch. 35. § 32-2. Both New Jersey and New Hampshire have rejected the rule by statute. N.J. STAT. ANN., § 2A: 131-6 (1935); N.H. REV. STAT. ANN. § 587: 1-d (1967). Minnesota rejected the rule in 1921. *State v. Storey*, 148 Minn. 398, 182 N.W. 613 (1921). The case is discussed at pages 40-42, *infra*. The rule has been seriously questioned, limited and qualified by appellate courts in several states and by at least two Federal circuits in pre-Organized Crime Control Act decisions. *United States v. Palese*, 133 F. 2d 600 (3d Cir. 1943); *Goins v. United States*, 99 F. 2d 147 (4th Cir. 1938); *Marvel v. State*, 33 Del. 110, 131 A. 317 (1925), and cases cited therein; *Mallard v. State*, 19 Ga. App. 89, 90 S.E. 1044 (1916); *State v. Cerfoglio*, 46 Nev. 348, 213 P. 102 (1923); *Ex parte Metcalf*, 8 Okla. Crim. 605, 129 P. 675 (1913); *Plummer v. State*, 35 Tex. Crim. 202, 33 S.W. 228 (1895). Several decisions have modified the direct evidence facet of the rule. *Harp v. State*, 59 Ark. 113, 26 S.W. 714 (1894); *People v. O'Donnell*, 132 Cal. App. 2d 840, 283 P. 2d 714 (1955); *People v. De Martini*, 50 Cal. App. 109, 194 P. 506 (1920); *Johnson v. People*, 94 Ill. 505 (1880); *State v. Wilhelm*, 114 Kan. 349, 219 P. 510 (1923); *State v. Sullivan*, 24 N. J. 18, 130 A.2d 610 (1957); *Shoemaker v. State*, 29 Okla. Crim. 184, 233 P. 489 (1925); *Commonwealth v. Sumrak*, 148 Pa. Super 412, 25 A.2d 605 (1942). In the military, the two-witness rule is set forth in paragraph 210 of the *Manual*. See text accompanying note 137, *infra*, and analysis of the rule in the military at note 203, *infra*.

"Organized Crime Control Act of 1970, 18 U.S.C. § 1623 (1970). Briefly, the Act—which took effect on October 15, 1970—abolishes the two-witness rule as a prerequisite to conviction for making a "false declaration" in any Federal trial or grand jury hearing. 18 U.S.C. § 1623(e).

¹³⁵ See pp. 44-48, *infra*.

¹³⁶ *Hammer v. United States*, 271 U.S. 620 (1925).

"MCM, 1969 (REV.) para. 210. The quoted *Manual* provision makes explicit that the military two-witness rule consists of the following correlative

The imposition of this burden on the prosecution in perjury cases, above and beyond that of establishing guilt beyond a reasonable doubt, has frequently drawn criticism from judges and commentators, including the late Dean Wigmore.¹³⁸ In order to understand why so unusual a rule came into being—which will aid in coming to a determination as to whether it should be retained—a consideration of its origin and historical development may help.

B. HISTORY

As has been previously discussed,¹³⁹ there was no English crime of perjury until the enactment in the 15th century of the Statute of 3 Henry VII, ch. 1, which the Star Chamber interpreted as empowering it to punish those who falsified under oath. Being an ecclesiastical court, the Star Chamber was guided by canon law rules, many derived from the Roman law, including that which provided, as a general proposition, that the testimony of one witness would not suffice to establish any point of fact."¹⁴⁰ As applied by the canon law, proof of guilt of crime in an ecclesiastical court could only be established by the testimony of at least two witnesses. Depending upon the nature of the crime and the status of the person accused, the number of witnesses

components of which only the latter deals with a witness requirement: (1) guilt cannot be predicated solely upon circumstantial evidence, and (2) guilt cannot be predicated upon the testimony of only one witness. Basically, it is these dual concepts which comprise the two-witness rule in all jurisdictions, though appellate decisions often fail to make this duality clear.

¹³⁸ 7 J. WIGMORE, EVIDENCE § 2041 (3d ed. 1940). See *United States v. Palese*, 133 F. 2d 600 (3d Cir. 1943) and authorities cited therein at 602; Whitman, *supra* note 2, at 141-145; cases and authorities cited at note 133, *supra*.

¹³⁹ See page 9, *supra*.

¹⁴⁰ Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 84 (1901) [hereinafter cited as Wigmore]. For an interesting recent account of the two-witness rule and the jurisprudential and biblical bases for its appearance in early Plymouth and in Massachusetts, see McBratney, *The One Witness Rule in Massachusetts*, 2 AM. J. LEGAL HIST. 155 (1958). The origins of this canon law rule were not only jurisprudential, i.e., from the Roman law, but—and surely more importantly to the canon lawyer—theological as well: the two-witness prerequisite to finding criminal guilt appears repeatedly in passages of the Old and New Testaments. See biblical sources cited in 7 J. WIGMORE, EVIDENCE 243 n. 6 (3d ed. 1940). Consequently, the concept had the stunning authority, as it were, of Divine sanction. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 203, 204 (3d ed. 1944). A third basis for the rule was the importance attached in the early days of English law to mere numbers in the oath-taking ritual in swearing to a fact; this was seen in the discussion of the original role of jurors as witnesses, page 9 *supra*.

required for conviction in the ecclesiastical courts might range to as high as several dozen.¹⁴¹ But under no circumstances could conviction be had on the oath of one opposing witness, for this simply counterbalanced the oath of the accused and equilibrium resulted.

In the common law courts, on the other hand, such a quantitative concept of criminal justice was gradually discarded with the evolution of the jurors as triers of fact rather than witnesses.¹⁴²

In the seventeenth century the common law courts of England rejected the numerical system of counting witnesses and replaced the ancient quantitative requirement of evidence with a "qualitative" concept, based on the kind and credibility of the evidence given.

Formerly in the common law system the jury members were witnesses and could supply evidence emanating from their own personal knowledge. Indeed, they would convict on this evidence were no other testimony presented. Hence in the early common law courts, there was no possibility of having in evidence merely the oath of one witness standing against the oath of the accused, as the evidence supplied by the jurors was present and was sufficient to prove or disprove an issue.

Later the jury evolved into a trier of fact. In general no particular number of witnesses was necessary for proof. The testimony of a single witness relevant in the eyes of the court and credible in the eyes of the jury, formed a sufficient basis for conviction. When there was conflicting evidence, the jury determined the degree of credit to be given the oath and testimony of each witness."

Notwithstanding this abandonment of the quantitative norm for conviction by the common law courts, the ecclesiastical courts retained the concept in the trial of crimes over which they had jurisdiction which included, as has been previously pointed out, perjury. Thus when jurisdiction over the old ecclesiastical court crime of perjury shifted from the ecclesiastical courts (specifi-

"For example, the canon law provided that no cardinal was to be convicted of unchastity unless there were at least seven (in some periods in history, twelve) witnesses. (This was nicely complemented by the canon law rule that a woman could not be a witness.) J. TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* 481 (17th ed. 1958). "The civil and canon law [in contrast to the English law] (like the Mosaic, the Roman, and the modern Scottish), required at least two witnesses, and, from the frequent difficulty of obtaining these, had to fall back upon confessions extorted by torture. The English common law, by avoiding the unreasonable rule, escaped such cruel expedients." (footnotes omitted) *Id.*

¹⁴² Wigmore at 93 *et seq.*

¹⁴³ Comment, *Proof of Perjury: The Two-Witness Requirement*, 35 *So. CALIF. L. REV.* 86, 88 (1961); Wigmore, at 86-88, 93-95.

cally, the Star Chamber) to the common law courts (1640), it brought with it an ecclesiastical rule: the canon law stricture against conviction on the testimony of one witness alone.¹⁴⁴

The question arises why the common law courts accepted and embraced a quantitative norm in the case of perjury which, for all other crimes, they had abandoned years before. Wigmore advances three reasons which may be stated briefly as follows:

(1) Upon the transfer of jurisdiction over perjury from the ecclesiastical Star Chamber (upon its dissolution) to the common law's King's Bench in 1640, "[T]he notions of proof as well as the definitions of substantive law peculiar to perjury were likely to pass over and be adopted as a whole in the subsequent common law practice,"¹⁴⁵ for the reason that, prior to 1640, the common law courts had had, for all practical purposes, no experience whatsoever in trying perjury cases, the same having been dealt with exclusively, as above discussed, in the Star Chamber.¹⁴⁶ Thus, it would seem that the unfamiliarity of the common law court judges with the crime and its incidents militated, in their minds, for a borrowing *in toto* of the developed canon law procedure and formalities applicable to it.

(2) The ancient common law rule that the twelve jurors were themselves sworn witnesses, which obviated any concern in regards to the oath against an oath impasse and thus, for centuries, had worked against the introduction of the ecclesiastical numerical or quantitative rule in the common law courts, was now moribund and thus could not prove the basis for opposition to introduction of the quantitative rule requiring the testimony of two witnesses for a perjury conviction.

(3) At the time perjury jurisdiction transferred to the common law courts—indeed, until 1898 in England—an accused was not permitted to testify in his own behalf. Thus, even if there were only one witness for the prosecution against him, and nothing more, at least there was some evidence against no evidence which, logically, could justify conviction. Not so, however, in the case of perjury, for the accused did "testify," in a sense, by having his previously sworn, allegedly perjured testimony before the court. Thus, testimony from but one witness would constitute merely that witness' oath against the accused's oath, "an oath against an oath," which apparently the common law judges felt left the scales of justice untipped. As a result, the quantitative

¹⁴⁴ See generally HOLDSWORTH, *supra* note 140, at 203-211; United States v. Weiler, 143 F. 2d 204 (3d Cir. 1944), *rev'd* 323 U.S. 606 (1945).

¹⁴⁵ Wigmore, at 107.

¹⁴⁶ *Id.*

theory — though repudiated in all other cases long before ¹⁴⁷—here seemed to offer itself backed with a strong brief pragmatically and jurisprudentially.

And thus the two-witness rule found its way into the law of perjury, receiving by the mid-1800's the full imprimatur of the English courts; ¹⁴⁸ and so it is with us today, a lonely though perdurable exception in penal jurisprudence.

C. THE PROS AND CONS OF THE TWO-WITNESS RULE

In 1945, the United States Supreme Court was specifically urged by the Government in *Weiler v. United States* ¹⁴⁹ to abrogate the requirement of a special quantum of evidence for conviction of perjury on the grounds that there was no sound reason why the evidential standards applicable to perjury cases should differ from those which obtain in prosecutions for other crimes. In a relatively short but trenchant opinion, the Court rejected the Government's argument. After observing that the two-witness rule is "deeply rooted in past centuries" and reviewing the contentions which have been traditionally made for and against its retention, the Court went on to say :

Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.

The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony. Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath". *The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.*

Whether it logically fits into our testimonial pattern or not, the

¹⁴⁷ It should be made quite clear, however, that although the quantitative rule was rejected by the common law courts, there was by no means any feeling of hostility against it. Indeed, if anything, perhaps the opposite could be said to be the case. 7 J. WIGMORE, EVIDENCE 248-252 (3d ed. 1940).

¹⁴⁸ Wigmore, at 106-108.

¹⁴⁹ 323 U.S. 606 (1945).

government has not advanced sufficiently cogent reasons to cause us to reject the rule.”

Subsequently, and until October 12, 1970, when the Organized Crime Control Act of 1970 was enacted,”] the rule remained inviolate in the Federal system, though subject to occasional sniping.¹⁵²

The core of the Court’s rationale, protection of the honest witness from the vindictive, unsuccessful litigant, was first expounded in depth over one hundred and twenty years ago by an English legal scholar, W. M. Best, in his *The Principles of the Law of Evidence*.¹⁵³ Best observed that every person who appears as a witness may be accused of the crime of perjury “by those against whom his evidence tells,—who are frequently the basest and most unprincipled of mankind” and that it was therefore incumbent upon society, in order not to discourage witnesses from coming forth, that they be afforded protection from baseless, vindictive charges of perjury or the threat of same, such obligation being, in the author’s lights, “paramount to that of giving even perjury its deserts.” Best developed and expanded his argument along the same lines for almost three pages, all but a few words of which were quoted verbatim by Wigmore,¹⁵⁴ who, in turn, is cited by the Supreme Court in *Weiler*, including the pages containing Best’s argument.¹⁵⁵

To whatever extent Best justifies the rule on the grounds that it came into being in order to protect witnesses, his position is untenable: the rule owes its existence, as has been demonstrated (and which the Court in *Weiler* inferentially recognizes), not to a salutary desire to protect witnesses, but rather to a happenstance foisting on the common law of a canon law rule from the procedures of the Star Chamber.¹⁵⁶

Further reflection on the provenance of the two-witness rule, however, may properly give way to analysis of the primary justification advanced by the rule’s advocates for its retention, namely: that the rule encourages honest witnesses to come forward and testify candidly by protecting them from vindictive charges of perjury brought by disgruntled litigants.

¹⁵² *Id.* at 609 (emphasis added). The Court went on to quote from *Hammer v. United States*, 271 U.S. 626 (1925). See note 133, *supra*.

¹⁵³ 18 U.S.C. § 1623 (1970).

¹⁵⁴ See notes 166 and 167, *infra*, and accompanying text.

¹⁵⁵ W. BEST, *PRINCIPLES OF THE LAW OF EVIDENCE* §§ 605-606 (1849).

¹⁵⁶ 7 J. WIGMORE, *LAW OF EVIDENCE* 275-276 (3d ed. 1940)

¹ *Weiler v. United States*, 323 U.S. 606, 608-609 (1945).

¹⁵⁶ See notes 144-146, *supra*, and accompanying text

The most telling objection to this *Weiler-out-of-Wigmore-out-of-Best-out-of-the-whole-cloth*¹⁵⁷ contention— notwithstanding its surface attractiveness— is that, simply, there is not now, nor has there ever been, a shred of empirical evidence to support it. No one has the slightest idea whether the two-witness rule has ever had any effect whatsoever in thwarting the potential vindictive accuser or, if it has, the extent to which this has encouraged witnesses to testify truthfully. In this regard, the writer is aware of no increase in spurious accusations of perjury brought by vindictive litigants in those jurisdictions where the two-witness rule has been abolished or modified, nor of heightened reluctance to testify on the part of witnesses. On the other hand, however, evidence abounds from prosecuting authorities that the two-witness rule has had a clearly inhibitory effect on prosecution of, and convictions for, the crime of **perjury**.¹⁵⁸

In addition, the crucial assumption upon which the witness-protection-*cum*-reassurance rationale wholly relies is equally subject to attack: namely *that our hypothetical potential witness knows of the two-witness rule to begin with*, for, obviously, if he does not know of the existence of the rule, it can have no effect on his decision to come forward with evidence and to testify without reservation.

Since, of course, no data on this point exists, each attorney is left to look to his own experiences and impressions in an attempt to gauge the extent to which laymen-witnesses are aware of the existence of the two-witness rule. In this regard, it is the opinion of the writer— based on over thirteen years' experience in criminal and civil cases— that not one witness he ever encountered would have evinced the slightest knowledge of the rule if questioned. Indeed, the writer would even go so far as to opine that, with the exception of judges and prosecutors, not one attorney in ten is aware of the rule: perjury, is, after all— as has been shown— a rarely-prosecuted crime. In any event, it would surely seem fair to say that so esoteric a jurisprudential principle can scarcely be expected to have other than absolutely minimal currency among laymen. If such is the case, assertions that the two-witness rule affords reassurance to witnesses apprehensive of perjury charge reprisals can be almost wholly discounted.

The witness-protection argument in support of the two-witness rule has been tellingly dissected by Senator John L. McClellan on

¹⁵⁷See notes 153–155, *supra*, and accompanying text.

¹⁵⁸See note 138, *supra*.

the Senate floor in that part of his discussion of the Organized Crime Control Act relating to Title IV thereof:

It seems clear that the two-witness and direct evidence rules ought to be abolished, at least in some areas. This was the conclusion of the President's Crime Commission. Suggestions that the existing rules are necessary "to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions," *Weiler v. United States*, 323 U.S. 606, 609 (1945), are unconvincing. Note first that the adopted remedy is broader than the alleged abuse. The existing rules apply across the board. They are not limited to situations where it might be reasonably supposed retaliation was involved. Further, it is obvious that the remedy is hardly adequate even as adopted. It can easily be circumvented merely by acquiring a spiteful accomplice. Thus, it is a bad rule even if you grant the possibility of the evil. The law, moreover, ought to encourage not testimony, but truthful testimony. The existing rules run counter to this goal; perjury, not truth, is protected. More importantly, the rules constitute an unwarranted slander on the power of discernment of prosecutors, grand juries, trial judges and the petit jury. The rule seems to assume that somehow the spiteful prosecution can be brought and a conviction obtained without the support of anyone other than the complainant.

The existing rules are, in short, an unwarranted obstacle to securing legitimate perjury convictions. There is ample protection against spiteful retaliation in the traditional safeguards applicable to every criminal case. There is no good reason why perjury—at least as before grand juries and courts—should not be treated like any other crime. Sound prosecutive discretion and proof beyond a reasonable doubt of a judge and jury constitute ample protection against the unwarranted charge and conviction of perjury.¹⁵⁹

A half-century ago, the Minnesota Supreme Court, in a decision which has since become something of a landmark for opponents of the two-witness rule,¹⁶⁰ was faced with a record which put the issue of the adoption or rejection of the rule so squarely before it as almost to seem contrived. The facts warrant recounting as providing an illustration nonpareil of what opponents of the rule find most objectionable: the rule's potential for effecting a miscarriage of justice in even the most clearly established case of perjury.

During the days of Prohibition, an occasional undercover man for a District Attorney's office in Minnesota, one Storey, filed a detailed report after what appeared to have been an eminently successful investigation, naming, among others, one Thiebault

¹⁵⁹ 115 CONG. REC. No. 42 (1969). Senator McClelland was a cc-sponsor of the Organized Crime Control Act.

¹⁶⁰ "State v. Storey, 148 Minn. 398, 182 N.W. 613 (1921).

as a wrongful seller of whiskey to him. It was not long thereafter, however, that Storey was approached and offered a bribe to falsify evidence in regard to the subject cases. Apparently having succumbed, Storey thereupon informed the prosecuting attorney that he had made a mistake as to Thiebault and certain others. In addition, apparently acting as an agent for his corrupters, he made attempts to bribe certain of his fellow undercover operators to feign inability to identify the defendants at the upcoming trial.

At the trial itself, Storey testified that although he had purchased whiskey in the place charged as owned by Thiebault on five successive days, he was never sold the whiskey by Thiebault, but rather by another person each time. Another witness testified that, on the contrary, Thiebault was in entire charge and the only one present who tended bar and worked about the premises. Under searching cross-examination, Storey, becoming enmeshed in transparent fabrications and contradictions in a desperate attempt to justify his story that he had made a mistake when he reported originally that Thiebault had sold him whiskey—even though a few days afterward he had again so identified him—rapidly descended to lies under oath so jarringly patent that the trial record begins to smack of the farcical. “It was”, the Minnesota Supreme Court drily observed of the latter stages of the feckless Storey’s performance, “simply an exhibition of utter collapse.”¹⁶¹

The trial judge, apparently thunderstruck, unhesitatingly eschewed the usual procedure of allowing the suspected perjurer to go free pending action on the court’s recommendation of prosecution to the district attorney, and incarcerated the hapless Storey *instanter* under a Minnesota statute so permitting in such cases.¹⁶² Storey was subsequently convicted of perjury by a jury based on the facts above set forth.

On his appeal, Storey’s major contention was that the two-witness rule—specifically in respect to its direct evidence corollary—had not been met in his case. In this, he was certainly

¹⁶¹ *Id.* at 615.

¹⁶² Now MINN. STAT. ANN. § 595.08: “When it shall appear probable to a court of record, having general jurisdiction, that a person who has testified in an action or proceeding before it has committed perjury in any testimony so given, it may, by order or process for that purpose, immediately commit him to prison, or take a recognizance for his appearance to answer to an indictment for perjury. In such case, if the court shall deem that any paper or document produced by either party is necessary to be used in the prosecution for perjury, it may detain the same, and direct it to be delivered to the county attorney.”

correct: indeed, it had not even been approached. Not only had there been no direct testimony of one witness corroborated by that of another witness, there had been no direct evidence at all: the evidence had been wholly circumstantial. The court reviewed the then unanimous authority for application of the two-witness rule, Federal, State and encyclopaedic, and went on to state:

The question is a new one in this state and we are at liberty to choose the rule which appeals to us as being most constant with reason. Notwithstanding the high authority above cited, we are of the opinion that the rule laid down is out of harmony with our sytem of jurisprudence. In our opinion it is one of the rules of the common law inapplicable to our situation and "inconsistent with our circumstances." and hence not to be followed. . . . We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder or that one charged with perjury should have greater immunity than one charged with murder. Suppose for example the only eyewitness to a murder should testify that the accused is not the man who committed the crime and yet the circumstantial evidence of guilt is so strong the jury convicts of first degree murder. With what consistency can it be said that a quality of testimony which will justify a court in condemning a defendant to life imprisonment, or, in some jurisdictions, to be hanged, is insufficient to sustain conviction of the falsifier of the crime of perjury for which he may suffer a penalty of a short term of imprisonment. The lightness with which we are pained to say, the oath of a witness is too often treated, does not warrant us in making conviction of the crime of perjury most difficult of all crimes of which state courts have jurisdiction. We hold that perjury may be proved by circumstantial evidence if proof is made beyond a reasonable doubt, as in the case of other crimes."

As has been noted, "there has been expressed through the years a continual, albeit sporadic, dissatisfaction with the two-witness rule. Wigmore observes that, "[T]he rule is in its nature now incongruous in our system. The quantitative theory of testimony, if consistently applied, should enforce a similar rule for every criminal charge, now that the accused is competent to testify. 'Oath against oath', as a reason for the rule, is quite indefensible.""; The Third Circuit, although adhering to the rule, did so with obvious reluctance, characterizing the criticism against it as, "well reasoned."¹⁶⁶ In the Fourth Circuit, as well, serious doubt was cast on the wisdom of continuing the distinction between the proof necessary to convict for perjury and that

¹⁶³ *State v. Storey*, 148 Minn. 398, 182 N.W. 613, 615 (1921).

¹⁶⁴ See note 138, *supra*.

¹⁶⁵ 7 J. WIGMORE, EVIDENCE § 2041 (3d ed. 1940).

¹⁶⁶ *United States v. Palese*, 133 F. 2d 600, 602 (3d Cir. 1943)

required for other crimes.¹⁶⁷ State court decisions criticizing or limiting the rule have already been alluded to.¹⁶⁸ The Model Act on Perjury has jettisoned the two-witness requirement,¹⁶⁹ but, in the past nineteen years since the Act was approved by the National Conference of Commissioners on Uniform State Laws, only Arizona has adopted the Act *in toto*.¹⁷⁰ However, two States, New Jersey and New Hampshire, have specifically abrogated the two-witness rule by statute.¹⁷¹ In the Commissioners' Prefatory Note to the Model Act on Perjury, it is stated, "This mechanical rule seems out of place in modern practice, and it would seem proof beyond a reasonable doubt would be sufficient to safeguard the accused."¹⁷² The New York Law Revision Commission,¹⁷³ as well as the American Bar Association Commission on Organized Crime,¹⁷⁴ have called for abolition of the two-witness doctrine. In 1967, the President's Commission on Law Enforcement and Administration of Justice unqualifiedly recommended the abolition of the two-witness and direct evidence rules in perjury prosecutions.¹⁷⁵

Perhaps the brief for the opposition to the two-witness rule was best summed up by the rather acerbic denunciation it evoked in 1955 from Philadelphia Assistant District Attorney Whitman :

[A]n increasing number of our judges have declared the rule bankrupt. Of hoary vintage and inapplicable to modern times, it persists devoid of logic, practicability or fairness, simply through precedence and a desperate survival instinct. The gradual evolution of the law has nibbled grimly around the ancient body, but in only a few forward-looking states has a significant bite been taken. While virtually every jurisdiction now recognizes that one witness, sufficiently corroborated, may prove falsity [as opposed to the rule as originally formulated and applied, which literally required two witnesses], only the jurisdictions noted above have taken steps toward the abolition of this curiosity [Minnesota, New York, Texas, Oklahoma, Nevada, Georgia, Delaware, Vermont. Oddly, Whitman does not list Arizona which, two years before the publication of his article, became the first State to abolish the rule statutorily]. It

¹⁶⁷ *Goins v. United States*, 99 F. 2d 147 (4th Cir. 1938). Both **Goins** and **Pales** are, of course, pre-Organized Crime Control Act of 1970.

¹⁶⁸ See notes 133 and 138, *supra*.

¹⁶⁹ Model Act on Perjury, § 4, 9B U.L.A. (1952).

¹⁷⁰ *Id.* at 530.

¹⁷¹ N.J. STAT. ANN. § 2A: 131-6; N.H. REV. STAT. ANN. § 587: 1-d.

¹⁷² Model Act on Perjury, at 530, 9B U.L.A. (1952).

¹⁷³ New York Report, 1935, *supra* note 5 at 322.

¹⁷⁴ Organized Crime and Law Enforcement 57-58 (1952), American Bar Association Commission on Organized Crime Report, 1 Sept. 1951.

¹⁷⁵ THE CHALLENGE OF CRIME IN A FREE SOCIETY, President's Commission on Law Enforcement and Administration of Justice (1969), 468.

presents an arbitrary, senseless distinction between perjury and other crimes, making it more difficult to convict a perjurer than a murderer, despite the fact that the perjurer may be penalized by a few years in jail but the murderer may receive the death penalty. It aids and abets perjurers by increasing unnecessarily the difficulty of convicting them. This writer purposes that the two-witness rule be indicted and convicted as an accessory after the fact to perjury and that its punishment be exile to the legal histories.

The rule, obsolete and archaic, should be terminated by judicial fiat or by statute. Instead of this anachronistic and ineffective distinction, we should provide that perjury should be proven by the same kind and degree of proof as all other crimes, proof beyond a reasonable doubt. Thus can we best solve the problem of perjury in our courts.¹⁷⁶

D. THE ORGANIZED CRIME CONTROL ACT AND THE TWO-WITNESS RULE: DENOUEMENT?

On October 15, 1970, the President signed into law the Organized Crime Control Act of 1970.¹⁷⁷ A comprehensive, wide-ranging enactment, specifically designed to provide the legal tools necessary to meet the "highly sophisticated, diversified, and widespread activity" into which organized crime has evolved, the Act creates new penal sanctions, establishes innovative remedies and —of particular interest herein— renovates and modernizes several facets of the traditional rules of evidence.

The Act contains twelve titles, encompassing a broad spectrum from grants of immunity to protective housing for endangered witnesses to prohibitions in the use of income derived from racketeering. Title IV,¹⁷⁸ entitled, "False declarations before grand jury or court", makes an addition to the United States Code effecting certain changes in the Federal law of perjury which might well be seen as a harbinger of root rethinking in all American jurisdictions anent the desirability of retention of certain historical evidentiary appendages to the crime.

The Act provides as follows :

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes

¹⁷⁶ Whitman, *supra* note 2 at 144-145.

¹⁷⁷ Pub. L. No. 91-452; 84 Stat. 922 (1970) [hereinafter referred to as the Act].

¹⁷⁸ *Id.*, section 401. This section amends chapter 79, title 18, United States Code, by adding a new section, 1623, to the present sections of chapter 79, 1621 and 1622, which deal with, respectively, "Perjury generally" and "Subornation of perjury."

any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court, or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.”¹⁷⁹

Before explication of the legislative history and legal effect of subsection (e), it may be of value to explore briefly the general relationship of the new Section 1623 and Section 1621 (Perjury) which was in nowise *directly* amended or repealed by Section 1623, but, rather, was merely complemented and, to a certain practical extent, supplanted by its wording.¹⁸⁰

¹⁷⁹ 18 U.S.C. § 1623 (1970).

¹⁸⁰ “In lieu of amending the existing [statute] relating . . . 18 U.S.C. 1621 . . . the Senate elected to create a new false statements offense.” De-

As has been discussed, 18 U.S.C. § 1621 is the general Federal perjury statute, applicable to a virtually limitless range of situations where, "a law of the United States authorizes an oath to be administered".¹⁵¹ These include such widely disparate acts as, for example, executing a civil service employment application,¹⁵² filing a sworn income tax return,¹⁵³ testifying at an administrative hearing,¹⁵⁴ testifying before a congressional committee,¹⁵⁵ and testifying before a pension examiner,¹⁵⁶ as well as, of course, the more familiar instance of falsified courtroom testimony.

The application of the new Section 1623, on the other hand, is far more restricted: it applies only to "false declarations" made under oath in any proceeding before or ancillary to *any court or grand jury* of the United States. Thus, it is clear that the new statute "is not as inclusive as the perjury statute, since it relates only to judicial proceedings whereas the perjury [statute is] applicable to administrative and legislative proceedings as well."¹⁵⁷

In addition, as its language makes clear, Section 1623, although an integral part of the Organized Crime Control Act as Title IV thereof, is, nevertheless, a statute of general application and thus not limited to trials or grand jury hearings relating to organized crime activities. Consequently, it is a tool which may be employed by the Federal Government to prosecute *any* perjury which occurs in a Federal court or before a Federal grand jury hearing, or in any proceeding ancillary thereto, as for example, pretrial depositions, affidavits and certifications.¹⁵⁸ Thus, while the old Section 1621 is still, theoretically, applicable to perjury committed before a Federal court or grand jury, its early desuetude in these areas, as a result of the more liberal provisions of the new Section 1623, seems inevitable.

Of the various innovative aspects of Section 1623, none drew

partment of Justice Comments, *Hearings on S. 30 and related proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 163 (1970) [hereinafter cited and referred to as the *House Hearings*].

¹⁵¹ *Dunlap v. United States*, 12 F.2d 868 (Cir. N.M. 1926).

¹⁵² *United States v. Crandol*, 233 F. 331 (D.C. Va. 1916).

¹⁵³ *Levin v. United States*, 5 F.2d 598 (Cir. Cal. 1925).

¹⁵⁴ Administrative Procedure Act, 5 U.S.C. § 556(c) (1).

¹⁵⁵ *United States v. Debrow*, 346 U.S. 374 (1953).

¹⁵⁶ *Markham v. United States*, 160 U.S. 319 (1895).

¹⁵⁷ *House Hearings* at 163.

¹⁵⁸ See *Hearings on S. 30, and related proposals, Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess., at 409, 411 [hereinafter cited and referred to as the *Senate Hearings*].

as much analytical attention and discussion in the Senate and House Hearings and Reports as Subsection 1623(e), which, as has been noted, does away with the two-witness rule and its corollary, the direct evidence requirement. And, with but two exceptions, all comments and recommendations made in the Hearings before the Senate and the House in regards to Subsection 1623(e) were **favorable**.¹⁸⁹

A reading of the Senate and House Hearings, and the resultant **Reports**,¹⁹⁰ makes clear that the original impetus for the enactment of Section 1623(e) came from the recommendation of the President's Commission on Law Enforcement and the Administration of Justice which recommended in 1967 that Congress and the States should abolish the rigid two-witness and direct evidence rules in perjury prosecutions, but retain the requirement of proving an intentional false **statement**.¹⁹¹

As has been previously noted, the United States Supreme Court decision in *Weiler v. United States*¹⁹² has for years been the bulwark of the advocates of the two-witness rule. And while their position has certainly been dealt a severe blow by the Federal abolition of the two-witness rule in the Organized Crime Control Act, it may well come about that, paradoxically, the very language of *Weiler* itself will deliver the *coup de grace*.

Justice Black, in delivering the opinion of the Supreme Court in *Weiler* upholding the two-witness rule, ended that portion of the decision dealing with this issue by quoting with approval from *Hammer v. United States*:¹⁹³

The application of [the two-witness] rule in federal and state courts is well nigh universal. The rule has long prevailed, *and no*

¹⁸⁹ The following organizations and persons went on record at the Senate Hearings in favor of the adoption of Subsection 1623(e): The Committee on Federal Legislation, New York County Lawyers' Association, *Senate Hearings*, at 217; The Criminal Law Section of The American Bar Association, *id.* at 264; Henry S. Ruth, Associate Professor of Law, University of Pennsylvania Law School, *id.* at 335; the Department of Justice, *id.* at 371-374, 379, 411. The American Civil Liberties Union provided the sole dissent to Subsection 1623(e) at the Senate Hearings, their position being basically that expounded in *Weiler*. In the House Hearings, there was also a dissenting voice in opposition to Subsection 1623(e), the Association of the Bar of the City of New York. *House Hearings*, at 309-310. The American Bar Association went on record as generally in favor of Section 1623 and registered no objection to Subsection 1623(e). *Id.* at 542.

¹⁹⁰ S. REP. No. 617, 91st Cong., 1st Sess. (1969); H. R. REP. No. 1549, 91st Cong., 1st Sess. (1970).

¹⁹¹ *House Hearings* at 100.

¹⁹² 323 U.S. 606 (1945). See discussion of *Weiler* at pages 37-40, *supra*.

¹⁹³ 271 U.S. 620, 626-627 (1926).

*enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice.*¹⁵⁴

Granted, that the enactment subsequent to *Weiler* of legislation in three States abrogating the two-witness rule¹⁵⁵ may have constituted at least a minimal undermining of its authority. Now, however, in the face of a Federal statute which explicitly abolishes the two-witness rule in all Federal trials and grand jury hearings, the obvious question is whether *Weiler* retains any authority at all. Certainly—if use of the very language of *Weiler* in contraposition would be acceptable as a rhetorical device—it would not be unreasonable now to urge universal abandonment of the rule by arguing that, "the presence of a Federal enactment in derogation of the rule—not to mention that of three States—indicates that it is not sound and has not been Pound satisfactory in practice."

Thus, it is submitted that if the total absence of legislation in derogation of the two-witness rule was the pivotal determining factor in the Supreme Court's decision in *Weiler*—which would clearly seem to be the case—then the enactment since of Federal legislation abolishing the two-witness rule strips *Weiler* of rational foundation and renders it devoid of authority. Conversely, the demise of *Weiler* would leave the two-witness rule bereft of what has been for years a preeminent and virtually impregnable jurisprudential apologist. And so it might well be argued that the rule should fall with its defender: that not only *Weiler v. United States*, but the two-witness rule as well, should be considered as no longer of force and effect in the law.¹⁵⁶

In any event, it seems fair to say that Subsection 1623(e) may well augur the demise of the two-witness rule and its corollary, the direct evidence rule, in many, if not all, American jurisdictions, and, further, that *Weiler*, by its heavy reliance on the continued widespread acceptance and vitality of the two-witness rule, has spelt its own doom. Most especially will this be the case if the present Federal figures for perjury prosecutions and convictions, lopsidedly low in relation to other Federal crimes,¹⁵⁷ rise appreciably under Subsection 1623(e).

E. THE MILITARY RULE

As the language of the *Manual* makes clear, the two-witness

¹⁵⁴ *Weiler v. United States*, 323 U.S. 606, 609-610 (1945) (emphasis added).

¹⁵⁵ See note 133, *supra*.

¹⁵⁶ See *Senate Hearings* at 57.

¹⁵⁷ S. REP. NO. 617, 91st Cong., 1st Sess. at 57 (1969).

rule is explicitly applicable to courts-martial for violation of Article 131, **Perjury**.¹⁹⁸ While all cases reported to date construing and applying the two-witness rule were decided under the 1951 *Manual*,¹⁹⁹ the corresponding language of the new *Manual*²⁰⁰ is sufficiently similar to make them still relevant and **instructive**.²⁰¹ A study of these decisions makes clear that the *Manual* paragraph on perjury²⁰² has been interpreted as little more than a codification of *Weiler*.²⁰³ The question, now, obviously, is how long Congress will permit two wholly disparate quantum of proof for

¹⁹⁸ **MCM, 1969 (REV.)** para. 210. See note 137, *supra*, and accompanying text.

¹⁹⁹ Manual for Courts-Martial, United States, 1951. See para. 210 thereof.

²⁰⁰ **MCM, 1969 (REV.)**. See note 137, *supra*, and accompanying text.

²⁰¹ Paragraph 210 of the **MCM (1969) (REV.)** differs from the corresponding paragraph 210 of the 1951 *Manual* basically to the extent that it has incorporated intervening decisions of the Court of Military Appeals clarifying and interpreting the language of the latter.

²⁰² Manual for Courts-Martial, United States, 1951, para. 210.

²⁰³ *Weiler v. United States*, 323 U.S. 606 (1945). See notes 149-159, *supra*, and accompanying text. The two-witness rule, as set forth in the *Manual*, provides, in summary, that *falsity* must be proved by: (1) two witnesses; or (2) one witness *directly* contradicting the accused's statement plus corroboration of its falsity; or (3) circumstantial evidence of the falsity where, by its nature, it cannot be proved by direct evidence (e.g., the witness' beliefs, opinions, thoughts, sensory impressions, etc.); or (4) documentary evidence *directly* contradictory of the accused's statement plus corroboration of the statement's falsity; or (5) documentary evidence *directly* contradicting the accused's statement alone, provided it (a) is an official record well known to the accused when he took the oath, or (b) it sprung from him, or (c) it has been recognized by him as contrary to the truth. For cases illustrating application of the doctrine as well as the exceptional rules set forth in paragraph 210 of the *Manual* where the directly contradictory evidence is documentary or the assertion of the accused is of a nature not susceptible of contradiction by direct evidence, see *United States v. Guerra*, 13 U.S.C.M.A. 463, 32 C.M.R. 463 (1963) (contradictory testimony held not directly so, therefore insufficient); *United States v. Walker*, 6 U.S.C.M.A. 158, 19 C.M.R. 284 (1955) (proof by circumstantial evidence alone of falsity of accused's negative assertion of what he saw — *something by its nature not susceptible of direct proof* — held: sufficient; this exception was subsequently embodied in paragraph 210 of the **MCM 1969 (REV.)**); *United States v. Taylor*, 5 U.S.C.M.A. 775, 19 C.M.R. 71 (1955) (directly contradictory testimony of prosecution witness corroborated by strong circumstantial evidence); *United States v. Martin*, 23 C.M.R. 437 (A.B.R. 1956) (documentary evidence directly disproving accused's assertion of holding various decorations insufficient (as would be the case with other kinds of evidence) where uncorroborated *unless* it is one of certain types of documentary evidence listed above); *United States v. Anders*, 23 C.M.R. 448 (A.B.R. 1956) (facts similar to those in *Martin*; documentary evidence properly corroborated by testimony negating claim of awards); *United States v. McLean*, 10 C.M.R. 183 (A.B.R. 1953) (weighty direct and circumstantial evidence of denied drinking); *United States v. Downing*, 6 C.M.R. 568 (A.F.B.R. 1952) (mere circumstantial evidence showing nonpresence at a hospital by nonexistence of entry in hospital records, held: insufficient).

perjury to exist side-by-side in the Federal system: the two-witness rule in courts-martial under paragraph 210 of the *Manual* and the mere-proof-beyond-reasonable-doubt norm in Federal trial courts under 18 U.S.C. § 1623(e).

It is submitted that there exists not even a mildly persuasive reason, historically or pragmatically, why the two-witness rule should not be excised from the *Manual*. Now that it clearly appears—with the enactment of 18 U.S.C. § 1623(e)—that the underlying rationale of *Weiler* is bankrupt, what conceivable reasons can be advanced for continuing to hamstring the military prosecutor in perjury cases while his civilian counterpart, the United States Attorney, is no longer so circumscribed? Apparently, however, a goodly number of the military judges surveyed would be able to advance such reasons: *almost eighty percent opted to retain the rule*, their explanations—when expressed—being basically those expounded in *Weiler*, i.e., witness-protection/reassurance.

V. DEFENSES

A. MISTAKE; LACK OF INTENT; INADEQUACY OF SPECIFICATION

In *United States v. Taylor*,²⁰⁴ the accused at his original trial had testified that he had not been in Frankfurt on 28 or 29 March, the occasion of the alleged crime, but instead had been aboard his base acting as Officer of the Day. He was acquitted. At his succedent trial for perjury based on that part of his alibi evidence in which he said he had not entered Frankfurt on 28 or 29 March, strong circumstantial evidence was introduced by the prosecution to establish that the accused had not served as Officer of the Day on the pertinent dates and that he had indeed been in Frankfurt. This evidence included a business entry from the record of fuel sales maintained by an Army filling station in Frankfurt reflecting the sale of gasoline to the accused on 29 March. The accused testified, *inter alia*, that in light of his signature on the gasoline record, he “must have been” present in Frankfurt on 29 March and so apparently had been mistaken in his testimony at the original trial, although it had been honestly given.

In instructing on mistake of fact, the law officer advised the court that if it believed that the accused was mistaken and that

²⁰⁴ 5 U.S.C.M.A. 775, 19 C.M.R. 71 (1955). Frederick Bernays Wiener appeared for the appellant.

his mistake was honest *and reasonable* under the circumstances, then it must acquit the accused of perjury. The accused was convicted.

In reversing, the Court of Military Appeals stated, citing its decision in *United States v. Rowan*,²⁰⁵

[T]he mental attitude of one who makes a false representation will fall logically within one of three categories: (1) he may know or believe that the representation is false; (2) he may possess neither knowledge nor belief with respect to its truth or falsity; or finally (3) he may believe the representation to be true.²⁰⁶

Observing that perjury would be established as a matter of law were the accused's statements to fall within categories (1) or (2), the Court held that the offense of perjury in the military "may not be extended to a situation in which an accused *honestly believes his testimony to be true, although . . . based on information a reasonably prudent man would consider insufficient*. To so broaden the Article's scope would be to substitute mere negligence for the specific criminal intent²⁰⁷ required by the statute which defines the crime of perjury."²⁰⁸

The decision is unquestionably correct in proscribing perjury convictions of those whose honest mistakes may be beneath the standard of care of the ordinary, prudent man; on the other hand, the door would appear to be opened to the honest but recklessly negligent false statement.²⁰⁹ The problem is probably academic, however, for the egregiously careless falsehood would probably not be found by the members of the court to have been an "honest" mistake of fact.

²⁰⁵ 4 U.S.C.M.A. 430, 16 C.M.R. 4 (1954).

²⁰⁶ "United States v. Taylor, 5 U.S.C.M.A. 775, 781, 19 C.M.R. 71, 77 (1955).

²⁰⁷ In carelessly employing the term of art, "specific intent," the Court makes an unfortunate slip here. Perjury is not a specific intent offense, as a perusal of its elements in the *Manual* and the *Military Judge's Guide* makes clear. *United States v. Smith*, 23 C.M.R. 629, 633-634 (A.B.R. 1957), *rev'd on other grounds*, 9 U.S.C.M.A. 236, 26 C.M.R. 16 (1958). It need only be "willful," i.e., not committed through inadvertence; "intentional" in the sense that it was not perpetrated through mistake. 2 F. WHARTON, CRIMINAL LAW 1782-1784 (12th ed. 1932); 1 W. BURDICK, THE LAW OF CRIME 492-493 (1946). See *Maragon v. United States*, 187 F. 2d 79 (D.C. Cir. 1950) where an instruction which failed even to mention "willfulness" was held to be good. *Compare United States v. Zimmek*, 23 C.M.R. 714, 721 (A.F.R.R. 1956).

²⁰⁸ "United States v. Taylor, 5 U.S.C.M.A. 775, 781, 19 C.M.R. 71, 77 (1955) (emphasis added). The Court went on to cite several authorities to show that the great majority of civilian jurisdictions are in accord with the announced principle. For authority *contra*, see 1 W. BURDICK, THE LAW OF CRIME 492-493 (1946).

²⁰⁹ "The English will convict on a false statement recklessly made. SMITH AND HORGAN, CRIMINAL LAW 509 (2d ed. 1969).

Since perjury is not a specific intent offense, the inability to form an intent is obviously no defense to the crime.²¹⁰ However, the element of wilfulness may be shown to be lacking by defense introduction of evidence of partial mental impairment or intoxication.²¹¹

Where an accused is tried for perjury based on testimony regarding his observations of an event when he was drunk, no separate instruction on honest mistake of fact need be given as the element in the perjury instruction requiring the members of the court to find beyond a reasonable doubt that the accused did not believe his testimony to be true (falsity-in-mind) adequately negates the defense of honest mistake of fact.²¹²

So long as the alleged perjury takes place at a previous "judicial proceeding", a defense is not made out because the specification before that hearing is subsequently found legally insufficient."

B. RECANTATION

As above pointed out,²¹⁴ honest mistake of fact is a good defense to a charge of perjury. To establish the honest mistake of fact, most courts which have passed on the question hold that a correction or attempted correction by the defendant of his allegedly perjured testimony before the tribunal where the statement was made and in the same proceeding is evidence of honest mistake of fact." This would seem to present little difficulty.

Suppose, however, the witness has made an *intentionally* false statement. Does a subsequent retraction constitute an affirmative defense or is it simply irrelevant because made after the crime had already come to full fruition? The authorities on the point are split, with several, including the Federal courts, following the

²¹⁰ United States v. Smith, 23 C.M.R. 629, 633-634 (A.B.R. 1957). See note 207 *supra*.

²¹¹ *Id.* at 634-635. The intoxication referred to, of course, is that at the time of the trial in which the allegedly perjured testimony was given. Intoxication at the time of the occasion testified about is irrelevant and no offense is committed so long as the witness recounts his best memory and belief on the stand. United States v. Chaney, 12 U.S.C.M.A. 378, 382-383, 30 C.M.R. 378, 382-383 (1961).

"United States v. Chaney, 12 U.S.C.M.A. 378, 383, 30 C.M.R. 378, 383 (1961).

²¹³ United States v. Crooks, 12 U.S.C.M.A. 677, 31 C.M.R. 263 (1962) (perjury committed at an Article 32 investigation; specification under investigation by investigating officer subsequently held legally insufficient).

²¹⁴ See pages 50-51, *supra*.

²¹⁵ Annot., 64 A.L.R. 2d 276, 279 (1959).

rule that recantation after an intentionally false statement is ineffective as a defense.²¹⁶

The leading case espousing this position is *United States v. Norris*²¹⁷ in which the United States Supreme Court held that where the defendant, in his trial for perjury, admitted he had testified falsely, his recantation on the stand the day following his having given the perjured testimony was ineffective to purge him of the crime. The Court noted,

It is argued that to allow retraction of perjured testimony promotes the discovery of truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect but if discovered, the witness may purge himself of the crime by resuming his role as witness and substituting the truth for his previous falsehood.²¹⁸ It ignores the fact that the oath administered to the witness calls on him to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means.²¹⁹

A few jurisdictions, most notably New **York**, permit the recantation to purge the crime, provided it is made with reasonable promptness.²²⁰ The Model Penal Code is basically in accord with the New **York** view, permitting the defense of "retraction" if made "in the course of the proceeding in which [the falsification] was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding".²²¹

Only one military decision has touched on the subject, and that only peripherally. In *dicta* in *United States v. Parrish*,²²² where one of the charges was false swearing, the Board observed that

²¹⁶ *Id.* at 284.

²¹⁷ 300 U.S. 564 (1937).

²¹⁸ The facts in *Norris* are especially outrageous in this respect. The day following his having given the perjured testimony, U.S. Senator Norris was present before the same congressional subcommittee and heard a cohort flatly contradict the Senator's previous day's testimony. After consulting with counsel, he requested and was allowed to return to the stand where he made the recantation. *Query* the effect this had upon the Court's decision.

"United States *v.* Norris, 300 U.S. 564, 574 (1937).

²²⁰ Annot., 64 A.L.R. 2d 276, 284 (1959). For a general discussion of the two rules on recantation, see authorities above cited and Whitman, *supra* note 2, at 130-141; Note, 8 INTRAMURAL L. REV. (N.Y.U.) 193 (1952); Note, 23 VA. L. REV. 947 (1937).

²²¹ MODEL PENAL CODE, PROPOSED OFFICIAL DRAFT. § 241.1(4) (1926).

²²² 21 C.M.R. 639 (A.F.B.R. 1955).

the principles of *Norris* would apply to perjury and false swearing cases in the military. It would seem, at first blush, that in view of its wide Federal following,²²³ the *Norris* doctrine would be embraced by the military should the issue be placed squarely before a military appellate tribunal. Any such prediction has become subject to considerable doubt, however, since the enactment of the Organized Crime Control Act of 1970, which explicitly allows recantation as a defense to perjury provided the recantation is made in the same continuous proceeding, before the falsehood has substantially affected the proceeding or before it has become manifest that the falsity will be exposed.²²⁴ This provision seems workable and reasonable, encouraging the disclosure of the truth while at the same time protecting the Government from the perjurer who purposely delays his revelation in order to ascertain whether it would be to his best advantage.²²⁵

C. RES JUDICATA

1. *In general.*

The doctrine of res judicata provides that a matter put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial [T]he doctrine of res judicata precludes the prosecution from relitigating a matter determined in the accused's favor by a previous final judgement or ruling, whether the present trial is for the same or a different offense and whether the previous proceeding culminated in an acquittal, a conviction, or otherwise. . . . Whether res judicata applies to a certain matter is an interlocutory question.²²⁶

To illustrate the operation of the doctrine, the *Manual* presents the following example. The accused is court-martialled for having assaulted the deceased by *shooting him on a certain occasion*. He is acquitted. The accused is then court-martialled for having murdered the deceased by *shooting him on that same occasion*. The accused could not successfully assert former jeopardy in bar of

²²³ See note 216, *supra*.

²²⁴ 18 U.S.C. 1623(d) (1970). This is substantially the Model Penal Code position. See note 221, *supra*, and accompanying text.

²²⁵ It should be observed that Senator Norris would clearly have been unsuccessful in asserting recantation as a defense under the wording of the Act's recantation subsection, the falsity of his statement having already been "exposed."

²²⁶ MCM, 1969 (REV.) para. 71b. Res judicata has long been firmly entrenched as a defense in military law. See *United States v. Doughty*, 14 U.S.C.M.A. 540, 34 C.M.R. 320 (1964), and cases cited therein.

trial because the two offenses are not the same.²²⁷ He may, however, assert the defense of *res judicata* in bar of the second trial on the grounds that *the matter*, of his having shot or not shot the accused on that certain occasion was decided in his favor in the first trial. Thus, the United States, being bound by that determination, is precluded from relitigating the issue.

One ordinarily thinks of *res judicata* as a doctrine applicable only in civil matters—as former jeopardy is properly thought of as an exclusively criminal law concept. Such, however, is not the case: long before the doctrine of *res judicata* had been held to be a part of the Fifth Amendment prohibition against double jeopardy by the Supreme Court,²²⁸ it had often been successfully asserted as a defense in criminal prosecutions²²⁹ and was well-entrenched in a majority of American jurisdictions.²³⁰ Many courts, however, were reluctant to permit invocation of the defense of *res judicata* where the second criminal trial was for perjury allegedly committed by the accused in a previous prosecution when he had taken the stand in his own behalf: ²³¹ it was felt that to permit the defense under such circumstances would be to give

²²⁷ MCM, 1969 (REV.) para. 215b. Nor could he invoke former jeopardy on the grounds that assault is a lesser included offense of murder: the MANUAL, by fiat, makes inapplicable the lesser included offense-former jeopardy defense in the assault-murder situation. *Id.* This weakens and confuses the example with an extraneous issue. A far clearer example would be where the two offenses involved are wholly unrelated: for example, where the accused has been acquitted of assault of A by punching him in the eye and then is referred to trial under Article 109, UCMJ, for willfully and wrongfully damaging A's eyeglasses by punching him in the eye on the same occasion. Here former jeopardy could clearly not be invoked for the reason that the offenses are not only separate but wholly unrelated in a lesser included offense context as well. See generally Note, *Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel*, 74 HARV. L. REV. 752 (1961).

²²⁸ *Ashe v. Swenson*, 397 U.S. 436 (1970), discussed *infra*.

²²⁹ "See 2 A. FREEMAN, JUDGMENTS, 1364 (5th ed. 1925) [hereinafter cited as FREEMAN]; O'Donnell, *Res Judicata in Military Law*, 22 MIL. L. REV. 57, 62-65 (1962). The doctrine of *res judicata* was first recognized in military law in 1945. See *United States v. Smith*, 4 U.S.C.M.A. 369, 372, 15 C.M.R. 369, 372 (1954). Actually, what has been invoked has been the doctrine of collateral estoppel (same parties, different cause of action) rather than *res judicata* (same parties, same cause of action). Civil *res judicata* is, speaking loosely, the analogue of the criminal doctrine of former jeopardy. See Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *United States v. De Angelo*, 138 F.2d 466, 468 (3d Cir. 1943).

²³⁰ See Anot., 25 L. ED. 2d 968, 973-975 (1971); Annot., 9 A.L.R. 3d 203, 228 (1966); Annot., 95 L. ED. 755 (1951); *Ashe v. Swenson*, 397 U.S. 436, 443-444 (1970).

²³¹ See O'Donnell, *supra* note 229, at 73-74; 41 AM. JUR. *Perjury* § 53 1942; 70 C.J.S. *Perjury* § 26 (1951); 9 A.L.R. 3d 203, 271 (1966).

criminal defendants “an uncontrollable license to testify falsely.”²³² In any event, philosophical or pragmatic opposition to the concept of *res judicata* as a criminal defense—whether in the case of the succedent perjury prosecution of the defendant who allegedly lied under oath in his first trial, or to invocation of the defense in all circumstances—became largely academic with the Supreme Court’s decision in *Ashe v. Swenson*.²³³ *Ashe* is of interest, not only in its apotheosis of criminal *res judicata* to the status of a Constitutional safeguard, but as an instructive example of the application of the doctrine.

Bob Fred Ashe was, with three others, suspected of robbing each of six men engaged in a poker game and subsequently stealing a car belonging to one of the six victims to effect a getaway. He was tried, however, for the robbery only of victim Knight. The prosecution’s evidence was as strong in establishing that a robbery had occurred and that Knight had been a victim along with the other five, as it was weak in establishing identification of Ashe as one of the robbers. Ashe’s defense counsel did not cross-examine the alleged victims regarding the robbery or their losses. He confined himself to “exposing the weakness of their identification testimony.”²³⁴ The defense offered no evidence. The jury found Ashe not guilty, making the gratuitous observation in its verdict that Ashe’s acquittal was “due to insufficient evidence.”

Thereafter, Ashe was brought to trial for the robbery of another of the victims, Roberts, and, upon somewhat stronger evidence from virtually the same prosecution witnesses and upon almost identical instructions, was this time convicted. Before the Supreme Court, Ashe argued that the first jury, in acquitting him, *could have rationally done so on but one ground, viz.: that he, Ashe, had not been one of the robbers of the six poker players*. Thus, contended Ashe, the State had been bound by that determination and his motion to dismiss at the second trial for the robbery of Roberts should have been granted. The Supreme Court agreed, stating:

The federal decisions have made clear that the rule of collateral estoppel [*res judicata*] in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to “examine the record of a prior

²³² *Adams v. United States*, 287 F.2d 701, 703 (5th Cir. 1961).

²³³ 397 U.S. 436 (1970). *Ashe* held criminal *res judicata* to be “embodied in the Fifth Amendment guarantee against double jeopardy.” *Id.*, at 445.

²³⁴ *Id.* at 438.

proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, *and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.*" ²³⁵ *

Straightforward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. *And the jury by its verdict found that he had not.* The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.²³⁶

²³⁵ This is frequently no easy task. For a discussion of cases dealing with the often extraordinarily vexing problem of divining the grounds upon which the jury has come to its decision, see O'Donnell, *supra* note 229 at 65-67; Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BKLYN. L. REV. 12, 17-19 (1958); Note, *Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel*, 74 HARV. L. REV. 752, 758-760 (1961); Note, 75 YALE L. J. 262, 285 (1965). See also Annot. 9 A.L.R. 3d 203, 244-248 (1966). The difficulties the Court faced in *Ashe* in this regard are illuminating. See dissent of Chief Justice Burger in *Ashe v. Swenson*, 397 U.S. 436, 466-468 (1970). A recent example of similar travails undergone by the Court of Military Appeals in seeking to ascertain the basis of the verdict of a military jury may be found in *United States v. Marks*, 21 U.S.C.M.A. 281, 45 C.M.R. 55 (1972).

²³⁶ *Ashe v. Swenson*, 397 U.S. 436, 443-445 (1970) (emphasis added). In the writer's opinion, it is unfortunate that the Court did not probe the rationale which underlies the concept of res judicata and which—as in *Ashe*—is invariably accepted by appellate courts *sub silentio* as valid: that criminal juries, by their verdicts, make findings of fact favorable and unfavorable to the parties. Thus, in *Ashe*, the Court does not hesitate to state that the jury in the first trial had “found” that *Ashe* had not been one of the robbers. The jury, of course, had done no such thing. In fact, it might well have believed *more probably than not* that *Ashe* had been one of the robbers. Its verdict was nothing more than a manifestation that it had a doubt that was reasonable that *Ashe* had been one of the criminal participants. It “found” nothing; it “determined” nothing. Nevertheless, as previously noted, it seems bootless at this point to attack the underlying rationale of res judicata since the doctrine is now—thanks to *Ashe*—enshrined as a Constitutional safeguard. Moreover, even if the writer's opinion is correct that the view of the jury as determiners-of-fact is palpably fallacious, it must be conceded that it is palpable fallacy of vintage class. See, e.g., cases set forth and accompanying sparse commentary in 2 J. VAN FLEET, FORMER ADJUDICATION, 1241-1249 (1895); Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BKLYN L. REV. 12 (1958); FREEMAN, *supra* note 229. Ancillary to the view of criminal jurors as finders of fact is the belief that they determine “guilt” or “innocence,” when in fact they of course do no more than express a belief, or lack thereof, at a certain quantum level as to whether the accused did or did not do certain acts. Even lawyers are continually heard to say after an acquittal that the accused was “found innocent” or “his innocence was established,” when the jury may, in reality, have believed the accused to have been “guilty”—but not beyond a reasonable doubt. How exceedingly rare is commentary—regard-

As has already been mentioned,²³⁷ it is often a task of enormous difficulty to divine the basis or bases upon which the trier of fact reached its verdict of not guilty. Thus, in several cases where the accused's defense was an alibi in the first trial and, after acquittal, he was indicted on different charges to which the alibi would have provided a conclusive defense, courts have held that the acquittal in the first trial *may or may not* have been based on the alibi, i.e., it may, for instance, have resulted from a general insufficiency of the prosecution's evidence. Since, therefore, the "truth" of the alibi could not be said to have been determined between the parties, it could not be asserted as binding upon the Government in the second trial.²³⁵

2. Military Cases.

Despite the general rule, as above discussed, against allowing the "successful" alibi to be interposed in a succedent prosecution as binding on the government under *res judicata*, and the strong pre-*Ashe* reluctance on the part of the courts to permit the defense of *res judicata* to be raised where the second prosecution was for perjury allegedly committed by the accused in his first prosecution, the Court of Military Appeals, in a 1957 decision in which both these factors were present, nevertheless held the defense of *res judicata* to be fully applicable and appropriate. In that case,²³⁹ *United States v. Martin*, Martin asserted the defense of alibi in his first trial and, despite the testimony of several government witnesses that he had been present and did commit the offense, he was acquitted. The Government then tried one Ridings for the same crime allegedly committed in Martin's presence a little later on the same evening and at the same place. At this trial Martin testified once again that he (Martin) had not been present on the occasion in question. The Government

less how brief—recognizing what a jury's verdict really means. For oases in a drought, see J. TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* 480-481 (17th ed. 1958); 120 *Just. P.* 358-359 (1956); 34 *N.Y.U.L. REV.* 631-635 (1959). In any event, it is submitted that justification for the existence of the doctrine of *res judicata* should not be bottomed on the "jury-as-determiners-of-fact" pseudo-rationale—which does violence to the proper concept of the function of the criminal jury—but rather on the salutary result effected by the doctrine through judicial ukase: that of putting an end to litigation between the parties. (*Cf.* the extremely cogent dissent of Chief Justice Burger in *Ashe v. Swenson*, 397 U.S. 436, 460-470 (1970).)

²³⁷ See note 235, *supra*. See also, *Turner v. Arkansas*, 40 U.S.L.W. 3600 (U.S. S. Ct. 1972).

²³⁸ See, e.g., *Hoak v. New Jersey*, 21 N.J. 496, 122 A.2d 628, *aff'd* 356 U.S. 464 (1958) (distinguished in *Ashe*); *Adams v. United States*, 287 F.2d 701 (5th Cir. 1961); *Annot.*, 9 A.L.R. 3d 203, 244-248 (1966).

²³⁹ *United States v. Martin*, 8 U.S.C.M.A. 346, 24 C.M.R. 156 (1957).

then prosecuted Martin for perjury based on his testimony in his own and Ridings' trials that he had not been present. His motion to dismiss on the ground of *res judicata* was denied and the Government's case resulted in conviction. The Board of Review reversed the finding of guilty of perjury as to Martin's testimony in his own trial because the "basic evidence" there adduced by the Government was "identical" to that which it introduced in his trial for perjury, i.e., testimony of witnesses that Martin was indeed present on the occasion in question, and thus "the earlier findings of not guilty preclude a conviction as to [the later perjury] specification."²⁴⁰ The Board, however, affirmed the perjury conviction as to Martin's testimony in Ridings' trial, holding *res judicata* there inapplicable "because the [perjury conviction] concerned the accused's testimony as a witness in Ridings' trial."²⁴¹ The Judge Advocate General of the

²⁴⁰ *Id.* at 348, 24 C.M.R. at 158.

