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CIVILIAN JUDICIAL REVIEW OF MILITARY CRIMINAL JUSTICE*

Captain Thomas M. Strassburg**

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** Instructor, The Judge Advocate General's School. **B.A.** 1966, J.D. 1969, Marquette University; LL.M. 1974, Northwestern University. Member of the Bars of Wisconsin and U.S. Court of Military Appeals.

I. INTRODUCTION

Justice William O. Douglas, speaking for a majority of the United States Supreme Court in the landmark decision of *O'Callahan v. Parker,*[1] stated that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law,"[2] and that while a "civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, . . . a military trial is marked by the age-old manifest destiny of retributive justice."[3] These statements have apparently been accepted as factual by some commentators and quoted in support of the proposition that the military criminal justice process should be subject to close scrutiny by the federal judiciary.* The federal courts, however, including the Supreme Court, have historically taken a "hands-off" attitude toward military tribunals.' It is the purpose of this paper to trace the development of civilian judicial review of criminal justice in the armed forces with a view toward determining whether such review should be expanded or limited and whether the system of review which exists at present should be changed.

Based upon the premise that it is impossible to fully understand the current law without reference to its history, an effort will be made in the first part of this paper to discuss the availability, method, and scope of civilian review of military justice from an historical standpoint. Since the law adopted by the founders of this nation for the government of our armed forces was based upon the military law of Great Britain,[6] it seems appropriate to begin with a discussion of the relationship of the common law courts to the military and naval courts-martial of England during the eighteenth century.

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1 395 U.S. 258 (1969).

2 *Id.* at 265.

3 395 U.S. at 266.

4 *See, e.g., Developments in the Law–Federal Hnbeas Corpus,* 83 HARV. L. REV. 1038, 1220 & 1224 (1970) [hereinafter cited as ***Developments in the Law***]; Comment, *Civilian Review of Military Courts-Martial,* 1971 U. ILL. L. FORUM 124, 129, Note, ***Civilian Cowt Review*** *of* ***Court-Martial*** *Adjudication*, 69 COLUM. L. REV. 1259, 1277 (1969).

5 See text accompanying notes 39-61 *infra.*

6 W. WINTHROP, MILITARY LAW AND PRECEDENTS *51(2d ed. 1920) [hereinafter cited as WINTHROP].

II. HISTORICAL DEVELOPMENT

A. EARLY HISTORY

1. England

The idea that the decisions of military tribunals should be subject to civilian review is not a new one in Anglo-American law. Blackstone in his *Commentaries on the Laws of* England states:

> [M]ore rigorous methods were put in use for the raising of armies and the due discipline of the soldiery: which are to be looked upon only as temporary excrescences of the state; and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law.[7]

Blackstone goes on to discuss the case of the Earl of Lancaster, who was tried under martial law in 1321 and whose case was reversed some five years later because he had been tried in time of peace.[8] Nevertheless, Blackstone recognized the king as the first in military command and stated that he had the sole power of raising *and regulating* fleets and armies.[9] While he lamented the fact that Parliament had, by its annual mutiny acts,[10] sanctioned the trial by court-martial in time of peace of members of the standing army, Blackstone also recognized the almost absolute power of the Crown with regard to military offenses.[11] It is not surprising, therefore, that few cases can be found in which the decisions of courts-martial were subjected to the scrutiny of the common law courts. It is clear that direct review was nowhere provided.

In 1774 Lord Mansfield, in his opinion in the case of *Mostyn v. Fabrigas*,[12] made reference to a case in which the Court of King's

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7 1 W. BLACKSTONE, COMMENTARIES *412-13 (footnotes omitted) [hereinafter cited as BLACKSTONE].

8 *Id.* at *413. The conviction was apparently reversed by Parliament. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 128 (1866).

9 1 BLACKSTONE *262.

10 The first British Mutiny Act was passed in 1689 and was reenacted annually, except for the years 1698-1702, until replaced by the Army Discipline and Regulation Act in 1879. F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 8 & n.9 (1967) [hereinafter cited as WIENER]. For the text of the first Mutiny Act see WINTHROP, *supra* note 6, at *1446.

11 1 BLACKSTONE *415-16.

12 1 Cowp. 161, 175-76, 27 How. St. Tr. 81, 232 (1774).

Bench awarded damages to a plaintiff who had been punished by a court-martial.[13] One Stephen Conning, a carpenter in the Office of Ordnance at Gibraltar, was apparently tried by a garrison court-martial acting under the authority of the governor of Gibraltar. As a result of his sentence he was imprisoned, given three hundred lashes, and deported. In 1738 he sought redress in an action for trespass against the governor, who had approved the sentence. It was the opinion of the Court of King's Bench that the court-martial in question lacked jurisdiction to try Conning. as he was not subject to military law. The jury awarded a substantial sum as damages.[14]

The leading eighteenth century author in the field of military law[15] relates the case of one Lieutenant Frye who was convicted by a court-martial based upon some depositibns of persons whom he n-as not permitted to confront. He was sentenced to confinement which was later remitted, but he brought an action for damages nonetheless. Unlike Stephen Conning's action, Frve's action was one for false imprisonment and was brought not against the official who approved the sentence but against the president of the court-martial. More significantly, Frye's action was based not upon a lack of jurisdiction but upon the erroneous admission of certain evidence. Substantial damages were awarded and the Court of Common Pleas indicated that Frve could sue the other members of the court-martial.[16]

Stephen Adye[17] and other authors of the period asserted that the common law courts could issue writs of prohibition to prevent the execution of sentences of courts-martial which acted bevond their jurisdiction and could issue writs of error or certiorari just as they could to correct judgments of other inferior courts.[18] In 1792, how-

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13 The record of that case was located through the research of Frederick Bernays Wiener, a noted author in the field of military law. See WIENER, *supra* note 10, at 16.

14 *Id.*

15 Stephen P. Adye, published *A Treatise on Courts-Martial* in 1769. WIENER, *supra* note 10, at 182-83. This was the first book on military law since the first Mutiny Xct, and Adye is apparently recognized as the leading author of the period. *See* 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 347 (1938) [hereinafter cited as HOLDSWORTH]; WIENER, *supra* note 10, at 182-83; Henderson, *Courts-Martial and the Constitzition: The Original Understanding*, 71 HARV. L. REV. 293, 320 (1957).

16 71 HARV. L. REV. at 320-21.

17 *See* note 15 *supra.*

18 Henderson, *Courts-Martial and the Constitution: The Original Understanding, supra* note 15, at 320.

ever, a case was decided in the Court of Common Pleas which is cited by modern authors for the proposition that the inquiry of common law courts into court-martial proceedings was limited to the question of jurisdiction.[19] One Samuel Grant was convicted by a general court-martial of being instrumental in enlisting two men into the service of the East India Company knowing that they were soldiers, and he was sentenced to be reduced in rank and pay and to receive one thousand lashes.?" He sought a writ of prohibition to prevent the execution of the sentence, claiming that he was not a soldier and was not subject to the jurisdiction of the court-martial.[21] Lord Loughborough in his opinion in *Grant v. Gould* discussed the relationship between courts-martial and the common law courts: "Naval courts martial, military courts martial, courts of admiralty, courts of prize, are all liable to the controlling authority which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them: the general ground of prohibition, being an excess of jurisdiction when they assume a power to act in matters not within their cognizance." [22] He went on to say, "it does not occur to me that there is any other [ground] that can be stated, upon which the courts of Westminster Hall can interfere in the proceedings of other courts, where the matter is clearly within their jurisdiction. . . . It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the court has acted erroneously." [23] The factual issue of his amenability to military law was resolved against Grant, and the writ of prohibition was not issued.''

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19 10 HOLDSWORTH at 382-83; WIENER, ***supra*** note 10, at 178.

20 Grant v. Gould, 2 H. Black. *69,* 72 (1792).

21 *Id.*

22 2 H. Black. at 100 (italics omitted),

23 *Id.* at 100-01 (italics omitted).

24 The willingness of the common law courts of the period to intervene in cases in which military tribunals had acted without jurisdiction is demonstrated by the case of Theobald Wolfe Tone. Tone, an alleged leader of the Irish Rebellion, was convicted by a court-martial of high treason and sentenced to death. He was not a member of the military or naval forces of Great Britain and the civil courts were open and functioning. The following exchange in the Court of King's Bench is reported by Howell in his STATE TRIALS:

> **My client must appear in this court. *He is cast* for *death this day.* He may be ordered for execution while I address you. I call on the Court to support the law. I move for a *habeas corpus* to be directed *to* the provost marshal of the barracks of Dublin, and major Sandys to bring up the body of Mr. Tone.**
>
> ***Lord, Chief Justice* [Kilwarden].—Have a writ instantly prepared.**
>
> **Mr. *Curran.*—My client may die while this writ is preparing.**

Less than ten years after Lord Loughborough delivered his opinion in *Grant v. Gould* it became clear that the scope of review would be similarly limited in cases involving applications for other prerogative writs including the writ of habeas corpus.[25] In the case of *The King v. Suddis*[26] it was argued that the sentence of a court-martial was required to conform to the sentence authorized by the law of England for similar offenses. In support of the argument counsel cited the case of one of the alleged mutineers of His Majesty's Ship Bounty who was eventually discharged from imprisonment after "the opinion of the Judges was taken; who all reported against the legality of the sentence on the ground of the rejection of legal evidence." [27] That case, however, did not involve an attack on the court-martial by means of a prerogative writ.[28] In any event, in the *Suddis* case three

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Lord **Chief *Justice.*—Mr. Sheriff, proceed to the barracks, and acquaint the** provost-marshal that a writ is preparing to suspend Mr. Tone's execution; and *see* that he *be not* ezecuted.

[The Court awaited, in a state of the utmost agitation, the return of **the Sheriff.]**

Mr. *Sheriff.*—My lords, I have been at the barracks, in pursuance of your order. The provost-marshal says he must obey major Sandys. Major Sandys says he must obey lord **Cornwallis.**

Mr. *Curran.*—Mr. Tone's father, my lords, returns. after serving the Habeas Corpus: he says general Craig will not obey it.

***Lord** Chief **Justice.*—Mr. Sheriff; take the** body **of Tone into your custody. Take the provost-marshal and major Sandys into custody: and show the order** of **this Court to general Craig.**

(italics in original) 27 How. St. Tr. 613, 625 (1798).

25 Those common law- writs which stood in a special relationship with the Crown came to be regarded as "prerogative" writs. They were issued almost exclusively by the Court of King's Bench and were not issued to subjects except upon a shoaing of cause, The prerogative writs which have survived include prohibition, habeas corpus, mandamus, and certiorari. *See generally* de Smith, *The Prerogative Writs*, 11 CAMB. L. J. 40 (1953).

26 1 East 306 (1801).

27 *Id.* at 313.

28 The case referred to by counsel in the *Suddis* case was that of William Muspratt. During the course of the trial of the Bounty mutineers it became clear that there was insufficient evidence to convict two of the co-defendants whom Muspratt desired to have testify in his behalf. He argued: " 'It is every day's practice in the Criminal Courts of Justice on the Land when a Number of Prisoners are tried for the same facts, and the Evidence does not materially Affect some. for the Court to acquit those that are not Affected, that the other Prisoners may have an Opportunity to call them if advised to do so. . . .' " O. RUTTER, THE COURT-MARTIAL OF THE "BOUNTY" MUTINEERS 181 (1931). The court-martial declined to follow that procedure and sentenced Muspratt to death. *Id.* at 198. Rutter speculates that Muspratt's conviction was set aside by a writ of prohibition issued by the Court of King's Bench. *Id.* at 54. It seems clear. however, that that was not the case. Simmons wrote in his treatise on courts-martial: "[The attorney general and the solicitor general] suggested the propriety of submitting the case to the judges.

judges of the Court of King's Bench were of the opinion that on a return to a writ of habeas corpus it was sufficient to show that the prisoner was held under the sentence of a "court of competent jurisdiction to inquire into the offence, and with power to inflict such a punishment." [29]

In summary, during the eighteenth century, when the military forces of England were subject to laws which formed the basis for those adopted for the government of the United States military,[30] civilian judicial review of courts-martial was very limited. It appears that review could be had either after the sentence had been served or before it became effective. The method of seeking review depended upon the time at which it was sought and the relief available. After a sentence had been served, an action at law for damages against a member of the court-martial or other official who had a part in ordering the sentence executed was apparently the only remedy available. Considering the severity of the sentences of courts-martial during that period, such a review was obviously of limited value.

Before a sentence was effectuated by the official responsible for doing so, two methods of review were possible, but only one was available as a matter of right. The King or his representative could be petitioned in the hope that the King would seek an opinion of his judges as to the legality of the proceedings,[31] but it is clear that such a review was entirely within the King's discretion. The other alternative was to seek to prevent the responsible official from ordering the sentence executed by means of a prerogative writ such as prohibition or habeas corpus.

It seems evident that the prerogative writs afforded the only truly effective method of review of military tribunals, and yet that effectiveness was severely limited by the scope of review permitted. Notwithstanding the fact that some eighteenth century authors be-

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. . . The twelve judges were appealed to, and in consequence of their opinion, Muspratt obtained his majesty's pardon. . . ." T. SIMMONS, REMARKS ON THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL 453 (4th ed. 1852). Simmons also quotes a letter written by one Lord Erskine, who was familiar with Muspratt's case: " 'There can be no doubt, that neither in this case, nor in any other of a similar description, could there have been an appeal to any of the courts of justice. It belongs to the ***king alone*** to abrogate or confirm the sentences of courts martial. . . .' " (italics in original). *Id.* at 453-54 n. 7.

29 1 East at 315-16.

30 ***See*** WINTHROP, ***supra*** note 6, at *51.

31 See note ***27 supra.***

lieved that a broader scope of review was allowed,[32] it now seems clear that when review was sought by means of a prerogative writ. its scope was limited to the issue of whether the tribunal in question exceeded its jurisdiction.[33] This limitation as to scope does not appear to have existed in the other methods of review described.[34]

2. United States

The earliest cases in the United States in which the decisions of courts-martial were attacked were very similar to the earliest eighteenth century cases in England in terms of the method used to obtain review. One of the first federal cases decided in this country on the subject was *Wise v. Withers*,[35] an action of trespass against an official charged with the duty of collecting fines. The plaintiff had been sentenced by a court-martial to pay a fine but claimed that the court lacked jurisdiction because he was not lawfully enrolled in the militia. The United States Supreme Court, in an opinion which turned upon the construction of a law which exempted certain classes of persons from militia duty, held that the court-martial clearly lacked jurisdiction and that its decision, therefore, did not protect the official who sought to enforce it from an action for damages.[36]

In the next significant case involving an action against an official which reached the Supreme Court, a United States deputy marshal sought relief from the judgment of a state court in an action of replevin.[37] The marshal had seized certain property of the plaintiff in satisfaction of a fine levied by a court-martial. The Court found that the court-martial was properly organized under a congressional enactment and, therefore, had jurisdiction to try the plaintiff. The opinion of Mr. Justice Story indicated that the'scope of the inquiry was limited: "[Some of the remaining issues] are properly matters of defence [sic] before the Court Martial, and its sentence being upon a subject within its jurisdiction. is conclusive. . . ." [38] Not until 1857, however, were the status of courts-martial and the scope of

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32 *See* Henderson, *Courts-Martial and the Constitzition: The Original Understanding*, **supra** note 15, at 320.

33 *See generally 10* Holdsworth 382-83; WIENER, *supra* note 10, at 178; Henderson, *supra* note 15, at 320.

34 See note 27 *supra* and text accompanying note 16 *supra*.

35 7 U.S. (3 Cranch) 331 (1806).

36 *Id.* at 337.

37 Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

38 *Id.* at 38.

review of their decisions in actions for damages fully discussed by the Supreme Court. In the case of *Dynes v. Hoover*[39] the Court stated that "Congress has the power to provide for the trial and punishment of military and naval offences in the manner . . . practiced by civilized nations; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed . . . the two powers are entirely independent of each other." [40] There was no question as to the naval court's jurisdiction over the person of the plaintiff, but it was claimed that it had no jurisdiction to convict him of an offense different from the one charged. The Court went on to say: "When confirmed, [a court-martial sentence] is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case which the court had not jurisdiction over the *subject-matter or charge*, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise." [41]

About two years before the Supreme Court handed down the opinion in *Dynes v. Hoover* the Circuit Court for the District of Columbia had occasion to decide one of the earliest reported cases in which the "Great Writ of Habeas Corpus" was used to seek review of the proceedings of a court-martial. Four prisoners in the District of Columbia penitentiary who had been tried by naval courts-martial and sentenced to confinement sought writs of habeas corpus, contending that they had not been convicted of offenses punishable by imprisonment at hard labor.[42] In remanding the prisoners to custody the court pointed out that it could not look beyond the record or act as a court of error because the law had placed such jurisdiction beyond its power.[43] About ten years later, the Supreme Court had occasion to consider for the first time a case involving the writ of habeas corpus as a method of seeking judicial review of the proceedings of a military tribunal. A citizen of Indiana who was not a member of the armed forces of the United States was tried by a military commission[44] during the Civil War for conspiracy against the gov-

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39 61 U.S. (20 How.) 65 (1857).

40 *Id.* at 79.

41 Id. at 81 (italics in original).

42 *In re* Biddle, 30 F. Cas. 965 (No. 18236)(C.C.D.C. 1855).

43 *Id.*

44 A military commission is a tribunal which is established to administer justice when military forces are charged with the duty of exercising the judicial function of government in either foreign or domestic territory. It is similar to a court-

ernment, inciting insurrection, and other similar offenses.[45] He was convicted and sentenced to death but petitioned the Circuit Court for Indiana for a writ of habeas corpus.[46] The question of whether issuance of the writ was proper was certified to the Supreme Court, and the result was one of the most significant decisions in the early constitutional history of our country?[47] In *Ex parte Milligan* the Court held that a military commission had no jurisdiction to try a citizen of the United States when the civil courts were open and discharging their functions.[48]

While the *Milligan* case clearly established that revieu. of the actions of military tribunals was possible by means of the writ of habeas corpus, relief was granted to petitidners in only a few reported cases during the nineteenth century. The inferior federal courts regularly applied the test of *Dynes v. Hoover*[49] and, finding

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martial in composition and procedure. U.S. DEPT. OF ARMY, PAMPHLET 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK, para 7.7d at 7-12; cf. note 48 *infra*. It is recognized that courts-martial and military commissions serve different purposes and have different jurisdictional bases, but it does not appear that the civilian courts have based their decisions upon any distinction benveen them.

45 *Ex parte* Milligan, 71 C.S. (4 Wall.) 2, 6 (1866).

46 *Id.* at 107.

47 For a discussion of the historical context in which the case of *Ex parte Milligan* was decided, see S. KLAUS, THE MILLIGAN CASE (1929); *see also Ex partr* Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861); Martin, *When Lincoln Suspended Habeas Corpus, 60* A.B.A.J. 99 (1974).

48 71 U.S. (4 Wall.) at 121. The concurring opinion in *Ex parte Milligan* includes an important discussion of the types of military jurisdiction which can be exercised: "There are under the Constitution three kinds of military jurisdiction: one to he exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the Cnited States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents: and a third to be exercised in time of invasion or insurrection within the limits of the United States or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under *military* ***law,*** and is found in the acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as *military government,* superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated *martial law proper,* and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." 71 US. (4 Wall.) at 141-42 (concurring opinion).

49 61 U.S. (20 How.) 65, 81 (1857).

that the military court acted within its jurisdiction, remanded the prisoner in question to custody.[50]

The question of whether military cases could be reviewed directly by the federal courts was resolved by the Supreme Court during the Civil War. In a case similar in its facts to ***Ex parte Milligan***, a civilian not connected in any way with the armed forces sought judicial review of the sentence of a military commission.[51] Contending that the military commission had no jurisdiction to try him, he petitioned the Supreme Court for a writ of certiorari to be directed to the Judge Advocate General of the Army requiring him to send up the record of the proceedings for review. The court pointed out that the appellate powers of the Supreme Court are limited and regulated by Congress and that the petition was not within any grant of appellate jurisdiction.[52] The Supreme Court also concluded that a military commission was not a court and did not exercise judicial authority in the sense in which judicial power is granted to the courts of the United States.[53]

A potential method of collateral review of military convictions was provided when Congress established the Court of Claims in 1855,[54] but it soon became apparent that the scope of review in that court would be as limited as that in other federal courts. In the case of *Keyes v. United States*[55] it was contended that a court-martial which sentenced an officer to be dismissed from the service was not properly constituted because one of the members of the court testified against him. The Court of Claims dismissed the claimant's petition for back pay on the basis that the presence as a court member of a witness against him did not deprive the court-martial of jurisdiction, and therefore the proceedings could not be attacked collaterally.[56] That decision was upheld by the Supreme Court[57] as were later decisions of a similar nature.[58]

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50 *See, e.g., In* re McVey, 23 F. 878 (D.C.D. Calif. 1885).

51 *Ex* parte Vallandingham, 68 U.S. (1 Wall.) 243 (1863).

52 *Id.* at 251.

53 68 U.S. (1 Wall.) at 253.

54 Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

55 15 Ct. Cl. 532 (1879), *aff'd*, 109 U.S. 336 (1884).

56 15 Ct. Cl. at 541.

57 Keyes v. United States, 109 US. 336 (1884).

58 Swaim v. United States, 165 U.S. 553 (1897), *aff'g*, 28 Ct. Cl. 173 (1893); United States v. Fletcher, 148 U.S. 84 (1893), *rev'g* 26 Ct. Cl. 541 (1891); Mullan v. United States, 140 U.S. 240 (1891), *aff'g* 23 Ct. Cl. 34 (1888).

While the early English cases dealt with various methods by which the sentences of military tribunals could be reviewed or their execution avoided, no reported case has been found in which it u-as sought to prevent a court-martial from hearing a case about to be presented to it. In the United States, however, the federal courts became involved in a comparatively large number of cases in which petitioners sought to avoid trial by court-martial. In the earliest of these, writs of habeas corpus weresought by prisoners being held for trial by military courts. In 1869 a paymaster's clerk sought such a writ, claiming that he was not in military service. He was being held for trial in a military prison for allegedly defrauding the government in connection with his official duties. The district judge did not discuss the proprietv of issuing the writ under those circumstances, but remanded the prisoner to custody because of his finding that a paymaster's clerk is "in the military service." [59] A few years later a similar case was argued before the Circuit Court for California with similar results, but in that case it was apparently argued that in any event the trial was barred by a former conviction and the statute of limitations.[60] The court pointed out that matters of defense such as those were questions for the court having jurisdiction to try the charge, and as to the argument that courts-martial tended to abuse their powers in such cases the court stated:

> This court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositories of jurisdiction over military offenses will abuse these powers, than those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them. It is, undoubtedly, the imperative duty, and **we** have no doubt that it will be the pleasure, of the judiciary to jealously and rigorously maintain its own jurisdiction in its utmost extent, for the protection of the citizen in all his rights of person and property; and to confine within their proper limits the special and limited jurisdiction of other tribunals. But, while this is so. it is no less its duty to abstain from trespassing upon, or usurping the rightful powers of any other tribunal, however limited may be the sphere of its jurisdiction. A breach of. this latter duty would be no less reprehensible than a breach of the former.[61]

The foregoing language is as good a statement of the attitude of most courts of the period as can be found. Nevertheless, relief was

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[59] *In re* Thomas, 23 F. Cas. 931 (*So.* 13888)(D.C.N.D. Miss. 1869).
[60] *In re* Bogart, 3 F. Cas. 796, 801 (*So.* 1596)(C.C.D. Calif. 1873).
[61] *Id.*

granted prior to trial in a few cases. In one case a government contractor was being held for trial by court-martial and the Circuit Court for Kentucky issued a writ of habeas corpus and ordered him discharged[62] based upon the construction of a statute purporting to grant military tribunals jurisdiction over such persons.[63] Shortly thereafter a district judge issued a writ of habeas corpus and ordered the release of an alleged deserter on the ground that his trial by court-martial was barred by the statute of limitations and if brought to trial he could not possibly be convicted,[64] but that decision was criticized[65] and reversed.[66] There was no doubt, however, that if a military tribunal clearly lacked jurisdiction over a prisoner awaiting trial, his release could be obtained by means of the writ of habeas corpus.[67]

In 1885 the Supreme Court considered for the first time a case in which a habeas corpus petitioner sought to prevent his trial by court-martial. Philip Wales, a medical director and former Surgeon General of the Navy, had been ordered to remain within the City of Washington and told by the Secretary of the Navy that he was "under arrest," although he had not been taken into custody. The Court agreed with the District of Columbia Supreme Court that Wales' case was not one which involved a restraint of personal liberty sufficient to warrant his discharge by habeas corpus.[68] The Court recognized that his motive for construing the Secretary's order as making him a prisoner was "to have himself brought before a civil court which . . . may decide that the offence . . . is not one of which a naval court-martial can entertain jurisdiction, and, releasing him from the restraint of the order of arrest, it would incidentally re-

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62 *Ex parte* Henderson, 11 F. Cas. 1067 (No. 6349) (C.C.D. Ky. 1878). The court's opinion contained dicta to the effect that the attempt of Congress to subject government contractors to trial by court-martial was unconstitutional. *Id.* at 1075. *But see* Holmes v. Sheridan, 12 F. Cas. 422 (No. 6644) (C.C.D. Kan. 1870).

63 Act of July 17, 1862, ch. 200, 12 Stat. 594.

64 *In re* Davison, 4 F. 507, 511 (D.C.S.D.N.Y. 1880), *rev'd,* 21 F. 618 (C.C.S.D.N.Y. 1884).

65 *In re* White, 17 F. 723, 725 (C.C.D. Calif. 1883).

66 *In re* Davison, 21 F. 618 (C.C.S.D.N.Y. 1884). The court stated: "It would be as indecorous and as wanton a stretch of judicial power to assume in advance that a general court-martial will erroneously convict an accused person of a military offense, as it would be to indulge such a presumption concerning a common-law court." *Id.* at 621.

67 *In re* Baker, 23 F. 30 (C.C.D.R.I. 1885).

68 Wales v. Whitney, 114 U.S. 564, 575 (1885).

lease him from the power of that court." [69] During the course of the opinion, the Supreme Court's attitude toward pretrial attacks on pending courts-martial became clear. Having discussed various post-trial remedies, the Court noted that "[post-trial relief] is more in accord with the orderly administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it." [70]

The decision in the *Wales* case illustrated the fact that the writ of habeas corpus was of limited value in seeking to have a civil court prevent a court-martial from proceeding with a trial. Less than a year after that decision was handed down, another Navy official sought to prevent a court-martial from proceeding by means of a writ of prohibition. His petition was dismissed by the Supreme Court of the District of Columbia on the ground that it did not have jurisdiction to issue such a writ to a court-martial." The United States Supreme Court did not decide the question of whether the District of Columbia court had power to issue a writ of prohibition to a military court, but ruled that no case had been shown for the exercise of such power." Nevertheless, the Court expressed the opinion that such a writ could be issued only when it clearly appears that an inferior court is about to exceed its jurisdiction.[73]

By the end of the nineteenth century the law seemed well-settled. Military tribunals were considered to be courts of limited jurisdiction not exercising judicial authority in the sense that it was exercised by courts established under Article III of the Constitution. Rather, they derived their authority from Congress' power to make rules for the government of the land and naval forces.[74] As long as they acted within their jurisdiction, their decisions could not be reviewed by the federal courts.[75] Neither could such courts interfere with military

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69 *Id.* at 570.

70 114 U.S. at 575.

71 Smith v. Whitney, 116 U.S. 167, 172 (1886).

72 *Id.* at 175.

73 116 U.S. at 176.

74 Johnson v. Sayre, 158 U.S. 109, 114 (1891).

75 *In re* Grimley, 137 U.S. 147, 150 (1890). The leading authority of the period on military law states: "[A court-martial] is not only the highest but the only court by which a case of a military offence can be heard and determined: and a civil or criminal court of the United Stares has no more appellate jurisdiction over offences tried by a court-martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or set aside its finding or sentence as

tribunals about to properly exercise jurisdiction. Nevertheless, various remedies were available to those who could establish that the military tribunal in question was without jurisdiction. If a court-martial sentence deprived a service member of pay which was otherwise due him, he could sue the United States in the Court of Claims; if property was taken from him to satisfy a fine he could sue the officials responsible; if a prisoner was confined as the result of the sentence of a court-martial he could petition a federal court for a writ of habeas corpus; the same remedy was available to an individual imprisoned awaiting trial, and for one not imprisoned the writ of prohibition was available, although the courts generally were most reluctant to issue such writs prior to trial.[76] Each of the foregoing remedies also had the effect of declaring that the proceedings of the military tribunal in question were or would be void, for in the absence of jurisdiction, a court's actions are a nullity.

Obviously, the question of jurisdiction was of prime importance. When discussing courts of general jurisdiction, the question is normally put in terms of jurisdiction over the subject matter and the parties.[77] While a finding of personal and subject matter jurisdiction in such a court resolves the question in its favor, that is not true of a court of special and limited jurisdiction such as a court-martial.[78] Indeed, it can be said that those questions cannot even be reached until it is determined that the court-martial in question has a legal existence.

One of the first indications of the peculiar nature of courts-martial came in a case decided in **1830** in which the Supreme Court pointed out that a court-martial is "considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with judg-

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such—than has a court of a foreign nation." WINTHROP at *55. Winthrop goes on to say that "an Accused has always an appeal, from a conviction and sentence by court-martial, to the President, (or Secretary of War), who, in entertaining and determining such appeal, is assisted and advised by The Judge Advocate General of the Army. Thus, as the tribunal is an executive agency, the appeal therefrom is to a superior executive authority." WINTHROP at *61 (emphasis in original; footnote omitted). See also E. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL § 456 (3d ed. 1915); G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 42 n. 3 (2d ed. 1901).

[76] *See, e.g.*, United States v. Maney, 61 F. 140 (C.C.D. Minn. 1894); *In* re Zimmerman, 30 F. 176 (C.C.N.D. Calif. 1887).

[77] See, *e.g.*, F. JAMES, CIVIL PROCEDURE § 11.6 (1965).

[78] McClaughry v. Deming, 186 U.S. 49, 64 (1902).

ments of a court of record." [79] The need for a court-martial to be organized and to proceed strictly in accordance with the statutes by which it was authorized was discussed in a number of cases during the 1800's,[80] but it was not fully discussed until 1902 in a case in which a "volunteer" officer had been tried by a court-martial composed of officers of the Regular Army. The Supreme Court stated:

> The attempt at the creation of a court failed because such attempt was a plain violation of the statute. A court-martial is aholly unlike the case of a permanent court created by constitution or by statute and presided over by one aho had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected.
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> [A court-martial] has no continuous existence, but under the prorisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members, and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial and has no jurisdiction over either the subject matter of the charges against a volunteer officer or over the person of such officer.[81]

For the next fifty years challenges to the jurisdiction of courts-martial were often based upon alleged failures to follow the statutes which authorized their creation. The question naturally arose as to which such failures were jurisdictional and which were procedural only and therefore not reviewable in a collateral attack. In 1909 the Supreme Court made it clear that not all failures to follow precisely the statutes prescribing rules for the proceedings of military tribunals were jurisdictional. In the case of *Mullan v. United States*[82] it was

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[79] ***Ex parte*** Watkins, 28 U.S. (3 Pet.) 193, 209 (1830).

[80] *See, e.g.*, Mullan v. United States, 140 U.S. 240 (1891); Keyes v. United States, 109 U.S. 336 (1884); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[81] McClaughry v. Deming, 186 US. 49, 64-65 (1902). The opinion of the lower court set out four "indispensable prerequisites" *to* the validity of court-martial judgments: "(1) That it was convened by an officer empowered by the statutes to call it; *(2)* that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes." Deming v. McClaughry, 113 F. 639, 650 (8th Cir. 1902). See ***also*** United States v. Brown, 206 U.S. 240 (1907).

[82] 212 U.S. 516 (1909).

argued that the use of proceedings of a court of inquiry as evidence before a court-martial in violation of a statute which permitted such use only when oral testimony could not be obtained deprived the court-martial of jurisdiction. The Court found that the right provided by the statute could be waived,[83] unlike jurisdictional requisites. Shortly after the end of World War I the Supreme Court considered an allegation that a court-martial lacked jurisdiction because the pleadings did not charge any crime known to the laws of the United States. The Court found jurisdiction and stated that it "is not necessary that the charge in Court-martial proceedings be framed with the technical precision of a common law indictment." [84]

During the 1940's the most popular statutory ground upon which courts-martial were collaterally attacked was the failure to comply with provisions requiring a thorough and impartial investigation before referral of a case to a general court-martial.[85] A conflict of opinion developed as to whether the lack of such an investigation was jurisdictional, although most of the lower federal courts apparently felt that it was, because they regularly examined alleged errors in pretrial investigations.[86] The conflict was settled by the Supreme Court in 1949 in the case of *Humphrey v. Smith.*[87] In an opinion which clearly held that the failure to conduct a pretrial investigation did not deprive a general court-martial of jurisdiction, Justice Black responded to the dissenters' argument that the Court's interpretation made the statutory requirement a "virtual dead letter":[88]

> This contention must rest on the premise that the Army will comply with the 70th Xrticle of War only if courts in habeas corpus proceedings can

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[83] *Id.* at 519.

[84] Collins v. McDonald, 258 U.S. 416, 420 (1922).

[85] *See generally* Annot., 15 A.L.R.2d 387, 399 (1951).

[86] *See* Henry v. Hodges, 171 F.2d 401 (2d Cir. 1948), *cert. denied,* 336 U.S. 968 (1949); Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *redd sub. nom.* Humphrey v. Smith, 336 U.S. 695 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); Waite v. Overlade, 164 F.2d 722 (7th Cir. 1947), *cert. denied,* 334 US. 812 (1918); Reilly v. Pescor, 156 F.2d 632 (8th Cir. 1946), *cerr. denied,* 329 U.S. 790 (1946). *But see* Becker v. Webster, 171 F.2d 762 (2d Cir. 1949), *cert. denied,* 336 US. 968 (1949); DeWar v. Hunter, 170 F.2d 993, 997 (10th Cir. 1948) (concurring opinion), *cert. denied,* 337 U.S. 908 (1949). At least one district judge squarely held that the lack of a thorough and impartial pretrial investigation is a jurisdictional defect. Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947).

[87] 336 U.S. 695 (1949).

[88] *Id.* at 702.

> invalidate any court-martial conviction which does not follow an .Article 70 pre-trial procedure. We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War. . . . A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure. . . .[89]

Humphrey v. Smith brought an end to an era in which the most popular and apparently most effective means of securing a determination that a military court lacked jurisdiction was the allegation of noncompliance with statutory provisions.

The final question to be considered in a discussion of the early development of civilian judicial review of military tribunals is the extent to which provisions of the Constitution could be used to support collateral attacks upon courts-martial. At the outset some distinctions must be made with regard to the types of constitutional attacks attempted. They fall into three categories: it might be alleged that (1) certain statutes pertaining to personal or subject matter jurisdiction of military courts are unconstitutional, (2) the exercise of jurisdiction by a military court over a given person or subject matter is unconstitutional, or (3) the military court proceeded in an unconstitutional manner.

An example of a constitutional attack upon the statutory basis of a court-martial is contained in the early case of ***Ex*** *parte Henderson*,[90] in which it was held that a statute'purporting to subject government contractors to trial by court-martial violated their right to trial by jury.[91] The case of ***Ex*** *parte Milligan*,[92] in which the Supreme Couft held that the trial of a civilian by a military commission when the civil courts are open violated the right to trial by jury,[93] is perhaps the best known example of a finding of a lack of jurisdiction in a military tribunal on constitutional grounds (as opposed to finding a statute purporting to grant jurisdiction unconstitutional),

The development of the final tvpe of constitutional attack—the allegation that the court-martial proceeded in an unconstitutional manner—requires greater discussion. During the nineteenth century there is recorded no successful collateral attack of this type upon a court-martial. In the case of ***Ex*** *parte Reed*[94] it was argued that the

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89 336 U.S. at 700.

90 11 F. Cas. 1067 (***So.*** 6349) (C.C.D. Ky. 1878).

91 *Id.* at 1075-76; see ***also*** *In re* Craig, 70 F. 969 (C.C.D. Kan. 1895).

92 71 U.S. (4 Wall.) 2 (1866).

93 See text accompanying notes 45-48 *supra*.

94 100 U.S. 13 (1879).

return of proceedings to a court-martial for revision of a sentence put a habeas corpus petitioner twice "in peril for the same offence," or "deprived [him] of his liberty without due process of law." [95] In denying the application for the writ the Supreme Court did not even discuss the argument.[96] Similarly, in 1922 it was argued that the only evidence of guilt before a court-martial was a coerced confession and that the petitioner was, therefore, compelled to be a witness against himself in violation of the Constitution.[97] The Court stated that this "at most, was an error in the admission of testimony, which cannot be reviewed in a *habeas corpus* proceeding." [98]

The groundwork for successful collateral attacks upon military criminal proceedings on the basis of constitutional defects therein was not laid until 1938, when the Supreme Court handed down the landmark decision of *Johnson v. Zerbst.*[99] The case involved a habeas corpus petitioner who was tried in a federal district court without the assistance of counsel. His petition was denied in the lower federal courts on the basis that the trial court had jurisdiction and nothing appeared which indicated the trial was a sham or a pretense,[100] and, therefore, the judgment could not be collaterally attacked.[101] The Supreme Court, however, held that habeas corpus was a proper remedy to obtain relief from the denial of counsel in violation of the sixth amendment. Mr. Justice Black, speaking for a majority of the Court, was unwilling to depart from the long standing precedent that the judgment of a court cannot be attacked collaterally unless there is a lack of jurisdiction. He created instead a legal fiction by stating: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not

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95 Id. at 19.

96 *But cf.* Ex parte Bigelow, 113 U.S. 328 (1885).

97 Collins v. McDonald, 258 U.S. 416,420 (1922).

98 *Id.* at 420-21.

99 304 U.S. 458 (1938).

100 In a number of earlier cases the Supreme Court had held that judgments were void and subject to collateral attack when convictions were the result of fraud during the course of the trial, Mooney v. Holohan, 294 U.S. 103 (1935), and mob domination of the trial. Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915).

101 Bridwell v. Aderhold, 13 F. Supp. 253 (N.D. Ga. 1935), *aff'd sub. nom.* Johnson v. Zerbst, 92 F.2d 748 (5th Cir. 1937).

intelligently waived this constitutional guaranty, and whose life or liberty is at stake."[102]

Due to the Supreme Court's expansion of the scope of review in federal habeas corpus proceedings, and probably because of the growing dissatisfaction with military justice as administered during the 1940's,[103] the federal courts began to assert authority to determine whether court-martial proceedings violated provisions of the Constitution, The constitutional requirements examined included the right to counsel,'@'to a transcript of the proceedings,[105] and to due process of law,[106] as well as the right to be free from unreasonable searches and seizures,"'' cruel and unusual punishment,[108] and double jeopardy.[109] It seemed quite clear that the trend was away from a "hands-off' attitude and toward broader collateral review of courts-martial by the federal courts.

In 1950, however, the Supreme Court decided a case which, it would seem, severely limited the scope of review of military trials. The Court of Appeals for the Fifth Circuit clearly held that one Eugene Brown was denied due process of law during the course of court-martial proceedings in violation of the Constitution."@In an opinion by Mr. Justice Clark the Supreme Court held in *Hiatt v. Brown*[111] that the scope of the Court of Appeals' review was too broad. Nevertheless, the language used in that portion of the opinion implied that compliance with the due process clause *was* a proper in-

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102 304 U.S. at 468.

103 *See generally* Sherman, *The Civilianization of Military Law,* 22 MAINE L. REV. 3, 28-38 (1970); Note, *Collateral Attack on Courts-Martial in the Federal Courts,* 57 YALE L. J. 483 (1948).

104 Waite v. Overlade, 164 F.2d 722 (7th Cir. 1947), *cert. denied,* 334 U.S. 812 (1948); Schita v. King, 133 F.2d 283 (8th Cir. 1943); Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied,* 318 U.S. 785 (1933).

105 Schita v. King. 133 F.2d 283 (8th Cir. 1943).

106 DeWar v. Hunter. 170 F.2d 993 (10th Cir. 1948), *cert. denied,* 337 U.S. 908 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1918); United States *ex. rel.* Innes v. Hiatt. 141 F.2d 661 (3d Cir. 1944).

107 Romero v. Squier, 133 F.2d 528 (9th Cir. 1943). *rert. denied,* 318 U.S. 785 (1943).

108 Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949), *cerr. denied,* 339 U.S. 986 (1950).

109 Anderson v. Hunter, 177 F.2d 770 (10th Cir. 1919).

110 Hiatt v. Brown, 175 F.2d 273, 277 (1949).

111 339 U.S. 103 (1950).

quiry on habeas corpus review.[112] The Court went on to say, however:

> [I]t is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction." . . . In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.[113]

The above language seems to take on greater significance in view of a decision handed down only a few years after *Johnston v. Zerbst*.[114] In the case of *Waley v. Johnston*[115] the Supreme Court rejected Justice Black's fiction of "loss of jurisdiction" and held that the writ of habeas corpus is properly used to review those cases in which the "conviction has been in disregard of the constitutional rights of the accused. . . ."[116] Was it possible that the Supreme Court in Hiatt *v. Brown* was telling the lower federal courts to limit their inquiry in reviews of courts-martial to the question of jurisdiction as that concept existed prior to the legal fiction established in *Johnston v. Zerbst*? A later decision indicated that such was not the intent of the Court,'" but a clear answer as to the scope of review in collateral attacks upon the proceedings of military courts has to this day not been provided. Perhaps one of the reasons it has not been provided is that in 1950 Congress greatly reduced the need for collateral review of courts-martial by taking the unprecedented step of providing for their direct review by a court composed of civilian judges.[118] The law by which this was accomplished is known as the Uniform Code of Military Justice.[119] It became effective on hlay 31, 1951,[120] bringing to a close what may be called the early history of civilian judicial review of military tribunals.

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112 *Id.* at 110.
113 339 U.S. at 111 (citation omitted).
114 304 U.S. 458 (1938).
115 316 U.S. 101 (1942).
116 *Id.* at 105.
117 Burns v. Wilson, 346 U.S. 137 (1953).
118 Act of May 5, 1950, ch. 169, art. 67, 64 Stat. 129.
119 10 U.S.C. §§ 801-940 (1970).
120 Act of May 5, 1950, ch. 169, § 5, 64 Stat. 145.

B. *DIRECT REVIEW OF COURTS-MARTIAL– THE COURT OF MILITARY APPEALS*

As is true of any controversial legislation, the provisions of the Cniforni Code of Military Justice relating to civilian appellate review of courts-martial were the product of compromise.[121] As a result the Court of Military Appeals is not as prestigious a body as it might have been. Its judges were not given life tenure or an undiminishable salary[122] and it was not vested with the "judicial Power of the United Stdtes" [123] as an inferior court within the meaning of Article III of the Constitution. Rather it is a "legislative court" established along with the rest of the Uniform Code of Military Justice pursuant to Congress' power to "make Rules for the Government of the land and naval Forces."[124] Nevertheless, the creation of the Court of Military Appeals provided for the direct appellate review of certain courts-martial by a panel of three civilian judges.[125] While this action reduced the need for collateral review by the federal courts, it is clear that it was not the intent of Congress to preclude all such review.[126]

At this point it seems appropriate to depart from a purely historical approach, for the military justice appellate system devised in 1950 has not changed appreciably since that time,[127] and in view of the scope of the remainder of this paper, it is best discussed in term of its current operation. In order to understand the extent to which direct civilian review of courts-martial is available, it is necessary to understand some of the details of the militarv justice system devised by Congress. A brief discussion follon s.

.All courts-martial are subject to some tvpe of review, although it mav not be "judicial" in the ordinary sense. Every record of trial

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121 *See generally* Willis, *The Cnited States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972) [hereinafter cited as Willis I].

122 Act of May 5, 1950, ch. 169. 4 5, 64 Stat. 129. The judges are now entitled to the same salary and allowances as judges of the United States Court of Xppeals. although their compensation is not "undiminishable" as a matter of constitutional right as is that of the judges of "Article III" courts. 10 C.S.C. § 867 (1970).

123 C.S. CONST. art. III, 4 1.

124 U.S. CONST. art I, § 8.

125 See text accompanying notes 141-142 *infra* for a discussion of the extent of the jurisdiction of the Court of Military Appeals.

126 *See* Willis I. *supra* note 121, at 68.

127 *Compare* 10 U.S.C. §§ 866 & 867 (1970) *with* Act of May 5, 1950, ch. 169, arts. 66 & 67, 64 Stat. 128-29.

must be reviewed by a military commander, normally the commander who ordered that the court be convened.[128] While he may not take any action which would prejudice the rights of the accused,[129] he has complete discretion with regard to actions which benefit the accused, including even the disapproval of findings and sentences which are fully supported by the evidence.[130] Records of summary[131] and special[132] courts-martial must be reviewed by a military lawyer.[133] Such a review is automatic and is normally accomplished by a member of the staff of a military commander authorized to convene general courts-martial. The lawyer who reviews the record has no independent authority, however, to set aside the findings or sentence of the Court-martial; rather, his recommendation to do so must be made to the commander who exercises supervisory authority in military justice matters over the officer who convened the court. Nevertheless, a check on the commander is provided by broad statutory language permitting the Judge Advocate General of the armed force in question to vacate or modify the findings or sentence of such a court-martial.[134] No further direct review is provided except in those cases in which a punitive discharge adjudged by a "BCD special" court-martial is approved by the convening authority.

All courts-martial affecting general or flag officers (the highest ranking officers of the armed services, a group very small in number) and all courts-martial which include an approved sentence of death, punitive discharge, or confinement for one year or more must be reviewed by a Court of Military Review.[135] In addition, the Judge Advocate General concerned may direct review by such a court of any general court-martial in which there has been a finding of guilty

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128 10 U.S.C. § 860 (1970).

129 10 U.S.C. § 862 (1970).

130 10 U.S.C. § 864 (1970).

131 A summary court-martial is a tribunal of extremely limited jurisdiction. It may try only those persons who consent to trial before it and can sentence offenders to a period of confinement for only one month or less. 10 U.S.C. § 820 (1970).

132 A special court-martial may try any person subject to military law for any noncapital offense punishable under the Uniform Code of Military Justice. It can impose confinement for a period of up to six months as well as accessory penalties. Under certain conditions it can sentence an offender to be discharged from the service with a bad-conduct discharge. 10 U.S.C. § 819 (1970).

133 10 U.S.C. § 865(c) (1970).

134 10 U.S.C. § 869 (1970).

135 10 U.S.C. § 866(b) (1970).

and a sentence.[136] A Court of Military Review is established by the Judge Advocate General of each armed force, and while it is not a court in the sense of Article III of the Constitution, its decisions are binding[137] and its judges are, by statute, made relatively independent.[138] Congress has authorized the assignment of civilians to Courts of Military Review,[139] but the actual presence of civilian judges on such courts is the rare exception rather than the rule. The review provided by the Courts of Jlilitarv Review is extensive:

> [A Court of Military Review] may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may *weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact*, recognizing that the trial court saw and heard the witnesses.[140]

Of the cases reviewed bv the Courts of Military Review- only those involving general or flag officers and those in which a Court of Military Review has affirmed a death sentence must be reviewed by the United States Court of Military Appeals.[141] Nevertheless, it may review anv case required to be reviewed by a Court of Military Review, either by granting an accused's petition for review or upon certification of the case to it by a Judge Advocate General.[142] As can be seen, direct civilian judicial review as a matter of right is simply not available to the average military defendant.

That is not to say, however, that the Court of Military Appeals has not been an important and effective force in insuring fairness in military trials.[143] In practice it reviews a substantial number of cases reviewed bv the Courts of Military Review.[144] Moreover, its opin-

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136 10 U.S.C. § 869 (1970).

137 10 U.S.C. § 866(e) (1970).

138 10 U.S.C. § 866(g) (1970).

139 10 U.S.C. § 866(a) (1970).

140 10 U.S.C. § 866(c) (1970) (emphasis added).

141 10 U.S.C. § 867(b)(1) (1970). The name of the court was changed from the "Court of Military Appeals" to the "Cnited States Court of Military Appeals" and it was made clear that it was established under Article I of the constitution in 1968. Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178 (codified at 10 U.S.C. § 867(a) (1970)).

142 10 C.S.C. § 867(b)(2) & (3) (1970).

143 *Sre generally* Willis I. *supra* note 121.

144 *See* Willis, *The Constitution, the United States Court* of *Military Appeals and the Future*, 57 MIL. L. REV. 27. 79 n, 259 (1972) [hereinafter cited as Willis].

ions since 1951 have provided a substantial body of precedent[145] which is applied in the review of all courts-martial as well as by military trial judges.[146] While the scope of direct review is limited to questions of law,[147] the Court of Military Appeals has power to decide whether the evidence is insufficient as a matter of law to support the findings.[148] In addition, the "nebulous distinction between questions of law and questions of fact and the liberal construction by the Court of its powers minimizes the significance of this limitation. . . ." [149] The present and potential value of the Court of Military Appeals will be further discussed in this paper,[150] but for the moment the examination of the development of collateral review will be resumed.

III. THE EXPANSION OF COLLATERAL REVIEW

A. SCOPE OF REVIEW

Less than two years after the Court of Military Appeals began its work the Supreme Court decided a case which is still cited regularly when the scope of review of military cases is discussed. The case involved petitions for writs of habeas corpus by two airmen who had been sentenced to death by a court-martial before the Uniform Code of Military Justice became effective. The district court, relying upon *Hiatt v. Brown*,[151] dismissed the petitions,[152] but the Court of

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145 The official reports of the United States Court of Military Appeals are now contained in 21 bound volumes.

146 In 1968 Congress established military judges as the presiding officers of all general courts-martial, and authorized them to preside over special courts-martial as well. Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1335 (codified at 10 U.S.C. §§ 816, **826** (1970)). In practice today, military judges preside at all military trials except those by summary court-martial. They must be members of the bar and certified by The Judge Advocate General of their armed force as qualified for such duty. 10 U.S.C. § 826(b) (1970). While summary courts-martial and special courts-martial in which no punitive discharge is adjudged cannot be reviewed by the Court of Military Appeals, the court's power to affect such tribunals has been demonstrated. See United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973).

147 10 U.S.C. § 867(d) (1970).

148 See 10 U.S.C. § 867(e) (1970).

149 Willis I, ***supra*** note 121, at 77-78.

150 See text accompanying notes 349 and 362-365 ***infra.***

151 339 U.S. 103 (1950).

152 Dennis v. Lorett, 104 F. Supp. 310 (D.D.C. 1952); Burns v. Lovett, 104 F. Supp. 312 (D.D.C. 1952).

Appeals for the District of Columbia considered the merits of the petitioners' claims[153] based upon the legal fiction that jurisdiction is lost by denial of constitutional rights."' In *Burns v. Wilson*[155] the Supreme Court asserted that the scope of review in militarv habeas corpus cases had always been narrower than in civil cases.'" Nevertheless, the opinion of four justices made it clear that the inquiry was not limited to jurisdiction in the traditional sense as had been indicated in *Hiatt v. Brown*, but on the other hand did not extend to an inquiry into the merits of all constitutional claims. Rather, if "a military 'decision has dealt fully and fairly with an allegation raised in [an application for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."[157]

It soon became clear that the "full and fair consideration" test of *Burns* was not intended to apply to constitutional challenges to the jurisdiction (in the traditional sense) of courts-martial. During the 1950's the Supreme Court considered a number of cases involving the question of a court's-martial jurisdiction of the person of certain categories of civilians. In a series of decisions the Court unhesitatingly found that statutes purporting to extend court-martial jurisdiction to civilians could not constitutionally be applied to former servicemen,[158] dependents of military personnel,[159] or government employees accompanving the armed forces overseas during peacetime.[160] In 1969 the Court was faced with a case challenging the subject matter jurisdiction of a court-martial and held that the court-martial was without jurisdiction because the offense involved was not "service-connected."[161] The case of *Burns v. Wilson* was not discussed in any of the foregoing decisions.