²⁴¹ Apparently the Board of Review took the position that even though the "fact" of the presence or absence of the accused had been decided between the parties in Martin's original trial in his favor, the Government would not be bound in a succeeding perjury trial of Martin for having again testified to the same fact in someone else's trial. In other words: Trial No. 1: "fact determined" between the United States and the accused; Trial No. 2: fact so determined asserted by the accused as a witness in another's trial; Trial No. 3: the United States properly (according to the Board's view) tries the accused for having perjured himself in Trial No. 2, regardless that it is bound by the truth of what was said by the accused in that trial as a result of the decision in Trial No. 1. Although, oddly, the court does not discuss the point, it would seem a clearly inexplicable position in the context of the "jury-as-determiners-of-fact" theory. The crucial concept of the "same parties" underlying the doctrine of *res judicata* (MCM, 1951, para. 71b; MCM, 1969 (REV.) para. 71b) means the same parties *who are relitigating the existence or nonexistence of the fact*, i.e., those parties to Trials Nos. 1 and 3, above. That Martin, then, was not a party to Trial No. 2 is irrelevant. Logically, therefore, once the "fact" is "determined" between the United States and an accused, the latter should be able to perjure himself with impunity in subsequent trials indefinitely so long as he takes care to stay within the bounds of the "findings." *United States v. Martin*, 8 U.S.C.M.A. 346, 350-351, 24 C.M.R. 156, 160-161 (1957). This is so even though he subsequently admits he lied under oath at the original trial about the "fact" which was "found" in his favor. *United States v. Houten*, 12 U.S.C.M.A. 339, 30 C.M.R. 339 (1961). And, yet, this precise issue was before the Court of Military Appeals six years later in *United States v. Guerra*, 13 U.S.C.M.A. 463, 466, 32 C.M.R. 463, 466 (1963), and it flatly held, as one of two grounds for finding *res judicata* inapplicable, that the accused's not being a party in Trial No. 2 precluded the defense. *Guerra*, as the last word in the premises, would seem to be the law at this time, although it is submitted that its holding is clearly incorrect within the purview of the "jury-as-determiners-of-fact" theory. When we say "parties" in this context, who is included in the word "party?" Is it the accused at the original trial, and him *only*? The answer is in the negative: the concept of "party" includes anyone who was in "privity" with the accused in regards

Army certified the correctness of both holdings to the Court of Military Appeals.

As to Martin's conviction of perjury based on his testimony in his own trial, the Government urged that the issue of whether Martin was absent or present (i.e., the truth of his alibi) was not "found" in favor of Martin in that trial by the members of the court because the acquittal did not "necessarily include a specific finding that [Martin's] alibi was true".²⁴² Thus, there was no inconsistency between Martin's acquittal at his original trial (which may not have been based upon a "finding" by the members of the court that his alibi was true, but on other grounds entirely) and convicting him at his perjury trial for having perjured himself in advancing the alibi.

The first issue facing the Court of Military Appeals, then, was clear: did the court in Martin's original trial acquit him because they "found" his alibi that he was not present to be true? If so, then the truth of the alibi bound the United States and Martin could not subsequently be convicted of perjury for having asserted it. The court conceded the difficulties which it faced in attempting to ascertain whether it was the alibi which was the determinative factor leading to the acquittal in the original trial, or whether that acquittal was the result of some other consideration on the part of the court members. Citing *United States v. Sealfon*²⁴³ for what it considered the crucial proposition that "whether an acquittal in a prior trial embraces a given issue 'depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial'," ²⁴⁴ the court went on to point out that at the original trial the testimony of Government witnesses placed Martin at the scene of the alleged crime and overwhelmingly established his guilt and that

the crime alleged in the original trial which ended in acquittal. Thus, if the accused can show that he was in privity with one who was acquitted in prosecution A, all of the "facts found" in that trial "against" the Government bind the Government in prosecution B against the accused. In *United States v. Doughty*, 14 U.S.C.M.A. 540, 34 C.M.R. 320 (1955), one Boyle's acquittal of perjury in having declared he was driving an auto on a certain occasion, could be asserted as a bar in the accused's trial for suborning Boyle to perjure himself to so testify (the element of the falsity of Boyle's assertion being common to both offenses) because the accused and Boyle were in "privity" as alleged suborner and perjurer and "there can be no subornation without the actual commission of perjury." *Id.* at 547, 34 C.M.R. at 327.

²⁴² *United States v. Martin*, 8 U.S.C.M.A. 346, 348, 24 C.M.R. 156, 158 (1957).

²⁴³ 322 U.S. 575 (1947).

²⁴⁴ *United States v. Martin*, 8 U.S.C.M.A. 346, 349, 24 C.M.R. 156, 159 (1957).

the accused's sole defense was that he was not present at the time in question.

Factually, therefore, the only dispute to be reconciled by the court-martial was the accused's presence [at the scene] at the time of the alleged offense. The instruction given by the law officer which we have previously quoted²⁴⁵ brought the issue into bold relief. Accordingly, unless the members of the court disregarded the obvious, to seek out the improbable theory that the Government witnesses were to be believed when they testified to his presence but were not to be relied upon concerning [Martin's commission of the crime], the only issue was alibi. A fair evaluation of human behavior compels a conclusion that the acquittal was based on the court-martial resolving that single issue in favor of the **accused**.²⁴⁶

Thus the rationale of the court can be analyzed as follows:

(1) It is definitely possible to determine the factual determination made by the members of the court which caused them to acquit in the original trial for they had but two alternative bases on which to acquit in light of the instructions given them :

(a) that the accused was not present on the occasion; or

(b) that, although the accused was present, he did not commit the crime.

(2) Since the Government witnesses all testified that the accused was both present *and* committed the crime, it is inconceivable the court would have found (1) (b), for that would require them to have believed that all of the Government witnesses spoke the truth when they said the accused was present on the occasion but that all of them lied when they said he committed the crime.

(3) Thus, the only basis upon which the court could conceivably have acquitted was (1) (a): that the accused was not present.²⁴⁷

²⁴⁵ "The law officer, in his final charge to the court, included an instruction upon the defense of alibi **as** the only defense raised in the case and advised as follows: '. . . Under the circumstances in this case, the burden is upon the prosecution to establish beyond a reasonable doubt that the accused was present at the scene of the offense at the time it was committed. Consequently, unless you are satisfied beyond a reasonable doubt that the accused was so present, you must acquit him.'" *United States v. Martin*, 8 U.S.C.M.A. 346, 347, 24 C.M.R. 156, 157 (1957).

²⁴⁶ *United States v. Martin*, 8 U.S.C.M.A. 346, 349, 24 C.M.R. 156, 159 (1957).

²⁴⁷ This, of course, is quintessential "criminal-jury-as-determiners-of-fact" reasoning. The decision is based on the assumption that the members of the court "resolv[ed] that single issue [i.e., the presence of the accused] in favor of the accused." They, of course, necessarily did no such thing. They may have come to no conclusion whatsoever about the accused's presence, but merely considered the evidence of alibi **as** sufficient to raise **a** doubt that

Martin can be said to stand for the proposition that where, from the facts of the case as can be divined from the record, the instructions and a "fair evaluation of human behavior", it appears that the members of the court acquitted because they *must* have resolved a certain disputed fact in favor of the accused, then such a resolution or finding is binding on the Government in any subsequent prosecution.²⁴⁸

The court disposed of the second certified question (whether the Board of Review properly held the doctrine of *res judicata* did not apply to Martin's perjury in Ridings' trial) by deciding that, since Ridings' criminal act supposedly took place after the accused's, the acquittal of the accused in his original trial was a determination of fact by the court members limited to a finding that he was not present when he allegedly committed the crime, but did not include a finding that he was not present "a little later in time" at the occasion of Ridings' criminal act. Thus, because Martin's presence on the later occasion of Ridings' crime was not "put in issue and finally determined by a court-martial in his favor,"²⁴⁹ the defense did not apply as to his testimony at Ridings' trial that he, Martin, was not present at the time of Ridings' criminal act.²⁵⁰ The court's pre-*Ashe* decision includes an analysis of Federal cases from which it was able to "glean a rule" permitting the assertion of *res judicata* in succedent perjury prosecutions in support of its own belief in the propriety of asserting that defense in such cases.²⁵¹ In short, the concept of "the-criminal-jury-as-determiners-of-fact" was now firmly enconced in military law.

In *United States v. Hooten*,²⁵² the accused was charged with several worthless check offenses. He testified that he had given a sum of money to his wife to deposit in the bank before he negotiated the checks. She testified that she received the money from him, but had failed to deposit it, i.e., the defense of honest mistake of fact was raised. The accused was acquitted. Thereafter,

was reasonable as to whether the accused was present. Indeed, they may have decided that the accused, *more probably than not*, was present. In nowise, then, can such an acquittal be transmogrified into a resolution on the part of the court members that the accused was *absent*. It is recognized, however, as has been heretofore noted, that such an objection is now almost wholly academic in the wake of *Ashe*.

²⁴⁸ *Accord*: *United States v. Marks*, 21 U.S.C.M.A. 281, 45 C.M.R. 55 (1972).

²⁴⁹ *United States v. Martin*, 8 U.S.C.M.A. 346, 351, 24 C.M.R. 156, 161 (1957).

²⁵⁰ See note 241, *supra*.

²⁵¹ Subsequently, the rule of *Martin* was closely followed in *United States v. Dodds*, 25 C.M.R. 801 (A.F.B.R. 1958).

²⁵² 12 U.S.C.M.A. 339, 30 C.M.R. 339 (1961).

the accused was tried for perjury on the basis of his testimony at the original trial that he had delivered the money to his wife. His conviction on this count was set aside by the Board of Review on the grounds of *res judicata*. He was also tried at the same time for conspiracy to commit perjury, the overt act of the conspiracy being his wife's allegedly false testimony concerning her receipt of the money to deposit.?" His conviction on this count was upheld by the board on the grounds that the defense of *res judicata* was inapplicable. The Judge Advocate General of the Navy certified the correctness of both board holdings to the Court of Military Appeals.

In once again facing that most difficult of questions under the "criminal-jury-as-determiners-of-fact" concept, viz. : "what was the precise factual determination which proved the basis for the acquittal?," the court stated the guide to be to "decipher exactly what facts have been, *or should be deemed to have been*, determined by the jury that acquitted [the accused]." ²⁵³ In regard to the accused's conviction of perjury for having testified that he had given the money to his wife to deposit, the court noted that, because of stipulations, the only issue at trial was the accused's culpability in failing to maintain sufficient funds in the bank. Thus the acquittal was obviously based on the defense testimony of honest mistake of fact, i.e., that the accused had given his wife the money and she had forgotten to deposit it. Thus, the "fact" of the receipt for deposit of the money by the wife, being binding upon the United States by the "finding" of the court members to that effect, could not be again relitigated. Consequently, the Court held that the board had properly set aside the accused's conviction for perjury for having testified to the same.

Likewise, in regard to the conviction for conspiracy to commit perjury, the court held that since the Government had been bound by the "determination" made at the original trial that the accused's wife had indeed received the money from the accused, the alleged overt act of the conspiracy—that she had falsely testified that she had received the money—could obviously not be made out.

Certainly, the decision is consistently logical within the bounds of the "criminal-jury-as-determiners-of-fact" theory. If one op-

²⁵³ On the conspiracy count, the Government was, of course, required to establish at trial the existence not only of an agreement to commit perjury between Hooten and his wife but also an overt act to further the ends of the conspiracy. Such overt act here was the wife's false testimony. *United States v. Hooten*, 12 U.S.C.M.A. 339, 342-43, 30 C.M.R. 339, 342-343 (1961).

²⁵⁴ *Id.* at 341, 30 C.M.R. at 341 (emphasis added).

poses that view, however, and considers the acquittal at the original trial a "finding" of absolutely nothing by the members of the court, then the accused should properly have been convicted for perjury and conspiracy to commit perjury at the subsequent trial in which, incidentally, his wife testified²⁵⁵ that all of her testimony at the original trial had been untrue and induced by the accused, and the prosecution introduced into evidence the accused's voluntary pretrial confession acknowledging the falsity of his testimony and that of his wife at the original trial).²⁵⁶

VI. SUMMARY PUNISHMENT FOR PERJURY AS CONTEMPT²⁵⁷

Certainly, few courtroom experiences are more maddening than helplessly watching a witness giving, unabashedly, what is clearly blatant perjury right before one's eyes. Nevertheless, regardless how convinced the military judge may be that he has heard perjury—indeed, even if it be *admitted* by the witness—he is powerless to take immediate remedial or punitive steps. His only recourse is to refer the matter to the appropriate authorities, who, as has been noted, will probably do nothing. In sum, his contempt powers²⁵⁸ simply do not obtain in such cases.

The language of the Code provision on contempt plainly ex-

²⁵⁵ She was, in fact, his mistress.

²⁵⁶ A subsequent Army Board of Review decision, which, although it cites *Martin* with approval, is completely unfathomable under the "jury-as-determiners-of-fact" rationale is *United States v. Warble*, 30 C.M.R. 839 (ABR 1960). In *Warble* the accused was charged with breaking restriction and driving without a license. (It is clear from the decision that the accused allegedly committed the breaking of restriction in order to do the driving which led to the no-license charge.) The accused testified that he had not left his quarters on the date in question. The summary court, for reasons best known to itself, found him not guilty of breaking restriction, but guilty of driving without a license, i.e., made "findings of fact" that he (1) did not break restriction, but (2) did break restriction by driving the auto without a license. Regardless the first "finding of fact" by the court that he did not break restriction, it was held that *res judicata* did not bar a prosecution for lying under oath when he testified that he had not left his quarters. Nor was there any rationalizing in the Board's decision, in order to justify the bizarre result, that the summary court, despite its acquittal on the breaking restriction charge, *must* have rejected the accused's testimony that he had not left his quarters. See *United States v. Doughty*, 15 U.S.C.M.A. 540, 542-45, 34 C.M.R. 320, 322-325 (1964), for an excellent example of orthodox "jury-as-determiners-of-fact" analysis. See also *United States v. Marks*, 21 U.S.C.M.A. 281, 45 C.M.R. 55 (1972).

²⁵⁷ The title phrase is meant to include punishment imposed in open court *instantly*, as well as punishment imposed by the judge after notice and hearing.

²⁵⁸ "Article 48. UCMJ.

cludes contempt for perjury from its purview, regardless how patent: "A court-martial . . . may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder"²⁵⁹ It seems anomalous that the same military judge who, for example, may find himself entrusted with the responsibility in a military-judge-only case of finding guilt or innocence of a serious felony on the testimony of one prosecution witness (and if guilt is found, of adjudging an appropriate sentence which could include imprisonment for several decades), is not empowered with even minimal contempt powers for the most outrageous perjury committed in his presence.

As one New York trial judge put it:

I have difficulty in grasping the reason underlying those decisions that hold that willful perjury committed upon a trial or hearing . . . may not be punished by contempt. . . . But it is said that if instead of refusing to answer, a witness deliberately answers untruthfully, he is not in contempt. If such be the rule, the witness who is unwilling to make an untruthful answer and yet is not willing to tell what he knows, and so remains silent commits a contempt, while the witness who is equally unwilling to say what he knows, but who instead of remaining mute, readily gives an answer he knows to be false, has not offended. I cannot subscribe to a rule which produces such a result. *Nor is it in my opinion any answer to say that in the case of a false answer, the witness may be prosecuted for perjury. The question of contempt of court has no relation to the commission of a crime.* It affects the dignity of the court and the integrity of all proceedings conducted therein. For a witness to deliberately swear falsely with a view to defeating justice is a more serious affront to the court than for him merely to refuse to answer. When a witness is required to answer, he is obligated to answer truthfully. He has no more complied with the direction when he gives a false answer than when he does not answer at all. In either situation he should be guilty of contempt.²⁶⁰

This decision is in accord with the view of the renowned legal scholar, Charles K. Burdick, who recommended that New York law be revised to specifically provide for summary punishment for contempt by perjury.²⁶¹ A like recommendation was made by the Commission on the Administration of Justice in New York State in 1934.²⁶² Nevertheless, there seems a widespread dread of

²⁵⁹ *Id.*

²⁶⁰ *Miele v. Acierno*, 122 Misc. 872 (N.Y. Sup Ct. 1924) (civil contempt) (emphasis added). In the same vein, regarding criminal contempt, *see* decision of Judge Learned Hand in *United States v. Appel*, 211 F. 495 (2d Cir. 1913).

²⁶¹ 12 THE PANEL 1 (1934).

²⁶² "The New York Report, 1934, *supra* note 15, at 847.

empowering judges with summary contempt powers for perjury regardless how awesome their powers and responsibilities in other areas may be. In those jurisdictions where the judge is supposedly so empowered, he is so severely circumscribed that, for all practical purposes, the power can hardly be said to exist at all.²⁶³ Thus, generally speaking, most jurisdictions permit a judge to summarily punish for perjury committed in his presence if (1) the false testimony obstructed the court in its judicial function; (2) there existed judicial knowledge of the falsity of the testimony; and (3) the false testimony was material.²⁶⁴ In regard to the first requirement, that the perjury be obstructive—obstruction of the judicial process being implicit in the concept of contempt—it would seem that all perjury must, by its very nature, obstruct justice. Such, apparently, is not the opinion of several appellate courts which require a clear showing that the falsification tended to obstruct the administration of justice.²⁶⁵ Nevertheless, it is seriously to be questioned whether the distinction these courts draw between perjury which is obstructive to the administration of justice and that which is not can have any rational basis.²⁶⁶

The requirement that the judge have actual, personal knowledge of the falsity of the testimony obviously limits the summary contempt power to a minuscule percentage of perjury incidents.²⁶⁷

The practical reason underlying this restriction appears to be a feeling that no witness should have to testify in fear of summary punishment if he should seem to testify falsely?" It has been said that if all perjury and false swearing were punishable without a jury trial, it would follow that if a court thought a witness were testifying falsely it could punish him for contempt until he gave testimony which the court believed to be true.

²⁶³ Puerto Rico, on the other hand, has for over sixty years statutorily empowered its judges to summarily punish as contempt perjury committed in their presence with no extraordinary limitations whatsoever placed upon them. 9A L.P.R.A. § 430 (1969). Minnesota has a similar statute. See note 162, *supra*. See citations of other authority on the point in the New York Report, 1934, *supra* note 15 at 844-847.

²⁶⁴ "See, generally, 17 C.J.S. *Contempt* § 24 (1963); 12 AM. JUR. *Contempt* § 17 (1938); Annot. 89 A.L.R. 2d 1258 (1963).

²⁶⁵ Comment, *Summary Power of Courts to Punish Perjury and False Swearing as Contempt*, 21 CAL. L. REV. 582, 586-587 (1933).

²⁶⁶ "Id. at 586-588.

²⁶⁷ Hibschan, *supra* note 2, at 907; McClintock, *supra* note 2 at 775.

"Clearly, no one should advocate that a judge who is empowered with summary punishment powers for perjury as contempt should be permitted to impose such punishment where it "seems" a witness has testified falsely, or where the judge "thinks" he has testified falsely. The standard, obviously, is that the judge believe beyond a reasonable doubt that perjury has been committed in his presence.

The court may acquire judicial knowledge of falsification from an admission on the stand by a witness or party that previous testimony was perjured or false, by his making affidavits which set up such conflicting sets of facts that falsification in one of them is obvious, or by his admitting, after presenting conflicting sets of affidavits, that one of them was false. . . . Where matters of fact are in dispute, however, and there is lack of judicial knowledge as to whether the alleged contemnor did swear falsely or commit perjury, the offender is left to the criminal law.²⁶⁹

The requirement of materiality, which has already been discussed, is governed basically by the same rules which obtain regarding materiality as an element of the substantive crime.²⁷⁰ And the same objections to the materiality requirement before enunciated are here pertinent as well.

The Federal trial judge is empowered by the United States Code²⁷¹ to punish, by summary contempt procedures, behavior in his presence constituting an obstruction of the administration of justice. In the case of perjury, however, even though it may constitute such an obstruction, no such summary punishment under the contempt statute may be imposed unless the falsity is within the personal knowledge of the judge and all the elements of the crime are present.²⁷²

It seems obvious that the widespread strong disinclination to empower a trial judge summarily to impose such punishment limited only by the reasonable doubt standard and nothing more, springs from a fear that the power may be abused. Yet, oddly, as has been noted, no such fears seem to exist in regards the exercise of judgment by the very same judge—bound only by the same reasonable doubt standard—when he sits alone in a criminal trial involving a serious felony, with, for example, irreconcilably conflicting evidence. Similarly, no misgivings are voiced where his virtually unfettered judgment is exercised in imposing a sentence which may, in some cases, exceed a score of years.

Certainly, if there be faith in the maturity, balance, and discretion of the trial bench, such power may be afforded the judge without qualm. Minnesota and Puerto Rico, which have had statutes permitting summary punishment for perjury for over 50 years, have yet to report a single appellate decision finding a trial judge's imposition of such punishment in error or an abuse of

²⁶⁹ Comment, note 265, *supra* at 585-586.

²⁷⁰ See Section IIIC, *supra*.

²⁷¹ 18 U.S.C. § 401 (1970).

²⁷² *In re Michael*, 326 U.S. 224 (1945); *Ex parte Hudgings*, 249 U.S. 378 (1919).

discretion.²⁷³ Indeed, in the case of Minnesota, there has never been a reported appellate decision even interpreting the statute. All of which would seem clearly to indicate that the power has been used properly and with great restraint by the trial judges of those jurisdictions. Moreover, it seems certain that, had such summary punishment power not been used judiciously, the Minnesota and Puerto Rico legislatures would have repealed the statutes years ago. Clearly, there is no reason to believe that military judges similarly empowered would be any less circumspect than their Minnesota and Puerto Rico brethren.

VII. RECOMMENDATIONS AND CONCLUSIONS

While what might be termed the ethereal approach advanced by many commentators to solving the problem of perjury, e.g., inculcation of a greater sense of religious and moral commitment in the body politic, the revival of the sancity of the oath, the dedication of all within the legal system to massive effort to root out perjury, and the like, is certainly not without merit, it is nevertheless submitted that only the most pragmatically-oriented attack will achieve empirical results in combatting this problem which has proven an enduring, constant bedevilment to our judicial processes. First, there must be extirpated the universally held (and quite correct) belief that "perjury is the most difficult crime to prove" which inevitably leads first to frustration and a feeling of helplessness in the face of the crime, then to apathy and indifference. Obviously, this can only be accomplished if we take what may seem to many the drastic steps necessary to remove the said "difficulty" of proof, namely: (1) abolition of the two-witness rule, or any vestigial remnant of it; (2) explicit definition of the element of falsity to be that of falsity-in-mind vice falsity-in-fact; (3) abolition of the prohibition against conviction on sworn self-contradictory statements without proof of which statement was false; (4) abolition of the requirement of materiality.

Such an approach is radical, actually, only in the sense of that word importing repristination, a return to the concepts which rationally should underlie perjury. The meaningless historical impedimenta now encrusting the crime so discourage and thwart its effective prosecution that perjury has become the offense one may commit with impunity, the felony reacted to with a shrug. What is sacrosanct about a set of rules which largely

²⁷³ See notes 162 and 265, *supra*.

were born of historical accident and passed down through the worst kind of inertial stare **decisis** and serve now only to hamstring military judges, convening authorities, and prosecutors alike in their efforts to combat the crime? While it is exasperating to hear the incessant carping about “the technicalities of the law” which mindlessly ignores that such “technicalities” embody the procedural and substantive protections of man’s freedom, property and dignity laboriously woven into our legal system over the centuries, it is nevertheless true that the law in some instances has canonized rules whose major attribute, beyond irrationality and, usually, historical illegitimacy, is hoary vintage. Yet, to suggest they be jettisoned evokes stunned horror.

What is a technicality? How does it come to pass, on the one hand, that technicalities should be regarded with so much contempt, and on the other, that they should exercise such a despotic influence?

The answer is that technicalities, generally speaking, are unintended applications of rules intended to give effect to principles imperfectly understood, and that they are rigidly adhered to for fear departure from them should relax legal rules in general. . . . When once established, [they] are adhered to partly because they are looked upon as the outworks of the principles which they distort; partly from a perception of the truth that an inflexible adherence to established rules, even at the expense of particular hardships, is essential to the impartial administration of justice; and partly because to a certain kind of mind, arbitrary and mischievous rules are pleasant in themselves. There are persons, to whom it is a positive pleasure to disappoint natural expectations by the application of subtle rules which hardly anyone else understands.”

It is submitted, then, that the alternatives are clear. We may continue to cherish and defend those aged, meaningless obstructions to successful perjury prosecutions while at the same time helplessly gnashing our teeth at the crime’s quotidian appearance, or revise and revamp the elements and proof required incident to the crime and, in the process, our do-nothing attitude about it.

Second, the military judge should be invested with summary punishment powers for perjury committed in his presence. Immediately upon the giving of the oath, the summary punishment powers of the court should be carefully explained to each witness and replies elicited indicating his full understanding. If a military judge believes beyond reasonable doubt—not “suspects” or “thinks” or “is satisfied”—that perjury has been committed before him in the courtroom, he should be permitted to incarcerate

²¹⁴ 3 STEPHEN, HISTORY at 337.

the offender immediately, or in his discretion set notice and time of hearing—over which he will preside—on the issue of whether the crime was committed. In either case, a maximum period of imprisonment should be set by statute. The sanctions impossible should include forfeitures and fine.

Presently under the Code, summary contempt procedures may be initiated against any person the military judge finds has so much as used a menacing word or gesture in court and it is within the judge's sole discretion to determine what, for example, the words "menacing" and "gesture" embrace. Yet, on the other hand, a witness may simply insist, without further explanation, that he remembers nothing of what occurred during a crucial occasion the previous day at which he was admittedly present, although neither drunk nor insane at the time, and the court is helpless.

Admittedly, such summary punishment power is awesome ; but certainly no more so than other powers with which the military judge is invested. We should no more expect abuse in this area than in a myriad others which depend upon the good judgment, balance, temperament and discretion of our military judges. If the experience provided by the conduct of our military judges and law officers over the past several decades of their presiding over courts-martial is any indicator, we should have nothing to fear.

JUROR SELECTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE: FACT AND FICTION*

By Major R. Rex Brookshire, II**

This study examines both the law relating to juror selection under the Uniform Code of Military Justice and the procedures actually employed in the active General Court-Martial jurisdictions. This law and these procedures are compared to their civilian equivalents, and both systems are evaluated according to generally recognized standards of justice relating to juror selection. Empirical data—obtained by the conduct of three separate surveys—is utilized throughout the study, which concludes with a section devoted to suggested reforms.

I. INTRODUCTION

There is perhaps no other single facet of British-American jurisprudence as well-known and as widely publicized as the concept of a jury trial. Indeed, the idea that a man should be judged by his peers dates at least from the eleventh century on the European continent and even earlier in England.¹ It is possibly this very antiquity which has caused the concept to become so ingrained in the American consciousness.² In any case, the right to have a jury trial is recognized in the Constitution³ and, for the

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¹ Erlanger, *Jury Research in America—Zts Past and Future*, 4 *LAW & Soc. REV.* 345 (1970).

² See generally, 47 *AM. JUR.* 2d, *Jury* § 12 (1969): "The right to jury trial is immemorial; it was brought from England by the colonists, and it became a part of the birthright of every free man. The right to have a trial by jury is a fundamental right in our democratic judicial system, including our federal jurisprudence. It is a right which is justly dear to the American people, and . . . should be jealously guarded by the courts. Any seeming curtailment of this right should be scrutinized with the utmost care."

³ "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . . U. S. CONST. art. III, § 2, cl. 3. See also, U. S. CONST. amend. VI,

time being at least, is a vital part of our criminal law and procedure. The mere existence of the lay jury, however, does not in itself sufficiently indicate the significance of the jury's role in the criminal justice system.

It is popularly stated that criminal trial juries are "fact-finders." They "weigh the evidence" and conclude their deliberations with a finding of guilt or innocence. This is all true, of course, but these statements oversimplify the complex and often intangible role played by the jury. In their monumental text, *The American Jury*, Professors Kalven and Zeisel point out that

[t]he jury . . . represents a uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents . . . an impressive way of building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it.⁴

The Supreme Court itself indicated this broader role in the case of *Williams v. Florida*:⁵

the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the *common sense judgment* of a group of laymen and in the *community participation* and *shared responsibility* that results from that group's determination of guilt or innocence.

These same observations may be applied to military justice and its system of courts-martial with certain reservations. One must realize that court-martial members are not true "jurors" in the legal sense of the word.⁶ Courts-martial are not Article III courts, according to present case interpretation. Rather it has been held⁷ that Congress has the power to authorize whatever tribunals it deems necessary to try members of the armed forces, and that this power is derived from Article I, § 8, of the Constitution wherein Congress is granted the power "[t]o make Rules for the Government and Regulation of the land and naval forces." Similarly, it has been held that all Fifth and Sixth Amendment guarantees do not apply to members of the armed forces since said

where it is stated that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

⁴ KALVEN AND ZEISEL, *THE AMERICAN JURY* 498 (1966).

⁵ 399 U.S. 78, 100 (1970) (emphasis added).

⁶ See Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. U. L. REV. 171, 184 (1966).

⁷ *Relford v. Commandant*, 401 U.S. 355 (1971). The interpretation is not a new one. See also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866), and *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78 (1857).

members do not have the right to indictment by grand jury nor trial by petit jury.⁸ Essentially, provisions for the trial of members of the armed forces must be regarded as being statutory rather than constitutional, and, if this is remembered, analysis will not be impeded by what are here irrelevant constitutional considerations.

Even accepting the present state of the law, it will nonetheless be seen that court-martial members and civilian jurors share many common functions: both are *ad hoc* assemblies of fact-finders, both determine guilt or innocence, both are subject to their own biases, prejudices, and opinions. It is perhaps in recognition of this identity of roles that the terminology in one proposed bill⁹ would modify the Uniform Code of Military Justice so that the word "juror" would be used in place of the existing word "member."

This article will focus on one aspect of the military justice system: juror selection. The entire array of commentary and judicial interpretation emphasizes the importance and significance of the juror selection process to the basic trial-by-jury concept. There is but one hypothesis: in order for a defendant to secure a fair trial, his jurors should be selected without bias or discrimination so that "they can reflect the conscience and mores of the community in applying punitive sanctions to individual cases."¹⁰ Should the selection process break down or become tainted, it would necessarily result in a distorted jury, and a distorted jury cannot produce anything other than distorted verdicts. This is not to imply that the military's "blue ribbon" panel of officers, the type of jury most often found on courts-martial, has *always* rendered a biased, distorted verdict. Even the most severe critic of the military has yet to go so far, for blue ribbon juries can also reflect community standards. But general principles of justice and fairness are applicable to both military and civilian jurisdictions and, since jurisdictions everywhere¹¹ are giving greater attention to their jury selection processes, recognizing the vital role those processes play

⁸United States v. Jenkins, 20 U.S.C.M.A. 112, 114, 42 C.M.R. 304, 306 (1970); Reid v. Covert, 354 U.S. 1, 37 n.68 (1957).

⁹ S. 1127, 92d Cong., 1st Sess. (1971).

¹⁰ Kuhn. *Jury Discrimination: The Next Phase*, 41 So. CAL. L. REV. 235, 245 (1968).

¹¹ "During the 1970's, jurisdictions throughout the country will reexamine techniques employed for centuries in the selection of prospective jurors. An increasing demand for jurors, constitutional revisions in the availability of jury trial, court reorganization and the application of modern data processing techniques will make reevaluation imperative." Mackoff, *Jury Selection for the Seventies*, 55 JUDICATURE 100 (1971).

in the administration of justice, so also should the military reexamine its own system of selection.

It has been noted before that projects evaluating military law have tended to become polarized.

The armed services generally emphasize the many good points about military justice, and their representatives attempt to avoid discussing the few deficiencies that exist. . . . [T]he military's critics . . . emphasize only deficiencies and sometimes ignore the many recent advances in military law.¹²

Aware of this pitfall, this writer shall not attempt to "justify" the military system of juror selection to its critics. Rather, the purpose of this study is to objectively examine first the existing state of military and civilian laws relating to jury selection, and second, to look at actual military and civilian practices in this area, to identify any extant shortcomings. Where such shortcomings are noted — admittedly a subjective, conclusory evaluation of the writer-concrete suggested reforms will be set out.

To assist in this effort, three surveys (printed in their entirety as Appendices A, B, and C) have been taken of field grade Army officers. These provide an insight, perhaps for the first time, into the prevailing attitudes and opinions of middle level and senior military officers regarding the administration of military justice.¹³ The initial study surveyed about 25 colonels and senior lieutenant colonels attending a Senior Officers Legal Orientation Course at The Army Judge Advocate General's School.¹⁴ The second study

¹² Schiesser and Benson, *Modern Military Justice*, 19 CATH. U. L. REV. 489, 492 (1970).

¹³ All three surveys are appended. It will be noted that each question contains a designated "data base," which is the number of responsive answers returned for that question. A few answers were discarded for analytical purposes because the respondents either modified the printed answers, submitted a multiple answer, or else did not answer at all. By each choice on the questionnaires is a series of numbers separated by a slash mark (/); e.g., 78/34.2. The digits to the left of the mark indicate the raw number of persons within the data base for that question who chose that particular response. The number to the right of the mark indicates the percentage that raw number constitutes of the entire data base.

¹⁴ The first survey conducted [hereinafter referred to as the SOLO Survey] was, in both form and fact, one of opportunity. In November 1971, twenty-seven career officers attended the Senior Officers Legal Orientation course at The Judge Advocate General's School, US Army, in Charlottesville, Virginia. All of these men were either colonels or senior lieutenant colonels and represented most of the branches of the Army. Most of them (63.7%) had actually served as a court-martial convening authority in one or more previous assignments. Twenty-six questionnaires were distributed to this group and twenty-two were returned. The purpose of this initial inquiry, which was undertaken during the formative stages of this study, was to determine only whether the survey method was a feasible and practical way to obtain useful information. Notwithstanding the diverse branch assign-

contacted staff judge advocates at general court-martial jurisdictions within the Army.¹⁵ The third, and largest, study surveyed class members at the prestigious Command and General Staff College at Fort Leavenworth.¹⁶ Data from these surveys will be extensively utilized throughout this article since highly interesting results have been obtained. An illustrative finding, and one that will surprise many, is that the great majority of Army officers today are themselves overwhelmingly in favor of some system of random selection of court-martial members.

ments and backgrounds of the respondents, it was recognized that their limited number rendered any statistical conclusions illusory. Even so, however, some insight was gained as to the senior line officer's viewpoint of the problem areas in military justice, areas which the subsequent surveys probed more deeply.

¹⁵ The second survey [hereinafter referred to as the SJA Survey] was conducted by mail throughout December 1971 and January 1972. A list of the general court-martial jurisdictions was obtained from The Judge Advocate General's School, United States Army, and from it were deleted those commands which, while technically having general court-martial jurisdiction, did not exercise it. A total of ninety-three questionnaires were distributed and seventy-six were returned. Four of the seventy-six were returned unanswered because the respondent command did not (contrary to the author's information) exercise its GCM jurisdiction, leaving a total of seventy-two responsive questionnaires. It should be noted that these were completed by the legal officers of the various units, the staff judge advocates, and not the convening authorities. The objective was to elicit the opinions of the Army's legal practitioners concerning various aspects of the military justice system, particularly as concerned the actual practices regarding jury selection.

¹⁶ This third survey [hereinafter referred to as the C&GSC Survey] was conducted during January-February 1972. The respondents were a cross-section of student officers attending the Command and General Staff College at Fort Leavenworth, Kansas. Class enrollment during the year was approximately 1100 students. A random sampling was necessary because, in the absence of data processing machinery, 1100 respondents were unmanageable. In lieu of a 100 percent poll, then, four sixty-man sections were surveyed. Students at the C&GSC are assigned to class sections at random, with assignments rotated periodically. Each section, as does the entire class, contains a diverse representation of majors, lieutenant colonels, and colonels, with a scattering of non-Army personnel from other services and a few allied officers from foreign countries. The allied officers did not participate in the survey. Two hundred and forty questionnaires were distributed and two hundred and thirty were returned. The selection of the C&GSC student body is of particular significance due to the singular position occupied by the Command and General Staff College. Attendance at this school is regarded as a prerequisite to advancement to the higher grades and more responsible positions within the military. Only about 40 per cent of all the Regular Army officers on active duty are selected to attend the C&GSC. Thus, the surveyed group represents not just a cross-section of field grade officers within the Army but a cross-section of *superior* field grade officers who will, in due course, become the commanders and convening authorities of the future.

II. THE LAW

Any intelligent comparison or evaluation of the civilian and military laws relating to juror selection requires the use of some standard. It would be of limited utility to compare the military system to various civilian systems if the civilian systems were deficient in some way. Accordingly, the standards proposed by the American Bar Association were selected as representing the best synthesis of contemporary legal thought as to how jury selection *ought* to be accomplished. These standards incorporate existing case law and trends identified by both legal scholars and practitioners:

The selection of prospective jurors should be governed by the following general principles:

(a) The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community.

(b) Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet specified minimum requirements. The grounds for disqualification should be clearly stated objective criteria, such as:

(i) inability to read, write, speak, and understand the English language;

(ii) incapacity, by reason of mental or physical infirmity, to render efficient jury service;

(iii) failure to meet reasonable requirements concerning citizenship, residence, or age; and

(iv) pending charge or conviction of a felony or a crime involving moral turpitude.

(c) Prospective jurors may be excused from jury service upon request on the basis of clearly stated grounds for exemption, such as:

(i) that the person has previously served as a juror within a specified period of time; or

(ii) that the person is actively engaged in one of a limited number of specially identified critical occupations.

(d) The court may excuse other persons upon a showing of undue hardship or extreme inconvenience."

The general principles set forth in the above standards are believed "to be basic to a fair and effective selection process."¹⁸ However, the American Bar Association has observed that even

"AMERICAN BAR ASSOCIATION STANDARDS RELATING TO TRIAL BY JURY, § 2.1 at 8 (*Approved Draft*, 1968) [hereinafter referred to as the ABA STANDARDS].

¹⁸*Id.* at 47.

these minimum principles are not being followed in a significant number of jurisdictions.¹⁹ An examination of the existing laws relating to juror selection—state, federal, and military—provides ample verification, although there has been some recent progress in the federal system.

A. CIVILIAN PRACTICES

Prior to 1968, the federal courts in the various districts, more often than not, adopted a selection plan similar to that employed by their host state. There were two principal methods for obtaining names of individuals to serve as jurors.

First, and most widely used [was] the key-man system, whereby certain individuals and/or organizations are chosen to suggest names of prospective jurors to the jury commission. Second, public lists such as voter registration rolls, telephone directories, city directories, and tax records [were] used by the jury commission to gather names of prospective jurors."

Since the use of any of these methods often was discriminatory,²¹ intentionally or unintentionally, the Federal Jury Selection and Service Act²² was passed in 1968 to provide a more uniform and just procedure. The Act mandated two important principles: first, using voter registration lists as a source, jurors had to be selected at random; and second, qualification or disqualification had to be based solely on objective criteria. Voter lists were chosen to be the source of jurors because it was felt that they represented, more than any other compilation, a fair cross-section of the community.²³ Even so, however, it was anticipated that the voter lists would be supplemented as necessary from other sources to obtain a community cross-section if such was not, in the specific jurisdiction, represented by the voter lists.²⁴ An im-

¹⁹ *Id.* at 48.

²⁰ *Lindquist, Analysis of Juror Selection Procedure in United States District Courts*, 41 *TEMPLE L. Q.* 32, 33 (1967), table V at 44 indicates the disparity which existed in the federal jurisdictions; see also, 26 *F.R.D.* 409, 425 (1961).

²¹ Kaufman, *The Judges and the Jurors: Recent Developments in Selection of Jurors and Fair Trial-Free Press*, 41 *U. COM. L. REV.* 179, 183 (1969). See also, Lindquist, *supra* note 20.

²² 28 U.S.C. §§ 1861-69 (1970).

²³ Kaufman, *supra* note 21, at 183. "the concept of obtaining a "community cross-section" was first judicially recognized in *Smith v. Texas*, 311 U.S. 128 (1940), and *Glasser v. United States*, 315 U.S. 60 (1942), although the courts never implemented it as such. Lindquist, *supra* note 20, at 32.

²⁴ *Id.* An article prepared by the U. S. Commission on Civil Rights indicates that 66.3 percent of the black voting age population in eleven southern states were registered to vote during the spring and summer of 1970, but 83.3

portant incidental provision in the Act required each district to reduce its selection plan to writing,²⁵ the objective being to remove the "vagueness, confusion, and ignorance that have often cloaked jury selection,"²⁶ and to allow each district some flexibility within the overall framework of the Act.

The various state courts thus far have adhered to either the keyman or public list method of juror selection. The state legislatures are in control of their own state's system, but this makes fifty distinct systems only a theoretical possibility. In fact,

[w]hile the statutes of the various states differ in detail, there is a pattern common to all of the legislation on the subject; i.e., creation by impartial officers of a general list of persons selected or made up from poll lists, tax lists, or directories, and the selection by lot from that general list of the names of particular persons which are delivered to the summoning officer?²⁷

This is not to say that the states are essentially uniform as to juror selection. Their general approaches may be the same, but the statutes are rife with subjective criteria which vest an extreme degree of discretion with the selecting official. On their face, these criteria may appear beneficial, but their potential for abuse is immediately obvious.

Illustrative are: ALA. CODE tit. 30, § 21 (1959) (persons "generally reputed to be honest and intelligent men . . . esteemed in the community for their integrity, good character and sound judgment"); ARK. STAT. ANN. § 39-206 (1947) ("persons of good character, of approved integrity, sound judgment and reasonable information"); CONN. GEN. STAT. REV. § 51-217 (1958) ("esteemed in their community as persons of good character, approved integrity, sound judgment and fair education"); DEL. CODE ANN. tit. 10, § 4504 (1953) ("sober and judicious persons"); FLA. STAT. § 40.01 (1963) ("only such persons as the selecting officers know, or have good reason to believe, are law abiding citizens of approved integrity, good character, sound judgment and intelligence"); GA. CODE ANN. § 59-106 (1965) ("upright and intelligent citizens"); IDAHO

percent of the whites of voting age were registered. 4 CIVIL RIGHTS DIGEST 29, 33 (1971).

²⁵ 28 U.S.C. § 1863(a) (1970).

²⁶ Kaufman, *supra* note 21, at 185.

²⁷ BUSCH, I LAW AND TACTICS IN JURY TRIALS, § 55 at 418 (1959).

CODE ANN. § 2-302 (1948) (“of fair character, of approved integrity and of sound judgment”) ; **ILL. REV. STAT. ch. 78, § 2 (1965)** (“of fair character, of approved integrity, of sound judgment, well informed”).²⁸

Additionally, more often than not, the state statutes provide that the same official or officials who select names for the general jury list, using the aforementioned subjective criteria, are also the officials who select specific names for actual cases as they are tried.²⁹ To be sure, the discretion of state officials is not completely unchecked. These statutes normally have a general provision which requires

not only that no persons be selected who lack the prescribed qualifications, but also that persons who possess the required qualifications shall not be excluded from that selection. Persons possessing the required qualifications cannot be arbitrarily excluded for racial or other reasons from either grand or petit juries.”

Taken as a whole, the state statutes may not always result in the purposeful discrimination condemned by the Supreme Court,³¹ but at the very least the utilization of the keyman and public list selection methods “do not result in jury lists drawn from a cross-section of the community.”³² It must be recognized that the selection process contains an inherent conflict between the concepts of representativeness and competency, so these state statutes should not be regarded as being defective per se. As the ABA committees observed in drawing up the quoted standards, “some sacrifice in representativeness must be made when the standards of competency are raised, while on the other hand attempts to maximize the representative nature of jury panels may not produce jurors of the greatest ability.”³³ The question is whether the states have struck the proper balance, and, as mentioned above,³⁴ the state jurisdictions are well aware that deficiencies may exist.

Perhaps as a result of individual state reevaluations more attention will be given to the Uniform Jury Selection and Service Act,³⁵ which thusfar no state has adopted. This uniform act was

²⁸ ABA STANDARDS at 53. See also, BUSCH, *supra* note 27, § 60 at 437-40 for additional criteria and extensive citation of state authority.

²⁹ BUSCH, *supra* note 27, § 55 at 420.

³⁰ “*Id.*, § 60 at 437 (citations omitted).

³¹ Swain v. Alabama, 380 U.S. 202 (1965).

³² ABA STANDARDS at 49 (citations omitted).

³³ *Id.* at 54.

³⁴ Mackoff, *supra* note 11.

³⁵ McKusick & Boxer, *Uniform Jury Selection and Service Act*, 8 HARVARD J. ON LEGISLATION 280 (1971).

approved by the National Conference of Commissioners on Uniform State Laws in August of 1970. Essentially based on the federal law, it

provides for the selection of jurors from as broadly inclusive a list of citizens as possible. It also strictly limits disqualifications from jury service, prohibits automatic exemptions and sharply limits excuses to individual cases of undue hardship, extreme inconvenience, or public necessity.³⁶

As is the case with the federal law, the Uniform Act does not guarantee any "right" of jury service but only ensures "that the *opportunity* for jury service will be equally available to all qualified persons."³⁷ To this end, jury commissioners under the act would strive for a jury list which included *all* adult citizens who resided in the jurisdiction. Voter lists would be used, but so would other sources in an attempt to achieve total representation. Pragmatically, however, it is realized that this goal will never be achieved, but "[a]bsolute completeness is neither possible nor necessary,"³⁸ for "only a *fair* cross-section of the community is required."³⁹

B. MILITARY PRACTICES

To these existing state and federal laws one may compare the provisions of the *Uniform Code of Military Justice* relating to juror selection for courts-martial. These are contained in Article 25, which has two main subject areas: eligibility criteria and selection criteria. Generally,⁴⁰ any commissioned officer on active duty is eligible to serve on all courts-martial, any warrant officer on active duty is eligible to serve on the general or special courts-martial of anyone who is not a commissioned officer, and enlisted men are eligible to serve on general or special courts-martial if an enlisted accused so requests their service. This request must be in writing, and, once it has been made, the trial

³⁶ *Id.*

³⁷ *Id.* at 284. The authors further explain that "the uniform act does not require that in every case a jury **consist** of jurors **who** represent a cross section or microcosm of the *particular* community [of the defendant] [emphasis added]. No group has a right to proportional representation. . . . The intention of the act is simply to provide a jury chosen *from* a fair cross section of the community by random selection [emphasis in original]."

³⁸ *Id.* at 285-86.

³⁹ *Id.* at 286.

⁴⁰ UCMJ art. 25 (a), (b), and (c). For a general exposition of the historical evolution of the UCMJ, see Schiesser, *supra* note 6, and Hansen, *The Commander's Judicial Functions—Their History and Future* (1966) (unpublished thesis presented to Judge Advocate General's School, US Army),

cannot proceed until enlisted court members are provided. These enlisted members must constitute at least one-third of the court's membership. The Code does provide that the trial may be held if such enlisted members "cannot be obtained on account of physical conditions or military exigencies," but as a practical matter such cases are exceedingly rare.

The Code does not specify any particular procedure for the selection of court members, officer or enlisted. It contains a general prohibition against "trial by juniors,"⁴¹ but otherwise leaves the selection of the court-martial members, or jurors, up to the convening authority.

When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, length of service, and judicial temperament.*

However the convening authority cannot detail anyone who has served as an investigating officer in the case or who will be a witness for the prosecution or who is the accuser in the case.⁴³

Patently, the Code provisions are as subjective as those found in many states, and wide discretion is vested in the selecting official. However, just as is the case with state laws on the subject, this discretion is not absolute. The courts will regard the convening authority's selection as an abuse of his discretion if there is an "appearance of impurity."⁴⁴ Additionally, state statutes prohibiting jury tampering are roughly paralleled by Article 37 of the Code⁴⁵ which outlaws the illicit influencing of

"When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." UCMJ art. 25(d)(1).

⁴² UCMJ art. 25(d)(2).

⁴³ *Id.*

⁴⁴ *United States v. Hedges*, 11 U.S.C.M.A. 642, 645, 29 C.M.R. 458, 461 (1960) (concurring opinion). In this case, officers from the staff of two Provost Marshal's offices, an Inspector General, a brig supervisor, and a lawyer were appointed as court members. "[B]y analogy to civilian occupations, [the court was found to be] improperly constituted when its members consisted of 'an attorney general, a sheriff of a county, a chief of police of a city, an investigating agent for the state, and a warden of a penitentiary.'" Hansen, *supra* note 40, at 38.

⁴⁵ "No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person . . . may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case. . . ." UCMJ, art. 37(a).

court members by either the convening authority or any other person subject to the Code.

One could, at this point, attempt to compare the provisions of the Uniform Code with the various state and federal laws relating to juror selection and, upon that basis, draw conclusions as to their relative merit. Such an analysis, however, would be inadequate, for statutes and case law are but a part of the picture. The manner in which these laws are actually implemented by federal, state, and military authorities is at least of equal and perhaps far greater importance to the effective and fair administration of justice. The next section, therefore, will explore these practices.

111. THE REAL WORLD

A. CIVILIAN PRACTICES

It is beyond the scope of this study to extensively analyze the actual selection procedures in all of the federal and state jurisdictions, but several comments and observations may nonetheless be made. The federal Act appears to adequately reflect all of the essential prerequisites identified in the ABA Standards if, in practice, the districts do not slavishly adhere to the use of voter lists as a source of jurors. The desire to simplify and administratively expedite the selection process would always make this a temptation, but the exclusive use of voter lists will automatically exclude a large percentage of the population from consideration. It has been pointed out that as socioeconomic status decreases the tendency to register to vote decreases, with the result being that the use of voter lists alone would be discriminatory per se⁴⁶ as against the economically disadvantaged. Even though it will complicate the mechanics of the juror selection process, it appears that supplemental lists will almost always have to be used to obtain a truly representative cross-section of the community. There has been at least one empirical study⁴⁷ which revealed that federal juries "do not reflect a cross-section of the eligible population but exhibit measurable biases in such areas as age, sex, education, and occupation." Specifically, biases in favor of males, older persons, and the better educated were identified.⁴⁸ Whether the federal system will overcome these deficiencies with time remains to be seen.

⁴⁶ See generally, Lindquist, *supra* note 20.

⁴⁷ Mills, *A Statistical Profile of Jurors in a United States District Court*, LAW AND SOCIAL ORDER 329 (1969).

⁴⁸ *Id.* at 337. Additionally, of course, the case reporters are rife with in-

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The state practices must be viewed with even more circumspection, emphasizing as they do the keyman, organization, and public list methods of selection.

The key-man system has been strongly attacked on the ground that key-men tend to exclude important segments of the community, albeit involuntarily, when suggesting prospective jurors. This tendency may be explained by the well-established sociological doctrine that individuals tend to associate primarily with others of similar socioeconomic status.⁴⁹

Mr. Lawrence Speiser of the American Civil Liberties Union no doubt had this sociological concept in mind when he said

[t]he difficulty with the key-man system is that it does not provide a representative cross section. . . . It is desirable to have representatives of the failures in the community on the jury just as well [as those who have succeeded].

In many cases the people who are on trial in criminal cases are the failures [of society]. . . .

. . . .
[T]he blue ribbon jury (resulting from key-man nominations) . . . may not understand what happens in the ghettos. They don't know what happens in lower economic areas. It is far too easy for them to have a distorted view and this is going to affect their judgment."

As noted by the ABA committees in compiling their standards, the fatal defect in the keyman system is that it is premised on the ability of the ordinary layman to ensure, at an initial stage, that only competent jurors are selected.⁵¹ The use of

stances wherein racial bias in the selection process is alleged. For example, *see* *United States v. Zirpolo*, 450 F.2d 424 (3d Cir., 1971), where a "clear thinking" test resulted in the elimination of 14.5% of persons from white neighborhoods and 81.5% of persons from black and low income neighborhoods; *Goode v. Cook*, 319 F.Supp. 246 (S.D.Miss., 1969), where it was held that Negro representation on juries were only a "token" quantity; and *Parker v. Ross*, 330 F.Supp. 13 (E.D.N.C., 1971), where prima facie case was made showing systematic exclusion of Negroes.

"Lindquist, *supra* note 20, at 43. Patently, the difficulty lies in the fact that the selection of the key men themselves is critical. If jury officials fail to appoint key-men who adequately reflect the entire community, the nominations of these men will almost necessarily be unrepresentative.

"*Id.* at 45.

⁵¹ ABA STANDARDS at 49. The observation is illustrated by ALA. CODE tit. 30, §§ 20, 21 (1958) which "requires jury commissioners to place on the jury roll all male citizens in the community over 21 who are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment. Apart from the question of whether the selection will be arbitrary when such subjective criteria are used, any attempt to make such judgments at the time the original list of prospective jurors is prepared is likely to diminish substantially the representative character of this initial

organizations to suggest names of prospective jurors is similarly defective. It has been observed that

the use of organizational sponsors would seem to eliminate about half of the community from consideration. Probing a little deeper into organizational membership, some marked differences between members and non-members are noted: (1) individuals who are members of voluntary associations tend to have higher education than non-members; (2) professional, business, and clerical occupations tend to join associations rather than skilled, unskilled, and farm occupations; and (3) more whites than Negroes, more Jews than Protestants, and more urban than rural dwellers tend to become members of organizations. [Also] as family income decreases, the tendency to belong to any organization decreases.⁵²

Just as the selection of the keyman was critical to the operation of the keyman system, so also the selection of the organization is significant. The point may be made, albeit by hyperbole, by noting that church groups or civic associations are often tapped to suggest names of potential jurors but the mores of our society are such that the Black Panthers or nudist associations are seldom (if ever) chosen.

As has been mentioned, the American Bar Association has found that a significant number of jurisdictions do not have procedures which meet even the most minimal prerequisites of fairness and justice.⁵³ If this is the view of juror selection from the civilian side, what does it look like under the military system as actually practiced in the court-martial jurisdictions?

B. MILITARY PRACTICES

According to some writers, convening authorities deliberately exercise the power Congress gave them to detail members in such a way as to *ensure* the conviction of the accused. The words "notwithstanding his innocence" are often added by implication. The following remarks are only illustrative:

In a court-martial . . . the serviceman is tried by a panel of court members arbitrarily selected by a convening authority, usually the base commander, who is also responsible for convening the trial. The result is undeniably a hand-picked jury.

[A]s long as the power to arbitrarily appoint court members

group, as the tendency is for jury officials and those they consult with to list only persons with whom they are personally acquainted." See *Commonwealth v. Carroll*, 278 A.2d 898 (Pa. 1971), a recent state case upholding the keyman system.

⁵²Lindquist, *supra* note 20, at 35.

⁵³ABA STANDARDS at 48.

rests with one individual, the convening authority, an accused in the court-martial system has very little chance of getting a fair trial.”

That author further opines that “an American public . . . has viewed with growing distaste a process by which **94** percent of its sons are convicted by hand-picked juries.”⁵⁵

Unfortunately, conclusions such as these are all too often accepted as irrefutable fact without any pretense of independent inquiry as to their foundation. These opinions seem to coincide with what many have heard about military justice and so, presumably, no further investigation is necessary. As was mentioned in the introductory section of this article, however, one of the present objectives is to determine the actual practices within the military justice system—particularly as to juror selection—and so secondhand assertions cannot be relied upon whether they are opposed to the military system or in favor of it. Accordingly, a quantity of empirical data has been amassed and this writer’s conclusions as to actual military practices are based solely on that data. An examination of available military information⁵⁶ does indeed indicate, as has been asserted, that approximately **94%** of those charged with offenses and tried under the military system are convicted. But recitation of that figure does not support the allegation that these men are convicted by “hand-picked juries.” If one examines *all* of the data, an entirely different picture of military justice emerges. It is particularly noteworthy that :

(1) During fiscal year **1971**, when the average total strength of the Army was **1,217,867** men, **30,646** men received either a general or a special court-martial, or **2.5%** of the total strength.

(2) Although **93.0%** of these men were convicted, almost half of them (specifically, **43.4%**)⁵⁷ pleaded guilty, thereby essentially convicting themselves rather than *being* convicted.

“Rudloff, *Stacked Juries: A Problem of Military Injustice*, 11 SANTA CLARA LAWYER 362, 375 (1971).

⁵⁵ *Id.* at 363. As will be seen, Mr. Rudloff’s use of statistics is more than slightly misleading.

⁵⁶ To this figure one may compare the civilian practice regarding plea bargaining: “. . . many courts have routinely adopted informal, invisible, administrative procedures for handling offenders. Prosecutors and magistrates dismiss cases; as many as half of those who are arrested are dismissed early in the process. Prosecutors negotiate charges with defense counsel in order to secure guilty pleas and thus avoid costly, time-consuming trials; in many courts **90** percent of all convictions result from the guilty pleas of defendants rather than from trial.” REPORT OF THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 127-128 (1967).

* The chart summarizes Army court-martial activity during the 1 July 1970-30 June 1971 fiscal year.

General Courts-Martial

Type of Court (a)	Tried (b)	Convicted (Total) (c)	Guilty Plea (d)	Not Guilty Plea (e)	NG Plea Conv. (f)
1. MJ Alone	2229*	2148* (96.5%)	1248* (56.0%)	981 (44.0%)	900 (91.7%)
2. MJ w/Members		359 (86.1%)	80 (19.1%)	338 (80.9%)	279 (82.5%)
3. Total GCM	2	2507* (94.6%)	1 28* (50.2%)	1319 (49.8%)	1179 (89.4%)
<i>Special Courts-Martial</i>					
4. MJ Alone	25794*	23984* (93.0%)	11389* (44.2%)	14405 (55.8%)	12595 (87.5%)
5. MJ w/Members	459*	371* (80.9%)			
6. Members Alone	1746	1570 (90.0%)	565 (35.2%)	1250 (74.8%)	882 (34.0%)
7. Total SpCM	27999*	25925* (92.1%)	11944* (42.7%)	16055 (57.3%)	13981 (87.2%)
8. Total CM	30646	28432 (93.0%)	13272 (43.4%)	17374 (56.6%)	15160 (87.4%)

Note 1. Items indicated with an asterisk (*) were taken directly from a report prepared by the United States Army Judiciary (JAAJ-CC) dated 1 Mar 72. All others are computations based on the information furnished.

Note 2. Column (d) percentages are based on the number of persons tried as reflected in column (b); e.g., of the 2229 persons tried by a military judge alone in a General Court-Martial, 1248, or 56.0%, entered a guilty plea.

Note 3. The quantities reflected in column (e) were obtained by subtracting (d) from (b).

Note 4. The quantities reflected in column (f) were obtained by subtracting (d) from (c), and the percentages in column (f) are based on the numbers reflected in column (e); e.g., of the 981 men who pleaded not guilty in General Courts-Martial before a military judge alone, 900 men, or 91.7%, were convicted notwithstanding the plea.

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(3) Of the total of 30,646 cases, only **2,623** (8.5%) involved the presence of court-martial members, or “hand-picked juries.” The bulk of these cases—the remaining 91.5%—were conducted by a military judge alone. If one disregards the 635 cases in which the accused pleaded guilty, there remain only 1,988 cases—or 6.5% of the total cases tried—in which the commander’s selection of jurors could have had any possible influence on the outcome; and yet the conviction rate for a court *with* members is actually *less* than that for a judge-alone trial.

Some critics rebut the significance of the cited figures by arguing that because the serviceman-accused “doesn’t expect justice” from a hand-picked jury he is therefore forced to “voluntarily” request trial by judge alone. Were this the case, one would expect defendants to take full advantage of fair, impartial juries where they *are* available. However, in the federal system only about 13% of all the criminal cases tried during fiscal year 1971 were disposed of by a jury trial.⁵⁸ One can only conclude that, since *civilian* defendants do not overwhelmingly opt for a jury trial, it is unrealistic to believe that military defendants would act otherwise in similar circumstances. It is far more rational to infer that factors *other* than the convening authority’s power to detail members—reputation of the judge involved, the nature of the offense charged, the defense attorney’s evaluation of the case on its merits, and similar tactical considerations—are a greater influence upon an accused and his lawyer in deciding whether to have a jury trial or a judge-alone trial.⁵⁹

The three surveys conducted by this writer provide heretofore unavailable insights as to the actual juror selection processes within court-martial jurisdictions. Since the military establish-

“This information was obtained from Mr. Samuel Moy, Chief of the Analysis and Reports Section, Division of Procedural Studies and Statistics, Administrative Office of the US Courts, Washington, DC. Mr. Moy stated that, during Fiscal Year 1971, there were a total of **46,674** defendants who appeared before all the federal district courts (including the District of Columbia). The judges acted to dismiss **11,043** cases, and of the remaining 35,631 cases only **4,691** were taken to a jury. This and related information may be found in the Annual Report of the Director of the Administrative Office of the US Courts, Fiscal Year 1971, Appendix Table D-6, which report will be published and available in May, 1972.

⁵⁹ See *Trial by Judge Alone—Danger?*, 3 THE ADVOCATE 61 (1971) [*The Advocate* is a monthly newsletter distributed to military defense counsel by the Defense Appellate Division of the US Army Judiciary]. In this article, military defense counsel are cautioned not to be overly hasty in opting for a judge-alone trial. The article comments generally on the many advantages attendant to a full trial, complete with members.

ment often projects an image of disciplined uniformity, it will no doubt be surprising to many to learn that these selection procedures often vary from jurisdiction to jurisdiction, just as they do in the civilian systems. A similar lack of uniformity has been revealed concerning the attitudes and beliefs of those individuals responsible for the conduct of the military justice system. This fresh data serves to place the entire military justice system in a clearer perspective, particularly as to juror selection.

Since, under the present Code, the process of juror selection is committed to the discretion of commanders, the convening authorities, an appropriate place to begin this analysis of military juror selection practices is with the convening authority himself. Taking the answers to the SOLO and C&GSC surveys, it is possible to draw a hypothetical profile of the "typical" field grade officer. This officer believes that the military justice system in today's Army is essentially similar to the civilian system of justice, and the military's need to preserve discipline is analogous to society's desire to maintain law and order generally. He readily admits, however, that the military justice system is also designed to assist officers and noncommissioned officers in fulfilling the special requirements necessary to maintain command responsiveness, morale, and leadership.⁶⁰ He doesn't believe the system is perfect. There is, in his opinion, a germ of truth to some of the criticisms which have been leveled at military justice, although he believes many of the adverse allegations are without foundation.⁶¹ An example of his disagreement with the present Uniform Code may be found in its requirement that he, when acting as a convening authority, be the one to detail court members. This is a procedure he does *not* like and, as a practical matter, the job is normally left to a staff member.⁶² He would much rather see some system of random selection employed,⁶³

⁶⁰ C&GSC Survey, question 5; SOLO Survey, question 3.

⁶¹ C&GSC Survey, question 17. Note that while most staff judge advocates concur in this assessment, a greater percentage of the Army lawyers "believed the allegations were *completely* untrue and unfair" than did the line officers. See SJA Survey, question 8.

⁶² SOLO Survey, question 5. Practice confirmed by SJA Survey, question 2. Compare C&GSC Survey, question 7, where far fewer respondents regarded the issue as "just another requirement of the UCMJ" but were more heavily in favor of changing the system because it ("had the appearance of evil" (response "c") or were in favor of some system of random selection (response "d").

⁶³ C&GSC Survey, question 7, response "d", and question 8; SOLO Survey, question 6. This point was one of the more unexpected results of the surveys conducted. The author anticipated that line officers, by and large, would be almost uniformly opposed to random selection. Instead, with cer-

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particularly if it could be done so as not to result in a man being tried by those junior to him in grade or rank.⁶⁴ Naturally, this would result in greater participation by enlisted men on courts-martial, but he believes this would not cause any inherent problems,⁶⁵ although many of his contemporaries feel that enlisted men would either be subject to the improper influence of senior court members—be it ever so subtle—or that enlisted men lack necessary training and experience in the Army, particularly as to military justice matters.⁶⁶

If this typical field grade officer of today's Army is ever called upon, as a convening authority, to detail court members, he believes that it is desirable to detail a representative cross-section of the military community although it's not essential for a fair trial.⁶⁷ He has *no* criteria at all as to age or education when detailing court members, and believes that *all* grades should be represented on the courts.⁶⁸ Under existing law, however, he

tain reservations, they are almost overwhelmingly in favor of such a system. These reservations, it should be noted, are not necessarily antithetical to random selection: they concern the commander's power to conduct a final review of a case and to establish the criteria for juror qualification, and reflect the desire that no man be tried by those junior to him in rank or grade. So long as reasonable, objective criteria would be enumerated, it would appear that a random selection system for the military would both satisfy the ABA Standards and meet with the approval of commanders. Note that, on the SOLO Survey, question 6, responses "a", "d", "e", and "f" constitute 81.8% of the group. On the C&GSC Survey, question 8, responses "c", "d", and "e" constitute 93.8% of the group. Surprisingly (to the author, at least), the staff judge advocates were not nearly so unanimous in their support of random selection, being about evenly split on the issue. See SJA Survey, question 11. However, it is realized that the phraseology of the question was changed when posed to the SJA group and so the comparison is perhaps unfair.

⁶⁴ C&GSC Survey, question 8, response "e"; SOLO Survey, question 6, response "f".

⁶⁵ C&GSC Survey, question 9; SOLO Survey, question 7. It is noted that a sharp difference of opinion exists between the older, more senior officers, as reflected by the SOLO group, and the midlevel field grade officers as represented by the C&GSC group. Most (68.3%) of the SOLO group felt that lower grade enlisted men definitely lacked the necessary training and experience to competently participate in courts-martial, whereas only a quarter (26.6%) of the C&GSC group was of this opinion. "his may offer some partial explanation for the tendency, identified in the SJA Survey, question 5, for senior officers presently acting as convening authorities to appoint only senior enlisted personnel to the courts.

⁶⁶ *Id.*

⁶⁷ C&GSC Survey, question 10; *contra*, SOLO Survey, question 8.

⁶⁸ *Id.*; and C&GSC Survey, questions 11, 12, 13, and 14; SOLO Survey, question 9. The older SOLO group is consistent in their belief that (1) senior enlisted personnel should be detailed if an accused requests enlisted members (SOLO Survey, question 9, response "j"); and (2) court members

cannot detail enlisted men unless the accused so requests. Should an accused make this request, he will honor it as required by the law, and he will appoint *all* grades to the court, not just senior enlisted personnel, but each member will at least be senior to the accused by date of rank if not by grade.⁶⁹ In any case, he expects that all personnel, officer or enlisted, whom he details to serve on courts-martial will be fair and impartial. Should one of the courts he convenes result in what appears to him an unseemly acquittal or a too-lenient sentence, he would, as the convening authority, probably make an informal inquiry to ascertain whether any remediable procedural errors had occurred but would otherwise take no action or say anything at all. He is willing to abide by the decision of the court.⁷⁰

Of course, this "typical" field grade officer is an artificial construct, and it can be misleading to refer to such a composite being as truly typifying anything or anyone. While the majority of field grade officers would concur in each of the aforementioned beliefs or viewpoints, it is unlikely that any one individual would concur in them all. The survey data must indeed be interpreted with care. The author realizes, for instance, that while the C&GSC Survey indicates more field grade officers believe there would be no inherent problems in having lower enlisted grades on courts-martial⁷¹ than any other single group of officers having a specific contrary opinion, nonetheless 67.2% of *all* the field grade officers would identify one or another objection to the practice.⁷² In reality, the sole useful function of the "typical" field grade officer created above is that he concisely represents the attitudes of the majority of his colleagues as to each of the subjects mentioned. To the extent his very existence is representative of field grade officers presently in the Army he makes suspect many of the preexisting stereotypes of career Army officers. Additionally, the beliefs and opinions expressed by the respondents themselves serve at least to question if not refute widely accepted assertions regarding the quality—or rather, the lack of quality—of military justice and the military jury selection procedure.⁷³

in any case must be senior to the accused (SOLO Survey, question 9, response "k").

⁶⁹ *Id.*

⁷⁰ C&GSC Survey, questions 15 and 16; SOLO Survey, question 9, response "n", and question 10.

⁷¹ C&GSC Survey, question 9, response "a".

⁷² *Id.*, responses "b", "c", "d", and "e" combined.

⁷³ For example, Robert Sherrill has mentioned that commanders believe they can best control their troops through the use of the court-martial sys-

The SOLO and SJA Surveys, in particular, are quite useful in ascertaining the actual practices within court-martial jurisdictions relating to juror selection. Notwithstanding the Code provision which requires the convening authority to select the members *he* deems “best qualified” for trial duty—this actually occurs in only 11% of the jurisdictions—the job is most often delegated to a subordinate staff officer.⁷⁴ In 45.6% of the jurisdictions, this staff officer is given *no guidelines whatsoever* by the convening authority as to the type of men he should select. In 43.9%, some guidelines are provided and others are left to the discretion of the selecting staff member. In only 10.5% of the jurisdictions do the convening authorities provide explicit guidelines where they have delegated the selection authority.⁷⁵ The statutory criteria of age, education, length of service, and judicial temperament are often ignored or given only token consideration,⁷⁶ and the panel of members in half of the jurisdictions is “selected by the convening authority” only in the sense that it receives his *pro forma approval*.⁷⁷

Although it is not properly reflected in the surveys, it is apparently common for a court’s composition to be determined almost solely by the administrative *availability* of personnel having the proper qualifications. Three officers in the SOLO group added this factor as one of their criteria for selection,⁷⁸ but at least six or seven of the respondents also mentioned it to the author during informal conversation after the survey was conducted. ‘These discussions were highly informative and did much to reveal the attitudes of convening authorities toward military justice activities. The following narrative paraphrases the comments of several of these officers.

Military justice can be a hairy area for a commander. Most of his troops never get in trouble, but the two or three percent that do are almost more trouble than they’re worth. You can

tern. R. SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970). It seems anomalous for the bulk (62.7%) of career officers to believe that Congress could go ahead and modify the UCMJ, giving the power to detail members to someone other than the convening authority/commander, and there would *be no appreciable effect at all on the commander’s ability to maintain discipline*. These men believe “the ‘maintenance of discipline’ is based on leadership and other considerations which far outweigh the significance of who it is that details court members.” C&GSC Survey, question 18, response “a”.

⁷⁴ SJA Survey, question 2.

⁷⁵ *Id.*, question 3.

⁷⁶ SOLO Survey, question 9.

⁷⁷ *Id.*, question 5.

⁷⁸ *Id.*, question 9, response “q”.

make distinctions between soldiers, naturally. Some of them are people who just get into a situation and can't get out of it. They go AWOL or steal something. But after they're busted, if the situation's been corrected, you'll never have any more trouble with them. Other people are just bad news. You wonder how they ever got through basic training. It's one AWOL after another, or bad checks, or theft until they're eliminated from the service either by court-martial or an administrative board. These are the ones you want to see go. They don't do the unit or the Army one bit of good. Sure, major felonies also tarnish the image, but these cases on the average post are the exception rather than the rule. Command influence? I won't say that it has never happened, but it's pretty rare, I know I've never tried to influence a court. From my viewpoint, it just doesn't make sense. You may have a joker you'd like to boot out of the service, but if you go the route of trying to influence a court you're just asking for trouble. Why should I blow my own career just to get rid of some deadbeat? Military justice is such a sensitive thing that I've found it's usually best to stick to the advice of the staff judge advocate.

The SJA survey, while possibly self-serving, does lend support to the statement that convening authorities rely heavily on their attorneys, the staff judge advocates, as to military justice matters. The SJA's report that in almost every case their advice is followed. Specifically, 37.9% of the staff judge advocates indicate that their advice is *always* followed, and 59.1% indicate that their advice is accepted *almost* always (90% to 99% of the time).⁷⁹

Even if it is accepted that the three studies indicate that military justice, in practice, is not as abusive as is often thought, the question still remains whether the existing military system and procedures constitute the *best obtainable compromise* between the interests of justice and military discipline. It has been observed that

neither the military's use of myopic vision when focusing on defects, nor the critic's blindness when advances in military law are discussed, is a satisfactory basis for study. In the long run, the patient's health will be more improved by a proper diagnosis and treatment, than either a refusal to admit the illness, or a desire for the patient's demise."

Obtaining such a "proper diagnosis" is, indeed, a prerequisite for evaluating military juror selection procedures *vis-a-vis* those in civilian society, and for comparing both to the ideals depicted in the ABA Standards. One of the purposes of this study has

⁷⁹ SJA Survey, question 13.

⁸⁰ Schiesser & Benson, *supra* note 12, at 492.

been to provide, as objectively as possible, this essential diagnosis of the defects—real or apparent—in the military juror selection procedures. Such defects cannot be glossed over on the theory that the civilian systems, too, have many deficiencies, and the military establishment should not be held to higher standards. This approach only begs the question. As has been seen, there *are* many deficiencies in the juror selection systems used by various federal and state jurisdictions. However, it is gross illogic to move from this statement to the proposition that the military should therefore do nothing to rectify any extent shortcomings in its own system. To this writer's mind, the proper conclusion can only be that both houses are in need of a thorough spring cleaning to remove a plethora of 19th Century cobwebs.⁸¹

The issue facing the armed forces today is not whether the military justice system *must* be changed, but whether change is warranted and *should* be made. Objective fairness is not here being questioned, for whether military justice and the military juror selection processes are, in fact, just or unjust is irrelevant. Even the *appearance* of injustice will be sufficient to undermine the system.

This conclusion, of course, is not one originated by this writer nor does it apply solely to military justice. The "appearance of evil" concept is a truism which permeates all legal systems. No doubt Chief Justice Burger had the same point in mind when he said:

[t]he public image of justice, like justice itself, is indivisible. The public . . . is not concerned with the details or interested in excuses. . . .

What the public thinks . . . becomes the measure of public confidence in the courts, and that confidence is indispensable.

To a large extent what people think is shaped by what we do or fail to do with less than two percent of the criminal cases in the federal system."

More specifically, in 1967 a panel of civilian judges remarked that

[t]he principle that the courts should be vitally concerned with ensuring fair jury selection cannot be challenged. We note in this connection that the President's 1967 Civil Rights message to Congress stated, "creating respect for legal institutions becomes vir-

"There are some who apparently feel that a "house cleaning" will be insufficient, and they propose instead the erection of a brand new, multi-dwelling apartment building.

⁸¹ Burger, *The Image of Justice*, 65 JUDICATURE 200 (1971).

tually impossible when parts of our judicial system operate unlawfully, or give the appearance of unfairness.”³⁷

While the judges were then advocating greater participation and supervision over the juror selection process by judges themselves, their observation highlights the relationship between the selection processes and the appearance of rectitude. Almost a decade earlier Mr. Justice Black had similarly emphasized the importance of proper juror selection.

The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the right of the accused, *but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application.* It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens.“

The impact of these comments, in evaluating military juror selection procedures, is that one must not only consider the existence of *real* abuses—either in law or in practice—but must also focus with equal if not greater force on *apparent* abuses and the *possibilities* of injustice. All can be equally disruptive of the military justice system if they are ignored. The next section of this article, highlighting the deficiencies which have thus far been briefly mentioned will review the various stages of the juror selection process and will, for each stage, indicate how present practice and desired goals can be better reconciled to each other within the limits of existing statutory law.

IV. TOWARD RANDOM SELECTION OF MILITARY JURIES

The ABA Standards propose juror selection standards which are not necessarily antithetical to the needs of the military. The drafting committees of the ARA have stated these objectives as follows :

(1) to maintain and promote the “cross-section” character of juries, *insofar as is practicable*, by ensuring that the initial selection is at random from representative sources and by carefully limiting the grounds for exemption; (2) to ensure that those who serve on juries are capable of performing competently, by requiring that prospective jurors meet *certain minimum qualifications*; (3)

³⁷ *Report of the Comm. on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 359 (1967) (emphasis added).

³⁸ *Green v. United States*, 356 U.S. 165, 215 (1958) (dissenting opinion) (emphasis added).

to prevent *arbitrary* exclusion of persons from jury service, by requiring that exclusions be based upon clearly stated objective criteria; and (4) to protect citizens and the general public from undue burdens from jury service, by *recognizing certain exemptions* which may be claimed and by also permitting the court to *excuse other individuals* for a limited time.⁸⁵

The emphasis placed in the above recitation is not to highlight "escape clauses" for the military but to point out that the standards are themselves inherently flexible. It was recognized that requirements would vary from jurisdiction to jurisdiction, and for this reason no stratified mechanics were listed.⁸⁶ Accordingly, one has ample leeway in reconciling the special needs of the military to the objectives of the ABA Standards.

There are, of course, two general ways by which these shortcomings can be rectified: regulatory prescription and statutory modification. This article will emphasize the first of these methods, and not without reason. It has been said that

[i]t is the duty of those responsible for the jury system to make that experience an edifying one. The success of judicial administration, most especially in the area of jury selection and service, is measured by public confidence in the efficacy and integrity of the local system of justice.⁸⁷

While the general public has a natural interest in the quality of military justice, and public confidence in the military justice system is certainly an understandable objective, the armed forces themselves have the greatest interest in military justice. It is servicemen who are subject to the Uniform Code and servicemen who must administer it. It is servicemen who feel the brunt of any inequities or injustices in the Code, and it is servicemen who are in a better position to correctly analyze and evaluate any shortcomings and provide for their correction. *If the military will but act*, it can tailor the random selection concept to the real needs of the services and so avoid the "unintelligent application of the legislative steamroller by the layman."⁸⁸ This writer has prepared

⁸⁵ ABA STANDARDS at 47-48 (emphasis added).

⁸⁶ *Id.* "No attempt has been made . . . to deal with the details or mechanics of the process by which prospective jurors are selected. These matters of necessity vary from jurisdiction to jurisdiction *as dictated by local conditions*" (emphasis added).

⁸⁷ Mackoff, *supra* note 11, at 104 (emphasis added).

⁸⁸ R. POUND, SPIRIT OF THE COMMON LAW xiv (1921). The "legislative steam-roller" is not just a colorful figure of speech. There are presently before Congress a multitude of proposals relating to military justice. Senator Bayh has introduced a bill (S.1127) which would, to remove the few existing defects in the Code, completely revamp the military justice system. This bill admittedly calls for the random selection of court members, but it also scraps the entire organizational structure of the military justice sys-

a proposed regulatory scheme to modify present procedures pertaining to juror selection for courts-martial *without any change in the existing UCMJ Article 25*. Utilizing an approach not unlike that in the Federal Juror Selection and Service Act, the adoption of the random selection concept could be adopted by individual military installations.

An illustrative plan for a typical military installation may be found at Appendix D. The author submits that the proposed regulatory scheme—or one similar to it—would effectively modify existing procedures of member selection in such a way that (1) any appearances of evil as well as any actual potential for abuse under the present system will be eliminated; (2) there will be greater “in-house” confidence in the military justice system, especially by the lower enlisted grades; and (3) the approval of the civilian community would be forthcoming, for the military justice system will more closely approximate universal concepts of fairness.

Considering the “special requirements of the military” for a moment, it will at once be seen that they do not, in themselves, conflict with the **ABA** Standards. For the most part, they result from the very organization of the military establishment and from its present and foreseeable missions. The most obvious of these requirements is that the juror selection procedures formulated must be operable in both peacetime and during a state of war or national emergency. Additionally, due to the different types of units and installations in the military, the selection procedures must be flexible enough to be capable of administration in a wide range of circumstances at different locations throughout the world. They must also be kept rather simple and must never be allowed to become an administrative monster. Finally, if at all possible, the procedures should recognize the unique role that the commander and the rank structure has throughout the military, providing such recognition does not sacrifice the integrity of the jury selection procedures themselves. These requirements do not seem unreasonable and, the author submits, are fully satisfied at each stage of the proposed juror selection process. The proposed concepts simultaneously give deference to bona fide military needs

tem. It creates in lieu thereof a separate “Court-Martial Command” to which all military judges and attorneys would be assigned (Result: isolation and alienation of the attorney from the very people he is supposed to serve) and requires complete adherence to the procedures in the Federal Jury Selection and Service Act (without any consideration being given at all to even the legitimate needs of the military, assuming automatically that what’s good for the civilians is per se good for the armed forces).

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and also eliminate the appearances of evil from the present system together with the often heard allegations of command control.

The jury selection process, heretofore spoken of as an integrated activity, is in reality three distinct operations. First, there must be a determination as to the source of potential jurors. Second, these potential jurors must be screened and the qualified jurors isolated from the disqualified. Third, qualified jurors, as needed for a trial, must be selected and summoned for **service**.⁸⁹ The overall objective in modifying existing military juror selection procedures must necessarily be to devise a system which, as to each of these three phases, both comports with the **ABA** Standards and also meets the requirements of the armed forces.

The first of these phases, source selection, envisions obtaining "a list of citizens in the community potentially qualified for **service**."⁹⁰ Civilian jurisdictions, as has been seen, often encounter difficulty in compiling such a list where the keyman or other system of source selection is used.

While that list must represent a fair cross-section of the community, it need not contain the name of every adult citizen in that community. The task is to find a readily available list which meets the constitutional standards for a "reasonable cross-section."⁹¹

It may be anticipated that most jurisdictions in the civilian community will eventually use voter registration lists, deciding that these represent the best source available to them. **As** necessary, these lists will be supplemented by other sources to attain the desired degree of representativeness.

The military court-martial jurisdictions, however, need not go through the exercise of compiling a master list of this nature. One is already available in each jurisdiction in the form of the post or unit Locator File. Since it is a normal part of in-processing for **every** serviceman at a new installation to complete a post locator card upon his arrival, which is subsequently filed alphabetically in a central location, this compilation is an ideal master jury list. Even though the civilian master list need not be all-inclusive, in the military it can be such with no administrative inconvenience. Use of locator cards for juror selection purposes has another advantage in that they are always current. When the serviceman leaves his organization on reassignment, his card is pulled or

⁸⁹ Mackoff, *supra* note 11, at 101.

⁹⁰ *Id.*

⁹¹ *Id.*

flagged to signal his departure,⁹² an automatic indication that the individual is no longer available for jury service.

Thus, the "source selection" phase of choosing jurors poses no problem at all for the military. The second operation, however, the random selection of names from the master list to obtain prospective jurors and the screening of the prospective jurors, requires more reflection. Consider, first of all, the random selection of names. Procedures here must be evaluated from the viewpoint of mechanics or methodology, but one must also keep in mind the provisions of existing statutes.

Recalling that one of the special needs of the service is to keep administrative procedures as simple as possible, the mechanics of physically selecting the names of prospective jurors should not be tied to inflexible formulae. So long as the *concept* of randomness is adhered to throughout the process of selection, there seems to be no justification for introducing mathematical calculations just to prove, with scientific precision, that jurors were chosen at random from the master list.⁹³ If eighty jurors are ultimately required, the selecting official should be able to act solely on the basis of his experienced estimates to obtain a roster of prospective jurors from which the eighty will be chosen, provided that the principles of randomness are observed throughout the pro-

"Use of the post locator cards as a source of jurors within the military is not an original idea of the author. It has been often suggested in the past in various forms. For example, Colonel Hubert G. Miller, Staff Judge Advocate of the US Army Air Defense Command, has suggested the adoption of a "courts-martial members selection card index file" using duplicate locator cards. During in-processing, the serviceman would complete two locator cards instead of one. The first would be given to the Post Locator for normal use in routing mail; the second would be sent to the SJA for inclusion in the index. Letter from Colonel Hubert G. Miller to Major General Kenneth J. Hodson, 4 February 1971, copy on file with author.

⁹³ As an example of unnecessary complexity, one need only look to the "Cleveland Key-Number System", a method used in some civilian jurisdictions: "The registration list of voters forms the basis of the jury list. The number of jurors required for the year is estimated by the court, and to this is added a number equal to that which past experience has shown will probably be eliminated upon examination. The resultant figure is divided into the entire list of voters, the quotient then being used as a key number in selecting juror's names from the polling list." ABA STANDARDS at 51 (citations omitted). This unbiased, mathematically precise quotient undoubtedly demonstrates that the jury commissioner had no ulterior motive for directing that, for instance, every 27th name on the voter list will be deemed a prospective juror and screened accordingly. However, presupposing there was no conspiracy in printing up the voter list with certain names being placed at certain locations, could there ever be a valid objection raised if the commissioner *arbitrarily* chose the number 27, or 32, or 47, or 56, or any other figure without *any* resort to arithmetic?

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cess. There is nothing inherently wrong with an official's unsupported opinion that, in order to derive eighty jurors, two hundred names should be selected from the master list and screened. Three hundred could be chosen, or four hundred. If the names are truly picked at random, their total number is irrelevant so long as the required number of jurors will be produced. Similarly, there is nothing inherently improper with allowing the selecting official to arbitrarily decide that every 23d person on the master list will be chosen as a prospective juror or every 38th person, or every 52d person. Indeed, there is no real requirement that there be *any* uniform separation between the individuals.

Applying these observations to military juror selection, the mechanics of obtaining potential court-members from the Locator File are obvious. Once a month—or otherwise as established by the jurisdiction's selection plan—the selecting official would go to the file, in the presence of one or more witnesses, and simply copy the name, rank, organization, and address of every 23d person appearing in the alphabetical index onto a sheet of paper. If the physical act of counting to 23 two hundred times would be too time consuming, the selecting official, aided by the witnesses, could literally pull the cards at random, a few here, a few there, until the requisite number had been drawn. Once this list is typed up and certified by the witnesses it would constitute the jurisdiction's Prospective Juror List. Should it later appear, due to an abnormal number of disqualifications or unanticipated court activity, that an insufficient number of names were drawn, a supplemental selection could always be conducted. Over a period of time these methods would ensure that virtually every person in the jurisdiction at least had the *opportunity* to be chosen for court-martial duty. The fact that some are not selected is solely a result of chance.

The final task to be performed during the second state of juror selection is that of screening the persons who appear on the Prospective Juror List. Here one must consider both mechanics and the requirements of the present Code.

The screening of prospective jurors should not be regarded as an opportunity to preordain verdicts. If carefully supervised, advance screening has the useful function of saving court time and the time of the prospective members by eliminating at an early stage those who are patently disqualified for service. The ever-present hazard, of course, is that if the screening is done improperly it may result in a "qualified" remainder which will not be

truly representative of the community.⁹⁴ Procedurally, the ABA standard relating to juror selection “contemplates that jury officials should utilize questionnaires or personal interviews to determine qualifications”⁹⁵ and that “the grounds for disqualification should be clearly stated objective criteria.”⁹⁶ Persons found to be qualified cannot thereafter be excluded from selection.⁹⁷ The military can easily conform to these requirements and it is indeed in this area where convening authorities have a decisive role to play.

Since it is unlikely that any jury selection official, military or civilian, would desire to screen by means of personal interviews—such interviews would be time-consuming, disruptive of office routine, and inconvenient for the prospective jurors—the use of questionnaires would seem to provide the best means for ascertaining which jurors were qualified for service. These questionnaires can be mailed out by the selecting official and evaluated on their return.⁹⁸ The key to the efficacy of the questionnaire, of course, is its contents, the actual standards for qualification.

As has been mentioned throughout this article, one of the pervasive requirements in the juror selection process is that qualification or disqualification be based on objective criteria alone. Taking the ABA Standard as a model, it is noted that there are four bases listed for disqualification.⁹⁹ It was not, however envisioned that these criteria would be exclusive of all others.

[They do not] prohibit the use of other objective criteria, and thus the standard would permit a higher level of selectivity for the purpose of ensuring that those who serve as jurors have a level of competence beyond that of mere literacy. Although some loss in representativeness might result, it is the judgment of the Advisory Committee that some sacrifice in the “cross-section” character of juries is justified when the selection process does not lend itself to discriminatory practices and when the objective is to secure juries capable of dealing effectively with the complex controversies presented to them. Thus, the standard is consistent with the notion that “trial by jury necessarily requires a jury which is

⁹⁴ ABA STANDARDS at 51.

⁹⁵ *Id.*

⁹⁶ *Id.*, at 52.

⁹⁷ BUSCH, *supra* note 27, § 61 at 140: “[E]ven in the absence of express provisions, the prescription of qualifications for jurors connotes the inclusion in jury lists and the summoning without discrimination of persons possessing those qualifications (citations omitted).”

⁹⁸ Colonel Miller, *supra* note 92, has recommended that the format be such that a “yes” answer to any of the questions indicates possible grounds for disqualification. The idea is a good one, for if all questions were phrased in this way the selecting official could make the necessary evaluation with extreme speed, looking only for affirmative answers.

⁹⁹ *Supra* note 17 and accompanying text.

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able to comprehend and intellectually resolve the factual issues submitted to its verdict.”¹⁰⁰

All jurisdictions, then, including court-martial jurisdiction, may add additional criteria to the selection process so long as they are reasonable and objective. It is by this means that commanders may *permissibly* exert some influence on the composition of courts-martial tribunals. The individual convening authority would have the power to specify, for instance, that no member of his command shall be eligible to serve as a court-martial juror if such services will require his absence from any one of several enumerated military duties considered essential by the convening authority.¹⁰¹ Criteria such as this are sanctioned by the ABA Standard and indicate one way in which “essential military interests” can be reconciled with the interests of justice without the flagellation of either.

Giving the commanders a voice in setting the qualifying criteria also answers the problems relative to the proposed screening process raised by the existing Code. Does not Article 25 call for the convening authority to exercise his own best judgment in selecting court members, determining their qualifications on the basis of their “age, education, training, experience, length of service, and judicial temperament”? It can be argued that the “selecting official” is preempting this function of the convening authority. However, the “preemption” argument is weak where it is the commander, the convening authority, who establishes the objective criteria to be used. The commander’s participation moots the whole issue, for he is in essence saying that those persons who meet the specified criteria are “best qualified” to serve as jurors for his command.

The convening authority’s role in the juror selection process under a random selection system would not be limited to his power of establishing the criteria for qualification as a court member. He is also the individual in the military system who

¹⁰⁰ ABA STANDARDS at 55-56 (citations omitted).

¹⁰¹ An example of such a person might be, in an active infantry division, the company commander of a unit undergoing an Annual Training Test. The convening authority may even believe that, since ATT’s are only held once a year and are an important phase of the training cycle, *no* persons assigned to such a unit should be pulled away from their jobs to serve on a court-martial. A specific qualifying/disqualifying question would be as follows: Is your unit presently scheduled to participate in an annual training test, major field exercise, or annual inspection during (period the members might be called upon to serve)? The question is an objective one, can be universally applied to all prospective jurors, officers and enlisted men alike, and is clearly not designed to prejudice any particular accused.

would determine which persons are to be excluded from jury service due to the nature of their occupations or military duties. It has been observed that

[o]nly the commander is properly situated to determine whether the needs of the service are best served by the presence of a particular member on the courts-martial. To the extent officers and enlisted men are no longer subject to his control, they have been as effectively removed from the operation of the command as though incapacitated by enemy action."¹⁰²

There is of course no *requirement* that certain categories of personnel be excluded or exempted from jury service, for even under state statutes these exemptions are a matter of grace."¹⁰³ However just as these exclusions are recognized in the civilian communities¹⁰⁴ and defendants cannot complain of their absence from juries, so also should the convening authority be able to exclude or exempt certain persons from jury service on occupational grounds with appellate impunity, thereby further tailoring the military justice system to the particular needs of his unit. These exemptions would be reflected in the questionnaire which would be mailed to those on the Prospective Juror List, and they would be granted automatically where applicable.

Thus far, inquiry has been directed to the first and second stages of a random selection system—source selection and the selection and screening of potential jurors. It has been demonstrated that the two stages do not pose any insurmountable problem relative to their adoption by the military. The third and final stage is the actual selection of trial jurors from the Qualified Juror List which has been obtained."¹⁰⁵ It is here that most actual conflicts with existing Code provisions arise. As it will be seen, these conflicts do not render adoption of random selection by the military an impossibility, but only require the mechanics of this final phase to produce a result which conforms to the existing statute.

Adhering to the hypothetical which has thus far been used, the initial two hundred names which were randomly selected have perhaps resulted in a Qualified Juror List of one hundred and

¹⁰²Hansen, *supra* note 40, at 45 (citations omitted).

¹⁰³BUSCH, *supra* note 27, § 62 at 454.

¹⁰⁴Exemptions recognized by various states run the gamut from accountants, agricultural harvesters, and attorneys to toll gate keepers, water service employees, and veterinarians. See BUSCH, *supra* note 27, § 62, n. 97 at 457-60 for an extensive list of ninety-one different categories of exempted persons and occupations.

¹⁰⁵The list would be the same as the Prospective Juror List, less the names of those who were stricken by the selecting official due to their having one or more disqualifications.

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sixty names. The jurisdiction now needs a court-martial jury for the trial of Specialist Fourth Class John E. Doe, accused of six offenses of petty larceny (barracks thievery) and one of simple assault. Once again recalling that simplicity is to be the hallmark of the military's selection process, the mechanics of determining which of the 160 qualified jurors will be chosen to sit as Specialist Doe's jury must not become unnecessarily complicated. Returning to the ABA model, it is seen that

the requirement is that the original sources, taken together, are representative; that prospective jurors be drawn from this group at random; and that jury panels be drawn from the group of qualified jurors at random."

The military system thus far described has capably complied with these requirements. Indeed, the military's "original sources" far exceeded those in the ABA model since the locator file is all-inclusive. Prospective jurors have been selected at random with no discriminatory design or plan in mind. All that remains is to randomly select the trial jurors from the Qualified Juror List. This can be simply done by choosing every sixth or seventh name on the list, or whatever number the selecting official decides to use. Or each man on the Qualified Juror List can be assigned a number which also appears on a small ball or token, the tokens mixed, and then numbers drawn at random. The mechanics of random selection are extremely easy to understand and apply, and by using either of these rudimentary procedures the selecting official will obtain the names of ten men of all grades and ranks. One cannot, of course, forecast the precise rank structure of these jurors. It may or may not accurately reflect the jurisdiction's actual officer-NCO-enlisted proportions. Whether it does is irrelevant;¹⁰⁷ the outcome depends solely on the laws of chance. Hypothetically, one can assume that the following ten men were chosen :

Lieutenant Colonels	2
Captains	1
Master Sergeants (E8)	1
Platoon Sergeants (E7)	1
Sergeants (E5)	2
Specialist Four (E4)	2
Private First Class (E3)	1
Total	10

The random selection, it is noted, has resulted in an absence of

¹⁰⁶ ABA STANDARDS at 51 (citations omitted).

"This fact is in perfect harmony with the ABA Standard for its provisions "do not mean that a particular jury must be shown to be a representative group from the community (emphasis added)." *Id.*

majors from the panel, even though two lieutenant colonels are represented, and an absence of all lieutenants, E9's, E6's, and E2's. Complete adherence to the principles of randomness would nonetheless insist that the jurisdiction go to trial with this particular panel. However, such action is impossible for it is at this point—the actual selection of trial members—that the selecting official must consider and abide by existing provisions of the Code.

These provisions have already been alluded to previously in different contexts. Concisely, under Article 25 of the Uniform Code of Military Justice an accused serviceman—

- (1) has a *right* to a blue-ribbon jury consisting of officers alone. Enlisted men are *not even eligible* to be a court-martial member unless the accused wants them;¹⁰⁸
- (2) is *assured*, should he desire enlisted men on his court, that *at least one-third* of the jury will be enlisted men,¹⁰⁹
- (3) has a *right* to have all members of his court-martial selected by the convening authority, a mature and experienced officer, who is solely to be guided by his best judgment and not by “principles of randomness”; and
- (4) has a *right* to a jury no member of which is junior to him in rank or grade.¹¹⁰

“”There is a divergence of opinion relating to the so-called “blue ribbon” jury, and the concept is far from being universally condemned. *See* Comment, 13 HASTINGS L. J. 479 (1962). In many instances, the better educated, more experienced persons found on these juries might be anticipated to operate to the *benefit* of the defendant, not to his detriment.

¹⁰⁸ To the author's knowledge, there is no civilian jurisdiction which grants a corresponding right to its criminal defendants; i.e., the right to have a specified minimum percentage of his jurors not only derived from but also representative of a particular class. A bill proposed by Senator Hatfield (S.2177) before the present Congress would increase this military “guaranteed percentage” from one-third to one-half.

¹¹⁰ The prohibition against “trial by juniors” is one of the most traditional provisions in the Uniform Code, and it is but a reflection of the fundamental senior-subordinate relationship upon which the military society as a whole is based. No member of the armed forces will contend that, for some reason, a subordinate is *incapable* of sitting in judgment of a superior—particularly if the crime charged is not essentially a military offense—but there is a definite consensus—one which emerges clearly in the surveys conducted—that subordinates *should* not do so. Military justice would undoubtedly be more “civilianized” if jurors were chosen without regard to their grade or rank in the sense that military justice would more closely resemble civilian justice. But the military justice system would also, necessarily, become disoriented from military life as a whole. One always envisions the problem in terms of an enlisted man or noncommissioned officer sitting in judgment of an officer. However, as the above hypothetical illustrates, pure random selection can also result in a Specialist Four being tried by a Private First Class, which may not exactly be to the liking of the Specialist.

To be sure, it is these very “rights” which are often attacked by civil libertarians as being discriminatory and the subject of much abuse. However, if the objective is to develop a random selection system for the military within the scope of existing laws, rhetoric must be disregarded and a bona fide attempt made to reconcile the selection system to all reasonable interpretations of the statutes.” How, then, can this reconciliation be accomplished? Simply by *preserving* the statutorily conferred rights of the accused relative to his jury.

The accused’s right to be tried by a jury consisting solely of officers—a right very likely to be insisted upon where the charge is barracks larceny—can be recognized by the selecting official by disregarding the names of all enlisted personnel on the Qualified Juror List unless the accused requests enlisted members. In the example given, the seven enlisted men would have been passed over and the selection process would have continued until ten officers had been chosen. These men would then be referred to the convening authority for detail on orders as court members.¹¹² If the accused should indicate a desire to have enlisted members on his court, the original procedure described would be followed—that is, with no distinction being made between officers and enlisted men—except that the statutory mandates relating to percentage and seniority would have to be observed. In the hypothetical case of Specialist Doe, the random selection—as would often be the case—resulted in *more* than one-third of the membership being enlisted personnel. But the selection procedure would have to *ensure* this result and therefore the jurisdiction’s selection plan would have to direct that where the random selection was resulting in less than the required percentage of enlisted men being chosen, officer names would be disregarded by the selecting official until one-third of the members consisted of enlisted men. Similarly, the selecting official would disregard all names of jurors who were junior to the accused in grade or by date of rank. In Specialist Doe’s case, the name of the PFC would be disregarded

¹¹¹ In this writer’s opinion, if an accused were today convicted by a court-martial jury chosen by pure random selection, it can be anticipated that precisely these issues would be raised, these “rights” asserted, by the Defense Appellate Division in attempting to gain a reversal.

¹¹² It is at this point that the convening authority could grant excuses, upon application of the selected member, for reasons of undue hardship or extreme inconvenience. Here also allowance could be made for unanticipated military exigencies requiring the selected member’s presence at his normal duty, such as unannounced Command Maintenance Inspections. In these cases, the selecting official would merely draw additional names as needed.

and another selected in its place. So also would the names of the Specialists be disregarded if they were junior to the accused.

The only question that remains unresolved is whether the selection process deprives an accused of the "right" to have his jurors detailed by the convening authority. There are, of course, no cases on the point, for the system has never been tried before. Admittedly, the Code makes no reference to random selection as such. However it has been seen that the present Article 25 gives the convening authority almost unfettered discretion in detailing members. How then can an *abuse* of discretion be alleged where a convening authority has chosen to *curb* his discretion? It would indeed be a novel argument for an accused to assert that he was prejudiced because his jurors were selected at random. It appears that a far more reasonable interpretation of Article 25 would dovetail nicely with the concept of random selection: since the convening authority has been granted the power by Congress to detail whomever he wishes to serve as a court member, guided solely by his own criteria as to age, education, experience, training, length of service, and judicial temperament, where it appears that these criteria are adequately reflected in a random selection procedure established by the convening authority, and where the convening authority regards members selected by this procedure as being "best qualified" for trial service, there is no prejudice to an accused.

It is submitted that procedures described in this section fully comply with and even exceed the ABA Standard for the selection of jurors. Yet they do not deprive the military authorities of any of their mission-essential requirements.

V. CONCLUSIONS AND RECOMMENDATIONS

Change for the sake of change should always be regarded with circumspection, but such would not be the purpose in adopting a random selection system for the military courts. The goal would be to update the military justice system so that it would more closely approximate the community expectations applicable to *any* justice system.

A point not to be overlooked is that the jury selection system is an integral part of military due process regardless of the method of member selection. While a defendant is never entitled to select his panel," he does have some rights in the matter and the appel-

¹¹³ *Frazier v. United States*, 335 U.S. 397 (1949); *Hyde v. United States*, 225 U.S. 347 (1912) ("The defendant's right is a neutral jury. He has no constitutional right to friends on the jury.")

JURY SELECTION

late courts are quick to reverse where improper member selection has taken place.¹¹⁴ The courts supervise not only the convening authorities of the various court-martial jurisdictions, but also watch their staff judge advocates.¹¹⁵ Under the due process concept, the courts have been and will continue to be charged with the responsibility of overseeing the juror selection process in the military. The introduction of the principles of random selection would change nothing in this regard.

The author submits that this study has demonstrated that it is not only possible but also practical and feasible to improve the military practice relating to juror selection. It is recommended that the procedures described herein—or similar procedures—be implemented by the armed forces as soon as possible. This action should be taken on at least a trial basis. Actual tests would indicate both the practicality of the concepts and the way in which they should be modified to achieve maximum effectiveness. To those who would resist change in this heretofore sacrosanct area of military law, this author joins with anthropologist Paul Bohannan in the sentiment that

[c]hange is not doom—it is the very antithesis of doom. Doom is to be found in the struggle to resist change—salvation comes with understanding it.¹¹⁶

The military justice system and those charged with administering the system are now at a crossroad. The present issue is whether the military should continue to adhere to its traditional practices or should in some way change those practices so that they more closely conform to the expectations of United States servicemen and United States citizens in general. This writer has concluded that change is the proper course, and it is submitted that the empirical data contained herein amply support that conclusion. The procedures, models, and theoretical concepts described have been espoused not to assert that action should proceed strictly along these lines but to indicate only that corrective action *can* be taken, and *should* be taken.

¹¹⁴ See *United States v. Greene*, 42 C.M.R. 953 (AFCMR 1970), *reversed*, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970).

¹¹⁵ *United States v. Boatner*, 20 U.S.C.M.A. 376, 43 C.M.R. 216 (1971); *United States v. Eller*, 20 U.S.C.M.A. 401, 43 C.M.R. 241 (1971); *United States v. Hamilton*, 20 U.S.C.M.A. 518, 43 C.M.R. 359 (1971); *United States v. Scott*, 20 U.S.C.M.A. 264, 43 C.M.R. 104 (1971); *United States v. Lopes*, 20 U.S.C.M.A. 495, 43 C.M.R. 335 (1971); *United States v. Stricklin*, 20 U.S.C.M.A. 609, 44 C.M.R. 39 (1971). All of these cases involved some type of erroneous staff judge advocate advice or activity.

¹¹⁶ Helwig, *The American Jury System: A Time for Reexamination*, 55 JUDICATURE 99 (1971), citing a special supplement to the February 1971 issue of NATURAL HISTORY magazine.

APPENDIX A

SENIOR OFFICERS LEGAL ORIENTATION SURVEY

(Data base: **22**)

1. Have you ever served—or are you now serving—in an assignment in which you were (or are) a special court-martial convening authority?

14/63.7% a. Yes.

8/36.4% b. No.

2. If your answer to Question 1 is “yes”, approximately how many cases did you refer for trial per month?

1/ 4.5% a. **Less** than 1 per month.

4/18.2% b. 1 to 3 per month.

3/13.6% c. 3 to 5 per month.

3/13.6% d. 5 to 10 per month.

2/ 9.1% e. Over 10 per month.

Note: For all subsequent questions, assume that you are now a special court-martial convening authority. If you have in fact served in that capacity, your answers may be based on your past experience. If you have not so served, your answers should be based on the way you believe you would act and react in that position.

3. **How** do you, as a special court-martial convening authority, regard the function of a court-martial?

1/ 4.5% a. Strictly as an “instrument of justice” to determine guilt or innocence, and to adjudge an appropriate sentence where necessary.

20/91.0% b. An “instrument of justice,” but also a key disciplinary tool of a commander.

1/ 4.5% c. Primarily a disciplinary tool, but one which is generally guided by law and basic concepts of justice.

0 d. Other (please specify): _____

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4. Assuming that a referred case resulted in a conviction and was then presented to you for approval, what is your inclination (admittedly a subjective generalization) as to clemency?
- 5/22.7% a. In most cases, I would probably approve the sentence as adjudged, wishing to abide by the decision of the court.
 - 8/36.4% b. In most cases, I would probably suspend a portion or all of any confinement where possible to give the accused soldier an incentive to keep out of trouble.
 - 7/31.8% c. I would have no noticeable "inclination" one way or the other, for whatever reason.
 - 2/ 9.1% d. Other: _____
-
5. The UCMJ now requires that court-martial members be selected, at least ultimately, by the convening authority. How do you regard this requirement?
- 3 13.6% a. I am in favor of it, for I have the opportunity to keep off members who would be disproportionately defense-oriented and those who are disproportionately prosecution-minded.
 - 1/ 4.5% b. I would rather see the military judge or someone else pick the members.
 - 3/13.6% c. I would like to see the requirement changed because it has the "appearance of evil"; e.g., some people think I deliberately "stack a court" to get a conviction.
 - 11 50.0% d. It's just another "requirement" of the UCMJ, and I fulfill it *by* being "ultimately responsible," but the actual selection of the members, in my organization, is a job I leave to a staff member. I usually approve their recommendation as to court composition.
 - 6/27.3% e. I am in favor of some method of random selection.

JURY SELECTION

3/13.6% f. Other: _____

6. Regarding the so-called "random selection of court members," I believe that

1/ 4.5% a. Such a system should be adopted without reservation.

3/13.6% b. Random selection is a nice principle, but it is impossible to administer in the military.

2/ 9.1% c. Such a system deprives me of my authority to appoint members of my own choosing, a power I regard as essential to the proper maintenance of discipline in my unit.

2/ 9.1% d. Random selection would be all right so long as I still had the authority to make a final review of the case after trial.

6/27.3% e. Random selection would be all right so long as I still had the authority to establish the criteria for the group from which members would be selected at random.

9/40.9% f. Random selection would be all right so long as the system would not result in a man being tried by his juniors or members from the same unit as the accused.

7. What do you believe are the chief problems, if any, with appointing lower grade enlisted personnel to a court?

3/13.6% a. I do not believe there are any inherent problems, at least no more so than is the case with civilian juries.

5/22.7% b. Lower grade EM would be subject to the improper influence of senior members.

15/68.3% c. They do not have enough training and experience in the Army, particularly in military justice matters.

3/13.6% d. They would be inclined to be overly sympathetic to an enlisted accused,

3/13.6% e. They would be inclined to use their position on the court as an opportunity to "get even

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with the establishment” if the accused happened to be senior to them.

4/18.2% f. Other: Greater difficulty w/issues.

8. When appointing court members, do you believe it is desirable to try and get a “representative cross-section” of the military community?

3/13.6% a. Yes. It’s not only desirable, but essential.

9/40.9% b. Yes, but it’s not really essential.

10/45.5% c. No. A true “cross-section” would be bottom-heavy with the lower enlisted grades and the interests of discipline would suffer.

0 d. Other: _____

9. What criteria do you establish for the selection of court members?

As to age:

20/91.0% a. No criteria. 1 = 21

2/ 9.0% b. Must be at least _ years old. 1 = 22

As to education:

10 45.5% c. So criteria.

6 27.3% d. High School graduate.

5/22.7% e. Some college background.

0 f. College graduate.

As to grade:

1 4.5% g. No criteria.

2 9.1% h. Must be an officer (of any grade).

7/31.8% i. Must be at least one senior officer.

10/45.5% j. E-7 or above if the accused requests enlisted members.

14 63.7% k. Must be senior to the accused.

l. Other: _____

JURY SELECTION

As to temperament:

- 6/27.3% m. **No** criteria.
- 10/45.5% n. Must be fair and impartial at all costs.
- 8/36.4% o. Should be aware of disciplinary problems in the command, but still able to be impartial.
- 0 p. Other : _____

As to any other criteria classification (specify):

- 3/13.6% q. Additional criteria (#1) : Availability
- 0 r. Additional criteria (#2) : _____

10. If a case you've referred results in acquittal, or results in a conviction but with a sentence that you regard as much too lenient, what action would you take as the convening authority as to the court members?

- 1/ 4.5% a. **No** official action, but I'd let them know that they didn't do their job.
- 2/ 9.1% b. I would say nothing, but I probably would not appoint them as court members again.
- 8/36.4% c. Take no action nor make any comment whatsoever.
- 12/54.6% d. Make an informal inquiry to ascertain the basis for the acquittal or lenient sentence to the end of correcting any procedural errors within my command.
- 0 e. Teach the court members a lesson by assigning the ex-accused to one of their units "for rehabilitation."
- 3/13.6% f. I would counsel the court members generally on the duties and responsibilities of persons serving on courts-martial.
- 5/22.7% g. If the accused was acquitted and I still believed him guilty—perhaps vital evidence couldn't get before the court due to legal technicalities—I would try to eliminate the man from the service by means of administrative action.

APPENDIX B

STAFF JUDGE ADVOCATES SURVEY

1. Approximately how many cases are referred for trial by your convening authority per month (original jurisdiction GCM's only)?

BASE 66

- 23/34.8% a. Less than 1 per month.
- 18/27.3% b. 1 to 3 per month.
- 7/10.6% c. 3 to 5 per month.
- 13/19.7% d. 5 to 10 per month.
- 5/ 7.6% e. Over 10 per month.

2. The UCMJ presently requires that the convening authority ultimately select the members of the court-martial, but who makes the initial selection within your GCM jurisdiction?

BASE 65

- 7/10.8% a. Convening Authority himself.
- 0/00.0% b. SJA.
- 1 1.5% c. Other person assigned to the SJA Office; e.g., DSJA, Admin Officer, etc.
- 44 67.7% d. Personnel assigned to G-1 office (or equivalent).
- 13/20.0% e. Personnel assigned to headquarters staff section other than G-1 or SJA.

3. If someone other than the convening authority makes the initial selection, has the Convening Authority provided him with explicit guidelines or is he solely limited by the existing provisions of the UCMJ?

BASE 57

- 6/10.5% a. The Convening Authority has established explicit guidelines as to age, grade, training and experience, and other relevant considerations.

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26/45.6% b. No explicit guidelines have been established, and the person who makes the initial selection of court members exercises his own discretion within the limits of the UCMJ.

25/43.9% c. The Convening Authority has established some guidelines and has left others up to the discretion of his delegatee.

4. In what percentage of cases within your jurisdiction does an accused request enlisted members serve on his court (all cases, including non-BCD SPCM)?

BASE 58

51/88.0% a. 0% to 5%.

4/ 6.8% b. 5% to 10%.

3/ 5.2% c. 10% to 25%.

0/00.0% d. 25% to 50%.

0/00.0% e. Over 50%.

5. When enlisted members are requested, those selected are

BASE 58

27/46.6% a. usually senior enlisted personnel (E-7, E-8, or E-9).

25/43.1% b. usually of all grades, senior and junior, but all members are of a higher grade than the accused.

6/10.3% c. usually of all grades, senior and junior, including EM in the same grade as the accused, but all members outrank the accused.

6. It has been your experience that, as a general rule, when enlisted personnel serve as court members

BASE 67

8/11.9% a. there is a higher probability of conviction.

3/ 4.57% b. there is a higher probability of acquittal.

56/83.6% c. there is no perceptible change in probability for conviction or acquittal.

7. Do you believe that EM sitting as court members mete out stiffer sentences, as a general rule, than does an all-officer court?

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BASE 70

19/27.2% a. Yes.

51/72.8% b. No.

8. How do you generally regard the criticisms which have been leveled at the military justice system by some civilian jurists, legislators, media commentators, and even servicemen; i.e., "stacked juries," "denial of right to indictment by grand jury," "no trial by one's peers," "unduly harsh sentences for petty offenses," etc.?

BASE 71

27/38.0% a. I believe the allegations are completely untrue and unfair, and are generally due to an ignorance of the way the system operates.

5 7.0% b. I believe the allegations are completely untrue and unfair, and are made in an attempt to gain popular acclaim at the expense of the military.

39 55.0% c. While most of the allegations are unwarranted, there is a germ of truth in some of the criticisms. No system is perfect.

0/00.0% d. Most of the allegations are based on fact, and there is a definite need for improvement in the military justice system; some of the criticisms, however, are absolutely unwarranted.

0/00.0% e. All of the criticisms I have heard are well made. The military justice system is in need of a complete overhaul.

9. If Congress were to modify the UCMJ in such a way as to require the appointment of court members by someone other than the convening authority, what do you think would be the effect on a commander's ability to maintain discipline within his unit?

BASE 72

52/72.2% a. There would be no appreciable effect at all, since only a very small percentage of troops

JURY SELECTION

are ever court-martialed anyway. The “maintenance of discipline” is based on leadership and other considerations which far outweigh the significance of who it is that appoints court members.

- 1/ 1.4% b. Such a provision would seriously impair the commander’s ability to maintain discipline. No other person is as well aware of the problems in his organization.
- 8/11.1% c. Such a provision would definitely have some impact on a convening authority’s ability to maintain discipline, but I am unsure as to how great or small the impact would be.
- 11/15.3% d. Such a provision might have some impact on a convening authority’s ability to maintain discipline, but I am unsure as to how great or small the impact would be.

10. What do you believe is the principle problem, if any, with appointing lower grade enlisted personnel to a court?

BASE 69

- 25/36.3% a. I do not believe there are any inherent problems, at least no more so than is the case with civilian juries.
- 5/ 7.2% b. Lower grade EM would be subject to the improper influence of senior members, however subtle it may be.
- 24/34.8% c. They do not have enough training and experience in the Army, particularly in military justice matters.
- 10/14.5% d. They would be inclined to be overly sympathetic to an enlisted accused, or would use their position on the court as an opportunity to “get even with the establishment.”
- 5/ 7.2% e. They would have greater difficulty in understanding complex legal and factual issues.

11. Presupposing any prerequisite statutory or regulatory change were made, would you be in favor of some method of random selection of court members if such could be devised?

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BASE 71

- 35/49.2% a. Yes.
29/40.9% b. No.
7/ 9.9% c. I am uncertain.
12. Some of the legislation pending before Congress would create a different system of military justice, one which would leave petty offenses to the command (for company or field grade Article 15's) but would, once a major offense was reported or discovered, completely remove the accused and the entire trial process from the unit. Conceptually, would you be in favor of such a system?

BASE 72

- 33/45.8% a. Yes.
15/20.8% b. No.
24/33.4% c. I am undecided; the feasibility of such a system depends on the mechanics involved.
13. How often does your Convening Authority accept your recommendations as to referring a case for trial or as to sentencing (i.e., with either no modification or only minor modification of the recommendation)?

BASE 66

- 25/37.9% a. Always (100%).
39/59.1% b. Almost always (90% to 99%).
2/ 3.0% c. Most of the time (75% to 89%).
0/00.0% d. About half of the time (40% to 74%).
0/ 00.0%; e. Less than half of the time (Less than 40%).

APPENDIX C

COMMAND AND GENERAL STAFF COLLEGE SURVEY

1. Have you ever served in an assignment in which you were a special or general court-martial convening authority?

BASE 230

18/ 7.7% a. Yes.

212/92.3% b. No.

2. If your answer to Question 1 is “Yes,” approximately how many cases did you refer for trial per month? (Note: Leave blank if your answer to Question 1 was “No”.)

BASE 17

6/35.4% a. Less than 1 per month.

8/47.0% b. 1 to 3 per month.

3/17.6% c. 3 to 5 per month.

0 d. 5 to 10 per month.

0 e. Over 10 per month.

3. What is your present grade?

BASE 230

1/ 0.4% a. Colonel or above (0-6).

7/ 3.0% b. Lieutenant Colonel (P) (O-5).

63/26.4% c. Lieutenant Colonel (O-5).

31/13.5% d. Major (P) (O-4).

128/55.6% e. Major or below (0-4).

4. What is your branch within the service?

BASE 230

63/27.4% a. Infantry.

25/10.9% b. Armor.

48/20.8% c. Artillery.

90/39.1% d. Other Army branch.

4/1.8% e. Other service (USN, USMC, USAF).

5. Considering the relationship between the military justice system and unit discipline, I believe that

BASE 228

- 58/25.4% a. the relationship is essentially the same as that which exists in civilian society between civilian criminal laws and the general need to preserve law and order; both courts-martial and civilian trials have the sole function of determining guilt or innocence and of adjudging an appropriate sentence where necessary.
- 94/41.3% b. the relationship is essentially similar to the civilian system of justice and the general need to preserve law and order, but the military services also have special requirements and the military justice system is designed to assist officers and non-commissioned officers in fulfilling these requirements of leadership, command responsiveness, and the need to maintain morale.
- 31/13.6% c. the relationship is generally similar to the civilian system of justice and the general need to preserve law and order, but the military system is principally designed to insure prompt obedience to lawful orders; this is necessary because such orders may demand a great personal risk which would not be voluntarily undertaken.
- 45 19.7% d. the relationship cannot be legitimately compared to the civilian system of justice at all because the civilian criminal statutes and civilian criminal procedures are generally designed to preserve law and order whereas the military justice system created by Congress is principally designed to assist in maintaining an effective fighting force, although it is generally guided by law and basic concepts of justice.

JURY SELECTION

6. Assuming that a case you referred for trial resulted in a conviction and was then presented to you for approval, do you feel that you would have some type of inclination or predisposition as to clemency?

BASE 230

- 102/44.4% a. In most cases, I would probably approve the sentence as adjudged, wishing to abide by the decision of the court; however, I would decide each case on its own merits.
- 40/17.4% b. In most cases, I would probably suspend a portion or all of any confinement where possible to give the accused soldier an incentive to keep out of trouble; however, I would decide each case on its own merits.
- 88/38.2% c. I would have no noticeable "inclination" one way or the other.

7. The UCMJ now requires that court-martial members be selected, at least ultimately, by the convening authority. How do you regard this requirement?

BASE 228

- 32/14.0% a. I am in favor of it, for I have the opportunity to exclude members who would be disproportionately defense or prosecution oriented.
- 65/28.5% b. I would like to see the requirement changed or modified in some way for it has the "appearance of evil"; that is, some people think convening authorities deliberately "stack the court" to get a conviction.
- 30/13.2% c. It's just another "requirement" of the UCMJ, and I fulfill it by being "ultimately responsible," but the actual selection of the members is a job I leave to a staff member. I usually approve his recommendation as to court composition.
- 101/44.3% d. I am in favor of changing the prevent requirement, substituting some method of random selection.

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8. Regarding the so-called "random selection of court members," I believe that

BASE 224

- 9 4.0% a. it's a nice principle, but is impossible to administer in the military.
- 5/ 2.2% b. such a system deprives me of my authority to appoint members of my own choosing, a power I regard as essential to the propelmaintenance of discipline.
- 25/11.1% c. random selection would be all right so long as I still had the authority to make a final review of the case after trial.
- 72/32.2% d. random selection would be all right so long as I still had the authority to establish the criteria for the group from which members would be selected at random.
- 113 50.5% e. random selection would be all right so long as the system would not result in a man being tried by his juniors or members from the same unit as the accused.
9. What do you believe is the principal problem, if any, with appointing lower grade enlisted personnel to a court?

BASE 226

- 74/32.8% a. I do not believe there are any inherent problems, at least no more so than is the case with civilian juries.
- 48/21.2% b. Lower grade EM would be subject to the improper influence of senior members, be it ever so subtle.
- 60/26.6% c. They do not have enough training and experience in the Army, particularly in military justice matters.
- 29 12.8% d. They would be inclined to be overly sympathetic to an enlisted accused, or would use their position on the court as an opportunity to "get even with the establishment."
- 15/ 6.6% e. They would have greater difficulty in understanding complex legal and factual issues.

JURY SELECTION

10. When appointing court members, do you believe it is desirable to try and get a “representative cross-section” of the military community?

BASE 229

- 57/24.9% a. Yes. It’s not only desirable, but essential if justice is to be done.
- 74/32.3% b. Yes, but it’s not really essential for a fair trial.
- 32/14.0% c. No. A true “cross-section” would be bottom-heavy with the lower enlisted grades, if the accused requested enlisted members, and the interests of discipline would suffer.
- 66/28.8% d. No. I’m supposed to pick those people who are, in my opinion, “best qualified” for the duty; a true “cross-section” would, of necessity, include average and even mediocre personnel.

11. When appointing court members and considering the criteria of age, I

BASE 228

- 162/71.1% a. have no established criteria as to age.
- 39/17.1% b. believe the court members should be at least 21.
- 11/ 4.8% c. believe the court members should be at least 25.
- 3/ 1.3% d. believe the court members should be at least 30.
- 15/ 5.7% e. believe the court members should at least be older than the accused.

12. When appointing court members and considering the factor of education, I

BASE 229

- 158/69.0% a. have no established criteria as to education.
- 44/19.2% b. believe the court members should be at least a high school graduate.

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- 9/ 3.9% c. believe the court members should have some college background.
- 2/ 0.9% d. believe the court members should be college graduates.
- 16 7.0% e. believe the court members should have the same or a higher level of education as the accused.

13. When appointing court members and considering the criteria of grade, I

BASE 228

- 37/16.3% a. have no established criteria as to grade.
- 50/21.9% b. believe that at least 1/3 of the court members should be approximately the same grade as the accused, although they must be senior to him if at all possible, as required by the seniority provision in the UCMJ.
- 91/39.9% c. believe that all grades should be represented on the court, although each man must at least be senior to the accused if at all possible. However, under the present UCMJ, I cannot appoint "all grades" unless the accused specifically requests enlisted personnel serve on his court.
- 50/21.9% d. believe that the court should be primarily composed of either senior officers or officers who have had a lot of experience in military justice matters, unless the accused requests enlisted members.

14. Should an enlisted accused request enlisted members on his court, I

BASE 228

- 41 18.0% a. have no established criteria as to their grade.
- 41/18.0% b. believe E7's or above should be appointed exclusively, for they are more likely to have the requisite experience, knowledge, and maturity.
- 78/34.2% c. believe that all grades should be represented

JURY SELECTION

on the court, although each man must at least be senior to the accused if at all possible.

- 68/29.8% d. believe at least some of the court members should be of the same grade as the accused, although they must still out rank the accused by date of rank due to the seniority requirement of the **UCMJ**.

15. I know, as a convening authority, that the members I appoint to a court-martial are supposed to have a "proper judicial temperament." In practice,

BASE 228

- 40/17.5% a. this requirement is so vague as to be meaningless.

- 82/35.9% b. I believe this means, and I expect my appointees to be, fair and impartial at all costs.

- 20/ 8.8% c. I believe this means that my appointees should be fair and impartial, but they should still be aware of the disciplinary problems and requirements in the command.

- 86/37.8% d. I believe this means that the appointees should have demonstrated a certain evenness of temperament, a certain openness or receptiveness, which may be regarded as being fair and impartial.

16. If a case you've referred results in an acquittal, or results in a sentence that you regard as much too lenient, what action would you take relative to the court members?

BASE 225

- 10/ 4.4% a. I would say or do nothing, but I probably would not appoint them as court members again.

- 89/39.5% b. I would take no action nor make any comment whatsoever.

- 105/46.7% c. I would probably make an informal inquiry to ascertain the basis for the acquittal or lenient sentence, as there may have been procedural errors within my command that I could rectify.

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- 13/ 5.8% d. I would counsel the court members generally on the duties and responsibilities of persons serving on courts-martial, but I would take care not to refer to the present case.
- 8/ 3.6% e. If the accused was acquitted and I still believed him guilty—perhaps vital evidence couldn't get before the court due to legal technicalities—I would try to eliminate the man from the service by means of administrative action.
17. How do you generally regard the criticisms which have been leveled at the military justice system by some civilian jurists, legislators, media commentators, and even servicemen; i.e., “stacked juries,” “denial of right to indictment by grand jury,” “no trial by one's peers,” “unduly harsh sentences for petty offenses,” etc.?