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153 Burns v. Lovett, 202 F.2d 335, 343-47 (D.C. Cir. 1952).

154 *Id.* at 342.

155 346 U.S. 137 (1953).

156 *Id.* at 139. During the same term in which *Burns v. Wilson* was decided. the Court decided a case which permitted broad review of state court decisions in federal habeas corpus applications. Brown v. Allen, 344 U.S. 443 (1953). See *also Developments in the Law*, *supra* note 4, at 1113-19.

157 346 U.S. at 142.

158 United States *ex. rel.* Toth v. Quarles, 350 C.S. 11 (1955).

159 Kinsella v. United States *ex rel.* Singleton, 361 C.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

160 Grisham v. Hagan, 361 C.S. 278 (1960); McElroy v. United States *ex. rel.* Guagliardo, 361 U.S. 281 (1960).

161 O'Callahan v. Parker, 395 U.S. 258 (1969).

With regard to alleged constitutional defects in the proceedings of courts-martial, the lower federal courts initially accepted and applied the *Burns* test of "full and fair consideration" with little difficulty. Because of the location of a large military confinement facility within its jurisdiction,[162] it is not surprising that the Court of Appeals for the Tenth Circuit had occasion to consider a comparatively large number of military habeas corpus cases. In a line of cases beginning with *Easley v. Hunter*[163] that court applied the *Burns* test to all types of allegations of denial of constitutional rights by courts-martial.[164] In *Easley* the court disposed of the petitioner's claims by stating:

> The record before **us** discloses that this case was reviewed as provided for in the Articles of War; that in addition, after this petition was filed, a hearing thereon was delayed for the purpose of giving the petitioner an opportunity to exhaust his remedies under the [Uniform Code of Military Justice]. It is not alleged nor contended that the identical questions now presented were not fully and fairly determined in the military courts, nor is there any showing that the procedure for military review was not legally adequate to resolve the questions which are presented in this case.[165]

During the 1950's the same test was applied in most other circuits in which the question was considered.[166] It was also used by the Court of Claims in suits for back pay.[167]

Obviously the test of "full and fair consideration'' is a highly subjective one. While there may not be much disagreement as to whether an issue was "fully" considered in a given case, the requirement of "fair consideration" may mean anything from "a lack of arbitrariness" to "correct in the judgment of the one making the determination." It is not surprising, therefore, that the *Burns* test began

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162 The United States Disciplinary Barracks is located at Fort Learenworth, Kansas.

163 209 F.2d 483 (10th Cir. 1953).

164 *See* Suttles **v.** Davis, 215 F.2d 760 (10th Cir. 1954), *cert. denied,* 348 U.S. 903 (1954); Dixon **v.** United States, 237 F.2d 317 (10th Cir. 1956); Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957), *cert. denied,* 355 U.S. 918 (1958); Thomas v. Davis, 249 F.2d 232 (10th Cir. 1957), *cert. denied,* 355 U.S. 927 (1958); Bennett **v.** Davis, 267 F.2d 15 (10th Cir. 1959).

165 209 F.2d at 487.

166 *See, e.g.,* Day **v.** McElroy, 255 F.2d 179 (D.C. Cir. 1958), *cert. denied,* 357 U.S. 930 (1958); Mitchell **v.** Swope, 224 F.2d 365 (9th Cir. 1955).

167 Begalke *v.* United States, 286 F.2d 606 (Ct. Cl. 1960), *cert. denied,* 364 U.S. 865 (1960).

an evolutionary process in the 1960's which resulted in a substantial expansion of the scope of revien- of military criminal justice.

Before discussing some of the recent cases in which courts have purported to decide the meaning of *Burns v. Wilson* it should be pointed out that in almost every case decided in this area the factual basis for the alleged constitutional infirmity is set out at some length in the opinion. As a result it is often difficult to tell whether a court is simply ignoring *Burns* and examining the merits of the claim.[168] In some cases it seems clear that that is precisely what the courts are doing,'" In addition to the courts which tacitly reject *Burns* there are a fen- which have openly abandoned any distinction between the review of military and state proceedings in collateral attacks. The argument in support of that position is that "the principal opinion in *Burns* did not applv a standard of revien- different from that currently imposed in habeas corpus revien- of state convictions." [169]

Most of the courts which have considered the issue have taken the view that the test of "full and fair consideration" will be applied onlv to factual determinations which form the basis for constitutional claims. According to this view, pure questions of constitutional lan- should be decided de novo bv the federal court. For example, in *Kennedy v. Commandant*[171] the habeas corpus petitioner did not argue that the officer appointed to defend him was ineffective, but rather contended that the failure to appoint a lawyer as counsel was a per se violation of his sixth amendment right. While the Court of Appeals for the Tenth Circuit resolved the question against the petitioner, it said, in effect, that since no factual determination was involved, the issue would be considered without regard to whether it had been fully considered by the military courts."' It appears that the court was serious about retaining the "full and fair consideration" test for constitutional issues involving factual determinations.]':'

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168 *See*, e.~.Rushing v. Wilkinson, 272 F.2d 633 (5th Cir. 1959), *cert. denied*, 361 U.S. 911 (1960).

169 Wimberly v. Laird, 472 F.2d 923 (7th Cir. 1973): Heilman v. United States, 106 F.2d 1011 (7th Cir. 1969), *cert. denied*, 396 U.S. 860 (1969).

170 Kauffman v. Secretan of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969). *cert. denied, 396* U.S. 1013 (1970). See *also* Allen v. VanCantfort, 436 F.2d 625, 629-30 (1st Cir. 1971). *cert. denied*. -102 U.S. 1008 (1971).

171 377 F.2d 339 (10th Cir. 1967); see *also* Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078 (1970); Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966); Gibbs v. Blackwell, 354 F.2d 169 (5th Cir. 1965).

172 377 F.2d at 3-12.

173 See Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), *rert. denied sub. nom*. Smith v. Laird, 391 U.S. 934 (1969).

It remains to be seen to what extent other courts which appear to have adopted the "fact-law" distinction will refrain from examining the merits of claims based upon factual questions.

A final consideration concerning the scope of review in collateral attacks involves the question of whether the proceedings of courts-martial are subject to review for errors which are not of constitutional dimensions. While the Supreme Court has never clarified the *Burns* decision, the Court did decide one case since then which touched upon the scope of review. *United States v. Augenblick*[174] involved two claimants who sued for back pay in the Court of Claims based upon defects in their trials by court-martial. In one case the Court of Claims granted relief because of what it perceived to be a violation of the Jencks Act.[175] The court stated that the denial of discovery in question "seriously impeded [the claimant's] right to a fair trial in violation of the Due Process Clause of the Constitution."[176] In the other case the Court of Claims granted relief because of a violation of a rule of evidence concerning accomplice testimony.[177] The court said: "In its relation to fundamental fairness, this rule is similar, and serves a parallel purpose, to the constitutional rule that the due process clause invalidates a conviction rested on no evidence at all."[178] The Supreme Court reversed both cases in a unanimous decision.[179] The opinion by Mr. Justice Douglas pointed out that "Rules of evidence are designed in the interest of fair trials. But unfairness in result is no sure measure of unconstitutionality. When we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions."[180] As to the discovery question Justice Douglas stated: "It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right, . . . But certain it is that this case is not a worthy candidate for consideration at the constitutional level."[181] The Court said in conclusion that "apart from trials conducted in violation of *express constitutional mandates*, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the pro-

174 393 U.S. 348 (1969).
175 Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967).
176 *Id.* at 606-07.
177 Juhl v. United States, 383 F.2d 1009 (Ct. Cl. 1967).
178 *Id.* at 1023.
179 393 U.S. 348 (1969).
180 *Id.* at 352.
181 393 U.S. at 356.

ceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest." [182]

It would appear that *Augenblick* clearly settled the question as to whether nonconstitutional procedural defects in courts-martial may be raised in collateral attacks. Nevertheless, two appellate courts have since considered issues which were not of constitutional dimensions. The Court of Appeals for the First Circuit[183] decided the question of whether a certain guilty plea violated the provision of the Uniform Code of hlilitary Justice prohibiting pleas of guilty to capital offenses.[184] It based its authority to decide such an issue on the language of the habeas corpus statute'" to the effect that custody can be challenged as being violative of the "Constitution *or laws* of the United States." [186] The Court of Appeals for the Ninth Circuit recently considered a question of statutory law in connection with a petition for a writ of habeas corpus by a military prisoner.[187] It was held, however, that the military courts had fully and fairly considered the airman's claim that his prosecution was barred by the statute of limitations.[188] If these decisions are followed, the already expanded scope of review will be widened substantially in habeas corpus cases.

B. *METHODS OF REVIEW*

Of the remedies historically available to the aggrieved service member, two have survived to be of present practical value. They are the writ of habeas corpus and the suit for back pay. As pointed out earlier, in addition to providing respectively a release from custody and a money judgment, they result in a public judicial declaration of the invalidity of the court-martial proceedings. Until the relatively recent past it did not appear that any other remedy of significant value was available. Nevertheless, there were those who

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182 *Id.* (emphasis added).

183 Allen v. VanCantfort, 436 F.2d 625 (1st Cir. 1971), *cert. denied,* 402 U.S. 1008 (1971).

184 10 U.S.C. § 845 (1970).

185 28 U.S.C. § 2241 (1970).

186 436 F.2d at 629.

187 Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972), *cert. denied,* 410 U.S. 942 (1973).

188 *Id.* at 819. One of the judges, relying on the opinion in *Fischer v. Ruffner,* 277 F.2d 756 (5th Cir. 1960), was of the opinion that such a claim could not be considered by the federal courts. 466 F.2d at 820.

were neither in "custody" [189] nor in a position to sue for back pay. In particular, service members awaiting trial who were not confined and those whose sentences included neither confinement nor forfeiture of pay were seemingly without a method to obtain civilian judicial review. In addition, for most persons the Court of Claims was not a convenient forum in which to seek relief.[190]

During the last decade new remedies have become available which have the potential to provide judicial review to almost everyone who is convicted by court-martial and to some who are awaiting trial. It now appears that under some circumstances it is possible to obtain a writ of mandamus requiring the correction of a discharge, a declaratory judgment that a court-martial conviction is void, or an injunction against prosecution in a military court. Before any collateral attack upon a conviction other than by habeas corpus can be successful, however, a statutory obstacle must be overcome. Article 76 of the Uniform Code of Military Justice provides in part as follows: "Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial [and action of the executive branch]." [191] At least one court has indicated that this finality provision bars collateral relief other than habeas corpus,[192] but most courts which have addressed the issue have held that it does not.[193] The basis for this holding seems to be that the person who is not in custody should not be deprived of review of a military conviction solely because of that fact.[194] The Supreme Court has had two opportunities to consider the question of non-habeas corpus collateral review of courts-martial but has declined to do so. In

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189 See text accompanying notes 245-249 *infra* for a discussion of the term "custody."

190 The Court of Claims sits in Washington, D.C.

191 10 U.S.C. § 876 (1970). It is clear that Article 76 was not intended to preclude review by means of the writ of habeas corpus. Weckstein, ***Federal Court Review*** of ***Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities,*** 54 MIL. L. REV. 1, 16 & nn. 86 & 87 (1971) [hereinafter cited as Weckstein].

192 United States v. Carney, 406 F.2d 1328 (2d Cir. 1969) (per curiam); *cf.* Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970).

193 Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 1013 (1970); Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *redd on other grounds,* 393 U.S. 348 (1969); see *also* Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); *cf.* Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

194 *See* Kauffman v. Secretary of the Air Force, 415 F.2d at 994-96.

United States v. Augenblick[195] the government argued that the finality provision of the Uniform Code of Military Justice bars review by the Court of Claims, but the Supreme Court decided the case in favor of the government on other grounds and did not reach the question.[196] In the recent case of *Secretary of the Navy v. Avrech*,[197] which involved an action for a declaratory judgment that the "general article" of the Uniform Code is unconstitutional. the issue of whether the federal courts have other than habeas corpus jurisdiction to review niilitary convictions was not raised until oral argument.[198] Subsequently the Court requested briefs on the subject but ultimately decided the case on the basis of their holding in *Parker v. Levy*[199] that the general article is not unconstitutional.[200]

In 1946 Congress authorized the secretary of each military department to correct anv military record of the department through a board of civilians "when he considers it necessary to correct an error or remove an injustice."[201] Similarly, in 1958 a board was authorized within each department to review the discharge of anv former service member other than discharges resulting from the sentences of general courts-martial.[202] The question naturally arises as to what extent the secretary or board concerned can be judicially compelled to change a military record which is the result of a court-martial. Until 1962 there were obstacles to obtaining relief in the nature of mandamus in courts other than those of the District of Columbia,[203] but Congress remedied the problem by specifically granting jurisdiction to the district courts[204] and allowing such an action to be brought in the district in which the plaintiff resides."[205]

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195 393 U.S. 348 (1969).

196 *Id.* at 351.

197 42 U.S.L.W. 5233 (July 8, 1974).

198 For a summary of the arguments see 42 U.S.L.W. 3477 (Feb. 26, 1974).

199 42 U.S.L.W. 4979 (June 19, 1974).

200 42 U.S.L.W. at 5233.

201 Act of Aug. 2, 1916, ch. 753 § 207, 60 Stat. 837 (codified at 10 U.S.C. § 1552 (1970)).

202 Act of Sept. 2, 1938, Pub. L. No. 85-857 § 13(v)(2), 72 Stat. 1267 (codified at 10 U.S.C. § 1553 (1970)).

203 *See generally* Byse, *Proposed Reforms in Federal "Non-statutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts*, 38 COLUM. L. REV. 903 (1938).

204 28 U.S.C. § 1361 (1970).

205 28 U.S.C. § 1391(e) (1970).

The availability of this "action in the nature of mandamus" to review indirectly a conviction by a military court was first discussed by a federal appellate court in 1965. In the case of *Ashe v. McNamara*[206] it was held that there is a judicially enforceable duty to correct a discharge given as the result of the sentence of a court-martial in which the defendant's constitutional rights were violated. The court's discussion of the legislative history of the statute authorizing boards for the correction of military records made it clear that it was not intended that judicial review should be precluded. In addition the Supreme Court had decided a case in 1958 which held that judicial review of a board's refusal to change an administrative discharge is available."[207] The court did not find difficult the step from review of a board's decision concerning an administrative discharge to the review of such a decision involving a discharge resulting from a court-martial.[208]

Ashe v. McNamara has been relied upon by other courts which have asserted jurisdiction to review the decisions of the administrative boards of the various military departments."[209] It is not entirely clear, however, whether the scope of review in a mandamus proceeding is as broad as that in other forms of collateral attack. It has often been said that a writ of mandamus will issue only when it is sought to compel performance of a nondiscretionary ministerial act or one which it is the official's plain duty to perform.[210] Nevertheless, quoting from portions of the *Ashe* opinion, the Court of Appeals for the Tenth Circuit stated the rule as follows:

> [W]here the "conviction was the product of court martial procedure *so* fundamentally unfair that, upon a proper petition, a district court at the place of incarceration would have been obliged to grant *** a writ of habeas corpus", it would be "as much the duty of the Secretary and the Correction Board, as it would have been of a court ***, to treat as void a sentence thus unconstitutionally imposed" and "the matter of changing the type of

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206 355 F.2d 277 (1st Cir. 1965).

207 Harmon v. Brucker, 355 U.S. 579 (1958).

208 355 F.2d at 281-82.

209 Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970); Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), *cert. denied* sub. *nom.* Smith v. Laird, 394 U.S. 934 (1969); cf. Cole v. Laird, *468* F.2d 829 (5th Cir. 1972); Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966), *cert. denied,* 385 US. 881 (1966).

210 *See, e.g.,* Rural Electrification Administration **v.** Northern States Power Co., 373 F.2d 686, 694 (8th Cir. 1967), *cert. denied,* 387 U.S. 945 (1967); Kurio v. United States, 281 F. Supp. 252, 263 (S.D. Tex. 1968).

> discharge [would therefore involve] a plain duty to grant relief. enforceable by an action in the nature of mandamus. . . ." [211]

Other courts, however, have relied upon a more traditional test and have held that relief can be granted in mandamus proceedings only when the board's denial of relief is arbitrary or capricious.[212] In addition it has been pointed out that in considering a petition for a writ of mandamus the district court cannot look beyond the administrative record.[213] It appears that mandamus has nonetheless developed into a useful method of obtaining review of the sentences of courts-martial.

Another remedy which has recently emerged is the action for a declaratory judgment. Unlike actions for writs of mandamus and habeas corpus, the action for a declaratory judgment is not one in which the federal district courts are specifically granted original jurisdiction. Rather, declaratory relief is authorized by statute in cases in which the federal court; otherwise have jurisdiction.[214] While such relief may be granted as an incident to relief given in an action seeking, for example, a writ of habeas corpus, if a declaratory judgment is the only objective of an action it must rest upon the court's "federal question" jurisdiction."[215] The amount in controversy in such an action must be in excess of $10,000.

One of the earliest cases in which an action for declaratory relief was held to be an appropriate method of collaterally attacking a court-martial conviction was *Kauffman v. Secretary of the Air Force*.[216] The Court of Appeals for the District of Columbia Circuit relied upon earlier decisions recognizing methods of review other than habeas corpus and stated that the requirement of custody "may surely be dispensed with in review of military judgments not otherwise reviewable by a constitutional court."[217] The question as to whether the amount in controversy was in excess of $10,000 was apparently not argued by the parties. While the action for a declaratory judgment has been recognized by at least one circuit outside the

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[211] Smith v. McNamara, 395 F.2d 896, 899 (10th Cir. 1968), *cert. denied sub. nom.* Smith v. Laird, 394 U.S. 934 (1969).

[212] Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970); Lima v. Secretary of the Army, 314 F. Supp: 337 (E.D. Pa. 1970).

[213] Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970).

[214] 28 U.S.C. § 2201 (1970).

[215] 28 U.S.C. § 1331 (1970).

[216] 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 US. 1013 (1970).

[217] *Id.* at 996.

District of Columbia as an available method of obtaining review of a military conviction,[218] it appears to have been rejected by two others.[219] One appellate court clearly held that the district court was without jurisdiction where it did not appear from the pleadings or the record that the "amount in controversy" requirement was satisfied. As can be seen, the availability of an action for a declaratory judgment that a court-martial conviction is void is unsettled at this point in history.

C. *LIMITING DOCTRINES*

In view of the fact that every method of review in the federal district courts heretofore discussed is based upon some extraordinary remedy, the doctrines which normally apply to such relief naturally come into play. The requirement that remedies within the military judicial system be used prior to seeking review in the federal courts is one which applies to all types of extraordinary relief. Questions arise, however, concerning the availability of certain remedies within the military and the extent to which those remedies which are available must be exhausted.

The issue of exhaustion of military remedies was considered by the Supreme Court in 1950 in the case of *Gusik v. Schilder*.[220] A federal district court had granted a writ of habeas corpus based upon the noncompliance with pretrial investigation requirements of the Articles of War, but Congress had recently enacted a new article which authorized the Judge Advocate General to grant a new trial or other relief.[221] In an opinion by Mr. Justice Douglas a unanimous Court refused to sustain the writ and upheld a decision of the Court of Appeals requiring resort to the new remedy provided by Congress. The opinion was based upon the policy that friction between the federal and military courts should be avoided. The continuing vitality of the *Gusik* case was established when it was relied upon by the Supreme Court in 1969 in a decision which required a military habeas corpus petitioner to seek relief from the Court of Military Appeals even in matters which are ancillary to the merits of a court-

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[218] Cole v. Laird, 468 F.2d 829 (5th Cir. 1972). See also Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971).

[219] United States v. Carney, 406 F.2d 1328 (2d Cir. 1969) (per curiam); Davies v. Clifford, 393 F.2d 4% (1st Cir. 1968).

[220] 340 U.S. 128 (1950).

[221] *Id.* at 130.

martial, such as release from confinement pending the outcome of an appeal.[222]

It seems well settled that it is necessary to exhaust only those remedies which provide a genuine opportunity to obtain the relief sought.[223] The Supreme Court recently applied that doctrine in a military context in the case of *Parisi v. Davidson*.[224] The habeas corpus petitioner in that case was seeking discharge from the Army as a conscientious objector. It was clear that he had exhausted all possible administrative methods of obtaining such a discharge, but he was awaiting trial by court-martial on charges of disobedience of an order to board an aircraft bound for Vietnam. The Supreme Court held that it was not proper for the district court to stay its consideration of the habeas corpus petition pending the outcome of the court-martial proceedings, because the military judicial system is powerless to grant a discharge based upon conscientious objection.

While it is evident that direct appellate remedies must normally be exhausted before seeking collateral relief, there is some question as to whether all collateral remedies available within the military must be used. Military collateral remedies include the various administrative boards for the correction of records, a provision in the Uniform Code of Military Justice pertaining to the redress of wrongs,[225] the possibility of review of some cases in the office of a Judge Advocate General,[226] and collateral review by the Court of Military Appeals.[227] An extended discussion of each of these remedies and the relief they are capable of providing is beyond the scope of this paper, but a few important points about some of them should be noted.

Of the foregoing remedies, only the review provided by the Court of hlilitary Appeals can be considered judicial. With regard to seeking collateral review in that court, the Supreme Court indicated in *Noyd v. Bond*[228] that such review was to be sought prior to petitioning for federal habeas corpus relief, although recent commentary has

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222 Noyd v. Bond, 395 U.S. 683 (1969).

223 *See* Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 48 MIL. L. REV. 91, 106 (1970).

224 405 U.S. 34 (1972). The idea that exhaustion will not be required where the remedy in question may not exist was also suggested in Noyd v. Bond, 395 U.S. 683, 698 n. 11 (1969).

225 10 U.S.C. § 938 (1970).

226 10 U.S.C. § 869 (1970).

227 *See* Willis, *supra* note 144, at 81 & nn. 264 & 265.

228 395 U.S. 683 (1969); *see also* Gusik v. Schilder, 340 U.S. 128 (1950).

pointed out that there will likely be exceptions to the requirement in some cases.[229] In addition, it appears that relief is rarely granted by the Court of Military Appeals.[230]

The remainder of the remedies listed, while they ultimately involve the judgments, opinions, and decisions of lawyers, are administrative in nature. Three recent cases have indicated that that distinction is significant. In *Cole v. Laird*[231] the Court of Appeals for the Fifth Circuit granted relief to a habeas corpus petitioner who had not sought review of his special court-martial by the Air Force Board for the Correction of Military Records. The court stated that while "some degree of exhaustion is required before federal courts will review courts-martial convictions, it is clear that Cole's only opportunity for **judicial** scrutinization of his conviction lies with the federal courts."[232] The court also implied that an application for review in the Office of the Judge Advocate General pursuant to Article *69* of the Uniform Code of Military Justice was not a prerequisite to judicial review. In the subsequent case of ***Betonie v. Sizemore***[233] the court resolved the question by quoting the opinion of the lower court with approval: "The district court correctly held that 'no other **judicial** *appellate* **tribunals** established to hear appeals in court-martial cases are available to these petitioners to which they could present their serious constitutional claim as a matter of right under the Uniform Code of Military Justice'."[234] The Court of Appeals for the Ninth Circuit has also indicated that exhaustion of the Article *69* review and the Article **138** remedy (application for redress of wrong) will not be required. In a footnote in the case of **Daigle** *v. Warner*[235] the court stated that where purely legal questions are involved there is no need to give "administrative agencies" an opportunity to apply their expertise.

A doctrine which is closely related to that of exhaustion of remedies is the doctrine that the deliberate failure to use an available remedy for review within the system in question precludes later collateral attack in spite of the fact that the remedy is no longer available at the time such collateral attack is made. The doctrine also ap-

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229 *Developments in the Law, supra* **note 4, at 1234-36.**

230 **Willis,** *supra* note **144, at 81** n. **265.**

231 **468 F.2d 829 (5th** Cir. **1972).**

232 *Id.* **at 831 (emphasis added).**

233 **496 F.2d 1001 (5th Cir.** 1974), *aff'g in part* **369 F. Supp. 340 (M.D. Fla. 1973).**

234 *Id.* **at 1005 (emphasis in district** court **opinion).**

235 **490 F.2d** 358, **360 n.1a (9th Cir. 1974).**

plies to claims which were intentionally not asserted during the original proceedings. This "waiver" doctrine is flexible, however, in that the federal district judge is given broad discretion in its application. The leading case on the subject is the 1963 Supreme Court decision of *Fay v. Noia*.[236] The Court made it very clear in that case that claims must be heard by the district court unless it is clear that the petitioner "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bv-passing of state procedures. . . ." [237]

While the Supreme Court has never had occasion to consider the issue, it appears that the doctrine of *Fay v. Noia* applies to military as well as state proceedings. Nevertheless, the waiver doctrine's relationship to the "full and fair consideration" test of *Burns v. Wilson*[238] merits some discussion. It is clear that the federal courts may consider constitutional claims of state prisoners de novo,[239] and therefore it seems to matter little theoretically whether a claim was asserted in the state courts. But as was pointed out in the Tenth Circuit case of *Suttles v. Davis*,[240] a case which antedated *Fay v. Noia*, "The civil courts may review only claims of infringement of constitutional rights which the military courts refused to give fair consideration. Obviously, it cannot be said that they have refused to consider claims not asserted." [241] The issue of the applicability of the principles of *Fay v. Noia* to military cases has rarely been litigated during the decade following that decision, and that, it seems, reflects favorably upon military courts and counsel. One federal appellate court has discussed the question at some length and concluded that *Fay v. Noia* applies to the collateral review of courts-martial. In *Angle v. Laird*[242] the Court of Appeals for the Tenth Circuit found that under the facts of the case, Angle's failure to petition the Judge Advocate General of the Army for relief pursuant to remedies available between 1949 and 1952 "was not a deliberate bypassing of those remedies." [243] The court did decide, however, that Angle's counsel's affirmative

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236 372 U.S. 391 (1963).

237 *Id.* at 439.

238 346 U.S. 137 (1953). **See** text accompanying notes 155-157 *supra*.

239 Brown v. Allen, 344 U.S. 443 (1953).

240 215 F.2d 760 (10th Cir. 1954), *cert. denied,* 318 US. 903 (1954).

241 *Id.* at 763; ***see also*** Weckstein, ***supra*** note 191, at 69-74; ***Developments in the Law, supra*** note 4, at 1230-32.

242 429 F.2d 892 (10th Cir. 1970), ***cert. denied,*** 401 ***U.S.*** 918 (1971).

243 ***Id.*** at 894.

statement that he had no objection to a deposition which was admitted in evidence at his trial operated to waive his right to confrontation and cross-examination.[244] It remains to be seen how this apparent conflict between the waiver doctrine and the scope of review of courts-martial will be resolved in other cases.

The final limitation to be discussed involves only the writ of habeas corpus, but in view of the importance of that remedy, a brief discussion of the "custody" requirement seems warranted. The statutory basis for the federal courts' habeas corpus jurisdiction provides that the "writ of habeas corpus shall not extend to a prisoner" unless he is in custody.[245] Until about ten years ago "custody" was taken to mean physical restraint, but in **1963** the Supreme Court held that a prisoner who has been released on parole is "in custody" within the meaning of the statute.[246] Five years later the Court held that the release of a habeas corpus petitioner from custody after federal jurisdiction has attached does not render the case moot even if the release is "unconditional." [247] Therefore, the federal courts must proceed with their consideration of the merits of a habeas corpus petition until a final decision is reached, provided the petition was filed while the petitioner was "in custody." The lower federal courts have followed the Supreme Court's lead in relaxing the custody requirement,[248] and there seems to be no reason to believe that greater restraints will be required as a prerequisite to consideration of the habeas corpus petition of a court-martialed service member.[249]

The expansion of the scope of review of military cases, the increase in the number of remedies available, and the relaxation of limitations on the use of collateral remedies, such as the "waiver" doctrine and the habeas corpus custody requirement, have combined to provide a potential for civilian judicial review of military justice which is unprecedented in our history. As will be seen, further expansion is not only possible but likely in the absence of congressional action or a decision of the Supreme Court to limit it.

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244 429 F.2d at 895.

245 28 U.S.C. § 2241(c) (1970).

246 Jones v. Cunningham, 371 U.S. 236 (1963). For a discussion of the various factors relied upon by the Court in finding the degree of restraint necessary for "custody" ***see Developments in the Law, supra*** note 4, at 1075-79.

247 Carafas v. LaVallee, 391 U.S. 234 (1968).

248 ***See generally*** Cushman, ***The "Custody" Requirement for Habeas Corpus***, 50 MIL. L. REV. 1 (1970).

249 Weckstein, ***supra*** note 191, at 17. ***See also*** Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969); *cf.* Strait v. Laird, 406 U.S. 341 (1972).

IV. THE GROWTH OF PRETRIAL RELIEF

During the last few years a steadily increasing number of injunctions have been sought to prevent courts-martial from proceeding. Suits for injunctive relief normally depend upon the district courts' "federal question" jurisdiction, although injunctions can be sought as incidental to other relief. The earliest recorded case in which a federal court issued an injunction prohibiting military authorities from proceeding with a court-martial was decided in 1969.[250] The case involved an attack upon the jurisdiction of the court-martial based on the holding of *O'Callahan v. Parker*[251] that the offense for which a service member is prosecuted must be "service-connected." The district court held that the possession of marijuana away from a military installation is not such an offense and issued a permanent injunction. The court concluded that '(exhaustion of intra-military criminal processes is not prerequisite to a federal equity proceeding by a member of the military who alleges that a court-martial convened to try him is without jurisdiction as a constitutional matter." [252]

In 1971 the Supreme Court decided a case involving state criminal proceedings which, while it included no mention of militarv trials, may be a stumbling block to those seeking injunctions against pending courts-martial. The Court held in *Younger v. Harris*[253] that state criminal proceedings should not be enjoined by federal courts unless they are brought in bad faith or for harrassment, are based upon statutes which are flagrantly and patently violative of express constitutional prohibitions, or other "unusual circumstances" justify federal intervention. The opinion discussed comity and the federal-state relationship at some length, but the holding of the Court rested upon "the absence of the factors necessary under equitable principles to justify federal intervention.''[254] The Court discussed "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" [255] and went on to say that the necessity of defending against a single criminal prosecution does not constitute irreparable harm.[256]

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250 Moylan v. Laird, 305 F. Supp. 51 (D.R.I. 1969).
251 395 U.S. 258 (1969).
252 305 F. Supp. at 554.
253 401 U.S. 37 (1971).
254 *Id.* at 54.
255 401 U.S. at 43-44.
256 *Id.* ar 46.

Subsequent to the Supreme Court's decision in *Younger v. Harris* the issuance of injunctions to prevent military trials has been considered in the United States Court of Appeals in four circuits. In a case decided shortly after *Younger* the Ninth Circuit held that a service member awaiting trial and three others who were not under charges could not obtain injunctive and declaratory relief in spite of their allegation that an Air Force regulation prohibiting the wearing of a uniform at certain public demonstrations violated their first amendment rights.[257] The court treated their action as basically one to enjoin a prosecution and relied upon the broad language of *Younger v. Harris* in rejecting the plaintiffs' argument.

In July of 1973 the Tenth Circuit upheld the issuance of an injunction in a case in which it found that a certain sale of marijuana by an Army officer to an enlisted undercover agent was not service-connected.[258] The opinion discussed only the merits of the case, however, and the question of whether an injunction should have been issued was not raised in the briefs.[259] In September, 1973, the Court of Appeals for the Third Circuit considered the question of whether military criminal proceedings should be enjoined by federal district courts. The case of *Sedivy v. Richardson*[260] involved charges of unlawful possession of drugs by an Army sergeant which were pending before a general court-martial. The Court of Appeals did not reach the merits of the question of service connection because it found the district court without authority to issue the injunction. The court framed the question as "whether the federal civilian courts may prevent absolutely the military from finding the facts and determining whether they have jurisdiction under *O'Callahan*" [261] and squarely decided it:

> It is in the military court that Sergeant Sedivy may present the facts and the appropriate motion to oust military jurisdiction. Those tribunals may freely make the necessary factual determinations and draw conclusions from all the evidence present. . . .
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> . . . .
>
> The district court should have required the appellee to exhaust remedies

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257 Locks v. Laird, 441 F.2d 479 (9th Cir. 1971), *cert. denied sub. nom.*, Bright v. Laird, 404 U.S. 986 (1971).

258 Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), *cert. granted sub. nom.* Schlesinger v. Councilman, 414 U.S. 1111 (1973).

259 *See* Sedivy v. Richardson, 485 F.2d 1115, 1118 n. 5 (3d Cir. 1973).

260 485 F.2d 1115 (3d Cir. 1973).

261 *Id.* at 1117.

> in the military court system and not have interfered with **in** orderly process.[262]

The court also relied upon *Younger v. Harris* and noted that while one of the bases of that decision was the recognition of comity between courts of two sovereigns, "a persuasive case can be made that the doctrine applies equally to mutual non-intervention by two coordinate courts of the same sovereign." [263]

The question of the issuance of injunctions to halt pending trials was recently considered by the Court of Appeals for the Fourth Circuit in *Dooley v. Ploger*,[264] a case which involved two plaintiffs who were awaiting trial by court-martial for offenses which were allegedly not service-connected. In an opinion grounded solely upon the exhaustion doctrine the court rejected the argument that the doctrine should not be applied to cases challenging the jurisdiction of the military court:

> There is no general exception to the exhaustion requirement for jurisdictional challenges; here, as in cases where the challenge may not be termed "jurisdictional," it is important to respect the orderly processes of the military court system, to avoid needless friction, and to have the facts developed and the law interpreted by the expert adjudicatory tribunals charged in the first instance with responsibility **for** offenses of members of the armed services.[265]

In spite of the fact that the weight of authority at the appellate level indicates that pretrial relief is generally inappropriate, some district courts have persisted in enjoining military authorities from proceeding with courts-martial.[266] It remains to be seen whether the growth of pretrial intervention in the military criminal justice process by the federal courts has reached its peak.

V. FEDERAL DISTRICT JUDGES' VIEWS OF THEIR ROLE I S THE SCPERVISION OF MILITARY JUSTICE

Later in this paper an attempt will be made to examine possible future developments in the law relating to civilian judicial review of

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262 485 F.2d at 1121.

263 *Id.* ar 1121-22.

264 491 F.2d 608 (4th Cir. 1974).

265 *Id.* at 613. The Fifth Circuit has taken a similar position. Scott v. Schlesinger, 498 F.2d 1093 (5th Cir. 1971).

266 *See, e.g.*, Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974); DeChamplain v. McLucas, 367 F. Supp. 1291 (D.D.C. 1973), *juris. postponed*, 42 U.S.L W. 3702 (U.S. Jun. 24, 1971) (No. 73-1346); Chastain v. Slay, 365 F. Supp. 522 (D. Colo. 1973).

military criminal justice. In view of the fact that the law is unclear at present, much is left to the discretion of district judges, and as a result their views are of the greatest importance in determining the future trends. Considering the relatively small number of reported district court opinions in the area and the fact that those opinions are necessarily rendered in given factual contexts, it was felt that interviews with a number of judges would be helpful in determining whether there was any consensus of opinion concerning the various facets of the expansion of review.

A total of seven district judges who sit in two Midwestern districts were interviewed. Some of them had heard cases involving the review of military criminal proceedings while others had not. They were randomly selected and all were asked similar questions concerning their familiarity with the military justice system and the areas of the law which were thought to have great potential for the further expansion of review.

As to pure questions of constitutional law, all the judges felt that they should be resolved by the district court—none believed that the "full and fair consideration" test of *Burns v. Wilson*[267] should be applied to such questions. All but *two* of the judges rejected the law-fact distinction[268] and felt that the collateral review of military cases should be treated in the same manner as the review of state criminal cases. Only *two* judges were of the opinion that substantial weight should be given to the findings of military courts.

There was less agreement among the judges in the other areas which were discussed. As to the requirement of exhaustion of remedies available in the military judicial system, three of the judges felt that it should be applied strictly whereas the others looked upon it as a flexible requirement allowing the district court broad discretion in its application. Most of the judges believed that the principles of *Younger v. Harris*[269] should be applied to military as well as state criminal proceedings and that injunctions should be issued to halt pending trials only under unusual circumstances. Three judges, however, took a somewhat less restrictive view and seemed to indicate that they felt greater discretion should be allowed the district courts in this area.

Finally, the interviews established that none of the federal judges was familiar with the military justice system which exists today.

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267 346 U.S. 137 (1953). See text accompanying notes 155-157 *supra.*

268 See text accompanying notes 171-173 *supra.*

269 401 *U.S.* 37 (1971). See text accompanying notes 253-256 *supra.*

Neither were they familiar with the composition or functioning of the United States Court of Military Appeals or other appellate remedies available within the system. That is not to suggest that they could be expected to be familiar with the administration of military justice or that they should be familiar with military law. The fact that they are not is merely noted here, and its significance will be discussed later.

VI. THE POSSIBILITY OF FURTHER EXPANSION OF REVIEW

During the 1950's the Supreme Court decided a number of cases which restricted the exercise of jurisdiction over civilians by military courts,[270] but since the question was clearly settled by the Court and in view of the fact that military courts do not often attempt to try civilians, there have been few subsequent cases in which the issue has been considered. A serious challenge to the subject matter jurisdiction of courts-martial was not made until 1969, when the Court decided in *O'Callahan v. Parker*[271] that courts-martial have no jurisdiction over offenses which have no "service connection." In spite of the fact that *O'Callahan* has been held not to apply retroactively,[272] the issue of service connection has given rise to considerable federal litigation.[273]

It seems evident from a discussion of the expansion of the scope of review of courts-martial that the most recent cases have substantially modified or rejected entirely the "full and fair consideration" test of *Burns v. Wilson*.[274] In addition, as noted above, district judges seem to prefer to treat state and military cases in the same way, so there appears to be little to stand in the way of a continued trend toward a broader scope of review. The Supreme Court has not discussed the issue during the twenty years since *Burns* was decided, and no cases are before the Court at present which are likely to result in any clarification of the test.

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270 See text accompanying notes 158-160 *supra*.

271 395 U.S. 258 (1969).

272 Gosa v. Mayden, 413 U.S. 665 (1973).

273 There has been much controversy concerning the question of whether the possession or use of marijuana or other drugs is always "service-connected." *See generally* Tracy, *Off-Post Use and Possession of Marijuana*, THE ARMY LAWYER, January, 1974 at 8.

274 346 U.S. 137 (1953). *see* p. 27 ***supra.***

While methods of obtaining post-conviction review of courts-martial such as actions for declaratory judgments and writs of mandamus have been used successfully, the remedies which have been available historically may provide the greatest potential for expansion, The writ of habeas corpus and the suit for back pay have some advantages over the newer remedies: (1) both provide an independent basis for jurisdiction, unlike the suit for declaratory judgment, which depends upon the district court's federal question jurisdiction and consequently upon the judge's willingness to find the requisite amount in controversy (or ignore the requirement), and (2) the scope of review in both depends only upon the court's interpretation (or rejection) of *Burns v. Wilson*, unlike the action for a writ of mandamus which is historically very limited in scope and function. The writ of habeas corpus is limited by the "custody" requirement, but in view of the relaxation which has already occurred, only a small step remains to make it available to all service members. It is now generally accepted that the writ of habeas corpus is available to a service member to contest the denial of his request for discharge.[275] An argument can be made, therefore, that the restraint imposed by military service is alone sufficient to meet the requirement of custody.[276]

Whether or not an individual is in military service at the time the collateral attack is desired, the suit for back pay may provide the best method of review. The United States Court of Claims, however, which sits in Washington, D.C., is not a convenient forum for most people. The possibility of a suit for back pay in a federal district court has not been extensively explored.[277] Nevertheless, if it is conceded that the Court of Claims has jurisdiction to entertain a suit for back pay by a court-martialed service member,[278] there seems to be little basis for an argument that the district courts do not have such jurisdiction provided the claim is for $10,000 or less.[279] Research

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275 Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). See also Developments *in the Law,* supra note 4, at 1252-54; *cf.* Parisi v. Davidson, 405 U.S. 34 (1972).

276 In at least one case in which pretrial relief was sought by means of a writ of habeas corpus, a district court held that the status of awaiting trial by court-martial as a member of the military constitutes sufficient restraint to support the writ. McCahill v. Eason, 361 F. Supp. 588 (N.D. Fla. 1973).

277 *See* Weckstein, supra note 191, at 21 n. 119; 34 Mo. L. REV. 619, 624 (1969); *cf.* United States v. Augenblick, 393 U.S. 348, 351 (1969).

278 The question which the Supreme Court failed to reach in *Augenblick* was whether such suits are barred by 10 U.S.C. § 876 (1970).

279 *Compare* 28 U.S.C. § 1346(a)(2) (1970) *with* 28 U.S.C. § 1491 (1970).

has disclosed no recent case involving such a suit for back pay, and yet in 1964 Congress removed the prohibition against the entertaining of suits "to recover fees, salary, or compensation for official services of officers or employees of the Cnited States" by the district courts.[280] The legislative history leaves no doubt that the intent of Congress was to permit suits for back pay up to $10,000 in the district courts.[281] It would seem that the monetary limitation would not serve to deter the vast majority of persons sentenced by courts-martial. Indeed, the prospect of a money judgment in addition to a judicial declaration that the court-martial was defective seems an attractive feature. Since many courts have held that the finality provision of the Cniforni Code of Military Justice is not a bar to post-conviction relief other than habeas corpus, the suit for back pay in federal district court holds great potential for the expansion of civilian review.

As noted earlier, pretrial relief (the avoidance of trial by court-martial) is uncertain at present, although expansion of the availability of such relief seems to be occurring in spite of *Younger v. Harris.*;[282] Most injunctive relief has been obtained in cases in which the pending court-martial is alleged to be without jurisdiction because of the lack of "service connection" in the offense alleged,[283] but absent a jurisdictional basis for the pretrial attack, what is the likelihood of a court granting injunctive or other relief'

Two district courts have recently prohibited the Navy and Marine Corps from conducting summary courts-martial in the absence of counsel.[284] Both cases resulted in the granting of relief by similar procedural devices, and if the cases are followed and the methods of proceeding upheld the potential for extensive civilian judicial control of the military justice process from its very inception will exist.

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280 Act of Aug. 30, 1964, Pub. L. No. 88-519, 78 Stat. 699, H.R. REP. No. 1604, 88th Cong., 2d Sess. 1 (1964).

281 H.R. REP. No. 1601, 88th Cong., 2d Sess. 1 (1964).

282 401 U.S. 37 (1971).

283 *See, e.g.*, Schroth v. Warner, 353 F. Supp. 1032 (D. Haw. 1973); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).

284 Henry v. Warner, 357 F. Supp. 495 (C.D. Calif. 1973), *redd*, 193 F.2d 1231 (9th Cir. 1974), *cert. granted sub. nom.* Middendorf v. Henry, 43 U.S.L.W. 3239 (U.S. Oct. 21, 1971) (Nos. 74-175, 74-5176); Daigle v. Warner, 348 F. Supp. 1071 (D. Haw. 1972), *rev'd*, 190 F.2d 358 (9th Cir. 1971). Both district courts relied upon the decision of the Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972), that any defendant who faces the possibility of deprivation of liberty has a right to be represented by counsel.

Daigle v. Warner[285] and *Henry v. Warner*[286] began as petitions for writs of habeas corpus by service members who had been convicted by summary courts-martial without being provided counsel. Other plaintiffs facing trial by summary court-martial intervened and the suits were successfully maintained as class actions. Both resulted in the success not only of the habeas corpus petitions but also of the petitions for writs in the nature of mandamus. Both courts ignored the historical limitations on the writ of mandamus and in effect enjoined future trials by summary court-martial in the absence of counsel by ordering officials of the Navy and Marine Corps *to issue orders to insure* that no such proceedings are commenced. Both decisions have been reversed by the Court of Appeals for the Ninth Circuit, but the reversals were based upon the merits rather than questions of procedure.[287] Neither district court mentioned the case of *Younger v. Harris.* It appears that the judges who were interviewed in connection with the research for this paper and indicated they did not feel bound to refrain from issuing injunctions to prevent military trials were not alone in their opinion.

Two cases are currently pending before the Supreme Court which have the potential to resolve the issue of pretrial intervention in the military criminal justice process. In *Councilman v. Laird*[288] the Tenth Circuit Court of Appeals upheld the issuance of an injunction which prohibited the Army from trying an officer charged with the off-post transfer and sale of marijuana to an enlisted undercover agent on the ground that the alleged offense was not service-connected. The question of the propriety of enjoining military authorities from trying Captain Councilman by court-martial was not raised at any stage of the proceedings until the Supreme Court requested briefs on the issue. In *DeChamplain v. McLucas*[289] a district court enjoined the Air Force from prosecuting a noncommissioned officer on the ground that the "general article" of the Uniform Code of Military Justice is unconstitutional and certain restrictions upon access to classified information would deny him a fair trial. The case has been

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285 348 F. Supp. 1074 (D. Haw. 1972), *redd,* 490 F.2d 358 (9th Cir. 1974).

286 357 F. Supp. 495 (C.D. Calif. 1973), *redd,* 493 F.2d 1231 (9th Cir. 1974), *cert. granted* sub *nom.* Middendorf *v.* Henry, 43 U.S.L.W. 3239 (U.S. Oct. 21, 1974) (Nos. 74-175, 74-5176).

287 Daigle v. Warner, 490 F.2d 358 (9th Cir. 1974).

288 481 F.2d 613 (10th Cir. 1973), cert. *grunted rub. nom.* Schlesinger v. Councilman, 414 U.S. 1111 (1973).

289 367 F. Supp. 1291 (D.D.C. 1973), *juris. postponed,* 42 U.S.L.W. 3702 (U.S. Jun. 24, 1974) (No. 73-1346).

appealed directly to the Supreme Court because the district court held an act of Cbngress unconstitutional.[290] While both *Councilman* and *DeChamplain* provide excellent opportunities for the Supreme Court to decide the question of the proprietv of pretrial relief, both cases could be disposed of quite easilv on their merits or otherwise if the Court decided to avoid the pretrial intervention issue.[291]

VII. THE PROPRIETY OF BROAD COLLATERAL REVIEW BY THE FEDERAL COURTS

A. THE DESIRABILITY OF EXTENSIVE REVIEW OF CRIMINAL CASES GENERALLY

That civilian judicial review of militarv justice has increased substantially and is continuing to expand has been established. The question to be faced now is the extent to which broad collateral revieu is supportable. It will be discussed first from the standpoint of whether extensive collateral review of criminal cases is desirable. The ends of our criminal justice system are generally considered to be the rehabilitation of offenders against the criminal law and the deterrence of criminal conduct. It seems evident that permitting collateral attacks upon criminal convictions serves to frustrate those ends to some degree. Professor Bator has written:

> A procedural system which permits an endless repetition of inquiry into facts and lair in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness

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290 28 U.S.C. 4 1252 (1970).

291 *Councilman* involves the question of whether the transfer and sale of marijuana by an officer while off-post, off-duty, and out of uniform is service-connected. It'hile *DeChamplain* involves the issue of the constitutionality of the "general article" (decided by the Supreme Court in *Parker v. Levy*, 42 U.S.L.W. 4979 (U.S. Jun. 19, 1974) (***So.*** 73-206)), it also involves more complicated issues. However, the case involves technical questions concerning the jurisdiction of the Supreme Court and the district court which may provide the basis for the decision. Brief of Appellant ar 15-19, McLucas v. DeChamplain, *juris. postponed*, 42 U.S.L.W. 3702 (U.S. Jun. 24, 1974) (***So.*** 73-1346). In short, while it is likely that the question of the propriety of pretrial intervention in the military justice process by the federal courts will be decided by the Supreme Court during the current term, it is by no means certain. The case of *Henry v. Warner*, which raises the question of whether counsel must be provided for defendants before summary courts-martial, may also have some potential to resolve the pretrial intervention issue. 493 F.2d 1231 (9th Cir. 1974), *rev'g* 357 F. Supp. 495, *cert. granted sub. nom.* Middendorf v. Henry, 43 U.S.L.W. 3239 (U.S. Oct. 21, 1974) (Nos. 74-175, 74-5176).

> of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders.[292]

It has been demonstrated empirically that the certainty of punishment is of some significance in deterring criminal conduct.[293] It can hardly be doubted that rehabilitation of criminals, if that is possible at all, is made more difficult "if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place." [294]

Nevertheless, our system does not permit the ends of the criminal law to be achieved by means which are unjust. The question really is to what extent collateral review is necessary to insure justice in the methods used to secure the goals of our criminal justice system, for it seems to be universally conceded that the purpose of collateral proceedings is not the relitigation of the issue of guilt or innocence as such. While there is considerable difference of opinion as to exactly what is necessary by way of collateral review to insure that a criminal conviction has been properly obtained,[295] the better view seems clearly to be that which would restrict the inquiry to questions which bear upon the integrity of the fact-finding process.[296] Put another way, if there is no indication that the original proceedings in question may have resulted in the conviction of someone who was in fact innocent, collateral review should not be permitted.[297]

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[292] Bator, ***Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,*** 76 HARV. L. REV. 441, 452 (1963) (footnotes omitted) [hereinafter cited as ***Finality in Criminal Law***].

[293] Antunes & Hunt, ***The Impact*** of ***Certainty and Severity*** of ***Punishment on Levels*** of ***Crime in American States: An Extended Analysis,*** 64 J. CRIM. L. & C. 486 (1973). The authors speak to the question of general deterrence—"the overall reduction in crime due to the inhibitory effect of sanctions on an aggregate of persons." ***Id.***

[294] ***Finality in Criminal Law, supra*** note 292, at 452.

[295] ***Compare*** Friendly, ***Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,*** 38 U. CHI. L. REV. 142 (1970), ***and Finality in Criminal Law, supra*** note 292, ***with*** Reitz, ***Federal Habeas Corpus: Postconviction Remedy for State Prisoners,*** 108 U. PA. L. REV. 461 (1960), ***and*** Pollak, ***Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ,*** 66 YALE L. J. 50 (1956).

[296] The traditional concept of collateral inquiry into the jurisdiction of the tribunal which heard the original proceeding should, of course, be retained.

[297] Some of the considerations which support the need for finality have been

The constitutional validity of such a position has recently been suggested by Mr. Justice Pdwell's persuasive concurring opinion in *Schneckloth v. Bustamonte*.[298] The opinion discussed the historical development of habeas corpus and concluded that the "historical evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained when Congress . . . first extended federal habeas review to the delicate interrelations of our dual court systems."[299] After criticizing the extension of habeas corpus beyond its historical limits and examining further the need for finality in criminal law, Justice Powell added: "Mr. Justice Black has suggested what seems to me to be the appropriate threshold requirement in a case of this kind: 'I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt'."[300]

B. THE NEED FOR JUDICIAL SCRUTINY OF MILITARY JUSTICE

Without regard to what attitude is adopted toward broad collateral review of criminal convictions within the federal system or of state criminal convictions by federal courts, is there, as some have suggested, special need for close civilian judicial scrutiny of militarv justice? This question leads ultimately to the question of whether the military justice system which Congress has created is somehow inferior to federal and state criminal justice systems. It is not the purpose of this paper to enter into a lengthy discussion of the merits of the various systems of criminal justice which exist in the Cnited States. Nevertheless, the authors who have recently proposed the expansion of collateral review of military justice have based their opinions largely upon the assumption that the system is inadequate to protect defendants' rights, especially those guaranteed by the Con-

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listed in Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378. 383-84 (1964); *see also, Finality in Criminal Law*. *supra* note 292.

298 412 U.S. 218, 250-75 (1973).

299 *Id.* at 256.

300 412 U.S. at 265 (citation omitted). Two justices concurred in Mr. Justice Powell's opinion, and one indicated his agreement but refrained from joining the opinion because it was not necessary to decide the case. 412 U.S. at 249. *See also* F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL, & G. STARKMAN, CASES AND COMMENTS *os* CRIMINAL PROCEDURE 1183 (1974).

stitution, in part because it is not sufficiently independent to do so.[301] This study would not be complete without at least a brief examination of the validity of those assumptions.