BASE 227

- 35/15.4% a. I believe the allegations are completely untrue and unfair, and are generally due to an ignorance of the way the system operates.
- 25/11.0% b. I believe the allegations are completely untrue and unfair, and are made in an attempt to gain popular acclaim at the expense of the military.
- 140/61.8% c. While most of the allegations are unwarranted, there is a germ of truth in some of the criticisms. No system is perfect.
- 26/11.4% d. Most of the allegations are based on fact, and there is a definite need for improvement in the military justice system; some of the criticisms, however, are absolutely unwarranted.
- 1/ 0.4% e. **All** of the criticisms I have heard are well made. The military justice system is in need of a complete overhaul.
18. If Congress were to modify the UCMJ in such a way as to require the appointment of court members by someone other than the convening authority, what do you think would be

JURY SELECTION

the effect on a commander's ability to maintain discipline within his unit?

BASE 228

- 143/62.7% a. There would be no appreciable effect at all, since only a very small percentage of troops are ever court-martialed anyway. The "maintenance of discipline" is based on leadership and other considerations which far outweigh the significance of who it is that appoints court members.
- 4/ 1.8% b. Such a provision would seriously impair the commander's ability to maintain discipline. No other person is as well aware of the problems in his organization.
- 29/12.7% c. Such a provision would definitely have some impact on a convening authority's ability to maintain discipline, but I am unsure as to how great or small the impact would be.
- 52/22.8% d. Such a provision might have some impact on a convening authority's ability to maintain discipline, but I am unsure as to how great or small the impact would be.

19. Would you oppose or support a system of military justice that would leave petty offenses to the command (for company or field grade Article 15's) but would, once a major offense was reported or discovered, completely remove the accused and the entire trial process from the unit?

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- 66/29.2% a. I would be in favor of such a system for it would relieve the commander and the unit itself from the many burdens of the present system.
- 51/22.6% b. I would be in favor of such a system, but my reasons are other than those mentioned in "a" above.
- 33/14.6% c. I would be against such a system for I believe the commander should have a voice in deciding which cases warrant trial, where

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the trial should be, and who should sit in judgment of the accused.

- 24/10.6% d. I would be against such a system, but my reasons are other than those mentioned in "c" above.
- 52/23.0% e. I am undecided; the feasibility of such a system depends on the mechanics involved.

APPENDIX D. MODEL POST REGULATION

Headquarters
Fort Blank, Missouri
15 August 1972

Post Reg.
No. 27-10-1

JUROR SELECTION PLAN FOR GENERAL AND SPECIAL COURTS-MARTIAL

1. Reference: Article 25, UCMJ.

2. Purpose.

It is the policy of this installation that, even though service members relinquish some of their rights as citizens due to the needs of the armed forces, the curtailment of individual freedoms and privileges should nonetheless be minimized and restricted solely to those areas where the military has a paramount interest. It is the purpose of this regulation to apply this philosophy to the selection of jurors for the trial of general and special court-martial cases at Fort Blank, Missouri.

3. Objectives.

The juror selection concepts and procedures herein enumerated are designed to ensure the attainment of the following objectives :

a. the prompt and fair trial of any accused charged with an offense under the Uniform Code of Military Justice whose case is referred to a general court-martial or special court-martial convened at Fort Blank, Missouri ;

b. the preservation of all statutory rights and privileges granted to an accused by the Uniform Code of Military Justice;

c. the elimination of any appearance of impropriety on the part of those charged with the responsibility of administering the military justice system ; and

d. a greater understanding of the military justice system on the part of all personnel assigned to Fort Blank, Missouri, resulting from their increased participation in the administration of military justice and the elimination of the vagueness, confusion, and ignorance which have often obscured the jury selection procedures of courts-martial.

4. Selection Procedures.

a. General. Consistent with the principles necessary to ensure

the preservation of all statutory rights and privileges granted to an accused by the Uniform Code of Military Justice, all court members who shall be detailed as jurors will be selected at random from the military community stationed at Fort Blank, Missouri. Their qualification or disqualification for service shall be determined solely on the basis of the objective criteria hereinafter stated.

b. Source of Potential Jurors. The grade, name, address, and organization of potential jurors shall be obtained from the Post Locator File located in Building T-406. The Commanding General has determined that this file constitutes the most comprehensive source available at Fort Blank, and that existing policies relating to in-processing and out-processing are adequate to ensure that the file is always current.

c. Selection of Prospective Jurors.

(1) *Responsibilities.* The Administrative Officer, Office of the Staff Judge Advocate, Fort Blank, Missouri, is the responsible individual for selecting the names of potential jurors from the Locator File. This selection is to be performed in the presence of two witnesses who may be called upon to assist in the process of selection.

(2) *Selection Procedure.* Past experience at Fort Blank, Missouri, has been that during any particular month an average of six general courts-martial and seventeen special courts-martial are conducted. Since each general court-martial requires ten jurors and each special court-martial requires six jurors, a total of 162 jurors are potentially needed each month. The Commanding General has determined that, in order to obtain these jurors, a total of 300 names should be selected at random from the Locator File by the Selecting Official. These names will be listed in the order drawn on a Prospective Juror List (Annex A). The list shall be verified by those who witnessed the selection process and then maintained by the Selecting Official.

d. Determination of Juror Qualification.

(1) *Procedure.* In order to avoid untimely delays at trial, the Selecting Official will conduct a preliminary screening of all personnel on the Prospective Juror List. This screening will be conducted by mailing a questionnaire to each individual on the list to verify his qualification to serve as a court-martial juror (Annex B). The questionnaire also indicates whether the individual has been exempted from jury service due to his assignment or duties. Should the questionnaire, on its return, indicate possible disquali-

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fication or exemption, the Selecting Official will verify the basis therefor by contacting the individual by telephone or through a personal interview. If the prospective juror is, in fact, disqualified or exempt from service, the Selecting Official will note same in Column "f" on the Juror List. Once all questionnaires have been returned and evaluated, all personnel on the Juror List who have not been disqualified or exempted from service shall be considered Qualified Jurors and may be selected for court-martial duty as the need arises. Qualified jurors will be notified of their status by an announcement in the Fort Blank Daily Bulletin, and will be summoned for a trial, as needed, by a trial counsel.

(2) *Responsibilities of Prospective Jurors.* All prospective jurors, upon receipt of the questionnaire, are directed to complete and return the form no later than one week after receipt. An attempt to avoid juror service by wilfully violating this order is an offense punishable under the Uniform Code of Military Justice. Additionally, all questions must be answered truthfully, without any attempt at evasion or subterfuge. Wilfully answering any question incorrectly constitutes making a false official statement, also an offense punishable under the Code.

(3) *Period of Service.* All qualified jurors are eligible for courts-martial service for three months. The reference in para. 4(c) (2) above is solely designed to obtain a raw quantity for the purpose of selection from the Locator File. Prior to the expiration of the three month cycle of service, the Selecting Official will proceed according to para. 4 (c) to compile a new juror list.

e. Selection and Detail of Trial Jurors.

(1) *General.* In the absence of a request from an accused that his jury contain enlisted members, the Selecting Official will prepare a panel consisting solely of officers, as required by the Uniform Code of Military Justice. Should an accused desire the presence of enlisted members, he must make this request in writing prior to the convening of the court. In no case will a juror, officer or enlisted, be selected who—

- (a) is a member of the same unit as the accused ;
- (b) has acted as accuser in the case ;
- (c) will be called as a witness in the case;
- (d) has acted as an investigator in the case; or
- (e) is junior to the accused in grade or by date of rank.

(2) *Procedure.* All Qualified Jurors will be assigned a number by the Selecting Official which corresponds to that appearing on a token or disc. These discs will be placed in a revolving wheel

or cage. After mixing the discs, the Selecting Official will withdraw names until an appropriate number of jurors have been selected. Should a qualified juror having one of the disabilities mentioned in subparagraph (1) above be drawn, said juror will be disregarded and the disc returned to the jury wheel. Similarly, the names of all enlisted personnel are to be disregarded unless the accused has requested enlisted members on his jury.

5. Juror Qualification Criteria.

Only objective criteria will be used in determining the competency of individuals at Fort Blank, Missouri, to serve as court-martial jurors. These criteria are enumerated on the Jury Qualification Questionnaire, Annex B.

DATE OF SELECTION:
 PERIOD OF SERVICE:

MASTER JURY LIST

Name (a)	Rank (b)	Unit (c)	Address (d)	Questionnaire Returned (e)	Exempt or Disqual. (f)	No. (g)
Smith, Richard C.	SSG (E6)	CoA, 3/16th	Same	Yes	None	1
Doe, Alan A.	1stLt	HHC, USAG	316 Merriam Ct.	Yes	Yes—c	
Blaust, Henry K.	LTC	HHC, USAG	* * * * *	*	*	
Adams, Oscar B.	SFC (E7)	20thTrans	420 Alamo Plaza	Yes	None	248
Keith, Omar J.	PVT (E2)	316thMaint	379 Dozer Ct.	Yes	Yes—c	
Hilgrade, Burke A.	CPT	CoD, 4/23d	Same	Yes	None	249
			Same	Yes	None	276

WITNESSES:

Selecting Official:

 J. W. Dant, CWO
 Office of the Staff Judge Advocate

HEADQUARTERS
FORT BLANK, MISSOURI

FBMJA

(Date)

SUBJECT: Juror Qualification Questionnaire

TO:

1. You have been selected as a prospective juror for the conduct of trials by court-martial at Fort Blank during the period to _____ .
2. You are herewith directed to complete the attached Juror Qualification Questionnaire and return it to this headquarters, ATTN: FBMJA, no later than ___ ___
3. Failure to comply with this directive or wilful falsification of entries made on the questionnaire constitute offenses punishable under the Uniform Code of Military Justice.

FOR THE COMMANDER:

Annex B

JURY SELECTION

Period: _____ to _____

Juror No. _____

JUROR QUALIFICATION QUESTIONNAIRE

Item	Yes	No
1. Will you be at least 21 years of age by the beginning date of the period mentioned above?		
2. Are you a citizen of the United States?		
3. Have you been in the military service on active duty for at least 1 year?		
4. Have you been at Fort Blank, Missouri, either assigned or attached, for at least six months?		
5. Do you anticipate a permanent change of station during the period mentioned above?		
6. Can you read, write, speak, and understand the English language?		
7. Are you presently in a state of sufficient good health, mental and physical, so that you could render competent jury service?		
8. Is it true that you have never been convicted of a felony or a crime involving moral turpitude, either by a civilian or military court?		
9. Is it true that during your present enlistment or the previous three years, whichever is shorter, you have not received nonjudicial punishment under the provisions of Article 15, UCMJ, more than twice?		
10. Is it true that you are not presently scheduled to participate in an annual training test, annual general inspection, or major field exercise during the period mentioned above?		
11. Is it true that you are not presently assigned as a post or division commander, assistant division commander, brigade commander, or as a principal staff officer of the post or a division?		
12. Is it true that you are not a doctor assigned to the Medical Corps or Veterinary Corps, a lawyer assigned to the Judge Advocate General's Corps, or a religious minister, priest, or rabbi assigned to the Chaplain's Corps?		
13. Is it true that you do not have an approved leave of absence, nor have you applied for such leave of absence, for any portion of the period mentioned above?		

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NOTE: If the answer to this question is no,
indicate your period of absence:

From _____

To _____

I do hereby certify that the answers I have given to the above questions
are true to the best of my knowledge and belief.

NAME (Please Print): _____

Signature

Unit or Address:

Grade: _____

Date of Rank: _____

THE LAW OF ENVIRONMENTAL RESPONSIBILITY:

A New Field for the Military Lawyer+

Captain John E. Kirchner**

The battle for the quality of the American environment is a battle against neglect, mismanagement, poor planning, and a piecemeal approach to problems of natural resources.'

I. INTRODUCTION

Two recent significant lawsuits have illustrated that the military departments cannot remain neutral in the battle over the "issue of the decade."² In California, a Federal District Judge ruled that an Army Installation Commander must comply with State administrative orders to stop polluting Monterey Bay.³ In addition, the Commander was held subject to suit for monetary damages for past violation of those orders.⁴ In Maine, local and

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

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'A Strategy of Quality: Conservation in the Seventies, Radio Address by Richard M. Nixon, 18 October 1968 (*reprinted in Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 1969)) [hereafter cited as Hearings on S. 1075].

² *Cape May Izaak Walton League v. Macchia*, 329 F. Supp. 504, 2 ERC 1661, 40 USLW 2001 (D.N.J. 1971) at 1661. [In recognition of the limitations and diversity of most Army legal libraries, authorities cited herein will attempt to include all known sources. Federal cases in the environmental field are frequently quite recent and many district court opinions are not published in official reports. For this reason, cases are frequently published only in the Bureau of National Affairs publication, *Environment Reporter*. Unless otherwise indicated, page citations for cases will be to the latter service (ERC). Additionally, it should be noted that many of the environmental cases have acquired descriptive names to overcome the problem of lengthy style and the fact that many cases involve identical parties. These descriptive titles are used throughout the text and are indicated in brackets in the initial footnote citation].

'*California v. Davidson*, 3 ERC 1157 (N.D. Cal., 19 January 1971 (Unpublished)) [*Fort Ord*].

'*Id.* at 1158. Because the case was dismissed by mutual consent on 14 July 1971 there was no challenge to this conclusion. The case was undoubt-

national citizen groups sought an injunction to block "Operation Snowy Beach"—a joint Navy/Marine amphibious training maneuver.⁵ The Federal District Court denied the injunction because the Navy was able to show "Full good faith compliance with the substantive and procedural requirements . . ." ⁶ of what has been described as "one of the cleverest pieces of legislation devised in recent years."⁷

With the passage of The National Environmental Policy Act of 1969⁸ the Federal Government, and thus the military departments, acquired a major new responsibility in the battle for environmental quality. As the mere mention of the word "lawsuit" suggests, the military lawyer can expect to be called upon to assist in both understanding and meeting that responsibility. Unfortunately, it is quite possible that only a few Army lawyers were even aware of *NEPA* until January 1972 when a Department of Army letter recommended "that command legal offices be represented on command environmental committees."⁹ On the perhaps questionable assumption that most local commands now have such a committee and that a lawyer has been assigned to it, this article offers an introduction to the Law of Environmental Responsibility—a field which promises to become a larger part of the military lawyer's job description.

Beginning with Earth Day in April 1970 the public effort to achieve environmental quality gained national recognition and power. Traditional conservationist organizations experienced

edly complicated by the fact that the cease and desist orders were issued merely to "Ford Ord," but the suit was against General Davidson individually. Whether the possibility of personal liability is truly viable probably depends upon the nature of the state law and the particular facts of a given case. In New Jersey, however, the *Fort Ord* case has been cited as authority for issuance of cease and desist orders against military installations. *Reported in Current Developments Section*, Environment Reporter, Vol. 3, No. 31, 3 December 1971, at 920. (New Jersey issued such orders to Camp Charles Wood, Camp Evans, Fort Dix, Fort Hancock, Fort Monmouth, Lakehurst Naval Station, McGuire Air Force Base, Pedrickstown Arsenal and Picatinny Arsenal directing compliance with State water quality standards or connection to regional public treatment facilities by 29 February 1972). See further discussion in Section III.B.2.d., *infra*.

⁵ *Citizens for Reid State Park v. Laird*, (D. Maine, 21 January 1972) [*Reid State Park*].

⁶ *Id.* at 14. See further discussion in Section IV.B.2.d., *infra*.

⁷ Reynolds, *An Ephemeral Survey of Environmental Law*, AIR FORCE JAG L. REV. 169 (Summer, 1971) at 176.

⁸ 42 U.S.C. §§ 4321 *et. seq.* (1970) [hereafter cited as *NEPA*: references to this Act throughout the text will utilize the section numbers of the original Act, P.L. 91-190].

⁹ Dep't of Army Letter, DALA-INE, Subject: Environmental Protection and Preservations, para. 3, 10 January 1972.

great increases in membership.¹⁰ New organizations developed on both local and national levels.¹¹ Colleges and universities hurriedly added new courses, departments, and even degree programs.¹² The newly formed Council on Environmental Quality (CEQ) labeled 1970 as “the year of the environment”¹³ and one writer concluded :

The environmental policy—growing numbers of citizens and students intensely committed and deeply concerned about the growing problems of environmental pollution—promises to provide the major impetus for the development of an environmental ethic. The masses of environmental activists promise to develop the law of the environment and to inspire the lawmaker. The citizen and his law bequeath to us the blessings of a clean environment.”

“Environmental law” in its broadest sense is not so much a new body of law as it is the effect of a new “environmental ethic”¹⁵ on a variety of traditional legal principles. Because both the statutory and case materials are still in a formative process, the “survey of law” contained herein is scarcely more than “ephemeral.” What is intended is a basic starting point for the military lawyer who faces the difficult task of assisting his client in complying with “both the requirements *and the spirit* of Executive Order 11507, . . . and with [NEPA] as implemented by Executive Order 11514. . . .”¹⁶ Because the relatively few “requirements”

¹⁰ *E.g.* The Sierra Club, originally founded in 1892 primarily as an outdoor social group, increased from 40,000 members in 1968 to over 100,000 in 1970. *Environmental Quality, The First Annual Report of the Council on Environmental Quality*, August 1970, at 215 [hereafter cited as *1st CEQ Report*]. By 1971, membership in the five largest national environmental organizations had increased to 1.6 million, almost 33 percent over 1970. *Environmental Quality, The Second Annual Report of the Council on Environmental Quality*, August 1971, at 92 [hereafter cited as *2d CEQ Report*], (The annual CEQ Reports are highly recommended to anyone interested in obtaining a broad overview of the problems of the environment in summary form.)

¹¹ Winder, *Citizen Groups, The Law and The Environment*, 2 ENVIRONMENT L. REV. 40, 50 reprinted from 1970 UTAH L. REV. 404 (1970).

¹² Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 2 ENVIRONMENT L. REV. 87 (1971), at 88–89 (reprinted from 70 COLUM. L. REV. 612 (1970)). (Mr. Sive has been counsel in a number of major environmental lawsuits, most notably the *Storm King* case, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom., *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966)).

¹³ *1st CEQ Report* at 1.

¹⁴ Winder, *supra* note 11, at 50.

¹⁵ *Id.*

¹⁶ US Army Chief of Staff Memorandum 70–323, Subject: Protection and Enhancement of Environmental Quality, para. 5(a), 14 September 1970, extended until 31 August 1972 by Chief of Staff Memorandum 71–115–48, 5 August 1971. (emphasis added) [hereafter cited as *CofS Memo*].

presently in existence require considerable interpretation, the lawyer's present task is primarily to assist in understanding the "spirit" of the law.

As with most ephemeral beings, the spirit of the Law of Environmental Responsibility is elusive and perhaps transitory. For the most part it appears to depend upon one's perspective. But, like a religion, the variety of specific philosophies and interpretations are united by one fundamental belief in "environmental quality." While there may be little agreement on what environmental quality is, virtually everyone knows what it isn't. Even though we may not agree on *how* to achieve it, everyone agrees we must try. For these reasons, accurate prediction of legal rulings and statutory interpretations is largely dependent upon the accuracy of one's appraisal of the attitude of the Courts, the Congress, and the Public. That appraisal must begin with a look at the basic precepts of the "environmental ethic."

II. WHAT VALUES ARE PROTECTED?

Defining and protecting the values contemplated by the "environmental ethic" can be simplified if they are divided into two distinct categories: objective and subjective. The former involves the most obvious and fundamental of values—that of life itself. Thus, Pollution Abatement Laws are designed to define and protect the health and safety of human life, plant life, and animal life. Because the presence or absence of life is fairly simple to determine, the factors which are detrimental to life can be dealt with objectively. And, because pollution abatement is concerned with objectively definable values, enforcement can deal with direct cause and effect relationships.

The latter category, which is broader, is much more difficult for a society accustomed to the ever-increasing benefits of an advanced technology. Except for a few complex and specialized subjects, such as the law of future interests in property, the legal system is not normally concerned with the long-range problems associated with "responsibilities to future generations." The emerging law of Impact Assessment Decisions, however, is an attempt to deal with such long-range problems. As such, it seeks to introduce a legal framework by which the subjective values can be identified.¹⁷ In addition, it seeks to insure that the decisions made today will not overlook the indirect consequences which in the future will present a threat to the objectively determinable values protected by pollution abatement laws.

¹⁷ See Section IV, *infra*.

Too often, administrative officials and government managers, particularly in the military departments, may tend to equate "environmental quality" with a reduction in the amount of effluent dumped into the physical surroundings. The result is to deemphasize the broader and more important considerations of "sustaining and enriching" human life. For life to be more than mere existence, decisions must include an assessment of the total impact on the environment. Whether the same broadly based evaluation occurs at lower levels of command may depend upon how well the military lawyer understands and conveys the meaning of environmental impact assessment as contemplated by present law.¹⁸

On 4 February 1970, President Nixon issued Executive Order 11507 designed to insure protection of the objective values by federal facilities.

[T]he Federal Government in the design, operation, and maintenance of its facilities shall provide leadership in the nationwide effort to protect and enhance the quality of our air and water resources.

. . . Facilities shall conform to air and water quality standards [established by or in compliance with Federal statutes]."

Thirty days later, the President issued a similar order designed to insure protection of the subjective and long-range values which are inherent in the quest for "environmental quality." In furtherance of The National Environmental Policy Act of 1969, Executive Order 11514 declares that

The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures

¹⁸ During Congressional hearings conducted in the spring of 1970, Congressman Dingell expressed considerable concern over the Navy's apparent failure to "get out the word" about the requirement of Section 102(2)(C) of NEPA. At issue was the decision by a local commander to dump a quantity of waste oil in the ocean off the coast of Florida. Although there had been full compliance with Navy regulations and Federal pollution law, an impact statement was not prepared. *Hearings on Administration of the National Environmental Policy Act of 1969 Before the Subcomm. on Fisheries and Wildlife Comervation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., Ser. No. 91-41 (1970) [hereafter cited as *1970 NEPA Hearings*] at 15-18, 885-908. Presumably taking its cue from the incident, Dep't of Army added sea-dumping as a specific example of activity requiring an impact statement. Dep't of Army Letter, DAAG-PAP (M) (1 Sep 71) DALO-IN, Subject: Environmental Considerations in DA Actions, RCS DD-H&E(AR) 1068, para. B.2, Attach. 1 to Incl., 21 October 1971 [hereafter cited as *Army Guidelines*]; see Section IV.B.2.e., *infra*.

¹⁹ Exec. Order No. 11507, Subject: Protection, Control, and Abatement of Air and Water Pollution at Federal Facilities, § 1, 3 C.F.R. 524, 42 U.S.C. § 4321 (1970), 4 February 1970.

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needed to direct their policies, plans, and programs so as to meet national environmental goals [as specified in *NEPA*].²⁰

These two orders represent the two distinct responsibilities imposed on *all* Federal agencies by present law. However, considering the complexity of the following one-sentence definition upon which Department of Defense policy is based, the distinction between protection of objective values and subjective values may well be lost on the average person :

Environmental pollution is that condition which results from the presence of chemical, physical, or biological agents in the air, water, or soil which so alter the natural environment that an adverse effect is created on human health or comfort, fish and wild-life, other aquatic resources, and plantlife, structures, and equipment to the extent of producing economic loss, impairing recreational opportunity, or marring natural beauty."

In the absence of careful reading of this definition, the policy that "Pollution of the environment . . . shall be controlled"²² may be ineffective in overcoming the real threat to "productive and enjoyable harmony between man and his environment."²³

If the damage is to be prevented by elimination of past mistakes, even the Department of Defense must be compelled to account for the *full* consequences of its actions. Demonstration of Federal leadership must include not only the duty to avoid "neglected choices;" it must include the duty to make the "right" choice with respect to every consequence. The Federal government, including every military commander and decision-maker, must insure that it "both sets and abides by standards of excellence; standards which will insure that our generation fulfills its responsibilities as trustee of the environment for future generations."²⁴ Those responsibilities require a calculated effort to protect not only the objective values, but to provide a maximum consideration of the long-range, indirect effects and a sincere concern for the subjective values.

²⁰ Exec. Order No. 11514, Subject: Protection and Enhancement of Environmental Quality, § 1, 3 C.F.R. 531, 42 U.S.C. § 4431 (1970), 5 March 1970.

²¹ Dep't of Defense Directive 5100.50, ASD(H&E), Subject: Protection and Enhancement of Environmental Quality, para. IV.C., 23 June 1970; *CofS Memo*, para. 3.a.; and Army Reg. No. 11-21, *Environmental Pollution Abatement*, para. 1-3, 3 November 1967 (Change 2, 27 November 1970).

"*Id.* at para. V.A.

²³ 42 U.S.C. § 4321 (1970).

²⁴ Statement of Senator Jackson on introducing the amendment to S. 1075 which ultimately became Title I of NEPA. 115 CONG. REC. S7815 (daily ed. 10 July 1969).

III. THE OBJECTIVE VALUES — POLLUTION ABATE- MENT LAWS

A. *THE REGULATORY FRAMEWORK*

Because the most obvious value for future generations is that of life itself, the problems of preserving the necessities of life naturally should receive first priority.²⁵ Two of the most obvious necessities are air to breathe and water to drink. Fortunately, both are susceptible to objective standards and definitions. This is not to say that the legal, political and economic issues surrounding the definition of such values are easily resolved. But it is clear that by dealing with scientifically measurable conditions, legal standards will be far easier to establish in the area of direct pollution abatement.

Executive Order 11507²⁶ requires Federal facilities to conform to the standards adopted pursuant to the Clean Air Act²⁷ and the Federal Water Pollution Control Act.²⁸ In the absence of such standards, the Order requires compliance with standards set by the Secretary of Health, Education and Welfare (air) or the Secretary of the Interior (water).²⁹ The Clean Air Act and the *FWPCA* provide for the administrative establishment of specific quality standards and for the apportionment of enforcement responsibilities between the states and the Federal government. Under the judicially expanded power of the Refuse Act of 1899,³⁰ the Army Corps of Engineers also plays a significant role in the control of water pollution?

²⁵ Where resources to accomplish pollution control are limited, priority of effort will be afforded in accordance with the following order:

- (1) Those situations which constitute a direct hazard to the health of man.
- (2) Those having economic implications.
- (3) Those which affect the recreational and esthetic value of natural resources.

Army Reg. No. 11-21, para. 1-5g (3 Nov. 1967) [hereafter cited as **AR** 11-21].

²⁶ *Supra* note 19, at § 4(a) (1).

²⁷ 42 U.S.C. §§ 1857 (1970).

²⁸ 33 U.S.C. §§ 1151 *et seq.* (1970) [hereafter cited as *FWPCA*].

²⁹ *Supra* note 19, at § 4(b).

³⁰ 33 U.S.C. § 407 (1970). *United States v. Republic Steel*, 362 U.S. 482 (1960).

³¹ *See generally*, Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. REV. 304 (1971); But *see*, C. MEYERS & A. D. TARLOCK, *SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION* (1971) at 168:

It has struck many as curious that a federal agency with a historic disregard for environmental quality problems would be entrusted with administering a program which

Although familiarity with these statutes is important to the military lawyer, detailed discussion of them is beyond the purview of this article.³² Because "clean air" and "clean water" tend to be defined in more or less specific terminology, the military "polluter" and his attorney will be faced with the traditional process of applying the law to the facts. A particular form of fuel either meets minimum standards for sulfur content or it doesn't. Aqueous discharge from a sewage treatment plant will either have the requisite amount of dissolved oxygen or it won't. These questions must of necessity be resolved by a close working relationship between the judge advocate and the appropriate scientific and technological experts within the local staff. The hard legal question, it is submitted, that faces the military lawyer is not what the laws require, but what law his client is required to obey.

B. ENFORCEMENT PROBLEMS

The current federal philosophy of pollution abatement is that "The primary responsibility for implementing the [national environmental] policy rests with State and local governments."³³ This philosophy creates significant problems for military installations attempting to ascertain the "spirit" of Executive Order 11507. The principal legal issue arises from the unique interaction among the concepts of "state responsibility," "Federal supremacy" and "military necessity."

1. State Responsibility

While national in scope, problems of the environment retain many essentially local attributes which defy a single, nationwide solution. For example, the economic burden of municipal sewage treatment cannot be handled identically in Washington, DC and Junction City, Kansas. Likewise, differences in geography and population density prevent identical treatment of the general problem of air pollution.

In fulfilling its responsibility to meet environmental pollution goals, Department of Army policy recognizes the importance of a

gives the federal government the power to establish effluent standards for some 40,000 industrial discharges into navigable rivers.

Compare the foregoing statement with the attitude displayed by the Corps in *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970).

³² For a short summary of these laws, see Reynolds, *supra* note 7.

³³ The National Environmental Quality Improvement Act of 1970, P.L. 91-224, 91st Cong., 2d Sess., (3 April 1970), § 202(b)(2); § 1(b) of the FWPCA (33 U.S.C. 1151(b) (1970)):

[I]t is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. . . .

high degree of state responsibility.³⁴ Military installations encounter the same problems of land utilization, waste disposal, power consumption, and air, water, and noise pollution as most cities. Independent and unrelated programs in the same geographic area, therefore, may contribute little to an overall solution to the problem. Additionally, many of the decisions concerning that overall solution involve the type of economic value judgments which must necessarily reflect the interest of the citizens most significantly affected.

Unfortunately, military installations are not simply another municipality or governmental agency. Their primary reason for existence is to carry out an assigned mission, with their municipal functions purely incidental to that mission. As a part of a worldwide operation, military installations must be operated in accordance with the uniform policies and procedures of the Department of Defense. This fact, together with the doctrine of Federal supremacy, has contributed to the development of the amorphous philosophy of "military necessity." In the predictable collision between the desirability of state responsibility and "military necessity" the law is not yet settled. The specific responsibilities of military installations, therefore, cannot be determined without considering the effect of pollution abatement legislation on the broad immunity from state and local regulation enjoyed by Federal facilities.

2. *Federal Immunity.*

The inherent potential conflict in the dual-sovereignty form of government was recognized by the framers of the US Constitution and resolved in favor of the Federal government by Article VI.³⁵ The supremacy doctrine, combined with the traditional immunity of a sovereign, has provided both the Federal government and its officials and activities with considerable freedom from control by state and local governments.³⁶ Difficulties arise, however, when the federal government authorizes state and local regulation of federal activities without clearly spelling out the limits on such regulation. Such a problem had arisen in the mili-

³⁴ AR 11-21, para. 1-5b, states:

All Department of the Army components . . . will cooperate with local communities in the development of pollution abatement programs.

³⁵ . . . This Constitution, and the laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the land: and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding

U.S. CONST., Art. VI.

³⁶ See generally, Ch. IX, October 1965.

tary's implementation of state and local air and water pollution laws. The Defense Department has called for a narrow reading of state and local authority. Other federal agencies and many state and local governments have sought a broad reading of the Congressional grant of regulatory authority to state and local governments.

An examination of the controversy beings with the federal statutes. Section 118 of the Clear Air Act provides :

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such requirement if he determines it to be in the paramount interest of the United States to do so. . . .³⁷

Section 21 of the *FWPCA* deals with the obligation of Federal facilities in even vaguer terms :

[Departments, agencies, and instrumenalities] having jurisdiction over any real property or facility, or engaged in any Federal public works activity of any kind, shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this [Act]. . . .³⁸

As regards air or water *quality standards*, neither Act creates much ambiguity— federal facilities must meet such state or local standards. With respect to other “requirements respecting control and abatement” and legislation promoting the “purposes of this Act” there is considerable debate.³⁹

³⁷ 42 U.S.C. § 1857f. (1970) (emphasis added) It should be noted at this point that this section was adopted subsequent to the issuance of Exec. Order 11507. That order is presently being revised by the EPA and may resolve some of the issues discussed in the remainder of this section.

³⁸ 33 U.S.C. § 1171(a). (1970) (emphasis added) One of the purposes of the *FWPCA* is to induce the states to enact “a plan for the implementation and enforcement of the water criteria adopted” pursuant to the Act. The argument can thus be made that the *FWPCA* also requires compliance with more than merely quality standards. Pending legislation may result in change to section 21 of the *FWPCA* which will make the problem more acute. The present version of the new water pollution bill which has passed both the House and Senate has adopted the identical language of Section 118 of the Clean Air Act. Unless DOD attempts to clarify the issue before the Joint Conference Committee, it seems likely that the confusion will be compounded.

³⁹ On 30 November 1971, the Environmental Protection Agency raised the

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Following the Defense Department's lead, the Army adopted the philosophy that the laws require compliance with nothing more than quality **standards**.⁴⁰ Other state or local policies, procedures, or requests have been complied with only through cooperative effort "as a matter of comity when such requests have not been burdensome" ⁴¹ Army Regulation 11-21 does, however, provide some guidance for commanders and emphasizes the duty to cooperate.

Representatives from Federal, State, local and interstate environmental pollution control agencies may be permitted to inspect facilities, examine operating records, and make tests to determine adherence to environmental performance specifications, provided security restrictions are met and the inspectors are accompanied by either engineer or medical technical representatives designated by the general operating agency commander (AR 37-100 series). Every effort will be made to resolve problems or conflicts with these authorities at the lowest possible level. . . ."⁴²

What is lacking, unfortunately, is any guidance for the commander who wants to know whether he *must* comply with local requirements to obtain a permit prior to engaging in a one-time discharge of pollutants, even though that discharge will meet

issue which DOD had either ignored or overlooked when it issued a Memorandum of Law concluding that

Federal facilities must comply not only with Federal, State, interstate, and local emission limitations, but also with other "requirements respecting control and abatement of air pollution," except in the case of a requirement which falls within one of five exceptions. . . .

Those exceptions, according to the Memorandum, are (1) States may not impose special requirements which do not apply equally to private facilities, (2) States may not enforce Federally established emission standards (i.e. those set by the EPA), (3) States may not violate the Supremacy clause, (4) States may not enforce state law if there has been a Presidential exemption, and (5) States cannot enforce any law in violation of the Constitution or Federal statute. *Memorandum of Law, Air Quality & Radiation Division, Environmental Protection Agency, Subject: Scope of section 118 of the Clean Air Act ("Federal Facilities")*, prepared for the Ass't. Administrator for Enforcement & General Counsel, 30 November 1971. (*provided by Mr. Alan Kirk, Deputy General Counsel, EPA, on 20 Jan. 72*). See further discussion at note 69 and accompanying text, *supra*.

⁴⁰ Letter from Brigadier General George J. Haynes, Office of the Ass't. Sec. Def. (Health & Environment) to William D. Ruckelshaus, Administrator, EPA, 22 December 1971. (This letter, also provided by Mr. Alan Kirk, Dep. Gen. Counsel, EPA, began the debate between DOD and EPA which has yet to be resolved (as of April 1972)).

It is debatable whether the Army even considers itself bound to the quality standards. AR 11-21 (ch. 2, 27 Nov. 70), merely states:

Environmental quality standards prescribed in this regulation or established by the appropriate Federal, State, or local authority will be used in determining corrective measures to control pollution.

Para. 1-5c.

⁴¹ Letter from BG Haynes to Mr. Ruckelshaus, *supra* note 40.

⁴² AR 11-21, para. 1-5h (emphasis added).

applicable quality standards. Neither does it answer the question of whether he must convert his coal-burning facilities to natural gas because the state's policy is to discourage strip mining of coal, even though air quality standards are being met.⁴³

There is little "guidance" from higher headquarters for the military lawyer to use in resolving conflicts with state and local officials "at the lowest possible level."⁴⁴ For the present, he must rely upon his own understanding of the "federal immunity" which flows from such concepts as: exclusive jurisdiction;⁴⁵ sovereign immunity;⁴⁶ limited judicial review of administrative actions;⁴⁷ and, Federal supremacy.⁴⁸

(a) *Exclusive jurisdiction.* While perhaps relevant in connection with private suits to enforce state laws,⁴⁹ exclusive jurisdiction arguments will be of little help to the military lawyer.⁵⁰ In the first place, the policy of the Federal Government has been to discourage acquisition of such jurisdiction and to relinquish it to the greatest extent practicable.⁵¹ This policy has effectively reduced the number of installations subject to such immunity and probably would dictate that such a defense would not be pressed by the Justice Department.

More importantly, since the real issue is whether the Clean Air Act or the *FWPCA* requires state law to be followed, a claim that state law does not apply because only Congress can legislate for such land merely circumvents the issue. If the Federal Acts require that a given state law be followed, the state requirement

⁴³See discussion at note 69 and accompanying text, *infra*.

⁴⁴AR 11-21, para. 1-5h.

⁴⁵"The Congress shall have the power . . .

To exercise exclusive legislation in all Cases whatsoever . . . over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings. . . .

Article I, § 8, Cl. 17, U.S. CONST: See generally *Military Reservations*, *supra* note 36, Ch. IV-VI.

⁴⁶See *United States v. Shaw*, 309 U.S. 495 (1940).

⁴⁷See Sive, *supra* note 12; Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929 (1968).

⁴⁸Art. VI, U.S. CONST.

⁴⁹See Section V, *infra*.

⁵⁰It would not seem necessary to include a discussion of exclusive jurisdiction, but from the author's conversations with a number of Army judge advocates it is apparent that reliance on the concept in pollution questions is a widely held misconception.

⁵¹See US Att'y. Gen., Report of the Intergovernmental Committee for the Study of Jurisdiction over Federal Areas within the States, 72 (Part I, 1956); Army Reg. No. 405-20, *Federal Legislative Jurisdiction*, para. 4, 28 June 1968; and 10 U.S.C. § 2683 (1970).

is *per se* federal law in the same manner that state laws are adopted under the Assimilative Crimes Act.⁵²

(b) *Sovereign Immunity from Suit.* The previously mentioned *Fort Ord* case⁵³ illustrates the remaining three sources of Federal immunity. After more than ten years of providing unenforceable and allegedly unheeded recommendations to Fort Ord, California water pollution control authorities found themselves in possession of new powers. In compliance with Section 10 of the *FWPCA*,⁵⁴ the state adopted a stringent new method of setting and enforcing water quality standards, to include recovery of monetary damages from violators. Following a three year investigative effort which revealed serious deficiencies in the Fort's handling of sewage treatment and disposal, the Regional Water Board held hearings which resulted in the issuance of a Cease and Desist Order aimed at reducing the Fort's contribution to the pollution of Monterey Bay. Since Fort Ord's financial resources were insufficient to meet the demands of the Order, General Davidson was faced with a difficult decision. Clearly in no position to stop operating the treatment facilities without closing the installation, he continued operations in violation of the Order. The state then instituted suit in the state court, seeking injunctive and monetary relief as provided by state law. After removal to the Federal District Court, the US Attorney sought dismissal of the case on the basis of "sovereign immunity." The court ruled that

Unless and until the President may determine otherwise, any action by defendant in violation of state or local water pollution standards exceeds the specific limitation found in the amended § 466 (i) [now § 1171 (a) of the *FWPCA*] and renders him subject to suit."

Nowhere in the *FWPCA* is there any language expressly granting consent to sue the United States, and the court made no mention of consent in its opinion. It is unlikely that any court will ever find consent to sue the *government* in anything less than clear and unequivocal **language**.⁵⁶ Officials, or functionaries, of the government present a different situation, however,

⁵² 18 U.S.C. § 13 (1970).

⁵³ "California v. Davidson, 3 ERC 1157 (N.D. Cal., 19 January 1971) (unpublished), discussed at note 3 and accompanying text, *supra*.

⁵⁴ 33 U.S.C. § 1161 (1970).

⁵⁵ California v. Davidson, 3 ERC 1157, 1158 (N.D. Cal., 19 January 1971).

⁵⁶ *Dalchite v. United States*, 346 U.S. 15 (1953); *e.g.* The Tucker Act, 28 U.S.C. § 1346 (1970), Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et. seq.* (1970).

as the Supreme Court noted in *United States v. Shaw*.⁵⁷ The only basis for allowing a government official to claim the privilege of sovereign immunity is that a suit against him is in reality a suit against the government. The Supreme Court has made it clear that the defense will not benefit the official if the allegation is (1) that the official has exceeded his authority, (2) that although within the scope of his authority, the basis for that authority is unconstitutional, or (3) that the authority has been exercised in an unconstitutional manner.⁵⁵ Relying on this "exception" to sovereign immunity, the *Fort Ord* court concluded that General Davidson had no authority to violate the California quality standards. That conclusion was based on the specific language of the *FWPCA*, Executive Order 11507, and "recent Presidential emphasis on protection of the ecology."⁵⁹

(c) *Limited Judicial Review*. The "exception" to sovereign immunity discussed in the preceding section is essentially the same rule found in Section 706 of the Administrative Procedures Act.⁶⁰ The APA provides for judicial review in all cases except where prohibited by statute, or where the subject matter of the dispute is one "committed to agency discretion by law."⁶¹ Because none of the environmental statutes preclude such review and because the agency discretion exception is very narrow,⁶² decisions such as that made at Fort Ord are potentially subject to the standards contained in Section 706.

In summary, the conclusion to be drawn from the *Ford Ord* case is that the installation commander or any other military decisionmaker *can* be brought into court and compelled to defend the merits of his decision. Mere assertion of "sovereign immunity" will not discourage the environmentally oriented state agency.⁶³ That fact makes the resolution of conflicts at "the low-

⁵⁷ 309 U.S. 495 (1940); Ausness, *The Effect of Sovereign Immunity on Environmental Protection Suits Against Government Officials*, 6 VALP. L. REV. 1 (1971).

⁵⁸ *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949).

⁵⁹ *California v. Davidson*, 3 ERC 1157, 1158 (N.D. Cal., 19 January 1971).

⁶⁰ 5 U.S.C. §§ 701 *et. seq.* (1970) [hereafter cited as *APA*].

⁶¹ 5 U.S.C. § 701 (1970). It has been argued that the *APA* represents a complete waiver of sovereign immunity in those cases where it applies. See Ausness, *supra* note 57, at 12, n. 90.

⁶² *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) [*Overton Park*] (citing Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965)).

⁶³ For a discussion of the various theories upon which government officials can be deprived of a sovereign immunity defense, see Ausness, *supra* note 57, at 12-20.

est possible level” more difficult because each side must get down to the real issues of the conflict between “state responsibility” and “Federal leadership.”

(d) *Federal Supremacy*. In *Fort Leavenworth Railroad v. Lowe*,⁶⁴ the Supreme Court ruled that Federal lands not under exclusive jurisdiction

will be free from such interference and jurisdiction of the state as would destroy or impair their effective use for the purpose designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from State control is essential to the independence of the United States within the sphere of their delegated powers.”

In *Mayo v. United States*⁶⁵ the Court affirmed this view but implied that Congress could affirmatively waive supremacy, although presumable it could not waive it to the extent that use of Federal facilities would be destroyed.

In “passing the buck” back to the President, the *Fort Ord* court avoided the crucial problem of determining what Congress intended by Section 21 of the *FWPCA*.⁶⁷ It apparently assumed that the Act constituted a waiver of the supremacy argument subject only to the President’s power to grant exemption. Insofar as that assumption applies to water *quality standards*, the case presents no significant problem for the installation commander. The executive order and subsequent instructions from Department of Defense make it quite clear that quality standards must be met.⁶⁸ The potential problem arises if the assumption of waiver is applied to the enforcement mechanism of state pollution abatement programs.

If the *Fort Ord* court’s assumption is carried to its natural conclusion, the states could enforce whatever procedures they wished until the President granted an exemption. In both the *FWPCA* and the Clean Air Act, the precatory language allowing Presidential exemption applies equally to quality standards and whatever else is contemplated by the respective phrases, “purposes of this Act” and “requirements respecting pollution control and abatement.” From the standpoint of the military

⁶⁴114 US 525 (1885).

⁶⁵*Id.* at 539.

⁶⁶319 U.S. 441 (1943). “But where . . . Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.” *Id.* at 447-48.

⁶⁷On 14 July 1971 the case was dismissed by mutual consent. *Supra* note 4. Presumably the issue of supremacy would have been raised and considered extensively on the merits.

⁶⁸See text accompanying notes 19, 22, and 29, *supra*.

departments, the only alternatives would be either a blanket delegation of authority to determine for themselves the "paramount interests" or a case by case request for exemption by the President. Since neither of these alternatives appears to be satisfactory, it is unlikely that that is what Congress intended. From the language of the Acts themselves, it would appear the most workable interpretation is that Congress intended a partial waiver of supremacy to the extent that state control did not approach destruction of Federal operations. If the word "paramount" has any meaning at all, it must be assumed that Congress has waived any argument of mere inconvenience as a basis for operation of the supremacy clause. With respect to quality standards, Congress' determination that compliance does not constitute a burden is clearly stated.

As to other state controls, the determination is not as clear. But it is reasonable to assume that Congress would not grant a waiver any more extensive than was contemplated in the area of standards. In short, it is reasonable to assume that by the language "consistent with the paramount interests of the United States" Congress has merely established the standard by which the burdensome test of *Low*e is to be applied in pollution control issues.

If that assumption is correct, the Department of Defense position that the Clean Air Act applies only to quality standards appears erroneous.⁶⁹ By using the longer phrase "requirements re-

⁶⁹ See note 39, *supra*. The DOD position is that the five exceptions listed by the EPA are unrealistic because they necessitate decisions on a daily, case-by-case basis and that the legislative history of Section 118 indicates only that it applies to air quality standards. Unfortunately, DOD cannot find very much direct comment in the legislative history to support its interpretation, and both the EPA and DOD rely heavily upon interpretation of the Clean Air Act as a whole. In light of the ambiguity of the legislative history, this latter approach appears appropriate. In *Overton Park*, the Supreme Court stated in footnote 21 that in such a case, the intent must be drawn from the language of the statute itself. The basic defect in both the EPA and DOD reasoning is that neither adequately addresses the issue of supremacy. Quite obviously the courts will not be bound by the opinion of either agency and will look to each case to ascertain whether or not a burden sufficient to preclude state interference exists. Assuming such a burden does exist, the court will then proceed to determine whether, and to what extent, Congress may have waived supremacy. Unless the court is then willing to concede a total waiver by Section 118, the only logical approach is to attribute to Congress an intent to merely set a new standard by which each requirement can be judged. It is highly improbable that a court would conclude that Congress had anticipated *every* possible requirement a State might impose prior to granting a total waiver, so the only way to interpret Section 118 is on a daily, case-by-case basis—just as supremacy arguments have always been judged.

specting control and abatement of pollution” rather than simply “air quality standards” in Section 118(2), it is only logical to assume that Congress intended *some* broader meaning.⁷⁰ Whatever that meaning is, the test of “paramount interests” applies and will allow a much more accurate interpretation of the broader phrase. Until the courts provide some guidance on this matter, or until the Department of Defense and Environmental Protection Agency reach an agreement, however, the only safe approach for the installation commander is to consider each state requirement from the standpoint of whether compliance is within his power. If he can comply on his own authority, it is unlikely that a court would consider noncompliance in the “paramount interests.” Even if he cannot, however, the most recent Supreme Court consideration of the “burdensome” argument seems to suggest that in matters concerning general public interests, the government will have a difficult time in establishing that a burden will result.” As long as the Congress adheres to the philosophy that the primary responsibility lies with the states, it is unlikely that interference with the Federal activity will be barred merely because it is inconvenient.

Unless and until the Department of Defense issues clearly stated guidelines to commanders of installations, the military lawyer will be forced to rely on his own argumentative skills to resolve the inevitable conflicts. Although Army Regulation 11-21 provides that unresolved conflicts be formally reported through engineer channels,⁷² it is suggested that the lawyer also utilize informal channels to the Regulatory Law Division, Office of the

⁷⁰“Compare the language of Section 116 (42 U.S.C. § 1857d-1 (1970)):

[N]othing in this [Act] shall preclude or deny the right of any State or political sub division thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. . . .

DOD apparently overlooks this obvious separation of standards and other requirements.

⁷¹District Court *w. United States*, 401 U.S. 520 (1971); *United States v. District Court*, 401 U.S. 527 (1971). In unanimous opinions the Court held that all Federal water rights in Colorado are subject to that state’s new statutory scheme of periodic water rights adjudication. Although the cases were based on an interpretation of the waiver of sovereign immunity granted by the McCarran Amendment (43 U.S.C. § 666 (1970)), the government presented the argument that the broad administrative scheme would be burdensome to the Federal government and that therefore such adjudications were not contemplated by the waiver. Justice Douglas’ rather cursory dismissal of that contention seems to suggest that what constitutes a burden may be significantly different when the objective of the burden is an all encompassing public interest. *But cf. Nevada w. United States*, 165 F. Supp. 600 (D. Nev. 1958).

⁷²AR 11-21, para. 1-5h.

Judge Advocate General of the Army.⁷³ Because the installation directly affected can best determine the effect of compliance with State requests, the installation commander, through his judge advocate, can provide significant input to the Office of the Judge Advocate General which may support a favorable ruling. Even though instructions from Department of the Army level may not be upheld in court, it seems quite clear that with such instructions a commander may be relieved of the possibility of being held personally liable under state law.⁷⁴

IV. THE SUBJECTIVE VALUES—IMPACT ASSESSMENT DECISIONS

A. THE PROBLEM OF LEGAL DEFINITION

Unlike the generally objective standards involved in the protection of health and safety, the subjective nature of the "enjoyability of life" is not easily defined in traditional legal "right-duty" terms. Imposition of a duty to protect the "right to a quality environment" presupposes that the right can be sufficiently defined to apply a uniform rule in all cases. Unfortunately, a highly mobile and affluent society requires more flexibility than an absolute right to a free-flowing river or a noise-free neighborhood will allow. The inevitable result of technological progress is a sacrifice of some subjective pleasure. All the law can do to facilitate the compromise of subjective values is to establish general guidelines to order the priorities involved in making decisions which impact on the quality of man's physical surroundings. Despite strong arguments for the creation of a constitutional right to environmental quality,⁷⁵ statutory recognition appears to be the most effective approach. The values and opinions of a progressive and technologically advanced society will continually change, so flexible guidelines are essential if the law is to keep pace.⁷⁶ However slow and cumbersome the legislative

"Army Reg. No. 27-40, *Litigation—General Provisions*, 25 May 1967, explains the authority of the Office of the Judge Advocate General of the Army in connection with Federal and State administrative or regulatory agencies. Because appearance before such bodies is handled by Army lawyers rather than the Department of Justice, close coordination between the installation judge advocate and the Regulatory Law division is essential in all cases involving the possibility of litigation. *Cf.* Dep't of Army Letter, 10 Jan 72, *supra* note 9.

⁷⁴ *Cf. In re Neagle*, 135 U.S. 1 (1890); *see generally, Military Reservations*, *supra* note 36, at § 9.4 and cases cited therein.

⁷⁵ Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

⁷⁶ *See* J. SAX, DEFENDING OUR ENVIRONMENT 235 (1971); *Cf.* Leighty,

process may be, it still provides greater response to public opinion than the tedious process of amending the Constitution.

B. NEPA AS A MEANS OF PROTECTION

Although a number of statutes provide for the consideration of subjective environmental values,⁷⁷ *NEPA* represents the first attempt to overcome the “piece-meal approach” condemned by President Nixon.⁷⁸ By mandating that Federal agencies “give substantial attention to environmental values” the Act accepts the conclusion that the basic cause of environmental destruction is a failure to take into account the environmental consequences. *NEPA* therefore requires an assessment of the total environmental impact by requiring that two questions be asked: (1) What are the consequences?⁷⁹ and (2) What the choices?⁸⁰

The cynical observer will point out, however, that unless the

Aesthetics as a Legal Basis for Environmental Control, 17 WAYNE L. REV. 1347 (1971).

⁷⁷ *E.g.*, Department of Transportation Act (49 U.S.C. § 1653(f) (1970')) :
It is hereby declared to be the national policy that special effort should be made to preserve the natural wildlife and waterfowl refuges, and historic sites.

The Wilderness Act (16 U.S.C. § 1131(1) (1970)) :

[I]t is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.
The Multiple Use-Sustained Yield Act (16 U.S.C. § 528) (1970) :

It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, and wildlife and fish purposes.

⁷⁸ *Supra* note 1. For the purposes of present discussion, the distinction between objective and subjective values is retained primarily as a matter of convenience. The reader should bear in mind, however, that the words direct and indirect can also be used. It would be a mistake to assume that *NEPA* applies only to the purely subjective or relative values suggested by the phrase, “enjoyability of life.” The broad problem of impact assessment necessarily includes consideration of matters which might more accurately be considered to be objective values, although in a more indirect fashion. Thus, in planning for the construction of a Safeguard missile site the environmental considerations contemplated by *NEPA* are not merely the problems of damage to the land and scenic or recreational aspects, but also to the impact on public power consumption, sewage facilities, air and water pollution, etc., which can be expected to be the indirect result of creating a massive increase in population. In this respect, *NEPA* is truly an all-encompassing approach—a fact which must be borne in mind throughout the discussion of the Act.

⁷⁹ In introducing the Title I amendment to S. 1075, Senator Jackson indicated the following opinion of what a national policy on environment would accomplish :

No agency will then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.

115 CONG. REC. S7815 (daily ed. 10 July 1969).

⁸⁰ Section 102(2)(D) requires agencies to “study, develop and describe alternatives” in any case where there are “unresolved conflicts” (42 U.S.C. § 4332(d)) (1970).

law also includes a responsibility to make the "right" choice, "lofty declarations" are soon forgotten, sooner ignored! Whether Senator Jackson, NEPA's sponsor, overcame that criticism in Title I is the subject of some debate. By the time a number of changes in the Senate version of *NEPA* were made by the Joint Conference Committee the language of Section 101 was sufficiently vague as to give rise to at least two divergent opinions."

The first seeks to distinguish between the creation of "substantive" and "procedural" rights.⁸² In essence, this approach attempts to view the Act in the traditional right-duty philosophy. It is based on the fact that the original version of Section 101(c) stated that Congress recognized that each person has an inalienable right to a healthful environment.⁸³ The Conference Committee changed the language to its present form "because of doubt . . . with respect to the legal scope . . . of the original version."⁸⁴ Although it has been argued that the change in language did not change the legislative intent,⁸⁵ the courts do not appear to agree.⁸⁶

The opposite approach to NEPA is taken by some Federal officials who seek to distinguish between mandatory and discretionary responsibilities. Viewing NEPA's procedural requirement of preparing an impact statement as the only mandatory duty, they are inclined to view the remainder of the Act as mere verbiage which creates little change in their existing statutory purpose in life. In short, they would argue that NEPA adds nothing to their existing standards for making the "right" choice.⁸⁷

Neither view adequately reflects NEPA's stated purpose to

"At the time NEPA was passed, the major issue was the creation of the Council on Environmental Quality. The House version had no provision comparable to Title I, so the present Act represents solely the modified version of S. 1075. Conf. Rept. 91-765, 91st Cong., 1st Sess. (17 December 1969).

⁸² See Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 2 ENVIRONMENT L. REV. 147 (1971) (reprinted from 24 RUTGERS L. REV. 230 (1970); Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ENVIRONMENTAL LAW REPORTER 50035 (1970).

⁸³ Senator Jackson's amendment to S. 1075. 115 CONG. REC. S7815 (daily ed. 10 July 1969) (reprinted in Hearings on S. 1075 at 206).

⁸⁴ Conf. Rept. 91-765, 91st Cong. 1st Sess. (17 December 1970).

⁸⁵ Hanks & Hanks, *supra* note 82, at 170-72.

⁸⁶ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). [*Gilham Dam*: the district court issued its opinion in 5 separate memorandums reported at 325 F. Supp. 729, 732, 737, 741, and 749, respectively.] *Upper Pecos v. Stans*, 328 F. 2d 332, 3 ERC 1418 (10th Cir. 1971) (citing the *Gilham Dam* opinion)

⁸⁷ See testimony of Mr. Roger C. Cramton, Chairman of the Administra-

[E]ncourage productive and enjoyable harmony between man and his environment; [and] promote efforts which will prevent or eliminate damage . . . and stimulate the health and welfare of man.⁸⁸

Just as the inalienable rights approach is too inflexible, the unbridled discretion philosophy merely fosters the exclusionary effect of "tunnel-vision." Particularly in the military departments where the primary mission is national defense, the law must provide some means to insure that subjective values are given appropriate consideration. The very nature of armed conflict imposes an obstacle to consideration of anything but tangible results. If that philosophy is extended to peacetime operations, the citizen has little hope for productive and enjoyable harmony with his environment. It is not enough for the commander of an installation responsible for training helicopter pilots to accept the general value of a noise-free residential area. In the absence of clearly defined priorities, his natural tendency may be to consider the constant noise of helicopters as the unavoidable price of national defense. A law requiring impact assessment must insure that such a conclusion is reached consciously and not merely assumed.

In summary, the conclusion of the Court of Appeals for the District of Columbia in the *Culvert Cliffs* case appears to be the most realistic :

We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties. The reviewing court probably cannot reverse a substantive decision on the merits . . . unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.⁸⁹

Although no court has yet reversed a substantive decision, *Culvert*

tive Conference of the U.S., before the 1972 hearings on NEPA conducted by Congressman Dingell's Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries. Quite obviously if the full hearings reveal a widespread acceptance of the philosophy expressed in the following statement, Congressman Dingell and others may be tempted to make NEPA more stringent and specific:

NEPA does not alter the promotional mission of line agencies. . . . Statutory mandates to promote peaceful use of atomic energy or use of the highway trust fund for building highways could not be questioned in NEPA review.

Quoted in *Current Developments Section*, ENVIRONMENT REPORTER, Vol. 2, No. 45, at 1354, 10 March 1972.

⁸⁸ § 2, NEPA (42 U.S.C. § 4321 (1970)).

⁸⁹ *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 115, 2 ERC 1779, 1783 (D.C. Cir. 1971).

Cliffs seems to warrant the conclusion that NEPA imposes a duty to make the "right" choice. What is "right" depends, of course, on the particular situation. Presumably, however, if all factors, including environmental values, have been considered, reasonable men will come to the same conclusion.

1. *Section 101—The Spirit of NEPA.* The key to understanding the spirit of NEPA is acceptance of the "continuing responsibility . . . to use all practicable means, consistent with other essential considerations of national policy," to achieve the six stated environmental goals of the statute.⁹⁰ Because those six goals represent highly subjective values,

Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations.⁹¹

In essence, NEPA "mandates a rather finely tuned and 'systematic' balancing analysis in each instance."⁹² This analysis then becomes subject to the scrutiny of the Congress, the courts, and the public. Under that scrutiny, the "right" decision is one which occurs after the official has asked the six important questions: Does the decision fulfill this generation's responsibilities to future generations? Does it provide for safe, healthful, productive, and esthetically and culturally pleasing surroundings? Does it attain the widest range of beneficial use of the environment without undesirable and unintended consequences? Does it contribute to preservation of the national heritage and support diversity and variety of individual choice? Does it achieve a balance between population and resource use which will permit

⁹⁰ 42 U.S.C. § 4331(b) (1970).

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustees of the environment for succeeding generations:

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

⁹¹ *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F. 2d 1109, 1112, 2 ERC 1779, 1780 (D.C. Cir. 1971).

⁹² *Id.* at 113, 2 ERC at 1781.

high standards of living and a wide sharing of life's amenities? and, Does it enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources?

It is still too early to tell whether these general guidelines are sufficient to insure that the right decision will always be made. Perhaps it may ultimately be necessary to create "substantive" rights to achieve these goals. But the attitude of the Courts, as well as Congress, seems to indicate that even if NEPA is not an Environmental Bill of Rights, as one article suggests,⁹³ it is very likely an Environmental Due Process and Equal Protection Clause. It is not unlikely that the Supreme Court would apply the rationale of *Citizens to Preserve Overton Park v. Volpe*⁹⁴ to any environmentally impacting decision. In *Overton Park* a group of citizens sought to prevent the routing of an interstate highway through a part near the center of Memphis, Tennessee. Subsequent to approval of the route, Congress passed the Department of Transportation Act⁹⁵ which included a section aimed at the preservation of park and recreation areas. Similar to a provision in the Federal-Aid Highway Act,⁹⁶ the section precludes approval of a highway route through a public park or recreation area unless (1) there was no feasible and prudent alternative and (2) the planning includes all possible effort to minimize harm to the area. The Supreme Court held that the Secretary of Transportation's action was subject to judicial review and was not committed to agency discretion. In response to the contention that the requirement of "no prudent alternative" gave the Secretary a wide discretion to engage in a broad balancing of competing interests, such as monetary cost, safety, and other technical factors, the Court held

[N]o such wideranging endeavor was intended. . . . Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with the preservation of parkland there would have been no need for the statutes. . . . the very existence of the statutes indicates that protection of parkland was to be given paramount importance?

The Court then remanded the case to the district court for review under the standards of Section 706 of the APA. While recognizing that the court could not "substitute its judgement

⁹³ See Hanks & Hanks, *supra* note 82, at 194.

⁹⁴ 401 U.S. 402 (1971).

⁹⁵ 49 U.S.C. § 1653(f) (1970).

⁹⁶ 23 U.S.C. § 138 (1970).

⁹⁷ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971).

for that of the agency”⁹⁸ the district court was instructed to look beyond the simple question of whether the Secretary acted within the scope of his authority and to “engage in a substantial inquiry” to ascertain

whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.⁹⁹

Admittedly the highway laws in question involved a specific prohibition, unlike the language of NEPA. However, the mere existence of NEPA suggests that all environmental factors have significant importance. By requiring their consideration in the balancing process, NEPA clearly injects a number of relevant factors into the decisionmaking process.¹⁰⁰ Applying that reasoning to NEPA’s goal of approaching maximum recycling of depletable resources, for example, could subject the military’s property disposal practices to judicial review, including even the simple process of awarding an installation garbage contract. If the judge advocate is to keep his commander out of court, he obviously must insure that such relevant factors are considered. Additionally, he must be especially careful to insure that any action having a potentially adverse affect is not only justifiable, but within the discretionary authority allowed by the many regulations and directives dealing with environmental policy. As the *Fort Ord* case illustrates, Presidential or Secretarial discretion does not necessarily apply to all levels of military command.