It should be pointed out first that the authors in question have not made any effort to support their assumptions with facts. Rather they rely upon the opinion of Mr. Justice Douglas in *O'Callahan v. Parker*[302] to the effect that a court-martial "is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved," that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law," and that "a military trial is marked by the age-old manifest destiny of retributive justice." [303] While Justice Douglas did not make it clear, an examination of military justice today indicates that he was speaking about the "so-called military justice" [304] of another era.

It is certainly true that life tenure and undiminishable salary are excellent guarantors of the independence of federal judges, but does it follow that without them independence cannot be achieved? Independence, in any event, is not absolute. Every judge's decisions are subject to review, if not by another court by colleagues and critics. Even federal judges are subject to removal for cause. If by independence is meant freedom from *improper* influence in making decisions, methods other than lifetime appointments and guaranteed salary are available to insure it. Congress has attempted to insulate military judges from improper influence by creating a military judiciary which is not subject to control by military commanders.[305] In addition, commanders and court-martial convening authorities are specifically prohibited from attempting to influence military judges.[306] Nevertheless, these statutory safeguards are not meaningful unless they are effective, so a question arises as to whether in practice military judges are subjected to improper influences. A former military judge has written:

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[301] *Developments in the* Law, *supra* note 4, at 1224-25; Comment, *Civilian Review of Military Courts-Martial,* 1971 U. ILL. L. FORUM 124, 129; Note, *Civilian Court Review of Court-Martial Adjudications,* 69 COLUM. L. REV. 1259, 1277 (1969).

[302] 395 U.S. 258 (1969).

[303] *Id.* at 265-77 (footnotes omitted).

[304] 395 U.S. at 266 n. 7.

[305] 10 U.S.C. § 826(c) (1970). Only members of this judiciary are permitted to preside over general courts-martial.

[306] 10 U.S.C. § 837(a) (1970).

> In actual practice, military judges consider themselves totally independent of local convening authorities. As a result, the problem of command influence on the military judge rarely arises. Commanders and staff judge advocates are so apprehensive of prejudicing a case by even the appearance of contact with the military judge that the military judge has come to be isolated within the military community.[307]

With regard to the protection of a defendant's rights, courts-martial are bound not only by the Constitution, but by safeguards established by Congress, the 'Cnited States Court of Military Xppeals. and the 'President. Manv authors have concluded that the accused before a militarv court is' better off procedurally than a defendant in a civilian criminal trial.[308] Professor Sherman, who has written extensively in the area and has not been hesitant to criticize military and civilian court procedural due process rights would find them justice, has concluded that "the most objective assessment of military roughlv equal. . . ." [309] Severtheless, the current trend in decisions of the Supreme Court in the area of criminal procedure seems to have shifted the balance in favor of the military defendant,

A few examples should serve to illustrate the value of the multiple sources of protection afforded the military accused. It is clear, first

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[307] Douglass, *The Judicialization of .Military Courts,* 22 HAST. L. J. 213, 220 (1971). It seems to be assumed that present day military commanders would, in fact. be inclined to exert pressure on the military criminal justice system if they could. Severtheless, General William Westmoreland, former Chief of Staff of the Army, seems to have reconciled the need for military discipline with the desire to insure fairness in criminal trials somewhat more effectively than Mr. Justice Douglas:

> [T]o talk of balancing discipline and justice is a mistake—the two are inseparable. An unfair or unjust correction never promotes the development of discipline.
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> . . . .
>
> A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.

Westmoreland, *Military Justice—A Commander's Viewpoint,* 10 AMER. CRIM. L. REV. 5, 8 (1971).

[308] *See, e.g.,* Everett, *Military Justice is to Justice as. . .,* 12 A.F. JAG L. REV. 202 (1970); Kent, *Practical Benefits for the Accused—A Case Comparison of the US. Civilian and Military Systems of Justice,* 9 DUQUESNE L. REV. 186 (1970); Moyer, *Procedural Rights of the .Military Accused: Advantages mer a Civilian Defendant,* 22 MAINE L. REV. 105 (1970). A federal defendant who was a soldier recently argued (unsuccessfully) before the Court of Xppeals for the Fifth Circuit that he had a right to be tried in a military court "claiming more comprehensive rights under the military system than those inherent in an indictment by grand jury. . . ." United States v. Hodge, 487 F.2d 945, 946 (5th Cir. 1973).

[309] Sherman, *The Civilianization of Military Law,* 22 MAINE L. REV. 3, 65-66 (1970).

of all, that the Court of Military Appeals now feels bound to apply decisions of the Supreme Court in the area of constitutional procedural safeguards to military practice "unless there is demonstrated a military necessity demanding nonapplicability." [310] A suspect must, for example, be advised of his right to counsel in accordance with *Miranda v. Arizona*,[311] but in the military certain warnings are required by statute to be given prior to questioning even in noncustodial interrogations.[312] In addition to this congressional protection, the President, by an executive order known as the Manual for Courts-Martial, has prescribed procedural rules for military criminal proceedings. When the current Manual for Courts-Martial was prepared, some decisions of the Warren Court were incorporated in broad language.[314] The Court of Military Appeals has since seen fit to distinguish later decisions of the Supreme Court by relying upon language in the Manual. For example, the Supreme Court held in *Harris v. New York*[315] that a confession obtained in violation of *Miranda* could be used for impeachment purposes, but subsequent to *Harris* the Court of Military Appeals held that such a statement could not be used in a military trial because of the language in the Manual prohibiting its use.[316] Finally, the Court of Military Appeals has itself fashioned procedural rules for the benefit of the accused which are suggested neither in the Constitution, the Uniform Code of Military Justice, nor the Manual for Courts-Martial. The presumption of denial of a speedy trial which arises after three months of confinement serves as an illustration.[317]

Obviously, courts-martial are required to deal regularly with the "nice subtleties of constitutional law." Do they in fact deal with them "ineptly" and are military trials "marked by the age-old

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310 United States v. Alderman, 22 U.S.C.M.A. 298, 303, 46 C.M.R. 298, 303 (1973) (concurring opinion),

311 384 U.S. 436 (1966). The Miranda warnings were applied to military practice in *United* States *v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

312 10 U.S.C. § 831 (1970).

313 Manual for Courts-Martial, United States, 1969 (Rev. Ed.) (Exec. Order So. 11476, June 19, 1969) [hereinafter cited as MCM].

314 *See, e.g.*, MCM, para. 153a at 27-66.

315 401 U.S. 222 (1971).

316 United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971). The dissenting judge was of the opinion that it was the intent of the Manual to set out constitutional requirements rather than a separate set of procedural rules. 20 U.S.C.M.A. at 618, 44 C.M.R. at 48.

317 United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).

manifest destiny of retributive justice"? Practitioners with substantial experience before military courts agree that the answer to both questions is "no." [318] A well-known civilian lawyer has made the following observations:

> Right now in the military we've got the most protective of the individual systems of law in the civilized world.
>
> I find that the military judge . . . is every bit as good if not better—and better in many instances—than the federal judge who sits on the federal bench. And I find that he is utterly and completely independent.[319]

C. THE EXTENT TO WHICH EXPANSION OF REVIEW CAN BE SUPPORTED BY PRECEDENT

While it appears there is no peculiar need for close supervision of military justice by the federal judiciary, a question remains as to whether as a matter of legal precedent and reasoning a basis exists for the expansion of the traditionally narrow scope of review and the limited number of methods of review.

Until the Supreme Court revises the test of *Burns v. Wilson*[320] it seems clear that it should be applied by the lower federal courts. As noted earlier, however, the test is a highly subjective one and can be applied to preclude consideration of constitutional claims previously asserted or waived as well as to permit consideration of many claims on their merits. Nevertheless, the outright rejection of the test by the lower courts cannot be supported by legal reasoning. The only attempt to do so was made by the Court of Appeals for the District of Columbia Circuit which stated:

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[318] That is not necessarily true in the case of summary courts-martial, which consist of one commissioned officer who is normally not a lawyer. The summary court-martial, however, is convened only infrequently today because the commander's disciplinary powers under Article 15 of the Uniform Code of Military Justice are greater than the maximum sentence authorized to be imposed by a summary court-martial as a result of the Supreme Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973); *compare* 10 C.S.C. § 815 (1970) *with* 10 U.S.C. § 820 (1970).

[319] Belli, *I'm Tremendously Impressed*, SOLDIERS, July, 1971 at 39, 40. The suggestion that conviction rates in military courts are abnormally high has also been refuted. A comparison of conviction rates, both in contested and uncontested cases, in federal and military courts disclosed that they were not significantly different. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482, 506 (1971).

[320] 346 U.S. 137 (1953).

> We think it is the better view that the principal opinion in *Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions. The Court's denial of relief on the merits of the serviceman's claims can be explained as a decision based upon deference to military findings of fact, similar to the general non-reviewability of state factual findings prevailing at the time.[321]

That view seems plainly incorrect. Only four months prior to the Supreme Court's decision in *Burns v. Wilson* the Court decided *Brown v. Allen*[322] which clearly gave federal district judges broad discretion to consider *state* factual findings de novo.

As opposed to the total rejection of the *Burns* test by the lower federal courts, the idea that the test is not to be applied to pure questions of constitutional law finds greater support. The *Burns* decision itself involved factual determinations, so it is arguable that its precedential value is limited to such cases. It has also been pointed out that a literal interpretation of the *Burns* test would allow the military to "create its own version of constitutional law," [323] for if the military trial and appellate courts and the Court of Military Appeals "fully and fairly" considered all constitutional claims, eventual review by the Supreme Court would not be possible absent a strained reading of the requirement of "fair consideration."

With regard to post-conviction remedies, it is clear that the finality provision of the Uniform Code of Military Justice[324] and its predecessor[325] were not intended to preclude federal court habeas corpus review?'' If the finality provision of Article 76 is to have any meaning at all, however, it must be read to prohibit other methods of collateral review. The cases which are now relied upon in support of non-habeas collateral attacks upon court-martial convictions did not satisfactorily answer the question of what Congress meant when it said that the proceedings, findings, and sentences of courts-martial in which the prescribed direct review has been completed are "final and conclusive" and "binding upon all . . . courts . . . of the United

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321 Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970).

322 344 U.S. 443 (1953).

323 *Developments in the Law, supra* note 4, at 1224.

324 10 U.S.C. § 876 (1970).

325 The finality provision became a part of the Articles of War when Congress amended them in 1948. Selective Service Act of 1948, ch. 625, § 226, 62 Stat. 637-38.

326 Burns v. Wilson, 346 U.S. 137 (1953); S. REP. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 35 (1949).

States. . . ."[327] The opinions in the leading cases have concluded that custody should not be a prerequisite to collateral review and have advanced other persuasive policy arguments in support of decisions permitting suits for back pay[328] and for declaratory judgments."[329] Nevertheless, research has disclosed no opinion which purports to explain what Congress *did* mean by its "finality" language.[330] Since it is clear that the language did not exist prior to the 1948 Articles of War, it would seem that Congress had some reason for including it at that point in time and inserting it as well in the Uniform Code of Military Justice enacted in 1950. The fact that the language was included at the same time at which a form of collateral review *within the military justice system* was provided[331] is significant. The most logical conclusion seems to be that the intent was to provide safeguards within the military and at the same time give conclusiveness to court-martial judgments except for the limited inquiry concerning the legality of restraints upon liberty then available by means of the writ of habeas corpus.[332] In short, there may be policy reasons for extending the availability of collateral review to those not in custody, but that decision is for Congress, not the federal courts, to make, and unless the finality language of the Uniform Code of Military Justice is held to be meaningless, non-habeas review cannot be supported.

It is arguable, however, that an adequate legal basis exists for one very indirect method of reviewing court-martial results. Since it now seems clear that the statute authorizing the secretaries of the military departments to correct records is sufficiently broad to permit them to change even discharges adjudged by courts-martial, the refusal to correct such a record is probably judicially reviewable.[333] The opin-

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327 10 U.S.C. § 876 (1970).

328 Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969).

329 Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966).

330 Professor Weckstein has aptly compared the language of the Court of Claims to the effect that the finality provision of the Uniform Code of Military Justice does not make the military appellate court truly final with the language of Humpty Dumpty to the effect that words mean whatever he chooses them to mean. Weckstein, *supra* note 191, at 8.

331 Selective Service Act of 1948, ch. 625, § 230, 62 Stat. 639.

332 S. REP. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 35 (1949).

333 Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

ion of the Court of Appeals for the First Circuit in *Ashe v. McNamara*[334] makes it quite clear that when Congress authorized the correction of records it did not intend to preclude review of that administrative action by the federal courts.[335] Nevertheless, while the secretary concerned apparently has power to affect the sentence of a court-martial, it does not follow that he has power to declare the court-martial conviction void, for if he had such authority, the provisions of Articles 74 and 76 which grant him only limited clemency power[336] would be meaningless. Therefore, a federal court can properly require the secretary concerned to change only the record in question, and the review should not result in a declaration as to the validity of the court-martial proceedings as such.[337]

The Supreme Court's opinion in *Younger v. Harris*[338] seems adequate to dispose of most questions of the propriety of pretrial intervention by federal courts. While the opinion discussed the federal-state relationship at some length, it is clear that the decision rested upon principles of equity rather than federalism, and there seems to be no reason why the decision should not be applied to military as well as state tribunals. The opinion made it clear that a federal court should not enjoin a pending prosecution unless the accused makes a showing that it was brought in bad faith or for harrassment or under other "unusual circumstances." The Court also said that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it. . . ."[339]

While there are a number of methods by which military defendants may obtain a hearing in a federal court prior to trial,[340] the relief which they seek is essentially injunctive, the purpose being to avoid trial by court-martial. The only question likely to arise which may not be covered entirely by *Younger v. Harris* is that of an alleged lack of jurisdiction in the court-martial. Whether that is considered as one of those "unusual circumstances" referred to in *Younger* or is treated as a matter not contemplated by *Younger*, the Supreme Court has provided some precedent in terms of the avail-

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334 *Id.*

335 *Id.* at 281.

336 10 U.S.C. §§ 874, 876 (1970).

337 Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968).

338 401 U.S. 37 (1971).

339 *Id.* at 54.

340 Pretrial relief has been sought by means of habeas corpus, mandamus, suit for a declaratory judgment, and suit for an injunction. See 28 U.S.C. §§ 1331, 1361, 2201, 2241 (1970).

ability of pretrial relief. In two cases in which the military attempted to try civilians by court-martial, the Supreme Court approved relief prior to trial.[341] In each of the cases the statute which purported to extend court-martial jurisdiction to the civilian in question was held unconstitutional. It appears, therefore, that the Court will not require someone over whose person a Court-martial allegedly has no jurisdiction to litigate the question before the military tribunal.[342]

The question of whether the same result should follow in cases in which it is alleged that the military court is without subject matter jurisdiction is a more difficult one. Younger *v.* Harris may provide the answer in cases in which it is alleged that the statute upon which the prosecution is based is unconstitutional, for Younger was such a case and it was held that the prosecution should not have been enjoined. The Supreme Court's decision in *O'Callahan v. Parker*,[343] however, has given rise to litigation in which it is contended that a military prosecution should be enjoined because the circumstances indicate that the alleged offense is not "service connected." [344] While an argument can be made that since a question of the court's-martial jurisdiction is involved, the service member should not be required to litigate the question of service connection in a military court, a recent Supreme Court decision indicates that the better view is that the issue of service connection is not one which goes to the jurisdiction of the court in the traditional sense. In *Gosa v. Mayden* the Court held that the *O'Callahan* decision is not to be applied retroactively.[345] Four justices agreed that the *O'Callahan* Court "concluded that in the circumstances there presented the exercise of jurisdiction was not appropriate, and fashioned a rule limiting the exercise of court-martial jurisdiction in order to protect the rights to in-

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341 Reid v. Covert, 354 U.S. 1 (1957); United States ex. *rel.* Toth v. Quarles, 35OU.S. 11 (1955).

342 When a federal court determines that the denial of a service member's request for an administrative discharge from the service was improper, it is clear that a pending military trial which is related to the basis for the request for discharge may be enjoined, for when the court states that the service member must be discharged, it is also saying that the military no longer has jurisdiction over the person of the accused. *See* Parisi v. Davidson, 405 U.S. 34 (1972).

343 395 U.S. 258 (1969).

344 *See, e.g.*, Sedivy v. Richardson, 485 F.2d 1115 (3d Cir. 1973); Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), *cert. granted sub. nom.* Schlesinger v. Councilman, 414 U.S. 1111 (1973).

345 413 U.S. 665 (1973).

dictment and jury trial. The Court did not hold that a military tribunal was and always had been without authority to exercise jurisdiction over a nonservice connected offense." [346] If the question of service connection is not truly jurisdictional, it appears that the principles announced in *Younger v. Harris* should be applied, and it is doubtful that a prosecution for an offense which may not be service connected falls within the "unusual circumstances" contemplated in *Younger*.

D. POLICY FACTORS INVOLVED IN THE EXPANSION OF COLLATERAL REVIEW

The final question to be discussed is whether broad collateral review in terms of scope and availability is justified from a policy standpoint. It is clear that the rehabilitation of offenders and the deterrence of criminal conduct are legitimate ends of our system of justice and that those ends depend to some extent upon the certainty of punishment and the finality of criminal convictions. It seems obvious that frustrating those ends will be more harmful in the military than in civilian society because of the peculiar need for discipline in the armed forces. It is arguable, therefore, that there is a greater need to limit collateral attack upon military convictions. On the other hand, our system will not tolerate methods designed to achieve the desired ends which violate the requirement of due process of law. While the military criminal justice system is no more likely to permit denials of due process than the civilian systems, the question of due process is one of constitutional law. Since direct review by the Supreme Court is not possible, it can be argued that there is a greater need for collateral review of military convictions because it is the only method by which the court ultimately charged with deciding constitutional issues can review them.

An attempt will now be made to examine the various problems relating to the scope and availability of collateral review with a view toward determining which solutions best serve the competing interests involved. With regard to the scope of review, the "full and fair consideration" test, properly applied, best serves to balance the interests of finality and due process. Professor Bator has pointed out the futility of searching for ultimate truth through a series of fact-finding exercises,[347] and Professor Amsterdam has discussed the danger that

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346 *Id.* at *677-78.*

347 *Finality in Criminal Law, supra* note *292,* at 446-51.

a postponed litigation will be less reliable in producing the facts.",' Therefore, if a court-martial defendant has been given an adequate opportunity to present a claim which turns upon a factual determination and the claim has been fairly considered by the militarv courts, it should not be permitted to form the basis for a collateral attack. The requirement of "fair consideration" should not be equated with the concept of "correct in the judgment of the federal court.'' Rather, unless it can be demonstrated that the claim was not considered in good faith, no further consideration should be given it. As far as pure questions of constitutional law are concerned, it seems apparent that military and civilian judges within the militarv justice system are quite capable of deciding them and are in the best position to decide the manner in which the principles of due process are to be applied to militarv law. Indeed, the Supreme Court has stated:

> In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts.
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> It is for these reasons that Congress, in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces." has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.[349]

Nevertheless, while great weight should be given to the decisions of the courts of the military justice system,[350] federal judges should not hesitate to decide for themselves pure questions of constitutional law or questions of jurisdiction in the traditional sense. To do otherwise would effectively preclude Supreme Court review of these issues, and that does not seem necessarv to protect the finality interest involved. especially in view of the fact that the number of such cases should be extremely small.""

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348 Amsterdam, *Search, Seizure, and Section 2255: A Comment*, *supra* note 297, at 384.

349 Soyd v. Bond, 395 U.S. 683, 694 (1969) (footnote omitted).

350 As noted earlier, federal judges are not likely to be familiar with the operation of the military justice system.

351 This assumes that a "colorable showing of innocence" is required prior

The foregoing discussion is helpful in disposing of a number of other questions relating to doctrines involved in collateral review. It seems evident that petitioners should be required to exhaust all direct appellate remedies before seeking review in the federal courts. In addition, if the allegations in question would provide a basis for a new trial under Article 73 of the Uniform Code of Military Justice,[352] it would seem appropriate to require that one be sought prior to entertaining a collateral attack. With regard to the seeking of collateral review by the Court of Military Appeals, however, the best view seems to be that such relief should only be required to be sought when it clearly appears that that court has power to grant it.[353]

A more difficult question is whether a petitioner should be held to have waived his right to review of a claim either by failure to use remedies which are no longer available or by failure to assert the claim within the military justice system.[354] Unlike the case in the review of state court convictions, it has been decided that the federal courts should give substantial weight to the military courts, and as one court has stated, "it cannot be said that [the military courts] have refused to fairly consider claims not asserted."[355] It seems that in view of the foregoing and the greater need for finality in military convictions, the "deliberate bypass" rule of *Fay v. Noia*[356] should be relaxed to provide that in cases in which the petitioner was represented by counsel at his trial, claims based upon factual determinations which could have been but were not asserted are waived. The requirement of a deliberate bypassing of the remedy or claim seems appropriate only in cases involving pure questions of constitutional law.

The writ of habeas corpus has been the post-conviction remedy traditionally used to seek review of court-martial convictions. Good

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to entertaining any collateral attack other than a challenge to the jurisdiction of the court-martial. ***See*** Friendly, Is ***Innocence Irrelevant? Collateral Attack*** *on* ***Criminal Judgments, supra*** note 295, at 160.

352 A petition for a new trial must be based upon newly discovered evidence or fraud on the court and must be filed within two years after the convening authority approves the court-martial sentence. 10 U.S.C. § 873 (1970).

353 *See* ***Developments in the Law, supra*** note 4, at 1234-36. ***See also*** Willis, ***supra*** note 144, at 81-83.

354 See text accompanying notes 236-244 ***supra.***

355 Suttles v. Davis, 215 F.2d 760, 763 (10th Cir. 1954), ***cert. denied,*** 348 U.S. 903 (1954). ***See also Developments in the Law, supra*** note 4, at 1231 & n. 152.

356 372 U.S. 391 (1963).

arguments can be made on both sides of the question of whether other methods should be available to attack the judgments of military courts. The Court of Claims has reasoned as follows:

> Liberty is of course important, but so are a man's career, his livelihood. his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement—the consequence of saying that habeas corpus is the only remedy—would be to deny the possibility of revieu by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen . . . who hare not been sentenced to jail or who have been released.[357]

On the other hand, judicial resources are limited, and duplication of judicial effort should, perhaps, not be countenanced except when the right to freedom is at stake. Additionally, the policy factors discussed earlier militate against extensive collateral review of military convictions. After all, it must not be forgotten that direct appeal is the primary method of litigating all claimed errors, including those of constitutional dimensions. In view of the fact that the vast majority of habeas corpus claims are without merit,[358] it does not seem the best policv to add to the burden of the federal courts by requiring them to 'consider similar claims not involving restraints upon liberty.

Pretrial intervention in the military criminal justice process by the federal courts is most difficult to justify. In addition to the policy against interference by one court system' with another,[359] there is a special need for the military to be free to proceed with criminal trials without delay. As General Westmoreland pointed out, in fulfilling its function as an instrument of justice the military trial promotes discipline. If it is not permitted to proceed, however, there is at least a possibility that discipline will be weakened.[360] Balanced

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357 Augenblick v. United States, 377 F.2d 586, 592 (Ct. CI. 1967), *redd on other grounds*, 393 U.S. 348 (1969) (foomote omitted).

358 *See* Friendly, *Is Innocence Irrelevant? Collateral Attack MI Criminal Judgments*, *supra* note 295, at 148.

359 Younger v. Harris, 401 U.S. 37 (1971).

360 A recent case has demonstrated that a federal court injunction may pose a threat to military discipline. In 1973 the Army launched an intensive program which was successful in producing about a 50% reduction in drug abuse among soldiers in Europe. Army Times, Mar. 13, 1974, at 27, col. 1. In February, 1974 a federal district judge entertained a class action by soldiers in Europe and permanently enjoined military authorities from proceeding with courts-martial based upon evidence obtained during the course of inspections pursuant to the program which he felt were unconstitutional. Committee for G.I. Rights v. Callaway, 370

against the military's need to prosecute is the necessity that an accused defend against a prosecution which he asserts is constitutionally defective, but that has been viewed by the Supreme Court as inadequate to justify injunctive relief.[361] In addition, there is no reason to believe that the military justice system cannot properly dispose of such a claim. There does seem to be at least one situation, however, in which the military's need for unhampered prosecution is outweighed by the burden of defending against a charge before a court-martial, namely the case in which it is alleged that the military court lacks jurisdiction over the person of the accused. Even in such a case it is arguable that the issue of jurisdiction should be raised first in the military tribunal, but it is difficult to see how military discipline could be threatened by one who has a colorable claim that he is not subject to military law. In sum, the danger that the effectiveness of our armed forces will be impaired by injunctions against courts-martial outweighs the risk that a defendant will be required to first present his claims to the military courts except in the most unusual of circumstances.

VIII. CONCLUSION: TOWARD A BETTER SYSTEM OF REVIEW

The system of federal court review of military criminal justice which has emerged and continues to expand at best provides meaningful relief to a very small number of present and former service members at substantial cost in terms of judicial and military resources. At its worst the system as expanded, especially in terms of pretrial intervention in the criminal justice process of the armed forces, poses a threat to the national interest in maintaining a well-disciplined, effective military. That is not to say that judicial review of military justice by Article III courts should be eliminated or that the military should be permitted to proceed in disregard of the constitutional rights of service members. Nevertheless, it seems clear that a more efficient and effective method of protecting all of the various interests involved is desirable.

Since review by an Article III court is thought by many to be essential to the protection of constitutional rights, if there is a more

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F. Supp. 939 (D.D.C. 1971). The order has been stayed by the Court of Appeals for the District of Columbia Circuit, Committee for G.I. Rights v. Froehlke, Civil No. 835-73 (D.C. Cir. order entered Mar. 7, 1974).

[361] Younger v. Harris, 401 U.S. 37 (1971).

effective method of providing that review than the cumbersome one which exists at present, it should be adopted. The obvious solution is for Congress to reestablish the Court of Military ,Appeals as a court of the United States created pursuant to Article-I11 of the Constitution. That would surely remove any fears concerning the court's independence and institutional limitations or bias, It has been stated that only "tradition, not logic or the Constitution would stand in the way of Congress' providing for the review of courts-martial by an Article III court."[362] The advantages of providing direct review by an Article III court over the current practice of permitting only collateral review by such a court are clear. The scope of review would be broad since direct appeal rather than collateral attack is involved; unlike federal district and circuit courts, the Court of Military +Appeals is in a position to provide a body of precedent which is not only uniform but binding upon American military courts throughout the world; meaningful review by an ,Article III court would be provided to a large number of court-martialed service members, and finally, such a court would be in a much better position than other federal courts to balance the needs of the military and the rights of individuals.

Whether or not the Court of Military Appeals is established under Article III of the Constitution, the problem of the creation of a separate version of constitutional law within the military would best be solved by permitting direct review of its decisions by the Supreme Court.[363] Since review by the Supreme Court is possible anyway, Congress should not be hesitant to provide a more efficient means of obtaining such review. The interest of finality in the criminal process as well as the interest in the protection of constitutional rights would be better served by direct review through the issuance of writs of certiorari than by the wasteful system of collateral attack which exists at present.

Finally, an expansion of the jurisdiction and powers of the Court of Military Appeals, the Courts of Military Review, and military trial and appellate judges would eliminate the need for the review of military cases and intervention in the military justice process by federal courts, If it were possible for the "new" Court of Military

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362 Willis, *supra* note 144, at 84.

363 *Cf.* Willis, *supra* note 144, at 91-94. That is not to say that constitutional principles should not be applied differently to military law. Rather, direct review by the Supreme Court would insure that the Court had the benefit of the Court of Military Appeals' "understanding of the distinctive problems and legal traditions of the armed forces."

Appeals proposed above to review all military cases either directly or collaterally, collateral review by other federal courts would serve no purpose. Further, if the court had power to grant equitable relief, the issuance of injunctions by other courts to prevent military trials from proceeding would not be appropriate. It might be argued that the Court of Military Appeals is not a convenient forum, and while that might be true for those few who might be in a position to collaterally attack a conviction after leaving the military, for the vast majority of service members it is the most convenient forum because of the organization of defense counsel in the armed services.[364]

While it is true that courts-martial are not permanent bodies, the military trial and appellate judiciary are as permanent as the military justice system itself and are organized in such a way as to be available to all service members. There seems to be no reason, therefore, to require the Court of Military Appeals to depart substantially from its role as an appellate tribunal. All that is necessary is to provide for the granting of extraordinary relief and review thereof by military courts and judges[365] along with the possibility of review ultimately by the Court of Military Appeals. The increase in the complexity of the military justice system and in the number of civilian and military judges necessary to implement such a proposal seems insignificant when compared with the savings in terms of the resources expended in deciding the claims of service members in the manner in which they must be litigated today. In short, provisions for comprehensive judicial review within the military justice system would be effective in protecting the rights of the individuals who serve our country and at the same time would minimize the danger that military discipline will be weakened by judges who do not have "a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." [366]

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364 All assigned appellate counsel are located in or near Washington, D.C. With regard to civilian counsel retained by present and former service members, the Supreme Court has not shown much sympathy for the argument that the Court of Military Appeals is not a convenient forum. Noyd v. Bond, 395 U.S. 683, 696-98 (1969).

365 The Court of Appeals for the Eighth Circuit has recently held that service members ordered into pretrial confinement are entitled to a hearing before a military judge or other neutral military officer. DeChamplain v. Lovelace, No. 74-1766 (8th Cir. Feb. 3, 1975).

366 Noyd v. Bond, 395 U.S. 683, 694 (1969). Recently, the Supreme Court again recognized that the military is a special community with its own laws and traditions and a primary mission of being ready to fight wars when necessary. Parker v. Levy, 94 S. Ct. 2547 (1974).

SERVICE CONTRACT ACT AMENDMENTS OF 1972*

Captain Clifford D. Brooks**

I. INTRODUCTION

In 1972, Congress amended the Service Contract Act of 1965[1] with the passage of Public Law 92-473.[2] The amended Service Contract Act and the implementing regulations promulgated by the Department of Labor pose unique problems in the procurement area for federal contracting agencies. In order to understand what those problems are and how they can best be minimized, it is necessary to examine the original Act—its purpose and its failures—and how Congress hoped to cure these failures with Public Law 92-473.

Congress hoped the Service Contract Act, hereinafter referred to as the SCA, would accomplish a desired socio-economic objective through the vehicle of federal contracts. The SCA is a labor standards statute that requires certain employers performing service contracts for the United States, and within the United States as defined in the Act, to pay their service employees working on federal contracts minimum wages generally higher than those required by the Fair Labor Standards Act.[3] Thus, it is one of a series of similar statutes designed to protect workers, improve working conditions, and raise wages of government contractor employees.

II. HISTORICAL ANTECEDENTS OF THE SERVICE CONTRACT ACT AMENDMENTS

The history of labor standards legislation for federal contracts began with the passage of the Davis-Bacon Act in 1931.[4] In addition to its other provisions, the still vital Davis-Bacon Act requires

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

** JAGC, U.S. Army. Instructor, Procurement Law Division, TJAGSA. B.A., 1966, Augustana College (Ill.); J.D., 1969, Duke University; LL.M., 1973, The George Washington University. Member of the Bars of Illinois, Court of Military Appeals and the Court of Claims.

1 41 U.S.C. §§ 351-357 (1970).

2 86 Stat. 790 (1972), 41 U.S.C. §§ 351-357 (1970), §§ 351-358 (Supp. II) (1972).

3 *See* 29 U.S.C. § 206(a)(1) (1970).

4 40 U.S.C. §§ 276a-276a-7 (1970).

employers to pay the prevailing wage rates and to pay the prevailing fringe benefits to laborers and mechanics performing work under federal construction contracts being performed within the United States; the Davis-Bacon Act applies to contracts in excess of $2000.[5] In 1936, Congress added contracts for manufactured goods in excess of $10,000 to the list of federal contracts impressed with special minimum wage requirements when it passed the Walsh-Healey Public Contracts Act.[6] Since the Davis-Bacon Act covered construction contracts and the Walsh-Healey Act covered supply contracts, by 1936 "service contracts" was the only major class of federal contracts where free market considerations determined employee wage rates.

In 1965 Congress decided that minimum wages in service contracts should be federally regulated and passed Public Law 89-286, the Service Contract Act.[7] With the enactment of the SCA, all major categories of federal contracts were covered by wage standard legislation.

A. REASONS FOR THE THREE STATUTES

All three wage standard statutes have the same basic purpose, the protection of wage rates from the effect of the procurement process. The House Report on the SCA explained why there was a need for such protection:

> Many of the employees performing work on federal service contracts are poorly paid. The work is generally manual work and in addition to craft work, may be semiskilled or unskilled . . .
>
> . . . .
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> The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for government service contracts with those who pay wages to their employees at or below the subsistence level. When a government contract is awarded to a service contractor with low wage standards, the government is in effect subsidizing subminimum wages.[8]

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[5] 40 U.S.C. § 276a (1970).
[6] 41 U.S.C. §§ 35-45 (1970).
[7] H.R. 10238, 89th Cong., 1st Sess. (1965).
[8] H.R. REP. *So.* 918, 89th Cong., 1st Sess. 2 (1965).

All three wage standards statutes have the same basic purpose; therefore, why are there three statutes. Aside from the political considerations, there are two major reasons: the nature of the three industries affected by the statutes and the differing impact of government contracts upon those industries; that is to say, regulations appropriate for the manufacturing and retail (supply) industry are not necessarily appropriate for the construction or service industry. With this realization Congress passed different statutes and consequently the Department of Labor promulgated separate administrative procedures to achieve the statutory goal of protecting employee wage rates from the effect of government conrracts.

By their nature, contracts for the furnishing of supplies, whether with manufacturers or retailers, can be performed virtually anywhere. Thus a contract let by AVSCOM in St. Louis, could be performed by a contractor in Bangor, Maine; a contractor in San Diego, California, or a contractor in Birmingham, Alabama. If the average wage rates paid by bidders in these three cities were $5.00 per hour, $4.00 per hour, and $2.00 per hour respectively, the contract would, in all likelihood, be awarded to a firm in Birmingham. The advantage a Birmingham firm has by virtue of its lower wage rates not only adversely affects other firms paying higher wages, but also has an impact upon their workers who have to accept lower wages or face potential unemployment since their employer cannot compete for government contracts while paying a higher wage rate. The Walsh-Healey Act was an attempt to ameliorate this bidding disadvantage by requiring employers awarded government supply contracts to pay a prevailing minimum wage based on minimum wages that prevailed either on a national or a very broad regional basis for the type of manufacturing or retail industry which would perform the contract.[9]

Unlike supply contracts, construction contracts, as well as most service contracts, can be performed at only one location. For example, while firms from across the country may bid on a construction contract to be performed in New York City, actual performance will be in New York City. With no wage standards required of contractors, invariably the employers paying his employees the lowest wages would get the job regardless of his principal place of business, This was particularly odious in construction contracts

[9] See, *e.g.*, 41 C.F.R. § SO-202 (1973). Wage determinations for supply contracts are now generally just the minimum wage prescribed by the Fair Labor Standards Act. 41 C.F.R. § SO-202.2 (1973).

because a contractor from Nebraska or Alabama could move hi5 whole labor force to New York City to perform the work. Local workers would see jobs generated by federal construction projects vanish because their wage scales were too high to withstand national competition. Thus, it appeared as if the federal government was saving money at the expense of the local economy. The Davis-Bacon Act solution to this problem was not the industry-wide approach taken by the Walsh-Healey Act, but rather it required employers awarded federal construction contracts to pay wage rates based on the wages prevailing in the "area," [10] "area" being subsequently defined by the Department of Labor as a geographic subdivision, for example, city, county, township." Thus the Davis-Bacon Act while allowing employers from across the country to bid on construction contracts, required that bidders base their bids on the prevailing New York City wage rates for buildings constructed under a federal contract 'in New York City. In addition to protecting local wage scales from an invasion of cheap labor occasioned by a federal contract, the Davis-Bacon Act had the auxiliary effect of allowing local construction firms to effectively compete for federal contracts.

The nature of the service industry and the impact of government contracts upon the service industry are much the same as in the construction industry. Work can usually be performed in only one location, for example, a contract for janitorial services at' Fort Hood, Texas can only be performed at Fort Hood, Texas. Since government contracts can precipitate an "invasion of labor" that works at a cheaper wage rate than locally available labor, it was not surprising that Congress decided to follow the Davis-Bacon model in enacting the SCA.

The Service Contract Act of 1965 required employers awarded federal service contracts to pay their employees not less than the "prevailing rates for such employees in the locality." [12] The prevailing rate concept as it applies to the SCA works as follows. When a federal agency wishes to let a contract subject to the provisions of the SCA, it informs the Department of Labor 30 days *prior* to any invitation for bids or commencement of negotiations by filing with it a Standard Form *98,* Notice of Intention to Make a 'Service

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[10] 40 U.S.C. § 276a (1970).
[11] 29 C.F.R. § 1.2(b) (1973).
[12] 41 U.S.C. § 351(a)(1) (1970)

Contract.[13] The Department of Labor responds to this notice with a wage determination which lists the prevailing wage rates by employee classification for the locality in which the work is to be performed. This wage determination is made by a Department of Labor area wage survey. The agency attaches this wage determination to the solicitation and the solicitation informs the bidder that he must pay his employees not less than the wage rates and fringe benefits attached.[14] The solicitation also provides for the enforcement of the wage determination and for penalties in the event of its violation.[15]

The prevailing rate concept is "fair" to all individuals affected by the performance of a federal contract. For blue collar workers performing under a contract, the prevailing rate requirement ensures that they are paid minimum wages and fringe benefits that prevail in the work locality; their wage structures and employment opportunities would not be completely undermined by an employer forced to reduce wages below those which prevail locally in order to effectively compete for a federal contract. For employers, the prevailing rate concept allows wage structures to be established in light of local economic conditions without precluding, as a practical matter, their being awarded federal contracts. For local communities, the prevailing rate concept prevents locally performable federal contracts from inflating or deflating local labor economics; it may increase the wage structure of contractor employees, but not beyond that which local economic conditions have dictated to be just compensation. For the federal government, the prevailing rate system assures the procurement of its needs at an equitable, if somewhat higher, price and dissipates any appearance of the federal government subsidizing substandard wages by its system of awarding contracts.

B. FAILURE OF ORIGINAL SCA

The prevailing rate model of the Davis-Eacon Act had worked remarkably well in accomplishing its Congressional goals in federal construction contracts. When it originally enacted the SCA, Congress thought the prevailing rate system would achieve basically

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[13] **29** C.F.R. § 4.4(a) (1973).

[14] *E.g.*, Armed Services Procurement Reg. § 7-1903.41(a)(a) **(1973)** [hereinafter cited as ASPR].

[15] *E.g.*, ASPR § 7-1903.41(a)(g) (1973).

the same results for federal service contracts as it had for federal construction contracts. By 1972, however, it was apparent that the prevailing rate system was not working as Congress had intended. There are several reasons why the SCA failed where the Davis-Bacon Act had succeeded.

First, Congress had not envisioned the use that the Secretary of Labor would make of Section 4(b) of the original SCX. That section provided:

> The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of government business.[16]

Utilizing this provision, the Secretary of Labor failed to make any wage determinations in over two-thirds of all federal service contracts.[17] As a result, many service employees of federal service contractors were not protected from the effects flowing from price competition for federal service contracts.

Second, Congress had failed to perceive in 1965 that certain essential differences existed between the construction and service industries and that these differences would effect the operation of the prevailing rate system. The prevailing rate system in both the Davis-Bacon Act and SCA was designed to guarantee the employees of government contractors wages prevailing in the locality where the contract was to be performed. Thus, wage rates contained in wage determinations were solely dependent on what private employers were paying their employees, not what the government contractor's employees were being paid. Therefore, the higher the wages in a local area, the higher the n-ages employees of contractors would be guaranteed. Since the construction industry utilizes skilled labor, their n-age rates are higher. More importantly, there are strong unions in the construction industry and these unions can demand and receive premium wages for their members. These wages become prevailing and federal construction contractors are forced to pay them, The service industry, on the other hand, does not require the use of skilled labor and labor unions have not organized much of the service industry. As a result, wages in the service industry are generally low, and wage increases are rare or

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[16] 41 U.S.C. § 353(b) (1970).

[17] H.R. REP. So. 1251, 92d Cong., 2d Sess. 3 (1972).

minimal. Thus, low wages are "prevailing." So unlike the situation in construction contracts, the prevailing rate system did not produce higher wage rates for employees of service contractors doing business with the United States.

Third, Congress failed to grasp essential differences between construction and service contracting and, as a result, failed to anticipate the effects these differences would have on the prevailing rate system. While the usual individual construction contract will completely fulfill a particular requirement, a service contract is generally only one increment in a series of contracts for basically ongoing identical services, janitorial, trash removal, laundry to name a few. However, since service contracts are subject to the general prohibition that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or under an appropriation adequate to its fulfillment,"[18] the government usually contracts for these services on a yearly basis. Congressional failure to appropriate funds for more than one year for service contracts to be performed in the United States results in an annual resolicitation for basically identical services. And, of course, this "annual award" will be made to that responsive, responsible bidder whose bid is deemed most advantageous to the Government,[19] generally the bidder with the lowest price. By awarding the contract to the low bidder, the government is awarding the contract to the bidder who minimizes his costs, costs in the service industry that are composed largely of labor wages.

As a result of the annual rebidding, there was a constant turnover in service contractors, in most instances attributable to the failure of the Department of Labor to make wage determinations or, when it did so, to the prevailing rate system itself. The following hypothetical—pre-SCA Amendment—will illustrate what we have been talking about. **A** contract for performing janitorial services at Fort Belvoir in fiscal year 1970 was being performed by X-Company. The Department of Labor declined to issue a wage determination. X-Company paid its employees the Fair Labor Standards Act minimum wage of $1.60 per hour[20] at the genesis of its contract performance. Later X-Company was forced to increase its hourly rate to $1.70 in order either to settle a labor strike or to retain its employees. During April 1970, Fort Belvoir resolicited

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[18] 41 U.S.C. § 11 (1970).

[19] *E.g.*, XSPR §§ 2-407.1 and 3-101 (1973).

[20] 29 U.S.C. § 206(a)(1) (1970).

for bids for janitorial services in fiscal year 1971. There was no wage determination by the Department of Labor; or in the alternative, the Department of Labor issued a wage determination listing the prevailing rate for janitors in the Fort Belvoir area at $1.65 per hour. Although X-Company based the cost of the labor element of its bid price on the $1.70 per hour figure it was currently paying its employees, other bidders based their predicted labor costs at $1.60 or $1.65 per hour rate depending on which alternative we use. Invariably, X-Company priced itself out of the contract because of its higher wage scales.

If the only result of the annual resolicitation procedure had been high contractor turnover, there would have been no Congressional reaction. However, an adjunct of the system was that wages were kept artificially low. Even low wages for service employees might not have raised the later apparent Congressional indignation if these new contractors had their own labor force which moved with them from job to job. But, the individuals performing the service contract were geographically stable, and were, except by legal definition, employees of the Government; they performed the same services year after year at the same location, only their employers changed.

These ever changing employers were appropriately characterized as "labor brokers" since they were awarded a contract only after they undercut the wage rate paid by current service contractors.[21] After he received an award, the "broker" would offer to retain the current employees at the lower wage rate projected in his bid. As a result, employees who had accumulated years of seniority at a government facility were forced to either accept wage reductions or unemployment. Year after year employees might force their employer to grant a wage increase, usually near the end of the contract year when contractors could afford to pay such an increase for a few months, only to be faced with a new employer on July 1, who would again reduce wages. Even if employees had organized a current contractor and were being paid wages pursuant to a collective bargaining agreement in excess of those required by the SCA, the collective bargaining agreement did not isolate them from wage cuts by a "follow-on contractor." While successor employers as a group were generally forbidden to unilaterally reduce wages

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21 118 CONG. REC. 7261, 7262 (1972). (Remarks of Congressman O'Hara during floor debate on H.R. 15376.)

under the provisions of the National Labor Relations Act,[22] the National Labor Relations Board had held that the unilateral reduction of wages by a successor service contractor was not illegal if he was performing a federal contract covered by the SCA.[23]

This type of wage cutting produced an unacceptable result.[24] Contractor employees performing services on a federal facility could, in almost all cases, be assured that they would never receive a lasting wage increase above that determined to be prevailing, regardless of their seniority at the facility. When this was added to the fact that the Department of Labor failed to issue wage determinations for two-thirds of all federal service contracts, many contractor employees perennially performing necessary services for the United States were receiving wages at or near the minimum level specified in the Fair Labor Standards Act.

III. PUBLIC LAW 92-473

Congress held oversight hearings on the administration of the SCA in 1971-72.[25] The ultimate findings of the Subcommittee on Labor of the House Committee on Education and Labor were:

1. a substantial disparity in wages and fringe benefits had developed between Federal Wage Board employees and service contractor employees (performing the same duties),

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[22] In 1969, the National Labor Relations Board ruled that a successor employer had to honor the collective bargaining agreement of his predecessor in Bums Int'l Detective Agency, Inc., 74 L.R.R.M. 1098 (1969). This decision was struck down by the Supreme Court in Bums Int'l Security Services, Inc. v. N.L.R.B., 406 U.S. 272 (1972). However, the Supreme Court left intact the general requirement that a successor employer could not unilaterally reduce wages without bargaining with the union. *See, e.g.*, Pittsburg Plate Glass Co. **v.** N.L.R.B., **404** U.S. 157 (1971).

[23] Emerald Maintenance, Inc., 76 L.R.R.M. 1437 (1971), *aff'd*, Emerald Maintenance Inc. v. N.L.R.B., 464 F.2d 698 (5th Cir. 1972).

[24] *Hearings on H.R. **6244** and H.R. **6245** Before the Special Subcomm. on Labor of the House Comm. **on** Education **and** Labor,* 92d Cong., 1st **Sess.** (1971) [hereinafter cited as *Hearings on H.R. **6244** and H.R. **62451.*** H.R. 6244 and H.R. 6245 were the predecessors of H.R. 15376, the Service Contract Act amendments. While innumerable examples of wage cutting exist, the most startling case occurred at Cape Canaveral where 1100 service employees performing under a $20 million support contract were forced to accept wage reductions of 25 to 50% without any change in duties, only a change in employers.

[25] *Hearings on H.R. **6244** and H.R. **6245, id.;** Hearings on S. **3827** and H.R. **15376** Before the Subcomm. on Labor* of *the Senate Comm. on Labor and Public Welfare,* 92d Cong., 2d Sess. (1972) [hereinafter cited as *Hearings on* S. *3827 and H.R. 15376*].

2. labor-management instability has arisen because of the failure to take the existence of collective bargaining agreements into account in n-age and fringe benefit determinations,
3. the practice of rebidding contracts yearly either without wage and fringe benefit determinations or with unrealistically low determinations created chaos for reputable contractors and great hardships for employees,
4. the Secretary of Labor stretched his discretion in administering the Act far beyond what Congress had intended, and
5. the Department of Labor failed to make wage and fringe benefit determinations for almost two-thirds of the contracts subject to the Act.[26]

As a result of these Hearings, a proposed amendment to the SCA was introduced in the House of Representatives on June 7, 1972." HR 15376 passed the House by a vote of 274 to 103 on August 7, 1972.[28] The Senate companion bill was introduced (S.3827) on July 2, 1972.[29] The Senate passed H.R. 15376, with slight modification and, after House concurrence in the modifications, President Nixon signed the bill into law on October 9, 1972.[31]

Public Law 92-473 changed the 1965 SCA in several respects. The greatest impact of the new law has been in the manner in which wage determinations are made. Under the 1965 SCA, prevailing wage rates in the locality determined the wage floor that federal service contractors were required to pay their employees. This remains one element of the wage floor under the new amendments, but the payment of collective bargaining rates is now required in two instances. Sections 2(a)(1) and 2(a)(2) of the Act now require that the Department of Labor wage determinations, incorporated in service contracts with the government as wage floors, reflect collective bargaining rates, including prospective rates, where a collective bargaining agreement covers service employees. The Department of Labor interprets these sections to mean that if a current contractor has a collective bargaining agreement, the wage determination for the follow-on contract will be a restatement of the wage and fringe benefit rates specified in that agreement.[32]

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26 H.R. REP. No. 1251, 92d Cong., 2d Sess. (1972).
27 118 Cosc. REC. 2261 (daily ed. June 7, 1972).
28 118 CONG. REC. 7263 (daily ed. August 7, 1972).
29 *Hearings on S.3827 and H.R. 15376, supra* note 25.
30 118 CONG. REC. 15342 (daily ed. September 19, 1972).
31 86 Stat. 790 (1972), *mending* 11 U.S.C. § 351-357 (1970).
32 *See* 29 C.F.R. § 4.3(b) (1973).

Additionally, the amendments added a new section, 4(c), to the Act. Section 4(c) requires that a successor contractor pay to his employees not less than the wages and fringe benefits, including prospective wage increases, paid by his predecessor under a collective bargaining agreement if those wages and fringe benefits are greater than the Department of Labor wage rate determination. The Section is unique in that it requires a successor to pay these wages and fringe benefits even if he does not hire any of his predecessor's employees. As a result, a successor contractor with his own labor force is required to pay his employees according to a collective bargaining agreement to which neither he nor any of his employees are parties.

All three sections, 2(a)(1), 2(a)(2), and 4(c), provide that a collective bargaining agreement may be disregarded if it was not entered into as a result of "arm's-length negotiations"; additionally, 4(c) can be avoided if collective bargaining agreement wage-rates are substantially at variance with prevailing wage rates. Other amendments to the SCA require (1) the Secretary of Labor to issue wage determinations by 1977 for all service contracts employing five or more service employees, (2) the Secretary to refrain from issuing variations, tolerances, or exemptions, except in special circumstances, (3) procuring agencies to get the approval of the Secretary of Labor before awarding multi-year service contracts—multi-year service contracts, however, have not generally been authorized by Congress—and (4) procuring agencies to attach a statement to all solicitations and contracts setting forth the wage rate Federal Wage Board employees working directly for the Government receive for doing similar work.[33] The purpose of attaching Wage Board rates to the contract is unclear, since the contractor does not have to pay these rates. Apparently, Congress wished to inform contractors of the wage rates that the Government pays its direct-hire employees for similar work.

A. THE SUCCESSOR CONTRACTOR PROVISIONS

While several other sections of the SCA amendments will modify pre-1972 procurement practices, their greatest effect will be as a result of sections 2(a)(1), 2(a)(2) and 4(c). In testifying before the Senate Subcommittee on Labor, Richard J. Grunewald, Assistant Secretary for Employment Standards, Department of Labor, argued

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[33] *See generally 86* **Stat. 790 (1972).**

that the proposed amendments would, among other things, (1) undercut the prevailing wage rate concept, (2) remove competitive forces within the industry which hold wages to reasonable levels since the Government will pick up the cost of any pay raises, and (3) open the procurement system to fraud between outgoing contractors and unions.[34] The Department of Defense witness before the same Subcommittee—Richard Keegan, Deputy Under Secretary for Procurement, Department of the Air Force, testified that the proposed amendments would (1) introduce a new concept, that is, giving wage and fringe benefit provisions of collective bargaining agreements the full force and effect of law through mandatory imposition of those terms of such agreements on successor employers and employees who may not have been parties to the agreements, (2) confer upon a relatively small percentage of the work force a substantial economic advantage over the majority of the same work force, and (3) constantly increase the cost of contract services to government procuring activities.[35] Substantially the same testimony was received from NASA[36] and the National Aerospace Services Association, a contractor's association.[37]

The basic objection to sections 2(a)(1), 2(a)(2), and 4(c) was, and is, that they enable a service contractor and the union representing his employees to establish wage rates for his successor, regardless of what the local economy has established as "fair wages" for service employees. This objection is even more compelling since the normal competitive forces that come into play in the negotiation of a collective bargaining agreement, economic interests of employers versus those of employees, are vitiated by the sections. A current service contractor has an incentive to limit wage raises during a contract year in which his reimbursement by the government is based on a fixed figure not including wage increases. Prior to the amendment, a service contractor also had an incentive to restrict wage increases that become effective after his current contract expired since there was a possibility that a bidder, not bound by such increases, would win the competition for the follow-on contract due to a lower wage scale. Sections 2(a)(1), 2(a)(2), and 4(c) eliminate any need for these considerations by a current service contractor because all bidders will have to base their labor

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34 *Hearings on S. 3827 and H.R. 11376.* ***supra*** note 25, at 19.
35 *Id.* at 98, 99.
36 *Id.* at 104.
37 *Id.* at 71.

cost projections on wage rates, including prospective wage increases, contained in the current contractor's collective bargaining agreement. Not only do these sections eliminate the incentive to contest a union's demand for future wage increases, they actually insure that a current contractor will agree to such increases. A wise current service contractor with six months to go on his contract will, during collective bargaining agreement negotiations, grant a large future increase if a union will drop its demand for an immediate wage increase that cannot be passed on to the government in the form of higher prices. Since all bidders for the follow-on contract will have to base their labor cost projections in their bids on these prospective wage increases, the current contractor is not restricted from using such a negotiation strategy by the fear that he will price himself out of the competition for the follow-on contract. Indeed, why should a current contractor even chance subjecting himself to money losing work slowdowns or strikes when a union demands prospective wage increases that do not affect his current profit structure or his opportunity to win the follow-on contract? It would thus be fair to state that sections 2(a)(1), 2(a)(2), and 4(c) have established wage standards which are subject to little government control and virtually no market control. Unfortunately, without such controls, there will be an ever increasing wage-cost spiral for service contracts.

In addition to virtually ensuring constantly higher cost service contracts, section 4(c) opens the procurement process to cost speculation and fraud. Section 4(c) requires that a successor contractor must pay his employees the wage rates specified in his predecessor's collective bargaining agreement, regardless of the wage rates contained in the wage determination on which labor costs in his bid were predicated. There is no time limitation as to when an applicable collective bargaining agreement must be negotiated. Thus, a lame-duck contractor, one who is aware that he has lost the follow-on contract, can negotiate a wage rate agreement with a union the last day of his contract performance and thereby cause his successor to pay these negotiated rates. Since the successor could not have considered those wage rates in submitting his bid, he will be forced to accept diminished profits, performance at a loss, or default. A lame-duck contractor even has an incentive to enter into a collusive collective bargaining agreement. By forcing his successor into default, he has an opportunity to win award on the resulting resolicitation. Even absent collusion, a lame-duck contractor about to complete his contract with the Government is certainly more receptive to a

union demand for prospective wage increases, which he does not have to pay, if the alternative is unnecessary costs occasioned by a strike or slowdown. The result of this lack of incentive to hold down costs and possible fraud will be, the inclusion of contingency costs in bid prices. Since no bidder can be certain that a current contractor will not grant prospective wage increases pursuant to a collective bargaining agreement prior to the conipletion of the current contract, bidders can protect themselves onlv by adding a speculative cost factor to their labor cost projections.

B. HEARING PROCEDURES ON COLLECTIVE BARGAINING AGREEMENTS

Congress attempted to forestall fraud and excessive wage increases by requiring that all collective bargaining agreements be entered into at arm's length in order for the wage rates specified therein to become wage floors. However, it is virtually impossible to prove such an agreement was not made at arm's length when the parties maintain that it was. Congress further attempted to prevent fraud and excessive wage increases by providing that wage rates contained in a collective bargaining agreement may be disregarded if the Secretary of Labor finds after a hearing that the agreed upon wage rates substantially vary from those prevailing in the locality. Until such a finding: however, the agreement controls. The procedures for implementing these remedies[38] provide that the Administrator of the Employment Standards Administration upon a prima facie finding that the wage rates in the collective bargaining agreement vary substantially from the prevailing rates in the locality will refer the matter 'to a hearing examiner. The hearing examiner has thirty days to issue notices, conduct the hearings, and any rehearings, and to issue findings, Before this process can even begin, however, the contracting agency, contractor, bidder, or other interested party must first colledt evidence to establish the prima facie case of variance and submit it to the administrator. This initial collection of evidence and its submission will probably take another thirty days. Thus. before a final decision as to the inapplicability of an agreement's rates can be expected, there will be a sixty-day period in which those rates are presumed valid.

The remedies for forestalling collusive collective bargaining agreements and excessive wage increases are largely illusorv as the fol-

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[38] *See* 29 C.F.R. § 4.10 (1973)

lowing examples illustrate. Assume in each example that there is a need for on-going janitorial services at Fort Myer. Fort Myer submits a Standard Form 98 to the Department of Labor on April 15, 1974. The Department of Labor returns a wage determination on April 30, 1974. Fort Myer solicits bids for a fixed price contract on May 1, 1974, with a closing date for submission of bids and an award date of May 30, 1974. The current contract is being performed by X Company. The winner of the May 30, 1974 award will begin performance on July 1, 1974.

EXAMPLE 1

X Company has no collective bargaining agreement with his employees on May 30, 1974. The wage determination issued by the Department of Labor listed the prevailing wage rate for janitors in the locality as $3.00 per hour. On May 30, 1974, Company Y is declared the winner of the award. On June 15, 1974, X Company negotiates a collective bargaining agreement with his employees, wherein the wage rates are specified as $4.00 per hour. Y Company immediately requests the Department of Labor to find that (1) the collective bargaining agreement was negotiated at less than arm's length or (2) the wage rates contained therein are at substantial variance with locality prevailing rates.

In this example, if the Department of Labor finds that the collective bargaining agreement was negotiated at less than arm's length or that the wage rates contained therein are substantially at variance with prevailing rates, Y Company will ultimately be afforded the relief of not having to pay the $4.00 rate. If not; Y Company will obviously be forced to default unless the government increases his contract price. It should be noted that currently there are no contract clauses allowing a contractor a price adjustment in this situation. Even if the Department of Labor makes the desired findings 60 days after June 15, Y Company will have performed the contract for 45 days at the higher labor rate of $4.00 per hour. While presumably Y Company will be able to recoup the difference between the aborted $4.00 rate and the $3.00 prevailing rate, it would be risking labor unrest if it did so. As it is, Y Company could expect labor problems by simply reducing employee wages from $4.00 to $3.00 per hour, without any attempt to recoup the already paid $1.00 difference.

EXAMPLE II

X Company has no collective bargaining agreement with his employees on April 30, 1974. The wage determination issued by the Department of Labor listed the prevailing rate for janitors in the locality as $3.00 per hour. On May 25, 1974, X Company negotiates an agreement with his employees, in which the wage rates are specified as $4.00 per hour. On May 30, 1974, bids are opened. Y Company is the low bidder, but it is obvious that he based his bid on the $3.00 per hour figure, as have all bidders except X Company, n-ho used the $4.00 per hour rate.

In this example, it would be unfair to award the contract to Y Company and require him to pay the $4.00 per hour figure when his bid price was based on the $3.00 per hour figure. Fort Myer could resolicit and inform all bidders that X Company has a collective bargaining agreement rate of $4.00 per hour. The first problem is, of course, lead time; the resolicitation might not be accomplished in time to permit the successful bidder to prepare for contract performance on July 1, 1974. Secondly, the resolicitation might result in a windfall profit to the successful bidder. Assume Y Company is again the successful bidder, only this time his price is raised to reflect the $4.00 per hour labor rate contained in X's collective bargaining agreement. After award, Y challenges the collective bargaining agreement rate. If the Department of Labor determines that the $4.00 figure is at substantial variance with the locality prevailing rate or that X's agreement was entered into at less than arm's length, Y will be able to pocket the $1.00 diterence between the $3.00 prevailing rate and the $4.00 rate on which he based his fixed price bid.[39]

EXAMPLE III

X negotiated a collective bargaining agreement rate of $4.00 per hour on March 1, 1974. On April 15, 1974, the Department of Labor issues a wage determination of $4.00 per hour for janitors, based on X's agreement rate. Bids are solicited and subsequently opened on May 30, 1974. Y is the low bidder, but it is obvious he

[39] The Dept. of Defense has attempted to limit Example II type bidding ambiguities caused by collective bargaining agreements being negotiated after bid solicitations but before awards by advising bidders of their obligations to honor predecessor contractors' collective bargaining agreements pursuant to 4(c) of the SCA. For the Department of the Army see Departnient of the Army Memo, DTG 180925Z, October 1972, Subject: "Service Contract Act Amendment of 1972, P.L. 92-473," on file Labor Advisor's Office, OASA (I&L), Pentagon, Washington, DC.

has bid his labor figure at less than $4.00 per hour, actually he used *$3.50* per hour in his computations.

Award will have to be made to Y. Obviously, Y is planning to challenge the $4.00 per hour rate as being at variance with the prevailing rate. If Y wins the challenge he will have a windfall of $.50 per man hour; the government loses. If the Department of Labor upholds the $4.00 per hour rate, it is only a matter of time before Y will be forced to default because of his losses of $.50 per man hour; the government loses.

These examples illustrate some of the problems associated with the application of collective bargaining agreement rates to successor contractors and some of the inadequacies of the hearing system designed to prevent abuses. The examples assumed that bidders will challenge wage rates in collusive agreements or excessive agreement rates. As a practical matter, bidders have little incentive to challenge collective bargaining agreement wage rates unless such rates are prejudicial to them, *i.e.*, when they cannot consider the agreement rates in preparing their bids. Since all bidders will be preparing their bids using the same, if somewhat inflated, wage rates, there is no bidding advantage to be gained by lower wage rates. A second reason bidders will be reluctant to challenge wage rates is to prevent labor difficulties. Since virtually every service bidder plans to use the current service contractor's labor force should he be awarded the follow-on contract, he would undoubtedly create labor discontent, which might jeopardize his contract performance should he win award, by challenging wage rates employees are currently getting or expect to get. Therefore, the responsibility for challenging collective bargaining agreement wage rates thought to be at substantial variance with locality rates or thought to have resulted from a collusive agreement will, in most cases, fall on contracting activities. The activities will have to gather supporting evidence, present their positions to hearing examiners, and utilize procurement procedures which will allow them time to process their challenges, to include contract extensions and terminations for convenience.

Contracting agencies must develop procedures to recoup windfall profits in cases where bids have been based on rates contained in collective bargaining agreements that are subsequently declared by the Department of Labor to be at substantial variance or to have been entered into at less than arm's length. By the same token, new price escalation procedures must be established to reimburse contractors who bid on one rate, the prevailing rate as contained in

a wage determination, and who are forced by section 4(c) to pay a higher rate as a result of a subsequently negotiated collective bargaining agreement. The failure to establish such procedures will (1) leave bidders guessing as to the rates on which they should project their labor costs in preparing their bids and (2) result in cases of windfall profits in certain situations.

IV. ADMINISTRATION OF THE SCA

Public Law 92-473, especially the collective bargaining agreement provisions and the procedures for challenging these agreements, creates certain procurement problems. Those problems are accentuated by the Department of Labor's implementing regulations and the extension of its pre-Public Law 92-473 administrative decisions to the new law. The Department of Labor published its interim regulations for enforcement of the amended SCA on November 30, 1972.[40] Included in the regulations are contract clauses for inclusion in all contracts subject to the SCA. The Federal Procurement Regulation has adopted these clauses for inclusion in service contracts," but the Armed Services Procurement Regulation has not done so because of a conflict between what a clause tells a bidder he will have to pay and what the Department of Labor actually will require him to pay. The clause reads:

> If this contract succeeds a contract subject to the Service Contract Act of 1965 as amended, under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, *then in the absence* of *a minimum wage attachment* for this contract neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract **work** less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would be entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increase in wages and fringe benefits provided for under such agreement.[42]

The emphasized phrase, "then in the absence of a minimum wage attachment," implies that if there is a wage determination, a contractor is not obligated to pay rates contained in an applicable collective bargaining agreement. If that were true, some of the hearing procedure problems heretofore discussed would not arise; no

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[40] *See* 37 Fed. Reg. 25468-25473 (1972), now codified in various sections of 29 C.F.R. Part. 4.

[41] 41 C.F.R. § 1-12.904-1 (1973).

[42] 29 C.F.R. § 4.6(d)(2) (1973) (emphasis added).

collective bargaining agreement negotiated after the issuance of a wage determination would have effect. However, this is not the case. The Department of Labor will enforce an applicable collective bargaining agreement rate that is higher than the wage determination rate.[43] As a result of this conflict between what the clause tells a bidder he will have to pay and what the Department of Labor will require a contractor to pay, the Department of Defense has not included this clause in its contracts.

A. DEFINITIONAL PROBLEMS: LOCALITY

Other major problems have developed with respect to the Department of Labor's interpretation of the SCA amendments. The Department of Labor's interpretation of the SCA amendments having the greatest impact is the interpretation of the phrase "in the locality." Sections 2(a)(1) and 2(a)(2) of the SCA require that wage determinations be made "in accordance with the prevailing rates for such employees in the locality . . . ." [44] Section 4(c) requires the payment of a predecessor's collective bargaining agreement rates unless found "substantially at variance with those which prevail for services of a character similar in the locality." [45] There are many service contracts which can be performed at any geographic locations; they are not restricted to a Government facility, for example, keypunch or computer services, repair or overhaul services, or certain equipment cleaning services. The Department of Labor currently reads the phrase "in the locality" as "for the locality." [46] Thus, the locality at which a wage determination will be made is not the location at which work will be performed, but rather a wage determination will be made at the location for which the service will be performed. In a classic service contract, trash removal, this interpretation has no effect. The location at which and for which the service is to be performed is the same. But in the case of a service contract which can be performed anywhere, the effect is to export the economic conditions of one location to another.

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43 Statement by Harold Nystrom, Assoc. Sol. of. Labor, US. Department of Labor, during all agency meeting on SCA, 14 December 1972; see *also* 29 C.F.R. § 4.1c (1973).

44 41 U.S.C. §§ 351(a)(1)-(2) (1970), as *amended,* (Supp. II, 1972).

45 41 U.S.C. § 353(c) (Supp. II, 1972).

46 See 29 C.F.R. I§ 4.1(a), 4.1(c), and 4.4(c) (1973).

The unacceptable effect of this interpretation is illustrated in a recent Department of Labor ruling.[47] On a General Services Administration (GSA) follow-on contract for kevpunch services for its Washington, DC office, the Department of Labor issued a wage determination based on prevailing rates for the employee classification involved as those rates existed in Washington, DC. The incumbent contractor was performing at Wilmington, Delaware. The site of the follow-on contract was unknown; it could be performed anywhere. The incumbent Delaware contractor protested the issuance of "prevailing wage rates" based on rates prevailing in the Washington, DC area.[48] The Comptroller General opined in a decision to the Secretary of Labor:

> The locality interpretation which you have adopted in the present case and in similar cases is subject to question. It results in employees being paid minimum wages as determined from the prevailing wages in a locality other than the one wherein they are actually engaged in performing the contract. Also, it establishes, in effect, a nationwide rate, since all bidders whatever their location are bound to pay the wage rates in the locality of the Government installation. This nationwide rate is not determined with reference to the prevailing wages throughout the country, but is based on the prevailing rates in the locality of the Government facility.[49]

However, the Comptroller General declined to uphold the protest or overrule the Department of Labor as the practice was not prohibited by the SCA. The contractor then sought a preliminary injunction to prevent GSA from awarding the contract until the wage determination issue had been settled and further sought a declaration that the wage determination should be made for the locality where the work could be performed, in this case, Wilmington, Delaware. The United States District Court for Delaware denied the request for injunctive relief, finding that although the contractor had demonstrated a likelihood of success on the merits, the requisite showing of irreparable harm had not been made.[50] In the subsequent trial for damages, the court held that the Department of Labor interpretation of "locality" as the place *for* which services will be performed rather than the place *at* which the services will

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47 Opinion letter from Warren D. Landis, Asst. Xdministrator, U.S. Department of Labor to (name withheld by Department of Labor), May 1, 1973, on file at Employment Standards Administration.

48 53 COMP. GEN. 370 (1973).

49 *Id.* at 7.

50 Descomp, Inc. v. Sampson, Civil *So.* 807-73 (D. Del., Jan. 18, 1974).

be performed was incorrect; as to the contract in question, the Department of Labor should have issued a wage determination for all localities at which the work might be performed.[51] The Department of Labor has not indicated it will acquiesce in this decision. Considering that the decision was made by a district court, it is doubtful if the Department of Labor will change their procedures.

In the case just recited, Section 4(c) was not involved. When there is a collective bargaining agreement, the Department of Labor procedure becomes even more absurd. For example, a facility in Washington, DC has a need for a continuing service which can be performed anywhere. The predecessor contractor performed in New York City and had a collective bargaining agreement. The successor contractor performs in Dubuque, Iowa. The Dubuque contractor must pay the rates contained in the New York City contractor's collective bargaining agreement unless those rates are substantially at variance with prevailing rates for Washington, DC. If the Department of Labor finds a substantial variance, the Dubuque contractor then must pay Washington, DC prevailing rates to his employees performing in Dubuque. The Comptroller General has also had occasion to rule on the use of a predecessor contractor's collective bargaining agreement rates being applied to a contractor performing in a completely different locality.[52] While he again questioned the practice, the Comptroller General held that the practice was not prohibited by the SCA.

In addition to the absurdity of this practice, the results are unnecessarily costly and will restrict competition. Contractors who perform services for private companies as well as for the Government will be discouraged from bidding on contracts that require they pay higher rates imported from another location to those of their employees performing the Government contracts. Since the private sector of the economy in their area has presumably established the effective price for the type of service, such contractors are in no position to pay all employees such rates. By establishing two different rates for employees based upon whether an employee was working on a Government contract, contractors would only be buying labor difficulties. It is, therefore, unlikelv they will bid on Government contracts under such circumstances. The result is a "lock-in'' by current contractors.

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[51] Descomp, Inc. v. Sampson, Civil No. 807-73 (D. Del., June 3, 1974).
[52] Comp. Gen. Dec. B-179250 (Feb. 28, 1974); 53 COMP. GEN. 646.

In this writer's opinion the Department of Labor has completely misread Congressional intent on the locality issue. The House report on H.R. 15376 stated that the SCA

> makes the Department of Labor responsible for assuring that service employees are paid at least the prevailing wages and fringe benefits for the same work *in their locality as others are paid . . . .* [53]

There are other indications in the legislative history that Congress intended locality to mean the locality where the work is to be performed.[54] And, it is apparent that Congress was not aware of any service contracts which could be performed anywhere. The locality question especially as affected by collective bargaining agreements, was presented to Congress in hearings only in the context of situations where the site of the work was identical to the installation for which the work was to be performed. During floor debate, a proponent of H.R. 15376, stated "[t]his bill merely requires that a successful bidder cannot pay less to employees than they were receiving *from their former employer* pursuant to a contract with respect to wage and fringe benefits." [55] This statement indicates that the Congressional purpose behind Sections 2(a)(1), 2(a)(2), and 4(c) was to prevent a successor contractor from disregarding collectively bargained for wages and fringe benefits and unilaterally lowering those rates in situations where the work situs does not change.

The Department of Labor admittedly has a problem in that it is required to make wage determinations, but there is no justification for issuing prevailing rates for a location at which the work in all probability will not be performed. Since wage determinations are mandatory, the Department of Labor is required to issue something when the work is to be performed at the unknown location of the unknown successful bidder. Such a determination should be based on national averages. As to the second aspect of the problem—determining whether a predecessor's collective bargaining agreement is at variance with the prevailing rates—"locality" should be defined as the locality of the successful bidder. The determination of variance would then be made after contract award.

The ultimate fate of the Department of Labor's locality definition remains uncertain. The Comptroller General directed the De-

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53 H.R. REP. *So.* 1251, 92d Cong., 2d Sess. 3 (1973) (emphasis added).
54 *See* S. **REP.** *So.* 1131, 92d Cong., 2d **Sess.** (1972).
55 118 CONG. **REC.** 7258 (daily ed. August 7, 1972) (emphasis added)

partment of Labor to seek clarifying legislation from Congress.[56] Hearings on SCA administration were held, but failed to resolve the issue.[57] Contractors and contracting agencies will have to look to the courts for relief.

B. DEFINITIONAL PROBLEMS: SERVICE EMPLOYEE

Other major procurement problems involving the SCA have arisen as a result of Department of Labor determinations of which employees and what contracts are covered by the Act. In terms of employee coverage, the legislative history of the 1965 SCA is replete with examples of the types of employees covered.[58] The then Solicitor of Labor in testifying as to the definition of service employee stated:

> The standards (in the SCA) would apply to guards, watchmen, and employees in jobs of the type for which wage rates are set by individual agency wage boards when the workers are employed directly by the Government. These employees are, as you know, employees . . . often referred to as "blue collar" workers. Included in coverage . . . would be janitorial, custodial, maintenance, laundry, etc., employees.59

The Department of Labor began after the 1965 enactment of the SCA to broaden the definition of service employee by including such non "wage board" and non "blue collar" employees as office and clerical workers within the scope of SCA's coverage. That action recently drew a critical response from the Comptroller General, who *recommended* that the Department of Labor cease issuing wage determinations for such employees until Congressional clarification on the issue could be obtained.[60] The Delaware court that found the Department of Labor interpretation of locality to be erroneous went farther then the Comptroller General and held that to be considered an employee within the meaning of the SCA, a con-

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56 53 COMP. GEN. 370 (1973); Comp. Gen. Dec. B-179250 (Feb. 28, 1974).

57 BUREAU OF NATIONAL AFFAIRS, INC., *Federal Contracts Report*, No. 501, pp. A-10, 11 (April 29, 1974). The hearings are before the Subcomm. on Labor of the House Committee on Education and Labor, 93rd Cong., 2d Sess. (1974).

58 *See, e.g., Hearings on H.R. 10238 Before the Subcomm. on Labor of the House Comm. on Education and Labor,* 89th Cong., 1st Sess., ser. 3, at 7, (1965) [hereinafter cited as *Hearings on H.R. 102381.*

59 *Id.* at 10.

60 U.S. GENERAL ACCOUNTING OFFICE REPORT, *Propriety of Minimum Wage Determinations For Clerical and Other Office Employees Under The Service Contract Act,* B-151261, November 30, 1973.

tractor employee must have a counterpart in the federal service classified as a "wage board" employee.[61] In that case, the Delaware court concluded that since kevpunch operators in the federal service are considered "general schedule" employees and not "wage board" employees, contractor kevpunch empldyees are not covered by the SCA. 'It is doubtful if thk Department of Labor will acquiesce in the Comptroller General's recommendation or the district court's decision. The Congressional hearings mentioned earlier also failed to resolve this problem. Contractors and contracting agencies will again have to relv on the courts for relief.

C. DEFINITIONAL PROBLEMS: SERVICE CONTRACT

1. General.

More critical to the procurement process than expanded SCA employee coverage, which results in higher contract costs to the Government, is expanded contract coverage, which results in both higher costs and restricted competition. The subject matter jurisdiction of the 1965 Act—contracts whose principal purpose is the furnishing of services through the use of service employees—was greatlv expanded by administrative actions of the Department of Labor between 1965 and 1972. In defining the statutorv phrase "contract . . . the principal purpose of which is to furnish services in the United States through the use of service employees . . .", the Department of Labor divided the phrase so that principal purpose only modified services and not service employees.[62] Thus, if a contract is deemed to be one for the furnishing of services, "the contract cannot be considered outside the reach of the Act unless it is known in advance that the contractor will in no event use any service employee during the term of the contract in furnishing the services called for."[63] The "any service employee test" is ameliorated to some degree bv the exemption provided for contracts whose principal purpose is the furnishing of a type of service requiring only incidental use of service employees as defined in the SCX. Examples of such types of contracts are those calling for the services of bona fide executive, administrative, or professional employees. However, even as to such contracts, the Department of Labor regulations provide:

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61 Descomp, Inc. v. Sampson, Civil *So.* 807-73 (D. Del., June 3, 1974)

62 *See* 29C.F.R. §§ 4.111 and 4.113 (1973).

63 29 C.F.R. § 4.113(a)(1) (1973).

> [W]hile the incidental employment of service employees will not render a contract for professional services subject to the Act, a contract which requires the **use** of service employees to a substantial extent would be covered even though there is some use of professional employees in performance of the contract.[64]

While this would appear to exempt large numbers of research type contracts from the provisions of the SCA, interpretations of this language belie that superficial appearance.

In 1966, the Department of Labor opined that a research contract for survey work on subterranean bore holes was covered by the SCA.[65] The contract called for testing, evaluation, and reports and was labeled by the Department of Labor as a basic research service agreement. Once the research contract was labeled a service contract, any service employees performing under the contract fell within the jurisdiction of the SCA. The opinion did not discuss whether service employees would be used to a substantial extent; it simply assumed they would be. Thus, early in the SCA's history, the Department of Labor asserted that the Act was applicable to contracts for research performed by professional employees if service employees, as defined in the Act, were necessary for contract performance.

The extent to which service employees must be utilized in order to bring a contract for professional services within the jurisdiction of the Act has never been precisely stated by the Department of Labor; it is a question that can only be made on the basis of all the facts in each particular case.[66] However, a NASA contract for engineering support was deemed to be within the Act's coverage even though only 18 percent of the employees working on the contract were deemed service employees.[67] In its opinion letter the Department of Labor stated:

> We do not regard the purpose **of** the contract to be limited to the furnishing of professional services "with the use of service employees being only a minor factor in the performance of the contract . . ." Since approx-

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64 29 C.F.R. § 4.113(a)(2) (1973).

65 ***Research Service Contract,*** BNA WAGE AND **HOUR** MANUAL 99:2370 (Opinion by Wage and Hour Administrator Clarence T. Lundquist, July 25, 1966).

66 *See* 29 C.F.R. § 4.111(a) (1973).

67 Opinion letter from Warren D. Landis, Asst. Administrator, Employment Standards Administration, US. Department **of** Labor to (name withheld by Department of Labor), March 6, 1973, on file at Employment Standards Administration.

> imately 18% of the total personnel performing on the contract are service employees, this nould represent more than a "minor factor" and amount, on the contrary, to the use of service employees to an extent that is "substantial" or important enough to bring the contract nithin the Act's coverage.

Thus, according to the Department of Labor view, a contract may be deemed a service contract if 18 percent of the employees covered by the contract can be classified as service employees. This would make virtually all contracts not specifically exempt from the provisions of the Act subject to the SCA.

Neither the language of the SCA nor its legislative history supports the Department of Labor's interpretation. The legislative history of the Act contained examples of types of contracts that were to be covered. These were invariably labor intensive service contracts, corresponding generally with services performed by "blue collar" employees. Nowhere in the legislative history is it intimated that research contracts or contracts for professional services fell within the jurisdiction of the SCA. The coverage language of the SCA, "contract . . . the principal purpose of which is to furnish services . . . through the use of service employees . . .," is interpreted by the Department of Labor to read "contract the principal purpose of which is to furnish services through the use of any service employees." Thus, instead of an Act whose coverage is limited to labor intensive service contracts, coverage is extended to all types of contracts for any type of services so long as some service employees, as defined in the Act, are utilized. The Department of Labor has taken the coverage phrase and interpreted it to mean that "principal purpose'' only speaks to "furnishing services." The prepositional phrase "through the use of service employees" is left dangling. Since there is absolutely no legislative history to support the Department of Labor's construction, the phrase should be read according to normal English language construction; the phrase means that the principle purpose of a contract must be for service employees to perform services.

The contracting agencies have not generallv implemented the Department of Labor's views on this subject. There are no Service Contract Act clauses listed in agency procurement regulations for inclusion in research and development contracts[68] or in architect-

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[68] ASPR § VII, Pts 3 and 4 (April 1973 ed.). Major Dan Kile, legal advisor to Defense Supply Service, Washington, which awards a large number of research contracts, states that it inserts SCA clauses only when specifically told to do so by

engineering contracts.[69] Thus far, the Department of Labor has not pressed the point: it has not issued direction to the procuring activities to generally include the clauses in such contracts. However, when specific cases of failure to include SCA provisions in such contracts have been brought to its attention, the Department of Labor has required their inclusion.[70]

Not only has the Department of Labor defined the basic coverage of the SCA broadly, but it has also narrowed the specific exemptions provided in the Act. Two of these exemptions will be discussed here: the construction and manufacturing exemptions. Section 7 of the SCA provides:

> This chapter shall not apply to—
> (1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;
> (2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act. . . .[71]

2. *Service Contract v. Construction Contract.*

The Department of Labor has determined that construction contracts are principally ones for the furnishing of services.[72] Its regulations state that "the intent of section 7(1) (of the SCA) is simply to exclude from the provisions of the Act those construction contracts which involve the employment of persons whose wage rates and fringe benefits are determinable under the Davis-Bacon Act."[73] Thus, a construction contract which has "service employees" whose wage rates are not determinable under the Davis-Bacon Act falls within the jurisdiction of the SCA and the wage rates of the "service employees'' employed on such a construction contract are determinable pursuant to SCA procedures.[74] Department of Labor

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the Department of Labor on a particular contract. Interview with Major **Kile,** in the Pentagon, Washington, DC, July 5, **1973.**

69 ASPR § VII, Pt. 6 (April 1973 ed.). Mr. Jack Gregory, Corps of Engineers Labor Relations Advisor, states that Corps has not in the past included SCA provisions in engineering support contracts, but has recently been told to do *so* by the Department of Labor. The Corps is currently holding the matter in abeyance. Interview with Mr. Gregory by telephone in Washington, DC, July **30, 1973.**

70 *See* notes 65 and **67,** *supra,* and accompanying text.

71 41 U.S.C. §§ 356(1) and (2).

72 See 29 C.F.R. § **4.116 (1973).**

73 29 C.F.R. § 4.116(a) **(1973).**

74 29 C.F.R. § 4.116(b)(2) **(1973).**

regulations also extend the **SCA** to construction contracts outside the jurisdiction of the Davis-Bacon Act.[75] Thus, construction contracts for less than $2,000, the Davis-Bacon Act jurisdictional floor, or construction contracts outside the geographic jurisdiction of the Davis-Bacon Act but within the geographic jurisdiction of the SCA, for example, Puerto Rico, are subject to the **SCA,** and the wage rates of the construction employees performing thereunder are determinable pursuant to the SCA.

This interpretation of the construction exemption flies directly in the face of the language of the Act and its legislative history. First, the original SCA-type bills, H.R. 6088 and H.R. 1678, provided an exemption only for construction contracts covered by the Davis-Bacon Act.[76] These bills were not passed. The reference to the Davis-Bacon Act was excluded from H.R. 10238, the enacted SCA bill, so that the exemption was for construction contracts generally. The Department of Labor regulations interpret the construction exemption as an exemption for only workers and contracts covered by the Davis-Bacon Act. This interpretation ignores the fact that Congress when providing a construction exemption from the SCA deleted the reference to the Davis-Bacon Act. Second, the testimony of witnesses as to SCA coverage emphasized that the Act was meant to cover service contracts as distinguished from construction and manufacturing contracts.[77] Third, the Davis-Bacon Act exempts from its coverage those construction contracts that the Department of Labor regulations bring within the scope of the SCA. The Davis-Bacon Act exemptions imply that Congress did not intend for those construction contracts to be covered by any labor standards provisions. It is unreasonable to assume absent express language or legislative history to the contrary that the SCA was intended to provide labor standards for those contracts. If Congress desired that labor standards provisions be applied to such construction contracts, it would amend the Davis-Bacon Act, which by its terms applies to construction contracts, and not apply such provisions to construction contracts through the SCA, which by its terms applies to service contracts. Congress has in the past amended the Davis-Bacon Act to expand its coverage over previ-

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75 29 C.F.R. § 4.116(b)(3) (1973).

76 H.R. 1678 and H.R. 6088, 88th Cong., 1st Sess. (1963).

77 *Hearings on H R. 10238, supra* note 58, at 7, 9: *Hearings on H.R. 10238 Before the Subcomm. on* **Labor** of *the Senate Comm. on Education and Labor.* 89th Cong., **1st Sess.**, ser. 3, at 7 (1965).

ously uncovered construction contracts. In 1935, it decreased the dollar volume that brought the Davis-Bacon Act into operation from $5000 to $2000;[78] and when Congress desired to increase the geographic jurisdiction of the Davis-Bacon Act, it included Alaska and Hawaii in 1940.[79]

3. *Service Contract v. Supply Contract.*

The Walsh-Healey exemption at 7(2) of the SCA has also been narrowly construed by the Department of Labor. Basically, the Department of Labor views only work, and not contracts, as being subject to the SCA's Walsh-Healey exception.[80] Therefore, a contract calling for the purchase or production of supplies, which is required to include Walsh-Healey provisions, must also contain SCA provisions if it also requires services to be performed in connection therewith.[81] This principle reached its illogical conclusion in a Department of Labor opinion which held that: while employees performing work on a production contract who are actually engaged in fabrication, assembly, handling, supervision or shipment of materials required under the contract are covered by Walsh-Healev, employees doing work which is not specifically called for under the contracts, such as guards, billing clerks, and pay roll clerks, are covered by the SCA.[82] This result was reached because the work of such employees is not performed under the provisions of the Walsh-Healey Act.[83]

The above interpretation of section 7(2) of the SCA is unwarranted. H.R. 1678 and H.R. 6988 both excluded contracts, not work, subject to the Walsh-Healey Act. In H.R. 10238, the SCA's Walsh-Healey exemption was changed to read that "work," rather than "contracts," subject to the Walsh-Healey Act was exempted from the SCA. While the reason for the change is not explained,

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78 Act of August 30, 1935, Pub. L. 74-403, 49 Stat. 1011.

79 Act of June 15, 1940, Pub. L. 76-633, 54 Stat. 399.

80 *See* 29 C.F.R. §§ 4.122, 4.131, and 4.132 (1973).

81 29 C.F.R. § 4.132 (1973), *e.g.*, installation, maintenance, etc.

82 Employees Excluded from Walsh-Healey, BNA Wage & Hour Manual 99:2403 (Opinion by Wage & Hour Administrator Clarence T. Lundquist, February 8, 1968).

83 The Department of Labor has proposed to eliminate this dualism: both SCA and Walsh-Healey coverage under one contract. But, it proposes to do so by providing full SCA coverage for such contracts, even those which are to be performed by manufacturing firms. BUREAU OF NATIONAL AFFAIRS, INC., *Federal Contracts* Report, No. 501 pp. A-2, 3 (October 15, 1973).

the then Solicitor of Labor testified in House Hearings on H.R. 10238 that "[a]ny workers or any contract which are subject to the Walsh-Healey Act would not be subject to this particular statute."[84] Both the Senate and House reports on H.R. 10238 stated that contracts subject to the Walsh-Healey Act are exempt from the SCA,[85] and all parties appeared to assume that contracts covered by Walsh-Healey were exempt from the SCA. The word "work" as used in the exemption must have been meant to apply to incidental manufacturing work required under a service contract. Thus, the intention of Congress in replacing the word "contract" with "work" was exactly the opposite of the current Department of Labor interpretation.

4. Effect of *Service Contract Definition*

In addition to the arguments made in relation to these specific exemptions provided in the SCA, the arguments made previously in properly interpreting the principal purpose language of the SCA may be applied here. Neither a construction nor a manufacturing contract is one whose principal purpose is the procurement of services through the use of service employees. Therefore, SCA coverage of employees performing under such contracts is improper even absent the exemptions. This is especially true when one considers that there are three different statutes designed to neutralize the effect of Government contracts on three different industries. While there is a comprehensive scheme of providing wage protection for employees covered by the three statutes, the manner in which wage protection is accomplished is different in each statute.[86] The statutes are different because the nature of the industries covered and because the impact of Government contracts on these industries are different, By applying remedies intended to correct "evils" in the service industry—existing partially as a result of Government contracts—to manufacturing and construction industries, the Department of Labor obviates the Congressional purposes behind legislating three statutes instead of only one.

The effect of applying the SCA to manufacturing and construction contracts before the 1972 SCA amendments was negligible

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[84] *Hearings on H.R. 10238,* ***supra*** note 58, at 9.

[85] H.R. Rep. No. 948, 89th Cong., 1st Sess. (1965); Sen. Rep. No. 798, 89th Cong., 1st Sess. (1965).

[86] See pp. 68-71 ***supra.***

because the Department of Labor normally did not make wage determinations that were included in these contracts. The **1972 SCA** amendments now require the Department of Labor to make SCA determinations and contracting agencies to include them in solicitations and contracts. While this can be expected to increase contract costs, the real impact of the Department of Labor's application of the SCA to other than service contracts will be to reduce competition as a result of the collective bargaining agreement language of 2(a)(1), 2(a)(2), and particularly 4(c).

When Congress made applicable collective bargaining agreements determinative of the wage rates successor contractors would be required to pay on federal service contracts, it was attempting to correct a particular evil that existed in the service industry with an extraordinary remedy. The evil, as noted earlier, was the inability of stable workforces performing services on Government installations to achieve wage increases or even maintain existing wage rates due to the constant change in employers resulting from the annual rebidding cycle. The remedy was to make their new employers accept wage rates and fringe benefits paid by their predecessor employers pursuant to collective bargaining agreements as minimum wages. In providing this remedy, Congress was not tampering with historical collective bargaining relationships in the service industry as, for the most part, employees of service contractors are not organized. In fact the collective bargaining agreement language of the **SCA** amendments can be expected to provide an impetus for union organization of service employees; service employees can be guaranteed that they will not be forced to accept lower wages every contract year only if their current wages are being paid pursuant to a collective bargaining agreement.

Congress saw no such corresponding evil in construction and manufacturing industries. First of all, most manufacturing and construction contracts are not rebid annually; the Government contracts for, and receives, all that it intends to purchase from a given contractor in accordance with current needs. Second, while the Government may later resolicit for the identical, or substantially the identical construction or supplies, the same group of employees will not be performing the work unless the same contractor performs the later contract. Such employees would, of course, be protected from a unilateral reduction of wages paid pursuant to a collective bargaining agreement by the National Labor Relations Act. And finally, construction and manufacturing industries are more heavily unionized. Contractors in these industries usually have

a substantial investment in assets; they are more than labor brokers. Contractors in these industries do not come and go with the regularity of those in the service industry. One result of this stability has been union organization by their labor force. Industrial and craft unions are usually strong in construction and manufacturing industries, and their opponents in collective bargaining agreement negotiations are usually fixed industrial businesses or trade associations that have equal economic muscle. As a result Congress did not intend to tamper with the long established collective bargaining patterns in these industries.

The Department of Labor's interpretation of SCA coverage—which as noted includes certain construction, manufacturing, and professional contracts within the SCA's jurisdiction—will, however, extend the extraordinary remedies intended for the service industry to certain construction and manufacturing enterprises. Thus, for instance, the following could occur. Ford Motor Company and the United Auto Workers, after a lengthy strike, negotiate a collective bargaining agreement which includes wage and fringe benefit provisions. Ford is the successful bidder on a contract, on which the previous contractor had employees represented by the International Association of Machinists (IAM). The contract might be a manufacturing contract under which "service" employees, *e.g.*, janitors, clerks, guards, were employed; or, it might be an overhaul contract on say tanks, which the Department of Labor would define as a service contract. Ford would then have to apply the wage and fringe benefit provisions of the IAM collective bargaining agreement to the "service" employees performing under its contract rather than those provisions of its own collective bargaining agreement, if the former's provisions are higher. Very few manufacturing concerns or construction contractors would accept this meddling with its industrial relations policy and collective bargaining position. The Department of the Navy has already experienced one instance where a potential contractor refused to sign a contract which obligated it to the successorship provisions of the SCA.[87]

V. AUTHORITY: DEPARTMENT OF LABOR v. CONTRACTING AGENCIES

Contracting agencies have not enthusiastically received the Department of Labor's administrative determinations of the expanded

[87] Interview with Mr. Richard Hedges, Labor Advisor, Navy Materiel Command, **Department** of the Navy, in Washington, DC, on **30** July **1973.**

scope of SCA coverage. While contracting agencies are generally bound by Department of Labor coverage determinations,[88] confusion exists (1) as to whether or not contracting agencies must submit the question of SCA coverage on a particular contract to the Department of Labor, and (2) as to the effect on the legality of a contract entered into without such a submission if the Department of Labor subsequently determines the SCA applies to the contract. The confusion results from the administrative scheme for implementing the SCA's provisions. As discussed earlier, a contracting agency must submit a Standard Form 98, Notice of Intention to Make a Service Contract, whenever it proposes to enter into a contract for the procurement of service "which may be subject to the Act."[89] The initial decision of whether a procurement is subject to the SCA thus rests with the contracting agency, the key words being contract "which *may* be subject to the Act." If a question exists as to whether the SCA applies, the normal procedure is to submit a Standard Form 98 in order to repose the question with the Department of Labor for final determination. If an agency determines that a procurement is not subject to the SCA, it does not submit a Standard Form 98 nor does it include SCA provisions in its solicitation or resulting contract.

The above procedure contemplates that the contracting agencies and the Department of Labor agree as to the general nature of contracts covered by the SCA, with the Department of Labor intervening in coverage determinations only in situations where it is uncertain whether a proposed procurement falls within the class of contracts on which agreement as to coverage has been reached. No such accord exists as to the expanded class of contracts that the Department of Labor has placed under the mantle of SCA coverage. The question thus becomes: may contracting agencies obviate Department of Labor coverage determinations requiring inclusion of SCA provisions by simply refusing to submit Standard Form 98's for those classes of procurements which the Department of Labor considers subject to the Act, but which contracting agencies do not.

Although the Comptroller General has become involved in the dispute over the authority of the Department of Labor to dictate SCA coverage, it has only added to the confusion. In one case, the Comptroller General opined that a contracting officer did not violate the SCA by failing to submit a Standard Form 98 and by

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[88] *See* 41 **U.S.C.** §§ 38, 39 and 353.
[89] 29 C.F.R. 4.4(a) (1973).

failing to include provisions in the resulting contract when such failures were based on a reasonable belief that the SCA was inapplicable to the contract.[90] The "reasonable belief" of inapplicability of the SCA in that case was based on the proposition that the Department of Labor had not informed the contracting agency that the type of procurement accomplished—primarily the overhaul of aircraft—was subject to the SCA. Hence, the Comptroller General found no intent on the part of the contracting agency to circumvent the statutory and regulatory scheme under which the Department of Labor is charged with enforcing the SCA. By negative implication, the Comptroller General appeared to be saying that if a contracting agency has been placed on notice by the Department of Labor that a class of contracts is subject to the SCA, an agency must submit a Standard Form 98 to the Department of Labor for final determination of whether a particular procurement falls within the class of contracts covered by the SCA. However, in a subsequent case where such a set of facts materialized, the Comptroller General *recommended* to the Secretary of the Air Force that the Department of the Air Force submit a Standard Form 98; he did not *require* the submission of a Standard Form 98, nor did he offer his opinion on the legality of a contract entered into without such a submission.[91] In recommending that a Standard Form 98 be submitted, the Comptroller General opined

> . . . in determining whether or not Service Contract Act provisions are applicable . . ., we think it is reasonably clear that contracting agencies must take into account the views of the Department of Labor unless those views are *clearly* ***contrary to law***.[92]

While questioning the Department of Labor's interpretation of SCA coverage, the Comptroller General held that that Department's interpretation was not prohibited by the Act and hence, as far as he was concerned, was not clearly contrary to law. The Air Force in this case did consider the Department of Labor interpretation of SCA coverage as contrary to law. Based on its interpretation, may the Air Force refuse to submit a Standard Form 98? The Comptroller General side-stepped the question stating that contracting agencies must give "due regard" to the Department of Labor's position. The only substantive result coming out of the

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[90] Comp. Gen. Dec. B-178773 (Dec. 6, 1973); 53 COMP. GEN. 412.
[91] Comp. Gen. Dec. B-179501 (Feb. 28, 1974).
[92] Id. at 3 (emphasis added).

dispute was the Comptroller General's recommendation that the matter be referred to Congress for clarifying legislation.

Court decisions as to the authority of the Department of Labor to dictate SCA contract coverage are just beginning to appear. The arguments advanced over contracting agencies' authority to disregard Department of Labor interpretations and determinations and the courts' power to review such Department of Labor actions center around 41 U.S.C. 353(a), which provides that the power of the Secretary of Labor to enforce the SCA, make rules and regulations, render decisions, and take other appropriate administrative action is coincident with his authority to act under the Walsh-Healey Act.[93] In 1943, the Supreme Court held that the definition of contract coverage under the Walsh-Healey Act is a matter for the Secretary of Labor and not for procuring agencies nor even the courts.[94] Based thereon, the United States District Court for New Jersey has stated that the Air Force must yield to the Department of Labor on the question of the applicability of the SCA to a procurement for aircraft overhaul and submit a Standard Form 98. The court further held that the Department of Labor's coverage determination was not reviewable by the court;[95] the United States District Court for Delaware has reached the opposite conclusion.[96] The Delaware court held that the Department of Labor's extension of the SCA to a GSA contract for keypunching and verification services to be performed by white collar workers was a reviewable determination. After disposing of the reviewability issue, the Delaware Court found the Department of Labor action beyond the scope of the SCA and invalid. The Delaware court, however, did not have before it the issue of a contracting agency's authority to disregard Department of Labor coverage determinations of contract classes; it only decided that there is judicial discretion to review and set aside Department of Labor determinations that courts consider to have no basis in law. Thus, while there is authority that courts may nullify Department of Labor action under the SCA, there is not yet definite authority that allows contracting agencies to disregard Department of Labor action.

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93 See 41 U.S.C. §§ 38 and 39.

94 Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

95 Curtiss Wright Corporation v. McLucas, Civil No. 807-73 (D.N.J., Sept. 14, 1973).

96 Descomp, Inc. v. Sampson, Civil No. 4773 (D. Del., June 3, 1974).

Given the conflict between courts and between courts and administrative agencies, a question yet to be resolved is whether contracting agencies must acquiesce in the Department of Labor's estension of the SCA to contracts where Congressional intent as to coverage thereof is at best questionable. This writer thinks not. The decision by the Delaware court (contracts to be performed by white collar workers are without the jurisdiction of the SCA) provides contracting agencies with a basis to refuse to submit Standard Form 98's for contracts to be performed by white collar employees: to wit, the Department of Labor coverage determinations as to such contracts are contrary to law. As to other areas where the Department of Labor is extending SCA coverage, primarily construction and manufacturing contracts, there is no neat solution to the problem for no court has yet found the Department of Labor action invalid. However, the Comptroller General's opinion that contracting agencies must give "due regard" to a Department of Labor position unless clearly contrary to law appears to permit contracting agencies to decide which positions are contrary to law, at least initially. By refusing to submit a Standard Form 98 to the Department of Labor, a contracting agency would force anyone disagreeing with its decision that the SCA was not applicable to a proposed procurement to appeal to the Comptroller General or the courts. These forums would then be forced to resolve the question.

From both a legal and practical standpoint, the current dispute between contracting agencies and the Department of Labor over the types of contracts covered by the SCA creates a great deal of confusion. There is some legal authority for both the proposition that contracting agencies must acquiesce in Department of Labor determinations and the proposition that contracting agencies may disregard Department of Labor determinations that are clearly contrary to law. While contracting agencies may, and indeed should, disregard Department of Labor coverage determinations that are in its estimation contrary to law, history teaches they should exercise restraint in doing so. Congress in its oversight hearings on the administration of the original SCA was concerned with the response of procuring agencies and the Department of Labor to the Service Contract Act, labelling it respectively indifferent and obstructionist.[97] The unanimous conclusion of the Subcommittee conducting

[97] 118 Cosc. REC. 7261-62 (daily ed. August 7, 1972). (Congressman O'Hara, summarizing the findings of the House Subcommittee on Labor, during floor debate on H.R. 15376.)

the oversight hearings was that "the Act is being so interpreted and administered as to substantially thwart the intent of the Congress in enacting it." [98] If Congress perceives similar conduct by contracting agencies to the amended SCA, legislation specifically withdrawing any control by contracting agencies might be forthcoming. Therefore, as a practical matter, contracting agencies may wish to forego disregarding Department of Labor coverage determinations in the absence of a court decision finding that the Department of Labor has exceeded its authority.

VI. CONCLUSION

The amendments to the SCA, Public Law **92-473,** have created a number of problems in the procurement of services. Some of these problems result from the amendments themselves, such as the effects of requiring successor contractors to pay predecessor contractors' collective bargaining agreement wage rates. These problems can only be limited by scrupulous agency surveillance of predecessor contractors' agreements and the development of new contract clauses. Other problems are caused by the Department of Labor's administration of the SCA, such as its application of successorship provisions to contracts that can be performed anywhere and its definitions of contract coverage. These problems can be somewhat minimized by court challenges and selective refusals to submit Standard Form 98's. While these are actions which can be utilized to reduce the impact of Public Law **92-473** and the Department of Labor's administration of the SCA, the ultimate resolution of problems caused by the SCA rests with Congress. Congress must limit the SCA to its original purpose, that is, neutralizing the effect of Government contracts and the procurement cycle on the wages of blue collar employees of Government service contractors. Until such Congressional action is obtained, no contractor nor any procuring agency can be certain as to the ultimate scope of SCA coverage or the effects thereof.

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[98] *Hearings on H.R. 6244 and H.R. 6241, Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st Sess., Part 2, at 1 (1971).

THE JURIDICAL STATUS OF MEDICAL AIRCRAFT UNDER THE CONVENTIONAL LAWS OF WAR*

First Lieutenant Edward R. Cummings**

1. INTRODUCTION

In 1910, General Mooy of the Dutch Medical Corp observed that aircraft could be successfully used to evacuate the wounded and sick from the battlefield.[1] Even at this early date, the concept of using medical aircraft[2] had a historical precedent, since during the German siege of Paris in 1870,[3] some wounded Frenchmen were successfully airlifted by balloon.[4] By 1913, Charles Julliot published the

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

** Signal Corps/JAGC, U.S. Army. Excess Leave Officer, International Affairs Division, Office of The Judge Advocate General, Department of the Army, Washington, DC. B.A., 1972, The Johns Hopkins University, Baltimore, MD; J.D. Candidate, 1975, The George Washington University, Washington, DC.

1 A. GIANNI, LA TUTELA DELL' AVIAZIONE SANITARIA 5 (1930); J. DEVILLERS, L'AVIATION SANITAIRE AU POINT DE VUE DU DROIT INTERNATIONAL 17 (1933); C. JULLIOT, AVIONS ET DIRIGEABLES AU SECOURS DES BLESSÉS MILITAIRES 7 (1913); Di Nola, ***Aviazione Sanitaria,*** 1 RIVISTA AERONAUTICA 35, 40 (1925).

2 The phrase "medical aircraft" is used in this study in the same way it is used in the 1949 Geneva Conventions on the protection of the victims of war and in the current proposals on medical aircraft found in the International Committee of the Red Cross draft protocols. Medical aircraft may be airplanes, helicopters, airships, seaplanes, dirigibles, and any other flying machine. ***See*** INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL **PROTOCOLS** TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, COMMENTARY 30 (October 1973); INTERNATIONAL COMMITTEE OF THE RED CROSS, 4 COMMENTARY: CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 173 (J. Pictet, ed. 1958) [hereinafter cited as 4 COMMENTARY (GCC)]

3A. HORNE, THE FALL OF PARIS: THE SIEGE AND THE COMMUNE 1870-1871 at 130 (1965).