In summary, the judge advocate and his commander are faced with the possibility that military installation decisions will be subjected to examination in the courts. With the increase in national citizen groups dedicated to environmental protection, belief that the local community will generally concur in the proposed action is not enough.¹⁰¹ Under NEPA, military necessity

⁹⁸ *Id.* at 415.

⁹⁹ *Id.* at 416.

¹⁰⁰ Sive, *supra* note 12, at 109-116.

““One of the defects in this philosophy is illustrated by the comment made by the EPA concerning the construction of the TRICAP helipad facility at Fort Hood, Texas. The Army’s impact statement indicated the principal environmental impact to be an increase in noise level, but concluded that “There is no significant impact” The Army’s reasoning was that the additional noise was minimal and that the local residents were accustomed to such military activity and unlikely to complain. EPA’s opinion, however :

[I]t is not reasonable to expect this acceptance to continue without limit. Though no *major* adverse reaction from the community is likely, such an operation as detailed here is bound to cause some individual complaints which must be dealt with, and to say simply that “no adverse reaction from the community is anticipated” may be short of the mark.

It is important to admit the expected environmental impact and plan to deal with accordingly. Though perhaps no “embarrassing” argument will arise there is likely to be

must be sufficient not only to outweigh monetary costs, but also environmental costs—whatever they might be. Full good faith performance of NEPA's procedural duties will insure that the military provides the leadership contemplated by Executive Order **11514**. That leadership is essential if the military is to contribute to the solution rather than the problem of environmental destruction.

2. *Section 102—The Requirements of NEPA.* Section **102** provides the “action-forcing” requirements designed to insure that the “spirit” outlined in Section **101** becomes more than a mere “lofty declaration.” With the exception of the requirement for preparation of environmental impact statements there has been little or no judicial interpretation of these requirements. The interest shown by the House Subcommittee headed by Congressman Dingell, however, indicates that inadequate compliance by Federal agencies could result in much stronger legislation.¹⁰² It is therefore important to consider the full impact of these requirements in order to insure that any apparent noncompliance is fully supportable.

a. *“To the Fullest Extent Possible”—How Much Discretion?* Section 102 begins with language which would appear to grant a degree of discretion to Federal agencies in following the various Congressional mandates.¹⁰³ Neither the legislative or judicial history supports such an interpretation, however. The language “to the fullest extent possible” is intended to insure that the values declared in Section **101** are not lost in the down-to-earth realities of government decisionmaking. According to the Conference Committee Report, the language was not intended “to be used by any Federal agency as a means of avoiding compliance with the directives set out in section **102.**”¹⁰⁴ From the provisions of

some complaints [sic] against an operation of this magnitude. Further, the Army has a responsibility to control noise to the fullest extent practicable and not rely on the congenial and accepting attitude of the nearby population.

Letter from the Dallas Regional Office of the EPA to the Ass't Sec. of the Army (I&L), August 1971 (filed in the Environmental Office, Office of the Director of Installations, ODCSLOG, Headquarters Dep't. of Army.

¹⁰² 1970 NEPA Administrative Hearings at 1-20. The present attitude of the Dingell subcommittee may well be even stronger after the 1972 hearings are completed. On the other hand, the AEC believes that the impact of NEPA has been too severe and is seeking legislation to mitigate the effect of the Act on licensing of nuclear power plants. Washington Post, AI, col. 5, 17 March 1972.

¹⁰³ “The Congress authorizes and directs that, to the fullest extent possible: . . . § 102, NEPA (42 U.S.C. § 4332 (1970)).

¹⁰⁴ Conf. Rep't. No. 91-765, 91st Cong., 1st Sess., 17 December 1969; *U.S. Code Cong. & Admin. News*, 1969, at 2751.

Section 103¹⁰⁵ and Section 105¹⁰⁶ it seems accurate to conclude that the only practical justification for noncompliance is some statutory prohibition.¹⁰⁷ Within the Army there appears to be no statutory prohibition¹⁰⁸ and, in view of the various DOD Directives, Army letters, and Executive Order 11514, there appears to be little discretion left to anyone below the Department of the Army Level.¹⁰⁹

b. A New Element in Decisionmaking. The whole purpose of NEPA is to "build into the agency decisionmaking process an appropriate and careful consideration of the environmental aspects. . . ." ¹¹⁰ Section 102(1) requires that "the policies, regulations, and public laws" be interpreted in accordance with the subjective values expressed in Section 101.¹¹¹ Taken in conjunction with Section 105,¹¹² it is clear that Section 102(1) provides ample authority for agencies to assert "Federal leadership."

In one of the first appellate discussions of NEPA, the significance of this authority was dramatically illustrated. In *Zabel v. Tnbb*¹¹³ the Army Corp of Engineers denied an application for a dredge and fill permit¹¹⁴ on purely ecological grounds: the project would be detrimental to fish and wildlife. The applicant contested the decision alleging that the Corps had no authority to consider the ecological impact. Upholding the Corps' action, the Fifth Circuit stated:

Although this Congressional command [NEPA] was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today. . . . in weighing the application, the Secretary of the Army

¹⁰⁵ 42 U.S.C. § 4333 (1970).

¹⁰⁶ 42 U.S.C. § 4335 (1970).

"*Accord*: Hanks & Hanks, *supra* note 82, at 175.

"As of February 1972, The Judge Advocate General of the Army had not reported any needed legislative changes pursuant to § 103. The *CofS Memo*, para. 6e, assigns this responsibility to TJAG.

¹⁰⁸ See Exec. Order 11514; *Army Guidelines*; and Dep't. of Defense Directive 6050.1, ASD(H&E), Subject: Environmental Considerations in DOD Actions, 9 August 1971 [hereafter cited as *DOD Guidelines*]; The *Army Guidelines* are substantially identical to the *DOD Guidelines*.

¹¹⁰ Council on Environmental Quality, Guidelines for Federal Agencies Under the National Environmental Policy Act of 1969, 23 April 1971 (36 Fed. Reg. 79, 7724 (1971), para. 1 [hereafter cited as *CEQ Guidelines*].

¹¹¹ 42 U.S.C. § 4331 (1970). See Section IV.B.1, *supra*.

¹¹² 42 U.S.C. § 4335 (1970).

¹¹³ 430 F. 2d 199 (5th Cir. 1970). Discussed in Comment, *The National Environmental Policy Act of 1969: A Mandate to the Corps of Engineers to Consider Ecological Factors*, 50 B.U. L. Rev. 616 (1970).

"Under the Rivers and Harbors Act of 1899 the Corps is responsible for controlling dredge and fill operations in navigable waters. 33 U.S.C. § 403 (1970).

is acting under a Congressional mandate to collaborate and consider all of these [environmental] factors. . . . there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act.”

The mere availability of NEPA’s authority, however, is no guarantee that all Federal officials will take ecological matters as seriously as the Corps of Engineers in this case. There are undoubtedly countless examples of laws and Army regulations governing the operation of military installations which will depend upon compliance with the “spirit” of NEPA to insure Federal leadership in enhancing the quality of the environment. The primary responsibility for interpreting those laws and regulations lies in the Office of the Staff Judge Advocate at every level of command. No other requirement of Section 102 provides a greater opportunity for the military lawyer to provide the difference between leadership and neglect.¹¹⁶

c. The Systematic, Interdisciplinary Approach. The complexity of potential environmental impact far exceeds the individual expertise found in any one agency or official. For that reason, Section 102(2)(A) requires a “systematic, interdisciplinary approach” in all planning and decisionmaking.” Unlike many other Federal officials, the military commander is already geared to a system of decisionmaking based upon a synthesis of the opinions and information available in his highly diversified headquarters. If a local farmer desires to lease land adjoining an Army airfield for grazing purposes, the commander is accustomed to seeking the advice of several people before granting a lease. He may consult his medical advisors about possible health hazards, his engineer about the need for fences, his aviation officer about the safety hazards, and certainly his judge advocate concerning the lease itself.

Thus, the only additional burden imposed by Section 102(2)(A) is the requirement that he ask the same individuals additional questions about the effect on environmental quality. How many livestock can the land support without posing a threat to existing plant and wildlife? Will extensive grazing create a risk

¹¹⁵ *Zabel v. Tabb*, 430 F.2d 199, 213–14 (5th Cir. 1970).

¹¹⁶ The *Army Guidelines*, Incl. at p. 3, requires all commands and agencies to “Establish internal procedures to insure that all regulations, directives, instructions, and other major policy publications . . . are reviewed for environmental consequences.” See also § 309 of the Clean Air Act (42 U.S.C. § 1857h-7 (1970)) which requires that all regulations proposed by any department or agency be reviewed by the EPA for impact upon those matters within the responsibilities and duties of EPA.

¹¹⁷ 42 U.S.C. § 4332(a) (A) (1970).

of uncontrolled soil erosion? Will the presence of livestock impair recreational activity in the area? Do the answers to these, and similar questions create potential legal controversies?

The second aspect of the interdisciplinary process will undoubtedly cause some consternation in commanders. Environmental impact statements must be forwarded to other agencies for comment. The interdisciplinary approach must of necessity include a willingness to consult with outside agencies who might have an interest in the proposed action, regardless of whether an impact statement is prepared.

It is also important that appropriate matters be brought to the attention of the local public for two reasons. First, if the issue is to avoid becoming "controversial" (resulting in delay for the preparation of an impact statement)¹¹⁸ efforts must be made to explain the matter to the public. Secondly, if the "public interest" is to really be protected, the "new environmental ethic" dictates that the public at least be given an opportunity to be heard on the subject. The military lawyer's responsibility thus must include advice and assistance designed to insure that public opinion is heard and considered.

d. The Informal Decisionmaking Process. In recognition of the fact that the vast majority of Federal actions result from the informal, behind-the-scenes decisions, NEPA requires all agencies to

[I]dentify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."¹¹⁹

Implicit in this requirement to insure consideration is the requirement to actually "consider" those same unquantified amenities. To the lawyer, the significance of such an informal process is twofold: (1) the preliminary assessment is essential to an accurate determination of the need for an impact statement,¹²⁰ and (2) in judicial review a court will be required to engage in "substantial inquiry" into the basis for the substantive decision.¹²¹

The second of the two cases cited in the Introduction illustrates an effective informal process.¹²² In the *Reid State Park* case, the

¹¹⁸ See discussion at note 176 and accompanying text, *infra*.

¹¹⁹ § 102(2)(B), NEPA (42 U.S.C. § 4332(2)(B) (1970)).

¹²⁰ See *Citizens for Reid State Park v. Laird* (D. Me. 21 January 1972), discussed at note 5, *supra*, and note 122, *infra*.

¹²¹ See the discussion of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) at note 94 and accompanying text, *supra*.

¹²² *Citizens for Reid State Park v. Laird* (D. Me., 21 January 1972).

District Court denied the requested injunction against "Operation Snowy Beach" because

As a result of this [continuing] assessment [by the Commander-in-Chief, Atlantic Fleet], it was determined that the total environmental impact would be slight The conclusion was that . . . no impact statement was required."

In the court's opinion, "The Act plainly commits this preliminary determination to the agency."¹²⁴ Since that determination did not appear to have been reached arbitrarily, the operation was allowed to proceed.¹²⁵ It is apparent from the court's opinion, however, that the internal plans and procedures developed by the Navy to minimize the anticipated potential impact were influential in the conclusion that the decision was not arbitrary.¹²⁶ The obvious lesson is that an informal process which successfully protects against adverse impact can eliminate the necessity of a formal environmental impact statement.

The *Calvert Cliffs* opinion,¹²⁷ however, suggests the second reason that an informal process is essential if the military commander is to comply with the requirement to "comply with applicable environmental laws and policies, even though an environmental statement is not required."¹²⁸ With or without an impact statement, the substantive decision must be reached in accordance with the same standards for environmental protection. In view of Section 706 of the *APA*¹²⁹ the mere existence of identifiable internal procedures could prevent reversal of a decision, assuming that those procedures were followed. An official could find it difficult to prove that he performed his "judicially enforceable duties"¹³⁰ (i.e., consideration of environmental factors)

¹²³ *Id.* at 12-13, slip sheet opinion.

¹²⁴ *Id.* at 14. *Contra*: Scherr v. Volpe, 3 ERC 1558 (W. D. Wash., 29 December 1971) ("The agency may decide no environmental impact statement is required," but when the decision is challenged in court, "the court must construe the statutory standard and decide whether the agency has violated NEPA.") .

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 4-6. (The opinion makes specific reference to the terms of the permit issued to the Navy by the Maine State Park and Recreation Commission.) .

¹²⁷ *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109, 2 ERC 1779 (D.C.Cir. 1971).

¹²⁸ *DOD Guidelines*, para. II.C., Encl. 1.; *Army Guidelines*, para. II.C., Incl. 1 to Incl. 1.

¹²⁹ The reviewing court shall—

(b) hold unlawful and set aside agency action, findings, and conclusions found to be—
(D) without observance of procedure required by law.

5 U.S.C. § 706(2) (D).

¹³⁰ See *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 2 ERC 1779 (DC Cir. 1971).

in the complete absence of a procedure established in compliance with NEPA.

Even though internal procedures and actual consideration will not preclude the possibility of litigation, they will simplify preparation of a defense by the preservation of an adequate record. Section 706 of the *APA* provides that the reviewing court shall consider "the whole record or those parts of it cited by a party" in determining whether a decision should be set aside.¹³¹ The *Overton Park* case¹³² provides an excellent example of the importance of an adequate record supporting an informal decision. After rejecting the possibility of *de novo* review of the Secretary of Transportation's decision,¹³³ the Supreme Court stated that the decision to route the highway through public parkland must be subjected to a "plenary review" of the "full administrative record that was before the Secretary at the time he made his decision."¹³⁴ Noting that the litigation affidavits used in the lower court were merely "post hoc rationalizations . . . which have traditionally been found to be an inadequate basis for review," the Court remanded the case.¹³⁵ The District Court was instructed to conduct a substantial inquiry based on an examination of either the "decision makers themselves" or such formal findings as the Secretary might elect to make.¹³⁶ In either situation, the Court pointed out that such after-the-fact justification was subject to critical analysis.¹³⁷

Because an injunction is the only method to prevent a dispute from becoming moot, the time required to conduct a "substantial inquiry" can result in expensive delay or even cancellation of a proposed project.¹³⁸ For this reason, the judge advocate should become involved in the creation of the record. Through active participation in a command environmental advisory council,¹³⁹

¹³¹ 5 U.S.C. § 706 (1970).

¹³² *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

¹³³ *Id.* at 415.

¹³⁴ *Id.* at 420.

¹³⁵ *Id.* at 419.

¹³⁶ *Id.* at 420.

¹³⁷ *Id.*

¹³⁸ *E.g.*, The District Court review of the *Overton Park* decision has just recently been completed—some three years after the route was first challenged in court. *Citizens to Preserve Overton Park v. Volpe*, 3 ERC 1510 (W.D. Tenn., 5 January 1972). After completing the "plenary review" the District Court remanded the matter to the Secretary of Transportation for further consideration and compliance with *NEPA*. Had *NEPA* been in effect and followed at the time of the original routing, the highway might be completed today.

¹³⁹ Dep't. of Army Letter, AGD-A(M) (24 Mar 71) LOG-C-PDBB, Subject: Environmental Protection and Preservation, 29 March 1971, recom-

the Army lawyer can become involved in many decisions and policymaking activities which formerly were handled without any legal assistance.¹⁴⁰ His participation will thus enable him to quickly provide necessary assistance to the Justice Department in preparing a defense against a temporary restraining order or injunction request.

e. The Formal Decisionmaking Process—Environmental Impact Statements. Section 102(2)(C) requires all Federal agencies to prepare a “detailed statement” describing the environmental impact in “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”¹⁴¹ It is unlikely that anyone in 1969 envisioned the power thus given to the environmental activists. In the short time since the Act became effective, virtually all litigation under NEPA has involved the implementation of this Section. Noncompliance, or inadequate compliance with Section 102(2)(C) has halted the Cross-Florida Barge Canal;¹⁴² delayed construction of dams in Arkansas¹⁴³ and Tennessee;¹⁴⁴ delayed construction of highways in Virginia,¹⁴⁵ Texas,¹⁴⁶ and Georgia;¹⁴⁷ required a revamping of the Atomic Energy Commission’s licensing procedures;¹⁴⁸ delayed the offering of \$500 million worth of off-shore oil leases in the Gulf of Mex-

mends the creation of a command “Environmental Quality Control Committee to assist the commander in the formulation of local policies and the planning and coordination of programs which have environmental implications.” Para. 6. Dep’t of Army Letter, DALO-INE, Subject: Environmental Protection and Preservation, 10 January 1972, recommends that “command legal offices be represented” on the committee. Para. 3.

¹⁴⁰ “Becoming involved” merely requires the judge advocate to develop and implement an effective preventive law program to overcome the common complaint that lawyers are consulted only after a problem arises.

¹⁴¹ 42 U.S.C. § 4332(2)(C) (1970).

¹⁴² *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1971) [*Cross-Florida Barge Canal*].

¹⁴³ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) [*Gilham Dam*].

¹⁴⁴ *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925, 3 ERC 1085 (D.D.C. 1971) [*Tombigbee Dam*]; *Environmental Defense Fund v. TVA*, 3 ERC 1553 (E.D. Tenn., 11 January 1972) [*Tellico Dam*].

¹⁴⁵ *Arlington Coalition on Transportation v. Volpe*, 332 F. Supp. 1218 (E.D. Va. 1971).

¹⁴⁶ *Conservation Society v. Texas*, 2 ERC 1872 (5th Cir. 5 August 1971).

¹⁴⁷ *Morningside-Lenox Park Association v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971).

¹⁴⁸ *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

¹⁴⁹ *Wilderness Society v. Hickel*, 325 F. Supp. 422, 1 ERC 1335 (D.D.C. 1971).

cio; ito required termination of a contract for the construction of two new incinerators at Walter Reed Hospital;¹⁵¹ and prevented the Secretary of Interior from terminating government contracts for the purchase of helium." In addition, even projects for which an impact statement was prepared have been delayed by either the preparation itself or by judicial challenges to the adequacy of the statement.¹⁵³

The headline nature of such litigation should not give military lawyers a false sense of security about the necessity of learning more about impact statements. Admittedly, cases litigated so far have rarely reached the type of activities a single installation might undertake. However, unless Congress bows to pressure to weaken the Act,¹⁵⁴ it is possible that the law presently being made through judicial enforcement of Section 102(2)(C) will eventually be applied to the thousands of actions which characterize the bulk of Federal operations. It is therefore important that the military lawyer be familiar with the defects being found in the preparation of impact statements. Additionally, it is not improbable that any installation may be called upon to provide the basic information required for an impact statement prepared by higher headquarters.* Even though the preparation of an impact statement for a new housing area or post hospital may be the responsibility of the Corps of Engineers, for example, the installation commander has a vital interest in insuring that the project is not delayed by litigation resulting from inadequate consideration of environmental values.

(1) *When is the Statement Required?* The most difficult question facing Federal agencies is interpretation of the phrase, "proposals for legislation or other major Federal actions significantly affecting the quality of human environment."¹⁵⁶ Although most of the litigation to date has involved this problem, as yet there is little real judicial guidance.¹⁵⁷ With respect to legislation, no

¹⁵⁰ *Natural Resources Defense Council v. Morton*, 3 ERC 1473 (D.C. Cir., 13 January 1972).

¹⁵¹ (Based on telephone conversation with Lit. Div., OTJAG).

¹⁵² *National Helium v. Morton*, 326 F. Supp. 151, 2 ERC 1372 (D. Kan. 1971).

¹⁵³ *E.g.*, Preparation of the impact Statement for the TRICAP helipad at Fort Hood, Texas, took more than six months. The statement for Safeguard missile sites in Montana and North Dakota took more than a year.

¹⁵⁴ See note 102, *supra*.

¹⁵⁵ *Cf. Upper Pecos v. Stans*, 328 F. 2d 332, 3 ERC 1418 (10th Cir. 1971), discussed at note 191 and accompanying text, *infra*.

¹⁵⁶ § 102(2)(C), *NEPA* (42 U.S.C. § 4332(2)(C), 1970)).

¹⁵⁷ The only case to attempt a definition is *Natural Resources Defense*

court has yet faced the possibility of holding a statute invalid for lack of an impact statement.¹⁵⁸ Presumably, Congress itself will police this aspect of NEPA; and if it doesn't, there is every reason to believe that the environmentalist lobby will. Nevertheless, the requirement should not be overlooked by the military departments. The Defense Department's budget is regularly subjected to intense and critical examination by Congress. In the years to come the military can expect more difficulty in obtaining funds for needed projects, particularly when there is a possible adverse environmental impact. For this reason, all projects initiated at the installation level for which appropriations will be required should be accompanied by either an impact statement or sufficient information to aid higher headquarters in preparing the impact statement.¹⁵⁹

With respect to the problem of "other major Federal actions," the courts are beginning to attempt a definition.¹⁶⁰ The outside limits of a "major action significantly affecting the quality of the human environment" (MASAQHE) are easily illustrated (although some of the cases suggest that Federal agencies haven't found it that easy). Decimation of a National Forest is clearly a MASAQHE. Removing one or two trees to improve visibility at a busy intersection is obviously not. In between, however, are a lot of trees! The only accurate conclusion that can be asserted at this point in time is that a court knows a MASAQHE when it sees it. Thus, "Operation Snowy Beach" was not a MASAQHE,¹⁶¹ but the termination of helium contracts was.¹⁶² Consideration of an application for a housing development loan under the Federal

Council v. Grant, 3 ERC 1883 (E.D. N. Car., 15 March 1972) [*Chicod Creek Channelization*],

¹⁵⁸ The argument is most likely to occur in connection with appropriation statutes. Although a court would probably not hold the appropriation invalid, it might well reject any argument that Congress had approved the project in spite of its environmental consequences and therefore require an impact statement before actual expenditure of the funds. *Cf.* Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971) [*Gilham Dam*].

¹⁵⁹ *Cf. Army Guidelines*, para IV, A.3 of Incl. 1 to Incl. 1.

¹⁶⁰ A major Federal action . . . requires substantial planning, time, resources, or expenditures [and] significantly affects the environment [if it has] an important or meaningful effect, direct or indirect, upon broad range aspects of the human environment."

National Resources Defense Council v. Grant, 3 ERC 1883, 1890 (E.D. N. Car., 15 March 1972).

¹⁶¹ Citizens for Reid State Park v. Laird (D. Me., 21 January 1972).

¹⁶² National Helium v. Morton, 326 F. Supp. 151, 2 ERC 1372 (D. Kan. 1971).

Housing Act was not,¹⁶³ but the grant of a loan by the Department of Housing and Urban Development for the same purpose was.¹⁶⁴ Approving a lease of Indian lands by the Secretary of Interior was not,¹⁶⁵ but offering off-shore oil leases was.¹⁶⁶

The *Army Guidelines* probably state the best rule for the military lawyer in the field :

[I]t will be necessary for the proponent of the action to assess the expected environmental effects of the action in conjunction with the intent of [NEPA] as implemented by the Council on Environmental Quality.¹⁶

While such a test leaves considerable room for agency discretion, it also invites litigation. Hopefully, as the many district court opinions work their way through the appellate process this test can be narrowed to a workable rule. Until that occurs, some general conclusions can be gleaned from a composite picture of the cases :

1) The amount of money is not determinative in and of itself.¹⁶⁷ Clearly if Congress had intended such a standard it could have easily written it into NEPA.

2) The mere presence or absence of potential air, water, or noise pollution is an insufficient test.¹⁶⁸ Even a cursory examination of NEPA reveals that environmental protection involves more than the mere elimination of effluents.

3) The fact that the impact will be environmentally beneficial, or minimally adverse, does not necessarily preclude a finding that an impact statement is necessary.¹⁷⁰ Although the *Reid State Park* case illustrates that minimum impact will support a discretionary finding that the project is not a MASAQHE, other courts

¹⁶³*Echo Park Residents Committee v. Romney*, 3 ERC 1255 (C.D. Cal., 11 Mag 1971).

¹⁶⁴*Goose Hollow Foothills League v. Romney*, 3 ERC 1087, 40 USLW 2161 (D. Ore., 9 September 1971).

¹⁶⁵*Davis v. Morton*, 3 ERC 1546 (D. N. Mex., 21 December 1971).

¹⁶⁶*Natural Resources Defense Council v. Morton*, 3 ERC 1473 (D.D.C., 16-17 December 1971), *aff'd.*, 3 ERC 1558 (D.C. Cir., 13 January 1972).

¹⁶⁷Para. A, Attach. 1 to Incl. 1.

¹⁶⁸In cases involving federally granted leases, the short run effect of NEPA compliance may be to cost the government leasehold income. *See generally*, *West Virginia Highlands Conservancy v. Island Creek Coal Company*, 441 F.2d 232 (4th Cir. 1971).

¹⁶⁹*See* the expansive list of goals discussed at 42 U.S.C. § 4331 (b) (1970).

¹⁷⁰*Army Guidelines*, Para. A, Attach. 1 to Incl. 1:

One of the obvious environmental lessons of NEPA is that beneficial and detrimental environmental consequences will typically go together. Few can deny the environment benefits from a flood control project: but, at the same time, its construction may destroy the esthetic and recreational values of a wild river. NEPA seeks to expose the value tradeoffs.

may disagree.¹⁷¹ Realistically, almost anything man does to alter nature may have **some** adverse impact. Thus the real issue is whether the proposed beneficial impact is more important than the possible adverse impact. For such a decision an impact statement may be the only means to provide full disclosure of all relevant facts.

4) The size of the geographic area involved is not necessarily determinative. Adverse impact on a small island may be far more significant than the same impact on an entire state if the island is the sole nesting ground of an endangered species of birds.¹⁷²

In short, the foregoing conclusions illustrate that the determination of what is or is not a MASAQHE must be based on the entire phrase, not merely the words "major Federal action." Otherwise minor actions will require an impact statement if the effect on the environment is significant. Conversely, no statement is required for an obviously "major" action if it can be justifiably stated that there is no significant impact.¹⁷³ Since this article is designed merely to introduce the judge advocate to the potential problems, a more detailed discussion of the case law in this area has not been attempted.¹⁷⁴ As previously noted, the average military command will not likely face the possibility of having the primary responsibility for truly "major" actions. What the "average" installation does face, however, are the potential situations for which Department of Defense has required an impact statement, even though informal assessment concludes that the action is not a MASAQHE.¹⁷⁵

An important additional factor for consideration is the "subject of controversy" requirement.¹⁷⁶ The increasing tendency of citizen groups to resort to judicial action, and the willingness of

¹⁷¹ *E.g.* Scherr v. Volpe, 3 ERC 1588 (W.D. Wash., 29 December 1971) (on judicial review, "the court must construe the statutory standard and decide whether the agency has violated NEPA." *Id.* at 1590.).

¹⁷² See generally, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

¹⁷³ See Natural Resource Defense Council v. Grant, 3 ERC 1883 (E.D. N. Car., 15 March 1972) [*Chicod Creek Channelization*].

¹⁷⁴ The variety of district court opinions and the constant flow of new cases has precluded an organized analysis in such a short space. What has been attempted in the foregoing discussion is a "feel" for the complexity of the problem. There are a number of cases not mentioned which resulted in the denial of injunctive relief in spite of lengthy discussion of NEPA and much of the early litigation turned on the question of NEPA's retroactivity, an issue which has not been discussed here (*see* Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971) [*Gilham Dam*] and United States v. 247.37 Acres, 3 ERC 1009 (S.D. Ohio 1971) for a discussion of retroactivity).

¹⁷⁵ *DOD Guidelines*, para. D, Attach, to Encl. 1.

¹⁷⁶ *Id.*, para. D.9.

the courts to entertain their allegations, illustrates the reason for this requirement. The presently unsettled scope of Section 102(2)(C) makes almost any environmentally impacting decision a candidate for litigation. Once a controversy arises, the possibility of legal action leaves little time to prepare a defense against judicially imposed delay. When a preliminary assessment indicates the possibility of such litigation, an existing impact statement should be available, even though it may not have been previously filed with the CEQ.¹⁷⁷ Failure to anticipate the controversy could result in considerable delay, particularly if the judge should decide that the preliminary determination was inadequate.*; Through vigilance in observing the types of environmental cases decided in the courts, the military lawyer can provide invaluable assistance in determining the likelihood of controversy.

(2) *What is Required?* Section 102(2)(C) requires that the impact statement include a discussion of five major points: (i) the environmental impact, (ii) the unavoidable adverse impacts, (iii) the alternatives, (iv) the relationship between short-term uses of the environment and long-term productivity, and (v) any irreversible and irretrievable commitments of resources.¹⁷⁸ In addition, the *CEQ Guidelines* require that a description of the project be included in order to provide commenting agencies with sufficient information to formulate an opinion concerning the adequacy of the statement.¹⁸⁰

Although there is little which can be added to the broad explanation provided in the *Army Guidelines*,¹⁸¹ one point has been made quite clear by the *Of-Shore Oil Lease* case.¹⁸² There, the

¹⁷⁷ Both the DOD *Guidelines* and the *Army Guidelines* are ambiguous about the exact procedure for processing impact statements below the Dep't. of Army level. Although one section implies that statements should be forwarded directly to CEQ (Para. V, Incl. 2 to Incl. 1, *Army Guidelines*) there is a provision requiring DA approval prior to releasing any statement in its entirety (para. IV, Incl. 2 to Incl. 1, *Army Guidelines*). Presumably, however, those statements prepared solely due to potential controversy would be sent to DA and withheld until the need for formal processing arose.

¹⁷⁸ It is also possible that a court would require an impact statement even though there was clearly no MASAQHE. It is well established that agencies must comply with their own regulations. *Accardi v. Shaughnessey*, 347 U.S. 260 (1954). In *Nolop v. Volpe*, 333 F. Supp. 1364, 3 ERC 1138 (D. S. Dak. 1971) the court took note of a similar "controversy" provision in the Department of Transportation guidelines and commented that the fact that 80 percent of the students at the Univ. of S. Dakota had signed petitions against the proposed highway through the campus evidenced the controversy.

¹⁷⁹ 42 U.S.C. § 4332(2)(C)(i)-(v) (1970).

¹⁸⁰ Para. 6(i).

¹⁸¹ Attach. 1 to Incl. 1.

¹⁸² *Natural Resources Defense Council v. Norton*, 3 ERC 1473 (D.D.C., 16-17 December 1971), *aff'd*, 3 ERC 1558 (D.C. Cir., 13 January 1972).

court enjoined the offering of the leases because the Interior Department had not made sufficient inquiry into the possible alternative sources of oil. In overruling the Department's contention that it need not consider alternatives which were not within its authority to implement, the court in effect said that the alternatives section of the statement must include a careful consideration of those courses of action which would eliminate the need for the proposed action, regardless of who had the authority to act.¹⁸³ To the military departments this would appear to imply that military necessity must be shown, rather than merely asserted as a basis for taking a proposed action. This fact becomes important in such decisions as the assignment of a new mission which will result in a high influx of personnel for which an installation or local civilian community is ill-prepared. The military lawyer must insure that the "ripple effect" of such seemingly non-environmental decisions is considered.

In reviewing either an impact statement or an informal assessment, the lawyer should not yield to the temptation to skip those sections dealing with the substantive aspects of environmental impact. Although a lack of scientific or technical background will make such a review more difficult, increased familiarity with environmental litigation should allow the lawyer to acquire the same ability to spot general issues that he has already acquired in such areas as aviation accident investigations, contract specifications, and financial audits. What is important is that the questions are asked. Whether the answers are technically or scientifically sufficient is properly a matter of debate between the people uniquely qualified to provide the answers.

Another important responsibility in reviewing impact assessments is the requirement that the impact statements be prepared in draft and sent to other agencies for comment.¹⁸⁴ Once the comments are returned, the agency must evaluate them and take appropriate action to include them in the final statement.¹⁸⁵ Failure to at least discuss the most significant of these comments might prove fatal on review.

(3) *Who Must Prepare the Statement?* NEPA's language that the impact statement must be prepared by the "responsible official"¹⁸⁶ has been further refined by the *CEQ Guidelines*. The agency "which has primary authority for committing the Federal

¹⁸³ *Id.* 3 ERC at 1561-2.

¹⁸⁴ § 102(2)(C), NEPA (42 U.S.C. § 4332(2)(C) (1970))

¹⁸⁵ *Army Guidelines*, para. V, Incl. 2.

¹⁸⁶ § 102(2)(C) (42 U.S.C. § 4332(2)(C) (1970)).

Government to a course of action" is the "lead agency" who must prepare the statement.¹⁸⁷

In the courts, the question of who should prepare the statement has arisen in two factual contexts. In *Goose Hollow Foothills League v. Romney*,¹⁸⁸ the Department of Housing and Urban Development was preparing to grant a loan for construction of a high-rise housing complex. At HUD's request, the applicants prepared an impact statement which indicated no significant environmental impact. Based solely upon that statement, the Department determined no formal statement was required. Objections by local property owners resulted in the issuance of an injunction against the loan until HUD prepared its own evaluation. In the court's opinion,

[T]he agency charged with the environmental responsibility appears to have done virtually nothing except to take the promoter's worksheet at face value and indorse it without independent investigation."¹⁸⁹

Although the court appears to disagree with the proposition that the finding of a MASAQHE is a discretionary function,¹⁹⁰ it is undoubtedly correct in believing that the Federal agency must not simply rely on the opinions of the beneficiaries of the project.

The second type of situation is that which confronted the Tenth Circuit in *Upper Pecos v. Stans*.¹⁹¹ There, the Commerce Department, through its Economic Development Administration, was funding a highway to be constructed through the Elk Mountain area of northern New Mexico. Because the route involved a National Forest, the US Forest Service was required to issue permits prior to actual construction of the highway. The Court upheld the District Court ruling that Commerce need not file an additional impact statement because the Forest Service was the "lead agency."¹⁹²

As the latter case suggests, many military commands may be relieved of the responsibility for preparing an impact statement. However, the lead agency may require considerable assistance from the installation or command most directly affected. Although the lead agency must make its own evaluation, the ultimate decision may be significantly influenced by the information it receives.

¹⁸⁷ *CEQ Guidelines*, para. 5(b).

¹⁸⁸ 3 ERC 1087 (D. Ore., 9 September 1971).

¹⁸⁹ *Id.* at 1088.

¹⁹⁰ *Compare Citizens for Reid State Park v. Laird* (D. Me., 21 January 1972), discussed at note 124, and accompanying text, *supra*.

¹⁹¹ 328 F.2d 332, 3 ERC 1418 (10th Cir. 1971).

¹⁹² *Id.* at 1419.

V. WHO MAY REPRESENT THE PUBLIC INTEREST? —
STANDING TO SUE

The new environmental ethic is founded upon the basic belief in the public's right to participate in its own destiny. However, it must overcome what has been described as :

[T]he non sequiter that where all are the intended beneficiaries of an interest, none has standing to protect it.¹⁹³

In the Federal courts, the origin of this non sequiter can be traced to the provision of the Constitution limiting jurisdiction to "cases and controversies."¹⁹⁴ Traditional views of the judicial role in adjudicating civil disputes arise from the traditional type of dispute; one party asserting that his rights have been injured by the conduct of another. There are clearly identifiable right-duty relationships which can be adjudicated. As the theory that "the King can do no wrong" gave way to a philosophy that a comparable right-duty relationship existed between a citizen and his government, the courts tended to apply the same principles to disputes between a private citizen and the sovereign: if the sovereign infringed upon the rights of the citizen, the citizen was entitled to litigate in the courts. Until recently, however, the traditional view that the citizen must have suffered some injury to his property rights or to his individual economic interests has imposed considerable limitations on public interests litigation. If the citizen did not himself suffer such an injury, he had no standing to complain of the government's action.¹⁹⁵ In an era of administrative government, combining this view of standing with judicial reluctance to overturn administrative discretion creates an insurmountable barrier to the environmentalist.

Even before ecology became a popular cause, more socially conscious courts began changing this philosophy.¹⁹⁶ In *Flast v. Cohen*¹⁹⁷ the Supreme Court indicated the modern view of the "case or controversy" limitation :

[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context

¹⁹³Hanks & Hanks, *supra* note 82, at 168.

¹⁹⁴Art. 111, § 2, U.S. CONST.

¹⁹⁵See Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

¹⁹⁶E.g. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) ; *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943) (coining the phrase "private attorney general"),

¹⁹⁷392 U.S. 83 (1968).

and in a form historically viewed as capable of judicial resolution.”¹

Even earlier, in asserting his belief that consumers were best qualified to vindicate the public interest, the present Chief Justice of the Supreme Court had noted :

The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.”²

The first major assault on the barrier by environmentalists occurred in New York where three municipalities and a private organization challenged the issuance of a power plant license by the Federal Power Commission.²⁰⁰ The 2d Circuit, in a broadly based opinion, upheld the right of all the plaintiffs to contest the application and sparked hope for the concerned citizen in the language :

Although a “case” or “controversy” which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a “case” or “controversy.” The “case” or “controversy” requirement of Article III, § 2 of the Constitution does not require that an “aggrieved” or “adversely affected” party have a personal economic interest.”²⁰¹

Because the court went on to find that the Federal Power Act²⁰² did protect noneconomic interests and that the plaintiff’s had some economic interests, the *Storm King* opinion

did not, however, dispense with the need for some connection between the plaintiff and the challenged administrative action, although once before the court the plaintiff can raise issues not personal to himself.²⁰³

Notwithstanding its limitations, *Storm King* did grant legal recognition to the rights of the public at large. The ambiguity of “some connection” was soon resolved in *Citizens Committee for the Hudson Valley v. Volpe*,²⁰⁴ when the court specifically granted standing to two plaintiff organizations notwithstanding their lack of personal economic interest, and quoted Judge Burger in concluding that

[the plaintiffs are competent to represent the public interest be-

¹ *Id.* at 101.

¹¹ *United Church of Christ v. FCC*, 359 F.2d 994, 1004 (D.C. Cir. 1966).

²⁰ *Scenic Hudson Preservation Conference v. FPC*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). [*Storm King*].

²⁰⁴ *Id.* at 615.

²⁰² *Id.* at 616.

¹⁴⁴ Hanks & Hanks, *supra* note 82, at 154.

²⁰¹ 425 F.2d 97 (2d Cir. 1970).

cause] they have **proved** the genuineness of their concern by demonstrating that they are "willing to shoulder the burdensome and costly process of intervention" in an administrative proceeding.²⁰⁵

In a somewhat different vein, the Supreme Court added strength to the judicial "enlargement of the class of people who may protest administrative action."²⁰⁶ In *Data Processing v. Camp* and *Barlow v. Collins*²⁰⁷ the Court enunciated a two pronged test which grants standing where (1) the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise; and (2) the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantees in question. Whether this new test "supports the emerging view that an interest so fundamental that all are within the protected class must be permitted to be its champion"²⁰⁸ is questionable in view of the Supreme Court opinion in the case of *Sierra Club v. Morton*.²⁰⁹

In what has become known as the *Mineral King Case*, the Sierra Club challenged the proposed development of a segment of the Sequoia National Park and Sequoia National Forest by Walt Disney Productions. The District Court enjoined the Secretaries of Interior and Agriculture from issuing the permits for the massive development because of the potential "irreparable harm" to the environment.²¹⁰ The 9th Circuit, however, failed to see the connection between the Sierra Club and the issuance of the permits and dismissed the case for lack of standing. In the requirement for injury and they refused to be swayed by the philosophy of *Storm King*.²¹¹

In a 4-3 decision, the Supreme Court affirmed the conclusion that the "Sierra Club lacked standing to maintain this action."²¹² In reaffirming the *Data Processing-Barlow* test for standing, the Court said

[T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."

²⁰⁵ *Id.* at 103.

²⁰⁶ *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

²⁰⁷ *Id.* and *Barlow v. Collins*, 397 U.S. 159 (1970).

²⁰⁸ *Hanks & Hanks*, *supra* note 82 at 168.

²⁰⁹ 40 U.S.L.W. 4397 (19 April 1972) [*Mineral King*].

²¹⁰ *Id.* at 4398-4399.

²¹¹ *Sierra Club v. Hickel*, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970).

²¹² *Sierra Club v. Morton*, 40 U.S.L.W. 4397 (19 April 1972) *aff'g*, *Sierra Club v. Hickel*, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970) [*Mineral King*].

²¹³ *Id.* at 4400.

While recognizing the right of an organization to represent its members, the court was particularly concerned with insuring that the right to judicial review did not become an open door to every dissenting member of the public. In the Court's words,

[A] mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA.²¹⁴

Some people might view the case as a serious setback for the environmentalists. However, a more careful reading of the opinion does not appear to warrant that view.²¹⁵ Specifically, all the case holds is that to attain standing, a party must allege facts showing that he has a "personal stake in the outcome of the controversy."²¹⁶ In other words, there must be "some connection" between the challenged administrative action and the complaining party. Emphasizing this point, the Court drew an important distinction :

[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury."²¹⁷

This latter requirement, according to the Court, is necessary to provide an objective basis upon which to limit access to the courts to those parties with a "direct stake in the outcome"²¹⁸— a goal which would

[B]e undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.²¹⁹

In stressing the importance of an objective basis to determine standing, however, the Court may have created further confusion in the application of the *Data Processing-Barlow* test. Admittedly, the Court did "not question that this type of harm [injury to environmental interests] may amount to an 'in injury in fact'

²¹⁴ *Id.* at 4401.

²¹⁵ See e.g. The Washington Post, AI, col. 4, 20 April 1972. Following the headline: "Ecology Suits Lose, Win 4-3" the article makes the initial statement that "deep concern and knowledge about the environment are not enough to give groups like the Sierra Club the right to sue the federal government over misuse of national resources." Later the article concedes that the decision was "a partial setback for environmentalists, but also a victory."

²¹⁶ *Sierra Club v. Morton*, 40 U.S.L.W. at 4399 (19 April 1972) (citing *Baker v. Carr*, 369 U.S. 186 204 (1962)).

²¹⁷ *Id.* at 4401.

²¹⁸ *Id.*

²¹⁹ *Id.*

sufficient to lay the basis for standing under § 10 of the APA.”²²⁰ But it provided little guidance as to what must be shown to establish such injury and specifically avoided any discussion concerning the meaning of “zone of interests.”²²¹ In the factual context of the Mineral King project, it does not seem improbable that specific injury could be alleged and that the specific allegations of exceeding statutory authority fall within the “zone of interests” protected by the statutes involved.²²² But the impact of the case on administrative decisions for which NEPA represents the only Congressional mandate is subject to speculation.

If a “zone of interests” connotes something less than the existence of “substantive rights,” it seems *NEPA*’s recognition that “each person should enjoy a healthful environment” constitutes the creation of at least an “interest” in the zone defined by Section 101(b).²²³ If a disputed government decision falls within that zone, then, it would seem logical that an allegation that NEPA’s goals were not being implemented would constitute a sufficient “environmental injury in fact.” In that situation, the only problem would be deciding who would suffer the injury.

If a citizen wishes to challenge a decision to turn the Grand Canyon into the world’s largest sanitary fill, will his right to do so depend on whether he lives in Flagstaff, Arizona, rather than Bethel, Maine? If not, does it depend on whether he has purchased airline tickets and reserved a motel room or whether he merely hopes someday to visit that natural wonder? Such questions are inevitable if the “direct stake” requirement is taken too seriously.

By its failure to consider the scope of *NEPA* in fulfilling a Congressional intent to “curb the accelerating destruction of our country’s natural beauty,”²²⁴ the court in *Mineral King* left open

²²⁰ *Id.*

²²¹ The Court specifically did not reach “any question concerning the meaning of the ‘zone of interests’ test or its possible application to the facts here presented.” *Id.* at 4399, n. 5.

²²² In addition to its purely environmental allegations, the Sierra Club relied strongly on the contention that the Interior and Agriculture Departments had exceeded their statutory authority and had failed to comply with their **own** regulations concerning the use and development of parks and forests. Brief for Petitioner, at 16–17.

²²³ 42 U.S.C. § 4331(b) (1970).

²²⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The Sierra Club did not refer to NEPA in its brief. In response to an amici curiae brief, however, the government specifically disclaimed the applicability of NEPA where other statutes were involved. Brief for Respondent at 29. **Compare** the government position set forth in the appendix to Justice Doug-

the question of who may represent future generations and the public interest in general.²²⁵ If the impact of the "direct stake" requirement should unduly limit the effectiveness of NEPA in achieving environmental quality, there are several alternatives open to the courts and/or the Congress.

The first two alternatives are suggested in the dissenting opinions in *Mineral King*. In a rare difference of opinion with the Chief Justice, Mr. Justice Blackmun expressed serious concern over the implications of denying standing to the Sierra Club.²²⁶ He would "permit an imaginative expansion of traditional concepts of standing" in the area of environmental litigation,²²⁷ leaving to the courts the power to "exercise appropriate restraints just as they have exercised them in the past."²²⁸ Presumably, such a theory would only require elimination of the requirement that a specific individual have a "direct stake." If so, only an injury to the public at large need be alleged and the court would merely engage in an inquiry as to whether the plaintiff was adequately representative of the public at large, just as it must do now to allow a class action.

The second alternative is that suggested by Justice Douglas and impliedly approved by Justice Blackmun.²²⁹ Mr. Justice Douglas would grant legal personality to the environment and allow suits to be brought on behalf of the "environmental objects"²³⁰ sought to be preserved. In such a suit

those people who have so frequented the place as to know its

las' dissent (40 U.S.L.W. at 4405-06 with the following view of the CEQ Legal Advisory Committee:

When an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of [NEPA], or on other legislation designed to protect the environment, the interposition by the government of the defense of lack of standing is inconsistent with the federal environmental policy, as exemplified in NEPA and in other legislation.

1 ENVIRONMENT REPORTER 746.

"Although the Court expressly states that "once review is properly invoked, [a plaintiff] may argue the public interest in support of his claim . . . , "there is no mention of the truly "public" action for the benefit of future generations. *Sierra Club v. Morton*, 40 U.S.L.W. 4397, 4400-01 (19 April 1972).

²²⁶ *Id.* at 4406.

²²⁷ *Id.* at 4406-07.

²²⁸ *Id.* at 4407.

²²⁹ *Id.* at 4402-06. Justice Blackmun posed the question:

Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issue?

Id. at 4406.

²³⁰ *Id.* at 4405.

values and wonders will be able to speak for the entire ecological community.²³¹

Therefore, the preservation of the whole spectrum of nature will be the primary issue before the court. In effect, the "directness" of the complainant's stake in the dispute would merely affect the weight to be given to his views, not his right to express them in court.

A final alternative to the traditional limitations of standing is the increasing popularity of the citizen suit.²³² Section 304 of the Clean Air Act²³³ specifically authorizes any citizen to enforce air quality standards, even against the United States. A similar provision is included in the proposed amendments to the FWPCA which are presently under consideration by a House-Senate conference committee.²³⁴ In addition, Senators Hart and McGovern have introduced legislation to authorize a citizen suit for "the protection of the air, water, land or public trust of the United States. . . ." ²³⁵

It is not unlikely that any one, or all of these alternatives may be adopted in the months to come. If we are to avoid the consequences which have been so ominously predicted by many scientists,²³⁶ some method must be found to prevent the "bulldozers of progress" from plowing under not only the "aesthetic wonders of this beautiful land" ²³⁷ but the roots of life as well.

VI. CONCLUSION

In the development of a body of law designed to "neutralize the effluents of affluence" and to "enable court's to decree in judgments the basic ecological principle that one community's toilet is another's faucet," ²³⁸ the citizen beneficiary of the "public trust" has hound new power in the courts and Congress. Whether this new power will provide a solution depends upon how well

²³¹ *Id.*

²³² Such suits are patterned after Professor Sax' proposals in DEFENDING OUR ENVIRONMENT, *supra* note 76. The citizen suit in effect eliminates the requirement for standing and adopts the view that every citizen may act as a "private attorney general" in behalf of the "public trust."

²³³ 42 U.S.C. § 1857h-2 (1970).

²³⁴ Washington Post, A1, col. 4, 21 March 1972.

²³⁵ S. 3575, 91st Cong., 1st Sess. (reintroduced as S. 1075, 91st Cong., 2d Sess., without change). The bill is essentially identical to Professor Sax' proposal, *supra* note 232.

²³⁶ See *e.g.* Sterling, *A Computer Curve to Doomsday*, The Washington Post, A16, col. 5, 5 January 1972.

²³⁷ *Sierra Club v. Morton*, 40 U.S.L.W. 4397, 4405 (19 April 1972) (Douglas, J., dissenting).

²³⁸ Sive, *supra* note 12, at 88.

the new body of law can cope with the problem so eloquently described by one Federal judge :

At one end of the spectrum of human values lies the resurgence of ecological demands: at the other, the understandable reluctance to retard technological progress. The one case nostalgically prompts a return to the pristine beauty of Thoreau's "Walden's Pond"—the other encourages a continuation of Einstein's Atomic expansion with unbridled ecological imoact. In one instance, the idyllic existence of a "Robinson Crusoe"—in the other, the horror evoked by a "Frankenstein." Our survival lies somewhere in between these extremes without doing violence to the causes or champions of either. Surely, there is an equipoise which does not unduly impede our scientific advancement nor accelerate the destruction of our environment. There is a necessary balance, dependent upon the circumstances of a particular case, which lies between reasonable use and destructive abuse.²³⁹

If the military is to contribute to achieving such a balance, the military lawyer must face the difficult and sometimes frustrating task of attempting to understand and comply with the "spirit" of the law of environmental responsibility. To fulfill our responsibility to future generations, a procedure of balancing competing interests against a standard of sincere concern for the total welfare of life is essential.

²³⁹ *Cape May Izaak Walton League v. Macchia*, 329 F. Supp. 504, 517, 2 ERC 1661, 40 U.S.L.W. 2001 (D.N.J. 1971).

COMMENTS EYEWITNESS IDENTIFICATION*

By Major Francis Gilligan""

I. INTRODUCTION

Prior to the landmark trilogy of *Wade-Gilbert-Stovall*,¹ eyewitness identification had been a neglected area of criminal law even though identification evidence, of all the classes of evidence, was probably the least to be relied upon.² The English³ and American⁴ annals are replete with many instances of mistaken identification by eyewitnesses and the unreliability of eyewitness identification has been scientifically demonstrated.⁵ Despite this, juries attach a great deal of weight to eyewitness identification.⁶ In his study of eyewitness identifications, Professor Borchard concluded that the major source of error is an identification of the accused or suspect by the victim of a crime of violence.' This is especially true when the victim is a child or young person." In such cases the emotional state of the witness or victim may nullify reflection and render vain all attempts to recall the past. The victim or witness may desire to seek vengeance

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

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¹United States *v.* Wade, 388 U.S. 218 (1967); Gilbert *v.* California, 388 U.S. 263 (1967); Stovall *v.* Denno, 388 U.S. 293 (1967).

²Williams & Hammelmann, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 480 [hereafter cited as Williams & Hammelmann].

³See G. WILLIAMS, THE PROOF OF GUILT, 106-24 (3d ed. 1963); Williams & Hammelmann, Parts I and 11, 479, 545.

⁴See generally F. BLOCK, THE VINDICATORS (1963); E. BORCHARD, CONVICTING THE INNOCENT (1932); J. FRANK & B. FRANK, NOT GUILTY (1957); E. GARDNER, THE COURT OF LAST RESORT (1952).

⁵See generally A. ANASTASI, FIELDS OF APPLIED PSYCHOLOGY 548-50 (1964); F. BERREN, PRACTICAL PSYCHOLOGY 416-44 (rev. ed. 1952); H. BURTT, APPLIED PSYCHOLOGY 232-65 (2d ed. 1957); F. RUCH, PSYCHOLOGY AND LIFE 291 (5th ed. 1958).

⁶See E. BORCHARD, CONVICTING THE INNOCENT XIII (1932); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 41 (1965); Williams & Hammelmann, Parts I and 11, at 480 and 545, 550.

⁷See E. BORCHARD, CONVICTING THE INNOCENT XIII (1932); see also M. HOUTS, FROM EVIDENCE TO PROOF 19-20 (1956).

⁸Williams & Hammelmann, Part 11, at 545, 546.

on the person believed guilty, or merely to support the identification which he assumes, consciously or unconsciously, has already been made by another.⁹ Even so, "juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi, character witnesses, or other testimony."¹⁰ Once the witness has made his identification he tends to maintain it "by a process of autosuggestion which evidences itself in a continually seeking means of justifying his opinion and reinforcing his belief. Questioned once more regarding the matter, the chances are that he would repeat, with even greater emphasis his previous declaration."¹¹

In addition to the unreliability of eyewitness identification, there are certain suggestions that are present at a lineup. Foremost, it suggests that the accused must necessarily be in the lineup.

Knowing that the man suspected by the police is present, and trusting the police not to have put up the wrong man, the witness may make every effort to pick out this man, on the mistaken assumption that if he can do so, this would provide the kind of corroboration of their suspicion that the police expect and require. His immediate reaction if he is not certain may be to strain his memory to the utmost to find some resemblance between one of the men before him and the offender as he remembers him. The witness may therefore be inclined to pick out someone, and that someone will be the one member of the parade who comes closest to his own recollection of the criminal. Discrepancies may be easily overlooked or explained away.¹²

Suggestions other than differences of height, weight, age, race, etc., may take the form of nonverbal communications in the lineup. The use of police officers may be suggestive because of their bearing and attitude which cannot easily be consciously altered.¹³ Furthermore, the attitude of the police participants

⁹E. BORCHARD, *CONVICING THE INNOCENT XIII* (1932).

¹⁰*Id.*

¹¹Gorphe, *Showing Prisoners to Witnesses for Identification*, 1 AM. J. POLICE SCI. 79, 82 (1930). Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." *United States v. Wade*, 388 U.S. 218, 229 (1967), quoting Williams & Hammelmann, Part I, at 482.

¹²Williams & Hammelmann, Part I, at 486-87; see also C. POLPH, *LAW AND THE COMMON MAN* 192 (1968); P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 47 (1965).

¹³Williams & Hammelmann, Part I, at 486-87. ". . . [P]olice officers should never be used in a parade unless, indeed, it is a case in which a policeman is suspect." Williams, *Identification Parades*, 1955 CRIM. L. REV. 525, 534.

toward the accused may unwittingly suggest the accused. The latter is also true of nonpolice participants who know the identity of the accused.¹⁴ Other nonverbal suggestions may be the suspect's emotional expressions because of the shame or anxiety of being confronted with the potential accusers.¹⁵ This anxiety may affect his facial expression, posture or gait. The likelihood of intentional suggestions might also be present in a pretrial confrontation.¹⁶ Some law enforcement officials are not impartial. "[W]ithout making any claim to generalization, it is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor."¹⁷

II. WADE-GILBERT-STOVALL

In an attempt to avert prejudice and to insure adequate cross-examination thereby guaranteeing the right to a fair trial, the Supreme Court in *United States v. Wade*¹⁸ held that an in-court identification by a witness who identified the accused in the absence of counsel at a postindictment lineup¹⁹ conducted approximately eight months after the crime²⁰ must be excluded unless

Another reason for not using police officers is as follows: Police techniques have been developed to make sure that any particular man can, if necessary, be "forced" on a witness, the way a magician forces a card. One of the most popular is to line the suspect up between a group of detectives who then all cast their eyes slightly in the direction of the suspect, instead of straight ahead, as is the standard procedure. Result: the witness's gaze is directed as though by arrows to the right place. M. MACHLIN & W. WOODFIELD, *NINTH LIFE* 61 n.2 (1961).

"Williams & Hammelmann, Part I at 489.

¹⁵ See *United States v. Wade*, 388 U.S. 218, 230-31 (1967); P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES*, 44-45 (1965); Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 *COL. L. REV.* 94, 99 (1966); see also R. ALLEN, E. FERSTER, & J. RUBIN, *READINGS IN LAW AND PSYCHIATRY* 36 (1968).

¹⁶ See *United States v. Wade*, 388 U.S. 218, 230-35 (1967); see also *Foster v. California*, 394 U.S. 440 (1969).

¹⁷ E. BORCHARD, *CONVICING THE INNOCENT XV* (1932); see also P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 46 (1965). Speaking for the majority in *McDonald v. United States*, 335 U.S. 451, 456 (1948), Mr. Justice Douglas said, "[H]istory shows that the police acting on their own cannot be trusted."

¹⁸ *United States v. Wade*, 388 U.S. 218 (1967).

¹⁹ A "lineup" for the purpose of this comment describes an event in which the suspect is placed in a group of persons and a witness viewing the group is asked to pick out the guilty party. Usually the circumstances are controlled by the law enforcement officials. A "showup" describes an event in which only the suspect is presented to the witness who is asked whether or not this was the person who committed the offense. See P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES*, 27-28, 40-41 (1965).

²⁰ *United States v. Wade*, 388 U.S. 218, 220 (1967).

it can be established that such evidence was not tainted by the pretrial identification or that its admission was harmless error. In *Gilbert v. California*,²¹ the Court dealt directly with the admissibility of a pretrial identification conducted in derogation of the accused's right, as well as with that of the subsequent in-court identification. The Court held the pretrial identification was absolutely inadmissible if it was "the direct result of the illegal lineup."²² These rules apply to both state and federal prosecutions and affect only cases involving confrontations²³ which occurred after June 12, 1967.²⁴

In *Stovall v. Denno*,²⁵ the Court indicated that pretrial identifications made prior to that date and those made after such date where counsel's presence was not required might be challenged as violating due process of law. In *Stovall* the Negro accused was presented to the victim while handcuffed to a police officer in a hospital room containing all white individuals, five police officers and two hospital attendants, one day after major surgery to save the victim's life. The victim was asked whether the accused ("was the man.") The Court stated that in determining whether there has been a denial of due process, the test to be applied is whether judged by the totality of the circumstances the conduct of the identification procedures was unnecessarily suggestive and conducive to irreparable mistaken identification. Applying this test, the Court stated that there was no denial of due process since the necessity of getting the identification from the sole surviving witness outweighed the highly suggestive circumstances.

In *Foster v. California*,²⁶ the Supreme Court held that the lineup procedures employed were unnecessarily suggestive and remanded the case for further proceedings. There the police first lined up the defendant with two shorter, heavier men, with only the defendant wearing clothes like those worn in the holdup. When that failed to produce an identification, the police arranged a face-to-face confrontation with the victim. When the victim was still not sure, police showed him the accused in a five-man lineup in which the accused was the only person in the second lineup who had appeared in the first.

²¹ 388 U.S. 263 (1967).

²² *Id.* at 272-73.

"The term "confrontation" as used in this comment describes a situation arranged by the police subsequent to the crime in which the witness or the victim observes the suspect or the accused for purposes of identification. The victim or witness may or may not identify the suspect or accused.

²⁴ *Stovall v. Denno*, 388 U.S. 293 (1967).

²⁵ *Id.*

²⁶ 394 U.S. 440 (1969).

The situation presented the trial judge in *Foster* on remand is similar to that facing the trial judge once the due process issue has been raised.²⁷ In determining whether a valid in-court identification may be made, a two-step procedure should be applied.²⁸ First, a judge should determine as an interlocutory matter at an out-of-court session whether the particular pretrial identification was unnecessarily suggestive. If the judge makes such a determination, he should then determine whether the impermissibly suggestive pretrial identification gives rise to a "likelihood of irreparable mistaken identification." If both of these elements are found, the use of the in-court identification is prohibited. However, where the pretrial identification is found to be unduly suggestive but not conducive to a likelihood of irreparable mistaken identification, an in-court identification by the same witness is admissible if the prosecution can prove by clear and convincing evidence that the identification, rather than stemming from the unduly suggestive confrontation, had an independent origin.²⁹

As to the second step, the courts have not found that an impermissibly suggestive pretrial identification gives rise to a "likelihood of irreparable mistaken identification" where external factors have indicated that the pretrial identification was accurate.³⁰

The courts have been reluctant to find a showup unnecessarily suggestive when compelling circumstances dictated a showup,³¹ or efficient law enforcement and "fresh" identification required an on-scene identification.³² The courts have held that there is a violation of substantive due process where there have been flagrant pretrial confrontations. For example, in *State v. Cooper*,³³

²⁷ Cf. *Foster v. California*, 394 U.S. 440 (1969) (Black, J., dissenting). If a due process violation itself rests upon a finding of "a very substantial likelihood of irreparable misidentification," then the only question is whether the error in the case was harmless. *Id.* at 446.

²⁸ *United States v. Smith*, ___ C.M.R. ___ (ACMR 1971); *Foster v. California*, 394 U.S. 440 (1969); *United States v. Gambrill*, 449 F.2d 1148 (D.C. Cir. 1971); *Sutherland v. United States*, 428 F.2d 1152 (5th Cir. 1970); *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 914-15 (2d Cir. 1970).

²⁹ *United States v. Wade*, 388 U.S. 218, 241-42 (1967); see also notes 143-153 *infra* and accompanying text.

³⁰ *United States v. Washington*, 447 F.2d 308 (D.C. Cir. 1970); *State v. Carnegie*, 158 Conn. 264, 259 A.2d 628 (1969), *cert. denied*, 396 U.S. 992 (1969).

³¹ *Stovall v. Denno*, 388 U.S. 293 (1967).

³² *United States v. Cyrus*, 41 C.M.R. 959 (AFCMR 1970); *pet. denied*, 19 U.S.C.M.A. 402, 41 C.M.R. 402 (1970); *United States v. Washington*, 447 F.2d 308 (D.C. Cir. 1970); *Harris v. Dees*, 421 F.2d 1079 (5th Cir. 1970); *Russell v. United States*, 408 F.2d 1280 (D.C. Cir. 1969).