4 Butera, ***Rescue Concepts, Before and After,*** 21 AEROSPACE HISTORIAN 8 (1974); Carlton, ***MAC's Aeromedical Evacuation Mission,*** AIR FORCE POLICY LETTER FOR COMMANDERS 15 (Supp., Jan. 1973); Funsch, Nareff & Watkins, ***Wings For Wounded Warriors,*** 200 J. AM. MED. ASS'N, May 1, 1967, at 121; SECRETARY OF THE AIR FORCE, AEROMEDICAL EVACUATION: BACKGROUND INFORMATION REPORT No. 68-3, at 3 (1968). Two U.S. Army officers constructed and flew a plane-ambulance in 1910 at Fort Barrancas, Florida. For the history of the U.S. use of flight ambulances, see ***id.,*** at 3ff. ***See also*** Guiford & Soboroff, ***Air Evacuation: An Historical Review,*** 18 J.

first volume on the legal status of medical aircraft entitled *L'Aviation Sanitaire Devant La XIve Conférence International de La Croix-Rouge.*

During the pre-World War I period, Julliot and other authors pointed out that many casualties died because they could not be located after a battle.[5] It was proposed that aircraft or balloons be equipped with devices to illuminate areas where the wounded were thought to be so that ground troops could locate them.[6] Thus, aircraft could be used to at least find the wounded. It was recognized, however, that the use of aircraft to search for the wounded would perhaps be governed by different rules than those designed for the evacuation of the wounded.[7] The main reason that different rules might be needed was that any flying vehicle could be used to observe the battlefield and thus obtain intelligence.[8] This security risk was too great, especially in light of the increasing use of balloons for military operations prior to the First World War.[9]

With the advent of the First World War, and the increasing recognition of the potential use of medical aircraft to aid the wounded and sick,[10] various attempts to grant juridical status to medical aircraft were made. In order to develop legal norms to regulate the use of aircraft in general, international law publicists have often made analogies to other areas of the law, such as the law of the sea.[11] The

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AVIATION MED. 601 ff. (19173 for a general history of the use of vehicles to evacuate the wounded.

5 C. JULLIOT, L'AVION SANITAIRE DEVANT LA XIVE CONFERENCE INTERNATIONALE DE LA CROIX-ROUGE 16 (1913).

6 *See id.,* the introduction by Rene Quinton, at 6; C. JULLIOT, *supra* note 1, at 11.

7 *See* the statement by Quinton in C. JCLLIOT, *supra* note 5 at 5.

8 C. JCLLIOT, *supra* note 5 at 33, 36; A. GIANNI, *supra* note 1 at 11.

9 Balloons had been used for military operations since 1792. During the siege of Maubeuge and Charleroi of that year, they were used for observation of the enemy forces. J. DELOUTER, 2 LE DROIT INTERNATIONAL PUBLIC POSITIFF 369-70 (1920); For the use of balloons in subsequent wars, see P. FAUCHILLE, 2 TRAITE DE DROIT INTERNATIONAL PUBLIC: GUERRE ET NEUTRALITE 628 (1921); NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 57 (1912).

10 *See, e.g.,* Simpson, *The Airplane Ambulance—Its Use in War,* 64 THE MILITARY SURGEON 35 (1929); Di Sola, *supra* note 1, at 55.

11 *E.g.,* Cooper, *Background of International Public Air Law,* 1965 YEARBOOK OF AIR AND SPACE LAW 3, 10 (1967); Kuhn, *The Beginnings of An Aerial Law,* 4 AM. J. INT'L L. 109, 119 (1910); Lately, *The Law of the Air,* 7 TRANSACTIONS OF THE GROTIUS SOC'Y 73 (1922); D. JOHNSON, RIGHTS IN AIR SPACE 3-4 (1965); 2 WHEATON'S INTERNATIONAL LAW 347-8 (7th ed. A. Keith 1944); Williams, *The Law of the Sea: A Parallel for Space Law,* 22 MIL. L. REV. 155 (1963); *cf.* M. LITVINE, DROIT AERIEN: NOTIONS DE DROIT BELGE ET DE DROIT INTERNATIONAL 21-2 (1970).

laws of aerial warfare were no exception. Just as the 1906 *Convention* for *the Amelioration* of *the Condition of the Wounded and Sick in Armies in the Field*[12] was later adopted in 1907 to maritime warfare,[13] attempts were made to convert the laws of land and sea warfare into a law of aerial warfare, evinced by the proposed Hague Rules of Air Warfare of 1922.[14] As this study will indicate, analogies to "hospital ships" have often been used in developing the law applicable to medical aircraft; likewise, there has been an extensive use of analogies to the customary international law pertaining to medical personnel and vehicles, Yet the authors who have written on the subject of medical aircraft have generally been cautious and have not found juridical protection in treaty clauses that were developed for different factual circumstances, As a result, there have not been many statements about a "customary law" on medical aircraft that is binding on all nations. Rather, it appears that the applicable law in any given situation is that first developed in the 1929 Red Cross Convention[15] and later changed in three of the Geneva Conventions of 1949.[16]

Given the sophistication and success of modern means of evacuation,'? the importance of medical aircraft to belligerents is consider-

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12 July 6, 1909, 35 Stat. 1885, W. MALLOY, 2 TREATIES, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909 [hereinafter cited as MALLOY], at 2183 (1910).

13 Convention (X) for the Adaption to Maritime Warfare of. the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, 2 MALLOY 2326 (1910) [Hereinafter cited as 1907 Convention].

14 CMD. 2201, at 15 (1924), *reprinted in* D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 139 (1973).

15 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, TS. No. 847 [hereinafter cited as 1929 Convention].

16 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3515, T.I.A.S. No. 3365; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3115, T.I.A.S. No. 3362; and the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship wrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 321'7, T.I.A.S. No. 3363.

17 On the capability of aircraft to evacuate the wounded and to transport them to hospitals, see generally Badalassi, *L' Elicottero Nelle Operazioni Militari E Nel Soccorso,* 42 RIVISTA AERONAUTICA 905 (1966); Butera, Rescue *Concepts,* Before *and After,* 21 AEROSPACE HISTORIAN 8 (1974); Carlton, *MAC's Aeromedical Evacuation Mission,* AIR FORCE NEWSLETTER FOR COMMANDERS (Supp., Jan. 1973); P. DANGEL,

able, both in financial terms and in terms of morale for the wounded. It will not be known until the end of the second session of the Diplomatic Conference on the development of the laws of war whether the limited juridical status that medical aircraft now enjoy will be expanded. The second session of the Diplomatic Conference will be held in Geneva, Switzerland in February of 1973. If the Conference does accept the various proposed articles on medical aircraft which will be submitted," the immunity of medical personnel and vehicles, first recognized in 1864, will be extended and provide for a more effective use of medical aircraft.

11. THE DEVELOPMENT OF CONVENTIONAL LAW FOR MEDICAL PERSONNEL AND VEHICLES

A. 1864 *GENEVA CONVENTION*

Under the 1864 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*,[19] which was drafted due to the initiative of Henri Durant and others who had witnessed the lack of medical treatment in the wars of the second half of the 19th century, medical personnel and facilities received juridical status under treaty law for the first time.[20] Article I stated that ambulances and

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DIE BEDEUTUNG DES LUFTTRANSPORTES VON VERWUNTDETEN CND KRAKKEN IM SANITATSDIENST **(1972);** Gibbons & Fromhagen, *Aeromedical Transportation and General Aviation,* **42** AEROSPACE MEDICINE 773 **(1971);** Jessens & Hagelsten, *S-61 Helicopter as a Mobile Intensive Care Unit,* 9 AEROSPACE MEDICINE **1071** (1974); McCann, Burnett, & Holmstrom, *Potentials of the Aeromedical Evacuation System in the Overall Treatment Process of the Seriously Ill Patient,* **41** AEROSPACE MEDICINE 323 **(1970);** Townshend, *Use of Helicopters in Semch and Rescue—Some Possible Further Applications,* 77 AERONAUTICAL J. **83 (1973);** White, Churbb, Rossing & Murphy, *Results of Early Aeromedical Evacuation of Vietnam Casualties,* **42** AEROSPACE MEDICINE **780 (1971).** The use of aircraft for various civilian medical purposes is increasingly recognized. *See, e.g.,* Allesandrone-Gambardella, *L'Organisation Nationale et International Des Secours Par Hélicoptrès,* 12 REVUE GÉNÉRALE DE L'AIR **162 (1954);** Fromage, *La Police Sanitaire Aérienne,* **10** REVUE GÉNÉRALE DE L'AIR **42 (1947);** *Il Soccorso Aero Italiano,* 48 RIVISTA AERONAUTICA **519 (1972);** La Pradelle, *L'Avion Au Service De L'Homme,* 21 REVUE GÉNÉRALE DE L'AIR **219 (1958);** *Medicopter—Evacuation Aérienne Des Blessés,* ANNALES DE DROIT. INTERNATIOSAL MÉDICAL 72 (No. 23, Dec. 1972); Pannier, *Les Évacuations Sanitaires Aériennes,* 47 REVUE INTERNATIONALE DES SERVICES DE SANTÉ DES ARMÉES DE TERRE, DE MER, ET DE L'AIR **203 (1974).**

18 *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, **1949,** articles **26-32** (June **1973).**

19 Aug. **22,** 1864, 22 Stat. **940,** 2 MALLOY **1903 (1910)** (The US. did **not** become a party to the treaty until **1882).**

20 Durant's experience is recounted in *Un Souvenir De SolFerino* **(1862).**

military hospitals were neutral and were entitled to protection as long as sick or wounded were in them. Article 7 required a distinctive and uniform flag for hospitals and ambulances and an arm-badge for medical personnel. The emblem used was a red cross.[21]

Whether the provisions contained in this treaty created some status for balloons or any aircraft during the period of 1864 to 1906 was discussed by one author who came to a negative conclusion.[22] The author noted that permitting an enemy balloon to scan a battlefield on which there are wounded created a security problem.[23] Such a scanning could give a tactical advantage to one side, a situation which the parties to the treaty would not have contemplated. Moreover, the proposed use of balloons would be to search for the wounded, not for their evacuation, which was the very object of the protection given to ambulances. Indeed, under the terms of the treaty, Article 1 gave medical establishments protection only if there were wounded therein, not if they were just being used to seek for the wounded. Despite the fact that some protection was given to medical vehicles, Julliot concluded that aerial vehicles did not have protection under the 1864 treaty.[24]

B. 1906 GENEVA CONVENTION

The 1906 Red Cross Convention[25] did not change these norms. Rather, it was made explicit that the limited protection afforded to medical establishments would terminate if they were used to commit acts injurious to the enemy.[26] Medical convoys could be broken up if military necessity required it.[27] Charles Julliot inferred from the latter provision that the convention would not permit medical convoys, whether aerial or not, to freely circulate in any area looking for wounded, and at the same time observe the enemy's secrets and military positions.[28]

Since medical aircraft received no juridical status under the 1864 and 1906 Conventions, the French *Lique Nationale Aerienne* sug-

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21 *See generally* T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 338 (1895).

22 C. JULLIOT, supra note 5, at 34.

23 *Id.* at 33, 36.

24 Id. at 34.

25 Convention for the Amelioration of the Condition of the Wounded and Sick, July 6, 1906, 35 Stat. 1885, 2 MALLOY 2183 (1910).

26 Art. 7.

27 Art. 17.

28 C. JULLIOT, supra note 1, at 36.

gested to the French Foreign Ministry that an International Red Cross Conference be convened on medical aircraft.[29] The Foreign Ministry declined to take any action on the request in February. 1913, on the grounds that no international rules on air navigation in times of peace existed and because of the difficulty of distinguishing the nationality and affiliation of aircraft in flight.[30]

During the First World War, there were several evacuations by aircraft.[31] In 1915, for example, French ambulances were used to evacuate wounded Serbian troops in Albania;[32] some wounded troops were transported for a distance of 180 kilometers.[33] It does not appear, however, that Red Cross marked flying ambulances were used during the First World War.[34] Italian and British forces also used aircraft to evacuate some wounded.[35] The French used medical aircraft in the post-war period in their colonies, also.[36] Some 2,800 wounded and sick were evacuated by the French during a three-year period alone.[37]

The first explicit recognition of medical aircraft in a proposed treaty is to be found in the Hague Rules of Air Warfare.[38] Article 17 of the Rules stated that the principles laid down in the Geneva Convention of 1906 and the adoption of that Convention to Maritime War "shall apply to aerial warfare and to flying ambulances," provided that the flying ambulances bear the distinctive emblem of the Red Cross. The proposed treaty, however, which was drafted by the Commission of Jurists created at the Washington Conference of 1921, never came into force.[39]

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29 J. DEVILLERS, supra note 1, at 18 (1933).

30 *Id.* at 18-19.

31 J. DEVILLERS, supra note 1, at 19. The use of medical aircraft during World War I is discussed in greater detail in C. JULLIOT, LES AÉRONEFS SANITAIRES ET LA GUERRE DE 1914 (1918); see also P. FACCHILLE, 2 TRAITÉ DE DROIT INTERNATIONAL PUBLIC: GCERRE ET NEUTRALITÉ 626 (1921).

32 J. SPAIGHT, AIR POWER AND WAR RIGHTS 359 (3rd ed. 1947).

33 *Id.*

34 Id.

35 GIASNI, supra note 1, at 7.

36 J. DEVILLERS, supra note 29, at 19ff.

37 Di Nola, *Aviazione Sanitaria*, 1 RIVISTA AERONAUTICA 35, 41 (1925).

38 DISPATCH FROM THE FIRST BRITISH DELEGATE TO THE INTERNATIONAL COMMISSION FOR THE REVISION OF THE RULES OF WARFARE, THE HAGUE, DEC. 10, 1922–FEB. 17, 1923, CMD. No. 2201, at 15-60 (1924), *reprinted in* 1 THE LAM OF WAR: A DOCUMENTARY HISTORY 437 (L. Friedmann ed. 1972).

39 K. COLEGROVE, INTERNATIONAL CONTROL OF AVIATION 127, 144 (1930). According to one author, the proposed rules never became law because of the "stubborn attempt of the drafters of the code to fit the new method of warfare

C. THE 1929 GENEVA CONVENTION

In the 1920's, the International Committee of the Red Cross (I.C.R.C.) began devoting attention to the adoption of the Geneva Convention of 1906 to the problems of aerial war.[40] During the 11th International Red Cross Conference of 1923, the French Delegation proposed that medical aircraft be included on the agenda of the next Red Cross Conference.[41] A draft convention was prepared and approved by the 12th International Red Cross Conference, but the Swiss Government, when it convened a Diplomatic Conference to revise the 1906 Conference, decided not to include medical aircraft into the programme.[42]

In May, 1929, the First International Congress of Medical Aircraft was held in Paris. The Congress expressed the hope that medical aircraft would be the subject of international regulation, especially at the upcoming Geneva Conference called by the Swiss Federal Council.[43] At the July, 1929, Convention of the Red Cross, the French and British Delegations introduced proposals on medical aircraft.[44] As Pictet put it, "it appeared impossible to revise the Geneva Convention without making provision for the use of medical aircraft" [45] and the Convention proceeded to adopt a provision on medical aircraft.

It has been observed that article 18 of the 1929 Convention,[46] which explicitly granted juridical status to medical aircraft, "has been widely and deservedly praised as the most important innovation made in this Convention." [47] The final text of Article 18 stated that

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into the traditional (and already outmoded) patterns of war on land and at sea." G. VON GLAHN, LAW AMONG NATIONS 595 (1970). On the development of the law of aerial warfare in the pre-Second World War period, see R. SASTRY, STUDIES IN INTERNATIONAL LAW 312ff. (1952) and P. TANDON, PUBLIC INTERNATIONAL LAW 702ff. (9th ed. 1963).

40 K. COLEGROVE, *supra* note 39, at 143.

41 For a history of the negotiations, see INTERNATIONAL COMMITTEE OF THE RED CROSS, 1 COMMENTARY GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD *285* (J. Pictet ed. 1952) [hereinafter cited as 1 COMMENTARY (GWS)].

42 Id.

43 J. DEVILLERS, *supra* note 1, at 52-53.

44 J. DEVILLERS, *supra* note 1, at 54-57; Pictet, 1 COMMENTARY (GWS) at 285.

45 Pictet, 1 COMMENTARY (GWS) at 285.

46 47 Stat. 2074, T.S. No. 847, *supra* note 15. *See generally* C. JULLIOT, LA CONVENTION DE GENÈVE DE 1929 ET L'IMMUNISATION DES APPAREILS SANITAIRES AÉRIENS (1929); DES GOUTTES, LA CONVENTION DE GENÈVE DE 1929 (1930).

47 Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, 8 AM. U.L. REV. 1, 14 (1959). On Article 18 in general see, A. WERNER, LA

> Aircraft used as a means of sanitary transportation shall enjoy the protection of the Convention during such time as they are exclusively reserved for the evacuation of wounded and sick and for the transportation of sanitary personnel and matérial.
>
> They shall be painted in white and shall bear clearly visible the distinctive sign mentioned in Xrticle XIX alongside of the national colors on their upper and lower surfaces.
>
> Excepting with special and express permission, a flight over the firing-line, as well as over the zone situated in front of the major medical dressing stations, and in general over any territory under the control of or occupied by the enemy shall be forbidden.
>
> Sanitary aircraft must comply with all summons to land.
>
> In the case of a landing thus required or made accidentally upon territory occupied by the enemy, the wounded and sick, as well as the sanitary personnel and matérial, including the aircraft, shall benefit by the provisions of the present Convention.
>
> The pilot, mechanics, and wireless operators who have been captured shall be returned on conditions of only being utilized in the sanitary service until the termination of hostilities.

The 1929 Conference, however, was aware that its article on medical aircraft was not adequate. Since it had not been on the Conference's agenda, it was drafted quickly without the help and advice of experts on the topic. As a result, the final act of the 1929 Conference called for another conference to convene "at an early date, for the purpose of regulating in as wide a sense as may be expedient the utilization of air ambulances in time of war." [48] Another draft convention was prepared by Julliot and Des Gouttes and was placed on the agenda for the Diplomatic Conference that was to convene in 1940.[49] However, because of the advent of the Second World War, the Conference was postponed. Thus, the 1929 Convention was the conventional law in effect on medical aircraft during the war.[50]

CROIX-ROUGE ET LES CONVENTIONS DE GENEVE: ANALYSE ET SYNTHÈSE JURIDIQUES 239-42 (1943).

48 Pictet, 1 COMMENTARY (GWS) at 286. A slightly different translation of the final act, which was signed on July 27, 1929, may be found in the Final Act of the Diplomatic Conference 1929, para. 3, *printed in* SCHINDLER & TOMAN, *supra* note 14, at 244, 245.

49 Pictet, 1 COMMENTARY (GWS) at 286.

50 Under Article 25 of the 1929 Convention, if one participant to a conflict is not a party to the Convention, "its provisions shall nevertheless remain in force as between all the belligerents who are parties to the Convention." This differs from the 1906 Geneva Convention. Under Article 24 of that Convention, the Convention was not obligatory if one party to the conflict was not a signatory.

Even though the provision on medical aircraft was deemed to be a contribution to the law of warfare, it proved to be of little practical value during the Second World War. The conditions imposed on medical aircraft were strict and far less liberal than those imposed on hospital ships.[51] One obstacle was that aircraft had to be used exclusively for medical evacuation. The practice of the British and the United States military during World War II was to use the same aircraft for both military and evacuation purposes.[52] Thus, the R.A.F. Transport Command would use its planes to carry material and personnel to the war zone and evacuate the wounded and sick during the return flight.[53] The U.S. found it militarily advantageous to do the same thing.[54] Because of this "dual use," such aircraft were not entitled to use the Red Cross marking. The German army, on the other hand, did have some planes that were used exclusively for the transport of the wounded and sick.

A major controversy erupted during the Second World War between two signatories of the 1929 Convention. The controversy centered on the issue of whether certain German "seaplane ambulances" were entitled to protection under Article 18.[55] In 1940, the German Government commissioned about one hundred light aircraft for air-sea rescue[56] purposes and began using Heinkel 59 seaplanes as "ambulance aircraft."[57] These planes had the Red Cross marking and were used to rescue German seamen who were shot down in the English Channel. The German Government claimed that these aircraft were immune under the 1929 Convention and thus had a right to operate near the British coast.[58] The German government also appears to have argued that the seaplanes could be treated as hospital

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51 R. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 130 (1957); On hospital ships in general during this period of history, see 2 WHEATON'S INTERNATIONAL LAW 273-81 (7th ed. A. Keith 1944).

52 J. SPAIGHT, *supra* note 32, at 360. The British did have some aircraft in the Mediterranean and the Middle East that were used exclusively for evacuation purposes. ***Id.***

53 ***Id.***

54 *Id.*

55 The dispute on the seaplanes is discussed in L. OPPENHEIM, 2 INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 506 (7th ed. H. Lauterpacht 1952); R. TUCKER, *supra* note 51, at 130 n.9; E. CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 396 (1954).

56 Mossop, *Hospital Ships in the Second World War*, 24 BR. Y.B. INT'L L. 398, 403 (1947).

57 J. SPAIGHT, *supra* note 32, at 361.

58 Mossop, *supra* note 56, at 403.

ships under the 1907 Convention[59] since that treaty did not specify any size limits for hospital ships.[60]

The German claims that the aircraft were protected under either the 1907 or 1929 Geneva Conventions were rejected by the British Government. The British had captured one ambulance carrier that had apparently been used for ordinary transport purposes,[61] and the logbook of another aircraft that was forced down by the R.A.F. indicated that it had been used for reconnaissance, *i.e.*, that it had been used for military, not humanitarian purposes.[62] As a result, the British Government stated that ambulance aircraft were not authorized to fly over areas in which operations were in progress, whether on land or sea; nor could such aircraft approach territory in British or Allied occupation or of British or Allied ships.[63] The British Government also rejected the German contention that airmen who were shot down into the sea could be deemed to be "shipwrecked" personnel within the meaning of the 1907 Geneva Convention.[64] On the same day that the announcement was made, two German seaplanes were shot down as they approached the English coast.[65]

Many international law publicats who have analyzed the seaplane controversy have supported the British action. Tucker emphasized that the Germans did not have the prior approval of the British to operate.[66] Spaight wrote that the Germans had tried to "twist the provision [on medical aircraft] to their own advantage in a wholly unauthorized way," and to use it for "a purpose never contemplated in the Convention of 1929."[67] Mossop thought that as far as the air-sea rescue crafts and ambulance aircrafts were concerned, "the British Government were within their strict rights."[68] According to Castrén,

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59 See *supra* note 13.

60 Mossop, ***supra*** note 56, at 403.

61 *Id.*

62 J. SPAIGHT, *supra* note 32, at 361.

63 ***Id.*** **L.** OPPENHEIM, ***supra*** note 55, at 506; Mossop, *supra* note 56, at 403. The British announcement was made in the AIR MINISTRY BULLETAIN, ***So.*** 18209, **2** April 1945, *cited in* J. SPAIGHT, *supra* note **32,** at 361.

64 Mossop, *supra* note 56, at 403. It seems that Oppenheim and Lauterpacht may have been of a different view. See L. OPPENHEIM, *supra* note 55, at 506. Apparently the German Government did not protest the British refusal to recognize the aircraft as protected .aircraft under the Geneva Convention. E. DAVIDSON, THE TRIAL OF THE GERMANS 399 (1966).

65 J. SPAIGHT, *supra* **32,** at 361.

66 R. TUCKER, ***supra*** note 51, at 130 n.9.

67 J. SPAIGHT, *supra* note 32, at 361.

68 Mossop, *supra* note 56. at 403.

Great Britain was entitled to not allow German aircraft to rescue airmen because "the international agreements then in force did not protect such medical aircraft while flying over the sea," [69] while Stone merely referred to the "German abuse of the privileges of medical aircraft." [70]

It has been said that during the Second World War, "Article 18 was . . . more or less a dead letter," [71] even though air evacuation flights were used extensively during the war. One and a half million Americans alone were evacuated by air during the war.[72] The United States primarily used aircraft that were not devoted exclusively to the care of the wounded and sick. It was able to do so because of its air supremacy. Even though these aircraft would not have been entitled to juridical protection under the 1929 Geneva Convention, none of the aircraft used to convey casualties "suffered any mishap during the war." [73]

Thus, the experience of World War II proved that a country with air superiority could evacuate its wounded without the protections of Article 18 of the Geneva Convention of 1929 at least given the fact that highly sophisticated helicopters were not widely used for evacuation from the battlefield. In addition, the enthusiasm for juridical protection for medical aircraft was perhaps dampened because of the apparent abuse of what purported to be medical aircraft.[74]

D. THE 1949 GENEVA CONVENTIONS

On August 12, 1949, a Diplomatic Conference convened by the Swiss Government approved the text of four new Geneva Conventions.[75] Three of these Conventions have provisions on

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69 E. CASTRÉN, ***supra*** note 55, at 3%.

70 J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 671 (1954).

71 J. SPAIGHT, ***supra*** note 32, at 361.

72 See AEROMEDICAL EVACUATION: BACKGROUND INFORMATION REPORT, ***supra*** note 4, at 3-4.

73 J. SPAIGHT, *supra* note 32, at 361. Indeed, only ***46*** of the patients transported by air during the Second World War died while in flight. Shaeffer, ***Deaths in Air Evacuation***, 19 J. AVIATION MED. 100 (1948).

74 Gutterridge, *The **Geneva** Conventions of* 1949, 26 BRIT. Y.B. INT'L L. 294, 308 (1949).

75 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3515, T.I.A.S. No. 3365 [hereinafter referred to and cited as the Civilian Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3115, T.I.A.S. No. 1362 [hereinafter referred to and cited as the GWS Convention]; and the Geneva Convention for the Amelioration of the

medical aircraft.[76] With the experience of World War II behind them, the drafters of the conventions sought to clarify and restrict the provisions of the 1929 Convention.

These provisions are the current legal codifications of the status of medical aircraft. Because of the new restrictions placed on medital aircraft," it has been rightly said that medical aircrafts were not "la grande dame de Genève" in 1949.[78] Many commentators agree that the provisions of the 1949 conventions are "strict" ones,[79] and as one author put it, "[i]t is readily apparent . . . that the inclusion of medical aircraft in the 1949 Convention was—at best—done only reluctantly." [80] At least one delegate realized that more protection was needed, He, a delegate of a great power, had proposed the complete immunity of hospital aircraft, which would obviously be the best solution from the humanitarian point of view.[81]

The provisions of Articles 36 and 37 of the Geneva Convention on the Wounded and Sick in the Field and Articles 39 and 40 of the Geneva Convention on the Wounded and Sick at Sea are substantially identical. The first provision[82] is as follows.

Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, **Aug. 12, 1949,** [1955] 3 **U.S.T.** 3217, **T.I.A.S.** No. **3363** [hereinafter referred and cited as the GWS (Sea) Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. **12, 1949,** [1955] 3 **U.S.T. 3316, T.I.A.S. So. 3364.**

76 Only the P.O.W. Convention lacks a provision on medical aircraft. **A** convenient listing of the signatories and the date of accession to the various conventions can be found in G. SCHWARZENBERGER, 2 INTERNATIONAL COURTS: **THE LAW OF ARMED CONFLICTS 792-93** (1968).

77 The phrase "medical aircraft" was introduced at the **1949** Conventions. Originally, the draft articles used the phrase "hospital aircraft," but this was changed due to motions made by the United States and Canadian delegations. **2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE 141-142.**

78 Schickelé, *Aviation Sanitaire Et Convention De Genève,* 13 REVUE GÉNÉRALE **DE** L'AIR **847 (1950).**

For a general discussion on the status of medical aircraft under the Geneva Conventions, see Evrard, *La Protection Des Transports Ahriens Sanitaires En Temps De Guerre Et La Convention De Genève,* ACTA BELGICA **DE** ARTE MEDICINALI ET PHARMECEUTICA MILITARI **439** (1963).

79 R. **TUCKER,** *supra* note **51,** at 130; **L. OPPENHEIM,** ***supra*** note 55, at **507;** G. **DRAPER, THE RED CROSS CONVENTIONS** 90 **(1958); E.** CASTRÉN, *supra* note 55, at **396.** Evrard, **La** *Protection Juridique Des Transports Aériens Sanitaire En* Temps *De Guerre,* ANNALES DES DROIT INTERNATIONALE MEDICAL 11, 17 (No. 12, Oct. **1965).**

80 R. **TUCKER,** *supra* note **51,** at 130 n.8.

81 2A **FINAL** RECORD **OF THE DIPLOMATIC CONFERENCE 89.**

82 GWS, art. **36;** GWS (Sea), art. **39.**

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.

They shall bear, clearly marked, the distinctive emblem prescribed in Article **38,** together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification that may be agreed upon between the belligerents upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Article **24** and the Articles following.[83]

According to the second provision,[84]

Subject to the provision of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land on it in case of necessity, or **use** it as a port of call. They shall give the neutral Powers previous notice of their passage over the said territory and obey all summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless agreed otherwise between the neutral Power and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

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[83] The only differences between this provision in the GWS Convention and the GWS (Sea) Convention is that in the clause two of the latter convention, Article 41 rather than **38** prescribes the distinctive emblem. Medical personnel are to be treated in accordance with Articles *36* and **37** (clause **5)** of the GWS (Sea) Convention.

[84] GWS, art. **39;** GWS (Sea), art. 40.

The provision in the Geneva Civilians Convention[85] does not track verbatim the ones in the other two conventions.

> Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.
>
> They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1919.
>
> Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.
>
> Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

E. ANALYSIS OF 1949 CONVENTIONS

The laws of war have generally been based on a balancing of "military necessity" and "humanitarian considerations."[86] This is especially obvious in the case of medical aircraft, as can be seen in the explicit provision that medical aircraft are entitled to protection *only* when flying at heights, times, and routes specifically agreed upon by the belligerents.[87] This means that the basic prerequisite for protection is the prior consent of the other belligerent. If the other belligerent does not give his consent for the specific flight or for flights in general, the medical aircraft are not entitled to juridical protection.[88]

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[85] GCC, art. 22.

[86] M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 522 (1961); De Mulinen, *Nécessité Militare Et Lieux Protégés Par Le Droit De La Guerre*, REVCE MILITAIRE SUISSE 335, 338ff. (July 1966).

[87] GWS, art. 36, para. 1; GWS (Sea), art. 39, para. 1; GCC, art. 22, para. 1. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE, para. 237, at 94 and para. 261, at 104 (1956) [hereinafter cited as FM 27-10]; THE WAR OFFICE, MANUAL OF MILITARY LAW, PART III, THE LAW OF WAR ON LAND para. 34, at 15, and para. 358, at 115. (1958) [hereinafter cited as MANUAL OF MILITARY LAW (UK)]; M. WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 372, 408 (1968); A. PAVITHRAN, SUBSTANCE OF PUBLIC INTERNATIONAL LAW 493-4 (1965). It is perhaps because of such a condition that one international law publicist deems the provisions on medical aircraft to be "purely optional"; G. SCHWARZENBERGER, A MANUAL OF INTERSATIOSAL LAW 209 (5th ed. 1967).

[88] The original draft article submitted by the I.C.R.C. stated that hospital aircraft and "in particular seaplanes" would not be the object of attack and that they would only "endeavour to inform the enemy of their route, altitude and time of flight." See INTERNATIONAL COMMITTEE OF THE RED CROSS, REVISED AND NEW

Two essential reasons are given for this provision. The first is technical. Some of the members of the Convention thought that under modern conditions of warfare, painted markings and red crosses on aircraft were not effective methods of identification.[89] Aircraft would be fired upon before their markings could be identified. Consequently, it was thought that only prior agreements as to the routes, heights, and times could provide effective protection.[90]

The second reason behind the restriction is based on the need for military security. Aircraft searching for the wounded, sick, and shipwrecked were not given protection under the treaty.[91] The risk that increasingly sophisticated aircraft would be used for espionage or other nonhumanitarian purposes was considered to be too great.[92]

This provision does not require that the aircraft have been built and equipped for medical purposes. As the U.S. manual on the law of war puts it, "[t]here is no objection to converting ordinary aircraft into medical aircraft or to using former medical aircraft for other purposes, provided the distinctive markings are removed." [93]

All medical aircraft are required to bear one of the distinctive emblems of the Geneva Conventions[94] and to have their national

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DRAFT CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, REVISION OF THE GENEVA CONVENTION OF JULY 27, 1929, FOR THE RELIEF OF THE WOUNDED AND SICK IN ARMIES IN THE FIELD, art. 36 (1948).

89 Pictet, 1 COMMENTARY (GWS) at 288; Pictet, 4 COMMENTARY (GCC) at 173; *see* 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE 86, 197. M. Greenspan has pointed out that aircraft could not be recognized at night, and that medical aircraft would be the easy target of wireless projectiles if they were not given better protection than they had under prior law. THE MODERN LAW OF LAND WARFARE 87 n.66 (1959).

90 The provisions for mandatory prior approval of all medical aircraft flights was introduced at the Convention by the United Kingdom. They were adopted in committee by a vote of 21 to 1 and 14 to 1. 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE at 86, 87. Still, some authors, such as General Evrard of the Belgium Medical Corp thought that the proper "identification" argument was just a pretext: the crux of the restrictions on medical aircraft was the fear that they might be used for operations that endangered one's military security. Evrard, *La Protection Juridique Des Transports Aériens Sanitaires En Temp De Guerre*, ANNALES DE DROIT INTERNATIONAL MÉDICAL 11, 17 (No. 12, Oct. 1965).

91 Pictet, 4 COMMENTARY (GCC) at 174.

92 *Id.*; L. OPPENHEIM, *supra* note 55, at 359. M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 593 (1961).

93 FM 27-10, para. 237 (6), at 94. Since aircraft need not be permanently assigned as medical aircraft, they can be converted into such for emergency relief missions. Pictet, 1 COMMENTARY (GWS) at 288-289, 2 COMMENTARY (GWS) (Sea) at 217; 4 COMMENTARY (GCC) at 174.

94 GWS, art. 36, para. 2; GWS (Sea), art. 39, para. 2. Under Article 38 of the

colours on their lower, upper, and lateral sides.[95] The 1949 Conventions abandoned the 1929 Convention's requirement that medical aircraft be painted white, although a belligerent has the option to do so. By eliminating this requirement. less time is needed to convert aircraft into medical aircraft.[96] The parties to a conflict, however. are free to agree on any other markings or other methods of recognition, such as radio signals.

Flights over enemy or enemy-occupied territory are expressly prohibited by the Conventions, unless there is prior approval."[97] As Pictet has put it, this provision is not as "prejudicial to the interests of humanity as has been believed."[98] Pictet reasons that medical

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GWS, the red cross on a white background is the distinctive sign of the Medical Service of armed services. For countries that already used the red crescent (such as Turkey) or the red lion and sun (such as Iran) on a white background, those emblems also are recognized. *See also* Article 41 of the GIYS (Sea). Israel attempted to have the Star of David made a distinctive emblem, but this was not accepted by the Convention. Consequently, it made a reservation to the Conventions when it acceded to them to the effect that the red Star of David would be Israel's emblem for purposes of medical personnel and vehicles. For a thorough discussion on the topic of proper identification of medical material, see De Mulinen, *Signalling and Identification of Medical Personnel and Material*, INTERNATIONAL REVIEW OF THE RED CROSS 479 (September 1972).

95 Wings are not mentioned in the articles because some medical aircraft will not have any. Pictet, 1 COMMENTARY (GWS) 289; Pictet, 2 COMMENTARY (GWS) (Sea) 217; It should be noted that under Article 22 of the Civilians Convention. medical aircraft "may be marked with the distinctive emblem." The phrase "shall bear, clearly marked, the distinctire emblem," which is used in the two other Conventions, is not used. Still, the Commentary to the Civilian Convention states that the marking with the distinctive emblem is, "in actual fact, indispensable," even though not required by the language of the provision. The main reason is that if the aircraft is diverted from the prearranged route, it might still need protection. 4 COMMENTARY (GCC) 175; *cf.* M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 165 (1959). Aside from the express provisions of the 1919 Conventions, other provisions also have a restraining effect on the use of medical aircraft. On the difficulty of creating landing areas around sanitary zones which have established in accordance with Article 14 of the GCC or the annex on hospital zones attached to GWS Convention, see Evrard, *Problèms Médico-Juridiques Posés Par Le Concept Des Zones Et Localitiés Sanitaires Et Celui Des Zones Et Localités De Sécurité En Temp De Guerre*, 46 REVUE INTERNATIONALE DES SERVICES DE SANTE DES ARMÉES DE TERRE, DE MER, ET DE L'AIR 563, 573 (1973).

96 Pictet, 1 COMMENTARY (GWS) at 290; Pictet, 2 COMMENTARY (GWS) (Sea) at 218.

97 GWS, art. 36. para. 3. GWS (Sea), art. 39, para. 3 GCC; art. 22, para. 3. FM 27-10, para. 237, at 94, and para. 261, at 104; MANUAL OF MILITARY LAW, para. 34, at 15, and para. 358, at 115.

98 Pictet, 4 COMMENTARY (GCC) at 175; Pictet, 1 COMMENTARY (GWS) at 291.

aircraft serve the purposes of bringing medical personnel and supplies to the wounded and sick and evacuating them. Accordingly, a medical aircraft need only operate in its home territory or that of its allies, or in areas occupied by its country's armed forces.[99] Nevertheless, this restriction is based on the demands of military security, even if it is strictly unwarranted observation.

If a medical aircraft voluntarily flies over enemy or enemy-occupied territory, without permission from the other belligerent[100] it is violating the rules embodied in the Conventions of 1949 and is not entitled to any special protection.[101] Since the immunity from attack is based on prior consent of the other belligerent, a medical aircraft could perhaps be deliberately shot down without violating the law of war.[102]

Medical aircraft have the duty to obey every summons to land,[103] just as was true under the 1929 Convention.[104] According to Pictet, this provision applies to aircraft flying over enemy or enemy-occupied territory (whether authorized to fly there or not) and also to aircraft flying over their own territory when they are close to enemv lines.[105] If the aircraft refuses to obey a summons to land, it may be lawful to fire upon it.[106] After the plane has obeyed, it is subject to inspection. But unlike the procedures under the 1929 Convention, the aircraft may continue with its flight if the inspection

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99 *Id. See also* Simpson, *The* ***Airplane Ambulance–Its Use In War,*** 64 THE MILITARY SURGEON 35, 46 (1929).

100 Pictet, 1 COMMENTARY (GWS) at 291. There is no definition of occupied territory in the provisions on medical aircraft because the Conference did not regard it as part of its task. 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE 205.

101 Pictet, 1 COMMENTARY (GWS) at 291.

102 The ***Manual of Military Law*** states that medical aircraft "must not be attacked," but then says that they must be respected only when flying on the prearranged routes, times, and heights. Para. 358, at 115. According to Pictet, it is lawful to fire upon medical aircraft if they refuse a summons to land. 4 COMMENTARY (GCC) at 176.

103 GWS, art. 36, para. 4 GWS (Sea), art. 39, para. 4. GCC, art. 22, para. 4. FM 27-10, para. 237, at 94, and para. 261, at 104. MANUAL OF MILITARY LAW, para. 34, at 15, and para. 359, at 115.

104 One author concluded that "[i]t is not unreasonable to assume that the power thus given belligerents to compel medical aircraft to alight is to be exercised with due discretion (e.g., having regard to the availability of safe landing facilities), though no such phrase is contained in Article 395 of the GWS (Sea) Convention." R. TUCKER, ***supra*** note 51, at 130 n.10.

105 Pictet, 1 COMMENTARY (GWS) at 292; 4 COMMENTARY (GCC) at 176.

106 ***Supra*** note 102.

reveals that the aircraft is, in fact, on a medical mission.[107] This is considered to be an appropriate rule because the medical aircraft should not be penalized for having obeyed all of the conditions necessary for protection.[108] If, on the other hand, the inspection indicates that the medical aircraft was used for acts harmful to the enemy, "the enemy may seize it and intern the crew and passengers," [109] and the aircraft becomes "war booty." [110]

The Conventions appear to have adopted a somewhat different rule for cases of involuntary landings. Both the crew and the wounded and sick shall become prisoners of war."' Medical personnel are to be treated as always under the Convention.[112]

Whether or not medical aircraft could fly over neutral countries was not addressed by the 1929 Convention. This led one author to speculate that "[f]lying ambulances will be free to enter neutral jurisdictions, and to leave again, in connection with the evacuation of the wounded and sick, presumably" although the aircraft might need permission to enter the neutral jurisdiction.[113] The wounded and sick personnel might also be subject to internment.[114]

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[107] Article **18** of the **1929** Convention stated that the personnel and material of the aircraft would "enjoy the privileges of the present convention." In effect, this meant that the wounded and sick would become prisoners of war and the medical personnel would be returned. Pictet, 1 **COMMENTARY** (GWS) at **292.** The crew would be sent back only on condition that "they shall be employed until the end of hostilities in the medical services only." (Geneva Convention of 1929, art. **18,** para. 5). *See also* **L. OPPENHEIM,** supra note 55, at **360.**

[108] *See* Pictet, 1 COMMENTARY (GWS) at **293;** 2 **COMMENTARY** (GWS) (Sea) at **221;** 4 **COMMENTARY** (GCC) at **177.**

[109] Pictet, 4 COMMENTARY (GCC) at **177.** *See also* **E.** CASTRÉN, supra note 55, at **397.**

[110] Pictet, 2 **COMMENTARY** (GWS) (Sea) at 222. If the aircraft belonged to a private relief society protected by the conventions, however, Pictet states that the aircraft will be treated as private property. *Id.* On "war booty" in general, see Downey, Captured *Enemy Property* of ***War:*** *Booty Of* ***War*** *And Seized Enemy Property,* **44** AM. J. INT'L L. 448 **(1950);** Smith, *Booty Of War,* 23 **BRIT.** Y.B. INT'L L. 227 (1946).

[111] GWS, art. **36,** para. 5; GWS (Sea), art. **39,** para. 5. FM **27-10,** para. 237, at **94.** **MANUAL** OF MILITARY **LAW,** para. **360,** at **115.**

[112] *See, e.g.,* GWS, art. 24, 25. *See* Evrard, *Organisation Mondiale De* ***La*** *Médecine, Pool Blanc, Medecine Militaire Et Conventions de Geneve,* 11 **THE** MIL. L. & **L. OF WAR REV.** 15 **(1972) for** a general discussion on the military medical services and their juridical status; *cf.* Gillyboeuf, *Le Service De Santé En Temps De Guerre,* 46 REVUE INTERNATIONALE DES SERVICES DE SANTÉ DES ARMÉES DE TERRE, DE MER, ET DE L'AIR **9ff** (1974).

[113] J. SPAIGHT, *supra* note 32, at 358-359.

[114] *Id.* at 359. *See also* G. HACKWORTH, 7 DIGEST OF INTERNATIONAL LAW 554

In order to clarify the rights of medical aircraft flying over neutral territory, a special provision was inserted in two of the Conventions of 1949.[115] These provisions seek to reconcile the rights of neutral states and humanitarian considerations.[116] According to Oppenheim, two customary rules of law have developed on the flight of belligerent aircraft during war. First, that they may not enter the air space above neutral territory and second that if they do, they must land and their personnel be interned.[117] Although medical aircrafts are not to be engaged in war, they often are part of the military service.[118] The solutions adopted in the 1949 Conventions are that medical aircraft must (1) give the neutral powers prior notice of their passage over neutral territory; (2) they must obey all summons to alight, whether on land or water; (3) they are immune from attack only when flying on routes, heights, and times specifically agreed upon by the parties to the conflict and the neutral power.[119] The neutral powers are entitled to place conditions on the passage or landing of medical aircraft on their territory, but these conditions must apply to all parties to the conflict.[120]

The provision on neutral territories is silent as to whether the flight may continue if there has been a voluntary or involuntary landing and an inspection. The official commentary to the Conventions has interpreted the provision to mean that the personnel can only be retained if an inspection reveals that the aircraft has been used for

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(1943); NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 100-101 (1926); NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 30 (1931).

115 GWS, art. 37; GWS (Sea), art. 40; *see also* FM 27-10, para. 540, at 189.

116 Pictet, 2 COMMENTARY (GWS) (Sea) at 223.

117 L. OPPENHEIM, *supra* note 55, at 725.

118 According to the authoritative commentary on the Geneva Conventions of 1949, "[a] medical aircraft is never a military aircraft, just as a hospital ship is never a warship" Pictet, 1 COMMENTARY (GWS) (Sea) at 216 n.2. Still, they may be owned by the armed forces (or voluntary aid societies), *id.* at 216, and as a general rule, they are part of a military medical service. The laws that apply to such medical aircraft and their personnel are based on the same principles applicable to land and sea medical vessels, however, not that which applies to belligerent forces. G. PALLIERI, DIRITTO INTERNAZIONALE 509 (7th ed. 1956). On the status of *military* aircraft *per se, see generally* M. MCDOUGAL, H. LASSWELL, I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 716ff. (1963); MING-MIN PENG, LE STATUT JURIDIQUE DE L'AÉRONEF MILITAIRE (1957); L'AÉRONEF MILITAIRE ET LE DROIT DES GENS (1963).

119 GWS, art. 37; GWS, art. 40. *See also* Pictet, 1 COMMENTARY (GWS) at 295. Pictet, 2 COMMENTARY (GWS) (Sea) at 224-225.

120 *Id.*

"acts incompatible with the humane role" of medical aircraft.'" In other words, this provision is interpreted to mean that personnel in the aircraft are free to leave after landing in neutral territory if the medical aircraft is fulfilling the requirements of the Conventions."' A responsible officer of the medical aircraft, however, may want to leave the wounded and sick in the neutral country, *e.g.*, for reasons of health. The Conventions of 1949 provide that unless otherwise agreed upon by the neutral country and the parties to the conflict,[123] the wounded and sick may be detained "where so required by international law, in such a manner that they cannot again take part in operations of war." [124]

The provisions on medical aircraft in the 1949 Conventions have generally not been well received by international law commentators. One author noted that some of the changes made in 1949 were "manifest regressions" from the 1929 Convention.[125] Another complained of the "grave faults" in what appeared to be an exhaustive treatment of medical aircraft." It has been said that the delegates of the Diplomatic Conference of 1949 forgot that medical aircraft had humanitarian purposes which should not have been disposed of lightly.[127] Still another complained that medical aircraft were considered to be part of the law of aerial warfare rather than part of international humanitarian law.[128] As one author put it, "[t]he effect of these provisions [of the 1949 Convention on medical aircraft] was either to

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121 Pictet, 1 COMMENTARY (GWS) at 295; Pictet, 2 COMMENTARY (GWS) (Sea) at 224.

122 *Id.*

123 GWS, art. 37; GWS (Sea) art. 40.

124 Pictet, 1 COMMENTARY (GWS) 295-6; Pictet, 2 COMMENTARY (GWS) (Sea) 224-5; Some authors, on the other hand, believe that the wounded and sick "must be interned." Ginnane & Yingling, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 399 (1952). *See* FM 27-10, para. 542, at 190, which might apply *to* wounded and sick left in a neutral state. See *also* De No Louis & Tardio, *Le Aeronawe Militar Y Los Paises No Participantes En La Guerra* in L'AÉRONEF MILITAIRE ET LE DROIT DES GENS 163, 174 (1963); A. SERENI, 4 DIRITTO INTERSAZIOSALE: CONFLITTI INTERNAZIONALE 1955 n.2 (1965); M. GREESSPAS, THE MODERN LAW OF LAND WARFARE 565 (1959).

125 E. CASTRÉN, *supra* note 55, at 396.

126 De la Pradella, *Le Statut De L'Aviation Sanitaire*, 29 REVUE GÉNÉRALE DE L'AIR 261, 262 (1966).

127 Shickelé, *Aviation Sanitaire et Convention de Genève*, 13 REVUE GÉNÉRALE DE L'AIR 847, 848, 881 (1950).

128 *E.g.*, DALLOZ, 2 RÉPERTOIRE DE DROIT INTERNATIONAL, para. 233, at 98 (ed. Francesakis 1969); *cf.* DeSaussure, *The Laws Of Air Warfare: Are There Any?* 5 INT'L LAWYER 827, 531 (1971).

keep medical aircraft permanently grounded or to subject their operations to the risk of attack without any legal protection." [129]

The view that medical aircraft would be used sparingly as a result of the 1949 provisions has perhaps proved to be accurate.[130] The provisions of the Convention of 1949 have virtually remained a "dead letter," [131] largely because agreement on routes, altitudes, and times have seldom been feasible: a technical channel of communication has not been developed.[132] Thus, although medical aircraft theoretically have immunity under the Conventions, for both technical and juridical reasons they can rarely receive such protection.[133] Since the protection afforded to medical aircraft is subject to sovereign discretion,[134] the view that medical aircraft receive only a nominal protection under the 1949 Conventions appears to be accurate.[135]

111. CURRENT INITIATIVES TO DEVELOP THE STATUS OF MEDICAL AIRCRAFT

Given the inadequacy of the 1949 Conventions as far as effective legal protection to medical aircraft is concerned, there have been requests to change the 1949 provisions. In 1965, the Medical-Juridical Commission of Monaco, at the request of the I.C.R.C., drafted a protocol regulating the Medical Transport by Air in Time of Armed Conflict.[136] The draft eliminated the prearranged flight plan

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[129] Solf, *That They May Live,* 18 U.S. ARMY AVIATION DIGEST 4, 5 (1972).

[130] R. TUCKER, *supra* note 51, at 130 n.8.

[131] *See* Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (2nd Session), 3 May-2 June 1972,* 3 NETHERLANDS YB. INT'L LAW 18, 25 (1972).

[132] Solf, *supra* note 129, at 5.

[133] Evrard, *La Protection Juridique Des Transports Ae'riens Sanitaires En Temps De Guerre,* ANNALES DE DROIT INTERNATIONAL MÉDICAL 11, 21 (No. 12, Oct. 1965).

[134] G. SCHWARZENBERGER, *supra* note 76, at 155.

[135] Some authors are of the view that the protection afforded to medical personnel on the whole has retrogressed in the 1949 Conventions. *See, e.g.,* Del Trono, *Decadenza E. Restaurazione D'Un Mito: La Neutralita' Della Medicina In Tempo Di Guerra,* 7 IL DIRITTO SANITARIO MODERNO 431, 434 (1959).

On the inadequacy of the Geneva Conventions of 1949 to provide effective legal protection for medical aircraft, see generally *La Protection De L'Aviation Sanitaire En Temps De Conflit,* ANNALES DE DROIT INTERNATIONALE 53 (No. 21, April 1971), *Le Statut International De L'Aéronef Militaire Sanitaire Et La Nécessité De Sa Réforme,* ANNALES DE DROIT INTERNATIONALE MÉDICAL 81 (No. 19, Dec. 1969).

[136] La Pradelle, *supra* note 126, at 261; Solf, *supra* note 129, at 5. The provisions of the Monaco draft are reproduced in INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT. 24

provision of the 1949 Conventions, except for battle areas and enemy-occupied territorv."[137] The draft also proposed that medical aircraft be equipped "with a continuous system of either light signals or of instantaneous electrical and radio identification, whichever is appropriate to operating conditions or with both." [138]

The Monaco draft evinces the fact that since 1949, there have been significant technological developments. First, the helicopter makes prompt evacuation from the battlefield possible, thus enhancing the possibility of survival for the wounded and sick.[139] Second, developments in communication and electronics makes it possible to devise effective identification systems[140]--the key reason why prearranged flight patterns were deemed necessary to begin with. Consequently, it was envisioned that new visual means of identification, including flashing blue lights, radio and radar could be used to provide better means of identification.[141]

The I.C.R.C., upon the recommendation of the 20th International Conference of the Red Cross, held in Vienna, in 1965, and the 21st International Conference of the Red Cross of 1969, held in Istanbul, decided to convene a Conference of Government Experts to consider the development of the existing humanitarian law applicable 'io armed conflicts.[142] The I.C.R.C. had also received encouragement from the Cnited Nations to study the steps which could be taken to better implement the existing law of armed conflict.[143]

From May 24 to June 11, 1971, a conference of government experts met in Geneva, Switzerland, upon the invitation of the I.C.R.C. At this session, the I.C.R.C. submitted to the experts various studies on medical aircraft and the Monaco draft, although no concrete proposals were formallv under consideration. The official report of

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Map-12 June, **1971,** 7 PROTECTION OF THE WOUNDED AND SICK **56-59 (1971);** *see also Commission Médico-Juridiqzre De Monaco,* INTERNATIONAL REVIEW OF THE RED CROSS 317 (June **1974).**

137 Monaco draft, art. 1, 5. This requirement for permission if flying over enemy held territory could be eliminated by agreement between the belligerents. (art. 5).

138 Monaco draft, art. **4.**

139 Solf, *supra* note **129,** at 5.

140 *Id.*

141 Evrard, *supra* note 133, at **26, 29,** 30.

142 INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, **1949,** at 1 (June **1973).**

143 *Id. See also Respect for Human Rights in Arnzed Conflict,* **G.A.** Res. **2852, 26** U.N. GAOR, U.N. Doc. A/Res/2852 **(1972);** *Report of the Secretary General, Respect For Human Rights in Armed Conflict,* U.N. Docs. **A/7720 (1969).**

the 1971 session indicates that the experts were faced with the fact that the 1949 Convention had the effect of "keeping the medical aircraft permanently grounded";[144] that the 1949 Conventions spoke only of the transport of the wounded and sick and medical personnel and equipment, not of civilian wounded and sick and civilian medical personnel;[145] that the 1949 texts did not clearly confer protection on all aircraft that was used for humanitarian purposes, such as those owned by the World Health Organization or the I.C.R.C.;[146] and that technical changes since 1949 could provide better means for identifying medical aircraft.[147] The government experts considered the possible use of flashing blue lights, radar and specific radio frequencies as means of identifying medical aircraft while on medica1 missions. Because of the technicality of the proposals, further discussions were postponed until the next session of government experts.[148]

A second session of the Conference of Government Experts was held from May 3 to June 3, 1972.[149] Seventy-seven governments were represented at the second session, while thirty-nine governments were represented at the first session.[150] The I.C.R.C. submitted two draft protocols to the second session of government experts, one on international armed conflict and one on noninternational armed conflict. These protocols were to supplement the four Geneva Conventions of 1949.

A technical subcommission was established to consider the marking and identification of medical transports, including medical air-

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144 INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 24 May-12 June 1971, 7 PROTECTION OF THE WOUNDED AND SICK, at 39 (1971).

145 Id. at 42.

146 Id. at 43.

147 Id.

148 INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT [FIRST SESSION, 24 MAY-12 JUNE 19711, 1 REPORT ON THE WORK OF THE CONFERENCE, para. 89-92, at 28 (August 1971).

149 The work of the conference is documented in INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT, SECOND SESSION, 3 MAY-3 JVNE 1972, 1 REPORT ON THE WORK OF THE CONFERENCE (July 1972) [hereinafter cited as REPORT ON THE WORK OF THE CONFERENCE].

150 *See generally* INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, 1-2 (June 1973).

craft.[151] This group, which met in Geneva from May 5 to May 10, 1972, submitted a report to the government experts who comprised Commission I of the Conference, those individuals charged with the problems of wounded, sick and shipwrecked persons.[152] The report, which served as the basis for discussion in Commission I, recommended that flashing blue lights, radio voice communications based on specified or agreed-upon frequencies and a Secondary Surveillance Radar (SSR) transponder code system be used to identify medical aircraft.[153] Visual identifications—the distinctive emblems—would still be required, but the more sophisticated means would be optional. This is because the other equipment is expensive, and if they were made mandatory, the conversion of regular aircraft into medical aircraft for temporary missions would be more difficult.

The technical subcommission recommended that one of the distinctive emblems of the protocol be conspicuously displayed so that it is visible in all directions.[154] The emblem should be red on a white field. A distinctive light signal was another recommended visual signal. This light signal would be a flashing blue light with a flash frequency of between 40 and 100 flashes per minute,[155] and the lamps producing the flashes should be located so that the light would be visible in as many directions as possible.

As for the nonvisual methods of identification, the technical subcommission recommended a radio message, prefixed by the word "Medical," that would transmit a specific message at an agreed-upon or specified frequency.*" The message would contain at least the following information: (1) the word "Medical" [followed by the

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151 Ten states and four specialized organizations were represented in the subcommission. The composition of the group is listed in annex IIIa, REPORT OF THE WORK OF THE COSFERESCE, *supra* note 149, at 55-56.

152 *See The Report of the Technical Sub-Commission on Marking and Identification of Medical Transports,* in REPORT OF THE WORK OF THE CONFERENCE, *supra* note 149, at 54-55.

153 For more information on the technical aspects, see generally INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION ASD DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, TECHNICAL MEMORANDUM OS MEDICAL MARKINGS AND IDENTIFICATION (April 1972).

154 *Draft Annex II to the Additional Protocol to the Four Geneva Conventions of August 12, 1949, Recommended International Standards, Practices and Procedures for the Identification and Signalling* of *Medical Aircraft,* in REPORT OF THE WORK OF THE CONFERENCE, *supra* note 149, art. 2.1.1, at 53.

155 Id., art, 2.1.2.

156 *Id.*, arts. 2.2, 2.2.1.1, and 2.2.1.2.

aircraft identification]; (2) the number and type of aircraft; (3) the route; (4) altitude; (5) timings. An SSR system, as specified by Annex 10 of the International Civil Aviation Organization (I.C.A.O.) could be used, according to the technical subcommission, and the designation of a specified code could be achieved in conjunction with I.C.A.O.[157] The technical subcommission also recommended that a system of periodic review be established in order to revise any system set up by the Protocols.

The technical subcommission's report, a series of draft articles on medical aircraft prepared by Commission I's drafting committee, and proposed draft articles submitted by the I.C.R.C. were subsequently discussed by the conference of government experts.[158] Although the Commission found the technical solutions on the identification of medical aircraft acceptable, whether the limited protection given to medical aircraft in the 1949 Conventions should be extended was more controversial.[159] Some delegations, including the United States, wanted to eliminate the burdensome requirement that a previous agreement on flight heights, times, and routes was absolutely necessary in order for medical aircraft to be immune from attack, even over a belligerent's own territory.'" For the battle area, it was deemed that only tacit agreement between the belligerents should suffice—no formal prior agreement would be necessary (although agreements would be necessary for flights over enemy-occupied territory).[161]

Some developing countries objected to the provisions on giving medical aircraft the freedom to operate without prior approval.[162] They not only reasoned that this would be an infringement on "sovereignty," but also argued that the "new proposals discriminated against states which did not have modern technical means of air transport." [163] In the view of some developing countries, "small states and liberation movements" which lacked sophisticated means of transport would be discriminated against.[164] It was also argued

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157 *Id.*, art. 2.2.2.

158 The Conference's discussion is to be found in REPORT OF THE WORK OF THE CONFERENCE, ***supra*** note 149, para. 1.66-1.110, at 41-52.

159 See Kalshoven, *supra* note 131, at 25.

160 *Id.* at 26; REPORT OF THE WORK OF THE CONFERENCE, *supra* note 149, para. 1.87, at 47.

161 *Id.*

162 REPORT OF THE WORK OF THE CONFERENCE, *supra* note 149 para. 1.67, at 42.

163 *Id.*

164 *Id.*

that medical aircraft, no matter what purpose they served, would still be "enemy aircraft" and thus to let them operate in a battle zone would create a grave security risk for the underdeveloped countries.'"

These arguments have been called "astonishing" in light of one of the "basic principles of international medical law that the wounded and sick will be evacuated and cared for without any distinction or discrimination based on nationality." [166] Indeed, if 'air ambulances had total freedom on the battlefield, those belonging to the underdeveloped country or the country which does not possess air superiority would receive protection—a protection that would be nonexistent if the technologically superior country were free to legally shoot them down.[167] One author has pointed out that if there is no requirement for prior approval for medical aircraft to operate in the battle area, some international organizations might be more likely to furnish aid if they could "count on a rule protecting their aircraft from direct attacks." [168]

The arguments that the party who had air superiority would use it unfairly has been aptly criticized by General Evrard:

> It is easy to counter because the party who possesses air superiority ha5 absolutely no need to resort to air ambulances in order to gather information or to proceed to other hostile actions. It is on the part of the belligerent who lacks air superiority that the temptation would be rather greater to use air ambulances for dual purposes: evacuation of the wounded and reconnaissance of enemy positions and installations. Thus, it is above all the weaker party which could become more susceptible to the temptation of cheating.[169]

Evrard went on to point out that because of the other restrictions on the flight of medical aircraft,

> . . . medical helicopters used in the forward field must quickly proceed to the point for assembling and loading the wounded and transport them directly, without proceeding to evolutions related to search and reconnaissance. The little amount of information that the crew could gather

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165 *Id.*

166 Evrard, *L'Avenir De La Protection Juridiqzre Des Transporter Sanitaires Par Voie Aerienne En Temps De Conflit Arme*, 46 REVUE INTERNATIONALE DES SERVICES DE SANTE DES ARMÉES DE TERRE, DE MER, ET DE L'AIR 391, 397 (1973).

167 Id.; *cf.* REPORT OF THE WORK OF THE CONFERENCE, *supra* note 149. para. 1.67. at 43.

168 Kalshoven, *supra* note 131, at 26.

169 Evrard, *supra* note 166, at 397 [translation].

> in these operations is so meager that it could certainly be obtained more easily, more surely, and more completely by the more specific and more efficient means at the disposal of any well-organized Armed Forces.[170]

Some compromise solutions to the various problems posed during the debates were agreed upon, including the elimination of the requirement that prior approval be given by the adversary for a flight over one's own territory. A prior agreement would only be needed in the battle area or in areas under the control of the adversary, and it was agreed upon that if the adversary recognizes an aircraft as a medical one, it shall not be the object of attack.

In February, 1973, a meeting of experts was held in Geneva on the issue of signalling and identification of medical transports.[171] This meeting was held in preparation of the Diplomatic Conference that was being convened by the Swiss Government to discuss the two draft protocols sponsored by the I.C.R.C. Experts from eleven countries and four specialized agencies attended, including representatives of the Soviet Union and several East European countries.[172] The experts discussed the proposals on light signals, radio and radar, corrected drafting errors in the draft proposals and suggested changes that would remove ambiguities from the I.C.R.C. draft articles.[173]

During the first session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, which was held in Geneva, Switzerland between February 20 and March 29, 1974, the proposed articles on medical aircraft were considered by the Committee on the Wounded and Sick. Although the Conference itself did not adopt any of the 150 proposed articles, some of the committees did achieve progress on various technical issues, including the identification and marking of medical personnel and medical means of transport.[174] A technical subcommittee was established for the Committee on the Wounded and Sick. This subcommittee, which was the only body

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170 *Id.* at 398.

171 For a discussion of the meeting and its progress, see REPORT OF THE U.S. DELEGATION TO THE INTERNATIONAL COMMITTEE OF THE RED CROSS MEETING OF EXPERTS ON SIGNALLING AND IDENTIFICATION SYSTEMS FOR MEDICAL TRANSPORTS BY LAND AND SEA, GENEVA, SWITZERLAND, 5-9 FEBRUARY 1973.

172 The list of delegations is to be found in *id.*, at 14-15.

173 *Id.*, at 4-5.

174 REPORT OF THE U.S. DELEGATION TO THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT, GENEVA, SWITZERLAND, FEBRUARY 20-MARCH 29, 1974, at 6, 15 (June 10, 1974).

of the Diplomatic Conference that completed the task assigned to it. adopted fifteen articles of a technical annex dealing with the identification and marking of medical transports.[175]

The 1974 Conference was highly politicized,[176] and four weeks were devoted to the problem whkther certain national liberation movements were to be represented.[177] Since only two weeks were spent on the actual articles, the lack of progress on the two draft additional protocols to the Geneva Conventions of August 12, 1949, is not surprising. In February, 1975, the Diplomatic Conference will reconvene for its second session in Geneva, and the preliminary issue of who will be represented will have been settled. The various proposals on medical aircraft, which received a relatively favorable reception in 1974, will again be considered by the Conference. Since the proposals on medical aircraft are now among the least controversial under consideration, although they are the most technical, there is a considerable possibility that they may be adopted.[178]

The Diplomatic Conference that is to convene in February, 1975, will discuss eight articles that expressly deal with medical aircraft and seven that deal with medical aircraft identification.

Article 21 of the 1973 I.C.R.C. draft defines medical aircrafts[179] and refers to both civilian and military "means of transport." The

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[175] *Id.* at 15.

[176] Indeed, the Israeli Delegation walked out of the opening meeting after President of Mauritania denounced Israel for alleged aggression and murder in the occupied Arab territories. N.Y. Times, Feb. 21, 1974, at 9, col. 1.

[177] One key issue was whether certain national liberation movements or those deemed to be fighting "just wars" should be given more favorable treatment than the belligerents. See Baxter, *The Evolving Laws* of *Armed Conflict*, *60* MIL. L. REV. 99, 105 (1973). A provision was adopted by one committee which would extend special protection to those fighting against colonial, racist, or imperialist regimes. The provision, if adopted by the Conference, would perhaps reintroduce the just war concept into the law of war and permit those fighting the allegedly just war to give their enemies less-favored treatment.

[178] *See* REPORT OF THE U.S. DELEGATION, *supra* note 174, at 11.

[179] *Article 21—Definitions*

For the purposes of this Part:

(a) "medical transport" means the transport by land, sea or air of the wounded, the sick and the shipwrecked and of the medical personnel and equipment protected by the Conventions and the present Protocol:

(b) "means of medical transport" means any means of transport, be it military or civilian, permanent or temporary, assigned exclusively to medical transport, under the control of a competent authority of a Party to the conflict. Permanent means of medical transport are those which are assigned for an indeterminate period to medical transport, Temporary means of medical transport are those which are assigned to one or more medical transport operations and shall be considered as such throughout the said assignment;

(c) "medical ships and craft" means any means of medical transport by sea, includ-

original Commission I draft limited the protection to medical aircraft "whenever used exclusively in the performance of a *medical air mission.*" [180] The "medical ah mission" phrase was dropped in the 1973 I.C.R.C. draft because it was considered to be too broad.[181] However, the omission of the phrase creates difficulties since it could imply that the aircraft's mission is the same as that of medical means of transport on land or sea, *i.e.*, that they may be used for search and rescue missions.

An explicit provision to the contrary has been added to the 1973 I.C.R.C. draft.[182] Four delegations intend to submit an amendment to Article 21 which would substitute the phrase "medical transportation" for "medical transport." This same amendment may also clarify the provision on temporary medical aircraft, since it would extend protection to such transports only while devoted to the performance of the medical mission rather than from the time they are "assigned" to such mission.[183] The official commentary to Article 21 defines the term "aircraft" as "planes, helicopters, seaplanes, dirigibles and any other flying machine, present or future." [184]

The first provision that deals strictly with medical aircraft, Article *26,* eliminates the requirement for prior notification by a party to

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ing hospital ships, lifeboats of all kinds and small medical service craft, whether civilian or military;

(d) "medical vehicle" means any means of medical transport by land;

(e) "medical aircraft" means any means of medical transport by air.

[180] 1972 Commission I draft, Art. 23(a) and 23(d).

[181] INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, COMMENTARY 30 (October 1973) [hereinafter cited as 1973 COMMENTARY].

[182] Art. 29, discussed *infra.*

[183] The amendment is sponsored by Belgium, Canada, the United Kingdom, and the United States. The first amendment to Draft Protocol 1 is as follows:

Article 81—Definitions

1. Revise paragraphs (a), (b), and (c) to read as follows:

(a) "Medical ***transportation"*** means the transportation by land, water, or air of the wounded and sick and of medical personnel, equipment and supplies protected by the Convention and by the present Protocol;

(b) "Medical transport" is any means of transportation, be it military or civilian, permanent or temporary, assigned exclusively to medical transportation, under the control of a competent authority of a Party to the conflict. "Permanent medical transports" are those which are assigned for an indeterminate period to medical transportation. "Temporary medical transports" are those which are assigned to one or more medical transportation missions while devoted exclusively to the performance of such mission;

(c) "medical ships and craft" means any medical transport by water, including hospital ships, lifeboats of all kinds and small medical service craft, whether civilian or military;

2. In paragraphs (d) and (e), delete the words "any means of."

[184] 1973 COMMENTARY, supra note 181, at 30.

the adverse belligerent of the route, time, and height for flights over areas of land or sea controlled by itself or allies.[185] An option to notify the adversary of such flights is inserted in the article.[186] This may be done in writing or verbally, by means of radio-communication or any other means of communication.[187]

A different rule is prescribed by Article 27, which deals with the "contact zone."[188] As proposed by the I.C.R.C. draft, the local military authorities must agree in order to insure protection for the medical aircrafts. A proposed amendment to the provision[189] would insure that if the enemy belligerent recognizes the aircraft as a medical one, it is prohibited from attacking it because no prior consent was given.[190] By using the phrase "contact zone" in this provision. as opposed to "battle area," which was used in the previous draft,[191]

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185 The I.C.R.C. draft Article *26,* entitled "sectors controlled by national and allied forces" states that

> Subject *to* Article 27, the medical aircraft of a Party to the conflict may fly over areas of land or sea controlled by itself or by its allies, without the prior agreement of the adverse Party. However, for greater safety, a Party to the conflict so using its medical aircraft may inform the adverse Party or its allies of such flights.

186 *Id.*

187 The proposed amendment submitted by Belgium, Canada, the U.K., and the U.S., is as follows:

> *Article 26.—General* ***protection of medical aircraft.***
>
> Subject to and in accordance with the provisions of this chapter, medical aircraft of a Party to the conflict shall be respected and protected.
>
> ***Article*** 26 ***bis. Land areas controlled by friendly forces, and*** **sea** ***areas not controlled by the adverse Party.***
>
> There is no requirement for prior agreement with the adverse Party in order to operate medical aircraft on and over land areas physically controlled by friendly forces, or on and over ***sea*** areas not physically controlled by the adverse Party. For greater safety, however, a Party to the conflict so using its medical aircraft may notify the adverse Party or Parties as provided in Article **30** of the present Protocol.

188 *Article 27—Contact zone*

> 1. In any parts of a land or sea contact zone effectively controlled by national or allied troops, and in those areas the control of which is not clearly established, the only guarantee of protection for medical aircraft is an agreement reached between the local military authorities of the Parties to the conflict. No particular form of such agreement is prescribed.
>
> 2. In the absence of such an agreement, the Parties to the conflict shall respect medical aircraft as soon as they have been identified.

189 *Article 27—Contacr zone*

> 1. In and over those parts of the contact zone physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the local military authorities of the Parties *to* the conflict as provided in Article **30** of the present Protocol. In the absence of such an agreement, the Parties to the conflict shall respect medical aircraft as soon as they have been recognized.
>
> **2.** "Contact zone" means any area on land upon which opposing forces are in direct contact with each other.

190 *See* REPORT **OS** THE WORK OF THE CONFERENCE, *supra* note 149, para. 1.81, at 46.

191 1972 Commission I draft. Art. 25(6); 1973 I.C.R.C. draft #1.

it was made clear that the article applied only where opposing forces are in contact and it eliminated a proposed distinction based on "forward part" and "rear part" of the "battle area." [192]

The provision on the areas effectively controlled by the enemy, I.C.R.C. draft Article 28, requires that there be a prior agreement with a competent authority of the adverse power in order for the aircraft to receive adequate protection.[193] The 1972 Commission I's draft requirement that the "routes, times, heights" be agreed upon is not incorporated into this new I.C.R.C. draft article.[194] However, a proposed amendment to Article 28 would explicitly deal with the possibility of an inadvertent flight over enemy-controlled territory.[195] According to the official commentary to the I.C.R.C. draft articles, in case of an unauthorized flight over this sector, "[t]he military authority must take all requisite security measures (summons to land, inspection, etc) before having recourse to any extreme measures." [196] Thus, the discretion to attack a medical aircraft that does not meet all the required conditions, which existed under the 1949 Conventions, has been severely curtailed.

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[192] 1973 COMMENTARY, *supra* note 181, at 36. The draft additional protocols do not use the word "territory" to define the rights of the belligerents over certain areas. Rather, the term "sector" is used. As the Commentary puts it,

> [B]ut we are not dealing here with State sovereignty; the factor involved is the domination over a given area, and this during armed conflict may be due exclusively to military supremacy. At sea, too, "sector" is not a legal concept like "high seas" and "territorial waters." A "sector", then, is merely an area of land or of water. It may even be an area comprising both land and water. Its size may vary. The question of air space sector is not dealt with in this chapter, as the wounded, the sick and the shipwrecked cannot be elsewhere than on land or sea.

1973 Commentary, *supra* note 181, at 35.

[193] *Article 28.—Sectors controlled by enemy forces*

> The medical aircraft of a Party to the conflict shall continue to benefit from protection while flying over land or sea areas effectively controlled by an opposing Party or its allies provided that it has previously obtained agreement to such flights from the competent authority of the adverse Party concerned.

Cf. REPORT ON THE WORK OF THE CONFERENCE, *supra* note 149, para. 1.87-1.89, at 47.

[194] However, Article 30 does require that such factors be agreed upon.

[195] *Article 28. Areas controlled by enemy forces*

> The medical aircraft of a Party to the conflict shall continue to benefit from protection while flying over land or sea areas physically controlled by an adverse Party provided that prior agreement to such flights has been obtained from the competent authority of the adverse Party concerned. Should a medical aircraft, in the absence of an agreement, fly over such areas through inadvertence or by force of urgent necessity, it shall make every effort to give notice of the flight and to identify itself. The adverse Party shall, so far as possible, respect such medical aircraft. It shall take the security measures referred to in Article 31 before having recourse to extreme measures.

(Submitted by Belgium, Canada, the U.K. and the U.S.).

[196] 1973 COMMENTARY, *supra* note 181, at 37.

Article **29** prohibits the use of medical aircraft to search over land or sea for the wounded and sick.[197] This provision applies in the contact zone and in areas effectively controlled by the opposing belligerent. Security considerations prompted this provision, since a search would consist of an exploratory flight over an area at a low altitude and the opportunity to gain intelligence was considered too great.[198] The provision prohibits the carrying of "photographic equipment," and the official commentary says that "any other intelligence equipment" is prohibited.[199] A proposed amendment to the draft I.C.R.C. article would clarify these restrictions on medical aircraft.[200]

A provision on how a medical aircraft may receive clearance from the adverse party, when so required, has been inserted.[201] The provision provides certain elements upon which the adverse belligerents can agree.[202] A proposed amendment would recognize the adverse

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197 *Article 29.—Restrictions*

When carrying out the flights referred to in Articles 27 and 28, medical aircraft may not, unless previously so agreed with the adverse Party or its allies, be used to explore areas of land and sea in order to search for the wounded and the sick. Furthermore, they may carry no photographic equipment.

198 1973 COMMENTARY, *supra* note 181, at 37-38; *cf.* REPORT OF THE WORK OF THE COSFERESCE, *supra* note 149, para. 1.74, at 44.

199 1973 COMMENTARY, *supra* note 181, at 38.

200 This amendment is to be submitted by the Belgium, Canadian, U.K., and US. delegations:

Article 29.—Restrictions

1. The Parties to a conflict are prohibited from using their medical aircraft to acquire any military advantage over another Party to the conflict. The presence of medical aircraft shall not be used to render military objectives immune from attack.

2. Medical aircraft shall not be used for the collection or transmission of intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not encompassed within the definition of medical transportation contained in Article 21(a) of the present Protocol. The carrying on board of the personal effects of the occupants or of apparatus intended solely to facilitate navigation, communication, or identification shall not be considered as prohibited.

3. Medical aircraft shall not carry any armament other than small arms and ammunition belonging to the wounded and sick persons on board and not yet handed over to the proper authorities, and such arms and ammunition as may be necessary to enable the medical personnel on board to defend themselves and the wounded and sick persons in their care.

4. While carrying out flights referred to in Articles 21 and 28 of the present Protocol, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded and sick.

201 *Article 30—Agreements and notifications*

The agreements and notifications provided for in Articles 26, 27, 28 and 29 shall make specific mention of the number of medical aircraft, their flight altitude and the means of identification that they will be using.

202 REPORT OS THE WORK OF THE COSFERESCE, *supra* note 119, para. 1.88, at 47. According to the 1973 Conference the article only enumerates some points on which agreement may focus, but the list is not exhaustive.

party's right to grant clearance on an alternative route.[203] It also requires the adverse party to the conflict to inform its troops on the means of identifying the aircraft of the adverse party.

I.C.R.C. draft Article 31 deals with the landing and inspection of medical aircraft.[204] Medical aircraft have an obligation to obey summons to land and may be inspected to insure that they meet the requirements of a medical aircraft. A proposed amendment would clarify what shall occur if the inspection reveals that the aircraft is being used in conformity with the Protocol and what shall happen if it is not.[205] According to the official commentary on this article, the

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[203] *Article 30.--Agreements and notifications*

1. Notifications or requests under Articles 26*bis*, 27, 28, 29, and 32 of the present Protocol shall make specific mention of the number of medical aircraft, their flight plans, and means of identification proposed and shall be deemed to constitute an undertaking to comply with Article 29 of the present Protocol. The notified Party shall acknowledge the receipt of the information: and it may make clearance under Articles 27, 28, 29, and 32 conditional upon reasonable alternative numbers, flight plans, or means of identification, and upon the prohibition or restriction of non-medical flights in the area concerned. If the Party employing the medical aircraft wishes the requested flight to be protected, it shall comply with such requirements.

2. The Parties to the conflict shall take necessary measures so that the substance of any such agreements and notifications is disseminated to the troops concerned and shall instruct such troops concerning the means of identification that will be used by medical aircraft of the adverse Party. [Submitted by Belgium, Canada, U.K. and the U.S.].

[204] *Article 31--Landing*

1. Medical aircraft flying over land and water under the control of an adverse Party, may be ordered to land, or alight on water, as appropriate, in order to permit inspection and verification of the character of the aircraft. Medical aircraft shall obey every such order.

2. In the event of an alighting, on land or water, ordered, forced or resulting from fortuitous circumstances, an aircraft may be subject to inspection to determine whether it is a medical aircraft within the meaning of Article 21. If inspection discloses that it is not a medical aircraft within the meaning of the said article, if it is in violation of the conditions prescribed in Article 24 or if it has flown without prior agreement, it may be seized: the medical personnel and the passengers shall be treated in conformity with the Conventions and this Protocol. Such seized aircraft as are designed to serve as permanent medical aircraft may be used thereafter only as medical aircraft.

3. If the inspection discloses that the aircraft is a medical aircraft within the meaning of Article 21(e), the aircraft and its occupants shall be authorized to continue their flight.

4. Inspection shall be conducted expeditiously in order not unduly to delay any medical treatment.

[205] *Article 32--Landing and inspection*

1. Medical aircraft flying over land or water under the physical control of an adverse Party, or over those areas the physical control of which is not clearly established, may be ordered to land, or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs of this Article. Medical aircraft shall obey such an order.

2. If such an aircraft lands or alights on water, whether ordered or otherwise, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4 of this Article. Any such inspection shall be commenced without delay and shall be conducted expeditiously. If the inspecting party requires the

purpose of this provision is to extend to civilian medical aircraft the protection of the provisions embodied in the 1949 Conventions on landing in an area controlled by the enemy.[206] Secondly, this provision eliminates the different treatment accorded to medical aircraft (in the 1949 Conventions) in cases of forced landing as opposed to a landing in response to a summons to land.[207] If material is seized because of a violation of conditions prescribed for medical aircraft, the material is to be used in accordance with Articles 33 and 34 of the 1949 Geneva Convention on the Wounded and Sick on Land.[208]

The final provision on medical aircraft deals with "states not parties to the conflict." [209] a phrase used instead of "neutrals" be-

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wounded and sick to be removed from the aircraft to facilitate the inspection, it shall ensure that the condition of such wounded and sick is not prejudiced by such removal.

3. If such inspection discloses that the aircraft:
   (a) is a medical aircraft within the meaning of Article 21(e) of the present Protocol; and
   (b) is not in violation of the conditions prescribed in Article 29 of the present Protocol; and
   (c) has not flown without or in breach of a prior agreement where such agreement is required, or has complied with the obligation laid down in Article 28 of the present Protocol, the aircraft and its occupants shall be authorized to continue the flight without delay.

4. If such inspection discloses that the aircraft:
   (a) is not a medical aircraft within the meaning of Article 21(e) of the present Protocol; or
   (b) is in violation of the conditions prescribed in Article 29 of the present Protocol; or
   (c) has flown without or in breach of a prior agreement where such agreement is required; or if it has flown without notification where notification is required,

   the aircraft may be seized. Each of the occupants shall be treated in conformity with the provisions of the Conventions and of the present Protocol. Such seized aircraft as are designated to serve as permanent medical aircraft may be used thereafter only as medical aircraft.

206 1973 COMMENTARY, *supra* note 181, at 38.

207 *Id.*

208 1973 COMMENTARY, *supra* note 181, at 39.

209 *Article 32—States not parties to the conflict*

1. Except by prior agreement, medical aircraft shall not fly over or land on the territory of a State not party to the conflict. However, with such an agreement they shall be respected throughout their flight and also for the duration of any calls in the territory, Nevertheless they shall obey any summons to land or to alight on water as appropriate.

2. Should a medical aircraft, in the absence of an agreement. be forced because of urgent necessity to fly over or alight on land or water in the territory of a State not party to the conflict, the medical aircraft shall make every effort to give notice of the flight and to identify itself. The State not party to the conflict shall, so far as possible, respect such aircraft.

3. In the event of alighting on land or on water, in the territory of a State not party to the conflict, whether forced or in compliance with a summons, the aircraft. with its occupants, may resume its flight after examination, if any.

4. The wounded and sick disembarked from a medical aircraft with the consent of the local authorities on the territory of a State not party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by

cause it is considered to be broader.[210] This provision extends to civilian medical aircraft the protection afforded in the 1949 Conventions to medical aircraft under the control of a military force.[211] Although the requirement remains for prior notification of the flight, the I.C.R.C. draft article and the proposed amendment[212] to it require that the aircraft be respected as far as possible. The provision applies both in cases of landings by virtue of prior agreement or because of necessity.[213]

An annex has been added to the Protocols on the identification of medical personnel and means of transport.[214] The Annex contains the requirement that one of the distinctive emblems of the Conventions is to be displayed on the aircraft. The annex also contains several articles based on the recommendations of the technical subcommission of the 1972 Conference of Government Experts. The signals used are designed to not infringe international rules and standards of

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that State where so required by international law, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the Power to which those persons belong.

5. The States not parties to the conflict shall apply any conditions and restrictions on the passage of landing or medical aircraft on their territory equally to all Parties to the conflict.

210 1973 COMMENTARY, ***supra*** note 181, at 40.

211 1973 COMMENTARY, ***supra*** note 181, **at** 39.

212 Submitted by Belgium, Canada, the U.K. and the US.

Article 32. Neutral or other States not parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land on the territory of a State not party to the conflict. However, with such an agreement they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

2. Should a medical aircraft, in the absence of an agreement, fly over or alight, through inadvertence or by force of urgent necessity, on land or water in the territory of a neutral or other State not party to the conflict, it shall make every effort to give notice of the flight and to identify itself. The neutral or other State not party to the conflict shall, so far as possible, respect such aircraft. It shall take the security measures referred to in Article 31 before having recourse to extreme measures.

3. If such an aircraft lands, or alights on water, in the territory of a neutral or other State not party to the conflict, whether forced or in compliance with a summons, the aircraft, with ita occupants may resume ita flight after inspection, if any. Should the inspection require the wounded and sick to be removed from the aircraft in order to facilitate the inspection, the inspecting party shall ensure that the condition of those persons is not prejudiced by such removal.

213 This provision was deemed necessary because the 1949 Conventions did not expressly deal with the problem of forced landings in neutral territory. ***See*** REPORT OF THE WORK OF THE CONFERENCE, ***supra*** note 149, para. 1.102, at 51.

214 ***Annex on Regulations Concerning The Identification And Marking Of Medical Personnel, Units And Means Of Transport, And Civil Defense Personnel, Equipment And Means Of Transport,*** in INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF **AUGUST** 12, 1949, at 28.

land, sea, or air signalling, and the approval of various organizations. including I.C.A.O., is deemed necessary for the provisions to be finalized.[215] Provisions on light signals,[216] radio signals,[217] secondary surveillance radar,[218] and other means of communication[219] have been recommended by the I.C.R.C.

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[215] **1973** COMMENTARY, *supra* note *181,* at 118.

[216] ***Annex*** *Article* ***8 – Light*** *Signals*

1. The light signal shall consist of a blue light flashing at a frequency of between **40** and 100 flashes a minute.

2. Medical aircraft and vehicles may be equipped by the Parties to the conflict with signals consisting of one or more blue lights flashing as mentioned in paragraph 1, and placed in such **a** way as to be visible in **as** many directions as possible.

[217] Two provisions have been introduced on radio signals. Annex Article 9 provides details on unilateral radio signals, while annex Article 10 deals with bilateral radio signals. The texts of the provisions are as follows.

Article ***9— Unilateral radio signal***

1. The unilateral radio signal consists of a radiotelephonic or radiotelegraphic message preceded by the call sign "MEDICAL" emitted three times and followed by the call sign of the medical means of transport. This message is transmitted in English at frequent intervals on an agreed or specified frequency. The use of the call sign "MEDICAL" shall be restricted exclusively to the medical services.

2. The radio message shall convey the following data :

(a) "MEDICAL" followed by the call sign of the means of transport;

(b) position of the means of transport;

(c) number and type of medical means of transport;

(d) itinerary:

(e) timetable;

(f) any other infonnation, such as flight altitudes, radio frequencies, languages, secondary radar modes and codes.

3. So as to facilitate the communication of information referred to in paragraphs 1 and 2 of the present article, the High Contracting Parties shall designate and publish the national frequencies to be used by them. These frequencies shall be notified by the High Contracting Parties to the International Telecommunication Union for listing in the Master International Frequency Register and for inclusion in Service Documents.

4. The use of other frequencies shall be the subject of special agreements entered into between the Parties to the conflict which, **as** a general rule, shall inform the International Telecommunication Union.

Article *10.—Bilateral radio signal*

1. The bilateral radio signal consists of an exchange of radio messages, in the language and on the frequency provided for in Article 9. It is initiated by the transmission of **a** unilateral radio signal.

2. The bilateral radio signal permits the communication and. if necessary, the discussion of the measures that should be taken to reinforce the protection of medical personnel, units and means of transport.

[218] *Article 11.—Secondary surveillance* ***radar*** *system signal*

1. Identification by the secondary surveillance radar system, which consists of an exchange of electro-magnetic impulses, may be used to identify and to follow the course of medical aircraft.

2. For that purpose, the secondary surveillance radar system **as** specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December **1944** may be **used.**

3. The exchange of impulses shall be made in mode A/3, using the radar code or codes assigned by the International Civil Aviation Organization for the identification of medical aircraft in accordance with the international standards, practices and procedures recommended by the Organination. The Parties to the conflict may agree to use

IV. CONCLUSION

Because of the considerable effectiveness of aircraft to evacuate the wounded and sick, the current initiatives on medical aircraft may serve to develop the humanitarian role of the laws of war. The history of medical aircraft indicates that nations have been skeptical about such aircraft, but the current initiatives have considerable safeguards built in them. Given the new methods of identification for medical aircraft, the old arguments why medical aircraft should only have a limited protection against attack are negated. As a result, there is reasonable possibility that the juridical status of medical aircraft, first recognized in 1929 and later restricted in 1949, may be developed by the 1975 Diplomatic Conference.

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other modes and codes. They shall inform the International Civil Aviation Organization of the agreements.

4. The High Contracting Parties may establish the use of a similar system for other means of medical transport.

219 The express provision on other means of communication, annex Article 12, provides that "[w]hen the use of the bilateral radio signal is not possible, the signals as provided for in the International Code of Signals by the Inter-Governmental Maritime Consultative Organization and in Annex 12 to the Chicago Convention on International Civil Aviation of 7 December 1944 shall be used." Under annex Article 7 "[t]he distinctive signals referred to in the present chapter shall be used exclusively by medical units and means of transport; their use is optional." The final provision on medical aircraft deals with the use of international codes.

Article 18.—Use of international codes. The medical units and means of transport of the Parties to the conflict may use the International Code of Signals radio codes and the International Telecommunication Union's Q code for their communications by radiotelegraphy or radiotelephony. The use of such codes shall be in accordance with international standards, practices and procedures laid down by the International Telecommunication Union, the International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization.

COMMENTS

DUE PROCESS: CONSUMER-SOLDIER VERSUS CREDITOR IN THE PREJUDGMENT ARENA*

CAPTAIN JAMES GLEASON""

I. INTRODUCTION

Soldiers comprise what is perhaps the largest single group of consumers in the United States today. Fundamental to the morale of the soldier is his ability to purchase, possess, own, and enjoy consumer goods. Also fundamental to the soldier's morale is the availability of legal assistance when he is confronted with legal problems involving his property.

One situation that significantly threatens the soldier's continued enjoyment of his consumer goods is the disputed default. The business creditor alleges that the consumer-soldier is in default of his legal obligations, and initiates action designed to culminate in a final judgment. Numerous legal devices—prejudgment alternatives—are available for the creditor to employ in order to protect his interest vis-a-vis the consumer. Among these alternatives that may be used are attachment, self-help repossession, replevin (judicial repossession), liens and garnishment.

Traditionally, slight consideration has been given to the impact that the use of these devices has upon the consumer. In reality, property essential to the very survival of a consumer may be taken or made useless for a significant length of time before the legal rights of the consumer and the creditor are finally adjudicated, Further, both the consumer who is in default of his legal obligations and the consumer who is not in default may be subjected to the same deprivations. Several facts suggest that the impact of application of prejudgment alternatives in a dispute involving a soldier may be more severe than similar application to a civilian consumer. Typically, the soldier

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** JXGC, US Army, Litigation Division, Office of The Judge Advocate General. B.S. 1966, United States Military Academy; J.D. 1973, University of Maryland. Member of the Bars of Maryland, US Court of Military Appeals and the U.S. Supreme Court.

is no more than a transient temporarily residing in a jurisdiction, He has neither family nor business contacts in the area,

The inherent conflict between the enormous power vested in the business creditor and the potential impact of using this power upon the consumer has been the catalyst for numerous challenges to prejudgment alternatives in recent years. The result has been a "due process awakening" favorable to the consumer. The purpose of this article is two-fold: (1) to ascertain the evolving state of prejudgment law by analyzing traditional alternatives in light of the recent due process revolution, and *(2)* to determine the adequacy of the legal assistance available to the consumer-soldier in a disputed default by analyzing the program in the context of evolving prejudgment law.

The importance of prejudgment alternatives to the creditor and to the consumer can best be understood by a realization of where they fit into the legal process. Section II of fhis article will be devoted to this subject.

The significance of the recent challenges to prejudgment law can be grasped when placed side-by-side with a detailed analysis of the traditional law. A separate section, Section III, will treat the traditional prejudgment devices using hypothetical cases involving consumer-soldiers. The juxtaposition of recent challenges and traditional law will be completed in Section IV. The hypothetical cases not onlv illustrate facets of the traditional law, but also provide a basis for.testing the adequacy of the military legal assistance available to the consumer-soldier in disputed defaults. The concluding section will examine the question of adequacy. Ideally, the traditional law, the recent challenges, and the adequacy of military legal assistance would receive unified treatment. However, the complexity of issues and the requirement for detail necessitate separation of the material into a trilogy of sections.

Prejudgment law is basically state law. Obviously, it varies, sometimes substantially, from jurisdiction to jurisdiction. It is, therefore, useful to select the law of one jurisdiction as a basis or foundation for analysis. The author has chosen Maryland for this purpose.

II. COLLECTIOS OF CLAIMS IS DEFAULT CASES

There are a myriad of legal alternatives available to the business creditor for the collection of his claims in consumer default cases. Prior to considering the remedies that are available, two threshold questions must be addressed. First, is the credit transaction one in

which the parties created a security interest in the goods?[1] For in a "secured transaction," the business creditor is the beneficiary of specific remedies in addition to those traditionally available in consumer default cases. Second, what action, inaction or behavior by the consumer constitutes a default in a particular instance? The answer to this second question is vitally important, especially in a "secured transaction." Consumer default is a requisite for application of the additional remedies afforded by the Uniform Commercial Code.[2] The Code, however, does not define "default." [3] It does provide that a security agreement is effective according to its terms between the parties.[4] At first glance, the absence of definition, coupled with the proviso that the parties may agree to their own terms, seems to offer desired flexibility in bargaining. Of course, it also assumes relatively equal bargaining power in both parties, a questionable assumption in the modern consumer-business creditor marketplace. The predictable outcome of this arrangement is that business creditors have great latitude in defining default in their form security agreements. Consequently, only in an extremely rare transaction will "nonpayment" of the debt be the single event constituting consumer default.[5] Broadly stated, the legal alternatives available to the business creditor are negotiation, proceeding to judgment, and self-help repossession.

A. NEGOTIATION

In any transaction, secured or unsecured, the business creditor may attempt negotiation as an initial effort to realize a debt owed to him.[6] For a variety of reasons—expense, time, community relations—it would be unrealistic to conclude that a business creditor will invariably resort to litigation to effect debt repayment. In numerous cases, negotiation with the individual consumers will prove to be successful. The business creditor may alter the payment schedule in return for a commitment by the consumer to voluntarily make the new payments. Thus, it may be advantageous to negotiate with a consumer who is financially overextended. If the negotiation involves

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1 MD. ANN. CODE art. 95B, § 1-207 (1964).

2 MD. ANN. CODE art. 95B, § 9-501 (1964).

3 *Id.*

4 MD. ANN. CODE art. 95B, § 9-201 (1964).

5 Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1974 WIS. L. REV. 334, 358.

6 R. SPEIDEL, TEACHING MATERIALS IN CONSUMER TRANSACTIONS 386 (1969).

a secured transaction, a settlement can be achieved by modifying the basic security agreement to conform with the new terms.

B. PROCEEDING TO JUDGMENT

When negotiation fails or is rejected as a viable alternative, the business creditor must consider whether or not to proceed to judgment on his claim. A party involved in an unsecured transaction has little choice in the matter. His right to collect on his claim must be established by reducing the claim to a judgment or decree.[7] The business creditor in an unsecured transaction, unlike his counterpart in a secured transaction, is unable to resort to self-help repossession.[8] Forced to resort to litigation, the law provides him with a substantial arsenal of prejudgment alternatives intended to protect his claim.[9] These alternatives are presumably an outgrowth of the recognition that litigation is time consuming and that property may be dissipated in the interim between default and judgment. Many of these prejudgment alternatives have been, or currently are, under judicial attack."[10]

In most cases. a secured business creditor will not resort to litigation when negotiation fails. The Uniform Commercial Code authorizes him to proceed to judgment, and there are cases where it would clearly be to his advantage to do so." For example, a business creditor who foresees a future need to reach the assets of a consumer, in addition to the collateral, may do so only if he obtains a judgment on his claim. When the collateral has been destroyed, or when it has substantially declined in value, the business creditor would find it necessary to reach the consumer's assets." Another reason for a business creditor to proceed against the collateral is to avoid litigating additional questions related to the collateral. By seeking a judgment on his claim, the creditor must only prove the existence of the debt and the subsequent contractual default by the consumer to prevail.[13]

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7 V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 1 (1964).

8 Any transaction which is not within the definition of a secured transaction as defined by the UNIFORM COMMERCIAL CODE, MD. ANN. CODE art. 95B, is an unsecured transaction.

9 Prejudgment alternatives which may be available to a creditor are attachment, garnishment, replevin, self-help repossession and Sale under the UNIFORM COMMERCIAL CODE, as well as the assertion of common law or statutory liens.

10 Prejudgment alternatives will be considered in detail in Sections III and IV, *supra* pp. 148-179.

11 MD. ANN. CODE art. 95B, § 9-501 (1964).

12 R. SPEIDEL, supra note 6. at 387.

13 *Id.*

C. SELF-HELP REPOSSESSION

The most widely used practice available to the secured business creditor is taking possession of the collateral after a contractual default.[14] The sole precondition that must be satisfied before the business creditor avails himself of this remedy is contractual default by the consumer. This precondition is often easily shown since the default clauses in the security agreement are usually sufficiently broad to encompass a wide range of action, inaction or other behavior by the consumer.[15] Upon determining that contractual default has occurred, the secured business creditor is authorized by the Uniform Commercial Code to invoke the nonjudicial remedy referred to as "self-help" repossession of the collateral. Under this remedy, he is not required to notify the consumer. He is, however, required to exercise some vigilance when actually retaking possession of the property since he must avoid committing a "breach of the peace."[16]

Once repossession of the collateral has been effected, there are several possible ways in which a business creditor may realize the consumer's debt. He may choose to retain the collateral as satisfaction for the debt,[17] but this would preclude recovery of any deficiency from the consumer.[18] Written notice of the proposed retention must be given to the consumer, who may object to the retention. An objection by the consumer to retention automatically forces the business creditor to dispose of the collateral at a foreclosure sale. If, however, there is no objection by the consumer after notice has been given, the business creditor may retain the collateral; the

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14 MD. ANN. CODE art. 95B, § 9-503 (1964).

15 See, *e.g.*, Crandall, ***supra*** note 5, at 385:

> DEFAULT. Upon the occurrence of one or more of the following events of default:
> Nonperformance. Debtor fails to pay when due any of the obligations, or to perform, or rectify breach of, any warranty or other undertaking by Debtor in this agreement or the obligations;
> Inability to Perform. Debtor or surety for any of the obligation dies, ceases to exist, becomes insolvent or the subject of bankruptcy or insolvency proceedings;
> Misrepresentation. Any warranty or representation made to induce Secured Party to extend credit to Debtor, under this Agreement or otherwise, is false in any material respect when made; or
> Insecurity. Any other event which causes Secured Party, in good faith, to deem itself insecure;
> all of the obligations shall, at the option of Secured Party and without any notice or demand, become immediately payable; and Secured Party shall have all rights and remedies for default provided by the Wisconsin Uniform Commercial Code. . . .

16 Since the Code fails to define the "breach of the peace," what is or is not a "breach of the peace" is a matter for state judicial determination. The definition varies widely from state to state. MD. ANN. CODE art. 95B, § 9-503 (1964).

17 MD. ANN. CODE art. 95B, § 9-505 (1964).

18 *Id.*

consumer loses any equity he had in the collateral and is not entitled to any surplus realized from its subsequent sale by the creditor.[19] The procedure involved in the business creditor's 'retention of repossessed collateral is analogous to a strict foreclosure in real property law. Because of the severe consequences to the consumer, there are certain additional limitations imposed on the remedy of retention.[20]

The foreclosure sale is the most common way to realize the debt of a consumer.[21] The business creditor niav dispose of the collateral at either a public or a private auction after giving reasonable notice to the consumer.[22] The business creditor is not required to hold the collateral for any length of time to enable the consumer to redeem it. A commercially reasonable sale. made in good faith, entitles the business creditor to a deficiencv, the difference betweon the debt on-ed and the resale price, if it exists.[23] On the other hand, the consumer receives the surplus, the difference between the resale price and the debt owed. if it exists.[24]

The secured business creditor is afforded a nonjudicial prejudgnient remedy by the Cniforni Commercial Code for use against a defaulting consumer. He also has the option of seeking a judgment on his claim. When he exercises this latter option, his prejudgment alternatives are identical to those of the unsecured business creditor who is forced to litigate his claim.

III. TRADITIONAL PREJCDGJIENT ALTERNATIVES I S DISPCTED DEFACLTS

A. *ATTACHMENT*

1. Hypothetical Consumer-Soldier Case

Army Specialist (SP/4) Morris Brown moved to Fort Meade. Marvland in 1973. While stationed at Fort Ord, California, Brown had purchased five rooms of furniture and an automobile on credit. Each credit purchase had an outstanding balance. Brown's current

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19 *Id.*

20 MD. ANN. CODE art. 95B, § 9-505 (1) (1964).

21 MD. ANN. CODE arr. 95B, § 9-505 (2) (1964). Because it precludes recover! of a deficiency from the consumer, retention is normally less beneficial to a business creditor than a foreclosure sale. Typically he is anxious to dispose of the repossessed goods and retention only increases the possibility of financial loss.

22 MD. ANN. CODE art. 95B, § 9-504 (3) (19641.

23 MD. ANN. CODE art. 95B, § 9-504 (2) (1964).

24 MD. ANN. CODE art. 95B, § 9-504 (2) (1964).

gross income was $485.00 per month. His recent North Dakota divorce placed additional financial burdens, alimony and child support, on him. An amateur musician, Brown found solace in country music and wanted to purchase an expensive guitar "package." Although he was unable to obtain additional credit, Brown responded to an advertisement in the Fort Meade newspaper. He felt that he could swing the payments on the "package" by working part-time during his off-duty hours. J.B. Smith was attempting to sell a quality guitar "package" for $1900.00. Brown inquired as to the availability of a credit purchase. Smith said he would agree to extend credit for three years, but only after a sufficient financial disclosure by Brown. In disclosing his financial status, Brown stated that he had no outstanding debts. He further stated that his gross monthly income was $610.00. Smith, on the basis of Brown's disclosure statements and assurances, entered into a written contract with Brown for the sale of the "package." Payment was to be in equal monthly payments *($57.77)* for a period of thirty-six months. A default in the monthly payments would make the entire balance due and payable immediately. Brown made payments for four months and then defaulted.

2. *Statutory Restrictions Upon Creditor Use*

A legal process whereby J.B. Smith, the creditor, could obtain a writ of attachment to seize and hold the property of Specialist Morris Brown, the debtor, as security for the satisfaction of an anticipated judgment was unknown to the common law. The historical roots of the process are in the civil law and the law-merchant.[25] In the United States, attachment is a statutory procedure,[26] and in most jurisdictions requires strict compliance by the creditor with the statutory provisions." Reiterating that the statutory process of attachment was in derogation of the common law, the court in *United States v. Coumantaros* stated that the statute, at least in Maryland, was to be strictly construed in favor of the debtor against whom attachment was invoked.[28] Thus, with the exception of the Northeastern states, attachment is available only to the creditor who can allege, and prove if necessary, some specific statutory ground for issuance of the writ.

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25 *In re* Dukes, 276 F.724 (D. Del. 1921).

26 *See* Randone v. The Appellate Department of Superior Court, 5 Cal. 3d 536, 543, 488 P.2d 13, 17 (1971).

27 Gill v. Physicians' and Surgeons' Bldg., 153 Me. 394, 403, 138 A. 674, 683 (1927).

28 165 F. Supp. 695 (D. Rld. 1958).