³³ *State v. Cooper*, 14 Ohio Misc. 173; 237 N.E.2d 653 (C.D. 1968).

the police took four of the five witnesses in a police cruiser to identify "Mr. Cooper." The accused was displayed to the group after the police had told the witnesses that they "thought they had the right man." When two of the witnesses failed to identify the accused, he was made to put on a hat and glasses, items that were the fruits of an unlawful seizure. All the witnesses then subsequently identified the accused. The Court held that this identification violated due process and hence the in-court identification was inadmissible.

III. RIGHT TO COUNSEL THRESHOLD

A. CIVILIAN PRACTICE

Five years less five days from the date of the *Wade-Gilbert-Stovall* decisions, the Supreme Court in *Kirby v. Illinois*³⁴ rendered its first decision explaining the right to counsel aspects of *Wade* and *Gilbert*. Prior to this decision the lower courts in interpreting *Wade* and *Gilbert* had applied different standards as to what point in time the accused is entitled to the presence of counsel: (1) A few courts limited the right to counsel to the post indictment lineup." These cases have relied on the language in *Wade* and *Gilbert* and also on the fact that the lineup in *Wade* was conducted 39 days after the accused's post indictment arrest and 15 days after the appointment of his defense counsel and the lineup in *Gilbert* was conducted 16 days after the indictment and appointment of counsel. (2) Other courts required counsel at any post arrest lineup which was critical for sixth amendment purposes.³⁶ (3) The Court of Appeals of the District of Columbia Circuit simply held that *Wade* applies to any identification proceedings unless urgent circumstances such as an on-the-scene confrontation do not allow for obtaining counsel.³⁵ In the plurality opinion in *Kirby*," the Court refused to apply the

³⁴ *Kirby v. Illinois*, U.S. ___ (7 June 1972).

³⁵ See, e.g., *People v. Palmer*, 41 Ill. App. 2d 571, 244 N.E.2d 173 (1969), which was relied upon by the Illinois Appellate Court in affirming the conviction in *Kirby w. People*, 121 Ill. App.2d 323, 257 N.E.2d 589 (1970).

³⁶ See, e.g., *United States v. Kinnard*, 294 F. Supp. 286 (D.D.C. 1968); *United States v. Webster*, 40 C.M.R. 627 (ABR 1969), *pet. denied*, 18 U.S.C.M.A. 614, 40 C.M.R. 327 (1969) (citing *United States v. Kinnard supra*, although applying the "focus" criterion).

A number of cases have held the accused is entitled to counsel after a station house arrest. See, e.g., *United States v. Wilson*, 283 F. Supp. 914 (D.D.C. 1968); *Hayes w. State*, 46 Wis.2d 93, 175 N.W.2d 625 (1970).

³⁷ *Perry w. United States*, 449 F.2d 1026 (D.C. Cir 1971) (identification 60-90 minutes after crime); *Russell v. United States*, 408 F.2d 1280, 1284 11.20 (D.C. Cir. 1969) ("within minutes of the witnessed crime").

³⁸ *Kirby v. Illinois*, ___ U.S. ___ (7 Jun. 1972) (opinion per J. Stewart

per se exclusionary rule of *Gilbert* to evidence of an out-of-court identification of the accused at a police station showup conducted without counsel the same day as the accused's arrest. The Court stated that this exclusionary rule is based on the right to counsel guaranteed by the sixth and fourteenth amendments.³⁹ All of the prior cases construing these amendments holding the accused is entitled to counsel "involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."⁴⁰ But an arrest is not an "initiation of judicial criminal proceedings." Such "initiation" takes place when "the Government has committed itself to prosecute"⁴¹ and "the adverse positions of Government and defendant have solidified."⁴² At such a point the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."⁴³

It is unclear from this language as to what point in time the accused is entitled to counsel at a confrontation for identification, whether a lineup or showup. The answer depends on when the "initiation of judicial proceedings" takes place. Chief Justice Burger seems to indicate that this is when formal charges have been made against the accused; whereas, the plurality opinion indicates that this right accrues at the time of formal charge, preliminary hearing, indictment, information, **or** arraignment. Although not setting forth a specific time when the accused would be entitled to counsel, the Court has set forth a rule that can be easily followed by law enforcement officials. That is, the accused is not entitled to counsel at *any* confrontation for identification prior to formal charge, preliminary hearing, indictment, information, or arraignment *provided* those stages of the prosecution are not purposefully delayed to deny the accused his right to counsel.⁴⁴

Although the plurality opinion "decline[d] to depart from

in which C. J. Burger, J. Blackmun, and J. Rehnquist concurred; J. Powell concurred in result stating that he would "not extend the *Wade-Gilbert per se* exclusionary rule"; J. Brennan wrote a dissenting opinion in which J. Douglas and J. Marshall concurred; J. White dissented and stated that *Wade-Gilbert* "compel[led] reversal of the judgment of the Illinois Supreme Court").

³⁹ *Id.* at ____.

⁴⁰ *Id.* at ____.

⁴¹ *Id.* at ____.

⁴² *Id.* at ____.

⁴³ *Id.* at ____.

⁴⁴ Compare *Adams v. United States*, 399 F.2d 574 (D.C. Cir. 1968) with *United States v. Broadhead*, 413 F.2d 1351 (7th Cir. 1969).

[the] rationale" of *Wade* and *Gilbert*,⁴⁵ this is what the majority did by relying on the right to counsel rather than the right to a fair trial. In *Wade* and *Gilbert*, the Court emphasized the unreliability⁴⁶ and suggestiveness inherent⁴⁷ in pretrial confrontations for the purposes of identification. Recognizing this, the Court in *Wade* and *Gilbert* stated that the accused was entitled to counsel at a pretrial confrontation for identification, "absent substantial countervailing policy considerations,"⁴⁸ to guarantee a fair trial by insuring meaningful cross-examination.⁴⁹ The plurality opinion does not expressly dispute the fact that the same hazards to a fair trial inhere in a post arrest confrontation as in a confrontation after the "initiation of judicial proceedings." Rather than explain this apparent departure from the *Wade-Gilbert* rationale, the plurality sidestepped it by basing the decision on the right to counsel rather than the right to a fair trial. On the basis of the right to counsel guarantee, the Court held that the right to counsel does not extend to the post arrest showup conducted at the police station; but the plurality did not hold that the accused would only be entitled to counsel at a post indictment lineup or confrontation for identification."

Even though the Court held that the *per se* exclusionary rule would not be applied in *Kirby* the plurality was careful to observe that this does not mean that a postarrest or preindictment identification would be free from attack. If the law enforcement officials abuse the identification procedures, counsel may show that

⁴⁵ *Kirby v. Illinois*, — U.S. — (7 Jun. 1972).

⁴⁶ *See* *United States v. Wade*, 388 U.S. 218, 228 (1967). "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."

⁴⁷ *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 228-30 (1967). "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . [The] risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification."

⁴⁸ *Id.* at 237.

⁴⁹ *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 228 (1967). A confrontation for identification "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."

⁵⁰ *Kirby v. Illinois*, — U.S. — (7 Jun. 1972). In his concurring opinion C. J. Burger stated that the accused was not entitled to counsel until formal charges have been made against the accused and he becomes subject to "criminal prosecution," citing the dissenting opinion in *Coleman v. Alabama*, 399 U.S. 1 (1970). The dissenting opinion in *Coleman* indicated that the accused should not be entitled to counsel at a preliminary hearing.

the confrontation was so unnecessarily suggestive as to be conducive to irreparable mistaken identification.⁵¹

B. MILITARY PRACTICE

The first military case to determine when the accused was entitled to counsel at a pretrial confrontation was *United States v. Webster*.⁵² The board of review stated that since *Wade* was based on the sixth amendment rather than the fifth amendment, *Escobedo*⁵³ rather than *Miranda*⁵⁴ would control as to when the right to counsel accrues. Thus the accused is entitled to counsel at that point in time when the "criminal investigation . . . ceases to be a general investigation and focuses on a suspect," that is, when "the evidence crystallizes and tends to incriminate a particular individual."⁵⁵ The offense alleged in *Webster* occurred before 1 August 1969, the effective date of paragraph 153 of the 1969 Manual for Courts-Martial, revised edition, setting forth the military rule with respect to eyewitness identification.⁵⁶ However, those cases decided after *Webster* involving offenses occurring after the effective date of the Manual have applied the "focus" test citing *Webster* without mentioning the Manual provision.⁵⁷

The Manual provides that an individual, who is accused or suspected of participating in an offense, is entitled to the presence of counsel at a lineup conducted by United States or domestic authorities to identify the participant of that offense.⁵⁸

⁵¹ *Id.* at ____.

⁵² 40 C.M.R. 627 (ABR 1969), *pet. denied*, 19 U.S.C.M.A. 614, 40 C.M.R. 327 (1969).

⁵³ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁵⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁵ *United States v. Webster*, 40 C.M.R. 627, 634 (ABR 1969), *pet. denied*, 19 U.S.C.M.A. 614, 40 C.M.R. 327 (1969).

⁵⁶ DA PAMPHLET 27-2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed., July 1970), para. 153a; see also *United States v. Cyrus*, 41 C.M.R. 959 (AFCMR 1970), *pet. denied*, 19 U.S.C.M.A. 402, 41 C.M.R. 402 (1970). Offense occurred prior to 1 August 1969. Court held that *Wade-Gilbert* did not apply to on-the-scene confrontations.

⁵⁷ *United States v. Smith*, ____ C.M.R. ____ (ACMR 1971); *United States v. Longoria*, 43 C.M.R. 676 (ACMR 1971), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971) (objective test); *United States v. Holmes*, 43 C.M.R. 430 (ACMR 1970), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971). *Cf. United States v. Bowman*, 42 C.M.R. 825, 828 (ACMR 1970) (MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV.) adopts *Wade-Gilbert* rule).

⁵⁸ "An identification of an accused or a suspect as being a participant in the offense, whether made at his trial or otherwise, which was a *result* of his having been subjected by United States or other domestic authorities to a lineup for the purpose of identification without the presence of counsel

In light of *Kirby*, what is the status of paragraph 153a of the Manual? Under UCMJ, Article 36, the President has the power to prescribe "modes of proof" before courts-martial "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." Pursuant to this valid delegation of authority,⁵⁹ the President prescribed by Executive Order 11476, Manual for Courts-Martial, United States, 1969 (Revised Edition), which includes chapter 27 entitled, "Rules of Evidence." Paragraph 137 of this chapter indicates that the "rules stated in this chapter are applicable in cases before courts-martial"⁶⁰ and will be binding on the Court of Military Appeals provided paragraph 153n is a valid exercise of that authority.⁶¹

Paragraph 153a deals with a rule of evidence, that is, the admissibility of testimony concerning in-court and out-of-court identification of the accused at trial. It states that an in-court or prior out-of-court identification which is the result of a lineup for the purpose of identification conducted by United States or other domestic authorities is inadmissible unless counsel was present or the accused waived his right to the presence of counsel. This language to the contrary, it may be argued that paragraph 153a does not set forth the rule of evidence but is merely an interpretation of *Wade-Gilbert*.⁶² However, it has been uniformly held that chapter 27 sets forth the rules of evidence for courts-martial except where the Manual language is so am-

for him is inadmissible against the accused or suspect if he did not voluntarily and intelligently waive his right to the presence of counsel." Paragraph 153a, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV.) [hereinafter cited as MCM, 1969 (Rev.)]. Paragraph 153a of the Manual set forth what the drafters considered the *Wade-Gilbert* rule. DA PAMPHLET 27-2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed. July 1970), para. 153a.

⁵⁹United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118 (1962).

⁶⁰Para. 137, MCM, 1969 (Rev.). See also United States v. Villasenor, 6 U.S.C.M.A. 3, 7, 19 C.M.R. 129, 133 (1955).

⁶¹United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 119 (1962).

⁶²See United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44, 48 (1971) (Chief Judge Quinn, dissenting).

The analysis of the Manual offers little light in the following remark on paragraph 153a of the Manual concerning lineups: "As to the material in this paragraph concerning the right to presence of counsel at a lineup, see *Gilbert v. California*, 338 [sic] U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967). See also *Stovall v. Denno*, U.S. (1967). DA PAMPHLET 27-2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed. July 1970), para. 153a.

biguous it may be interpreted as being merely illustrative of the rules of evidence practiced in the federal courts.⁶³ Thus, since paragraph 153a is not ambiguous, the military will be bound by this rule even though the right to counsel may accrue before that of the military accused's civilian counterpart.

1. *Accused or Suspect.*

A serviceman is only entitled to counsel if he is accused or suspected of the particular offense and the witness viewing the group is asked to pick out the participant of that offense. In determining who is an accused or suspect one must examine the cases dealing with the "accused" or "suspect" under Article 31b, UCMJ. Adopting this rule means that the accused will be entitled to counsel prior to his civilian counterpart.⁶⁴

2. *United States or Domestic Authorities.*

Although the *Wade-Gilbert* rule is aimed at law enforcement officials, or as the Manual rule states, "United States or domestic authorities," it applies equally to confrontations arranged by

"Compare United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971) (the Manual provision and not the Supreme Court decision in Harris v. New York, 401 U.S. 222 (1971) controls the use of prior statements of an accused and prohibits their use for impeachment purposes unless the accused was warned of his rights under article 31b, UCMJ, and Miranda and Tempia. Harris sanctioned the use of otherwise inadmissible statements for impeachment purposes), with United States v. Massey, 15 U.S.C.M.A. 274, 35 C.M.R. 246, 249 (1965) (in Massey the Court interpreted paragraph 148e of the 1951 Manual which provided that each spouse was entitled to the privilege of prohibiting the use of one spouse as a witness against the other except the privilege does not exist "in favor of the accused spouse when the other spouse is the person or one of the persons injured by the offense charged, as in a prosecution for an assault by one spouse upon the other, for bigamy, unlawful cohabitation . . .") In holding that incestuous carnal knowledge was not an injury to the accused's spouse the Court cited United States v. Moore, 14 U.S.C.M.A. 635, 639, 34 C.M.R. 415, 419 (1964), as follows: "[C]onsidering the equivocal language of the Manual provision; the illustrative nature of its definition of offenses outside the scope of the privilege; and the uncertain need for, or desirability of, a substantially different rule of evidence for the military courts, we are persuaded that the Manual does not create a rule of law . . . [but] merely comments on the rule prevailing in the Federal courts" (emphasis added). See also United States v. Rener, 17 U.S.C.M.A. 65, 37 C.M.R. 329 (1967) (adultery and cohabitation are not injuries to the accused's spouse within the meaning of paragraph 148e, MCM, 1969 (Rev.)) ; Recent Developments, 62 MIL. L. REV. 169, 188-91 (1971).

⁶⁴ See *United States v. Longoria, 43 C.M.R. 676 (ACMR 1971), pet. denied, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971)* (criminal investigation focuses on a particular individual when that person is a "suspect" in accordance with article 31b, UCMJ).

persons having "a direct disciplinary power over the accused."⁶⁵ However, the *Wade-Gilbert* rule does not apply to a person who is acting in a private capacity.⁶⁶

3. *For the Purpose of Identification.*

The "lineup" for the purpose of identification⁶⁷ apparently describes an event in which the suspect is placed in a group of persons and a witness viewing the group is asked to pick out the guilty party. The term "lineup" does not seem to encompass any confrontation for identification between the accused and government witnesses such as a showup. However, the accused or suspect should also be entitled to counsel at a showup absent countervailing reasons.⁶⁸ Under this rule the accused would not be entitled to counsel at an on-the-scene identification since the delay in procuring counsel would result in the unnecessary detention of innocent suspects,⁶⁹ the diminished reliability of any identification,⁷⁰ and the unnecessary diversion of police resources." Nor would the accused be entitled to counsel at a showup staged in the hospital room of the apparently dying victim.⁷² To adopt another rule would permit the police to skirt the constitutional rights by simply conducting all identifications at showups. Furthermore,

⁶⁵United States v. Holmes, 43 C.M.R. 430 (ACMR 1970), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971).

⁶⁶United States v. Venere, 416 F.2d 144 (5th Cir. 1969). *Wade-Gilbert* does not apply where the two accused, who were suspected of passing counterfeit bills at the betting windows of the stadium, were returned from the audience by two stadium employees to be identified by the ticket seller.

⁶⁷Para. 153b, MCM, 1969 (Rev.).

⁶⁸See, e.g., United States v. Cyrus, 41 C.M.R. 959 (AFCMR 1970), *pet. denied*, 19 U.S.C.M.A. 402, 41 C.M.R. 402 (1970); United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969). It is questionable how much weight should be placed on this factor since psychological experiments have demonstrated that persons viewing a particular shape from a group can distinguish this shape for a number of weeks; however, the viewer's ability to verbalize the shape may significantly decline after two days. See Rock & Englestein, *A study of Memory for Visual Form*, 72 AM. J. PSYCHOL. 221 (1959); cf. Stricker & Cooper, *The Efficacy of the Benton Visual Retention Test at the "Very Superior" Intelligence Level*, 68 J. GEN. PSYCHOL. 165 (1963).

⁶⁹See, e.g., United States v. Cyrus, 41 C.M.R. 959 (AFCMR 1970), *pet. denied*, 19 U.S.C.M.A. 402, 41 C.M.R. 402 (1970); United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969).

⁷⁰*Id.*

⁷¹United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971) (citing the need for fast police action); LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 117, 119-22 (1968) (if the suspect is not arrested at or near the scene, the chances of ever arresting him are very slim).

⁷²Stovall v. Denno, 388 U.S. 293 (1967).

the showup poses even more serious problems of suggestiveness due to the fact that the witness is only asked to identify the single person placed before him. The witness in such a situation will conclude that the police have the "guilty party" or they would not have bothered to arrange the confrontation.⁷³

4. *Participant in the Offense.*⁷⁴

If the accused is not suspected of being a participant in the offense for which the pretrial confrontation for identification is staged, the accused is not entitled to counsel. Thus an individual who is in police custody under charges or suspicion of other offenses and is requested to appear in a lineup is not entitled to counsel. The same result would seem to be true when the individual is placed in a lineup to be viewed by witnesses to a number of unsolved crimes having a common *modus operandi* and geographical proximity to the offense with which the individual is charged or suspected of having committed.⁷⁵ This "open crime" lineup is a prevalent police practice and would seem consistent with the rationale of *Wade-Gilbert* since there is little danger of intentional suggestions. But there are still the dangers of unintentional suggestiveness and of the accused's inability to reconstruct the circumstances of the identification. Perhaps the solution involves weighing the possible prejudice to the accused in light of the crime he is charged with or suspected of against the burden on the police in obtaining counsel.

5. *Exception—Accidental Viewing.*

The *Wade* and *Gilbert* rules do not apply to an unintentional or accidental viewing of the accused by the witnesses.⁷⁶ But even an "accidental viewing" must be probed at trial.

⁷³ See Williams & Hammelmann, Part I, at 486-87; C. POLPH, LAW AND THE COMMON MAN 192 (1968); P. WALL, EYE-WITNESSES IDENTIFICATION IN CRIMINAL CASES 47 (1965).

⁷⁴ Para. 153a, MCM, 1969 (Rev.).

⁷⁵ See, e.g., *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969); *State v. Mentor*, 433 S.W.2d 816 (Mo. 1968); *Lujan v. State*, 428 S.W.2d 336 (Tex. Crim. App. 1968). See also *United States v. Davis*, 399 F.2d 948 (2d Cir. 1968), cert. denied, 393 U.S. 987 (1968). In *Davis* the court held that the protection of *Wade-Gilbert* does not attach as soon as mere suspicion is aroused where the accused is identified by a toll collector on a turnpike while en route to the police station in the custody of law enforcement officials for an entirely separate offense.

⁷⁶ *United States v. Young*, _____ C.M.R. _____ (AFCMR 1971) (the accused was taken through the room in which the witnesses were situated and taken to a cell within view of the witnesses); see also *People v. Covington*, 47 Ill.2d 198, 265 N.E.2d 112 (1970); *Robertson v. State*, 464 S.W.2d 15 (Mo. 1971) (encounter at police station); *State v. Turner*, 81 N.M. 571, 469

IV. TRIAL PROCEDURES

A. OUT-OF-COURT HEARING

When a *Wade-Gilbert* issue arises, there should be an out-of-court session to determine whether the out-of-court identification should be admitted and whether the witness should be allowed to make an in-court identification." Even if it has been determined that the accused was not entitled to counsel at the out-of-court identification, it should be shown on the record whether there is an independent basis for the in-court identification. This allows the appellate court, in case it disagrees as to the threshold requirements, to determine whether the in-court identification was tainted, to determine whether the admission of evidence of the out-of-court identification was harmless error.⁷⁷

It has usually been held that a defendant has no standing to seek suppression of evidence secured from his cohort in violation of *Miranda*.⁷⁸ It has been held that a similar rule may apply when a suspect asks suppression of an identification of his cohort secured in violation of *Wade-Gilbert*.⁷⁹

B. MOTION TO SUPPRESS

1. Testimony Concerning Pretrial Identification.

A pretrial identification violating the accused's right to counsel⁸⁰ is inadmissible in the absence of a waiver.⁸² Also, where such a pretrial identification has been unnecessarily suggestive,⁸¹

P.2d 720 (1970) (no right to hearing on taint where confrontation inadvertent).

"Many "accidental identifications," though seemingly spontaneous, may be the result of maneuvering by the police. The fact that the witness accidentally "bumped into" the suspect should perhaps itself arouse suspicion. When the victim identifies the handcuffed suspect in the police station prior to a formal lineup, it may be the handiwork of the police, a ploy known as the "Oklahoma Showup" in police jargon. See *United States ex rel. Ragazzini v. Brierley*, 321 F. Supp. 440 (W.D. Pa. 1970) (victims at accidental encounters are not immune from constitutional infirmity).

"*United States v. Bowman*, 42 C.M.R. 825 (ACMR 1970); *United States v. Webster*, 40 C.M.R. 627 (ABR 1969).

⁷⁷ See *United States v. Bowman*, 42 C.M.R. 825 (ACMR 1970 (rehearing required)); *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir. 1968).

⁷⁸ See *People v. Varnum*, 427 P.2d 415 (Cal. 1967); *People v. Denham*, 41 Ill.2d 1, 241, N.E.2d 415 (1968); *Dimmick v. State*, 473 P.2d 616 (Alaska 1970).

⁷⁹ *Burton v. State*, 442 S.W.2d 354 (Tex. 1969). *Contra State v. Isaacs*, 24 Ohio App. 115, 265 N.E.2d 327 (1970).

⁸⁰ See Section IV B 5, *infra*.

⁸¹ See Section IV B 4, *infra*.

⁸² See note 16, *supra*, and accompanying text.

evidence that the witness identified the accused at such a confrontation is inadmissible.

2. *Courtroom Identification.*

Once it has been determined that the accused has the right to counsel at a pretrial identification, the prosecution must as a predicate to an in-court identification of the accused clearly establish: (a) that the accused had the presence of counsel, (b) that he had been advised of his right to the assistance of appointed counsel and affirmatively waived the right, or (c) that the in-court identification had an independent basis free of any exploitation of the primary taint stemming from the defective pretrial identification.⁸⁴

3. *The Presence of Counsel and his Role at the Lineup.*

The Court in *Wade* stated that pretrial identification is a critical confrontation of the accused by the prosecution which might well settle the accused's fate and reduce the trial to a mere formality.⁸⁵ Once a witness has identified the accused as a result of a lineup, he is not likely to go back on his word, "so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."⁸⁶ This is true since the accused will often be precluded from reconstructing what occurred at the time of the identification." In the case of an innocent suspect, his surprise and nervousness as a result of being suddenly detained by the police may render him unable to give a full account of the confrontation to his counsel, Lastly, the accused lacks credibility in the eyes of the jury or might be discouraged from testifying out of fear that his prior convictions will be brought to the jury's attention to impeach his testimony.⁸⁷ "[N]either witnesses or lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit. . . ." ⁸⁹ The police usually do not contribute to the gap in knowledge either because of lack of adequate records of pretrial confrontations or because they believe they have the right man and their chief concern is getting sufficient proof of guilt.⁸⁰

⁸⁴ *United States v. Longoria*, 43 C.M.R. 676 (ACMR 1971), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971).

⁸⁵ *United States v. Wade*, 388 U.S. 218, 224 (1967).

⁸⁶ *Id.* at 229.

⁸⁷ *Stovall v. Denno*, 388 U.S. 293, 298 (1967).

⁸⁸ *United States v. Wade*, 388 U.S. 218, 231-32 (1967).

⁸⁹ *Id.* at 230.

⁹⁰ *Id.* at 233-35.

In short, the accused is denied the right of meaningful cross-examination. However, the "presence of counsel itself can . . . assure a meaningful cross-examination."⁹¹ On the basis of his observations, counsel would be in a position at trial to decide whether it is tactically wise to bring out the lineup identification in order to cast doubt on the in-court identification and, if he decides to do so, he will be in a better position to know what questions to ask the witnesses concerning the pretrial identification.⁹²

The Court left "open the question whether the presence of substitute counsel might not suffice"⁹³ where the presence of the accused's own counsel might result in a delay or the refusal to attend.⁹⁴ However, the Court went on to say in a footnote that "[a]lthough the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel."⁹⁵ Relying on this language, it has been held that the requirement of the "presence of counsel"⁹⁶ is met when an attorney is present to insure the fairness of the proceedings, even though he does not establish a confidential relationship with the accused.⁹⁷ Such an *ad hoc* counsel may meet the requirements of *Wade* since his presence may serve to eliminate the hazards that render a pretrial identification potentially and secretly unfair to the accused.⁹⁸ "Putting

⁹¹ *Id.* at 236.

⁹² In *Spriggs v. Wilson*, 419 F.2d 759 (D.C. Cir. 1969), the court stated that it saw no reason why "a description of the suspect as given to the police (should not) be made available to counsel for the appellant at the lineup." However, the defendant has no right to prelineup disclosure of the names of the government witnesses and the descriptions they gave to the police since such information is available at the time of the motion to suppress. Compare *United States v. Eley*, ___ F.2d ___ (D.C. Cir. 1972), with *United States v. Stevenson*, 443 F.2d 661, 662-63 (D.C. Cir. 1970).

⁹³ *United States v. Wade*, 388 U.S. 218, 237 (1967).

⁹⁴ *Redding v. State*, 10 Md. App. 601, 272 A.2d 70 (1971) (counsel refused to attend).

⁹⁵ *United States v. Wade*, 388 U.S. 218, 237 n.27 (1967) (emphasis in original).

⁹⁶ *Id.* at 228, 236, 237.

⁹⁷ *United States v. Longoria*, 43 C.M.R. 676 (ACMR 1971), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971); *State v. Griffin*, 205 Kan. 370, 469 P.2d 417 (1970); *Zamora v. Guam*, 394 F.2d 815, 816 (9th Cir. 1968); *State v. Wright*, 46 Wis.2d 75, 175 N.W.2d 646, 651 (1970). *But see* *People v. Thorne*, 21 Mich. App. 478, 175 N.W.2d 527 (1970) (accused was not effectively represented when attorney who was present at the lineup did not know he was representing the accused).

⁹⁸ *United States v. Longoria*, 43 C.M.R. 676 (ACMR 1971), *pet. denied*,

aside the Court's comment that the police may not have adequate records to aid the accused, the police may not be helpful to the defense for another reason, that is, they may be bent on getting a conviction since they may have concluded before the identification that they have the culprit.⁹⁹ Such language seems to indicate that the Court wishes to subject the police to the impartial scrutiny of an observer not connected with the prosecution. Thus, the use of a stationhouse counsel who may be identified with the police would not satisfy the counsel requirements of *Wade* and *Gilbert*.¹⁰⁰

The use of lineup counsel has at least one other advantage over the accused's own counsel. That is, when it becomes necessary to produce testimony on behalf of the defense at trial, the use of lineup counsel avoids the often embarrassing predicament of counsel testifying as a witness on behalf of his client. Canon 19, *Canons of Professional Ethics*,¹⁰¹ requires that, except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client. The problem of the lawyer-witness relationship as it relates to the lineup raises the question whether the lawyer should withdraw from employment if he was a witness to a lineup. It does not seem objectionable for a lawyer who is a potential witness to continue employment as long as it is unlikely that he will be called as a witness. One of the purposes of the presence of counsel at the lineup is to enable him to effectively cross-examine the witnesses. If during the course of the trial, it appears that the lawyer's recollection is different from that of a witness, he may have to take the witness stand. But whether he should withdraw from the case would seem to be dependent on whether the particular question on which he must testify is an interlocutory question to be decided by

20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971); *United States v. Queen*, 435 F.2d 66 (D.C. Cir. 1970); *United States v. Kirby*, 427 F.2d 610, 613-14 (D.C. Cir. 1970); *Summerville v. State*, 266 Ga. 854, 178 S.E.2d 162 (1970).

⁹⁹ *See United States v. Wade*, 388 U.S. 218, 235 (1967), citing *Williams & Hammelmann*, Part I at 483.

¹⁰⁰ *See Comment, Lawyers and Lineups*, 77 YALE L. J. 390, 389 n.32 (1967); *but see State v. LaCoste*, 256 La. 697, 237 So.2d 871 (1970). Court approved of the use of an assistant district attorney as lineup counsel when there was no objection to his competency until the end of trial. The Court also noted that the accused did not show that the assistant district attorney did not "properly. . . represent him at the lineup."

¹⁰¹ ABA CANONS OF PROFESSIONAL ETHICS, No. 19: "When a lawyer is a witness for his client, except as to merely formal matters, . . . he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client."

the judge outside the presence of the jury. If such is not the case, the lawyer should withdraw and not be put in the embarrassing position of testifying and then having to argue the credibility and effect of his own testimony.¹⁰² This ethical problem may be avoided by the use of lineup counsel, since such counsel is not required to further represent the accused.¹⁰³ Where a lineup counsel is used, the government has the burden to show that counsel was present at the time of the identification.¹⁰⁴ Also, where the government elects to use a lineup counsel to satisfy the accused's sixth amendment rights to counsel, "it may well be incumbent upon the prosecution to ensure that the observations and opinions of the substitute counsel are transmitted to the accused's subsequently appointed trial counsel."¹⁰⁵

The role of defense counsel at the lineup may vary from that of a passive observer to an active participant in arranging the pre-trial confrontation. The Court¹⁰⁶ in *Wade* was concerned that any suggestive influences, intentional or unintentional, may significantly affect the reliability of the eyewitness identification. As a result, counsel's presence at the pretrial identification is required to preserve the accused's ability to subject the accuracy of an identification "to effective scrutiny at trial." Although the rationale of *Wade-Gilbert* is not solely restricted to preserving the right to meaningful cross-examination, this was a primary factor. But in addition to preserving meaningful cross-examination, the presence of counsel may also "avert prejudice"¹⁰⁷ and prevent the "unfairness . . . that experience has proven can occur."¹⁰⁸

May counsel only make suggestions to avert prejudice or does he have the right to demand changes in the procedure? In *Wade*, the Court did not assume that the risk resulted from police procedures intentionally designed to prejudice an accused,¹⁰⁹ but that the risk "derive[d] from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."¹¹⁰ Thus the Court seemed to imply that a

¹⁰² See *Galarowicz v. Ward*, 119 Utah 611, 620, 230 P.2d 576, 580 (1951).

¹⁰³ *United States v. Kirby*, 427 F.2d 610 (D.C. Cir. 1970).

¹⁰⁴ *United States v. Garner*, 439 F.2d 525, 527 (D.C. Cir. 1970).

¹⁰⁵ *Marshall v. United States*, 436 F.2d 155, 160 n.18 (D.C. Cir. 1970).

¹⁰⁶ *United States v. Wade*, 388 U.S. 218, 228-39 (opinion of Brennan, J.), 243 (opinion of Clark, J.), 246-47 (opinion of Black, J.), 260-62 (opinion of Fortas, J.), joined by Warren, C. J., and Douglas, J.).

¹⁰⁷ *United States v. Wade*, 388 U.S. 218, 236 (1967).

¹⁰⁸ *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

¹⁰⁹ *United States v. Wade*, 388 U.S. 218, 235 (1967).

¹¹⁰ *Id.*

suggestion of change by counsel in the procedure will be sufficient on the "assumption" that the suggestive influences will not be intentional. But, the Court did envision that counsel would be alert for suggestive influences and would "actively participate in minimizing risk of misidentification."¹¹¹ This participation does not include compelling the police to conduct a lineup in a certain way; but counsel may offer suggestions to the police.¹¹²

If counsel is allowed to take an active role in the lineup, he may propose a realignment of those participating in the lineup, a blank lineup, or a saving clause. Since the invitation to view a lineup suggests that the suspect may be among the participants,¹¹³ counsel should have the right to suggest a "blank lineup."¹¹⁴ that is, a lineup in which the suspect or accused does not appear as a participant. This type of lineup would be held after advising the witness that he will view two lineups, and the suspect will only appear in one.

If either lineup counsel or regular counsel takes an active role in setting up the lineup "it might well be that, absent plain error or circumstances unknown to counsel at the time of the lineup, no challenges to the physical staging of the lineup could successfully be raised beyond objections raised at the time of the lineup."¹¹⁵ However, if counsel decides to take a different tact and remain passive at the time of the lineup, this does not mean that the lineup is thereafter free from attack.¹¹⁶ Counsel might also consider refusing to attend a lineup on the belief that by attending the lineup he will increase the credibility of the identification at trial and thereby work against the interest of his client.;

The post lineup role of counsel is also of vital importance to the

¹¹¹ *Mason v. United States*, 414 F.2d 1176, 1188 (D.C. Cir. 1969); *United States v. Denno*, 355 F.2d 731, 744 (2d Cir. 1966) (dissenting opinion).

¹¹² *United States v. Wade*, 388 U.S. 218, 259 (1967) (separate opinion by White, J.) ("Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can"); *United States v. Webster*, 40 C.M.R. 627, 634 (ABR 1969), *pet. denied*, 18 U.S.C.M.A. 614, 40 C.M.R. 327 (1969); *Long v. United States*, 424 F.2d 799 (D.C. Cir. 1969).

¹¹³ See Napley, *Problems of Effecting the Presentation of the Cases for the Defendant*, 66 COL. L. REV. 94, 98-99 (1966).

¹¹⁴ *Williams & Hammelmann*, Part I at 487.

¹¹⁵ *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969); *Edmisten v. People*, ___ Colo. ___, 490 P.2d 58 (1971) (where accused's attorney actively participated in the preparation of the lineup, it would be error to hold the lineup was unduly suggestive).

¹¹⁶ See *Thurman v. State*, 262 N.E.2d 635 (Ind. 1970); *Jones v. State*, 47 Wis.2d 725, 178 N.W.2d 42 (1970).

¹¹⁷ McGowan, *Constitutional Interpretation in Criminal Identification*, 12 WM. AND MARY L. REV. 235, 241 (1970).

accused. Is the accused entitled to have counsel present when the witness' response to the lineup is made to the police? There are two primary reasons why counsel should be present. First, to detect any unfairness that might have occurred at lineup which might be revealed and, second, to ensure that counsel will be aware of any suggestion by the police at the time the witness makes his identification.””

4. *Waiver.*

The Court in *Wnde* said that “counsel’s presence should have been a requisite to conduct of the lineup, absent an ‘intelligent waiver.’”¹¹⁹ The failure to request counsel does not constitute a waiver.”“ The waiver of a constitutional right is not to be presumed, but must be intelligently and understandingly made.’?”

Since the Court indicated that the right to the presence of counsel at a lineup might be waived, apparently by a *Mirndn* type warning, it would be well to examine the aim of the Court in *Miranda* and to compare *Wade* and *Miranda* as to the purpose counsel might serve in both settings. The basic goal of *Miranda* was to “assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”¹²² The warning itself was not considered wholly sufficient in assuring this freedom of choice because “the circumstances surrounding in-custody interrogation can operate quickly to overbear the will of one merely made aware of his privilege by his interrogators.”¹²³ As a result, the Court believed the presence of counsel “indispensable”¹²⁴ at custodial interrogations “to dispel the compelling atmosphere of interrogation” and to ensure that the accused’s statements are not the product of compulsion.¹²⁵ Such presence might also mitigate the dangers of untrustworthiness, reduce the possibility of compulsion,¹²⁶ allow the accused to effectively tell his story without fear,¹²⁷ and enhance “the integrity of the fact finding

”“*People v. Williams*, 3 Cal.3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971); but see *United States v. Cyrus*, 41 C.M.R. 959 (AFCMR 1970), *pet. denied*, 19 U.S.C.M.A. 402, 41 C.M.R. 402 (1970).

¹¹⁹ *United States v. Wade*, 388 U.S. 218, 237 (1967).

¹²⁰ *Carnely v. Cochran*, 369 U.S. 506, 513-16 (1962).

¹²¹ *Id.*; see also *Rice v. Olson*, 324 U.S. 786 (1945); *Johnson v. Zerbst*, 304 U.S. 458, 464-69 (1938).

¹²² *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 466.

¹²⁶ *Id.*

¹²⁷ *Id.* at 466.

process in court"¹²⁸ since counsel could offer himself as a witness to the coerciveness of the interrogation should that be an issue or as to the accuracy of a statement reported by the prosecution at trial.¹²⁹ Although the *Miranda* warning would not be completely effective,¹³⁰ it might alleviate some of the compulsion inherent in the custodial environment. If the warning was ineffective, the accused, for whatever value his testimony might have,¹³¹ would be able to testify in his own behalf because he would have personal knowledge as to what transpired. However, this is not true where there has been a lineup. In most cases, the accused will be precluded from reconstructing what occurred.¹³² The accused may not know the participants since in many cases the participants are police officers.¹³³ Next, the witnesses and the other participants may not be alert for prejudice.¹³⁴ This is particularly true in a crime of violence where the understandable outrage may prevent any recollection of the events at a future time. Third, the physical conditions may prevent the detection of suggestive influences by the accused.¹³⁵ For example, in many lineup situations, the lights shine on the accused in such a way that he cannot see the witness.¹³⁶ In other cases, where a one-way mirror is used, the accused may not learn of the confrontation until sometime in the future. Further, the emotional tension of the accused may prevent his recall of the facts.¹³⁷ Because of these differences, one wonders whether there could have been a waiver of counsel at a lineup. This question was answered in *United States v. Schultz*.¹³⁸ In *Schultz*, a battalion formation was held and a CID agent informed those in the formation, including the accused, "that he proposed to have each man walk by a window where someone would be observing them. They were advised that if anyone did not want to participate without the aid of 'legal counsel' they could immediately fall out and inform the first sergeant or company commanders who were also present."¹³⁹ The Court held that

¹²⁸ *Id.*

¹²⁹ *Id.* at 470.

¹³⁰ *Cf. Driver, Confessions and Social Psychology of Coercion*, 82 HARV. L. REV. 42, 59 (1968).

¹³¹ *United States v. Wade*, 388 U.S. 218, 231 (1967).

¹³² *Stovall v. Denno*, 388 U.S. 293, 298 (1967).

¹³³ *United States v. Wade*, 388 U.S. 218, 230 (1967).

¹³⁴ *Id.*

¹³⁵ *Id.* at 230 n.13.

¹³⁶ *Id.*

¹³⁷ *Id.* at 231.

¹³⁸ 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970).

¹³⁹ *Id.* at 315.

since the accused did not step out of the formation, he had waived the right to counsel at the pretrial confrontation.¹⁴⁰

Frequently the defense succeeds in suppressing evidence of a pretrial identification but fails to secure suppression of the witness' courtroom identification. When this occurs, the prosecution may not bring out the fact of the pretrial identification. However, the defense may do so if it chooses.¹⁴¹ If the defense brings out some facts concerning the pretrial confrontation, the prosecution may bring out all the facts.¹⁴²

If the defendant introduces the pretrial confrontation into evidence because he believes that it will weaken the witness' testimony, he waives his objection to the evidence. However, the prosecution is placed in a tactical dilemma. When the defendant begins to bring out the pretrial confrontation, it may look as though the prosecution sought to hide what the defendant suppressed. The remedies for this are to raise the issue before trial and ask the court to force the defense counsel to elect whether he wants evidence of the pretrial confrontation in or out of the case. Alternatively, the prosecution may object and state his reasons in the presence of the jury.

5. *Independent Source.*

An in-court identification has an independent source when the eyewitness' identification is based on the events of the crime without dependence upon or assistance from the "illegal" identification and unaffected by any promptings or suggestions which took place at an out-of-court identification. Those factors show that the in-court identification is "sufficiently distinguishable" from the "illegal" identification. Factors which tend to establish guilt, such as statements of accomplices or possession of stolen property, should not be considered in applying the independent source standard. In *Wade* the Court mentioned seven factors: (1) prior opportunity of the witness to observe the criminal act, (2) existence of discrepancy between any prelineup

¹⁴⁰"See *Henry v. State*, 46 Ala. App. 125, 239 So.2d 318 (1970) (voluntary waiver established by signed form); *People v. Keim*, 8 Cal. App. 3d 776, 87 Cal. Rptr. 597 (1970) (half-hour wait for counsel insufficient to constitute waiver); *Jaggers w. People*, ___ Colo. ___, 484 P.2d 796 (1971); *Redding v. State*, 10 Md. App. 601, 272 A.2d 70 (1971) (no waiver where defendant's counsel was notified and did not attend); *Walker v. State*, 454 S.W.2d 415 (Tex. Crim. 1970). See also *United States v. Ayers*, 426 F.2d 524 (2d Cir. 1970) (waiver can only follow adequate warning of right independent of *Miranda* warnings).

¹⁴¹*Davis v. State*, 467 P.2d 521 (Okla. 1970).

¹⁴²*Commonwealth w. Redman*, 258 N.E.2d 287 (Mass. 1970); *Thomas v. State*, 453 S.W.2d 495 (Tex. 1970).

description and the actual appearance of the accused, (3) any identification of another person prior to the lineup, (4) failure to identify the accused on a prior occasion, (5) photographic identification prior to the lineup, (6) lapse of time between the criminal act and the lineup identification, and (7) circumstances surrounding the conduct of the lineup.¹⁴³ Some of the factors clearly support a finding of independent source, *e.g.*, prior opportunity to observe the criminal act while others clearly negate such a finding, *e.g.*, discrepancy in description, prior mistaken identification, and failure to identify the accused on a prior occasion. Two other factors, the conduct of the lineup and photographic identification prior to the lineup, are ambiguous as to whether they should support or negate a finding of independent source. On the basis of "the conduct of the lineups" criteria some courts have held that other factors to be considered are the fairness of the out-of-court identification procedure,¹⁴⁴ the spontaneity of the identification,¹⁴⁵ and the exercise of unusual care to make observations at the lineup.¹⁴⁶ Since these factors are not "evidence come at . . . by means sufficiently distinguishable"¹⁴⁷ from the illegal lineup, the Court was probably referring to negative factors such as an initial wrong man identification or a statement "this looks like the man." These latter factors would negate the idea of an independent basis for the in-court identification. The other ambiguous factor mentioned by the Court, prior photographic identification, would also seem to be a negative factor. To use that factor to support an independent basis, would allow the lineup to be bolstered by an identification which is more subject to error than the lineup.¹⁴⁸

Some other factors which may show that the in-court identification was not infected by the illegal lineup are distinctive physical characteristics of the defendant,¹⁴⁹ prior acquaintance of the

¹⁴³ *United States v. Wade*, 388 U.S. 218, 241-42 (1967).

¹⁴⁴ *United States v. Longoria*, 43 C.M.R. 676 (ACMR 1971), *pet denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971).

¹⁴⁵ *People v. Covington*, 47 Ill.2d 198, 265 N.E.2d 112 (1970); *People v. Triplett*, 46 Ill.2d 109, 263 N.E.2d 24 (1970).

¹⁴⁶ *United States v. Green*, 436 F.2d 364 (D.C. Cir. 1970); *United States v. Sera-Leyva*, 433 F.2d 535 (D.C. Cir. 1970).

¹⁴⁷ *United States v. Wade*, 388 U.S. 218, 241 (1967).

¹⁴⁸ *United States v. Marson*, 408 F.2d 644, 651 (1968) (Winter, J., dissenting in part); M. HOUTS, FROM EVIDENCE TO PROOF 19 (1956); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 68-69 (1965).

¹⁴⁹ *United States v. Zeiler*, 447 F.2d 993, 995 (3d Cir. 1971); *People v. Bey*, 42 Ill.2d 139, 246 N.E.2d 287 (1969); *People v. Knowles*, 264 N.E.2d 716 (Ill. 1970).

witness with the suspect,¹⁵⁰ ability and training in identification," the "positiveness of the witness about the independent basis for the in-court identification . . . remembering that the most assertive witness is not invariably the most reliable,"¹⁵² and the extent of cross-examination at trial."? It is arguable that this last factor should have no bearing on the independent basis question.

V. CONCLUSION

In *Wade*, Mr. Justice Brennan, delivering the opinion of the Court, stated that legislatures or other governmental agencies might adopt alternative procedures for safeguarding the rights of an accused at a lineup.¹⁵⁴ Five members of the Court, however, appeared to reject this view that the presence of counsel could be eliminated by legislative adoption of other safeguards.¹⁵⁵ Based on Mr. Justice Brennan's invitation, and the loss of three of the five aforementioned members, the United States Army should adopt a regulation for safeguarding the rights of accused at lineups, thereby eliminating the requirement of counsel and the problems associated with counsel. The regulation should provide for the following protections :

(1) The regulation would be applicable to all lineups conducted by persons subject to the UCMJ in the course of an official investigation into the circumstances surrounding a suspected crime.

(2) The identification proceedings should be transcribed, including the names and addresses of the participants and witnesses and a descriptive detail of the participants, and if possible an audio and or video tape made of the proceedings. Such records will be made available to the accused's defense counsel.

(3) The regulation should provide that at least five persons, in addition to the accused, of similar appearance to the accused

¹⁵⁰ *People v. Davis*, 45 Ill.2d 514, 261 N.E.2d 314 (1970); *State v. Kandzinski*, 255 A.2d 154 (R.I. 1969).

¹⁵¹ *United States v. Ganter*, 436 F.2d 364 (7th Cir. 1970).

¹⁵² *United States v. Holmes*, 43 C.M.R. 430 (ACMR 1970), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971). See also *United States v. Longoria*, 43 C.M.R. 676 (ACMR 1971), *pet. denied*, 20 U.S.C.M.A. 573, 43 C.M.R. 413 (1971); *United States v. Mesolella*, 42 C.M.R. 495, *pet. denied*, 20 U.S.C.M.A. 163, 42 C.M.R. 355 (1970); see also *United States v. Abrate*, 451 F.2d 990 (2d Cir. 1971); *United States v. Breaux*, 450 F.2d 948 (9th Cir. 1971); *United States v. Harris*, 437 F.2d 686 (D.C. Cir. 1970).

¹⁵³ *United States v. Long*, 449 F.2d 288, 302 (8th Cir. 1971) (no cross-examination); *United States v. Mason*, 440 F.2d 1293, 1299 (10th Cir. 1971).

¹⁵⁴ *United States v. Wade*, 388 U.S. 218, 239 (1967).

¹⁵⁵ *Id.* at 243 (opinion of Clark, J.), 246-47 (opinion of Black, J.), 262 (opinion of Fortas, J., joined by Warren, C. J., and Douglas, J.).

LINEUPS

should participate in the lineup. If feasible, such participants may not be police officers or know the identity of the accused.

(4) The witnesses shall give a written description of the perpetrator prior to viewing any lineup. A copy of this shall be given to the accused's counsel.

(5) The witnesses shall be kept separate before, during, and after viewing the lineup to prevent communications among the witnesses.

(6) The accused must not be required to wear distinctive clothing unless such clothing is worn by all of the participants.

(7) If a witness makes an identification, he would be required to dictate a written statement, including what features prompted his recognition and the degree of certainty of his identification.

(8) The police would be prohibited from making suggestions to the witnesses.

(9) The accused shall not be placed in any location where he could be viewed separately by any witness.

Both the holding and implications of *Kirby* are inconsistent with the rationale of *Wade* and *Gilbert*. However, *Kirby's* effect on the rights of servicemen will be limited since the Manual rule or the suggested alternative would serve to prevent the suggestiveness present in eyewitness identification by ensuring meaningful cross-examination and thus a fair trial.

THE PROVIDENCY OF GUILTY PLEAS: DOES THE MILITARY REALLY CARE?*

By Captain Arnold A. Vickery**

The vast majority of criminal cases in the United States are resolved by guilty pleas,¹ most of which result from plea bargaining² between the prosecution and defense.

It has been said that the plea "is itself a conviction," for the court "has nothing to do but to give judgment and sentence."³ Because constitutional rights are at stake, the courts have fashioned constitutional standards to ensure that the plea represents

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

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¹"It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty pleas." *Brady v. United States*, 397 U.S. 742, 752 n. 10 (1970). See D. NEWMAN, *CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 n. (1966); *THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967). See also *People v. West*, 3 Cal.3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970); 32 OHIO ST. L. J. 426, 435 nn. 77-82 (1971).

²It is not the primary purpose of this Article to inquire into the constitutionality and/or propriety of plea bargaining as a mode of dispensing justice. This has been done by numerous authors already. See *Gentile, Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514 (1969); Note, *The Unconstitutionality of Pleas Bargaining*, 83 Harv. L. Rev. 1387 (1970); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964). It should be noted, however, that plea bargaining has been an accepted practice within the military for nearly twenty years, *United States v. Villa*, 19 U.S.C.M.A. 564, 42 C.M.R. 166 (1970), subject to certain reservations and limitations. *United States v. Troglin*, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972); *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Welker*, 8 U.S.C.M.A. 647, 25 C.M.R. 151 (1958). Anyone conversant with the modern criticisms of plea bargaining and with the operation of the pretrial agreement in the military must realize that the military system, through the use of a written agreement providing for a maximum penalty, has avoided the major pitfalls encountered under most civilian practices. McGovern, *Guilty Plea—Military Version*, 31 FED. B. J. 88 (1972). See generally, Della Maria, *Negotiating and Drafting the Pretrial Agreement*, 25 JAG J. 117 (1971).

³*Kercheval v. United States*, 274 U.S. 220, 223, (1927). See generally, Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204 (1956).

the intelligent and voluntary choice of the defendant and that it relates accurately to the defendant's actual conduct. These procedural safeguards relating to guilty pleas culminated during the decade of the sixties as did many of the other pretrial criminal safeguards.⁴ The change from "Warren Court" to "Burger Court"⁵ has, however, occasioned a reevaluation and severe limitation of these safeguards.⁶

For more than twenty years, the procedural standards which control the entry of guilty pleas in courts-martial have been imposed not only by the Constitution (as interpreted by the Supreme Court), but also by statute⁷ and presidential executive order.⁸ Thus, although the current ebb in procedural protections will tend to decrease the protection afforded civilian criminal defendants, it is the contention of this author that the standards by which a military accused's plea must be measured will, and should, remain largely unaffected. Accordingly, this comment will trace the evolving constitutional standard for measuring the providency of guilty pleas and juxtapose this standard with the rule of the Uniform Code of Military Justice and the decisions of the United States Court of Military Appeals.

⁴ *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (applying principle against self-incrimination to police interrogation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying principle against self-incrimination to statutory pretrial inquiry); *Jackson v. Denno*, 378 U.S. 368 (1964) (defendant is entitled to judicial determination of the voluntariness of his confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (guaranteeing right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (protecting against unlawful search and seizure).

⁵ Chief Justice Warren Earl Burger was named by President Nixon to replace Chief Justice Earl Warren who retired on June 23, 1969. It is a popular practice to refer to a given composition of the Court by the name of the Chief Justice. This denomination of the Court is not meant to suggest that the Chief Justice has any particular control over the decisions of the Court. Professor Harry Kalven makes this point clear from his discussion of the voting patterns of the Court in the 1970 Term. Kalven, *Foreword: Even When a Nation is at War*—, 85 HARV. L. REV. 3 (1971).

⁶ *E.g.*, *United States v. Harris*, 403 U.S. 573 (1971) (lowering requirements for affidavits used to obtain search warrants); *Harris v. New York*, 401 U.S. 222 (1971) (confession obtained without *Miranda* warning may be used for impeachment of defendant who takes the stand) *Dutton v. Evans*, 400 U.S. 74 (1970) (upholding Georgia coconspirator exception to hearsay rule). *See*, Kalven *supra* note 5.

⁷ Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ with an indication of the pertinent Article]; *See generally*, Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970), reprinted at 51 MIL L. REV. 1 (1971).

⁸ MANUAL FOR COURTS-MARTIAL, 1969 (REVISED EDITION) [hereinafter cited as MCM with a reference to the pertinent paragraph] promulgated by Exec. Order 11476 (June 19, 1969).

I. THE CONSTITUTIONAL STANDARD

A. HISTORICAL FOUNDATIONS

Among the guarantees of the Bill of Rights were an absolute right against self-incrimination⁹ and a right to confront one's accusers.¹⁰ Originally, the Bill of Rights was thought to limit only the federal government,¹¹ but after the adoption of the Fourteenth Amendment most of those rights were "selectively incorporated"¹² into that amendment and made binding on the states.

Although the guarantees of the Fifth and Sixth Amendments are stated in absolute terms, they have been historically conceived as rights or privileges of the accused. The United States Supreme Court reviewed this history in *Patton v. United States*¹³ and concluded that an accused could waive his constitutional right to a jury of twelve when one of the panel became ill and was unable to finish the trial. The doctrine of waiver was refined and distilled by the Court in *Johnson v. Zerbst*.¹⁴ In recognition of the fundamental nature of the Bill of Rights in the American system of criminal jurisprudence, the Court established a strict formula for waiver which has been used since that time: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."¹⁵ Thus, "intentional relinquishment" has come to mean that the waiver must be voluntary; and "known

⁹ U.S. CONST. amend. V, which provides in relevant part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

¹⁰ U.S. CONST. amend. VI, which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury [and] to be confronted with the witnesses against him

¹¹ *Barron v. Baltimore*, 32 U.S. (6 Pet.) 243 (1833).

¹² *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporates double jeopardy guarantees of Fifth Amendment); *Duncan v. Louisiana*, 391 U.S. 146 (1968) (incorporates jury trial guarantees of Sixth Amendment); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (incorporates guarantee of a speedy trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporates Fifth Amendment privilege against self-incrimination), See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Henkin, "Selective Incorporation" in *The Fourteenth Amendment*, 73 YALE L. J. 74 (1963).

¹³ 281 U.S. 276 (1930). The Court recognized the validity of a rule against waivers, allegedly enforced at early common law, but rejected the applicability of that rule to a time when defendants enjoyed the assistance of counsel and the availability of compulsory process regardless of their means. *Id.* at 308. See *Hack v. State*, 141 Wis. 346, 124 N.W. 493 (1910) (right to arraignment and plea is waived by otherwise unprejudiced silent defendant).

¹⁴ 304 U.S. 458 (1938). The opinion was one of the first written by the late Justice Hugo Black.

¹⁵ *Id.* at 464. See generally, Wasinger, *The Doctrine of Waiver*, 39 MIL. L. REV. 85 (1968).

right" requires that the defendant know and appreciate the full consequences of his choice.¹⁶ Hence, the requirement for the acceptance of guilty pleas that they be voluntary and intelligent.

B. THE WARREN COURT

The Warren Court, consonant with its concern for individual rights,¹⁷ strictly construed the waiver concept within the guidelines suggested by *Zerbst*, particularly with respect to guilty pleas. In *Machibroda v. United States*,¹⁸ the Court held that a defendant who alleged that his guilty plea was a product of pressure from the district attorney was entitled to be heard on his claim.¹⁹ Similarly, in *Brookhart v. Janis*,²⁰ the Court, after noting that there is a strong presumption against the waiver of constitutional rights, held that a defendant whose lawyer had persuaded him to agree to a prima facie trial—a procedure of state law under which the state must only show probability of guilt and the defendant does not have a right to cross-examine the witnesses or to be tried by jury—was denied his constitutional rights. The trial court admitted that this procedure was tantamount to an entry of a guilty plea. Yet, the defendant had exclaimed during the course of the trial, "I would like to point out in no way am I pleading guilty to this charge."²¹ Resolving the disparity in favor of the defendant, the Court held that the defendant's alleged waiver did not satisfy the "intentional relinquishment of a known right" test as set out in *Zerbst*²² and therefore reversed the conviction.

¹⁶ See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (accused cannot properly be said to have waived the right to counsel unless she did so competently, intelligently, and with full understanding of the implication); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) (accused in the exercise of free and intelligent choice with the considered approval of the court could waive a jury trial and likewise the right to counsel); *Waley v. Johnston*, 316 U.S. 101 (1942) (plea of guilty which because of coercion will not support a conviction has no validity as a waiver of the right to assail a conviction based on the plea).

¹⁷ See generally, A. Bickel, *The Supreme Court and the Idea of Progress* (1970); Pye, *The Warren Court and Criminal Procedure*, in *THE WARREN COURT* 58 (1968).

¹⁸ 368 U.S. 487 (1963).

¹⁹ See also *Shelton v. United States*, 356 U.S. 26 (1958), *rev'g* 246 F.2d 571 (5th Cir. 1957).

²⁰ 384 U.S. 1 (1966).

²¹ *Id.* at 7. Contrast defendant's statements herein with those made by defendant Alford quoted in the text accompanying note 55 *infra*. Alford's protestation of innocence was more declarative than Brookhart's, yet it was held to be "voluntary."

²² See text accompanying notes 14-16 *supra*. For an interesting discourse

More direct evidence of the Warren Court's suspicion of the guilty plea may be found in its endorsement of an amendment to Rule 11 of the Federal Rules of Criminal Procedure which sets forth the formula for consideration of guilty pleas in federal courts. Prior to 1966, the Rule merely admonished the trial judge to assure himself that the plea was made "voluntarily with understanding of the nature of the charge."²³ The 1966 amendment, implemented with the sanction of the Court,²⁴ added the requirement that the trial judge personally address the defendant to ascertain whether the defendant comprehends both the nature of the charge and the consequences of his plea.?: The amended Rule further requires that the trial judge satisfy himself that there is a factual basis for the plea.

The Court gave Rule 11 a literal application in *McCarthy v. United States*.²⁶ In *McCarthy*, the Court reversed an income tax evasion conviction because the trial judge had failed to personally address the defendant." The defendant claimed that his failure to file had been due to negligent bookkeeping during a period of poor health. Chief Justice Warren, writing for the majority, described the two-fold purpose of Rule 11: (1) to assist the trial judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary; and (2) to assure a complete record in each case, thereby reducing the effectiveness of post-conviction attacks on the plea.²⁸

on the *Zerbst* standard in the guilty plea context, see Tigar, *Foreword: Waiver of Constitutional Rights: Dis quiet in the Citadel*, 84 HARV. L. REV. 1, 19-25 (1970).

²³ FED. R. CRIM. P. 11, 327 U.S. 842 (1945). The military counterpart of Rule 11 is MCM, para 70 b. See *United States v. Griffing*, 15 U.S.C.M.A. 135, 35 C.M.R. 197 (1964); text accompanying notes 112-14 *infra*.

²⁴ The Rules were promulgated by Court order dated February 28, 1966, 383 U.S. 1089. Justices Black and Douglas dissented.

²⁵ The current text of Rule 11 reads as follows:

A defendant may plead not guilty, or guilty with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is *made voluntarily with understanding of the nature of the charge* and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

FED. R. CRIM. P. 11. For a discussion of the current proposals for modification of Rule 11 in light of recent developments, see notes 90-99 *infra*.

²⁶ 394 U.S. 459 (1969). See *United States v. Halliday*, 394 U.S. 831 (1969) (*McCarthy* does not apply retroactively).

²⁷ *Id.* at 468-69. The Court, after noting that there had not been full compliance with Rule 11, adopted the holding of *Heiden v. United States*, 353 F.2d 53 (9th Cir. 1965), that absent full compliance with the Rule, a guilty plea must be set aside and remanded for another hearing.

²⁸ 394 U.S. at 465 & n.11. To support its claim that the voluntariness

While the Court specifically noted that this construction of Rule 11 was made pursuant to its supervisory power over the lower federal courts and not upon constitutional grounds,²⁹ it would appear that compliance with the Rule may well be a requirement of due process. Indeed, if Justice Harlan's assessment of the majority opinion in *Boykin v. Alabama*³⁰ is correct, the Court was viewing Rule 11 as the embodiment of the type of procedure necessary to meet the threshold requirements of constitutional due process and is therefore applicable to the states via the Fourteenth Amendment.³¹ In *Boykin* the Court reversed the state conviction of the petitioner because the trial record failed to adequately disclose that the defendant voluntarily and intelligently entered his plea as required by *McCarthy*. Justice Douglas' opinion for the Court emphasized that "[t]he question of an effective waiver of federal constitutional right in a proceeding is of course governed by federal standards." - Although the Court did not specifically rule that state trial judges had to make a Rule 11 inquiry, it was clear that the Court saw a need for some procedural safeguard of due process. Justice Harlan criticized the Court's use of *McCarthy*, a procedural case, to handle a substantive constitutional issue. Harlan concluded that the Court had in effect fastened upon the states, as a matter of federal constitutional law, "the rigid prophylactic requirements of Rule 11." Thus, after *McCarthy* and *Boykin*, it seemed that the Supreme Court required all courts in the land to adopt ade-

determination was "constitutionally required," the Court cited *Machibroda v. United States*, 368 U.S. 487 (1962). See also COOLEY, CONSTITUTIONAL LIMITATIONS 443 (7th ed. 1903). The requirement of a voluntary plea is adopted by the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.5 (Approved Draft 1968) [hereinafter cited as PLEAS OF GUILTY] which in relevant part provides:

The court should not accept a plea of guilty or *nolo contendere* without first determining that the plea is voluntary. BY inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached

²⁹ *McCarthy v. United States*, 394 U.S. 459, 464 (1969).