Statutory grounds generally deal with one of three situations: (1) where the plaintiff is unable to obtain in personam jurisdiction over the defendant because he is a nonresident, or is absent from the state, or is concealing himself;[29] (2) where the defendant is about to conceal or dispose of his property to put it beyond a creditor's reach or has already done so;[30] or (3) where the nature of the plaintiff's underlying claim is such as to entitle it to special treatment, where "the deb; sued for was fraudulently contracted." [31]

The statutory description of the types of underlying claims for which an attachment writ is cognizable places another limitation on the availability of the writ.[32] In Maryland, attachment is available based upon the statutory grounds of "nonresident" or "absconding" debtor if the action is one arising in contract or in tort.[33] But an attachment based upon "resident defendant returned twice non est," "fraud," and "nonresident heir and devisee," will issue only if the action is one founded in a contract for liquidated damages.[34] Thus, the contract must itself fix the amount of damages, or furnish a sufficiently certain standard upon which the creditor may base his claim.[35]

Yet a third form of statutory limitation on the availability of the writ is the provision, or decisional interpretation, relating to the status of the debt or obligation on the date the plaintiff seeks attachment. Can attachment issue if the debt has not matured, or if it is only contingent? Statutory and decisional law vary in this area of restriction, Maryland allows attachment before maturity of the claim only when the attachment is based on an "absconding debtor" or on "fraud." [36]

A final statutory restriction placed upon the creditor seeking an attachment writ is the giving of a bond. The bond is usually conditioned so that the plaintiff will pay all the damages resulting from a wrongful attachment and so that it will protect the plaintiff unless he attaches without probable cause.[37] In Maryland, the plaintiff in a contract action for unliquidated damages, or in a tort action in-

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29 MD. ANN. CODE art. 9, §§ 1(a)-(c) (1968).
30 MD. ANN. CODE art. 9, §§ 1(c)-(d) (1968).
31 MD. ANN. CODE art. 9, § 1 (1968); *see* V. COUNTRYMAN, *supra* note 7, at 10.
32 V. COUNTRYMAN, *supra* note 7, at 9.
33 MD. R. CIV. P. G 41a.
34 MD. R. CIV. P. G 41b.
35 Dirickson v. Showell, 79 Md. 49, 52, 28 A. 896, 899 (1894).
36 MD. R. CIV. P. G 41c.
37 V. COUNTRYMAN, *supra* note 7, at 10.

volving a nonresident or absconding debtor, must file a bond equal to the amount allegedly due from the defendant debtor. The bond is conditioned upon the satisfaction of the damages awarded, if any, to the defendant.[38]

3. *Creditor Benefits: His Due Process*

Despite the statutory restrictions, a creditor, particularly an unsecured creditor, may find that attachment affords him several crucial benefits. Having the debtor's property seized by legal process and held pending adjudication of his claim gives the creditor security against any voluntary acts or omissions of the debtor.[39] This is clearly reflected in the general statutory grounds for attachment. The second creditor benefit derived from attachment is the acquisition of a contingent lien on the debtor's property. This lien, referred to as an inchoate lien, is acquired by the levy of a writ of attachment.[40] No lien is acquired by mere issuance of an attachment.[41] *In re Stevenson's Estate*[42] illustrates the importance of an inchoate lien to an unsecured creditor. In this case, two plaintiff's proceeded against the defendant, Stevenson, in separate suits. One plaintiff procured a writ of attachment which was levied prior to a judgment in favor of the second plaintiff. The determinative question was whether or not the attachment had precedence over the intervening judgment lien. The plaintiff, having attached the property, had a specific, although inchoate, lien on the property. Once he obtained a judgment, the lien was perfected relating back to the date of the levy of attachment, and thus cut off *intervening* encumbrances. In some jurisdictions, the lien has its inception at the date of the writ.[43]

4. *Analysis: The Creditor's Position in the Hypothetical Case*

J. B. Smith, in analyzing his situation, decided that he could meet the Maryland statutory requirements to commence an attachment proceeding. There were sufficient indicies of fraud under Maryland decisional law. The debt had matured, and the suit would be based

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38 MD. R. CIV. P. G 42e.

39 Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 FLA. L. REV. 60, 61 (1973).

40 Buschman v. Hanna, 72 Md. 1, 2, 18 A. 962,963 (1889).

41 May v. Buckhannon River Lumber Co., 70 Md. 448, 449, 17 A. 274, 275 (1889).

42 87 Mont. 486, 289 P.566 (1930).

43 V. COUNTRYMAN, *supra* note 7, at 11.

on a contract for liquidated damages. Thus. by giving a bond, the requirements would be satisfied.

5. *Traditional Protection for the Consumer*

Upon issuance of the writ, the Maryland Sheriff, after obtaining permission from militarv authorities to enter Fort Meade, would seize Specialist Brown's guitar "package."

The obvious effect of an attachment levy on the debtor is that he loses the use and possession of the chattel seized.[44] If the property involved is real property, the debtor will remain in possession and have the use of the property, but will be unable to dispose of it because of the inchoate lien that has been created. The severity of the deprivation on the debtor is quantifiable only in light of specific, individual circumstances. It is certain, however, that there is a deprivation of property imposed on the debtor prior to adjudication of the claim.

The defendant-debtor who has been summarily deprived of his property via a levy of attachment has several remedies which he may resort to in order to protect his interests. All jurisdictions would permit the defendant to use legal process to have the writ quashed and the propertv returned. By simply stating that attachment is a summary proceeding. the court in an old Maryland case aptly articulated the 'reason for consideration of questions raised by the motion to quash.[45] Several important considerations are inherent in the court's statement. First, compliance with certain requirements of the law entitles a plaintiff to secure, in effect, an execution prior to trial or determination of the issues involved in the case. Second, in view of the privilege given the plaintiff, it is not a hardship to him that the defendant should be granted a prompt hearing on all the facts tending to show: (1) that the plaintiff secured the grant of the unusual privilege irregularly or wrongfully, (2) that this behavior occurred without any judicial proceeding before the court from whom the

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[44] Md. R. Civ. P. G 46. If a factual situation falls within the enumerated statutory restrictions, a Maryland creditor seeking to avail himself of the benefits of an attachment writ must satisfy procedural requirements when initiating the proceedings. Typically, the sheriff is given instructions pertaining to the description and location of the debtor property to be attached. After the clerk of the court issues the writ of attachment, the sheriff may seize the personal property (or, in the case of real property, post a copy of the writ on the property).

[45] Campbell v. Morris, 3 Harris & McHenry 535, 553 (1797) (Maryland Reports).

plaintiff obtained his summary remedy.[46] The protection afforded a debtor by the availability of the legal process is, in many ways, proportional to his ability to absorb the cost incident to its use. It is readily apparent by focusing on consumer transactions that filing a motion to quash an attachment writ would necessitate the retention of an attorney. The cost would vary greatly, depending on whether the alleged substantial defect in the attachment writ appeared on the face of the documents or had to be proved by extrinsic facts. An additional problem involved in the use of this remedy by the debtor is that it is a jurisdictional challenge. A decision, not going to the merits of the claim, is not res judicata with respect to a second attachment on the same debt.[47] Yet, another defect in this remedy is that it is time consuming. In specific instances, the deprivation of property may result in severe hardship for the debtor. Despite the availability of the motion to quash, there will be a deprivation during the interim between the levy of the attachment and the favorable decision on the motion.

Each of the statutory limitations or restrictions placed on the availability of the attachment writ reveals a legislative effort to protect certain persons from summary deprivations of their property. The requirement that a plaintiff seeking attachment give a bond, conditioned on his proper exercise of the privilege of the summary legal procedure, is an attempt to give some balance, some due process, to the summary taking of the debtor's property. The quantum of protection against an irregular or wrongful attachment by a plaintiff depends in large degree upon the statutory or contractual conditions of the bond. A bond conditioned to pay all damages incurred by the defendant resulting from a wrongful suing out of the attachment seems to offer limited protection. The defendant will prevail if either no basis exists for a claim of debt by the plaintiff when he files for the writ or the statutory grounds for attachment are not satisfied.[48] A bond, conditioned so that a defendant may recover costs and damages if he either prevails on the merits of the claim or successfully has the attachment writ quashed, offers additional protection to the defendant.[49] This type of bond has its greatest advantage in a disputed default situation. The defendant, by raising

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46 Johnson v. Stockham, 89 Md. 368, 70, 43 A. 945 (1899) (argument of counsel).

47 *Id.* at 377, 43 A. at 942.

48 Burkhalter v. Matteson, 125 Kan. 778, 780, 265 P. 1108, 1110 (1928); National Surety Co. v. Jean, 36 F.2d 468 (6th Cir. 1929).

49 Frick Co. v. Deiter, 168 S.C. 289, 290, 167 S.E. 499, 500 (1933).

appropriate affirmative defenses, niav be able to obtain a judgment notwithstanding an apparent debt due the plaintiff when the attachment proceeding was initiated. Since there are many other types of bonds in addition to the two set forth in this discussibn, it is virtually impossible to make a general assessment of the degree of protection afforded the defendant by a statutory bond requirement. In Maryland, the bond requirement offers very limited protection in specifically defined cases.[50] The amount of the bond in those cases is only the amount of the plaintiff's claim. If the defendant is sufficiently outraged, he can ask the court to increase the bond.[51] In many cases involving wrongful attachment, the defendant, having no recourse on a bond, must resort to a common law tort action.

In *Delisi v. Garnett*,[52] Garnett gave a note for $1500.00 to Delisi as partial payment for the purchase of Delisi's grocery store. Prior to the settlement on the property, the defendant apparently reconsidered the sale and closed his store. Garnett brought an action on the note, but while the case was pending, he was told that Delisi had gone to Florida. Garnett then attached the real property of Delisi on the ground that Delisi was an absconding debtor. Maryland law did not require Garnett to post a bond because his action was based on a contractual claim for liquidated damages. Delisi, returning from Florida after a ten-day absence, was successful in having the attachment quashed. Subsequently, he sued Garnett for the wrongful attachment of his property. Since there was no defect in the writ and the property attached belonged to Delisi,[53] the court held that recovery of damages actually sustained could be granted only upon a showing of malice or lack of probable cause. In this context, probable cause relates to the evidence which caused Garnett to believe Delisi was an absconding debtor. Since the evidence supported a conclusion of probable cause and the writ was not defective when issued, the court rejected the wrongful attachment claim.

The defendant debtor is offered protection against wrongful attachment either by statutory bond requirements, by tort decisional law. or by a combination of the two. The problems inherent in this means of protecting the consumer against the wrongful summary

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50 Md. R. Civ. P. G 42e.

51 Md. R. Civ. P. G 53.

52 257 Md. 4, 6, 261 A.2d 784, 85-87 (1970).

53 Sterling v. Marine Bank of Crisfield, 120 Md 396, 97, 87 A. 697, 698 (1913). Maryland allows recovery when these conditions exist, without regard to causation or malice.

attachment of his property are essentially the same as those in the motion to quash a writ. As a general rule, the consumer is required to initiate costly, time-consuming litigation to recover his damages. Even if successful, the consumer may not be placed in a position comparable to his preattachment position. In cases where the likelihood of success is questionable, the endeavor may not be worthwhile. In the meantime, the hardships suffered by the consumer will invariably outweigh those to the business creditor, for it can be suggested that there is a balance of power and resources between the consumer and the business creditor.

One additional remedy for wrongful attachment contained in most statutory schemes is the defendant's bond. The attached property will be released to the defendant if he posts a bond conditioned on one of two occurrences. Typically, the occurrences will be either the payment of any judgment the plaintiff recovers or the return of the property for application to a judgment in favor of the plaintiff.[54] Maryland allows a defendant to dissolve an attachment by giving a bond equal to the value of the property, or double the amount of the underlying claim, whichever is less.[55] The discharging or dissolving bond clearly works to the disadvantage of the lower income debtors, the same debtors who undoubtedly experience the most severe impact from the deprivation of their property,

6. Summary: The Consumer-Soldier's Position in the Hypothetical Case

In the hypothetical case, J. B. Smith versus Specialist Morris Brown, it is reasonably certain that Brown could not avail himself of the protections afforded by statute and decisional law in Maryland primarily because he is not engaged in a disputed default and apparently has not been subjected to wrongful attachment. If, however, the facts were altered so that there was a dispute about the debt owed, or Smith caused the writ to issue by improperly alleging the grounds, or the writ was defective in any other way, Brown might seek redress.

B. GARNISHMENT

1. Hypothetical Consumer-Soldier Case

A simple modification of the facts of the credit sale between Specialist Morris Brown and J. B. Smith, will permit the creditor to use

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54 V. COUNTRYMAN, *supra* note 7, at 13.

55 MD. R. CIV. P. G 57.

an additional remedy. After purchasing the guitar, Brown obtained a part-time off-duty job. Working eighty hours per month, Brown receives a gross income of P170.00. Four months after its purchase, the guitar is stolen from Brown's quarters. Brown continues to work at his part-time job but decides that he will discontinue making payments on the guitar.

2. *Garnishment: A Sub-Category of Attachment*

Consumer credit financing relies heavily on the ability of the average consumer to make regular payments out of his wages. This reliance often results in the consumer-debtor and his creditors having competing interests in the disposition of the debtor's wages. Perhaps the best known device by which a creditor may gain access to these wages is wage garnishment.[56] Garnishment is often considered a subcategory of attachment. Attachment normally refers to the creditor gaining an interest in the debtor's property; garnishment refers to the seizure or attachment of property belonging to or owing to the debtor, but which is presently in the hands of a third person.[57] Garnishment is most commonly used by creditors to effect access to their debtor's wages.

Wage garnishment is a statutory remedy, having its inception shortly after the abolition of debtors' prisons. Some statutes permit the freezing of future wages until the debt is satisfied. Others only permit or allow the garnishment of wages that are presently due the debtor.[58] In Maryland, a plaintiff-creditor can attach the wages of his debtor, but the attachment is effective only as to wages actually due at the date of the levy.[59] The percentage of the wages which may be garnished varies, with only two states prohibiting all garnishment of wages.[60] There are indications that the exemption percentage is a significant factor in consumer banltruptcies. Thus if a state's garnishment exemption is high, its citizens will probably experience fewer bankruptcies.[61]

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56 *Garnishment of Wages*, 2 THE MARYLAND RESEARCHER 65 (1972).

57 *See* Randone v. The Appellate Department of Superior Court, 5 Cal. 3d *536,* 543,488 P.2d 13. 17 (1971).

58 Sweeney, *Abolition* of *Wage Garnishment,* 38 FORDHAM L. REV. 197, 205 (1969).

59 MD. ANN. CODE art. 9 § 31(a) (1968).

60 Sweeney, *supra* note 58, at 203-204.

61 Brunn, *Wage Garnishment in California: A Study and Recommendation,* 53 CAL. L. REV. 1214, 1237 (1965).

Recent statutory amendments in Maryland reflect the impact of federal legislation[62] in the area of wage garnishment. The current statute sets a minimum exemption of seventy-five percent of the wages due or $120 times the number of weeks in which the wages are due, whichever is greater.[63] An employer is also prohibited, under criminal penalty, from discharging an employee because his wages have been garnished for any one indebtedness within a calendar year.[64]

3. Analysis: The Hypothetical Case

Wages to be paid from public funds are not garnishable unless specifically authorized by statute.[65] Thus, it would not be possible for J.B. Smith to garnish Specialist Brown's military pay. Smith would, however, be able to attach or garnish Brown's off-duty wages if he satisfied the statutory grounds for attachment and Brown's income exceeded the statutory exemption. However, Brown's weekly income would be less than $120 times the number of weeks in which wages are due at the time of any attachment. Thus, garnishment of wages would not be a viable prejudgment remedy for J.B. Smith.

C. THE SECURED CREDITOR – SELF-HELP REPOSSESSION

1. Hypothetical Consumer-Soldier Case

Army sergeant Robert Jones had been stationed at Fort Meade, Maryland, for two years. He commuted to his job from Baltimore, a distance of about twenty miles. Having recently experienced difficulty with his 1962 Volkswagen, he decided to trade it for a 1970 Austin America. Mr. John Tower of City Austin, Inc., offered him $100.00 for his trade-in, and a ninety-day warranty on all parts and labor on the 1970 Austin America. The list price of the Austin America was $1200.00. Jones agreed to pay $200.00 down and finance the remaining $900.00. The financing was approved, and Jones signed both the purchase contract and a security agreement.

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62 15 U.S.C. §§ 1671-77 (Supp. 1970). The Consumer Credit Protection Act of 1968 provides for a minimum exemption of seventy-five percent of disposable weekly income; or, thirty times the federal minimum hourly wage, whichever is less. It also prohibits an employer from discharging a worker because his wages are subjected to garnishment for any one indebtedness.

63 MD. ANN. CODE art. 9, § 31(a) (1968).

64 MD. ANN. CODE art. 9, § 31(b) (1968).

65 6 AM. JUR. 2d *Attachments and Garnishments* § 184 (1963).

Two weeks later, Sergeant Jones received a letter notifving him that Maryland National Bank had purchased his contract with Citv Austin, Inc. and that all his payments should be made to them.

Ten weeks after his purchase, Jones was driving home from Fort Meade when the Austin America developed an engine knock. The following morning Sergeant Jones was unable to start the car. He called the dealer, reminded him of the existing warrantv, and requested that the Austin be repaired. The car was subsequentlv picked up bv the dealer and several days later Sergeant Jones was notified that'his car was repaired.

For several days the Austin functioned normally, but with only ten days remaining on the warranty, the automobile experienced periodic engine power failures. Jones made repeated requests to the dealer that the automobile be picked up and repaired. When his requests were ignored, Jones obtained repair estimates from several sources that indicated the Austin America needed a new engine; a new engine would cost $450.00.

Three days before the warrantv was to expire, Jones succeeded in reaching the owner of the dealership bv telephone. Sergeant Jones told the owner that unless the Austin was picked up and repaired, he wanted both his Volkswagen and his money returned. The owner promised to consider this demand.

One day after the warranty expired, Jones received a call informing him that the auto had been repaired once and that Citv Austin was no longer liable because the warrantv had expired. Jones replied that he would discontinue payments and demanded in excess of 5450.00 for breach of the warranty. Jones' position was conveyed to the Marvland National Bank bv a letter.

For the three months following this exchange, Jones failed to make his monthlv payment. After the Bank had made repeated calls to Jones and his company commander, Sergeant Jones paid two of the three months past due payments. He also promised to fullv update his pavments within thirtv days. The next morning Sergeant Jones discovered that the 1970 Austin America had been removed from his driveway.

Marvland National Bank sent a certified letter to Jones acknowledging repossession of the Austin, stating that a public sale of the automobile would take place and informing him that he had a right to redeem the automobile prior to the sale. The letter also included the date of the public sale. Jones lacked sufficient cash to either attend the sale or redeem the automobile.

After the sale had taken place, the Bank sent another letter to Jones informing him of the sale price, and claiming a deficiency of $150.00. An attached sheet contained an itemized accounting of the calculations used in determining the deficiency.

City Austin, Inc., in the interim, had filed a petition in bankruptcy.

2. *Who is a Secured Creditor?*

"A 'secured party' and a 'debtor,' by entering into a 'security agreement' create a 'security interest' in 'collateral.'" [66] When a business creditor and a consumer execute a security agreement pursuant to the requirements of the Uniform Commercial Code, the business creditor becomes a secured party thus entitled to certain remedies unavailable to an ordinary creditor. These remedies, designed to alleviate the delays and costs of collecting a judgment, may be invoked without resort to judicial process. They are, in effect, prejudgment nonjudicial privileges for debt satisfaction.

When the business creditor determines that the consumer has violated one or more of the default provisions of the security agreement, he may repossess the property in which he has a security interest. To satisfy his claim, the business creditor may retain the property, or he may sell it at a public or private auction. If he sells the property and the proceeds of the sale fail to satisfy his claim, the creditor may proceed to judgment for the deficiency.[67]

3. *The Security Agreement: Default Provisions*

The default provisions contained in the security agreement are vitally important to both the business creditor and the consumer. The absence of a statutory definition of "default," coupled with a statutory provision that the security agreement is "effective according to its terms between the parties," results in comprehensive default provisions. Typical provisions contained in a security agreement fall into four categories: (1) nonperformance (2) inability to perform (3) misrepresentation and (4) insecurity.[68]

Nonperformance is the failure of the debtor to pay any obligation when it is due or to perform any other obligation in the security

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[66] V. COUNTRYMAN, COMMERCIAL LAW, CASES AND MATERIALS 11 (1971). See MD. ANN. CODE art. 95B, § 9-102(1)(a) (1964), for the statutory definition of a secured party.

[67] See notes 21-21 *supra* and accompanying text.

[68] V. COUNTRYMAN, *supra* note 66, at 25; Crandall. *supra* note 5, at 385.

agreement.[69] Inability to perform generally arises when the debtor dies or becomes insolvent.[70] Misrepresentation encompasses materially false statements made by a debtor that induce a business creditor to extend credit.[71] The occurrence of an event, that which causes the business creditor to believe that future payments or performance is impaired is the basis for the insecurity provision.[72]

Thus, a wide variety of activity, other than nonpayment, may constitute a default.

4. The Security Agreement: Waiver Provisions

The security agreement will often contain two waiver provisions.[73] The secured creditor may allow the debtor to correct any default without waiving assertion of the default corrected. The creditor may also waive any default by the debtor without waiving subsequent defaults. In the hypothetical case, this waiver provision would enable Maryland National Bank to accept two of the three overdue payments without waiving the default resulting from *any* of the overdue payments or in the alternative, to waive two of the overdue payment defaults upon receipt of the amount without waiving the default created by the remaining overdue payment.

A second, more significant, waiver provision is the waiver of defenses against an assignee. Essentially, the debtor agrees not to assert against the assignee of the secured creditors' rights, any rights or defenses he may have against the secured creditor. Thus, in the hypothetical case, Sergeant Jones may have affirmative defenses or rights against City Austin, Inc., but he cannot raise them against the assignee, Maryland National Bank. The Uniform Commercial Code acknowledges this type of agreement unless other statutory or decisional law of a jurisdiction proscribes them.[74] A further limitation is imposed: the assignee must take the assignment for "value," in "good faith," and "without notice of a claim or defense." While these limitations suggest a variety of litigable issues, the clause would have vitality in many jurisdictions.[75]

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69 Crandall, *supra* note 5, at 385.

70 *Id.*

71 *Id.*

72 *Id.*

73 V. COUNTRYMAN, *supra* note 66, at 25; Crandall, *supra* note 5, at 385.

74 MD. ANN. CODE art. 95B, § 9-206(1) (1964).

75 *See, e.g.*, Jennings v. Universal C.I.T. Credit Corp., 442 S.W. 2d 565 (Ky. 1969); First Sational Bank v. Husted, 57 Ill. App. 2d 227, 230, 205 N.E. 2d 780, 783 (1965).

5. *Analysis: The Consumer-Soldier's Rights in the Hypothetical Case*

After considering the default and waiver provisions of a security agreement, one might wonder whether the consumer in a secured transaction has any rights. A description of the atmosphere in which most consumer secured transactions take place adds to this inquiry:

> It is not only that the parties do not deal on an economic parity, neither do they ordinarily meet on a level of social equality. Moreover the consumer does not appear to be in the situation of buying anything. . . . Rather he appears to be asking for something and, if his request is granted, neither the economic nor social situation is propitious for completion of the transaction.[76]

In our hypothetical case, Sergeant Jones must assert a valid defense to the default of nonpayment to regain his Austin or to recover his monetary losses. The Uniform Commercial Code provides for the revocation of an acceptance of goods by a consumer in situations similar to those in Sergeant Jones' case.[77] The automobile must have been nonconforming and the nonconformity must have substantially impaired the value of the auto to the buyer. The defective engine in Jones' Austin would appear to satisfy both of these requirements. Further, discovery of the nonconformity was impossible without a mechanic's examination. Finally, Jones' conversations with the owner of City Austin, Inc. indicate that he revoked within a reasonable time, giving timely notice to the dealer. Thus, Jones appears to have made a proper revocation.

In addition to his revocation of acceptance, Jones has a cause of action for breach of warranty against City Austin, Inc.[78] If City Austin, Inc., was the plaintiff, Jones could show he was not in default since the Code[79] entitles him to deduct the amount of monetary damages from the amounts due under the contract. Thus, if City Austin has repossessed his automobile, Jones could have shown that he was not in default and recovered damages.

However, City Austin, being insolvent, is not involved in the action by their assignee, Maryland National Bank. Sergeant Jones must be able to assert his defenses against the bank in order to prevail. In many jurisdictions, a waiver of defense clause in the security

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76 Shuchman, *Consumer Credit By* ***Adhesion*** *Contracts*, 35 TEMP. L.Q. 125, 131 (1962).

77 MD. ANN. CODE art. 95B, § 2-608 (1964).

78 MD. ANN. CODE art. 95B, § 2-714 (1964).

79 MD. ANN, CODE art. 95B, § 2-717 (1964).

agreement would foreclose Jones from raising his defenses and claims against City Austin in an action brought by the assignee bank for the deficiency.[80]

Assuming the bank's repossession and claim for deficiency satisfies the requirements of the Uniform Commercial Code,[81] Jones will lose his Austin and be liable for the deficiency.

Recently enacted legislation in Maryland would prevent this curious result.[82] Maryland now allows defenses arising out of **a** consumer credit sale'to be asserted against a bona fide assignee. The defenses must be asserted in a written notice to the assignee within a ninety-day period following the assignee's giving notice of assignment to the consumer. Applying this statutory change to the hypothetical case, it is easy to surmize a completely different result for consumer Jones.

D. REPLEVIN–JUDICIAL REPOSSESSION

Replevin at common law was a summary procedure to recover goods wrongfully taken. Gradually, as commercial transactions increased in number, the scope of the writ expanded and it evolved into a remedy used to recover the possession of personal property to which one had a right of immediate possession.[83] Conditional vendors, the holders of retail installment contracts, most often resorted to the use of replevin. Their contracts typically reserved title in the seller. pending successful completion of the payments by the consumer. Thus, a failure on the part of the consumer to fulfill his payment obligations enabled the seller to resort to replevin immediately.[84] A writ of replevin would issue upon the giving a bond[85] and simultaneously, or upon return of the property, filing a declaration that the defendant unjustly detained the property.[86]

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[80] *See, e.g.*, Jennings v. Universal C.I.T. Credit Corp., 442 S.W. 2d 565 (Ky. 1969); First National Bank v. Husted, 57 Ill. App. 2d 227, 230, 205 N.E. 2d 780, 783 (1965).

[81] See MD. ANN. CODE art. 95B, §§ 9-503, 9-504 (1964). Essentially, there must be a consumer default, a repossession without committing a breach of the peace, notice of a sale. a commercially reasonable sale, and an accounting of the proceeds.

[82] MD. ANN. CODE art. 83, § 21 G (1969).

[83] MD. R. CIV. P., MD.D.C., BQ 41.

[84] Wheeler v. Adams Co., 322 F. Supp. 645, 650 (D. Md. 1971).

[85] MD. R. CIV. P. RQ 42. A bond in the amount of double the value of *the* property claimed must be given.

[86] MD. R. CIV. P. BQ 44.

The bond requirement offered a wronged consumer some protection, but the degree of protection depended on the conditions contained in the bond given by the plaintiff. Maryland bonds were conditioned on successful prosecution of the action, on the return of the goods by the plaintiff if so required by the judgment, and on the satisfaction of an adverse judgment.[87]

A defendant could also file a motion for return of the replevied property. If the motion was granted, the property would be returned after the defendant had been given a bond.[88]

By requiring notice and hearing prior to the seizure of property by replevin, the decision in *Fuentes v. Shevin*[89] significantly changed the character of the ancient writ. Maryland, for example, established a new procedure directing the clerk of the court to issue a show cause order to the defendant immediately after a replevin action is initiated by the plaintiff.[90] The defendant is given a minimum of seven days prior to a hearing to determine whether or not the property should be returned to the plaintiff. The writ will issue and the property be seized if the court at the hearing determines there is a reasonable probability that the plaintiff is entitled to immediate possession of the property.[91]

E. STATUTORY LIENS[92]

1. Common Law Origins

The common law recognized particular liens in favor of two classes of persons: (1) those persons bound by law to serve the public—innkeepers, carriers and warehousemen, and (2) those persons who, by their labor and skill, enhanced the value of goods entrusted to them—artisans, mechanics and laborers.[93] The lien consisted of the privilege of detaining or holding the possession of particular property of a debtor as security for a debt, or of detaining the property until the reasonable charges for labor were paid.[94] In

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87 MD. R. CIV. P. BQ 42.

88 MD. R. CIV. P. BQ 46, 47. The defendant's bond must be equal to that of the plaintiffs. It is conditioned on the defendants return of the disputed property if the plaintiff prevails on the merits.

89 407 U.S. 67 (1972).

90 MD. R. CIV. P., MD.D.C., BQ 43.

91 MD. R. CIV. P., MD.D.C., BQ 44.

92 See Gleason, *The Erosion of An Ancient Writ*, 3 MD. L. FORUM 53 (1973).

93 51 AM. JUR. 2d *Liens* § 21 (1970).

94 *Id.*

neither case does the creditor haw a possessory lien on the general assets of the debtor.

In many states, these common law liens have been modified by legislative enactment. The statutory innkeeper,[95] garageman,[96] and warehouseman[97] liens are of current interest because thev are the result of frequent marketplace consumer transactions.

2. *The Innkeeper Lien*

In some instances, the legislative enactments have modified the common law lien:[98] the innkeeper's absolute liability may be limited or reduced; the coverage of the lien may be broadened to include ordinaries, hotels, inns and boarding houses; and the lien may attach before the price actually becomes due. If the debtor fails' to pay within a specified time period, the lienor may sell the goods to satisfy the debt.[99] Statutory provisions, such as the ones enumerated, grant innkeepers and ordinaries, hotels, and boarding houses enormous power to effectively confiscate propertv.

If a dispute arises between the guest and his innkeeper, the latter, having some amount due or about to become due, may seize the guest's goods. The guest has few alternatives available to combat the imposition of this lien. He can pay the alleged amount owed, regain his property, and then seek legal redress or he can seek a writ of replevin. If the. statute permits the sale of the goods—in Maryland, for example, if the debt is due for fifteen davs—the guest must act immediately or risk the loss of such goods.

3. *The Garageman and Warehouseman Liens*

The garageman or repairman, and warehouseman liens are often codified remedies that enable businessmen after a consumer has voluntarily relinquished his goods for repair or storage to retain possession until payment of the debt is made. For example, in Maryland, a garageman has a statutory lien for charges that is superior to third party liens not recorded in the State.[100] The owner of the automobile

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95 MD. ANN. CODE art. 71, § 4 (1970).

96 MD. ANN. CODE art. 63, § 41 (1972).

97 MD. ANN. CODE art. 95B, § 7-210 (1964).

98 *See, e.g.*, MD. ANN. CODE art. 71, § 4 (1970).

99 *Id.* In Maryland, a sale may be held upon expiration of a fifteen-day period following the date the debt matures.

100 MD. ANN. CODE art. 63. § 41 (1972).

subjected to the lien has several statutory remedies.[101] If he disputes the amount of the charge claimed, he may file suit against the garageman. Alternatively, the debtor will obtain the right to immediate repossession if he gives a double-value bond. These statutory remedies are time consuming and costly for the consumer involved in such a dispute. It seems to be fair to say the remedies discriminate in favor of consumers in higher income brackets. It is also realistic to conclude that, regardless of the remedy used, the consumer will be deprived of the use and possession of his automobile for some period of time. The only action available to secure immediate release of the automobile is immediate payment of the disputed charge by the consumer.

The warehouseman's lien,[102] now codified in the Uniform Commercial Code, is limited to the usual charges incident to a storage transaction.[103] In a default situation, the lien is enforceable by a public or private commercially reasonable sale of the goods after notice to the debtor. The bailor-debtor may pay the amount claimed by the warehouseman at any time prior to a sale and regain possession of his goods. Other remedies available to the debtor are actions against the warehouseman for failure to comply with the statutory sale requirements or for conversion of the goods.[104] Thus, there will be a denial of repossession to the debtor of his goods for some period of time unless he pays the amount claimed.

4. Creditor Benefits

Several common benefits accrue to creditors who are entitled to assert statutory liens. First, they are permitted to summarily seize or retain property owned by the debtor. Second, they are entitled to satisfy the debt by selling the seized or retained property. Third, both the seizure or retention and the sale of the property may be effected without resort to judicial process. Fourth, if there is a dispute between the creditor-lienor and the consumer, the burden to initiate judicial proceedings is on the consumer. Thus, the legal vindication of wrongful actions perpetrated against the creditor is swift and sure; and, vindication of the creditor's wrongful acts against the consumer is slow, costly and unsure.

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101 MD. ANN. CODE art. 63, §§ 42, 45 (1972).
102 MD. ANN. CODE art. 95B, § 7-210 (1964).
103 MD. ANN. CODE art. 95B, § 7-209 (1964).
104 MD. ANN. CODE art. 95B, § 7-210(9) (1964)

IV. CONSTITUTIONAL CHALLENGES TO PREJUDGMENT ALTERNATIVES

A. GARNISHMENT IN DISPUTED DEFAULTS: THE SNIADACH CASE

In *Sniadach* v. *Family Finance Corporation of Bay View*,[105] Family Finance instituted a garnishment action against Christine Sniadach and her employer. The complaint alleged a claim of $420.00 on a promissory note executed by Sniadach. Wisconsin procedure permitted the clerk of the court to issue a summons upon the request of the claiming-creditor's attorney. Service of the summons on the garnishee-employer by the requesting party set in motion a process u-hich froze one half of the $63.18 in wages owed to Sniadach.

The wages remained frozen until there was a trial in the main suit and the wage earner won on the merits. In the interim, the wage earner suffered a deprivation of the use and enjoyment of the frozen wages. This deprivation without an opportunity to be heard and to present any defense, even against fraud, was the basis of Sniadach's challenge to the Wisconsin garnishment procedure.

1. Due Process Protection for the Use of Money Wages

As a legal concept, property consists of the totality of the rights and powers incident to some "thing." It is more than the "thing" itself. The right to use and derive enjoyment—or profit—from the "thing" is property.[106] The concept that the *use* of the "thing," property, is "property" within the meaning of the due process clause is not new.[107] In *Sniadach*, the Supreme Court recognized that the *use* of one's money wages was constitutionally protected property. More significantly, however, the Court held that due process demanded a hearing prior to the attachment of wages, even when the restriction on use is relatively brief and an eventual hearing is guaranteed.

The *Sniadach* decision hurdled decades of prior decisions on prejudgment attachments which either ignored the *use* of property as being within the protection of the fourteenth amendment,[108] or con-

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105 395 U.S. 337 (1969).

106 McKay v. McInnes, 279 U.S. 820 (1929), *aff'g per curiam*, 127 Me. 110, 141 A. 699 (1928).

107 *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1948).

108 *See* Coffin Bros. v. Bennett, 227 U.S. 29 (1928); Owenby v. Morgan, 256 U.S.94 (1921).

sidered its temporary loss to be too inconsequential to warrant constitutional protection.[109] Thus, *Sniadach* was the first Supreme Court decision to indicate that increased consumer debtor protection vis-a-vis the business creditor was on the horizon.

Seemingly a sweeping consumer victory, the Court's holding, nonetheless, must be read with caution. In 1929, the Court affirmed *McKay v. McInnes*,[110] a state court decision that held that the deprivation of property caused by the attachment procedure was too inconsequential to be entitled to constitutional protection, In addressing this general proposition, Mr. Justice Douglas, author of the majority opinion, created a specific exception: wages were "a specialized type of property presenting distinct problems in our economic system."[111] He emphasized the hardship that a deprivation of wages would work on a family and the harsh consequences, *e.g.*, loss of job, social stigma and so forth, which often follow a garnishment action.[112] Thus, the Court's emphasis in *Sniadach* upon "hardship" and "harsh consequences" leads one to conclude that goods must be absolute necessities of life in order to be within the purview of the due process clause.

2. *Extraordinary Situations Justifying a Summary Procedure*

The Court acknowledged that a summary procedure, such as that allowed for garnishment, would satisfy due process requirements in extraordinary situations. *Ownbey P. Morgan*,[113] for example, rejected a 1920 challenge to the summary attachment of a nonresident's property. Similarly, *Coffin Bros. P. Bennett*[114] found summary execution against the property of the stockholders in an insolvent bank to be constitutionally permissible. These situations involved affording special protection to a state or to the interest of a creditor, factual contexts not present in *Sniadach.* Since Sniadach was a resident of Wisconsin subject to in personam jurisdiction, the Court required that a hearing be conducted prior to the attachment of the wages; any other statutory remedies available to the debtor for interim relief from the seizure between the service of the summons

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109 See McKay v. McInnes, 279 U.S. 820 (1929), ***aff'g*** *per curiam*, 127 Me. 110,141 **A.** 699 (1928).

110 *Id.*

111 395 U.S. at 340.

112 *Id.* at 340-41.

113 Owenby v. Morgan, 256 U.S. 94 (1921).

114 Coffin Bros. v. Bennett, 227 U.S. 29 (1928).

and adjudication of the merits of the main claim were inadequate to satisfy due process requirements.

3. *Failure to Specify Hearing Requirements*

One distressing aspect of the Court's opinion in *Sniadach* is its failure to specify the dimensions of the required hearing. A concurring opinion suggests that, at a minimum, the hearing must establish the probable validity of the underlying claim against the alleged debtor.

B. *FUENTES REPLEVIN, DISPUTED DEFAULTS, AND DUE PROCESS*[115]

The prejudgment replevin statutes of Florida and Pennsylvania were before the United States Supreme Court in *Fuentes v. Shevin.*[116] In *Fuentes*, the creditor sought to repossess a stove and a stereo that were purchased under a conditional sales contract. The debtor made payments under the contract for more than one year but after a dispute over servicing the store, she refused to make further payments. Since the contract provided that the purchaser was entitled to possession only so long as she made her payments, the creditor filed a repossession action in small claims court.

At the same time the replevin action was initiated the creditor completed a form document.[117] When the document was filed with the clerk of the Florida court, the clerk issued a writ of replevin directing the sheriff to seize the stove and the stereo. Challenging the constitutionality of the state replevin statute—allegedly it violated the due process clause of the fourteenth amendment—the creditor filed suit in federal district court. In vacating a three-judge court's decision upholding the statute's constitutionality[118] the United States Supreme Court held that in the absence of "extraordinary" circumstance~,' the temporary deprivation of the use and the possession of

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115 See Gleason, *supra* note 92.

116 407 U.S. 67 (1972).

117 This procedure is typical of many jurisdictions. *E.g.*, in Maryland, see notes 84-88 and accompanying text.

118 Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

119 407 U.S. at 90. The Court points out that precedent for an outright seizure without the opportunity for a prior hearing is found in those truly unusual circumstances where (1) it was necessary to secure an important governmental or general public interest, (2) there was a special need for immediate action, and (3) the state maintained strict control, since a government official initiated the

the consumer goods is sufficient to constitute a denial of due process guaranteed by the fourteenth amendment unless a judicial hearing is conducted prior to issuance of the writ of replevin.

The three dissenting judges in this four to three decision (Justices Powell and Rehnquist took no part) reasoned that the three-judge court should not have heard the case since there were no bad faith actions alleged; any possible irreparable injury could have been averted by allowing the state court to test the constitutional objection to the statute and, the pending state court proceeding demanded federal court abstention.[120] The dissenters also felt that the majority ignored the rights of the creditor who, like the debtor, is entitled to protection of his property interests. Anyway, the dissenters pointed out, the decision allowed creditors to insert a "waiver of rights" clause in the credit agreement, thus, negating the force of the majority opinion.

1. *Consumer Goods and Due Process Rights*

The *Fuentes* majority clarified what is consumer property within the meaning of the due process clause:

> No doubt there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally.[121]

Thus, the impression created by *Sniadach*,[122]—only goods that were absolute necessities of life were constitutionally protected—was rejected.

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seizure after carefully determining it was necessary and justified by the statute involved. See, *e.g.*, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1930) (seizure of property to collect the internal revenue of the United States); Central Union Trust v. Garvan, 254 U.S. 554 (1920) (seizure to protect against the economic disaster of a bank failure); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1949) (seizure to protect the public from misbranded drugs); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure to protect the public from contaminated foods). The Court points out that, in addition to "extraordinary" circumstances, special situations may legitimately demand prompt action. The example posited by the Court is the situation where the creditor makes a showing of immediate danger that a consumer will destroy or conceal disputed goods.

120 407 U.S. at 97, 98.

121 *Id.* at 90.

122 395 U.S. 337 (1969).

2. The Dimensions of the Due Process Hearing

Although the Court felt that a judicial hearing was required prior to seizure under the facts of *Sniadach* dnd *Fuentes*, both opinions failed to enunciate the scope of the hearing. A concurring opinion in *Sniadach* suggested that the hearing must be of sufficient scope to establish the probable validity of the debt.[123] However, the majority in *Fuentes*, which seemed to require less than a full hearing, stated that the extent and form of a hearing may vary with each case. A prior hearing, said the majority, is the only effective safeguard against the arbitrary deprivation of property. Placing a bond requirement on the creditor in a replevin action is not an acceptable alternative to the hearing requirement.[124] Safeguards other than a hearing may, however, be considered in determining the extent and form of a hearing.

The Court indicated that other factors may be significant in determining the extent of a hearing. The simplicity or complexity of the issues pertaining to the right of continued possession—complex issues requiring more formality—a balancing of the property interests involved, the probable time from deprivation to final resolution, and the severity of the deprivation on the debtor should be considered."[125]

The Court, however, left the extent and form of the preseizure hearings to the discretion of the state legislatures[126] and it is likely that any legislative attempt to enunciate those instances when a *full* prior hearing—as opposed to a *partial* one—is required will meet with failure. The Court's failure to set a hard and fast rule as to what constitutes a hearing and its failure to definitively list the factors u-hich must be considered in enacting statutory guidelines providing for such hearings compounded, rather than clarified, the state legislative task.

An additional difficulty with the Court's decision is that due process is not afforded to certain consumers when only a *partial* hearing is conducted. For example, if the debtor has no defense to replevin there is no need to distinguish between the type of hearing provided. Likewise, if a consumer can only prove his defenses in the procedural context of a *full* hearing, he might be deprived of the use and possession of his property if a *partial* hearing is conducted.

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123 See 395 U.S. 337, 343 (1969).
124 407 U.S. at 83.
125 *Id.* at *87* n.18, 90 n.21.
126 *Id.* at *96-97.*

Thus, some consumers may not be afforded constitutional due process if only a partial hearing is conducted. *Fuentes* seems to require a full hearing to determine severity of deprivation, to underline the basis for the debt, and to identify the complexity of the issues involved before a determination can be made as to whether a *partial* or *full* prior hearing is required under the due process clause of the fourteenth amendment.

Taken together, *Sniadach* and *Fuentes* dictate that a full hearing be conducted prior to the seizure of property.[127] Current concern with effective and efficient use of judicial resources supports such a conclusion. For example, seizure after a partial hearing would, in most instances, be followed by a full hearing resulting in final adjudication, while a full hearing prior to seizure would result in only one adjudication.

Furthermore, a full "preseizure" hearing supports both individual and societal interests. Except in the most extraordinary cases, a seizure under writ of replevin prior to a full hearing serves no societal interest. A full prior hearing does not frustrate society's interest in assuring that creditors are made "whole." Property will be seized and sold if the creditor prevails and the proceeds of that sale applied against the debt. Any deficiency must be adjudicated in a separate legal proceeding. Thus, the full preseizure hearing completely protects the debtor's constitutional rights, rights which society also has an interest in protecting. Therefore, the full preseizure hearing which precedes the judgment protects both the debtor and creditor interests and is detrimental to neither.

3. *Contractual Waiver of Due Process Rights*

Justice White in his concurring opinion in *Fuentes*[128] was incisive when he observed that insertion of a waiver provision in a credit instrument would do away with the right to a preseizure hearing. The point Justice White made was completely ignored by the majority, a point which might well fall within the ambit of the well settled doctrine that constitutional rights may be waived and that such a waiver may be effective in both criminal and civil cases.[129] What

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[127] *See* MD. R. CIV. P., MD. D.C., BQ 43 and BQ 44. This revised Maryland procedure will culminate in a full trial, in effect, if the consumer asserts defenses.

[128] 407 U.S. at 102.

[129] Boddie v. Connecticut, 401 U.S. 371, 378-79 (1970) (in the civil area, a due process hearing is subject to waiver); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (in the criminal area, the right to counsel and the right against compulsory self-incrimination are subject to waiver).

standard—the criminal or the civil—is to be applied was left unresolved. The Supreme Court has, however, held that a contractual waiver of constitutional rights is to be measured by the criminal standards.[130] Thus the waiver must be voluntary, knowingly and intelligently made. In the same case, hon-ever, the Court decided that the waiver met "the test" since the parties to the contract were of equal bargaining strength. both were represented by counsel, and the waiver of rights was one of the contractual provisions actually bargained for.

Since in *Fuentes* the creditor waived no rights. the Court was able to avoid enunciating a standard. If the Court subsequently adopts Justice White's opinion as articulated in his *Fuentes*' concurrence. *Fuentes* has little, if any, meaning or effect.

C. AUTOMOBILE CASES AND SELF-HELP[131]

1. Basis for Federal Jurisdiction

A creditor has two primary grounds for asserting jurisdiction in federal district court. First, the creditor may assert that the state's statute is a violation of the Civil Rights Act of 1871.[132] Second. the creditor inav allege that the factual situation presents a "federal question," an allegation that meets the statutorily prescribed prerequisite.[133] Whether the basic federal jurisdiction statute or the Civil Rights Act of 1871 is alleged as a jurisdictional basis for the district court's jurisdiction over the controversy between the creditor-debtor, some significant state involvement in the alleged wrongful acts must be shown. Additionally, if jurisdiction is alleged under the general statute, the value prerequisite410,000—must be satisfied, a prerequisite that most consumers are hard put to satisfy if the property involved is an automobile.

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130 405 U.S. 174, 181-182 (1972).

131 See Gleason *supra* note 92.

132 Every person. who under color of any statute, ordinance, regulation. custom, or usage. or any State or Territory, subjects, or causes to be subjected. any citizen of the United Stares or other person within the jurisdiction thereof to the deprivation of any rights. privileges, or immunities secured by the Constitution and laws. shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. 42 C.S.C. § 1983 (1958); 28 U.S.C. § 1343 (3) (1964).

133 The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of 510,000, exclusive of interest and costs, and arises under the Constitution. laws, or treaties of the United States. 28 U.S.C. § 1331(a) (1964).

2. Significant State Involvement

Prejudgment seizure may take four forms. First, state officials may be involved, the factual situation in *Sniadach* and *Fuentes*;[134] second, a state statute may provide both the right and procedure under which a seizure is made;[135] third, a statutory provision may predicate the repossession provisions of the creditor-debtor agreement;[136] and fourth, the creditor-debtor agreement may be unaffected by any state statute. State involvement may be easily asserted in the first instance, and, conversely, easily disregarded in the fourth. In the former, the state official's action is clearly "under color of state law," and the state involvement is sufficient to call into play the due process requirements of the fourteenth amendment—no state shall take any action which shall deprive the individual of property without due process of the law. The fourth form is a private agreement independent of any state involvement. Therefore, the federal court would lack jurisdiction under either the Civil Rights Act of 1871 or the general jurisdiction statute and the fourteenth amendment would be inapplicable to prehearing seizures of consumer goods.

a. *Form Two*

In *Klim v. Jones*,[137] the court considered the gray area of form two in the context of a challenge to California's innkeeper lien law. Finding jurisdiction under the Civil Rights Act of 1871, the court squarely addressed one troublesome jurisdictional issue: was there sufficient state action to fall within the "under color of state law" requirement of the Act? The *Klim* court found that the innkeeper lien statute not only outlined the applicable conditions for imposition of such a lien, but also derogates from an innkeeper's common law liability for certain tortious acts, and thus was the sole authority under which the innkeeper may impose a lien on the plaintiff's personal effects.[138] Assertion of the lien was not merely private action within a state policy but rather action encouraged and made possible by explicit state authorization. This was sufficient state action for jurisdictional purposes.

The other obstacle in assuming jurisdiction, that the Civil Rights Act of 1871 applies only to "personal rights" and not to "property rights," was put to rest in *Lynch* v. *Household Finance Corporation*, where the Court stated:

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134 395 U.S. at 388-389; 407 U.S. at 71.
135 MD. ANN. CODE art. 71, § 4 (1970).
136 MD. ANN. CODE art. 95B, § 9-503 (1964).
137 315 F. Supp. 109, 113 (N.D. Cal. 1970).
138 Id. at 114.

> The right to enjoy property without unlawful deprivatioc, no less than the right to speak or the right to travel, is, in truth, a "personal" right, whether the "property'. in question be a welfare check, a home, or a savings account.[139]

b. *Form Three—Nonobvious State Involvement: Self-Help Repossession of Automobiles*

The private security agreement—the other unclear form of action—as set against a codified backdrop of Sections *9-503* and 9-504 of the Uniform Commercial Code, is more difficult to classify as state action. *Adams v. Egley*[140] and *Oller v. Bank of America*[141] illustrate how the determination of significant state action, and hence jurisdictional issue, varied within two California Districts. Both cases involved self-help repossession of automobiles pursuant to signed security agreements that essentially mirrored Section *9-503* of the California UCC.[142] In *Adams*, the court decided that the UCC provisions had a significant impact upon the ostensibly private agreement.[143] For this court, the agreement, since the Code sections enunciated state policy—merely embodied that policy and this finding was sufficient under the rule in *Reitman v. Mulkey*[144] to be "under color of state law."[145]

In contrast, the court in *Oller* found that it did not have jurisdiction under the Civil Rights Act of 1871.[146] Starting with the premise that the "state action" requirement is seldom met if the action fails to directly involve a state officer, the court listed the factual situations which have compelled an extension of jurisdiction.[147] In each instance, either a state official was acting in concert with a private party; the state law compelled the action; or the power exercised mas'purely statutory and was not derived from the common law or

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139 405 U.S. 538, 552 (1972).

140 338 F. Supp. 614 (S.D. Cal. 1972).

141 342 F. Supp. 21 (N.D. Cal. 1972).

142 CAL. ASS. COMM. CODE 44 9503 and 9504 (West 1964).

143 338 F. Supp. at 617. The security agreement specifically referred to the CALIFORNIA UNIFORM COMMERCIAL CODE and provided for immediate repossession in the event of default by the consumer.

144 In *Reitman*, the Supreme Court held that a California constitutional amendment that prohibited any limitation on the right of a person to sell property authorized private racial discrimination in the housing market by repealing anti-discrimination statutes. and created a constitutional right to discriminate on racial grounds. 387 U.S. 369 (1967).

145 338 F. Supp. 614, 617 (S.D. Cal. 1972).

146 342 F. Supp. at 23.

147 *Id.*

contractual origin.[148] Since the security agreement in *Oller* made no reference to the Uniform Commercial Code, the court concluded that the repossession was based on judicially sanctioned contractual rights that existed prior to enactment of the statutes.[149] In distinguishing *Adams*, the court firmly stated that any reliance upon *Reitman* in resolving the jurisdictional question was misplaced; the racial discrimination in *Reitman* presented a compelling factual situation to which the Civil Rights Act was particularly intended to apply.[150]

This issue, whether or not self-help repossession under Section 9-503 is under "color of state law,'' has spearheaded the lively battle between consumers and the automobile financing industry. Self-help repossession is used almost exclusively to repossess automobiles. To avoid committing a breach of the peace, most creditors seeking to repossess household goods resort to judicial repossession.[151] Approximately ten federal district courts, evenly split in their opinions, have considered the issue.[152]

The Court of Appeals for the Ninth Circuit may have foreshadowed the conclusion to the UCC self-help repossession debate when it reversed the district court in *Adams*.[153] Concluding that self-help repossession was not conduct taken under "color of state law," the court emphasized that the test is "significant state involvement." *Reitman,* the court said, involved far greater state participation in the challenged conduct than the self-help repossession cases. Since the California constitutional amendment was intended to authorize that which had previously been expressly prohibited, Adams could be distinguished; it merely codified existing law and did not reverse any previously enacted statutes.

The validity of this argument is questionable. Enactment of Sections 9-503 and 9-504 of the UCC did more than codify existing common law in some jurisdictions. The common law permitted an entry onto premises without legal process only if the entry was pursuant to a private contractual arrangement. Furthermore, repossession by a conditional vendor was an action disaffirming the sale. Con-

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148 **Id.**

149 Id.

150 Id.

151 **White, The Abolition of Self-Help Repossession: The Poor Pay Even More, 1973 Wis L. Rev. 503,** 513 **(1973).**

152 *See* **Boland v. Essex County Bank and Trust Co.. 42 U.S.L.W. 2116 (D. Mass. 1973).**

153 **Adams v. Southern California First National Bank, 42 U.S.L.W.** 2231 **(5th Cir. 1973).**

sequently, the vendor was estopped from maintaining an action to recover the unpaid price.[154] The majority opinion, as the dissent points out, seems to state a bare conclusion. Other than pointing to a factual difference, the majority failed to show how the state was involved to "a far greater degree" in *Reitman* than in *Adams.*

The court enunciated a second reason in support of its finding of no significant state involvement. **A** case involving racial discrimination should not be permitted to control prejudgment self-help repossession and there was no indication that legislative enactment of the CCC was intended to violate due process. Additionally, the creditor remedies were based on well established economic grounds rather than on an intentional indirect circumvention of constitutional rights, as found in the racial discrimination cases,

While the Ninth Circuit's conclusion may be correct, their analytical approach is suspect. A strong case can be made that nonobvious state involvement may be *significant* state action only within the context of racial discrimination cases. **A** growing line of decisions, from *Shelly v. Kraemer*[155] to *Moose Lodge No. 107 v. Irvis*,[156] support this proposition. *Reitman*[157] referred to "invidious discrimination" in enunciating a test for determining state involvement. Subjecting other types of nonobvious state involvement to the *Reitman* rationale would be the prelude to subjecting all private behavior that conforms to state law to the fourteenth amendment.[158]

If one accepts the premise that nonobvious state involvement is "significant" state involvement only in racial discrimination cases, the *Adams* case is reduced to analysis under the conventional state action doctrine.[159] The UCC self-help repossession provisions would not constitute "significant" state involvement, and there would be no federal jurisdiction under the Civil Rights Act of 1871.