³⁰ "394 U.S. 238 (1969). For a brief but interesting discussion on the impact of *McCarthy* and *Boykin* on standards for the acceptances of guilty please, see Note, *Requirements for Acceptance of Guilty Pleas*, 48 N.C.L. REV. 352 (1970).

³¹ See note 12 *supra*.

³² *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

³³ *Id.*, at 245. Mr. Justice Harlan was joined in dissent only by Mr. Justice Black. Thus, it would seem that considerations of federalism underlie the dissent. The other two "swing" men of the Court, Justices Stewart and White, voted with the majority.

quate procedures to shield an accused from his own involuntary or inaccurate plea.

In the Term before the *McCarthy* and *Boykin* decisions were handed down, the Court gave some warnings against pressures which would render a plea involuntary. In *United States v. Jackson*,³⁴ the Court determined that the death penalty scheme of the Federal Kidnapping Act³⁵ exerted unconstitutional pressures on a defendant to forego his Fifth and Sixth Amendment rights by entering pleas of guilty. Under the statute if the kidnap victim was harmed, the accused could be sentenced to death if the jury so recommended. If, however, the defendant pleaded guilty to the offense, thereby waiving a jury trial, his maximum potential punishment would be life imprisonment. The Court held that this put a premium on the guilty plea and dampened the exercise of the Sixth Amendment right to trial by jury. The "chilling effect" which this quandary had on the defendant's exercise of his Fifth and Sixth Amendment rights was impermissible. Thus, the Court invalidated the penalty-by-election portion of the statute. For a while, the case stood as a warning that the Supreme Court of the United States would not tolerate procedures which inhibited the free exercise of a defendant's constitutional rights.³⁶ Although it has not been expressly overruled, *Jackson* has been so severely limited by the decisions of the Burger Court that its impetus is almost totally lost.

C. THE BURGER COURT

1. *The Brady Trilogy*.

In *Brady v. United States*,³⁷ the Court encountered a situation remarkably similar to that present in *Jackson*. Indicted for kidnapping under the Federal Kidnapping Act in 1959, defendant Brady originally pleaded not guilty. Upon finding that his co-defendant had confessed and would be available to testify against

³⁴ 390 U.S. 570 (1968).

³⁵ Commonly known as the Lindbergh Law, the Act is codified at 18 U.S.C. § 1201 (1970) and provides in relevant part

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or
(2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

³⁶ See, e.g., *Pope v. United States*, 392 U.S. 651 (1968); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).

³⁷ 397 U.S. 742 (1970), noted in 84 HARV. L. REV. 148 (1970).

him, Brady changed his plea to guilty, thereby avoiding the possibility that he would receive the death penalty on recommendation of the jury. On petition for writ of habeas corpus, Brady alleged that his plea was coerced by the same death penalty scheme held to be unconstitutional in *Jackson*. He also alleged that his defense counsel had exerted considerable pressure upon him to plead guilty, that the solicitor had induced the plea by misrepresentations as to the chances of clemency, and that there had been no compliance with the dictates of Rule 11. Because the primary motive for Brady's guilty plea was fear of his co-defendant's testimony rather than fear of the imposition of the death penalty, the Court determined that Brady's situation was distinguishable from that of the defendant in *Jackson*.³⁸ The Court was willing to admit that Brady probably would not have pleaded guilty, in spite of his codefendant's testimony, were it not for the potential imposition of the death penalty, but preferred the traditional test of "voluntary" and "intelligent" to the defendant's proffered "but for" test. Mr. Justice Brennan, though concurring in the result achieved in *Brady*,³⁹ expressed grave reservations as to the Court's basic approach. He would have preferred a clear holding reaffirming the *Jackson* proscription against the death penalty schemes which tend to chill the exercise of constitutional rights."⁴⁰

The *Brady* Court recognized the gravity of the waivers in-

"The Court gave a narrow reading of the holding in *Jackson*:

Jackson ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201 (a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." *Id.* at 747.

"Justice Brennan wrote a single opinion for the *Brady* case combined with *Parker v. North Carolina*, 397 U.S. 790, 799 (1970). He was joined by Justices Douglas and Marshall. The opinion dissented from the Court's position in *Parker*, but concurred in the result of the *Brady* decision because Justice Brennan believed that Brady's plea was triggered by his codefendant's confession.

"*Brady v. United States*, 397 U.S. 742, 750 (1970). Significantly, the Brennan view would render a plea involuntary where it is shown that the possibility of the death sentence in a jury trial as an isolated factor played a significant role in a defendant's decision to enter a plea of guilty. *Id.* at 815 (opinion of Brennan, J.). In *Brady* it appeared to the Brennan faction that this test was not met; in *Parker* it was apparent that the possibility of the death sentence as an isolated factor did play a significant role, thus rendering the plea involuntary. The majority holding in *Brady* apparently decides that a guilty plea is involuntary only in a minor class of cases in which the defendant's will has been literally overborne. *Id.* at 801-02 (opinion of Brennan, J.).

herent in guilty pleas and reemphasized that they be accepted with great caution. Concerning the nature of the guilty plea, the Court observed: "*Central to the plea . . . is the defendant's admission in open court that he committed the acts charged in the indictment.*"⁴¹ The Court determined that since Brady had been advised by competent counsel, his plea had been intelligently made. *Miranda v. Arizona*⁴² was cited in support of this cure-all role of counsel.⁴³ The Court also noted the many "advantages" accruing to the defendant on entering a guilty plea—including the reduced exposure to the public eye, an immediate start of the rehabilitory process, elimination of the practical "agony and expense" burdens of a full trial, and the great probability of a lesser penalty.⁴⁴ Yet the Court recognized the weaknesses of the system and resorted once again to the "factual basis" requirement and the integrity of trial judges to prevent injustice.⁴⁵

In a companion case, *Parker v. North Carolina*,⁴⁶ the Court upheld the guilty plea of the fifteen-year-old defendant who had been indicted for first degree burglary. Parker pleaded guilty under a North Carolina statute which provided for a maximum sentence of death if the defendant pleaded not guilty and was tried before a jury, but provided for mandatory sentence of life imprisonment if the accused pleaded guilty.⁴⁷ Parker, like Brady, claimed that such a scheme constituted an unconstitutional inducement of the guilty plea. Parker further alleged that his plea was involuntary because it was the product of a coerced confession and was unintelligently made since his counsel mistakenly advised him that his confession was admissible.

⁴¹ 397 U.S. at 748 (emphasis added).

⁴² 384 U.S. 436 (1966).

⁴³ See note 52 *infra*; Tigar, *supra* note 22, at 18–19. Compare this attitude toward the effectiveness of counsel with that of the Court of Military Appeals in *United States v. Care*, 18 U.S.C.M.A. 939, 941, 40 C.M.R. 247, 253 (1969). *Infra* at note 130.

⁴⁴ *Brady v. United States*, 397 U.S. 742, 752 (1970).

⁴⁵ *Id.* at 757–58.

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.

⁴⁶ 397 U.S. 790 (1970).

⁴⁷ *Id.* at 792n.1.

The Court first rejected Parker's claim that the possibility of the death sentence rendered the guilty plea involuntary, citing *Brady* as authority. Next, it found that in spite of the fact that Parker's confession was given after he had been kept in a dimly lit cell all night without food or water, the relationship between the confession and the guilty plea was "so attenuated as to dissipate the taint."⁴⁸ Finally, the Court determined that Parker's counsel's error was not sufficiently prejudicial to render the plea unintelligent.

In his dissenting opinion,⁴⁹ Justice Brennan stated that the *Parker* decision seriously undermined the rational underpinnings of *Jackson* and departed from the Court's prior approach to the determination of the voluntariness of guilty pleas and confessions.⁵⁰ Justice Brennan also outlined the difficulty with which the term "voluntariness" is defined and used by courts, concluding that, "the legal concept of 'involuntariness' has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations which the government cannot properly introduce."⁵¹ Justice Brennan likewise attacked the notion that the mere presence of counsel insulates the defendant from impermissible state pressure, especially where counsel is court-appointed rather than privately retained by the accused.⁵²

⁴⁸ *Id.* at 796, quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939).
⁴⁹ 397 U.S. at 796.

⁵⁰ *Id.* at 799-800. See notes 39-40 *supra*.

⁵¹ *Id.* at 802.

Even after the various meanings of "involuntary" have been identified, application of voluntariness criteria in particular circumstances remains an elusory process because it entails judicial evaluation of the effect of particular external stimuli upon the state of mind of the accused. *Id.* at 803.

⁵² *Id.* at 804.

The Court's answer to the stringent criterion of voluntariness imposed by [*Bram v. United States*, 168 U.S. 582 (1897)] and subsequent cases is that "the availability of counsel to an accused effectively offsets the illicit influence upon him that threats or promises by the government may impose. Of course, the presence of counsel is a factor to be taken into account in any overall evaluation of the voluntariness of a confession or a guilty plea. However, it hardly follows that the support provided by counsel is sufficient by itself to insulate the accused from the effect of any threat or promise by the government,

"It has frequently been held, for example, that a guilty plea induced by threats or promises by the trial judge is invalid because of the risk that the trial judge's impartiality will be compromised and because of the inherently unequal bargaining power of the judge and accused. The assistance of counsel in this situation, of course, may improve a defendant's bargaining ability, but it does not alter the underlying inequality of power."

397 U.S. at 804. See notes 40 & 51 *supra*. But see *Brown v. Peyton* 435 F.2d 1352 (4th Cir. 1970), noted in 5 GA. L. REV. 809 (1971). See note 73 *infra*. The efficacy of *Jackson v. Denno* has recently been somewhat diminished by the decision of the Court in *Lego v. Twomey*, 404 U.S. 477 (1972) which held that the prosecution must only sustain a preponderance of the evidence standard of proof regarding the voluntariness of a confession.

Before noting the similarity between the North Carolina penalty scheme and that under the Federal Kidnapping Act which the Court held to be invalid in *Jackson*, Justice Brennan reached the conclusion that “the penalty scheme presents a clear danger that the innocent . . . will be induced nevertheless to plead guilty.”⁵³ Thus, without reaching the question of whether the allegedly coerced confession compelled the guilty plea, Justice Brennan determined that the North Carolina penalty scheme was invalid under *Jackson* and that it had in fact exerted impermissible pressure on defendant Parker.

The third case of the *Brady* trilogy, *McMann v. Richardson*,⁵⁴ involved three New York prisoners who sought writs of habeas corpus, alleging that their guilty pleas were the products of coerced confessions.” The Court once again noticed the centrality of the admission of guilt to the guilty plea: “a plea of guilty normally rests on the defendant’s own *admission in open court* that he committed the acts with which he is charged.”⁵⁶ The majority ultimately held “that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus.” ; Once again, Justice Brennan voiced a strident dissent. Focusing on the fact that the only real issue was whether or not the defendants were entitled to a hearing on the issue of voluntariness, he exclaimed :

⁵³ 397 U.S. at 809. The North Carolina statutory scheme, like the penalty scheme under the Federal Kidnapping Act put a premium on the guilty plea and a price on the constitutional right to trial by jury. See text accompanying notes 34-36 supra.

⁵⁴ 397 U.S. 759 (1970).

”These pleas were taken prior to the Court’s decision in *Jackson v. Denno*, 378 U.S. 368 (1964), which held that New York’s procedure which allowed the jury to determine the voluntariness of confessions was unconstitutional, the rationale being that allowing such a determination was prejudicial to the jury’s subsequent determination of guilt. *Jackson v. Denno* was subsequently held to be retroactive insofar as it required hearings to determine the voluntariness of pre-*Jackson* confessions which were introduced at trial. See e.g., *Johnson v. New Jersey*, 384 U.S. 719, 727-28 (1966); *Tehan v. United States ex rel Shott*, 382 U.S. 406, 416 (1966); *Linkletter v. Walker*, 381 U.S. 618, 639 & n. 20 (1965). The majority’s opinion in *McMann* held that the guilty plea was voluntary and intelligent because of the presence of competent counsel. Yet even the most expert advice by counsel would have had to take into account a procedure for challenging the validity of confessions which was pregnant with a constitutional defect infused into the pleading process. Thus, the inability of the defendants to constitutionality challenge the validity of their coerced confessions could not possibly have been cured by the presence of competent counsel. See 397 U.S. at 782-83 (Brennan, J. dissenting); note 52 supra.

⁵⁶ 397 U.S. at 766 (emphasis added).

⁵⁷ *Id.* at 771.

"I would not simply slam shut the door of the courthouse in their faces."⁵⁸

Taken together, the cases in the *Brady* trilogy marked a serious retreat from the safeguards advanced by the Warren Court. Although they paid lip service to the concept of voluntariness, their primary emphasis is on achieving solidarity in pleading. The court relied on the "factual basis" requirement of Rule 11 and *Boykin v. Alabama*⁵⁹ to guard against inaccuracy. In the following Term, the Court encountered a situation where a guilty plea was accompanied by a protestation of innocence. Therein, the Court's theories of voluntariness and accuracy were pushed to their ultimate limits.

2. *North Carolina v. Alford: The Ultimate Anomaly.*

Henry Alford was indicted for murder in the first degree by a North Carolina grand jury on December 2, 1963. Eight days later, pursuant to the bargain arranged by Alford's attorney with the local solicitor, he tendered a plea of guilty to murder in the second degree. The trial judge inquired into the desire of the defendant to enter this plea. Alford reaffirmed his intention to submit a guilty plea, but tempered this decision with the following remarks :

[B]ut I ain't shot no man, but I take the fault for the other man. . . . I just pleaded guilty because they said if I didn't they would gas me for it. . . . I'm not guilty but I plead guilty."

The trial judge then heard the state's testimony from one police officer and two other persons, none of whom was an eye witness to the alleged murder. Then, accepting the guilty plea, the judge found the defendant guilty of second degree murder and sentenced him to the maximum punishment for that crime—thirty years.

After several unsuccessful collateral attacks on the providency of his plea,⁶¹ Alford succeeded in getting the attention of the

⁵⁸*Id.* at 786 (Brennan, J. dissenting).

⁵⁹395 U.S. 238 (1969). See text accompanying notes 30–33 *supra*.

⁶⁰"North Carolina v. Alford, 400 U.S. 25, n.2 (1970). A court could not ask for a more blatant disparity between plea and accused's own personal belief. Cf. note 21 and accompanying text *supra*. The court's failure to reconcile this incongruency in logical terms is the major weakness of the opinion.

⁶¹Alford exhausted all available state channels of appeal and habeas corpus before seeking his original federal habeas writ, *See Fay v. Noia*, 372 U.S. 391 (1963); *Minnesota v. Brundage*, 180 U.S. 499 (1901). His original habeas petition was dismissed by the federal district court; the dismissal was affirmed by the Fourth Circuit. For an exhaustive analysis of the prerequisites for and scope of federal habeas corpus review of court-martial, see Weck-

Fourth Circuit. That court decided that in light of the Supreme Court's then recent decision in *United States v. Jackson*,⁶² the North Carolina statutory death scheme had exerted impermissible pressure on Alford to relinquish his Fifth and Sixth Amendment rights and concluded that Alford had in fact yielded specifically to this pressure.⁶³ Alford's testimony at the state post-conviction proceeding clarifies the basis for the Fourth Circuit's holding :

Mr. Crumpler said if I didn't enter a plea I would surely get a death sentence. That is what he told me. . . . And I can't read or write, and he just run over it because he knew I couldn't understand it and he said if I didn't take a plea of second degree I would surely get a death sentence.⁶⁴

Regrettably, for Henry Alford, the Warren Court which noted probable jurisdiction⁶⁵ of his case and which had previously decided *United States v. Jackson*⁶⁶ did not ultimately determine his case. Instead, the *Alford* decision was rendered by the same Court which decided the *Brady* trilogy.⁶⁷ Predictably, the judgment of the Fourth Circuit was vacated and Alford's guilty plea was upheld.

During oral argument before the Court, Alford's counsel, attempted to stress two points: first, that the North Carolina

stein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971).

⁶² 390 U.S. 570 (1968). See text at notes 34-36 *supra*.

⁶³ *Alford v. North Carolina*, 405 F.2d 340 (4th Cir. 1968).

⁶⁴ *Id.* at 348-49, quoting the Transcript of the Proceedings, North Carolina v. Alford, Superior Court, Forsyth County, North Carolina (December, 1963 Term). A supporting affidavit was filed by Alford's sister, Mrs. Christine Green. It indicated the nature of the pressure put on Alford by his attorney to induce him to enter a plea of guilty. Mrs. Green swore to the following:

Henry at first stated that he wanted to plead guilty to second degree murder: then a few minutes later he changed his mind. I explained to Henry that if he got thirty years, I could still visit him and it would be better than running a risk of losing his life. . . . Henry then said that he didn't kill the deceased person, but that he did not want to be killed either, and at this time stated that he wanted to enter a plea of guilty to second degree murder.

405 F.2d at 348-49 n. 21, quoting Mrs. Christina Green's affidavit, filed in the Superior Court of Forsyth County, North Carolina.

⁶⁵ 394 U.S. 956 (1969).

⁶⁶ See notes 34-36 and accompanying text *supra*.

⁶⁷ Chief Justice Warren retired June 23, 1969, at which time Chief Justice Burger took his seat. Justice Fortas had previously resigned from the Court on May 14, 1969. Justice Blackmun took office on June 9, 1970.

Interestingly enough, Chief Judge Clement Haynsworth of the Fourth Circuit, one of the two Nixon appointees who were denied confirmation by the Senate, dissented from the Fourth Circuit's decision in *Alford*.

The current composition of the Court also includes two more Nixon appointees—Justices Lewis F. Powell, Jr., and William Rehnquist. These men replace the late Justices Hugo Black and John Harlan.

death scheme was so similar to the scheme which the Court held unconstitutional in *United States v. Jackson*⁶⁸ that Alford's plea was compelled and therefore involuntary, and second, that the defendant had never admitted his guilt and that therefore the plea was inaccurate.⁶⁹ To this latter statement the Chief Justice responded: "Guilt is a legal conclusion, is it not? . . . A man may be guilty in fact and not in law."⁷⁰ The irony of that statement lies in the fact that the Court ultimately upheld Alford's guilty plea. That plea, taken together with Alford's *in judicio* protestations of innocence, suggests the possibility that the converse of the Chief Justice's statement might be true, *i.e.*, that Alford could be guilty in law, but not in fact. That possibility is repugnant to the foundations of fairness on which the American system of criminal justice is supposedly built.

The Alford Court's treatment of the *Jackson* case warrants comment. The Court devoted only one paragraph to the vitiation of Alford's *Jackson*-based argument. Referring the reader to its last Term's decision in *Brady v. United States*,⁷¹ the Court ruled that *Jackson* had not undermined the traditional waiver test of "voluntary" and "intelligent."⁷² The Alford Court's interpretation of "voluntary" and "intelligent" is at best a mutation of those words as used by the Court which fashioned the test. In effect, Alford says that the presence of an unconstitutional death scheme does not necessarily invalidate all guilty pleas made in order to limit potential sanctions. This is especially true, reasoned the Court, where the defendant is represented by competent counsel.⁷³ The facts of the Alford case, however, suggest

⁶⁸ 390 U.S. 570 (1968).

⁶⁹ 8 CRIM. L. REP. 4027 (1970).

⁷⁰ *Id.*

⁷¹ 397 U.S. 742 (1970). See notes 37-45 and accompanying text *supra*.

⁷² *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The Court ignored the questions raised by Justice Brennan's separate opinion in the *Brady-Parker* cases involving the "rationale underpinnings" of *Jackson*. See notes 49-53 and accompanying text *supra*.

⁷³ The Court did not expand on this reference to the role of counsel. Perhaps this was done to purposefully avoid Justice Brennan's dissent in *Parker v. North Carolina*, 397 U.S. 790, 799 (1970). See generally PLEAS OF GUILTY at § 3.2; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

Much has also been written concerning the role of the prosecution in plea negotiation. E.g., PLEAS OF GUILTY, at § 3.1; Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514, 528-34 (1969); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). Regarding the role of the prosecutor one recent study concluded:

A prosecutor may not properly participate in a disposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court.

that counsel was less than effective.⁷⁴

The Court next addressed itself to the accuracy issue—the fact that Alford had protested in open court that he had not killed the decedent. The opinion makes the categorical statement that “State and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of **guilt.**”⁷⁵ The Court cited several opinions which purportedly support the position that a court may accept such a plea.

The first such case was *Tremblay v. Overholser*,⁷⁶ a federal district court opinion from 1961. It was cited for the proposition that a court cannot constitutionally force a defense on an unwilling defendant. The facts of the case demonstrate the narrowness of its holding. Defendant Tremblay was arrested for public intoxication. Although she could have paid a ten dollar fine to settle the offense, she chose not to do so. At the trial before the Criminal Branch of the Municipal Court, she pleaded guilty, but the trial judge refused to accept her plea and found her not guilty by reason of insanity, although neither she nor her counsel raised the issue. The applicable statute of the District of Columbia made it mandatory for the court, when acquitting a person on a criminal charge by reason of insanity, to commit such person to

ABA PROSECUTION AND DEFENSE FUNCTIONS STANDARDS, § 4.2 (1970). See also Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964).

Pretrial bargains in the military must be initiated by the accused. The prosecutor (trial counsel) functions only as agent of the convening authority. It has been held that the trial counsel has a duty to inform the court of any matter of which he has knowledge which is inconsistent with the accused's plea of guilty. *United States v. Croft*, 33 C.M.R. 856 (AFBR 1963).

⁷⁴ The guilty plea was entered eight days after the indictment. Counsel did not interview all of the witnesses. None of those witnesses present at the trial heard Alford threaten the victim by name or confess to the murder. The state has no evidence that Alford's gun was the murder weapon or that it had been fired. The state's case, in short, rested entirely upon circumstantial evidence. See Transcript of Proceedings, *North Carolina v. Alford*, Superior Court, Forsyth County, North Carolina (December, 1963 Term); Supplemental Brief for Appellant, *North Carolina v. Alford*, 400 U.S. 25 (1970); Comment, 32 OHIO ST. L.J. 426, 436-37 (1971).

⁷⁵ *North Carolina v. Alford*, 400 U.S. 25, 33 (1970). This Comment will proceed to examine the cases which the court cites for the proposition that a guilty plea accompanied by a protestation of innocence *may* be accepted. Suffice it to say that the cases cited for the opposite side of the “split authority”—*i.e.*, that such a plea may not be accepted—not only contain language which supports the proposition, but uniformly so hold.

⁷⁶ 199 F. Supp. 569 (D.D.C. 1961).

a local mental institution." After eleven months' detention in the local mental hospital, her case reached the district court on a petition for writ of habeas corpus. It is no small wonder that the court quickly issued the writ.

Next, the *Alford* Court cited *McCoy v. United States*⁷⁸ for the proposition that "[a]n accused, though believing in or entertaining doubt respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty"⁷⁹ In *McCoy*, the District of Columbia Circuit affirmed the lower court's rejection of defendant's tendered guilty plea to a lesser included offense and subsequent conviction of the originally charged offense.⁸⁰ The trial judge had questioned the providence of the plea and rejected it when the defendant denied his guilt. When the defendant insisted that he would prefer to plead guilty, the trial judge replied: "You can't plead before me to a charge to which you say you are not guilty. No sir, you cannot do that."⁸¹ So, in *McCoy*, although there is dicta supporting the Supreme Court's citation, the holding was quite the contrary. When the facts of *Alford* are juxtaposed to those of *McCoy*, it becomes readily apparent that *McCoy* supports the position of the petitioner in *Alford* and is not authority for the Court's conclusion. The basic divergence between *McCoy* and *Alford* is that they held opposite ways at the trial level. The trial judge in *Alford* accepted the proffered plea, whereas the *McCoy* judge rejected it. As a general rule, it is the role of the trial judge to determine that a guilty plea or any other waiver of a basic constitutional right is made voluntarily.⁸² It is clear, however, that the trial judge's discretion is not plenary.

The *Alford* Court's third major authority for its holding con-

⁷⁷ *Id.* at 570.

⁷⁸ 363 F.2d 306 (D.C. Cir. 1966).

⁷⁹ Quoting *id.* at 308.

⁸⁰ Appellant had pleaded not guilty to a charge of violating D.C. CODE § 22-2204 (1967), unauthorized use of a motor vehicle, punishable by a fine not exceeding \$1000 or imprisonment not exceeding five years, or both. The lesser offense to which defendant was willing to plead guilty was for violation of D.C. CODE § 22-2211 (1967), taking property without right carrying a maximum sentence of six months or a fine of \$100 or both.

⁸¹ *McCoy v. United States*, 363 F.2d 306, 307 (D.C. Cir. 1966).

⁸² *E.g.*, PLEAS OF GUILTY, at § 3.3; Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514, 524-28 (1969). See Note, *The Unconstitutionality of Plea Bargaining*, 83 HAR. L. REV. 1387, 1394 (1970) (footnote omitted):

Within the plea bargaining process, "[t]he judge is forced to assume an inquisitorial role because only he has sufficient disinterest in the bargain to examine its validity." See note 52 *supra*.

sisted of dictum from *State v. Kaufman*,⁸³ which was decided by the Iowa Supreme Court in 1879. The court there held that a defendant may waive a full jury of men when one of the twelve becomes ill and is unable to continue the trial. This view was supported by the rule that a man has an absolute right to plead guilty. The fact that the United States Supreme Court held in *Lynch v. Overholser*⁸⁴ that this absolute right to plead guilty does not exist undercuts both the theory and utility of *Kaufman*.

In *Bruce v. United States*,⁸⁵ another case cited by the *Alford* Court as standing for the proposition that a court may accept a guilty plea accompanied by a denial of guilt, the District of Columbia Circuit cautioned trial judges regarding their acceptance of such pleas :

The fear lest an innocent man be unjustly punished bids a court be chary before it accept a plea of guilty filed by one proclaiming he is not guilty.⁸⁶

The court recognized the possibility that when a question of guilt involves a legal rather than a moral determination, as when the defendant is unaware that his acts constituted a crime, or when it involves assessment of judgment or intent, that "the judge need not reach a definite conclusion of guilt if he is satisfied of a high probability of conviction."⁸⁷ This language is inapposite given the factual posture of *Alford*, *i.e.*, where the defendant denies the primary fact.

Only one of the remaining cases cited by the Supreme Court to constitute the side of "split authority" which allows the acceptance of a guilty plea accompanied by a protestation of innocence, stands directly for that proposition. In *United States ex rel. Brown v. LaVallee*,⁸⁸ the Second Circuit reversed a federal district court's issuance of a writ of habeas corpus. Defendant Brown was a homosexual on trial for first degree murder in the stabbing of a sex partner. He was also pending indictment for aggravated assault. The victim of the assault, another of Brown's sex partners, had been knifed by Brown. He was scheduled to

⁸³ 51 Iowa 578, 2 N.W. 275 (1879).

⁸⁴ 369 U.S. 705, 719 (1962).

⁸⁵ 379 F.2d 113 (D.C. Cir. 1967).

⁸⁶ *Id.* at 119-20 n. 19. The *Bruce* court intimates that one possible solution is to use the plea of *nolo contendere* more freely. *Id.* See, Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 24 n. 77 (1970). Cf. notes 90-94 and accompanying text *infra*. See generally Levin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L. J. 1255 (1942).

⁸⁷ *Bruce v. United States*, 379 F.2d 113, 120 n. 19 (D.C. Cir. 1967).

⁸⁸ 424 F.2d 457 (2d Cir. 1970), *cert. denied* 401 U.S. 942 (1971).

testify at Brown's murder trial. Brown's four lawyers arranged for a guilty plea to second degree murder, but Brown refused to accept the deal. In an effort to change their client's mind, the lawyers had Brown's mother flown from Texas to New York where Brown was being held. After a prolonged argument in which his hysterical mother begged him to plead guilty to avoid the death penalty, Brown consented to enter the plea. His lawyers then secured Brown's signature on a waiver of trial and on the guilty plea. At arraignment, the judge refused to allow Brown to change his plea to not guilty. Focusing on genuine interests which the lawyers and mother undoubtedly had in Brown's well-being, the Second Circuit held that the plea was made voluntarily. The court said: "In the . . . months [sic] of the prosecutor or the trial judge, these statements might have been coercive; coming from his lawyers and his mother, they were sound advice."⁵⁹ Having accepted the institution of plea bargaining⁶⁰ the court distinguished *United States v. Jackson* on the facts.

⁵⁹*Id.* at 461. See notes 52, 73 *supra*.

⁶⁰The question of plea bargaining is a complex one and has been thoroughly debated by the courts and commentators. See generally, Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

One of the problems with plea bargaining has been the disparity between the promises and the results. In *United States ex. rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966) the court considered a case in which the state trial judge did not advise the defendant that he had withdrawn his promise of a given sentence, and held that the defendant did not knowingly waive or relinquish his constitutional rights given this withdrawal. See also, *Bailey v. MacDougall*, 392 F.2d 155, 158 n. 7 (4th Cir. 1968).

Courts-martial have alleviated the problem. The administrative or "convening" authority who exercises court-martial jurisdiction over an accused also has a final approval on the sentence. Although he is without power to increase the sentence, he is empowered to disapprove part or all of the sentence. Hence, in the plea bargaining process, the prosecutor functions as agent of the convening authority who will ensure that the terms of the bargain are carried out.

California has dealt with the possible incongruity between bargain and sentence by making the plea bargain a part of the trial record. Citing *Brady* as authority for the constitutionality of plea bargaining, the California Supreme Court decided to "exhume the process from the stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter." *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Repr. 385 (1970).

The Proposed Amendments to Rule 11, FED. R. CRIM. P. (April 1971) incorporate this principle by requiring that any plea negotiations be revealed to the trial judge who must give the bargained-for penalty or a more lenient one if he accepts the plea. If adopted as currently drafted, the Rule will read in part as follows:

[T]he court shall require the disclosure of the agreement in open court at the time the plea is offered. . . . If the court accepts the plea agreement, the court shall inform the

In light of the Supreme Court's holding in *AZford*, the likelihood of reversal in *Brown* seems slight. Significantly, Alford's claim rested on firmer ground than Brown's. Brown had admitted the slaying of which he was accused yet interposed that his action was in self-defense; whereas Alford denied the slaying itself. *Brown*, however, remains *as* the best authority for the Court's position in *AZford*.

The *AZford* Court found additional solace in the line of *nolo contendere* cases following *Hudson v. United States*,⁹¹ from which it concluded that: "Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence."⁹² Although it is true that the *nolo* plea may be accepted, even in cases involving moral turpitude, it is not widely used in such cases. The main benefit of the plea is that it has no collateral estoppel effect in subsequent civil proceedings.⁹³ For this reason, it finds its primary application in those situations in which a conviction would

defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement . . . If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Exposing the bargaining process to judicial scrutiny could ferret out many of the infirmities which have plagued it.

In courts-martial the military judge may inquire into the nature and terms of the pretrial agreement as an incident of his inquiry into the providency of the plea. *United States v. Villa*, 19 U.S.C.M.A. 564, 42 C.M.R. 166 (1970); *United States v. Razor*, 41 C.M.R. 708 (ACMR 1970), *aff'd*, 19 U.S.C.M.A. 570, 42 C.M.R. 172 (1970). Any knowledge of the existence or terms of a pretrial agreement by the court members is inappropriate and will nullify the plea. *United States v. Welker*, 8 U.S.C.M.A. 647, 25 C.M.R. 151 (1958); *United States v. Withey*, 25 C.M.R. 593 (ABR 1958).

⁹¹272 U.S. 451 (1926). *Hudson* involved the conviction of a defendant on a charge of using the mails to defraud, another based on the entry of defendant's *nolo contendere* plea. Defendant entered the plea in expectation of limiting his punishment to a fine. The trial court sentenced him to serve a year and a day in the state penitentiary. Hudson appealed. The Supreme Court held that, "like the plea of guilty, it [plea of *nolo contendere*] is an admission of guilt for the purposes of the case." *Id.* at 455. It is inconceivable that Justice White could rely on this holding in light of Alford's express declaration of innocence. See note 86 *supra*.

⁹²*North Carolina v. Alford*, 400 U.S. 25, 36 (1970). The plea of *nolo contendere* is not recognized as valid under military law. *United States v. Davis*, 4 C.M.R. 195 (ABR 1952).

⁹³*United States v. One Chevrolet Stylemaster Sedan*, 91 F. Supp. 272 (D. Colo. 1950).

enhance the likelihood of civil judgment.⁹⁴ The defendant who enters a nolo plea does not expressly admit his guilt; nor is such a plea analogous to a guilty plea accompanied by a protestation of innocence. Yet, the Supreme Court in *Alford* seemed to equate the two.⁹⁵

The apparent refuge in the *Hudson* line of cases momentarily eclipses the fact that this reasoning is being propounded by the very Court which held six months earlier in *Brady* that an admission in open court was "central to the plea."⁹⁶ It now appears as if this standard is to be abandoned for one which reduces the burden of determining the accuracy of the plea to a simple judgment that there is a factual basis for it.

Neither Rule 11 of the Federal Rules of Criminal Procedure nor the *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty*,⁹⁷ makes any attempt to state what standard of probability of guilt the judge should use to make this factual basis determination. "The matter is left largely to the discretion of the judge."⁹⁸ Arguably, this dilutes the guarantee that a criminal defendant has to be proven guilty beyond a reasonable doubt since corroborating evidence of confessions often does not meet the "beyond a reasonable doubt" standard.⁹⁹ However, the patent distinction is that in the confession case, the defendant has admitted his guilt, while in an *Alford*-type case, he is insisting on his innocence. Realizing this, the ABA Advisory Committee suggested that while a judge may not require the defendant to admit his guilt in open court, it would be inappropriate for the judge to accept a guilty plea if

⁹⁴ Perhaps the most popular circumstance for application of the plea is during the course of an antitrust prosecution. Section Five of the Clayton Act, 15 U.S.C. § 16 (1970), provides that a conviction based upon a guilty plea may be used as prima facie evidence of violation in subsequent civil litigation, and it is no surprise that "guilty" defendants often choose to seek refuge from treble damage exposure in a nolo plea. See generally Note, *Nolo Pleas in Anti-Trust Cases*, 79 HARV. L. REV. 1475 (1966). The plea also finds occasional use in traffic offenses and other cases of minor criminal violations likely to result in large civil liability.

⁹⁵ Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of Innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

⁹⁶ *Brady v. United States*, 397 U.S. 742, 748 (1970). See note 41 and accompanying text *supra*.

⁹⁷ PLEAS OF GUILTY, at § 1.6, comment at 33.

⁹⁸ *Id. Accord*, Proposed Amendment to FED. R. CRIM. P. 11 (April 1971).

⁹⁹ *Cf. Lego v. Twomey*, 404 U.S. 477 (1972).

the defendant protested his innocence.¹⁰⁰ Notably, the ABA Committee cited *McCoy v. United States*¹⁰¹ to support this proposition—a case cited by the Supreme Court in *Alford* for just the opposite view.

In its opinion, the Court expressed some indignation at the fact that Alford argued that the trial judge should have been more stringent and forced him to stand trial for first degree murder, thereby risking the death penalty. The Court viewed this approach as “counterproductive” of the values protected by constitutional safeguards.¹⁰² Presumably, this “counterproductivity” argument reasons that it was to Alford’s advantage to get the thirty year sentence rather than risk the death penalty; but our system does not admit of an advantageous sentence for an innocent man. If Alford truly believed that he was innocent, he should have been forced to stand trial for first degree murder. The American system of justice with its philosophy of procedural safeguards, including the beyond-a-reasonable-doubt standard of proof, contemplates that innocence will prevail at trial. If this seems overly harsh to force the defendant to risk the death penalty, it may only be said, that if twelve jurors find beyond a reasonable doubt that the defendant murdered the deceased with malice aforethought, then that is justice according to our system. The American penal system is supposedly designed to rehabilitate wrongdoers. There is no rehabilitative value in thirty years incarceration to a man who, believing his own innocence, was induced to plead guilty because of counsel’s assertion that he would surely receive the death penalty. Imprisonment could only embitter the man.

It appears that the guilty plea is becoming sacrosanct in the hands of the Burger Court and that plea bargaining is becoming firmly entrenched as a vehicle of administratively-applied justice. Though some applaud this reversal of the Warren Court trend

¹⁰⁰ PLEAS OF GUILTY, at § 1.6, comment at 33–34. The Proposed Amendments to Rule 11 do not treat this situation specifically. The Advisory Committee gives deference to the Court’s decision in *Alford* in the comments by suggesting that the proper procedure where the defendant protests his innocence is to treat the plea as one of *nolo contendere*, but immediately tempers this remark with the observation that

The defendant who asserts his innocence while pleading guilty or *nolo contendere* is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions.

Proposed Amendment to FED. R. CRIM. P. 11, comment at 17 (April 1971).

¹⁰¹ 363 F.2d 306 (D.C. Cir. 1966). See notes 78–82 and accompanying text *supra*.

¹⁰² *North Carolina v. Alford*, 400 U.S. 25, 39 (1970).

as an end to "judicial legislation" or as a return to the strict construction of the Constitution,¹⁰³ the threat to liberties inherent in such a reversal may offset the advantages of strict construction. While there may be an urgent need to expedite the handling of criminal cases, the Court should be exceedingly wary of vitiating individual rights in judicial haste. Under the Burger Court's decisions, there is a danger that true volition may be subordinated to a fictional world of implied waivers and the beyond-a-reasonable-doubt standard sacrificed for probabilities.¹⁰⁴

It may well be that, given the nature of the plea bargaining process, the trial judge is the only one to whom the system can realistically look to prevent abuses of individual rights; but to allow him unfettered discretion in making his determination of voluntariness and accuracy could seriously impair the impartiality of our system.¹⁰⁵ In *North Carolina v. Alford*, the Burger Court was presented with an opportunity to resolve what it itself had termed a split of authority and to provide concrete guidelines for handling the combination guilty plea-protestation of innocence. Instead of propounding decisive guidelines, the Court relegated the trial judges to their own consciences and the nebulous factual basis standard.

II. PROVIDENCY IN THE MILITARY

A. THE STATCTORY STANDARD

When Congress unified military law and codified it into the Uniform Code of Military Justice in 1951, it was keenly aware of the necessity of keeping military justice beyond reproach. Accordingly, it included many safeguards which were not to become reality for civilian defendants until the Warren Court activism

"Chief Justice Burger declared his intention at the outset to give plain meaning to the words of the Constitution: In *Coleman v. Alabama*, 399 U.S. 1 (1970), he dissented from the Court's holding that defendants are entitled to counsel at preliminary hearings with the following admonition:

while our holdings are entitled to deference I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result, even though I agree with the objective of having counsel at preliminary hearings.

Id. at 22.

¹⁰⁴ *Cf. Lego v. Twomey*, 404 U.S. 477 (1972).

¹⁰⁵ Already the *Alford* case has had substantial recognition by the courts. Although it has been held that *Alford* neither amended Rule 11 nor relaxed the strict requirements of *McCarthy*, *United States v. Cody*, 438 F.2d 287, 289 (8th Cir. 1971), no decision has questioned the validity of *Alford* as a precept of constitutional law. The net result of this view is that *pro forma* compliance with the dictates of Rule 11 will insulate the plea from post-conviction attack. *Palermo v. Rockefeller*, 323 F. Supp. 478, 484 (S.D.N.Y. 1971).

of the sixties.¹⁰⁶ One area which provoked particular attention was that of the acceptance of guilty pleas. In order to insure that they were providently entered, Congress provided for a specific procedure which must be followed prior to the acceptance of a plea of guilty. These guidelines were embraced within the language of Article 45 which currently reads as follows :

If an accused after arraignment makes an irregular pleading,"" or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, or plea of not guilty *shall be entered* in the record, and the court shall proceed as though he had pleaded not guilty.""

Of course, the words of Article 45 standing alone do not indicate the full import of the guarantee. Congress presumed that Article 45 would be implemented through the promulgation of a Manual for Courts-Martial. In order to aid the President in his rule-making capacity, Congress suggested that the recommendations of the Keefe Board should be adopted as to the procedure to be followed by a court-martial when a plea of guilty is tendered.¹⁰⁷ The Keefe Board had recommended that the following steps should be followed :

(1) The accused must have had the advice of counsel prior to entering the plea.¹¹⁰

(2) The court must explain the meaning and effect of the plea to the accused, such explanation to include the fact that a guilty plea admits every element of the offense, that it makes conviction mandatory, and that the maximum sentence may be imposed (and what that sentence might be). Congress admonished the trial judge to reject any plea "unless the accused admits doing the acts charged."¹¹⁰

(3) A verbatim record of the inquiry into the providency of the plea should be maintained for appellate scrutiny.

¹⁰⁶ *E.g.*, the protections afforded military defendants under Article 31 were not accorded to civilian defendants until *Miranda v. Arizona*, 384 U.S. 436 (1966). See notes 4, 17 *supra*.

¹⁰⁷ The term "irregular pleading" is defined by the Manual to include "such contradictory pleas as guilty without criminality." MCM, para. 70a. Presumably, the Alford-type guilty plea-protestation of innocence would fall within the Article 45 proscription of "irregular pleadings."

¹⁰⁸ UCMJ, Art. 45.

¹⁰⁹ SEN. REP. No. 486, 81st Cong., 1st Sess. reproduced at 1950-2 U.S. CODE, CONG. & ADMIN. NEWS 2222, 2244-45.

"If the accused has refused counsel, the plea should not be received."

Id. at 2245.

¹¹¹ *Id.*

Paragraph 70(b) of the Manual establishes the procedural steps of inquiry which a military judge must make prior to accepting a plea of guilty. The language of paragraph 70(b) is strikingly similar to Rule 11.¹¹² Just as the federal trial courts are bound by the requirements of Rule 11,¹¹³ military courts-martial must follow paragraph 70(b).¹¹⁴

The Court of Military Appeals has strictly construed and enforced the provisions of Article 45 and paragraph 70(b). It has invalidated, for example, pleas of guilty where it appeared from the record that the accused was misinformed as to the maximum sentence.¹¹⁵ Similarly, the Court has affirmed the provisions of the Manual which call for an open court assertion by the accused that he is pleading guilty because he is in fact guilty.¹¹⁶

In *Cnited States v. Chancellor*,¹¹⁷ the Court reviewed the authorities and again concluded that Article 45 requires strict adherence to the rule of paragraph 70(b). Defendant Chancellor had pleaded guilty to a charge of issuing worthless checks and to wrongful cohabitation. On appeal he challenged the providency of his plea as to the former charge. Chancellor's contentions were based on the fact that he testified in a posttrial clemency interview that he had thought that the check would clear. This testimony was inconsistent with the requisite element of intent to defraud, but the President of the court had neither explained the elements of the offense nor obtained a statement from the accused that he was pleading guilty because he was in fact guilty. Thus, the Court was compelled by the clear language of Article 45 to vacate the plea and remand the case for possible rehearing. Although Article 45 suggests that the plea should be rejected whenever an accused sets up matters inconsistent with the plea after it has been entered, the Court was quick to hold that it would not allow defendants such discretion. If the accused had

¹¹² See *United States v. Griffin*, 15 U.S.C.M.A. 135, 45 C.M.R. 107 (1964); *United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963); *United States v. Butler*, 9 U.S.C.M.A. 618, 26 C.M.R. 398 (1958).

¹¹³ State courts are bound to afford the defendant due process of law as interpreted by *Boykin v. Alabama*, 395 U.S. 238 (1969). See notes 30-33 and accompanying text *supra*.

¹¹⁴ The Manual has been held to have the force and effect of law. *United States v. Jordan*, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971); *United States v. Griffin*, 15 U.S.C.M.A. 135, 35 C.M.R. 107 (1964); *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

¹¹⁵ *United States v. Zemartis*, 10 U.S.C.M.A. 353, 27 C.M.R. 427 (1959). *Accord*, *United States v. Van Valkenberg*, 42 C.M.R. 403 (ACMR 1970). *But see* *United States v. Johnson*, 42 C.M.R. 630 (ACMR 1970).

¹¹⁶ *E.g.*, *United States v. Drake*, 15 U.S.C.M.A. 375, 35 C.M.R. 347 (1965).

¹¹⁷ 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966).

indicated during the providency inquiry that he was in fact guilty, then his subsequent protestations of innocence would, in the words of the Court, "have fallen on deaf ears."¹¹⁸

To cure subsequent testimony or allusions which are in conflict with the plea, the Court of Military Appeals has suggested a rule of disavowal. The leading case is *United States v. Vance*.¹¹⁹ In *Vance*, the Court reversed a conviction based on a guilty plea where it appeared from the record that defense counsel had informed the law officer that the accused steadfastly maintained that he had been discharged—a complete defense to the charge of desertion. Counsel's assertion was buttressed on appeal by an affidavit from a former commander of the accused. In reversing the plea, the Court held that the law officer erred by not receiving "from the appellant a disavowal of such claim or refus(ing) to accept the plea."¹²⁰ Similarly, in *United States v. Pinkston*,¹²¹ the Court invalidated a plea of guilty where the defendant testified in mitigation that he had taken certain goods because he feared for his own life as well as that of his fiancée and baby. Here, unlike in *Vance* there was no surety that the inconsistent facts, if established, would comprise a defense in the eyes of the court.

A similar problem confronted the Court in *United States v. Lewis*.¹²² In this case, defense counsel alluded to an unprovable defense in his presentencing summation to the court. Declaring that Article 45 "permits no digression"¹²³ the Court announced the rule with unmistakable clarity :

(C)ounsel and the accused may not introduce information inconsistent with a guilty plea and then leave the information in suspension after concluding it is unlikely to result in a finding of not guilty. Unless they disavow such inconsistent matter, the guilty plea must fall as improvident.¹²⁴

Of course the most effective tool against subsequent protestations of innocence would be an unequivocal admission of guilt in fact at the original providency inquiry. Although paragraph 70(b) of the Manual and *Chancellor* suggested that this should be standard practice, it was not until 1969 that the Court of Military Appeals required strict adherence to this suggestion.

¹¹⁸ *Id.* at 300, 36 C.M.R. at 456.

¹¹⁹ 17 U.S.C.M.A. 444, 38 C.M.R. 242 (1968).

¹²⁰ *Id.* at 446, 38 C.M.R. at 244.

¹²¹ 18 U.S.C.M.A. 261, 39 C.M.R. 261 (1969). *Accord*, *United States v. Woodrum*, 20 U.S.C.M.A. 529, 43 C.M.R. 369 (1971).

¹²² 18 U.S.C.M.A. 287, 39 C.M.R. 287 (1969).

¹²³ *Id.* at 290, 39 C.M.R. at 290.

¹²⁴ *Id.* at 289, 39 C.M.R. at 289.

B. *THE CARE INQUIRY*

*United States v. Care*¹²⁵ marked the pivotal point in court-martial providency inquiries. In this case the United States Court of Military Appeals held that all courts-martial in which guilty pleas are entered must include on the face of the record an inquiry into the providency of the plea which fully comports with paragraph 70(b) of the Manual and *United States v. Chancellor*.

Care pleaded guilty to desertion to attain the benefits of a pretrial agreement with the convening authority. The court accepted his plea without explaining the elements of the offense, including the element of intent to remain away permanently, or inquiring as to whether Care was pleading guilty because he was in fact guilty. On appeal, he challenged the providence of the plea on the basis that the military judge failed to explain each element.

The majority held that, although the military judge's inquiry fell short of the guidelines suggested by *Chancellor*, the accused was not materially prejudiced by the omission of an explanation as to the elements of the offense. This was so because the accused had a prior record of AWOL and was represented by competent counsel.¹²⁶ The Court used the fact that in *Halliday v. United States*¹²⁷ the Supreme Court had applied its *McCarthy* construction of Rule 11 prospectively to rebut the inference from *Boykin* that an explanation of the elements is a requirement of due process, Judge Ferguson dissented from this latter holding. He read *Boykin* as establishing a rule of constitutional dimensions¹²⁸ and thus favored reversal.

If the opinion had stopped at this juncture, it would have made but a minor ripple in the state of the law. However,

¹²⁵ 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

¹²⁶ On the role of counsel generally, see notes 43, 52, 73 *supra*.

¹²⁷ 394 U.S. 831 (1969). For a discussion of *McCarthy*, *Halliday*, *Boykin*, see notes 26-33 and accompanying text *supra*.

¹²⁸

What started three years ago in *Chancellor* . . . as a positive requirement of statute and Presidential regulation for the military courts has now metamorphosed into a matter of due process—the positive constitutional command that the *record* show an adequate inquiry into the accused's understanding of his plea, *i.e.*, that such effectively waived his constitutional rights; that he understood the elements of the offense; that he understood his plea established such elements; and that the facts accorded with them.

United States v. Care, 18 U.S.C.M.A. 536, 543, 40 C.M.R. 247, 255 (1969) (Ferguson, J. dissenting).

While it is clear that the *Brady* trilogy and *North Carolina v. Alford* have reached a different constitutional standard than that envisioned by Judge Ferguson, there is nothing in any of those opinions to negate the "positive requirement of statute and Presidential regulation for the military courts."

the court expressed great displeasure at the fact that courts-martial were apparently ignoring the suggestion of *Chancellor* that an explanation be furnished to the accused as to each element of the offense and that some inquiry be made into the accused's guilt in fact.¹²⁹ In order to rectify this situation in the future, the *Care* court held that all records of trial of cases decided more than thirty days from August 29, 1969, in which pleas of guilty were entered must reflect "not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty."¹³⁰ This, then, is the *Care* inquiry.

C. POTENTIAL IMPACT OF NORTH CAROLINA V. ALFORD ON THE MILITARY

From the foregoing discussion it would seem that military law is impervious to any influence from the change of constitutional standards evidenced by the *Alford* decision. Given the nature of Article 45, paragraph 70(b) of the Manual, and the *Care* inquiry, the true *Alford* case where an accused protests his innocence contemporaneous with his plea should never occur in military jurisprudence. *Alford* may, however, be cited for a broader proposition, *i.e.*, that whenever an accused is fully cognizant of the import of a guilty plea and concludes (with the advice of counsel) that his best interests warrant the entry of a guilty plea in spite of lingering personal doubts as to his guilt, a potential defense which seems slight, or an inability or unwillingness to admit his guilt, that the plea is truly voluntary and intelligent and therefore unassailable. Framed in this manner, *Alford* may portend changes to the military system.

¹²⁹ *Id.* at 541, 40 C.M.R. at 253.

¹³⁰ *Id.* The Court indicated that although it was the role of defense counsel to make these inquiries before tendering the plea the judge should make them again for the benefit of the record. *Cf.* text at note 28 *supra*. Thus, the inquiry by the military judge is in no way a slur on the competency of defense counsel. The sufficiency of a providency inquiry under *Care* has been determined by the Court on a case by case method. *See* *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) (Exact verbatim compliance with *Care* unnecessary where record indicates a voluntary and intelligent plea).

In the situation where the defendant maintains lingering doubts as to his guilt, one must first isolate and characterize those doubts. If they focus on the issue of moral culpability, perhaps a guilty plea should be accepted in spite of them.” This situation is best illustrated by the murder defendant who killed his wife and lover after catching them in mutual embrace. The defendant may believe that he had a moral right to commit homicide. Yet, although some states may recognize this as justification for homicide,¹³² the Manual provides that it may only be sufficient provocation to reduce the charge from murder to voluntary manslaughter.”. If the accused can negotiate a pretrial agreement with the convening authority that is beneficial to him, there is no authority for rejecting the plea merely because the defendant is not repentant. The facts which he admits are, under the relevant law, sufficient to satisfy the requisite elements of the offense of voluntary manslaughter. It would not be appropriate, however, in view of the defendant’s assertions to allow him to plead guilty to murder. The avowal of heat of passion would be legally incongruous with the charge of murder.

The case of a potential defense is more difficult. The defense to which defense counsel alluded in his presentencing summation to the court in *United States v. Lewis*¹³⁴ was that the defendant, charged with AWOL, had been unlawfully detained by a group of black militants for the entire duration of his AWOL. Because of counsel’s inability to locate the militants, his inability to corroborate the story by other evidence, and the preposterous nature of the assertion, counsel and accused concluded that it would be better to plead guilty. If established, the fact of the kidnapping would probably have constituted the defense of duress.”. Given the pragmatic wisdom of the choice to waive the defense, must the defense stand mute in mitigation? *Lewis* holds yes. If the defense waives a potential defense, it jeopardizes the solidarity of the guilty plea to allow passing references to a possible defense. Perhaps the appellate court must make a determination of law as to whether the inconsistent fact *will* or only *might* invalidate the plea.¹³⁶

”This distinction has been discussed in the context of the *Alford* Court’s citation of *Bruce v. United States*. Test at notes 85–85 *supra*.

¹³² *E.g.*, TEX. PENAL CODE, art. 1220 (1948).

¹³³ MCM, para. 198a.

¹³⁴ 18 U.S.C.M.A. 287, 39 C.M.R. 287 (1969). *See* notes 122–24 and accompanying test *supra*.

¹³⁵ *See* MCM, para. 216f.

¹³⁶ This distinction is suggested by Tesler, *The Guilty Plea is Innocent: Effects of North Carolina v. Alford on Pleading Under the UCMJ*, 26 JAG.

This distinction has been made in several cases by the Court of Military Appeals. In *United States v. Hollins*¹³⁷ the court upheld the defendant's guilty plea to unpremeditated murder in spite of his allegation that he had been too intoxicated to remember what he intended. Intent was not a relevant substantive inquiry for the charged offense. Similarly, in *United States v. Watkins*,¹³⁸ the court upheld the defendant's guilty plea to attempted bribery because the facts of police solicitation which the defendant alleged were insufficient to constitute the defense of entrapment. On the other side of the coin, there are a legion of cases in which the court has vacated a guilty plea because the inconsistent facts would have constituted valid defenses.¹³⁹ While this "might/may" inquiry may serve a valid purpose in some contexts, it presupposes that the judge has made a complete *Care* inquiry and that the choice of the defendant to plead guilty was fully provident.

Two recent cases demonstrate the impact which *Alford* has had on military pleading: both involved situations in which the defendant was unable to remember the pertinent facts surrounding his alleged criminality. In *United States v. Butler*¹⁴⁰ the defendant pleaded guilty to assault with intent to commit murder even though he could not remember the incident except for a vague recollection of a fist fight. Nevertheless, the corroboration fully convinced the defendant that he had done what the specification alleged. Citing *Alford*, the Court upheld the plea. In

J. 15, 30 (1971). Lieutenant Tesler also suggests another distinction based upon the point in time at which the inconsistency arises. This distinction is supported by *United States v. Richardson*, 15 U.S.C.M.A. 400, 35 C.M.R. 372 (1965). According to *Richardson* preplea protestations of innocence are to no moment in providency inquiries if the accused intelligently offers his plea. This is true because "the accused may have maintained his innocence only until he saw, from the weight of the Government's case, that his pretense was useless, or until his consciousness of guilt overwhelmed him." *Id.* at 402, 35 C.M.R. at 374.

While it is true that the plain meaning of Article 45 and *Richardson* support this distinction, there is nothing in either to suggest that a defendant may enter a guilty plea if he has sincere reservations about his guilt. *Cf.* note 107 *supra*.

¹³⁷ 17 U.S.C.M.A. 542, 38 C.M.R. 340 (1968). See *United States v. Juhl*, 20 U.S.C.M.A. 327, 43 C.M.R. 167 (1971).

¹³⁸ 11 U.S.C.M.A. 611, 29 C.M.R. 427 (1960).

¹³⁹ *E.g.*, *United States v. Woodrum*, 20 U.S.C.M.A. 529, 43 C.M.R. 369 (1971); *United States v. Cuero*, 19 U.S.C.M.A. 398, 41 C.M.R. 398 (1970); *United States v. Williams*, 19 U.S.C.M.A. 334, 41 C.M.R. 334 (1970); *United States v. Lewis*, 18 U.S.C.M.A. 287, 39 C.M.R. 287 (1969); *United States v. Pinkston*, 18 U.S.C.M.A. 261, 39 C.M.R. 261 (1969); *United States v. Vance*, 17 U.S.C.M.A. 444, 38 C.M.R. 242 (1968).

"20 U.S.C.M.A. 247, 43 C.M.R. 87 (1971).

answer to the argument that Butler was unable to recollect his intent and that intent is an essential element of the offense, the court replied that the stipulated facts gave rise to a "compelling inference" of an intent to commit voluntary manslaughter. Unfortunately the court went further by categorically stating that

Even a personal belief by an unremembering accused, that he did not commit the offense, does not preclude him from entering a plea of guilty because he is convinced that the strength of the Government's case against him is such as to make assertion of his right to trial an empty gesture.¹⁴¹

Of course this is only dicta in the context of the case. Hopefully, the court will reevaluate this view if ever faced with a case on point.

*United States v. Luebs*¹⁴² involved a semiliterate defendant who pleaded guilty to a charge of sodomy and assault with intent to commit rape, although he stated that he was too drunk to remember the incident. The stipulations of fact from independent sources convinced the defendant that he had done the acts in question. Accordingly, the Court upheld the providence of the plea. Once again, *North Carolina v. Alford* was the primary authority.

The *Luebs* holding drew a fiery dissent from Judge Ferguson. Pointing out that the stipulations of fact were only hearsay as far as the defendant was concerned, Judge Ferguson concluded that the defendant's inability to remember the offense necessarily vitiated the plea. Judge Ferguson went further to reject the notion that *Alford* controlled trials by courts-martial. He pointed out the several policy reasons why *Care*, not *Alford*, should control guilty pleas in courts-martial :

[*Alford*] did not establish the law of this Court, *Care* did, and I submit that the military rule for the acceptance of a guilty plea, set forth in *Care*, is stricter than that provided in Rule 11 of the Federal Rules of Criminal Procedure. . . . This is not the first time we have had occasion to apply a broader test in military cases than that required in the Federal civilian courts. . . . The stricter rule in military cases is a salutary one. Many of those in the military are now serving by reason of compulsory laws; many are away from home, family, and friends for the first time; and

¹⁴¹ *Id.* at 248, 43 C.M.R. at 88. It would seem that this statement contravenes both Article 45 and *United States v. Care*.

¹⁴² 20 U.S.C.M.A. 475, 43 C.M.R. 315 (1971). *But see* *United States v. Vaughn*, 17 U.S.C.M.A. 520, 38 C.M.R. 318 (1968) (defendant's inability to remember larceny vitiates plea). *Cf.* *United States v. Palacios*, 9 U.S.C.M.A. 621, 26 C.M.R. 401 (1958) (defendant's plea is provident in spite of fact that defense counsel would not let him admit his factual guilt only because he was given every opportunity to reject or withdraw his plea).

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many are of an age making them responsible in some jurisdictions only as juveniles. These and other similar reasons make it desirable that the elicitation of the facts reflecting that the accused is in fact guilty of the offenses to which he is so pleading be proved under a more stringent rule.¹⁴³

A more poignant distinction between *Alford* and *Care* was announced by the Air Force Court of Military Review in *United States v. Brooks*.¹⁴⁴ Brooks took another airman's stereo equipment to "teach him a lesson." Brooks' assertion of a pedantic motive was incongruous with the requisite larcenous intent for wrongful appropriation. Based on this divergence, the court reversed the conviction. In the course of its opinion, the court focused on a loophole in *Alford*: *Alford* was a constitutional interpretation. In pointing this fact out, Justice White had left open the possibility that states would want to provide stricter guidelines than those inherent in the *Alford* opinion.¹⁴⁵ The *Brooks* court took Justice White at his word :

That message unmistakably communicates the proposition that the States and the Congress are vested with the unfettered license to forge independent standards for acceptance of guilty pleas which operate to provide an accused with a greater degree of protection than he would otherwise enjoy constitutionally. As to the military accused, Congress has, of course, already exercised that license, for the mandate of Article 45(a) of the Code is clear. It unconditionally requires that a plea of not guilty "shall be entered in the event of any declaration by the accused amounting to a claim of innocence."¹⁴⁶

¹⁴³ *United States v. Luebs*, 20 U.S.C.M.A. 475, 478 C.M.R. 315, 318 (1971). The Court of Military Appeals has been unwilling in other areas to depart from established military procedure under the Manual in deference to a more lax constitutional standard. *E.g.*, in *United States v. Jordan*, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971) the court declined to follow the rule of *Harris v. New York*, 401 U.S. 222 (1971) which permits the use of statements inadmissible under the *Miranda* rule for impeachment purposes if the defendant takes the stand. Cf. *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) (speedy trial guarantees of Article 10, UCMJ, are more stringent than those under Sixth Amendment).

¹⁴⁴ 43 C.M.R. 945 (AFCMR) *petition for review denied*, 43 C.M.R. 413 (1971). The court recognized that many defendants equivocate or rationalize their actions. It held that these statements would not invalidate the plea if they could be "construed in a manner consistent with guilt." *Id.* at 948.

¹⁴⁵ *North Carolina v. Alford*, 400 U.S. 25, 38 n. 11 (1970) :

Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right. Likewise the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. We need not now delineate the scope of that discretion. (Citations omitted)

¹⁴⁶ *United States v. Brooks*, 43 C.M.R. 945, 952 (AFCMR 1971), *petition for review denied* 43 C.M.R. 413 (1971).

It is clear, then, that guilty pleas in the military are to be tested by the standard of Article 45 and the *Care* case. The only question for resolution which remains is what latitude should be allowed to the defendant under that standard. As has been stated, there is nothing in *Care* to bar the acceptance of a guilty plea from a defendant who admits factual and legal guilt. While the question of waiver of defenses is somewhat more complicated, it is submitted that defense counsel must be afforded sufficient latitude in the presentation of his case, provided it appears from the plea inquiry that the defendant is aware of the full effect of his plea.¹⁴⁷ This is not to suggest, however, that it is not appropriate to obtain an *in judicio* admission of guilt from the accused as required by *Care*.¹⁴⁸

111. CONCLUSION

The standard of inquiry into the providency of a guilty plea which must be followed under prevailing military law differs significantly from that allowable under the constitutional standard of *North Carolina v. Alford*. While it may be desirable to allow the entry of guilty pleas by defendants who have moral reservations about their guilt or whose potential defenses are inconsequential in comparison to the government's case, military tribunals must still adhere to the inquiry required by *United States v. Care*. This inquiry demands that the military judge make an independent examination of the ramifications of pleading guilty, that he understand the elements of the offense with which he is charged, and that his actual conduct comport with that to which he wished to plead guilty. If the military judge makes this inquiry in every case, there is no doubt that every guilty plea upon which a court-martial conviction is based will have been entered providently.¹⁴⁹

¹⁴⁷United States v. Hinton, 8 U.S.C.M.A. 39, 23 C.M.R. 263 (1957).

¹⁴⁸It merely means that the defendant may, in his own best interests, decide to waive a potential, but unlikely, defense. Cf. text at notes 88-90 *supra*. Since the guilty plea automatically waives such a defense, it is neither necessary nor appropriate for the defense counsel or the accused to make any further reference to the discarded defense. Text at notes 135-36 *supra*.

¹⁴⁹The United States Supreme Court handed down *Santobello v. New York*, 404 U.S. 257 (1971), subsequent to the research for this paper. Its major impact is to insure defendants that their bargains will be kept. As such, it will have no real impact on plea bargaining practices within the military system. It should serve, however, to bring civilian practices in line with those long recognized in the military. See *Hilliard v. Beto*, — F.2d — (5th Cir. 1972) [No. 72-1869, Sep. 1, 1972].

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United States v. Lenox, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972)—The End of the *Noyd* Era in Military Law*

I.

In *United States v. Noyd*,¹ the United States Court of Military Appeals (hereinafter, COMA) held that a military court-martial could consider an erroneous administrative denial of an accused's application for discharge as a conscientious objector as a defense to certain military offenses. The decision followed initial disagreement between federal district courts as to whether remedies existed within the military justice system for servicemen administratively denied discharge as conscientious objectors.² The *Noyd* decision has been cited as requiring exhaustion of military court-martial "remedies)) prior to federal court habeas corpus review of an administrative denial of a serviceman's request for status as a conscientious objector.³ The disagreement between the circuits on this exhaustion issue, was apparently resolved by the Supreme Court in *Parisi v. Davidson*.⁴ In *Parisi*, it was held that the pendency of court-martial proceedings should not delay federal court review of a serviceman's conscientious objector claim once military administrative remedies had been exhausted.⁵ The Court rejected the government's argument that the *Noyd* defense, plus COMA's extraordinary relief power under the All-Writs Act, 28

*The opinions expressed are those of the author and do not necessarily represent those of any governmental agency.

¹18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

²Compare *Noyd v. McNamara*, 267 F. Supp. 701 (D. Colo), *aff'd* 378 F.2d 538 (10th Cir. 1967), with *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. (1968)), and *Crane v. Hedrick*, 284 F. Supp. 250 (N.D. Cal. 1968).

³See *Parisi v. Davidson*, 435 F.2d 299 (9th Cir. 1970), *rev'd* 405 U.S. 34 (1972); *Polsky v. Wetherill*, 438 F.2d 132 (10th Cir. 1971), *vacated* 403 U.S. 916 (1971); see also *Small v. Commanding General*, 320 F. Supp. 1044 (S.D. Cal. 1970), *aff'd* 448 F.2d 1397 (9th Cir. 1971); *Hanson v. Resor*, ___ F. Supp. ___ (N.D. Cal. 1971); *Coombs v. Commanding General*, 327 F. Supp. 786 (W.D. La. 1971). The Ninth Circuit required exhaustion only if court-martial proceedings had already been initiated. The Tenth Circuit, however, required a serviceman to actually violate military law to occasion court-martial procedures. Both theories were rejected in other circuits. E.g. *Pitcher v. Laird*, 421 F.2d 1272 (5th Cir. 1970); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968).

⁴405 U.S. 34 (1972).

⁵The Court considered compliance with applicable service regulations dictating necessary procedures to be followed by servicemen seeking discharge as conscientious objectors as the only administrative remedies to be exhausted. *Id.* at n.3.

U.S.C. section 1651 (a) constituted military judicial remedies that must be exhausted.⁸ The Court cautioned, however, that their decision should not be construed as broadening the permissible limits of federal court intervention in military judicial processes, and suggested that federal courts should take care in effectuating their habeas corpus decrees, so as to maintain the proper balance between the two judicial systems.;

In *United States v. Lenox*,⁸ COMA admitted that the military judicial system did not provide a proper forum for reviewing the merits of a conscientious objector's claim or a secretary's denial of a conscientious objector's application for discharge.⁹ COMA disputed the *Noyd* rationale and adopted Judge Darden's opinion in *United States v. Stewart*.¹⁰ Analysis of *United States v. Noyd* indicates that the immediate impact of *Lenox* upon the posture of military law may be minimal. However, *Lenox* is evidence of the inherent limitations of COMA and the military judicial structure, and the decision is expected to immediately impact on the present interrelationship between the military and the federal court systems.

II.

The appellant, Don A. Lenox, was inducted into the Army on 11 October 1968. After receiving orders assigning him to duty in the Republic of Vietnam, on May 1, 1969, he reported to the Overseas Replacement Station, Oakland, California, at that time an embarkation point for Vietnam.¹¹ Upon his arrival in Oakland, he

⁸ *Parisi v. Davidson*, 405 U.S. 32, (1972).

⁷ *Id.* at _____. Traditionally, federal courts have been loath to interfere with matters felt to be legitimately the concern of the Armed Forces. E.g. *Noyd v. Bond* 395 U.S. 683 (1969), see also Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 186-187 (1962).

⁹ 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

¹⁰ At his court-martial, Lenox challenged the Secretary's denial of his CO claim by motion to dismiss, noting that such does not necessarily involve a determination of whether he is a CO or not. Later, he sought de novo review of his CO beliefs. Record, General Court-Martial, *United States v. Lenox*, pp. 10-27, 77-81.

¹¹ 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971). Specifically COMA referred to that portion of Judge Darden's opinion in *Stewart*, at 275-276, 43 C.M.R. 115-116 which states:

[C]laimed conscientious objection or a Secretary's denial of a discharge application by a conscientious objector is a defense to a court-martial proceeding only if the Constitution, a statute, or a regulation so provides. In this instance there is no Constitutional right to refuse military orders because of conscientious objection; no statutory provision . . . and the regulation . . . contains no authority for the litigation of this issue at a court-martial.

"Petition for Writ of Habeas Corpus, p. 2, *Lenox v. Fuller*, Civil No. 51587 (N.D. Cal. 1969).

submitted an application for discharge as a conscientious objector, and was subsequently reassigned to a Receiving Company at Fort Ord, California.” On June 13, 1969, Lenox received Department of the Army notification that his application had been denied.¹³ On June 16, 1969, Lenox requested review of the Secretary’s decision by the Board for Correction of Military Records,” and on June 20, 1969, he was returned to the Overseas Replacement Station in Oakland.¹⁵ On June 23, 1969, Lenox petitioned the Federal District Court for the Northern District of California for a writ of habeas corpus ordering his discharge from the United States Army. Lenox alleged that the Secretary of the Army’s de-

¹² *Id.* Lenox’ parents were missionaries of The American Baptist Church. Trained early in the faith of his parents, Lenox later attended a private Quaker School, and Kalamazoo College, a Baptist School. He graduated from West Virginia University in 1967. *See*, Exhibit C. Lenox’ beliefs are best summarized in his application for discharge as follows:

Having **been** reared in an atmosphere which stressed the value of human life and serving to one’s fellow man, buttressed by a liberal American Baptist faith emphasizing the application of Christ’s life and teachings to one’s **own** life, having had a strengthening religious experience in a Quaker high school, and having been physically **nonaggressive** all my life, I **now** find myself conscientiously opposed **to** war, its acceptance as a method for solving national and international conflicts, and the military life (its attitudes and values).

My moral basis for judging the rightness or wrongness of an act is whether or not that act is destructive or constructive. This **is** based upon the concept that hate, selfishness, and self-righteousness are un-Christlike and manifest themselves in constructive actions. To me, Peace as a way of life is God’s will and Christ’s way of living, **so** that I am obligated to **look upon** all men as my brother. Ex. 1 to App. **Ex. 4**; App. Ex. 6.

See Final Brief for Appellant under Rule 43, p. 14, *United States v. Lenox*, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

¹³ *See* a copy of letter dated 12 June 1969 from an AG officer indicating that “verbal communication with Department of Army indicates that the following is the reason for disapproval based on a personal moral code, not on sincere religious beliefs;” and “ordering that EM will be directed to comply with his original assignment orders.” Petition for Writ of Habeas Corpus, *supra* note 11, Exhibit 6. The three members of the **DA** board differed in their reasons for rejecting Lenox’ claim. One member recommended disapproval because the “request is based on a personal moral code.” Another stated that “request is not based on religious training (and) beliefs” and that Lenox’ “sincerity is in doubt.” The other members concluded that Lenox’ “objections are religiously based, but lack sincerity.” Final Brief for Appellant, *supra* note 12 at p. 3, **n.2**.

¹⁴ Lenox requested that, “pending the Board’s decision on my application herein, I remain at my present duty station and the assigned duties consistent with my professed beliefs.” It has been recognized that the case of a serviceman denied discharge as a conscientious objector is not a proper matter for the Board’s consideration. *Craycroft v. Ferrall*, 408 F.2d 587 (9th Cir. 1969), *vacated* 397 U.S. 335 (1969). For a synopsis of the legislative history of the Boards for Correction of Military Records, *See* 10 U.S.C. §§ 1552–1553 (1970). *See Ashe v. McNamura* 355 F.2d 277 (1st Cir. 1965).

“Petition for Writ of Habeas Corpus, *supra* note 11, at p. 6.

cision was without basis in fact,¹⁶ denying him the due process of law as required by the Fifth Amendment to the United States Constitution. On July 9, 1969, this petition was denied." Lenox was subsequently scheduled to depart for Vietnam on a flight departing Travis Air Force Base on July 23, 1969. Lenox failed to report for this flight and was charged with missing movement and disobeying an order of a superior commissioned officer.¹⁸

Lenox, contrary to his pleas, was found guilty as charged, sentenced to a bad conduct discharge, forfeiture of eighty dollars per month for six months, and confinement at hard labor for six months.¹⁹ Tried before a military judge alone, Lenox had moved the court to dismiss both charges on grounds that the order given him by his superior officer was unlawful, and that any requirement to board the plane was derived from that unlawful order. The legality of the order was argued to be dependent on the validity of the Secretary of the Army's decision denying Lenox' application for discharge as a conscientious objector. Lenox charged that the Secretary's decision was without basis in fact and a denial of due process.²⁰ Additionally, he contested the Secretary's

¹⁶ The basis-in-fact standard was first enunciated for Selective Service cases in *Estep v. United States*, 327 U.S. 114 (1946). The standard has been almost unanimously applied by the federal courts in in-service conscientious objector cases, e.g. *Bates v. Commander*, 413 F.2d 475 (1st Cir. 1969). It was also adopted by the military courts. See *United States v. Goguen*, 42 C.M.R. 807 (ACMR 1970). See also Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. REV. 975, 1003 (1970).

¹⁷ *Lenox v. Fuller*, No. 51587 (N.D. Cal. 1969).

"These infractions of military law are among those which may result directly from a denial of a conscientious objection claim, including: Art. 85 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 885 (1970), *Desertion*, e.g. *Cooper v. Barker*, 291 F. Supp. 952 (D.Md. 1968); Art. 86, U.C.M.J.; 10 U.S.C. § 886 (1970), *Absence without Leave*, e.g. *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969); Art. 87, U.C.M.J.; 10 U.S.C. § 887 (1970), *Missing Movement*. E.g. *Hubbard v. Seamans*, 20 U.S.C.M.A. 164, 43 C.M.R. 4 (1970); Art. 90(2), U.C.M.J.; 10 U.S.C. § 890(2) (1970), *Disobeying a Superior Commissioned Officer*, e.g. *Lee v. Pearson* 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969); Art 91(2), U.C.M.J.; 10 U.S.C. § 891(2) (1970), *Disobedience of Non-Commissioned Officer*, e.g. *United States v. Castorena*, 38 C.M.R. 719 (NBR 1967). Cases involving failure to comply with reassignment orders are normally prosecuted as unauthorized absence offenses. *United States v. Finegold*, 43 C.M.R. 477, 482 (ACMR 1970). Failure to report for any military duty may similarly be prosecuted as an unauthorized absence. Typically these are the types of situations that provide a conflict for the conscientious objector, but the "Noyd" defense was considered inapplicable to prosecution for AWOL. See *Hanson v. Resor*, ___ F. Supp. ___ (N.D. Cal. 1971).

¹⁹ See *United States v. Lenox*, No. 422358 (ACMR March 15, 1971).

²⁰ See Record of Trial, General Court Martial, *United States v. Lenox*, pp. 11-13.

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decision due to several procedural irregularities alleged to have occurred during the processing of his claim.²¹ Lenox also attempted to raise his stated conscientious beliefs as an affirmative defense, seeking de novo review of his conscientious objector claim without regard to the legality of the administrative decision denying his claim.²² It was also suggested that the merits of Lenox' claim should be relitigated as they were relevant to Lenox' intent at the time of the offenses.²³ The military judge denied the motion,²⁴ and ruled that Lenox' beliefs would be considered in extenuation and mitigation, but not as an affirmative defense to the charges.²⁵

On appeal to the Army Court of Military Review, appellate defense counsel substantively attacked the Secretary's decision as without basis in fact, and charged that the conduct of the administrative conscientious objector hearing officer violated AR 15-6.²⁶ The Court of Military Review considered only whether the mili-

²¹ *Id.* at 14-16, App. Ex. 4. Counsel for Lenox argued that AR 15-6, (Aug. 12, 1966), "Procedures for Investigating Officers and Boards Conducting Investigations", is applicable to the processing of conscientious objector claims under AR 635-20 (3 Dec. 1968), "Personnel Separations—Conscientious Objection," and that Lenox was deprived of procedural rights provided him by AR 15-6. See Hansen, *supra* note 16 at 1001, 1002.

²² See note 9 *supra*.

²³ Record of Trial, *supra* note 20 at 81.

²⁴ The military judge specifically found that:

"proceedings held under the provisions of AR 636-20 [are] not an investigation within the scope of AR 15-6, and that, therefore, there is no requirement to comply with the procedural requirements of AR 15-6 in granting an accused the right to an appearance in and in conducting the hearing which is prescribed by AR 635-20. With respect to the accused's contention that the Department of Army erroneously denied his application for discharge, the court finds that the Department of Army did have a basis in fact for denial of the accused's application for discharge as a conscientious objector. Considering the file as a whole, there is sufficient evidence to support a determination that the application is based upon a personal moral code and not upon sincere religious beliefs. For these reasons, the motion for dismissal of the charges and specifications is denied." Record of Trial, *supra* note 20 at 43. See also, *United States v. Lenox* 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

²⁵ Record of Trial *supra* note 20 at 82. MANUAL FOR COURTS-MARTIAL, UNITED STATES, (REV. ED. 1969) para. 75(c). Additional evidence other than that contained in the administrative record may be admitted for purposes of extenuation and mitigation. Anomalously, the court after extenuation and mitigation may be persuaded of the defendant's sincerity, but be without power to remedy the situation. The court may reflect such opinion in their sentence, but the defendant remains convicted. See, *United States v. Weber*, 37 C.M.R. 516 (ABR 1966). The sincere conscientious objector may then again be forced to disobey orders contrary to his conscience, and the process theoretically begins once again. Conviction of sincere conscientious objectors for disobeying orders contrary to their conscience serves no useful military purpose. Yet, *United States v. Lenox* will foster such anomalies as it repudiates perhaps the only defense available to the objector.

²⁶ Brief for Appellant, *United States v. Lenox*, No. 422358 (ACMR Mar. 15, 1971). See also note 21 *supra*.

tary judge erred by failing to dismiss charges on grounds that the Secretary's denial of Lenox' claim was without substantial basis in fact.'; The Court specifically rejected any inference that the proper scope of review was whether there was "substantial evidence" to support the administrative decision," and upheld the military judge's ruling. The court did not, however, delineate specifically what they believed constituted an appropriate basis in fact supporting the Secretary's denial of Lenox' claim. Interestingly, the court suggested that a defendant's conscientious objection may constitute an affirmative defense, but deferred awaiting further guidance from COMA.²⁹ However, the COMA holding in *United States v. Lenox*³⁰ was unexpected. COMA granted review only to consider whether the military judge and the Secretary of the Army utilized an improper standard in rejecting the accused's claim of conscientious objection." The vitality of the *Noyd* doctrine was neither argued nor briefed.³²

In *Lenox*, COMA stated that the briefs and arguments, read together with *Parisi v. Davidson*³³ and *United States v. Stewart*³⁴ necessitated a revisitation of *Noyd*." *Parisi*, however, in no way dictated such a course. Indeed, the Supreme Court in *Parisi* merely pointed out the narrow scope of the *Noyd* holding, noting that a court martial could not direct discharge, the remedy sought by petitioner *Parisi*.³⁶ In fact, as mentioned previously, the Court

²⁹ *United States v. Lenox*, 43 C.M.R. 814 (ACMR 1971).

³⁰ See note 16 *supra*. For an interesting use of the "substantial evidence test." See *United States v. Finegold*, 43 C.M.R. 477, 483-485 (ACMR 1970) (Finkelstein, J., dissenting).

³¹ *United States v. Lenox*, 43 C.M.R. 814, 816 (ACMR Mar. 15, 1971).

³² 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).

³³ *Id.* at 315 45 C.M.R. at 89.

³⁴ "The vitality of *United States v. Noyd* was not questioned. Final Brief for Appellant at p. 5, Brief for Appellee at p. 6, *United States v. Lenox*.

³⁵ 405 U.S. 34 (1972).

³⁶ 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971).

³⁷ *United States v. Lenox*, 21 U.S.C.M.A. 314, 316, 45 C.M.R. 88, 90 (1972).

³⁸ Critics may contest COMA's motivation for their decision in *United States v. Noyd* as, in fact, an attempt to forestall encroachment into military matters by the federal courts. (see note 2 *supra*). Yet, the decision evidences a concern for the in-service CO's dilemma and did carve out a possible defense to avoid further injustice to the CO. *United States v. Lenox*, is not necessarily indicative of a decreased empathy for the CO's plight, but may forecast a more simplistic approach by COMA to military law and its own powers. Viewing COMA, as a "guardian of its own jurisdiction", (a role it has obviously assumed since *O'Callahan v. Parker*, 395 U.S. 258 (1969)). See generally, *United States v. Lovejoy*, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); *United States v. Mercer*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); *United States v. Easter*, 19 U.S.C.M.A. 68 41 C.M.R. 68 (1969) *United States v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969),

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went to some length to indicate they were not upsetting "basic principles of comity", existing between the military and federal courts and suggested flexible habeas corpus remedies be fashioned to maintain the traditional balance between the two systems.³⁷ Furthermore, the Supreme Court's earlier opinion in *Ehlert v. United States*³⁸ seemed to sanction the posture of military law with regard to conscientious objection.³⁹ COMA also apparently believed the Supreme Court's decision in *Younger v. Harris*,⁴⁰ restraining federal intervention in state proceedings, is applicable to military proceedings.⁴¹ Any trend away from increased federal court scrutiny of military processes indicated by these cases, however, seems to be reversed by *United States v. Lenox*.⁴²

COMA, clearly yielded to the Article III courts, as the only proper forum for litigation of an individual's conscientious objection claim.⁴³ The court noted its lack of statutory authority as distinguished from that of the federal courts which do consider wrongful denial of conscientious objector status as a defense in Selective Service prosecutions.⁴⁴ Judge Duncan writing the opinion of the court, seemed to construe Lenox' position as a jurisdictional challenge, even though Judge Quinn clearly explained in *United States v. Noyd* that such was not the substance of the

one wonders, however, if the *Lenox* result may not have been different but for the result in *Parisi v. Davidson*.

³⁷ See note 7 *supra*.

³⁸ 402 U.S. 99 (1971).

³⁹ For a discussion of *Ehlert v. United States*, together with *Gillette v. United States*, and *Negre v. Larsen*, 401 U.S. 437 (1971) see 53 MIL. L. REV. 185 (1971). The author suggests that in the *Ehlert* decision and also in *Relford v. Commandant* 405 U.S. 355 (1971), the Supreme Court indicated a "willingness to allow the armed services to make sensitive and administrative decisions." *Id.* at 199.

⁴⁰ 401 U.S. 37 (1971).

United States v. Goguen, 20 U.S.C.M.A. 527, 43 C.M.R. 367 (1971).

⁴² *Younger v. Harris*, 401 U.S. 37 (1971) would encourage the conscientious objector and the military to "race to the courthouse". See Hansen, *The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military I*, 3 S.S.L.R. 4001, 4002, n. 15 (1971). To the extent *United States v. Lenox* indicates that the in-service conscientious objector is without an adequate remedy at law, the *Younger* decision is inapplicable. See *Younger v. Harris*, at 43. Justice Douglas does not believe the doctrine of comity is at all applicable to the military. See *Parisi v. Davidson*, 405 U.S. 34 (1972) (Douglas, J. dissenting).

⁴³ *United States v. Lenox*, 21 U.S.C.M.A. 314, 319, 46 C.M.R. 88, 93 (1972).

⁴⁴ *Id.* However, Judicial Review of Selective Service determinations in a prosecution for refusal to submit to induction was actually established when the finality language of selective service statutes arguably could have been construed to preclude judicial review. See *Estep v. United States*, 327 U.S. 114 (1946); *Falbo v. United States*, 320 U.S. 549 (1944).

defense.⁴⁵ Apparently disregarding the plight of the conscientious objector, and concerned with military exigencies, Duncan seemed particularly disturbed that the generation of orders concept would "result in a member actually being in the service, but who could not be the recipient of any lawful order".⁴⁶ The court left unresolved the issue of its own ability to afford relief upon direct application," and never considered the scope of *Welsh v. United States*,⁴⁸ or its retroactive effect on administrative decisions prior to its decision.

III.

The immediate impact of the *Lenox* decision on military law may perhaps best be evaluated by an analysis of what it overruled, that is *United States v. Noyd*.⁴⁹ *The Manual for Courts-Martial*, paragraph 169(b) clearly precludes raising one's conscientious objection as an affirmative defense to willful disobedience of orders, and prior to *Noyd*, attempts to do so proved fruitless.⁵⁰ The doctrine as carved out by Judge Quinn in *Noyd* did not amount to recognizing conscientious objection as an affirmative defense or as a limitation upon the courts jurisdiction to try the case. The court merely stated that the validity of the order given to *Noyd* (an order to fly as an instructor in an F-100 aircraft) depended upon the validity of the Secretary's decision denying him conscientious objector status, and that "if the Secretary's decision was illegal, the order it generated was also illegal."⁵¹ *Noyd* argued that the Secretary of the Air Force misconstrued applica-

⁴⁵ *United States v. Noyd*, 18 U.S.C.M.A. 483, 486, 40 C.M.R. 195, 198 (1969).

⁴⁶ *United States v. Lenox*, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972). Judge Darden feels that in such a situation, "the Secretary would have no practical alternative except to discharge the member", but objected that the ability of courts-martial to make this determination would in effect improperly transfer legislative authority conflicting with "the statutory grant of authority to administer the armed forces." *United States v. Stewart*, 20 U.S.C.M.A. 272, 276, 43 C.M.R. 112, 116 (1971).

⁴⁷ Prior decisions would indicate that COMA cannot afford such relief. See *Hubbard v. Adcock*, 20 U.S.C.M.A. 14, 43 C.M.R. 4 (1970); *Lee v. Pearson*, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969), *Mueller v. Brown*, 18 U.S.C.M.A. 534, 40 C.M.R. 246 (1969); see also *West v. Samuel*, 21 U.S.C.M.A. 290, 45 C.M.R. 64 (1972); *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

⁴⁸ 398 U.S. 333 (1970). *Welsh* authorizes CO status based on deeply held moral and ethical beliefs opposing participation in war.

⁴⁹ 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

⁵⁰ See *United States v. Noyd*, 39 C.M.R. 937 (AFBR 1968); *United States v. Dunn*, 38 C.M.R. 917 (AFBR 1967); *United States v. Castorena*, 38 C.M.R. 719 (NBR 1967); *United States v. Taylor*, 37 C.M.R. 547 (ABR 1966).

⁵¹ *United States v. Noyd*, 18 U.S.C.M.A. 483, 492, 40 C.M.R. 195, 204 (1969).

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ble regulations by excluding the selective objector opposed to an “unjust” war, conceding he was not an “universal pacifist.”⁵² Thus, Noyd’s defense challenged the substance of the Secretary’s decision and to date similar claims and claims like Lenox’ allegation that the Secretary’s decision was without basis in fact have been unsuccessful.⁵³

The defense recognized in *United States v. Noyd* pertained solely to the legality of the order with which Noyd was charged with disobeying. Clearly, the defense was available only in a limited number of cases.⁵⁴ Furthermore, the vagaries of Quinn’s opinion created confusion as to whether the orders challenged necessarily had to conflict with an accused’s beliefs.⁵⁵ Two weeks after the decision in *Noyd*, the court implicitly upheld an order “to train — to go out and join the company.”⁵⁶ and a few months later implied that the defense was unavailable to challenge an order to put on a military uniform.⁵⁷ Yet, the type of duty an individual may feel ultimately conflicts with his conscience will vary in the individual case.⁵⁸ Some conscientious objectors may reach the point where *any* further involvement connected with the military is contrary to their convictions.⁵⁹

Noyd also created confusion as to when an order could be held to have been “generated” by a Secretary’s decision.⁶⁰ Further, COMA could not order discharge of a defendant, nor could it

⁵² *Id.* at 486, 40 C.M.R. at 198. “Selective conscientious objection” was rejected in *Gillette v. United States* and *Negre v. Larsen*, 401 U.S. 37 (1971).

⁵³ The Supreme Court has also construed the “Noyd” doctrine narrowly and noted “we have been referred to no reported military court decision (including *Noyd* itself) that has yet acquitted a defendant upon the basis of a *Noyd* defense.” *Parisi v. Davidson*, 405 U.S. 32, n. 11 (1972).

⁵⁴ See note 18 *supra*. Cf. *Jones v. Lemond* 18 U.S.C.M.A. 513, 40 C.M.R. 225 (1969).

⁵⁵ Cf. *Parisi v. Davidson*, 396 U.S. 1233 (1969), *United States v. Patten*, 4 SSLR 3055, ____ C.M.R. ____ (ACMR 1971). Counsel in *Parisi v. Davidson*, 405 U.S. 34 (1972) arguing before the Supreme Court explained that the lawfulness of the order in issue depended not on whether it conflicted with Parisi’s CO beliefs, but whether the order was “given as a direct result” of denial of CO status. 4 SSLR 57 (1971).

⁵⁶ *Lee v. Pearson*, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

⁵⁷ *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969).

⁵⁸ E.g. *Bratcher v. McNamara*, 415 F.2d 760 (9th Cir. 1969), *vacated sub nom* 397 U.S. 246 (1970) (order to cut weeds); *Gillian v. Reeves*, 263 F. Supp. 378 (W.D. La. 1966) (order to pick up weapon).

⁵⁹ See generally *United States ex rel Lohman v. Laird*, 430 F.2d 96 (4th Cir. 1970); *United States ex rel Healy v. Beatty*, 300 F. Supp. 843 (S.D. Ga.), *aff’d* 425 F.2d 299 (5th Cir. 1970); *Cooper v. Barker*, 291 F. Supp. 952 (D. Md. 1968).

⁶⁰ Cf. *United States v. Goguen*, 42 C.M.R. 807 (ACMR 1970).

order the Secretary to reconsider his decision.⁶¹ Thus, it becomes patent that the scope of the *Noyd* doctrine was extremely narrow and did not afford an adequate remedy for in-service conscientious objectors.

In *United States v. Larson*,⁶² and a host of other cases,⁶ *Noyd* has been cited as authority for dismissal of charges when procedural irregularities in the processing of an accused's CO claim amount to a denial of due process. Lenox challenged the Army's processing of his claim as violative of military due process regulations,⁶⁴ as well as violative of the regulations solely governing processing of conscientious objection claims.⁶⁵ Review was not granted upon these issues in *United States v. Lenox*, but the result in that case creates confusion as to the present vitality of such cases as *United States v. Larson*.

Discussion above of the *Noyd* decision assumed that that case's repudiation in *United States v. Lenox* went no farther than precluding challenge to the substantive decision of the Secretary involved. *United States v. Noyd* was based upon a solid foundation of case law in which COMA had considered the validity of administrative decisions challenged as an abuse of discretion, contrary to constitutional right, in excess of jurisdiction, or without observance of required procedures.⁶⁶ In *Noyd*, Judge Quinn cited *United States v. Gentle*⁶⁷ and *United States v. Voorhees*,⁶⁸ to support his decision. Both were cases in which regulations were directly challenged as unlawful or orders were challenged as unlawful due to their direct contravention of lawful regulations. The distinction between considering the legality of regulations,

⁶¹ See *United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971) (Opinion of Darden J.); cf. *United States v. Laraway*, 30 C.M.R. 436 (ABR 1960).

⁶² 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971). Larson contended, without success, that the Army had violated its regulations regarding the time at which he was interviewed by a chaplain.

⁶³ E.g. *United States v. Bussard*, 4 SSLR 3511, No. 423331 (ACMR June 18, 1971).

⁶⁴ See note 21 *supra*.

⁶⁵ Record of Trial, General Court-Martial, *United States v. Lenox*, at pp. 108 *et seq.* Specifically, Lenox contested qualifications of the 0-3 hearing officer (See AR 635-20, (Dec. 3, 68), para. 4*d*), and alleged he had not properly entered "his recommendation and reasons therefor into the file". See AR 635-20, (Dec. 3, 68), para 4*d*(1). This regulation has been superseded since then by AR 635-20 (Jan. 21, 1970), and AR 635-20 (July 31, 1970) and is currently pending revision. See DA Message 1519452, Oct. 71.

⁶⁶ See *United States v. Finegold*, 43 C.M.R. 477, 483, 484 (1970) (Finklestein, J. dissenting opinion) and cases cited therein.

⁶⁷ 16 U.S.C.M.A. 437, 37 C.M.R. 57 (1966).

⁶⁸ 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

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the failure to observe regulations, and other factually uncontested violations of regulations, and consideration of the substantive merits of one's claim as they are relevant to the propriety of an administrative determination was recognized before the *Noyd* decision.⁶⁹ Thus, *Noyd* merely allowed an additional challenge to the Secretary's decision on the substantive merits theretofore considered unreviewable. COMA, in repudiating the *Noyd* decision also seemed to construe it narrowly. In most cases, claims of procedural irregularity do not contest the Secretary's actual decision or allege specific procedural error on his part, but rather are directed to error committed at other levels of command.⁷⁰ Yet, the holding in *Lenox* seems to only proscribe the interposition of "a claim of error in the Secretary's decision."⁷¹ It may be argued that the court's intention was far broader than this literal interpretation, but there are other indications to the contrary. The court's analysis of the *Noyd* defense does not include the *Larson* procedural error situation. Judge Duncan stated, "In its bare ratiocination appellant's position narrows to a requested adjudication that he is no longer a member of the Army since the date that his application for discharge was, in his judgment, wrongfully denied. Looking further, if that argument has merit, then the jurisdiction of courts of the military system of justice is questionable."⁷² Any remedy, other than dismissal of charges, sought by Larson would amount to an order that procedural requirements be observed, not a discharge.⁷³ However, too literal interpretation of *Lenox* would ignore the more basic substantive-procedural distinction." For instance, it seems clear that a refusal to consider a second application for discharge as "substantially the same"⁷⁵ involves the same sort of considerations

⁶⁹See *United States v. Sigmon*, 1 SSLR 3054, CM 416356 (ABR Jan. 2, 1968) where the court stated, "[W]e have no authority to determine the merits of appellant's claim to being of such belief as that is a matter for administrative determination . . . [A]ll we need to ascertain from this record is that appellant tried to make application for discharge in accordance with the regulation, he was improperly prevented from doing so, and he was then given the order that ultimately produced his conviction of the two offenses charged. There was and is no dispute to any of these facts." See also *United States v. Blake*, 40 C.M.R. 781 (ABR 1969); *United States v. Quirk*, 39 C.M.R. 528 (ABR 1968). Cf. *Brown v. McNamara*, 263 F. Supp. 686 (D.N.J.), *aff'd* 387 F.2d. 150 (3rd Cir. 1967).

⁷⁰The case of *United States v. Lenox* is but one example. See note 65 *supra*.

⁷¹*United States v. Lenox*, 21 U.S.C.M.A. 314, 319, 45 C.M.R. 88, 93 (1972).

⁷²*Id.* at 318, 45 C.M.R. at 92.

⁷³*United States v. Larson*, 20 U.S.C.M.A. 565, 566, 43 C.M.R. 405, 406 (1971).

⁷⁴See note 69 *supra*.

⁷⁵See AR 635-20, (31 July 1970), para 5(a-c) which states in part, that

as reviewing the substantive correctness of the secretary's decision and therefore is precluded by the *Lenox* decision.⁷⁶ On the other hand, this reasoning would also apply to secretarial functions. Thus a clear failure of a service secretary to comply with procedural requirements of applicable regulations would fall outside the ambit of *Lenox* and be considered separately from the determination of the substantive merits of an applicant's claim.

As viewed by COMA, there also is a possible difference in the constitutional overtones of the two types of defenses. Given that the basis in fact test is extremely narrow,⁷⁷ a successful challenge to a Secretary's decision almost amounts to a determination that the individual concerned is entitled to status as a conscientious objector, one of Judge Duncan's principal concerns.⁷⁸ COMA has long contended that they are committed to preservation of the constitutional rights of servicemen,⁷⁹ but COMA has adamantly labeled status as a conscientious objector a privilege, not a First Amendment right.⁸⁰ Acknowledging the merits of procedural challenges to service regulations and outlining procedures for CO applications may be categorized as insuring due process and the fundamental fairness required by the Fifth Amendment.⁸¹ It is a well settled rule that regulations conferring certain rights upon soldiers are binding and cannot be waived. Regulations covering conscientious objectors are no exception.⁸² Therefore, a procedural

those commanders specified "are authorized to return to an applicant, without action, any second or subsequent application for discharge under this regulation when review reveals that it is substantially the same as a previous application disapproved by Headquarters, Department of the Army."

⁷⁶ See *United States v. Forrest*, 5 SSLR 3054, No. 425279 (ACMR Nov. 10, 1971).

⁷⁷ The "basis-in-fact" test has been described as the narrowest known scope of review in the law. Hansen, *supra* note 16 at 1003, n. 3.

⁷⁸ See note 72, *supra*.

⁷⁹ E.g. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

⁸⁰ See *United States v. Lenox* 21 U.S.C.M.A. 314, 317, 45 C.M.R. 88, 91 (1972). COMA stated, "there is no constitutional duty to grant a serviceman the right to be separated from the service or to remand reassignment to duties unrelated to combat to satisfy his scruples of conscience."

⁸¹ E.g. *Crotty v. Kelley*, 443 F.2d 214 (1st Cir. 1971); *United States ex rel Donham v. Resor*, 436 F.2d 751 (2d Cir. 1971); *United States ex rel Bruenig v. Commanding Officer*, ____ F. Supp ____ (W.D. Wis. 1972).

⁸² See *United States ex rel Brooks v. Clifford* 409 F.2d 700, 706 (4th Cir. 1969); cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1958); *Service v. Dulles*, 354 U.S. 363, 388 (1956); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1953); *Roberts v. Vance* 343 F.2d 236, 239 (D.D.C. 1964); *United States v. Goins*, 23 C.M.R. 452 (ABR 1957). But see *Turpin v. Resor*, 452 F.2d 240 (9th Cir. 1971).

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error, in deprivation of rights conferred by regulations seems to remain a defense after **Lenox**.⁸³

Nevertheless, **Lenox** portends doom for **Lurson**. The same problems of remedy still exist, as a court-martial can not order correction of procedural error.⁸⁴ The success of direct application to **COMA** for relief also seems unlikely.⁸⁵ Finally, there is no doubt that the *Parisi* decision is as applicable to those contesting denial of their application for discharge due to procedural error, as it is to those alleging substantive error. It has long been decided that release from custody is not the only remedy courts may fashion by way of habeas corpus,⁸⁶ and federal courts have consistently remanded cases and ordered compliance with regulations.⁸⁷ Clearly, the only real remedy for the conscientious objector denied procedural due process lies in the federal court system.⁸⁸ The reasoning in **Lenox**—that *Parisi* holds that Article III courts are the proper forum in such a case—would seem to forecast the same ruling upon a **Larson** type challenge.

However, defense counsel should continue to raise procedural errors committed in processing their client's CO claim as a defense to court-martial charges. Efforts to expand the scope of this defense should also be attempted. One case suggests that the Army's failure to assist an individual in filing a claim when they should have been aware of the individual's desire to claim CO status may be interposed as a defense. The court considered the defendant's obvious lack of knowledge and expertise in regulatory provisions concerning conscientious objectors and such factors as time in service, age and background.⁸⁹ Continued efforts to raise

⁸³ *But see United States v. Larson*, 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971) (Darden, J. dissenting); *United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971) (opinion Darden J.); *United States v. Lenox* 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972) (Darden J. concurring without opinion).

⁸⁴ See note 61 *supra* and text accompanying.

⁸⁵ See note 47 *supra*.

⁸⁶ See *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971).

⁸⁷ *E.g. Morrison v. Larsen*, 446 F.2d 250 (9th Cir. 1971); *Crotty v. Kelly*, 443 F.2d 214 (1st Cir. 1971); *Hollingsworth v. Balcom*, 441 F.2d 419 (6th Cir. 1971); *United States ex rel Donham v. Resor*, 436 F.2d 751 (2d Cir. 1971).

⁸⁸ Habeas corpus, 28 U.S.C. § 2241 (1970) has been recognized by all eleven circuits as a proper vehicle for relief to in-service conscientious objectors denied discharge. See Hansen, *supra* note 42, at 4002, n. 19. For use of mandamus, 28 U.S.C. § 1361 (1970), see *Bluth v. Laird*, 436 F.2d 1065 (4th Cir. 1970); *Valentine v. Laird*, ___ F. Supp. ___ (S.D. Cal. 1971).

⁸⁹ *United States v. Sanders*, CM 420053 ___ C.M.R. ___ (ABR May 2, 1969).

one's conscientious objector beliefs as an affirmative defense should also be made, as the constitutional basis for conscientious objection remains a viable issue.⁹⁰

Orders given during the pendency of application for discharge may also still be challenged as violative of the "minimum conflict" provisions of regulations.⁹¹ The court in *Lenox* cited that portion of AR 635-20 providing that, ". . . (A)n individual who applies for discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum practicable conflict with his asserted beliefs pending a *final decision on his application.*"⁹² What constitutes minimum conflict in a given situation, of course, varies according to the nature of an individual's asserted beliefs and alternative duty assignments available, and broad discretion in such matters is left to the commander.⁹³ The protection afforded sincere conscientious objectors by such provisions is minimal when it is considered that generally their beliefs dictate against any type of participation in the military.⁹⁴ However, these regulatory provisions do allow a defense to disobedience of orders contrary to "minimum conflict regulations" and the vagueness of those provisions allows a margin of freedom for argument.⁹⁵ DOD 1300.6 clearly limits the scope of these "minimum conflict" provisions to time periods between application and decision by the Secretary.⁹⁶ Language within AR 635-20 as to who makes a "final decision," coupled

⁹⁰ Generally, the constitutional basis of conscientious objection has not been recognized. *But see Parisi v. Davidson*, 405 U.S. 34 (1972) (Douglas J. dissenting) *Ehlert v. United States*, 402 U.S. 99 (1971) (Douglas J. dissenting); *see also Comment, God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968), and Brahm, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-a-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1 (1970).

⁹¹ The so-called "minimum conflict" provisions are contained in DOD 1300.6, (August 20, 1971) at para. VI H, and AR 635-20, (July 31, 1970) at para. 6a. Permissible duties for I-A-0 conscientious objectors are set out in AR 600-200, (April 22, 1969), at para. 3-7c, and AR 614-106, (October 21, 1970) at para. 7. An assignment contrary to AR 600-200 was successfully challenged in *United States v. Quirk*, 39 C.M.R. 528 (ABR 1968).

⁹² *United States v. Lenor*, 21 U.S.C.M.A. 314, 317, 45 C.M.R. 88, 91 (1972) (emphasis supplied).

⁹³ *See Dalton v. Wells*, ___ F. Supp. ___ (N.D. Cal. 1969); cf. *Kimball v. Commandant* 423 F.2d 88 (9th Cir. 1970). Federal courts are restrained from reviewing duty assignments. *See Orloff v. Willoughby*, 345 U.S. 83 (1953). *But see Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970).

⁹⁴ *See notes 58, 59, supra* and text accompanying.

⁹⁵ *See note 91, supra*. Provisions of AR 600-200 and AR 614-106 are more specific.

⁹⁶ DOD 1300.6 (Aug. 20, 1971) at para. VIII.

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with limitations covering second applications, and appeals to the ABCMR would indicate a similar Army policy limiting the time period during which “minimum conflict” duty assignments are required.⁹⁷ The *Lenox* decision, however, suggests a possible redefinition of what constitutes a “final decision” and possible expansion of the minimum conflict provisions for a reasonable time to allow the opportunity for appeal in the federal system. The court, stated, “AR 635-20 provides for two kinds of relief: a discharge and also that, pending a final decision on an application, an applicant is to be assigned duties providing the minimum practicable conflict with his asserted beliefs. On the date of the alleged offenses the appellant had no application *pending* final decision. The application had been denied and further administrative relief was not requested; also, the judgment of the Federal District Court was not on appeal. The Army was not impressed with a duty to give appellant specially assigned duties.”⁹⁸ If an appeal had been pending in the federal court system, would the court’s inquiry necessarily have been different? COMA in *Lenox* ruled out any further remedy within the military system for an in-service conscientious objector beyond the procedures outlined in AR 635-20, and recognized resort to Article III courts as the only possible appeal of denial of one’s claim.⁹⁹ Pursuance of this remedy would be hampered by reassignment *overseas*.¹⁰⁰ Often such reassignment would put an individual into a situation in which he could not function in conformity with his conscientious beliefs and thus force him to disobey. The same occurs with immediate assignment of training duties and other details inconsistent with an individual’s beliefs.¹⁰¹ Resultant court-martial prosecution only compromises an individual’s ability to pursue remedy in federal court. Furthermore, to unnecessarily prosecute sincere conscientious objectors for violating orders contrary to their stated beliefs

⁹⁷ AR 635-20 (Jul. 31, 1970), at paras. 4a, 6b, 6d.

⁹⁸ “*United States v. Lenor*, 21 U.S.C.M.A. 314, 45 C.M.R. 88, 92 (1972) (emphasis supplied).

⁹⁹ It has already been noted that resort to the Board for Correction of Military Records does not afford the unsuccessful CO applicant a remedy. See note 14 *supra*.

¹⁰⁰ If read literally, 28 U.S.C. § 2241 (a) (1970) would preclude anyone in custody outside the territorial United States from resorting to habeas corpus. However, the Court of Appeals for the District of Columbia has interpreted the statutory jurisdictional limitation to apply only when the petitioner is held within the territorial limits of another district court, see *Day v. Wilson*, 247 F.2d. 60 (1957); *Cozart v. Wilson*, 236 F.2d. 732 (1956); and have consistently heard the claims of soldiers in Vietnam; e.g. *United States ex rel. Burr v. Resor*, 309 F. Supp. 217 (D.D.C. 1969).

¹⁰¹ “See notes 58, 59 *supra* and text accompanying.

would serve no useful military purpose and only serve to increase possible "friction" between federal courts and the military court systems.¹⁰² Such considerations would seem to warrant extension of the minimal conflict regulations beyond the time period now apparently recognized to cover periods of time during which a remedy in federal court is pursued.¹⁰³

IV

Lenox also suggests staying court-martial proceedings until a reasonable opportunity is afforded individuals pending charges, who have been denied administrative discharge on the basis of conscientious objection, to pursue federal court remedies. After *Parisi*, it is clear that the federal courts can intervene without regard to an impending court-martial. To allow exhaustion of federal remedies may well obviate the need for a court-martial. A "flexible military" policy and wise exercise of prosecutorial discretion can be extremely helpful in avoiding possible future "clashes" between federal and military courts.¹⁰⁴

¹⁰² Certainly the court's repudiation of *Noyd* indicates no useful military purpose. The court's lack of a remedy and any subsequent disruptive effect it would have on military personnel operations may be ameliorated by legislative change, cf. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 at 20-21 (1955) and does not justify the *Lenox* result. See also *Parisi v. Davidson*, 405 U.S. 34, at n. 13 (1972). It is clear that the federal courts will intervene; e.g. *Larsen v. Laird*, 443 F.2d 617 (5th Cir. 1971).

¹⁰³ Possible opposition to such a policy may best be summarized by the district court's opinion in *Brown v. McNamara* 263 F. Supp. 686 at 691 (D.N.J.) *aff'd* 387 F.2d 150 (3rd Cir. 1967), *cert. denied* 390 U.S. 1005 (1968). The court also noted, however, at 691, that it is likely applicants would face court-martial rather than comply with orders. Certainty of personnel administration, should not override the beneficial effects of the policy suggested. Indeed, any possible disruptive effect of extending the time scope of required "minimum conflict" assignments would be minimal as evidenced by the numbers of personnel involved. In 1971 the **Army** received 1525 in-service I-O discharge applications and approved 879, leaving only 646 service members who might possibly pursue further remedy in the federal courts. See note 136, *infra*. AR 600-200 and AR 614-106 attest to the fact that service members may temporarily perform "minimal conflict" type duties without necessarily disrupting the administration of military personnel.

The military might find it to their long run advantage to insure that CO claimants denied military administrative relief were informed of the possibilities of federal court relief. Such notice could be provided in the notice of rejection of claim sent by the Service Secretary to the applicant. The notice should also indicate the availability of JAGC officers for counseling purposes. Finally, "minimum conflict" duties should be continued for a short time after the Secretary's denial to enable the claimant to seek review in federal court.

¹⁰⁴ Cf. *United States v. Adams*, 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972). Considering defendant's speedy trial motion, the military judge commended

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The Supreme Court in *Parisi v. Davidson* cautioned the federal courts to uphold "basic principles of comity" prevailing between the federal civilian and military judicial systems, and noted that a district court in certain cases might condition its order to discharge upon the completion of court-martial proceedings and the service of any lawful sentence imposed.¹⁰⁵ Parisi had been tried for refusing orders to report for deployment to Vietnam, where he was to perform noncombatant duties similar to those previously assigned him in accordance with the Army's own minimum conflict regulations. A stay of this order deploying him to Vietnam was denied by Justice Douglas who concluded that compliance with said order would not be contrary to Parisi's stated beliefs.¹⁰⁶ Strikingly similar to Lenox, Parisi had refused an order to board a plane for Vietnam, was tried by court-martial for violating this order, and convicted. The Supreme Court stated its belief that their decision in *Parisi v. Davidson* "is not inconsistent with the need to maintain order and discipline in the military and to avoid needless friction between the civilian and military judicial systems", and explained that given the availability of the Noyd defense, if Parisi's claim were valid, there would be no military interest in punishing him, but, if his claim were invalid, the Army could prosecute him.¹⁰⁷ Upon remand, the District Court found no basis in fact for the denial of Parisi's request for discharge as a conscientious objector, and ordered Parisi discharged from the Army under honorable conditions expunging his court-martial conviction.¹⁰⁸ The court reasoned, "In light of the decision by the Supreme Court, this court should have entertained the petition when the order to show cause issued. Had this court done so, it would have found on this record that there was no basis in fact for the denial of the claim; accordingly petitioner would have been entitled to discharge as a conscientious objector and release from the custody of the respondents prior to his trial by court-martial for an offense which was directly related to his conscientious objector claim. Accord-

the command for attempting to obtain an administrative decision as to Adams' application for a CO discharge before proceeding to court-martial. In this case certain offenses with which Adams was charged occurred prior to his application. COMA stated, "We, too, credit the command for having sought a decision that could have obviated court-martial action." *Id.* at 404, 45 C.M.R. at 178.

¹⁰⁵ *Parisi v. Davidson*, 405 U.S. 34, n. 15 (1972).

¹⁰⁶ 396 U.S. 1233 (1969).

¹⁰⁷ *Parisi v. Davidson*, 405 U.S. 34, n. 13 (1972).

¹⁰⁸ *Parisi v. Davidson*, - - F. Supp. - - - (N.D. Cal. May 10, 1972).

ingly, appropriate relief is now to expunge petitioner's court-martial."¹⁰⁹ The government almost immediately decided against appeal and on 19 May 1972, nine days after the District Court's decision, the CMR without citing the district court order terminated litigation in the "ends of justice".¹¹⁰

The Supreme Court's appraisal of the impact of the *Parisi* holding upon the "need to maintain order and discipline in the military"¹¹¹ also included consideration of cases where charges would be unaffected by the validity of the conscientious objector claim, with the court noting that both habeas action and military court-martial could proceed concurrently.¹¹² The Court recommended that remedies fashioned by federal courts when a court-martial is pending should consider the military's interests, suggesting immediate release in those cases where the *Noyd* defense would ultimately invalidate the court-martial.¹¹³

Lenox, however, would indicate a military interest in trying "disobedient" soldiers without regard to the merits of their conscientious objector claim and precludes easy reference to military law for fashioning the "flexible" remedy encouraged by the Supreme Court.¹¹⁴ *Lenox* also suggests no overriding military interest that would dictate federal court restraint from ordering a conscientious objector's immediate release from the service.¹¹⁵ Thus federal courts on a case-by-case basis are asked to ascertain the possible impact of alternative remedies upon the military and its judicial system. Without further guidance, federal courts may elect to consider distinctions previously made by the military

¹⁰⁹ *Id.* at 2 (slip opinion). The court's reasoning raises serious questions as to whether the failure to petition for habeas prior to a conviction by court-martial would amount to a waiver of this remedy.

¹¹⁰ *United States v. Parisi*, CM 423632 (ACMR May 19, 1972). The court cited DA message 1518312, May 72, whereby the Secretary of the Army ordered Parisi's discharge. There is some uncertainty as to when an individual's release from active service terminates the appellate jurisdiction of the military appellate courts. Compare *United States v. Goguen*, 20 U.S.C.M.A. 527, 43 C.M.R. 367 (1971) with *United States v. Maze*, 21 U.S.C.M.A. 260, 45 C.M.R. 34 (1972). An earlier order of the Secretary of the Army, GCM order # 24 (April 14, 1972) setting aside Parisi's conviction would have obviated the federal court's decision to expunge the court-martial conviction. This order was revoked, however, when the Court of Military Review on its own motion ordered review of the issue of whether the Secretary's action legally abated the judicial proceedings in the case, divesting the court of jurisdiction.

¹¹¹ *Parisi v. Dawidson*, 405 U.S. 34, n. 13 (1972).

¹¹² *Id.*

¹¹³ *Id.* at n. 15.

¹¹⁴ "It has been noted that *United States v. Lenox*, confuses the present state of military law, see notes 62-88 *supra* and text accompanying.

¹¹⁵ *Cf.* notes 102, 103 *supra*.

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courts such as the nature of the offense charged¹¹⁶ and when the offense occurred.¹¹⁷ Courts however, have ignored these distinctions in the past, applying a more subjective test examining possible causative factors between conscientious objector beliefs and the type of military offense involved.¹¹⁸ The extremes hypothesized in *Parisi* suggests another possible distinction between uniquely military crimes, where only a military interest in "discipline" is involved, and those crimes commonly cognizable in civilian jurisdictions where a larger societal interest exists in trying the individual.¹¹⁹ Clearly, *Lenox* will operate to broaden the present scope of federal court inquiry into military affairs. If the conscientious objector is to be afforded appropriate relief, the federal courts are forced to ignore the posture of military law and search elsewhere for a standard on which to base their decision as to the proper remedy. Federal courts, following the Supreme Court's decision in *Burns v. Wilson*,¹²⁰ have reviewed military courts-martial to assure their full and fair consideration of all constitutional claims.¹²¹ Where it has been thought that military courts would consider such constitutional issues, exhaustion of

¹¹⁶ See *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969); *United States v. Goguen*, 42 C.M.R. 807 (ACMR 1970); *United States v. Patten*, ____ C.M.R. ____ (ACMR 1971).

¹¹⁷ See *United States v. Adams* 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972). See also *Bratcher v. McNamara*, 448 F.2d 222 (9th Cir. 1971).

¹¹⁸ See *Hanson v. Resor*, 4 SSLR 3611, ____ F. Supp. ____ (N.D. Cal. 1971) (AWOL); *Goguen v. Clifford*, 304 F. Supp. 958 (D.N.J. 1969) (AWOL, and disobedience of order to put on a proper military uniform). In both cases the individuals were administratively released from the service; in *Hanson's* case, prior to trial, *Goguen's* case, *United States v. Goguen*, 20 U.S.C.M.A. 527, 43 C.M.R. 367 (1971), while appellate review was pending; see also *Parisi v. Davidson*, 405 U.S. 34 (1972) (Douglas J. concurring). Douglas commented, "a person who appropriately shows he is exempt from military duty may not be punished for failure to submit." After discussing the statutory and constitutional basis to conscientious objection, Justice Douglas stated, "if there is a statutory or constitutional reason why he should not obey the order to the Army, that agency is overreaching when it punishes him for his refusal."

¹¹⁹ *Parisi v. Davidson*, 405 U.S. 34, n. 15 (1972). The one extreme was a replica of *Parisi's* situation, the other, a hypothetical case like a larceny. The court categorized the latter type case as one that "has no real connection with the conscientious objector's claim", supporting the approach noted at note 118, *supra*.

¹²⁰ 346 U.S. 137 (1953).

¹²¹ For a thorough discussion of the historical development of habeas corpus as a vehicle for review of military courts-martial, see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1208-1238, (1970). Other means have been used to attack court-martial convictions, see *United States v. Augenblick*, 393 U.S. 348 (1969); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965).

military remedies has been **required**.¹²² The very requirement of exhaustion is itself a recognition that the military courts will “fully and fairly” consider constitutional claims. Thus if *Burns v. Wilson* remains good law, the scope of review is extremely narrow. Although traditionally narrow, the scope of review of court-martial convictions has been broadened by some courts,¹²³ and where it is clear that an accused’s constitutional claims are not recognized within the military system, a legitimate avenue for expanding the scope of review is opened. Lenox type cases resulting in conviction without consideration of a defendant’s constitutional due process claims may be subjected to very close scrutiny if reviewed in the federal court system.¹²⁴

Parisi v. Davidson clearly dictates that the federal courts take cognizance of a CO claim without regard to the stage of military judicial proceedings.¹²⁵ To avoid this “friction” between the military and the federal courts, the military, upon denial of a CO claim should itself encourage immediate resort to the federal courts, expand “minimum conflict” provisions to help avoid unnecessary courts-martial and where courts-martial do result adopt a reasonable policy of a case-by-case analysis of its own interests and the feasibility of staying court-martial proceedings pending federal court review of an accused’s conscientious objection claim.

The conscientious objector claimant denied relief within the Selective Service System, may elect to refuse induction and raise his beliefs as a defense to prosecution for his **refusal**.¹²⁶ At trial he is guaranteed representation by counsel. The sincere in-service conscientious objector denied his application for discharge, must gain speedy relief in federal court or ultimately be confronted by military orders contrary to his beliefs. In fact there are undoubtedly several individuals now pending court-martial or appealing court-martial convictions who prior to *Parisi v. Davidson*, were denied or misled as to the possibility of federal court relief, until

¹²² See *Noyd v. Bond* 395 U.S. 683 (1969); *Gusik v. Schilder* 340 U.S. 128 (1950).

¹²³ See *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969). Note, *Civilian Court Review of Court-Martial Adjudications* 69 COLUMN L. REV. 1269 (1969).

¹²⁴ But cf. *Hubbard v. Laird*, 5 SSLR 3534 (E.D. Cal. 25 May 1972); as to whether Lenox can now **seek** federal habeas corpus review of his court-martial, see *Brown v. Resor*, 393 U.S. 10 (1968); cf. *McAliley v. Birdsong*, 451 F.2d 1244 (6th Cir. 1971). Defense counsel should continue to raise their client’s constitutional claims to avoid any question of waiver. See *Developments in the Law, supra* note 121 at 1230.

¹²⁵ But see note 109 *supra*.

¹²⁶ See *Estep v. United States*, 327 U.S. 114 (1946).

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exhaustion of their military judicial remedies.¹²⁷ These individuals are entitled to military counsel both at court-martial and military appellate levels.¹²⁸ However, after *Lenox*, the individual's only remedy and relief from court-martial prosecution lies in the federal court system.¹²⁹ This obviously places the indigent soldier at a distinct disadvantage and effectively denies him a remedy. Furthermore, several persons may be in foreign jurisdictions when their CO applications are denied and thus subjected to communication difficulties with counsel and additional expenses in pursuing habeas corpus relief.¹³⁰ Since the conscientious objector issue may be a crucial issue in the soldier's "defense" of charges brought against him, and *Lenox* rules that such issue must be litigated only in Article III courts, does the inability to secure counsel to pursue this remedy effectively deny the military defendant assistance of counsel? Present case law would indicate a negative answer. Assuming a right to counsel exists, however, several other questions arise. Under the Uniform Code of Military Justice, the right to appointment of military counsel does not exist before the filing of charges.¹³¹ Therefore, would a conscientious objector necessarily have to violate military law prior to being afforded counsel to pursue his remedy in the Article III Courts? If federal court relief is predicated upon the lack of military jurisdiction,]" do the same rights attach to individuals allegedly arbitrarily denied other types administrative relief." Logisti-

¹²⁷ See *United States v. Johnson*, CM 421395, a case currently pending before the Army Court of Military Review, and concurrently scheduled for trial before the United States District Court for the Middle District of Tennessee on a writ of habeas corpus, *Johnson v. Birdsong*, Civil No. 6294. See generally, *Johnson v. Judge Advocate General*, ___ U.S.C.M.A. ___, ___ C.M.R. ___ (7 July 1972).

¹²⁸ 10 U.S.C. § 827 (1970), Article 27, UNIFORM CODE OF MILITARY JUSTICE; 10 U.S.C. § 870 (1970), Article 70, UNIFORM CODE OF MILITARY JUSTICE.

¹²⁹ Again, this is assuming that COMA lacks power to grant extraordinary relief in these circumstances, see note 47 *supra*.

¹³⁰ Cf. *Turpin v. Resor*, 452 F. 2d 240 (9th Cir. 1971). See note 100 *supra*.

¹³¹ See *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); *United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

¹³² Justice Douglas' dissent in *Parisi* is suggestive of a possible jurisdictional attack, see note 119 *supra*.

¹³³ The *Noyd* and *Larson* rationale would seem applicable to several other secretarial actions where rights guaranteed by regulation may be denied. Typically the federal courts have refrained from reviewing internal military affairs, and cases arising under CO regulations have been distinguished, e.g. *Silverthorne v. Laird* ___ F.2d ___ 5th Cir. 1972); *Anderson v. Leird*, 437 F.2d 912 (7th Cir. 1971); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968); *Weber v. Clifford*, 289 F. Supp. 960 (D.Md. 1968). But review has been held available where military officials have violated their

cally, who is to represent the soldier situated in foreign jurisdictions, his appointed counsel at that location or separate counsel situated in the federal jurisdiction where relief is sought? Must the plaintiff be temporarily transferred stateside to assure adequate representation? Defense counsel should make the argument suggested above. Initially military counsel should exhaust presently existing regulations allowing the appearance of military personnel as counsel in civilian courts.¹³⁴

V

The impact of *Lenox* on the future course of military justice is at best uncertain. During a period of close scrutiny and criticism, the military court system has stubbornly guarded its diminished jurisdiction,¹³⁵ professing its commitment to the preservation of the individual rights of servicemen. With the increasing number of in-service conscientious objectors,¹³⁶ and the increased use of the writ of habeas corpus to achieve federal court review of the military's handling of CO applications,¹³⁷ it is perhaps the area of conscientious objection that has drawn the greatest attention to military administrative and criminal processes and tested most severely the system's flexibility, and capability to preserve and protect the rights of its soldiers. Almost by definition, tenets of conscientious objection contradict the military's mission during wartime.

own regulations. e.g. *Mindes v. Seaman* 453 F.2d 917 (5th Cir. 1971); *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970) *Feliciano v. Laird*, 426 F.2d 424 (2d Cir. 1970).

¹³⁴ AR 27-40 (4 Apr. 1972), para. 1-4.

¹³⁵ See note 36 *supra*.

¹³⁶ See figures released by the US Army, (BUS MPA 96, 19 Jan 72).

IN-SERVICE I-O (DISCHARGE) APPLICATIONS

Year	Applications	Approvals
1961	8	1
1962	5	2
1963	69	29
1964	62	30
1965	101	26
1966	118	3
1967	185	9
1968	282	70
1969	243	194
1970	1106	357
1971	1525	879

¹³⁷The first reported case concerning application of DOD 1300.6 was *In re Kanewske*, 260 F. Supp. 521 (N.D. Cal. 1966). *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968) seemed to start the flood of federal court litigation. See generally Hansen, *supra*, note 16 at 975-976.

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United States v. Lenox, seems to evidence a regression from the positive development and expansion of the powers of COMA in an effort to improve military justice. A recent commentator has noted that COMA "may have fully expanded its present statutory power and jurisdiction and may have exhausted the post-war congressional mandate to upgrade military justice. . . . [E]xamination of the decisions and structure of the Court may very well reveal a need for [its] revitalizing . . ." ¹³⁸ *United States v. Lenox* would support this conclusion and demand the closest attention of those concerned about the future course of military justice.

CAPTAIN GEORGE STOHNER**

¹³⁸See Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*. 55 *MIL. L. REV.* 39, 92-93 (1972).

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