D. THE FUENTES DOCTRINE: JUDICIAL EXTENSION OR REJECTION?

The basic doctrine of procedural due process set forth in *Fuentes*[160] has enjoyed widespread application in the federal district

154 ***Id.***

155 334 U.S. 1 (1948).

156 407 U.S. 163 (1972).

157 387 U.S. at 380.

158 *See* White, supra note 151, at 506; and, Adams v. Southern California First Sational Bank, 42 U.S.L.W. 2231, 2232 (9th Cir. 1973).

159 *See* notes 146-150 supra and accompanying text. The ***Oller*** court sets forth the more conventional tests for state action.

160 Note 116 and accompanying text.

courts.[161] Additionally, in *Mitchell v. W. T. Grant Co.*,[162] the Supreme Court was confronted with a summary seizure procedure peculiar to Louisiana. W. T. Grant argued that the procedure, while similar to replevin in appearance, was peculiar to the laws of that state. Counsel for Mitchell argued that *Fuentes* was controlling, notwithstanding the peculiarity. The Court had obvious latitude either to leave untouched, or severely cripple the *Fuentes* rationale. The court, however, distinguished *Mitchell* and *Fuentes* based upon the different statutory provisions under scrutiny. Finding the Louisiana sequestration standards constitutional, the court pointed out that: "[a] bare conclusionary claim of ownership [does] not suffice" under the statute; the requisite showing of cause "must be made to a judge"; and "judicial authorization" must be obtained.[163] Thus, unlike the procedure in *Fuentes*, there is judicial control throughout the course of the procedure. In addition to *Mitchell*, the Court will be confronted with an appeal in the *Adams* case or a similar case involving the self-help repossession provisions of the Uniform Commercial Code in its next term.

The advocacy of extension or rejection of the requirements of *Fuentes* in summary seizure procedures other than replevin reveals rather clearly drawn legal arguments. One argument, considered in the preceding section, focuses on the jurisdictional requirement of significant state action. Secondly, advocates of rejection of *Fuentes* argue that the doctrine is meaningless since consumers can, and will, waive their rights especially in the security agreements of secured transactions.[164] Finally, the substantive arguments focus on the validity of the *Fuentes* assessment of due process in consumer cases involving, in particular, repossession of automobiles.

The dissent in *Fuentes* suggests that the creditor interests were not assigned proper weight in the due process determination.[165] Professor James J. White agrees, and supports the argument with empirical data.[166] To Professor White, the empirical evaluation of due process balancing test reveals that the benefits to the individual when weighed against the public costs are insufficient to extend *Fuentes*

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161 *E.g.*, Scott v. Danaker, 343 F. Supp. 1272 (N.D. Ill. 1972) (garnishment); Dorsey v. Community Stores Corp., 346 F. Supp. 103 (E.D. Wis. 1972) (replevin); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972) (self-help repossession).

162 42 U.S.L.W. 4671 (U.S. May 13, 1974).

163 See *id.* at 4676-4677.

164 *See, e.g.*, 407 U.S. at 102.

165 See note 128 *supra* and accompanying text.

166 *See* White, *supra* note 151, at 513.

to the automobile repossession cases.[167] The crude data available suggests that there are infrequent repossessions from nondefaulting debtors; the number of debtors having affirmative defenses creating a right to continued possession until final judgment is small; and, the number of debtors who would assert these affirmative defenses is also small.[168] Thus, the benefits to the debtor class from a preseizure hearing are few in number.

On the other hand the data reveals that the creditor in secured automobile loan cases relies on self-help repossession almost exclusively; experiences a default in approximately four percent of his outstanding loans; will not experience debtors absconding with their automobiles if judicial repossession is required; will incur an additional cost of approximately $100-$200 per automobiles required to be judicially repossessed; will pass on these costs to the consumers, probably to the less credit-worthy ones; will seek deficiency judgments in virtually all cases; and, will be able to have greater access to the automobile in judicial repossession, since a sheriff is often not subject to the CCC "breach of peace" limitation on self-help repossession.[169] In short, the cost to the creditor class and the consumer class will rise sharply if judicial repossession is required.

Based upon a repossession rate of four percent of the total number of outstanding contracts in 1971, 24.1 million, Professor White calculates a nationwide cost of $143 million to eliminate self-help repossession.[170] This is an average cost, per automobile credit contract, of about six dollars ($6.00). How would this cost be passed on to the consumer? While Professor White's figures are staggering in the aggregate, they appear rather nominal when viewed against all outstanding financing contracts. It seems unlikely that the credit establishments would adjust their loan procedures so as to eliminate certain classes of individuals now receiving loans. Regardless of whether the credit industry in a given area covered the increased cost by requiring a higher down payment or adjusting the interest rate upward if permissible under usury laws, these should have little effect on the consumer. The cost is simply not that great.

Professor White fails to consider the due process benefits that inure to the individual consumer whose property is subjected to a wrongful repossession. Alternatively, he fails to consider the impact upon

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167 *Id.* at 530.
168 *Id.* at 512, *526-529.*
169 *Id.* at 511, 513-526.
170 *Id.* at 521.

the individual deprived of his automobile in our society, Statistically, he seeks to demonstrate that a due process hearing should not be afforded because the public cost is exorbitant and meritorious cases are almost nonexistent. If accepted, this argument would have vitality in a myriad of due process cases ranging from welfare rights to the rights of criminal defendants.

The logical conclusion is in the opposite direction: distributed costs resulting from a requirement of due process prior to seizure of automobiles are very small in comparison to the protection provided to individual debtors against wrongful seizures.

V. LEGAL ASSISTANCE TO THE CONSUMER-SOLDIER

A. TRADITIONAL LEGAL ASSISTANCE

In 1943, the progenitor of the modern legal assistance program was born. It resulted from recognition of the obvious: personal legal problems adversely affect the morale and efficiency of soldiers. Thus, legal assistance was, and is, an effort by the Armed Forces to provide soldiers with the legal advice and assistance necessary for resolution of their personal legal problems.[171]

1. The Scope of the Program

The scope of the traditional program has been limited from the outset. First, legal assistance is to be given only to the extent that military resources and facilities will allow.[172] Thus, the commitment to legal assistance is not a total commitment. Second, legal assistance is to be given only to individuals that satisfy certain requirements.[173] Third, the duties of a legal assistance attorney are narrowly defined, limiting the type of assistance he can provide a prospective client.[174]

2. *Functions of the Attorney*

The legal assistance attorney has four functions or duties with respect to a client.[175] They are to interview, advise, assist and if necessary, refer clients to civilian attorneys. In February, 1973, The Judge Advocate General of the Army announced a policy change in the regulation governing duties of legal assistance attorneys:

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171 Army Reg. No. 608-50, para. 1 (28 April 1965).
172 *Id.*
173 *Id.* at para. 5.
174 *Id.* at para. 7.
175 *Id.* at para. 7c.

> The Code of Professional Responsibility requires that lawyers represent their clients competently and zealously within the bounds of the law. A legal assistance officer, in adhering to these provisions, is authorized to sign letters written on behalf of his client; to negotiate with adverse parties; and to perform all professional functions, short of actual court appearance unless authorized to do so by The Judge Advocate General, to secure an appropriate resolution of his clients' problem.[176]

A relatively broad reading of this change seems to authorize legal assistance attorneys to provide complete professional services to their clients, short of entering an appearance as counsel of record or actually appearing in court. This increased authorization should reduce the attorney's need to refer cases to a civilian attorney.

3. Categories of Disputed Default Cases

Consumer cases involving disputed defaults, and the exercise of both creditor and debtor prejudgment alternatives, are likely to fall within one of three broad categories: (1) those in which analysis of both the facts and existing law reveals clear legal rights in the creditor (2) those in which analysis indicates the soldier-debtor has been subjected to wrongful action by a creditor and (3) those in which, because of existing factual and/or legal issues, the rights of the parties are not clearly delineated. Although this approach is somewhat simplistic it is necessary to categorize the consumer-soldier cases which may confront the legal assistance attorney in order to evaluate the legal assistance alternatives presently available.

4. Testing Program Adequacy

The hypothetical situation set forth in Section III[177]—a heavily indebted Army Specialist (SP/4) Morris Brown made a credit purchase of an expensive guitar "package"—is a good example of a factual situation in which the creditor had clearly defined legal rights. Brown defaulted after making four monthly payments and there were no indications that the "package" was defective. Likewise, the signed instrument was not defective. Under these facts, the legal assistance attorney would probably not have seen Specialist Brown until the writ of attachment had been levied on the "package." Since

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[176] Letter, dtd. *26* February **1973,** from Major General George S. Prugh, The Judge Advocate General, United States Army, to all Staff Judge Advocates and Legal Assistance Officers.

[177] See text *supra* pp. 148-149.

close analysis reveals a very strong creditor argument that the statutory requirements for commencement of the writ were satisfied, the legal assistance attorney must conclude that Specialist Brown has no affirmative defense to the "default" and has no grounds on which to move to quash the writ. Clearly, then, the role of the legal assistance attorney as adviser is adequate to assist Specialist Brown.

Now, the attorney can provide an additional service. What if Brown told the attorney he had erred, that he now had sufficient funds to pay the overdue payments and that he would be willing to pay half of the remaining payments in return for a "second chance." The full client legal service concept would dictate the legal assistance attorney attempt to persuade the plaintiff to withdraw his action and renegotiate the contract. Although renegotiation may seem unrealistic in this factual setting, the important point is the availability of an additional legal service to the consumer-soldier.

Assume that the attachment procedure in the Brown case, although scrupulously complied with, was of questionable constitutional validity. The legal assistance attorney could certainly exercise his advisory role, but regardless of his assessment of the probabilities for success in test litigation, he would be unable to represent the client-soldier in a judicial vindication of his constitutional rights. Whether or not a legal assistance attorney should be able to appear in court is beyond the scope of this article.[178] The existing prohibition, at least with respect to federal test litigation, is probably desirable. The expense in time and resources simply does not permit such endeavors in a program functioning on already limited resources.

The second type of consumer case the legal assistance attorney is likely to encounter, clear legal right in the consumer-soldier, is susceptible of satisfactory resolution. The service provided by the legal assistance attorney may, however, be inadequate to solve the problem. Advice and negotiation with the creditor may not result in a settlement. This circumstance creates a more subtle issue: whether the restriction preventing the legal assistance attorney from resorting to litigation compromises his negotiating leverage.[179] It is unrealistic to believe that creditors and their attorneys are not, for the most

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178 The question of representation of military members by military attorneys, in civilian courts, involves political and legal questions. For instance, local bar admissions requirements automatically render extensive legal services in this area impractical. Local bar associations are quite naturally concerned about the potential impact on their members.

179 *Buyer v. Seller in Small Claims Court,* Consumer Reports, Oct. 1971, at 625.

part, aware of this restriction. Still another question is presented: should an attorney attempt negotiation when he realizes that he is not allowed to furnish total legal services to his client. For instance, in a situation where attempts to negotiate a settlement fail, the legal assistance attorney must refer his client to a civilian attorney. A variety of reasons suggest that it might be important for one attorney to control a case from the initial interview through the final judgment. The time and effort will literally be doubled if the case is ultimately referred to a civilian attorney. And time may be crucial. For example, if the creditor is financially insecure or the consumer-soldier is suffering a deprivation of an automobile he needs for transportation. Granting authority to negotiate with adverse parties, while withholding authority to initiate law suits against the parties, seems to present additional problems with regard to professional responsibilities and client service. The legal assistance attorney must be extremely cautious in the use of his negotiating authority. The soldier, however, is not without recourse if the legal assistance attorney, after weighing the facts, makes a professional decision to immediately advise the soldier to confer with a civilian attorney.

More difficult is the case in which the factual issues and/or legal issues are clearly disputable. Even without empirical data, one can conclude that the cases most frequently confronting legal assistance attorneys will be contested. In the contested case, the legal assistance attorney's negotiating leverage will be less than it would be if the case is favorable to the consumer-soldier. Adverse parties are aware of the restrictions upon the legal assistance attorney's use of litigation. In these instances, when there are real issues of liability present negotiation presents more serious questions. On the other hand, a referral may be difficult. Unless a recovery will be economically adequate, litigation is not practical. Without litigation, there is little chance of satisfactory resolution. Given this scenario, the conclusion would be that the consumer-soldier could not afford to pursue his claim by retaining a civilian attorney.[180] This would appear to be the area into which most soldier cases fall—and also the area in which the current legal assistance program most clearly fails.

Perhaps one way legal assistance attorneys may fill this void is to focus on the use of the small claims court in their jurisdictions. The typical small claims court was intended to be a forum for vindication of claims involving small monetary amounts without the plain-

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180 *Id.* at 624.

tiff retaining an attorney. Normally, complaints may be drawn in normal language; the procedure is informal and the rules of evidence relaxed. And, the court fees range from $2.00 to $15.00.[181] There are several limitations on the use of the small claims court: (1) maximum dollar limits, $100.00 to $3,000.00, placed, on claims limit the jurisdiction of the court to cases of no greater value than the limit; (2) collection of a judgment may be difficult; and (3) more often than not, the consumer will face an attorney representing his adversary.[182] The essential point is that the small claims procedure may be used to fill an existing void in the legal assistance program. Viewing this brief sketch in the context of the authorized duties of the legal assistance attorney, either his "assistance" or "negotiation" functions would enable him to provide invaluable service to a consumer-soldier in a contested case.

B. THE ARMED FORCES DISCIPLINARY CONTROL BOARD

Although differing in approach from the traditional legal service of advice, negotiation, and litigation, there is one alternative frequently overlooked by the legal assistance attorney: the "off-limits" sanction which may be imposed by an Armed Forces Disciplinary Control Board. By invoking this alternative on behalf of his client, the legal assistance attorney may create a variety of desirable results. Where there has been misconduct by a business creditor, actual or potential imposition of an "off-limits" sanction may serve a preventive law function and create the impetus for resolution of individual claims.

1. Organization

Establishment of Armed Forces Disciplinary Control Boards is an exercise of the military's authority to regulate the conduct of service members. Initially, this authority springs from Constitutional grants of authority to the Congress and to the President as Commander-in-Chief.[183] Congressional authorizations empower the President to prescribe regulations necessary to carry out his military functions, powers and duties,[184] as well as to prescribe regulations for governing

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181 *Id.*
182 *Id.* at 627-30.
183 U.S. CONST. arts. I, § 8 and II, § 2.
184 10 U.S.C. § 121 (1959).

the Armed Forces.[185] The Congress has also delegated power to the Secretary of Defense and Secretary of the Army to control their departments subject to the direction of the President.[186] Thus, the President and his subordinate department heads, are responsible for the operation of the Armed Forces. Coextensive with this responsibility is their authority to further the health, morale, welfare and discipline of these Forces. Pursuant to this authority, the regulation creating the Armed Forces Disciplinary Control Boards was promulgated.[187]

A senior Armed Forces Disciplinary Control Board (AFDCB) is organized in each United States Army area.[188] The First Army, covering the north and central eastern states, provides an example of the geographical area within the jurisdiction of a single senior board. Within this jurisdiction, twelve local boards have been established.[189] The local boards are the backbone of the AFDCB program, providing primary service to the individual military installations within their jurisdictions. The two tier, senior-local board structure provides for a designated commander-sponsor for each board.[190] In the First Army area, the commanding general is the sponsor to the senior board; and the commanding officer, Fort Meade, Maryland, is the sponsor for the Maryland-Delaware local board.'"

Local boards receive and consider reports from local commanders on conditions relating to "improper discipline, prostitution, venereal diseases, liquor violations, drug abuse, disorder, illicit gambling, unfair commercial practices, and other undesirable conditions as they apply to service personnel." [192] These reports are the sequel to unsuccessful attempts by a local commander to rectify an existing condition adversely affecting his soldiers. Essentially, the commander desires to have a civilian establishment placed "off-limits" to his soldiers.

Procedurally, the local board must afford the alleged responsible party notice, an opportunity for a hearing and a reasonable period of time for corrective action. In the event the party fails to take the

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185 10 U.S.C. § 3061 (1959).
186 10 U.S.C. §§ 133a, 133b and 3012b (1959).
187 Army Reg. No. 190-24 (11 January 1972).
188 *Id.* at para. 2-2a.
189 First Army Reg. No. 11-6, Appendix A, Map A-13 (2 January 19701.
190 Army Reg. *So.* 190-24, para. **2-2b** (11 January 1972).
191 *See*, First Army Reg. No. 11-6, Appendix A, Map A-13 (2 January 1970)
192 Army Reg. No. 190-24, para. 2-5 b (2) (11 January 1972).

appropriate corrective action, the board may recommend imposition of the "off-limits" sanction to the local commander-sponsor. The sanction may then be approved unless other local commanders file objections. Notice of the adverse action must be given to the responsible party.[193]

2. *The Commander's Authority to Further Morale and Discipline*

Imposition of the "off-limits" sanction raises legal issues as to the extent of the commander's authority to further morale and discipline, the rights of the responsible party against whom the sanction is imposed and the extent to which the off-post activities of a soldier may be restricted.

Two cases, *Ainsworth v. Barn Ballroom Co.*[194] and *Harper v. Jones*,[195] have upheld ((off-limits" sanctions imposed by installation commanders. In *Ainsworth,* a dance hall was placed off-limits due to "unsatisfactory and immoral conditions."[196] In *Harper,* a used car dealer was declared off-limits for defrauding a soldier in the sale of an automobile.[197] The decision in *Alnsworth,* and perhaps implicitly the decision in *Harper,* was based on sovereign immunity. Both courts, however, strongly suggested that imposition of the sanction was an action within the limits of lawfully delegated authority. Further, they stated that the commander's judgment concerning the morale and discipline of his soldiers would be accorded great deference. Extrapolating from these statements, even assuming rejection of sovereign immunity, imposition of the sanction would be upheld provided it was reasonably related to furtherance of the morale and discipline of the unit.

3. Due Process for the Business Creditor

The plaintiff-businessmen in *Ainsworth* and *Harper* sought to enjoin enforcement, alleging that the imposition of the sanction was a violation of due process. If the decisions rest on sovereign immunity, judicial actions of this type are doomed to failure. On the other hand, if a court focused on the propriety of the exercise of the authority and deferred to the commander's conclusion that there was a nexus between the alleged condition and the morale and discipline

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193 *Id.* at para. 2-8 c, d.
194 157 F.2d 97 (4th Cir. 1946).
195 195 F.2d 705 (10th Cir.), *cert.* denied, 344 U.S. 821 (1952).
196 157 F.2d at 98.
197 195 F.2d at 706.

of his men, it seems apparent that the due process argument must fail. Under the current regulation, a businessman is afforded not only notice and an opportunity to be heard, but he is also given an opportunity to correct the existing condition. Thus, the following factors weigh against any violation of due process argument: (1) the commander's authority grows out of the constitution (2) the commander's exercise of authority is predicated on a procedure which exceeds the normal procedural 'due process requirements of notice and hearing and (3) the commander's decision is based on a condition which bears a reasonable relationship to the furtherance of the morale and discipline of his unit.

4. Restricting Of-Post Activities of the Soldier

The issue of how far an individual soldier's off-post activities may be restricted is likely to surface if court-martial charges result from disobedience of an "off-limits" order. Military courts have held that broad restrictions on private activities may be illegal unless circumstances show a nexus between the restrictions and military needs.[198] Limiting the ability of a soldier to do business with specified establishments in the marketplace does not appear to violate any fundamental right. Further, a restriction such as the one in *Harper*, against doing business with a specific dealer in no way constitutes a broad prohibition against doing business in general. In consumer cases, the "off-limits" sanctions do not appear to unduly restrict the private activities of soldiers.

5. The Potential Value of the "Off-Limits" Sanction in Consumer Cases

Harper illustrates the potential value of the "off-limits" sanction in consumer cases. Jones was a used car dealer doing business with soldiers stationed at Fort Sill, Oklahoma. Representing an automobile as "new," he entered into a conditional sales contract with a young officer. The officer made a down payment of *$900.00*. Two weeks after the transaction, the officer discovered evidence that the automobile was "used" rather than "new." He attempted to rescind the contract by returning the automobile and demanding the return of his down payment. Jones refused and the matter was referred to a legal assistance attorney at Fort Sill. Investigation supported the officer's contention. Despite suggestions that "off-limits" recom-

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198 *See* U.S. v. Wilson, 12 U.S.C.M.A. **165,** 166, 30 C.M.R. 165, 166 (1961); U.S v. Milderbrandt, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).

mendations would be made, negotiations with the dealer were unsuccessful. Subsequently, the dealer was declared "off-limits." [199] In this instance, the record fails to reveal whether or not the officer was ever compensated. While it was unlikely to happen during the pendency of the dealer's federal court challenge, one may conclude the officer was ultimately compensated. Without doubt, the "off-limits" sanction had a heavy impact on a dealer relying on military business. Corrective action by the dealer would have alleviated his crisis. However, another positive result flowed from the occurrence. The officer had clearly been defrauded. The "off-limits" sanction served a preventive purpose—the dealer was unable to conduct business transactions with soldiers at Fort Sill.

One caveat to the exercise of the "off-limits" sanction is that it is an extraordinary action. Army policy requires that every attempt be made to solve problems through normal community relations.[200] It should be quite apparent that use of this sanction, while perhaps directly beneficial to the unit, has attendant public relations implications which could adversely affect both the individual unit and the Armed Forces in general. It is an example of the proverbial two-edged sword.

C. ADDITIONAL ALTERNATIVES: THE EXPANDED LEGAL ASSISTANCE PROGRAM

In October, 1970, the Secretary of Defense directed the military services to initiate a pilot legal assistance program. The program was to test, in cooperating states, the concept of providing expanded legal services to members of the armed services and their dependents who are unable to pay, without substantial hardship, a fee for personal legal services.[201]

Consumer law problems, domestic relations, landlord-tenant disputes and criminal matters in the civilian courts are examples of the variety of cases qualifying under the program. Fee generating cases, for example, real estate transactions or personal injury suits, are automatically excludable.[202]

In 1973, the Secretary of Defense directed that this pilot program, now operating in nineteen states, be made part of the traditional legal

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199 195 F.2d at *706.*

200 ***See Army*** Reg. ***No.*** 190-24, para. 2-8c (11 January 1972); **JAGA** 1970/458.

201 E. Vernon, ***The Department of Defense Pilot Legal Assistance Program: The New Jersey Experience,*** 31 **FED.** B.J. *26* **(1972).**

202 ***Id.***

assistance program and continued on a permanent basis.[203] Thus, legal assistance attorneys in these jurisdictions may provide the indigent soldier a full legal service.

The capability of providing a full legal service, to include necessary litigation, greatly enhances the probability that a consumer-soldier in a disputed default will obtain an equitable result. Representation at *Fuentes* preseizure hearings is clearly within the scope of the program. Depending on the local law, these hearings may be required prior to attachment,[204] replevin,[205] repossession under the UCC,[206] distraint by a landlord,[207] or imposition of a statutory lien.[208]

The increased authority of the legal assistance attorney to initiate litigation should result in more settlements, especially in instances where the consumer-soldier has a sound factual and legal position.[209]

The most significant limitation of the program, the indigency requirement, reveals its most significant defect. It simply is not applicable to most legal assistance clients. For example, from February 1, 1971 to January 31, 1972, only 1,026 of the 13,805 clients seen at Fort Monmouth were within the financial requirement.[210] Consequently, legal assistance attorneys are now in the position of providing essentially unequal assistance to clients with similar cases.

VI. CONCLUSION

A once dormant area of law, prejudgment remedies, has been thrust into judicial focus by the consumer litigation in *Sniadach* and *Fuentes*. Long thought by the business world to be sacrosanct, both the ancient and recent creditor prejudgment remedies are now challenged in courts and legislatures across the country. Since the *Sniadach* decision the trend has been to reaccess and modify creditor

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203 See THE ARMY LAWYER, Sept. 1973, at 19.

204 *See* Randone v. The Appellate Department of Superior Court, 5 Cal. 3d 536, 543, 488 P.2d 13, 17 (1971).

205 See Fuentes v. Shevin, 407 U.S. 67 (1967).

206 *See* Boland v. Essex County Bank and Trust Co., 42 U.S.L.W. 2116 (D. Mass. 1973).

207 *E.g.*, Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972) (Pennsylvania distraint statute unconstitutional).

208 *See* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal 1970).

209 *E.g.*, see note 179 and accompanying rext. Of the cases studied, at least twenty-five percent were settled after initiation of a small claims suit. The action was initiated only after negotiations failed.

210 See Grause, *A Civilian* Lawyer's *Perspective of* the *Legal Assistance* Program, THE ARMY LAWYER, Sept. 1973, at 22.

remedies making them more favorable to the consumer. Judicial modification has focused on increased due process for the consumer. Legislative alterations range from repeal of the "self-help" repossession provisions of the Uniform Commercial Code to alterations applicable in consumer cases, such as negating waiver of defenses clauses in security agreements. However, the current judicial barometer seems to point to cloudy skies for the consumer. The ninth circuit, in the *Adams* case, may have abruptly terminated the battle of the automobile by upholding self-help repossessions. The Supreme Court reaffirmed the vitality of the *Fuentes* decision in *W. T. Grunt* Co. It seems reasonably certain that *Fuentes* will not be extended in the future.[211] Courts will conclude that an extension of *Fuentes* will require redefining the concept of state action in such a manner as to open a floodgate of federal litigation on every conceivable transaction effected by state laws and regulations. Clearly, the courts are unlikely to expand the jurisdiction of the federal courts in consumer cases.

As consumers, soldiers are beneficiaries of the changes in prejudgment actions by business creditors. Legal assistance attorneys, although restricted from pursuing litigation in most instances, can effectively provide the legal services required by the consumer-soldier. In most cases, the restriction on litigation can be overcome by effective use of negotiations, small claims courts, and the off-limits sanction.

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[211] *But see* Watson v. **Branch, 380** F. **Supp. 945** (W.D. Mich. 1974).

RECENT DEVELOPMENT

UNITED STATES v. NELOMS, 48 C.M.R. *702* (ACMR 1974) A SURVEY OF ITS POTENTIAL IMPACT UPON ON-POST VEHICULAR INSPECTIONS*

Petitioner was a passenger in a privately owned motor vehicle that was stopped by a roadblock established by the Provost Marshal's Office within the Fort Benning Military Reservation at the intersection of two roads. Military police personnel conducting the roadblock consisted of two teams. The first, handling traffic, selected every fifth vehicle for submission to a roadside check. The second, comprised of an officer-in-charge, a noncommissioned officer (NCO) dog handler with a specially trained marihuana detecting dog, and a second NCO, would customarily require the occupants of the selected vehicles to exit them leaving the doors ajar. The dog handler would then lead the dog around the automobile and, in the event the dog alerted, the second NCO would search the auto as well as its former occupants. The entire procedure was conducted under the aegis of a purported general delegation of authority from the Fort Benning Commander to his Provost Marshal to conduct security inspections within the reservation.

Following this procedure, the NCO dog handler "worked" his dog around the petitioner's vehicle. When it alerted at the right passenger door the OIC gave the second NCO permission to search the automobile. After discovery of what appeared to be marihuana on the floor of the passenger side, petitioner was required to empty the contents of his pockets on the trunk of the car and in doing so produced two packages containing heroin. He was subsequently convicted by a special court-martial of wrongful possession of heroin in violation of Article 134 of the Uniform Code of Military Justice.

On appeal, the conviction was set aside and the case dismissed by the Army Court of Military Review, which held that insofar as the purported blanket delegation of command authority to search vehicles was constitutionally excessive, the actions of the military police were supportable only by the legitimate scope of their authority to

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

stop a vehicle on a military reservation for safety purposes and to make incidental inquiries. Since the requirement to leave the vehicle's doors ajar exceeded the scope of this limited purpose, it was violative of the fourth amendment. Furthermore, the court held that such an intrusion could not be supported by an "implied consent" theory.'

Although the utility of this case as precedent is reduced by the court's threshold determination that the military police were not the legitimate recipients of a quasi-magisterial authority,* its analysis encompassed three discrete issues relating to the employment of gate searches and intra-installation checkpoints as security devices. In connection with its narrow holding, it considered the delegability of command authority to initiate such measures, and the use of a consent rationale to justify them. In addition, it reflected upon the dynamism of a "military necessity" theory as a legitimizing vehicle. Since the court's comments on each of these questions will have a substantial impact upon the validity of similar prospective measures, they merit some analysis from the perspective of earlier judicial assertions.

Military appellate tribunals have long recognized a commander's authority to conduct "administrative inspections" or inventories of the personal living areas of personnel within his command. Such intrusions within areas generally protected by the fourth amendment are usually justified on the ground that, within the military context, they are reasonably necessary to assure the welfare, morale, safety and combat readiness of the unit.[3]

More recently, this rationale has been extended to justify various command-initiated administrative measures designed to interdict or intercept narcotics traffic on military installations. In *United States v. Gaddis*,[4] the Army Court of Military Review placed its imprimatur

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1 United States v. Neloms, 48 C.M.R. *702* (ACMR 1974).

2 *Id.* at 706.

3 *See, e.g.*, United States v. Welch, 19 U.S.C.M.A. 134, 41 C.M.R. 134 (1969) (inventory of detainee's saddlebags); United States v. Kazmierczak, 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967) (inventory cf detainee's room); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.1I.R. 48 (1959) (barracks inspection); United States v. Sayles, 48 C.M.R. 743 (AFCMR 1974) (barracks inspection). The commander's inherent authority to conduct such inspections is specifically recognized in the Manual for Courts-Martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rei-. ed.), para. 152 [hereinafter cited as the MANUAL]. For a discussion of the scope of this authority and its theoretical bases see Rintamaki, *Plain View Senrches,* 61 MIL. L. REV. 25, 45-48 (1973).

4 41 C.M.R. 629 (ACMR 1969).

upon gate searches in a combat zone. Relying on the inspection cases, it reasoned that, at least in Vietnam, gate searches were similarly a legitimate device for assuring the security and fitness of a command.[5] In a second case arising in the Vietnam context, *United States v. Poundstone*,[6] an installation commander directed that all vehicles and personnel entering the Phu Loi basecamp be stopped and inspected as a means of combating the dual problems of unsafe vehicles and drug abuse. The accused, a passenger in a truck entering this camp, was ordered to submit to a personal search. He fled into the camp, was apprehended, and found to be in possession of ten vials of heroin. In sustaining his subsequent conviction for wrongful possession of heroin, the two concurring judges of the Court of Military Appeals agreed that an installation commander possesses the inherent authority to take reasonable intrusive measures in executing his responsibility for assuring the security of his command. Under the circumstances, the search of military vehicles and personnel entering a military compound was eminently reasonable. The issue of reasonableness was injected in a second way by Judge Quinn. Citing *United States v. Biswell*,[7] he opined in an alternative resolution that *such government action is permissible when it is a crucial part of a regulatory scheme and presents only a limited threat to the individual's expectation of privacy.* Accordingly, both resolutions appear to reduce themselves to a balancing of the governmental need for initiating intrusive measures against the extent to which such measures offend the serviceman's reasonable expectations of privacy within the factual context. This approach has been utilized by the Supreme Court in sanctioning various types of administrative inspections absent the traditional probable cause.[8]

Subsequent holdings relying upon the rhetoric of *Poundstone* appear to have taken two somewhat divergent courses. The first, characterized by a Navy case, appears to presume that *Poundstone* simply stands for the proposition that any gate search procedure generally authorized by an installation commander to assure security is *in. se*

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[5] *Id.* at 631:

> The gate guard's inspection of the person and property of the appellant, who was then entering a secured military camp in a war zone, was a "legitimate, normal and customary routine" in military administration. . . . The intent of the prescribed search was predicated mainly upon security considerations. . . .

[6] 22 U.S.C.M.A.277, 46 C.M.R.277 (1973) (Quinn & Darden, JJ.).

[7] 406 U.S. 311 (1972).

[8] *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967).

reasonable and that the responsibility for determining the appropriate occasion for imposing such a measure is a ministerial function that can be exercised by his subordinates.[9]

The second development arising from *Poundstone* is of far greater consequence in assessing the impact of *Nelom*. In *United States v. Unrue*,[10] a CONUS brigade commander, confronted with an unusually high rate of drug abuse, established on a random basis a roadblock inspection system on the access routes leading to his unit area. Two checkpoints were set up thirty feet apart. At the first, vehicular traffic was stopped, the occupants warned of an impending search, and the opportunity given to drop contraband in an "amnesty box." At the second, a marihuana dog was walked around the vehicle with the occupants still inside and, if the trained dog alerted, the vehicle and its occupants were searched., The accused, one of several passengers in a private automobile subjected to this procedure, was searched after the dog alerted and was found to be in possession of heroin. The Court of Military Appeals affirmed his court-martial conviction for wrongful possession of heroin, relying upon a military necessity theory to uphold the search. The court, again, reasoned that the rubric of military necessity really amounts to nothing more than an assessment of reasonableness within a given factual context. It recognized that either of two conditions can provide the foundation for this determination: that the intrusive measure is utilized to protect the security of the command, or that it is incident to the effectuation of a proper military regulatory program. Upon considering the qualitative impact of the narcotics threat upon the command's morale, capability, and health, as established by statistical data, it found that the brigade commander's program was, indeed, proper. The court also reasoned that a second ingredient in computing the intrusion's "reasonableness" was its scope, since the sentient capabilities of the dog arguably made its employment more akin to electronic surveillance than a visual intrusion. On the other side of the equation it placed the vehicle occupant's residual expectation of privacy after passing a preliminary checkpoint, a warning sign and an "amnesty box." It concluded that at the inspection point the occupant's justifiable expectation of privacy was "not of impressive dimension" and, that when this residuum was balanced against the inspection's limited scope, its purpose, and the circumstances which impelled it, the pro-

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9 United States **v. Dukes,** 48 C.M.R. 443 (NCMR 1973) **(frisk upon** entry).
10 22 U.S.C.M.A. 466, 47 C.M.R. 556 ***(1973).***

cedure was reasonable.[11] Accordingly, in view of the dog's proven capabilities and its conduct upon subjecting the vehicle in question to this permissible intrusion, sufficient probable cause existed to search the accused.

The *Unrue* court also discussed a consent theory as an alternative justification for a gate search but dismissed it as not a legally operative basis for the intrusion in question.[12] It observed that reliance upon this theory can be predicated upon Army Regulations which give installation commanders the authority to condition entry upon submission to a gate search and to deny it to those refusing to acquiesce.[13] In a preceding case, the Navy Court of Military Review invoked a similar rationale to justify a fruitful gate search where the subject had executed a "consent'' form upon applying for a base decal.[14]

When considered collectively on the eve of *Nelom,* these holdings would appear to have enunciated several guidelines to the installation commander bent on curbing drug abuse through inspection techniques. First, a thorough gate inspection system of both vehicles and personnel could be mandated with assuredness. This authority is inherently reasonable in view of the installation commander's responsibility for security and morale. Such inspections could alternatively be supported by a consent theory since potential subjects could be deemed to have assented to them by seeking to cross the installation's threshold. Second, and of a more equivocal scope, where drug abuse could be established as a special threat to an organization's mission performance capability, it would be permissible to initiate some limited intrusive measures with respect to vehicles and personnel traveling within the reservation as long as such measures were reasonable in the context of the circumstances.

The court's holding in *Neloms* tends to touch on each of these suppositions rendering the certain less certain and the equivocal perhaps somewhat less unclear. Although this case makes it clear that it "is not concerned with the right of the military to search automo-

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11 *Id.* at 470, 47 C.M.R. at 560.

12 22 U.S.C.M.A. at 468-69, 47 C.M.R. at 558-59.

13 Army Reg. No. 190-22, para. 2-36 (12 June 1970) provides:

> Commanders may have notices posted informing all persons that they and their vehicles are subject to search upon entry and exit from nonrestricted areas and, such information may be printed on the reverse of a visitor's pass or card. However, if a person refused to be searched upon entry, he should not be searched over his objection but should be denied access to the post.

See also Army Reg. No. 210-10, para. 1-15a (1 Dec. 1970).

14 United States v. Smith, 46 C.M.R. 926, 928 (NCMR 1972).

biles at the entry point into a reservation," [15] its language impacts upon this authority in several respects. It is clear from the legally operative portion of this decision that in the future Army commanders will not be able to delegate the general authority to determine the occasion for such intrusions to staff officers responsible for law enforcement activities nor will such subordinates be able to presume a delegation of such authority from loosely-phrased regulations. This is, of course, more restrictive than the apparently extant Navy rule. The Army Court's rationale for this restriction is predicated upon *Coolidge* v. *New Hampshire*[16] where the Supreme Court denounced the authority of a state attorney general to issue search warrants because he was a law enforcement official and deemed incapable of acting impartially as contemplated by the fourth amendment. The *Neloms* court reasoned that, inasmuch as a provost marshal is also primarily engaged in the suppression of criminal conduct, this stricture is equally applicable.[17]

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15 48 C.M.R. at 709.

16 403 U.S. 443 (1971). See Almeida-Sanchez v. United States, 413 US. 226 (1973) where the Supreme Court similarly limited the descretion of the Border Patrol to conduct searches. The *Neloms* court also determined that the facts were inadequate to support a finding that there was actually any delegation in this case. 48 C.M.R. at 708.

17 This result was boded by the language of the Court of Military Appeals in United States v. Ness, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962) where the court reflected in a footnote that a substantial question existed as to the propriety of a blanket delegation of authority to order searches to a provost marshal. *Id.* at 20 n.1., 32 C.M.R. at 20 n.1. This stricture does not appear to have been subsequently applied to other subordinates. *See* United States v. Drew, 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965). Even prior to *Ness,* The Judge Advocate General of the Army opined:

> It is not considered advisable to select the Staff Judge Advocate who may later be called upon to pass upon the legality of his own act, nor the Provost Marshal, whose function is analogous to that of a Chief of Police and who should not be empowered to authorize his own activities.

JAGS 1953/6606, 14 Aug. 1953. Both the 10th Circuit Court of Appeals and the Army Court of Military Review have rejected arguments to the effect that *Coolidge* renders commanding officers inherently ineligible to perform the magisterial duties enumerated in paragraph 152 of the Manual since they are concurrently responsible for the maintenance of discipline and order within their units. Wallis v. O'Kier, 491 F.2d 1323 (10th Cir. 1974); United States v. Carlisle, 46 C.M.R. 1250 (ACMR 1972). The result might be different, however, where the commander can be shown to have personally directed investigative efforts against the subject prior to making the determination as to probable cause. In this regard, he might be analogized to a convening authority who disqualifies himself by antecedently assuming the role of an accuser in fact. *Cf.* Brookins v. Cullins, 23 U.S.C.M.A. 216, 49 C.M.R. 5 (1974).

It is submitted, however, that the court's apparently heavy reliance on *Coolidge* is misplaced and will, perhaps, result in unnecessarily restrictive consequences. Unlike a prosecutor, a provost marshal's duties encompass a broad spectrum of functions relating to the maintenance of morale, order and discipline within a military reservation. A strict application of *Coolidge* could forbid him from being the recipient of any discretionary inspection authority in the furtherance of a legitimate regulatory program falling within his area of responsibility. Nevertheless, insofar as *Nelorns* forbids the provost marshal from assuming untrammeled discretion in substituting his judgment for the installation commander's, it is indisputably correct. In *Camma v. Municipal Court*[18] the Supreme Court held that even building inspectors must conduct their intrusive activities pursuant to the issuance of a warrant from a magisterial official. Although such a warrant could be predicated upon the establishment of a reasonable governmental interest rather than the traditional probable cause, it was an essential vehicle to limit and specify the scope of the inspector's authority. Similarly in *Biswell v. United States*[19] the court sanctioned the inspection of a pawn shop dealing in firearms by Federal Revenue Agents because the procedure was a crucial part of a federal regulatory scheme and the inspector's authority was carefully limited as to time, place and scope by statute.[20] In this regard it would seem that the provost marshal in fulfilling his mission of assuring installation security more closely approximates the building inspector or the revenue agent than the attorney general bent on prosecution. Accordingly, although he should not be permitted to substitute his judgment for that of the magistrate, neither should he be precluded from receiving a mandate according him some discretion within clearly enunciated guidelines. It would seem that a delegation enumerating general guidelines as to objectives, scope and subjects would fulfill the objectives of *Camara* and satisfy the requirements of *Neloms* since the latter case appears to forbid only general delegations of authority.[21] However, it is presently uncertain whether such a broadly framed instrument of delegation will meet the approval of the Army Court.

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18 387 U.S. 523, 532 (1967).

19 406 U.S. 311 (1972).

20 18 U.S.C. 923(g) (1970).

21 The Neloms court also cited language from Almeida-Sanchez v. United States, 413 US. 266 (1973) with approval which, citing *Camara*, indicated that its principal concern was curbing the unfettered discretion of the Border Patrol rather than totally eliminating its inspectional authority.

It will be recalled that an alternative basis for justifying gate inspections is the consent of a vehicle's occupant, sometimes established by his mere entry on the installation. Although the *Neloms* court also stated that it was not concerned with the problems of implied consent in administrative searches,[22] it vigorously rejected the government's argument that the petitioner had implicitly consented to an inspection by virtue of his presence on the installation even though a post regulation contained language which rendered presence tantamount to consent:

> We conclude that the Fort Benning Regulation 190-5, ***cannot validly require implied consent of all*** personnel operating their automobiles on the Fort Benning Military Reservation . . . ***to the extent that it would permit any evidence obtained by such search to be admissible in a court*** of *law*.[23]

Unfortunately, this language is so unclear that it is impossible to predict with any accuracy its potential impact upon the use of "consent" as the basis for a vehicular inspection. A cursory reading of this language would indicate that it is simply an enunciation of a new exclusionary rule: refusing to forbid the practice of conducting inspections on the basis of implied consent but indicating that it will suppress any fruits thereof. However, when one considers the purpose of an exclusionary rule as a vehicle for precluding the use of evidence *that has been seized in violation of a practice antecedently condemned as unlawful*, this is improbable.[24] Second, the court could have intended to say that the entry on a military reservation simply cannot be conditioned upon the waiver of a constitutional right. This is also improbable, however, as the court subsequently recognized that the presence of a sign can be an instrumental factor in establishing a legitimate "consent" search at a gate:

> . . . , a notice that anyone entering through a certain ***entry point*** will be subject to search provides a basis for recognizing consent to the search ***at the entry point*** similar to . . . a search before entering a commercial airplane.[25]

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[22] 48 C.M.R. at 709.

[23] *Id.* at 708 (emphasis added).

[24] It should be noted, however, that in Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971), the court held that although a university regulation permitting officials to enter student dormitory rooms for inspection purposes might be legitimately utilized in furtherance of its academic objectives, it could not be construed to permit searches directed toward criminal prosecutions and the fruits of such searches would be inadmissible. Otherwise, the regulation would constitute an unconstitutional condition to occupancy of a dormitory room.

[25] 48 C.M.R. at 710.

This assertion, when considered in tandem with the former and in the context of the factual situation, impels the conclusion that the *Neloms* court probably sought to propound two requirements relating to the employment of a consent theory to justify gate searches. First, the potential subjects of such intrusions must be given actual notice that their entry on a military reservation is conditioned upon consenting to a gate search. The requirement of affording such notice cannot be satisfied by merely placing a provision in a post regulation and arguing that, as a result, knowledge can be imputed. The requirement of according such notice had been previously suggested by the Second Circuit Court of Appeals in assessing the lawfulness of an airport boarding ramp search. In *United States v. Davis*,[26] where an issue arose as to whether the subject of a "consent" search did, in fact, evidence consent, the absence of actual notice that his conduct rendered him amenable to search was determined to be essential. A threshold determination of this nature is critical where the proponent of a search seeks to establish consent through reliance upon an act purportedly manifesting acquiesence. This, of course, can include either boarding an airplane or crossing the entrance of a military reservation.

Second, the *Neloms* court intimated that a genuine choice must be afforded the potential subject once such notice has been given. A viable option to refuse to be searched must exist contemporaneously with the act of consent and extend to the time and place of the actual intrusion. In this regard the *Neloms* court carefully distinguished *Unrue*, indicating that in *Unrue* a choice was afforded by the warning signs immediately preceding the checkpoint which permitted persons not choosing to consent to regress. Such an option was not available to Neloms. This requirement is also supported by several federal cases involving boarding ramp searches which reject the application of a consent theory. For example, in *United States v. Lopez*[27] a federal district court refused to sustain the legality of such

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26 482 F.2d 893, 913-14 (2d Cir. 1973). The court was careful to distinguish this situation from that where the *voluntariness* of the consent was contested. In this event, knowledge as to one's option to refuse consent is an instrumental factor in establishing voluntariness but not a *sine qua non*. In this regard see Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In United States v. Doran, 482 F.2d 929 (9th Cir. 1973), the court determined that the subject of a boarding ramp search had implicitly consented when he proceeded to attempt to board the aircraft in the face of warning signs and public address system broadcasts.

27 328 F. Supp. 1077 (E.D.N.Y. 1971). The court alternatively held that where the exercise of the constitutional right to travel was conditioned upon giving such

a search where it found that its subject was not free to reverse his decision to board the airplane at the time it was actually initiated. It held that no intrusion can be considered voluntary when the product of express or implicit duress or coercion. The requirement of a viable option raises the question of whether a serviceman living off-post but required to enter a military installation daily for duty is capable of giving such consent. Although no court has so held, it is arguable that such a person has no genuine option since absence from his place of duty is punishable under military law. Accordingly, he is inherently incapable of giving meaningful consent to a threshold search.[28]

Although unnecessary to its holding, the court commented on some of the circumstances wherein an installation commander can legitimately conduct security inspections of an intrusive nature. Inasmuch as this language tends to indicate the latitude that such officers will be accorded in the future by the court, it merits some evaluation and comment. First, in distinguishing the factual circumstances in *Unrue* from those confronting it in the case *sub judice*, the court recognized that in the former a specific showing of military necessity was established by evidence of record, whereas in the latter this justification was asserted only by an inadmissible statement by the trial counsel that there was a drug problem at Fort Benning. Thus, it appears that in future cases inspection procedures relying upon a "military necessity" theory will have to be justified by the presentation of hard statistical data such as that offered in *Unrue* and that the Army

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consent the condition was unlawful and the procedure inherently coercive. *Accord,* United States v. Kroll, 481 F.2d 884 (8th Cir. 1973); United States v. Meulener, 351 F. Supp. 1284 (D.C. Cal. 1972). See United States v. Miner, 484 F.2d 1075 (9th Cir. 1973), where the court found withdrawal of consent when an airline employee attempted to conduct a boarding search but was refused access to the subject's briefcase, Courts sustaining the legality of boarding ramp searches have generally relied upon a "reasonableness in the context" theory rejecting consent arguments nhen made. See, *e.g.*, United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974). On their face, Army Regulations do not appear to suffer from the deficiency that no genuine option to refuse exists. They instruct military policemen simply to deny nonconsenters access to the post. Army Reg. No. 190-22, para. 2-3b (12 June 1970).

28 Analogous problems arise with respect to conditioning the entry of civilians upon submission to a gate search. In United States v. Vaughan, 475 F.2d 1262 (10th Cir. 1973), the court stated in dicta that a civilian visitor's entry on a closed post could be conditioned upon assenting to such a search. This result, however, becomes questionable when refusal to submit to an entry search is tantamount *to* loss of employment within the military reservation.

Court, at least, will not be content to accept offers of proof or prayers to take judicial notice of the fact that a special drug problem exists. Both *Unrue* and *Nelom* leave questions regarding the requisite quantity and quality of such evidence unanswered. *Neloms* hints, however, that these factors will probably be largely governed by the place and extent of the intrusive governmental conduct. In this regard, *Neloms* makes much of the fact that the inspection sanctioned by *Unrue* was conducted at the threshold to a unit area where the attendant conditions diminished an entrant's reasonable expectation of privacy.'' The *Unrue* court, however, specifically recognized that it was not being asked to adjudicate the lawfulness of a gate search but rather a roadblock conducted *within* a military reservation.[30] The Army Court's somewhat strained distinction permits the inference that it would require qualitatively less evidence of military necessity where a threshold search was involved than where an intrapost roadblock technique was employed, since the countervailing expectation would vary significantly. The rhetoric employed by it in conveying this impression also hints that in the future a genuine balancing effort might replace the apparently extant supposition that gate searches are inherently reasonable exercises of command authority. Nevertheless, in a single negative pregnant, the *Neloms* court intimated that where a showing of military necessity is sufficiently compelling, it would sanction not only an intrapost roadblock but the incidental requirement that occupants exit their vehicles with doors ajar for an inspection. In discussing limitations on the provost marshal's authority to stop vehicles for inspectional purposes it stated:

> The permissible scope would not include a requirement that doors be left ajar when not a part of a regulatory program ***instituted by a commander*** in response to a particular problem posing a "serious threat to the morale, capability, and health of his command". . . .[31]

The obverse of the proposition is that where such measures *are* part of a program instituted by a commander in response to a sufficiently serious discipline or morale problem they ***will*** be permitted. Such an interpretation, if accurate, would tend to grant commanders greater inspectional latitude than heretofore recognized where sufficiently compelling circumstances justify them. The exact limits of this admittedly speculative assertion will, however, have to be enunciated

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[29] 48 C.M.R. at 710.
[30] 47 C.M.R. at **559.**
[31] 48 C.M.R. at ***709*** (emphasis in original).

with greater certainty in future decisions if it is to afford any genuine guidance.

It is apparent from this brief analysis that the *Neloms* decision possesses a potential impact of a far broader scope than its narrow holding and contains several important instructional assertions which installation commanders would do well to heed. First, the Army Court of Military Review will no longer tolerate general delegations of inspectional authority to subordinates responsible for law enforcement. Therefore, in the future, directions of this nature must be accompanied by sufficient guidelines to make it clear that the military police are acting as instrumentalities of the post commander rather than the provost marshal. Second, inspectional intrusions cannot be justified by arguing that the subjects implicitly assented by their presence on the installation with constructive notice of post regulations. Where consent is utilized as the justification for any type of intrusive practice, it will have to be predicated upon a showing that it was intelligently given and a genuine option to refuse contemporaneously existed. Third, the court appears to have shifted to a "military necessity" theory as the principal basis for assessing any intrusive inspectional procedure. It is clear that commanders must carefully establish such necessity through statistical or other factual data. Where, however, such evidence is sufficient, inspectional procedures of the scope utilized in *Neloms* might be considered reasonable. Although it is obvious that only the passage of time and the enunciation of future decisions will bear out these speculative remarks, commanders and their staff judge advocates would do well to prepare themselves for the developments boded by *Nelom* by critically assessing their local inspection policies and justifying them where necessary in the ways suggested by its rhetoric.

CAPTAIN JOHN F. DEPUE**

** JAGC, US Army; hlember Twenty-Third Advanced Class, TJAGSA. A.B. 1967, Georgetown University; J.D. 1970, Villanova Law School, LL. M. candidate, New York University. hlember of the Bars of Pennsylvania, US Court of Military Appeals and US Supreme Court.

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* **Mention of a work in this section does not preclude later review in the *Military Law Review.***

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